

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

----- x  
 In the Matter of Arbitration :  
 Between: :  
 :  
 DAVID AVEN, et al., :  
 : UNCITRAL Case No.  
 Claimants, : UNCT/15/3  
 :  
 and :  
 :  
 THE REPUBLIC OF COSTA RICA, :  
 :  
 Respondent. :  
 ----- x Volume 7

HEARING ON JURISDICTION AND MERITS

February 7, 2017

The World Bank  
700 18th Street, N.W.  
J Building  
Conference Room JB 1-080  
Washington, D.C.

The hearing in the above-entitled matter came on,  
pursuant to notice, at 9:03 a.m., before:

MR. EDUARDO SIQUEIROS T., President

MR. C. MARK BAKER, Co-Arbitrator

PROF. PEDRO NIKKEN, Co-Arbitrator

ALSO PRESENT:

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Secretary to the Tribunal

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C O N T E N T S

PAGE

PRELIMINARY MATTERS.....2046

WITNESSES:

JORGE ANTONIO BRICEÑO VEGA

Direct Examination by Mr. Burn.....2050

Cross-Examination by Mr. Leathley.....2062

MANUEL A. ABDALA

Direct Examination by Mr. Burn.....2120

Cross-Examination by Mr. Leathley.....2151

Redirect Examination by Mr. Burn.....2207

Questions from the Tribunal.....2214

TIMOTHY HART

Direct Examination by Mr. Leathley.....2238

Direct Presentation.....2239

Cross-Examination by Mr. Burn.....2267

Questions from the Tribunal.....2331

CLOSING ARGUMENTS

ON BEHALF OF THE CLAIMANTS:

By Mr. Burn.....2339

ON BEHALF OF THE RESPONDENT:

By Mr. Leathley.....2364

P R O C E E D I N G S

1  
2 PRESIDENT SIQUEIROS: Good morning. Are we  
3 ready to proceed?

4 Good morning. This is Tuesday, February 7th,  
5 2017, which will be the following of the hearing in  
6 the case involving Mr. David R. Aven, et al., against  
7 the Republic of Costa Rica.

8 Before we proceed with the examination of the  
9 witness that was scheduled for today, I would like to  
10 ask the parties if there are any administrative issues  
11 they would like to address.

12 MR. BURN: On the Claimants' side, no, sir.  
13 But I know that my friend does have a couple of points  
14 which we have discussed briefly before proceedings  
15 began today.

16 PRESIDENT SIQUEIROS: Mr. Leathley?

17 MR. LEATHLEY: Thank you, sir. Just two very  
18 brief points.

19 One, in relation to the request from the  
20 Tribunal regarding the U.S. submissions. You'll  
21 recall where we left it. Mr. Weiler produced a large  
22 document which we were reviewing, which we have.



1           We're going to speak further between counsel,  
2 so, I don't necessarily want to foreshadow where we  
3 will come out, but just to let the Tribunal know that  
4 we're in discussion on that point.

5           PRESIDENT SIQUEIROS: Okay.

6           MR. LEATHLEY: The second point, sir, is just  
7 in relation to the timing for the delivery of the  
8 post-hearing briefs. The procedural order indicated  
9 two weeks. As of today, I'm hoping that with the  
10 instructions that Mr. Burn needs, that we think we may  
11 have an agreement that is amenable to the Tribunal.  
12 If we can have an extension of two weeks, which I  
13 think would take us to March the 10th.

14           This would be the only request that we'd be  
15 making. So, we hope that that would then be, you  
16 know, a hard delivery date for the post-hearing brief.

17           MR. BURN: We have no objection to that  
18 request.

19           PRESIDENT SIQUEIROS: And assuming the parties  
20 are in agreement, my recollection--although I may be  
21 wrong, but my recollection is that this was a  
22 period--the timing that was agreed to by the Parties

1 earlier, not necessarily fixed by the Tribunal. So,  
2 if there's an agreement between the Parties, I don't  
3 believe the Tribunal will have an objection.

4 MR. LEATHLEY: Thank you very much.

5 PRESIDENT SIQUEIROS: Okay.

6 MR. LEATHLEY: Nothing further from us in  
7 terms of any housekeeping.

8 PRESIDENT SIQUEIROS: Thank you. So, are we  
9 ready with Mr. Briceño?

10 MR. BURN: Yes. So, I'd like to call  
11 Mr. Jorge Briceño.

12 So, before we begin, I'd just like to make a  
13 suggestion. Mr. Briceño identified a few very minor  
14 corrections he needs to make to his statement.

15 If I could be given permission to lead him on  
16 those, I think it will smooth out the process of just  
17 incorporating those few corrections rather than  
18 leaving it purely to him to set them out. I think it  
19 will just save a little bit of time.

20 PRESIDENT SIQUEIROS: I have no objection.

21 JORGE ANTONIO BRICEÑO VEGA, CLAIMANTS' WITNESS

22 Good morning, Mr. Jorge Antonio Briceño Vega.

1           As you probably have been informed by the  
2 party for which you are offering your testimony, you  
3 will be questioned by the Respondents through their  
4 counsel with regard to the statements you have made.

5           As you've probably been informed, the Claimant  
6 will also be asking you questions to confirm your  
7 statements or to make changes to them.

8           Then you will also be asked by the Respondents  
9 about your statements.

10          And then if the Claimants would like to ask  
11 follow-up questions on that cross-examination, they  
12 will also have the opportunity to ask you some  
13 additional questions.

14          I would ask that you please just limit  
15 yourself to respond to the question you've been asked,  
16 and then you can later make any clarifications about  
17 the statements you have made.

18          You have a card in front of you. This is a  
19 statement that you should make about your conduct  
20 through this hearing. Please read it out loud.

21          THE WITNESS: Good morning.

22          PRESIDENT SIQUEIROS: Please bring the mic

1 closer. I can hear you, but the transcribers and the  
2 interpreters would like you to be closer to the mic.

3 THE WITNESS: Good morning, Members of the  
4 Tribunal. I am Jorge Antonio Briceño Vega. I  
5 solemnly declare upon my honor and conscience that I  
6 shall speak the truth, the whole truth, and nothing  
7 but the truth.

8 PRESIDENT SIQUEIROS: Very well. Thank you.

9 Just a last point, Mr. Briceño, something I  
10 forgot that I didn't clarify for you earlier.

11 Since you will be responding in English--you  
12 will note that what we are stating now in Spanish is  
13 being interpreted into English. And the questions you  
14 will be asked in English will also then be interpreted  
15 into Spanish.

16 So, if the question is asked in English, if  
17 you could please wait a few seconds before you  
18 respond, otherwise we will have an overlap of the  
19 languages. It makes it difficult for the transcribers  
20 and interpreters. Thank you.

21 DIRECT EXAMINATION

22 BY MR. BURN:

1 Q. Mr. Briceño, as the president of the Tribunal  
2 has indicated, the first thing I need to do is to take  
3 you to your witness statement in these proceedings and  
4 deal with corrections and so on.

5 And I'll have a few questions for you just by  
6 way of introductory remarks.

7 Then we will be handing it over to  
8 Mr. Leathley, who is counsel for Costa Rica, and he  
9 will have questions, and then it may come back to me  
10 for some questions if there are any to be made by way  
11 of clarification.

12 And at any time, the three members of the  
13 Tribunal may have questions for you. And your  
14 obligation this day is very simple. It is to answer  
15 all of the questions that are put to you to the best  
16 of your ability, no more, no less than that.

17 Is that all clear?

18 A. Yes. Right.

19 Q. Thank you.

20 Now, if you look to your right-hand side,  
21 you'll see a file of materials. If you could take  
22 that file, please. Now, this file contains

1 documents--copies of documents to which you may be  
2 referred during the course of today's proceedings.

3           If you can just open the file. At the top,  
4 before the numbered tabs down the side, you will see a  
5 copy of your statement in Spanish, and behind the blue  
6 page, for your information, there is a version of the  
7 English translation.

8           Could you just go through the Spanish language  
9 version, just quickly flick through it, and let us  
10 know whether or not that is or appears to be a copy of  
11 the statement you submitted in these proceedings.

12           A. Yes. Correct. That is my statement, and I  
13 signed it, and it has my ID number also.

14           Q. So, on the final page, is that your signature  
15 above the date, 3rd November, 2016?

16           A. Yes. 3rd November, 2016. That is my  
17 signature.

18           Q. Thank you.

19           Now, I believe you have some corrections to  
20 make to the statement. So, if I could just take you  
21 back to the statement so you could make those  
22 amendments. I believe the first amendment is in

1 paragraph 9. Is that correct?

2 A. Yes, it's in paragraph 9.

3 Q. Can you just inform the Tribunal what the  
4 correction is that you wish to make to paragraph 9?

5 A. Yes. In line 5 after it says "Mr. Gerardo  
6 Acuña Calderón was also challenged," the other two who  
7 were proposed as internal auditors. That's the  
8 correction.

9 Q. Okay. So, the text should read, after the  
10 name Mr. Gerardo Acuña Calderón, "and was formally  
11 challenged or opposed by the other two candidates for  
12 the position as auditor;" is that correct?

13 A. That is correct.

14 Q. Thank you.

15 Now, I believe in paragraph 27 there's an  
16 error, and the two names have been transposed in the  
17 subparagraphs. Do you need to correct that? So, I  
18 believe that it says 27(f) and 27(g); is that correct?

19 A. That is correct.

20 Q. So, the names of the engineer in  
21 27(f)--Engineer Andrei Bourrquet Vargas, should be  
22 swapped with the name in 27(g), Mr. German Torres.

1 So, those two should be swapped around?

2 A. Yes, this is correct. The names have been  
3 inverted. May I make the correction? On line 3 of  
4 (f), it should say that the Official Letter was sent  
5 to German Torres of the Department of Permits and not  
6 to Andrei Bourrquet. And so, there was some  
7 confusion. So this needs to be changed.

8 And then in (g), line 3, it should state that  
9 the letter was sent to Andrei Bourrquet, Secretary  
10 General of the Plenary Commission, and not to German  
11 Torres.

12 So, there was some confusion here also. The  
13 year and the date is incorrect. It says 2010, and it  
14 was 2011. And so, I'd also like to correct that.

15 Q. So, that's in 27(g). So, the record is  
16 DeGA-104-2010. It should say 2011. And 16 June 2010  
17 should say 2011; is that right?

18 A. That's correct.

19 PRESIDENT SIQUEIROS: Mr. Briceño, just a  
20 point. When you're going to read out a specific text,  
21 or you're going to respond to a question, please try  
22 to moderate the speed. This will help the



1 interpreters.

2 THE WITNESS: Thank you. Yes.

3 BY MR. BURN:

4 Q. And I believe the final pair of corrections  
5 needs to be made in paragraph 32 in (b) and (f)(ii).  
6 The meeting number, I believe, should be 2362 and  
7 2361; is that correct?

8 A. That is correct. It is 2362 and not 2361 in  
9 both subparagraphs.

10 Q. Thank you.

11 Do you have the other corrections or additions  
12 to make to the statement?

13 A. No, just with regard to these issues.

14 Q. Thank you.

15 Just a few questions before Mr. Leathley  
16 begins. Now, have you read through the response that  
17 has been filed by the lawyers for Costa Rica in  
18 relation to your evidence?

19 A. Yes. Correct.

20 Q. How do you respond to the allegations that you  
21 received a pension contrary to provisions of law?

22 A. Well, with regard to that, I should say--I

1 state, rather, that when I began to work--before I  
2 began to work, because my appointment as an internal  
3 auditor for the Municipality of Parrita was under the  
4 mayor, Gerardo Acuña Calderón, and it was challenged  
5 by the other two candidates. So, my appointment was  
6 not in March 2010.

7           Rather, I started working at the municipality  
8 until the Administrative Tribunal of Costa Rica ruled  
9 in September 2010--or, excuse me, July. And then in  
10 October it notified the fact that my appointment was  
11 going through.

12           In September in 2010, the Constitutional Court  
13 of Costa Rica, through 1528, declared that the  
14 articles on the pensions were unconstitutional. So, I  
15 did not have to renounce my pension in order to be the  
16 internal auditor. It is not directly under the  
17 central government; rather, it's a municipality. So,  
18 I did not waive my pension.

19           Then in 2011, in August, the Tribunal--and I  
20 think it was 1530--issued another opinion referring to  
21 the prior opinion, and it invalidated it. It was then  
22 some 12 months later. So, when I went into my job and

1 started working for the municipality, I received these  
2 two remunerations, but in good faith, but in keeping  
3 with the first decision of the Constitutional Court.

4           Thereafter, when I resigned--in April 2012 I  
5 resigned. However, 90 percent of the employees in the  
6 municipalities asked me not to resign, and they also  
7 sent a note to the Municipal Council asking them to  
8 reconsider my resignation.

9           So, I met with the council and the mayor, and  
10 so they decided not to accept my resignation, and I  
11 continued in my post as the internal auditor.

12           But by March or later--well, in March, again I  
13 resigned. I resigned the post of the auditor, which I  
14 explained in an official letter I sent to the  
15 Municipal Council, and I resigned from my post.

16           Subsequently, in February 2014--I think it was  
17 ten or 12 months later--the Commission on  
18 Pensions--the National Commission on Pensions informed  
19 me that there had been a complaint with regard to the  
20 fact that I had two remunerations and that we had to  
21 come to some kind of settlement or agreement.

22           And it's what I told you, that in keeping with

1 the Constitutional Court's ruling, I had acted in good  
2 faith. And, so--but I said we could come to an  
3 agreement on this.

4 On 26 February of that year, 2014, we drew up  
5 a document, which is called a compensation act or  
6 document, and it included all the calculations of what  
7 I received from the Pension Commission. And this was  
8 the debt that I owed them, and so I am still paying  
9 them now.

10 And that is the situation, and that's what I  
11 have to say about the payment of the pension.

12 Q. Thank you.

13 And what do you say about the suggestions that  
14 you were not independent or the basis of your  
15 involvement in local politics?

16 A. Well, with regard to local political life, if  
17 this is referring to before 2010, I participated in  
18 political parties--well, they have to name  
19 representatives for what is called the electoral  
20 cantonal committee. And that it depends on the  
21 Supreme Electoral Tribunal, which controls the voting  
22 and electoral process.

1           And that electoral cantonal council has  
2 meetings, and there are representatives from all  
3 political parties. And they come to agreements.

4           And we call these packages, packets, or tulas  
5 (in Spanish), and these are the votes or the ballot  
6 papers that Costa Ricans are going to use, and then  
7 they need to also be distributed to the different  
8 balloting places, and that is under the Supreme  
9 Electoral Tribunal.

10           Then that council, once elections have taken  
11 place, then they, again, go to the different balloting  
12 places, and they collect the ballot papers, and a  
13 truck goes and picks them up.

14           So, I participated in several elections for  
15 different parties, even though I wasn't a member of  
16 the party or a follower of the party.

17           I'm not sure of the date, but in 2012 another  
18 party asked me to participate on a district committee.  
19 These district committees--well, they organize parties  
20 in Costa Rica. Political parties have district  
21 elections. Then there are cantonal elections, and  
22 then there are provincial elections, and then there is

1 a national assembly to choose their representatives  
2 and candidates for the presidency.

3           And on that opportunity, they invited me. And  
4 since in my job/my profession I'm an auditor, and I  
5 carry out oversight in my job, they asked me to do  
6 this oversight.

7           I told them I couldn't participate because I  
8 was an auditor. They said, "Well, you can be an  
9 alternate prosecutor."

10           And so, I said, "Well, I'll find out whether I  
11 can be an alternate prosecutor."

12           And so, they did do their research. And,  
13 finally, the Tribunal, because of the structure of the  
14 party, did not accept my appointment as an alternate  
15 prosecutor because this post didn't exist.

16           They invited me into another meeting, but I  
17 didn't actively participate, nor was I spreading  
18 propaganda or involved in voting for them.

19           So, that's--well, if that's the accusation  
20 with regard to why I'm not independent--well, this is  
21 my explanation, and you can assess my response.

22           Q. And, finally, Mr. Briceño, at the time you

1 served as auditor, how did the municipality view your  
2 work?

3 A. In that regard, I always got along with all  
4 the employees because my job--although it's a job of  
5 oversight and is under the internal control law of our  
6 country, and you have to do oversight over assets, the  
7 universe of activities also of the municipality, in  
8 order to ensure taxpayers that their tax dollars are  
9 being used correctly.

10 So, based thereon, you look at the risk, the  
11 level of risk, the maritime part, the legal part, the  
12 technical area, the highways, cash, the monies that  
13 the municipality gives out for other functions.  
14 That's your work.

15 And so, you're not the police. But you need  
16 to be very independent and be very sure of what you're  
17 doing.

18 By 2012, during the time I was there, I only  
19 received one evaluation because there was a new mayor  
20 that came in in February 2011. And, so, he evaluated  
21 me in July 2012.

22 And in that evaluation of the nine

1 points--well, each point could be 1 to 5. So, the  
2 maximum score could be 45, and I have 44.48. And  
3 my--I was--got an excellent assessment. And, so, all  
4 circumstances are explained with regard to me. They  
5 never spoke badly about me. The attorneys can look at  
6 that.

7 Well, there are only good things. And  
8 sometimes you don't expect so much from people. But I  
9 have to say that the score from the mayor, who was the  
10 mayor then and is now the mayor, said that I did  
11 excellent work.

12 MR. BURN: Thank you. I have no further  
13 questions for you at this stage. Mr. Leathley will  
14 now ask questions for you, Mr. Briceño.

15 CROSS-EXAMINATION

16 BY MR. LEATHLEY:

17 Q. Thank you very much. Good morning,  
18 Mr. Briceño. Buenos días. My name is Christian  
19 Leathley. I'm appearing here today on behalf of Costa  
20 Rica.

21 I'm going to ask you a few questions. I will  
22 try to ask them in English, and then we will see how



1 we go along. Maybe it will be faster for us to float  
2 to Spanish.

3 Mr. Briceño, you do not speak English; is  
4 that correct?

5 A. No.

6 Q. And you are an accountant; is that correct?

7 A. Yes. I'm also a private accountant and a  
8 certified public accountant.

9 Q. And have you ever had contact with any of the  
10 Claimants?

11 A. No. To date, no. In the proceedings, no, I  
12 never directly had contact with any of the Claimants.

13 Q. And have you ever provided professional or  
14 accounting services to any of the Claimants or anyone  
15 involved with the Las Olas Project?

16 A. No, sir.

17 Q. And you served as an internal auditor for the  
18 municipality from October 2010 to April 2013; is that  
19 correct?

20 A. Yes, that's correct. October 2010 and  
21 April 2013.

22 Q. And you're not a lawyer; is that right?

1           A. No, sir.

2           Q. Now, in paragraph 9 of your witness statement,  
3 you say that while you worked as an internal auditor  
4 for the Municipality of Parrita, you did not have any  
5 other people working below you; is that correct?

6           A. Well, at that time, if you will allow me to  
7 elaborate, the only person who was together with me  
8 was an assistant, but he was a secretary. He was not  
9 involved in auditing.

10          Q. So, you didn't have a lawyer on your team with  
11 whom you could consult on any legal issues that arose  
12 during your investigations; is that right?

13          A. That is correct.

14          Q. And, so, your legal conclusions were based on  
15 no qualified legal input; is that right?

16          A. Well, I'd like to make a clarification, if you  
17 would allow me.

18                 PRESIDENT SIQUEIROS: Well, no. I think it's  
19 the reverse. First you answer, and then you can  
20 clarify.

21                 THE WITNESS: Well, the thing is, to answer  
22 yes or no, that could have some implications I deem

1 that it would be necessary to clarify. The  
2 municipality does not have an attorney.

3 PRESIDENT SIQUEIROS: So, I would ask you  
4 first to answer and then to clarify.

5 THE WITNESS: Well, please, if the attorney  
6 could repeat the question.

7 BY MR. LEATHLEY:

8 Q. Yes, sir.

9 So, your legal conclusions that you reached  
10 were based on no qualified legal input; is that  
11 correct?

12 A. Well, not on the part of any attorney at the  
13 municipality, no.

14 Q. Okay. Thank you.

15 Now, you said you had no contact with any of  
16 the Claimants. I just wanted to clarify because it  
17 wasn't entirely clear from your answer.

18 Have you had any contact before this  
19 arbitration with Mr. David Aven?

20 A. Well, before the arbitration, no, there wasn't  
21 a contact really. I couldn't speak to him about any  
22 aspect that had anything to do with this. No, I

1 didn't have any contact.

2 Q. You don't sound 100 percent sure with that,  
3 sir. Did you have any contact with him at all? Had  
4 you met him?

5 A. No.

6 Q. Or with Mr. Jovan Damjanac?

7 A. I do know Jovan Damjanac, but I don't have any  
8 contact with him. I do know Jovan Damjanac, though.

9 Q. How do you know him, sir?

10 A. Well, I met Jovan Damjanac because on one  
11 opportunity I went with some municipal people to carry  
12 out some inspections, something that they had to do.  
13 So, I went along with them because there had been some  
14 claims that had been filed, but it had to do with a  
15 different area of the maritime part because of some  
16 construction.

17 So, we went to a site there. There seemed to  
18 be kind of an office, and this gentleman was sitting  
19 in that office.

20 But I went along with the municipal officers,  
21 and they were the ones who went to seek certain  
22 documentation.

1 Q. Thank you.

2 And was that the only occasion that you met  
3 Mr. Jovan Damjanac?

4 A. Probably that is the case.

5 Q. When did you first hear about Las Olas? In  
6 the context of your role as auditor, when did you  
7 first hear about Las Olas?

8 A. Well, I heard--well, I can't be specific as to  
9 the date because these events occurred five, six years  
10 ago. So, I also ended my task as being the internal  
11 auditor. That was about four years ago when I  
12 finalized.

13 So, it's somewhat difficult to be specific as  
14 to a date such as this one. But within the  
15 municipality, there had been certain circumstances  
16 relating to communication about the process that was  
17 being conducted within the municipality and  
18 against--well, no, not against, but having to do with,  
19 related to the project. So, at that time, if I  
20 received a copy of a letter or a communication, I know  
21 what's happening.

22 And furthermore, Parrita is a relatively small

1 township, very small. Well, actually, it's an  
2 extension of about 500 square kilometers as far as  
3 land, but its population is very tiny. Maybe 14-,  
4 15,000 inhabitants.

5           And the concentration then makes it possible  
6 for us to hear about everything. And, as you know,  
7 the municipality is a small one and everybody is well  
8 aware about what's going on. So--

9           Q. Yes. Thank you, sir. I'm sorry to cut you  
10 off shortly. I'm just worried about the timing of  
11 this. So, when did you hear about Las Olas?

12           I appreciate everything you said, but I'm just  
13 focusing on the time. You say in your statement it  
14 was around 2012. Can you remember when in 2012?

15           A. Well, I prepared my reports. I began my  
16 process on reporting about the Las Olas Project. I  
17 believe it was October 2012. And, therefore, slightly  
18 before that date, I heard about all the events in  
19 addition to communications I had been seeing  
20 previously.

21           So, my process begins in October 2012, and I  
22 completed it in November 2012. That's when I drafted

1 my last report for 2012.

2           Then in 2013 I prepared my final report, that  
3 in which I include--

4           Q. I understand, sir. Yes. I'm sorry again to  
5 cut you off. It's a very discrete question.

6           So, your answer to the question is around or  
7 just before October of 2012, is that right, when you  
8 heard of Las Olas?

9           A. Before beginning that report in October 2012.  
10 Maybe it was--as I say, it's very difficult to be  
11 specific about a date as to when I realized--

12           Q. Let me assist you. Was it one week, one  
13 month, or six months? Which will it be closer to?

14           A. No, I couldn't even be that specific as to a  
15 date for you.

16           Q. Okay. Thank you.

17           In paragraph 18 of your witness statement, you  
18 say you were aware of your competencies, powers, and  
19 limitations while acting as Internal Auditor of the  
20 Municipality; is that right? That's your testimony in  
21 paragraph 18?

22           A. Correct.

1 Q. I'd like you to look in your folder there on  
2 your desk, sir, and I wonder if you can go to Tab 1.  
3 This is exhibit--for the record, it's R-538. It's a  
4 certification from Costa Rica's registry of political  
5 parties dated October the 8th, 2012.

6 MR. BURN: Sorry to interrupt. Is it 526?

7 MR. LEATHLEY: I'm so sorry. Yes, I jumped a  
8 reference. Tab 2, and the exhibit is actually R-538.

9 BY MR. LEATHLEY:

10 Q. In the last paragraph there, you can see where  
11 it says "Inconsistencies." I'm going to read it in  
12 English. Hopefully the interpreters will have a copy  
13 of the Spanish version.

14 It says in English--or the translation we  
15 have--"The appointment of Jorge Antonio Briceño Vega,  
16 personal identification number, et cetera, et cetera,  
17 designated as Deputy Prosecutor, is denied because it  
18 is not contemplated in the bylaws of the political  
19 party. In addition, the designation for the positions  
20 of alternates in the Executive Committee is pending."

21 Do you see that, sir?

22 A. Correct.



1 Q. So, according to this document, in  
2 October 2012, while you were still an auditor at the  
3 Municipality, you ran for Deputy Prosecutor with the  
4 party Acción Ciudadana; is that correct?

5 Do you recall running for that role, sir?

6 A. Well, I didn't apply--go as a candidate. They  
7 asked me if I could serve. And as I said earlier,  
8 what I told them was no because I was the internal  
9 auditor.

10 Nonetheless, they were suggesting that I be  
11 the Deputy Prosecutor. And I said, "As long as  
12 there's no problem, you can include me."

13 Now, the problem arose, as I said, in this  
14 document because the party does not have a structure.  
15 So, never did I appear as a member of this structure.

16 As it says in the document here, you have the  
17 description of the political structure of the  
18 committee, and I'm not included in that structure on  
19 that list of names.

20 Q. I wonder if you can go to Tab 1 now, please,  
21 sir. This is Exhibit R-526. And R-526 is the  
22 Internal Control Act. And in particular, I wonder if

1 you can go to Article 34(e). Again, I'll read in  
2 English.

3 Article 34 is titled "Prohibitions." It says,  
4 "The internal auditor, internal sub-auditor and other  
5 officials of the Internal Audit Department shall have  
6 the following prohibitions."

7 And then paragraph (e) continues. "To  
8 disclose information on the audits or special studies  
9 of the audit that is being carried out or information  
10 on anything that determines possible civil,  
11 administrative or even criminal liability of the  
12 officials, of the entities and bodies subject to this  
13 Law."

14 Do you see that, sir?

15 A. I'm sorry. Could you please repeat which  
16 article? I was looking for it here, and I got lost.

17 Q. Yes. Article 34(e).

18 A. Yes. Now, yes. Could you repeat your  
19 question now, please.

20 Q. No. Only that you can see that. And my  
21 question now is about paragraph 14 of your witness  
22 statement.

1           You acknowledge that an internal auditor has a  
2 duty of confidentiality with respect to the  
3 information he has access to; is that correct?

4           A. Correct. And that's something I always did.

5           Q. And you're aware of the internal auditor's  
6 duty to properly document the investigations that you  
7 conduct?

8           A. To document?

9           Q. Yes, sir. You're aware of that?

10          A. Yes. Any information has to be documented.

11          Q. And, please, can you go to Tab 5 in that  
12 binder. This is Exhibit R-551. This is a resolution  
13 issued by the Contraloría in September of 2003. And  
14 I'm going to read the last paragraph on page 6.

15                 It says, "It should be kept in mind that an  
16 advice and a warning, different from the audits and  
17 special studies, may be issued a priori or  
18 concomitantly. They must have a constructive and  
19 supportive tone and be adequately founded and  
20 documented, given the responsibility that would be  
21 implied in inducing those that receive them into  
22 error."

1           Do you see that section there, sir?

2           A. Yes, correct.

3           Q. And did you fulfill that obligation while  
4 investigating the Las Olas Project during your time at  
5 the Municipality?

6           A. Before responding to your question, this  
7 letter is sent to Mr. Trigueros, not to Briceño Vega.  
8 So, it all depends on the consultations being carried  
9 out by the Municipal Mayor and not of the internal  
10 auditor. And this is a municipality that has nothing  
11 whatsoever to do with Parrita.

12                   But with regards to your question . . .

13           PRESIDENT SIQUEIROS: Once again, for the  
14 benefit of interpreters, we'd would ask you to please  
15 speak a little bit slower when providing responses.

16           A. This document that you mention is addressed to  
17 Mr. Guillermo Zuñiga Trigueros, Mayor of the  
18 Municipality of La Unión of Cartago, not Jorge Briceño  
19 Vega, Internal Auditor of the Parrita Municipality.

20                   Therefore, whatever is here is binding for  
21 him, not for Jorge Briceño, because this is a totally  
22 different matter and a different municipality.

1 Q. You're conscious, sir, that Contraloría  
2 resolutions are binding on you as a matter of law?

3 A. Yes, that is correct. The controller has  
4 oversight over the auditor and will respond. They  
5 are, after all, the eyes of the controller of the  
6 municipality in which he is working.

7 Q. Thank you.

8 Can we go to Tab 6? And this is R-532. And  
9 this is a certified copy of the file that you used to  
10 document your investigation of the Las Olas Project  
11 back in 2012. And the first page of the document is a  
12 certification from the current internal auditor at the  
13 Municipality.

14 And this states, "The undersigned, Geiner  
15 Calderòn Umaña, in his capacity as Municipal Internal  
16 Auditor of the Municipality of Parrita, hereby  
17 certifies that the following 66 original pages  
18 correspond to the file entitled "File Las Olas 2012,"  
19 which was in the Internal Audit Department when the  
20 undersigned started work in the Municipality of  
21 Parrita as Municipal Internal Auditor on the 1st of  
22 April 2014. This file is numbered from page 001 to

1 066. These are identified in the upper right corner  
2 with the seal of this office and my signature for the  
3 purposes of verifying that this certification  
4 corresponds to the entirety of the pieces and  
5 documents that comprise it on the date of this  
6 certification."

7 Do you see that, sir? That's behind Tab 6.

8 A. Yes. Correct.

9 Q. And could you please go to page 6. Have you  
10 seen this document before today, sir?

11 A. Well, this document, the auditor says, is part  
12 of the documents of the Office of the Auditor. This  
13 document, when I was auditor--if the document was  
14 there and if this was true, then yes.

15 But I'm now looking at it. This is four, five  
16 years after I left my position as auditor, so, I  
17 cannot state whether I had or had not seen it at that  
18 time. I cannot recall.

19 Q. Thank you.

20 And please take a look at the handwritten  
21 notes on the page. Now, these notes clearly are not  
22 written by you. In fact, one would question whether

1 even the typed notes are written by you because they  
2 have the Spanish that one would expect of a non-native  
3 Spanish speaker.

4           Would you agree with that, sir? Yes, the page  
5 you're looking at now.

6           A. Yes, I don't know whose handwriting this is.

7           Q. And the third line of the note, it says, "La  
8 inundacion es"--it says "major," but I think it means  
9 probably "mejor"--"no peor in Esterillos por esta  
10 trabajo."

11           We provided a translation. "The flooding is  
12 better, not worse, in Esterillos due to this work."  
13 Would you agree that that's what it's trying to say?

14           A. Well, I didn't draft this document, so, I  
15 can't be sure. If we look at it, you're saying this  
16 was done--written by a person who potentially is not a  
17 Spanish speaker. Perhaps it's an English speaker.

18           And if we look at mejor/major, then it means  
19 something different. And then here you have the other  
20 word "worse." A contrary of worse could be greater or  
21 could be better. So, I cannot interpret this because  
22 I didn't draft this document, so, I can't really know

1 what that person was trying to say.

2 Q. Yes. And, so, this document, which was on  
3 your file, continues on the fourth line. "Esta  
4 canteria, tuberia fue installer de Muni. Las Olas  
5 donar 100,000 por eso. Ahorita en calle centro in  
6 Esterillos Oeste no hay inundación."

7 We have a translation which we provided.  
8 "This canteria pipe was installed of Muni. Las Olas  
9 donates 100,000 for this. Now in the center of the  
10 street in Esterillos."

11 Again, you see that translation. I appreciate  
12 what you commented on before. But you see this?

13 A. Yes, I'm looking at the line 4 that you're  
14 talking about, "This canteria."

15 Q. Can we go to Tab 7 in your binder? You may  
16 want to just keep--you may even want to take out that  
17 page because we're going to come back to it in a  
18 moment. But let's go to Tab 7.

19 This is the witness statement of Mr. Jovan  
20 Damjanac. And let's go to paragraph 108 and 111. I  
21 just want to read into the record--I wouldn't expect  
22 to you comment on this, sir.



1           But at paragraph 108 it says, "The storm  
2 drains started to be put in in August of 2010. This  
3 was done as a joint effort by the local municipality  
4 and Las Olas. The local municipality had run storm  
5 drains from the soccer field, which was about  
6 100 meters from our office, to the estuary that ran  
7 into the ocean. The municipality asked us to help  
8 them complete the storm drains along the rest of the  
9 public road. They needed to run another 450 meters of  
10 storm drains along the road in front of our office,  
11 then turn right before running up the road on the west  
12 of the project that connected the community to the  
13 main highway."

14           And then paragraph 111 continues, "The  
15 drainage work on the public roads was completed in  
16 around November 2010. It was very successful. I took  
17 a video in November 2010, shortly after the work was  
18 finished, at a period when there was heavy rain. As  
19 is clear from the video, the issues with flooding had  
20 been resolved by the works."

21           Do you see that sir? Again, I'm not asking  
22 you to comment on that paragraph. I just wanted to

1 read that into the record for the benefit of the  
2 Tribunal.

3 A. Yes. Correct. I see it here.

4 Q. Thank you.

5 And you see how Mr. Damjanac was aware of  
6 these issues, obviously, being involved with the  
7 Project? Sir? You see that Mr. Damjanac is aware of  
8 this?

9 A. Excuse me. Based on what the document says,  
10 yes. But this is just as I joined the municipality.  
11 It was right at the beginning. So, I see here  
12 August 2010. I wasn't working for the municipality  
13 then.

14 November I had only been there for perhaps one  
15 month. I joined it a month ago. And I'm organizing  
16 the department because it was totally disorganized.

17 Q. That's fine and understood, sir.

18 Please turn to Tab 8 in your binder. This is  
19 the Claimants' Memorial. And, in particular,  
20 paragraphs 110 and 111. Again, I'm not actually going  
21 to ask you a specific question. It's just to, again,  
22 draw the Tribunal's attention to this because it's

1 important for the questions I'm going to ask you. And  
2 perhaps for the sake of interest and time just to note  
3 these paragraphs on the record referring to the storm  
4 drains and the involvement of the municipality in  
5 relation to installing the storm drains.

6 But if you can go now, sir, to Tab 6. This is  
7 Exhibit 532. So, we're back to the handwritten note.  
8 And on the fourth line of the page, that says--I'm  
9 looking at the handwritten notes in blue. "Muni  
10 approves the work and does this, not Las Olas."

11 Do you see that, sir?

12 A. Correct.

13 Q. Is that your writing?

14 A. No, that is not my writing.

15 MR. BURN: Sorry to interrupt. He has already  
16 said on more than one occasion that none of the  
17 handwriting on this page is his. He doesn't know  
18 about this document. You're asking him to speculate  
19 about a document he's already confirmed he doesn't  
20 know about.

21 MR. LEATHLEY: Thank you. And your witness  
22 can answer these questions perfectly well without your

1 interruption, if I may.

2 BY MR. LEATHLEY:

3 Q. Let's turn to Tab 9. This is the Second  
4 Witness Statement of Mr. Damjanac. Paragraph 44.  
5 Again, I'm going to read this.

6 Sorry, this is a little laborious. Apologies  
7 to the Tribunal, but it's important that we get this  
8 on the record.

9 Paragraph 44 says, "The Municipality has, for  
10 years, had poor infrastructure to deal with rain on  
11 the public roads near our property, especially  
12 rainwater that would run downhill."

13 And then, importantly, in the next sentence it  
14 says, "In 2010, the Municipality (and not Las Olas)  
15 installed a storm drain and rainwater line, but they  
16 had not constructed the catch basin large enough to  
17 deal with the volume of rainwater that came on  
18 occasion. As a result, the rainwater line collapsed."

19 Do you see that, sir?

20 A. Well, it's a little bit different, the way you  
21 say it and the way it is written here, but I am seeing  
22 it, yes.

1 Q. Thank you. And, so, let's go back to this  
2 handwritten document, the document where I had asked  
3 you to take out your binder.

4 And the sixth line says, "Steven Allen  
5 Bucelato is the one who filed the claim, and he has  
6 personal reasons for this action. He is problematic  
7 for people."

8 Do you see that?

9 A. Excuse me. Are you talking about this page  
10 here? Could you please tell me what line?

11 Oh, the claim is by Steven Bucelato, and he  
12 has reasons for this action. He is problematic for  
13 the town.

14 MR. LEATHLEY: Sorry to interrupt, sir. We  
15 seemed to have stopped with the Spanish transcription,  
16 and I'm now hearing a different version of the  
17 interpretations through this channel.

18 (Pause.)

19 PRESIDENT SIQUEIROS: Could we take a couple  
20 minutes' break?

21 We're going to take a break of a few minutes  
22 till the logistics are put back into good working

1 condition.

2 MR. BURN: Just for the record, I'd like just  
3 to make it clear to the witness that he's not  
4 permitted to talk to anyone during breaks in his  
5 evidence.

6 PRESIDENT SIQUEIROS: Please. Or I can advise  
7 him.

8 During this period, if you need to rest or if  
9 you need to use the facilities, kindly do not contact  
10 any individual to talk about this matter. I would ask  
11 you to please remain separate from all the other  
12 participants.

13 This is a question of protocol. It is--there  
14 has--there must be no comments or any advice about  
15 your answers.

16 THE WITNESS: Yes, I understand. Thank you.

17 (Brief recess.)

18 PRESIDENT SIQUEIROS: You may now continue.

19 MR. LEATHLEY: Thank you, sir.

20 BY MR. LEATHLEY:

21 Q. And I think we were looking at the--I think we  
22 were looking at the document--this one page,

1 Mr. Briceño.

2 I need you to respond to me, I'm afraid,  
3 audibly, because we have a transcription. So, I just  
4 need to confirm that you're agreeing.

5 We're looking at this page; correct? This is  
6 the Tab 6 document.

7 A. Yes, sir.

8 Q. And we're looking at the sixth line, we were  
9 just reading. "Complaint is from Steven Allen  
10 Bucelato and he has personal reasons for this action.  
11 He is problematic for the town."

12 Do you see that, sir?

13 A. Yes, correct.

14 Q. Let's go back now to Tab 7. This is the first  
15 Witness Statement of Mr. Damjanac, and Paragraphs 92  
16 and 93.

17 Paragraph 92 says, "I recall that our sales  
18 efforts were hampered by one of the neighbors"--

19 (Interruption by Spanish Reporter.)

20 BY MR. LEATHLEY:

21 Q. Paragraph 92 says, "I recall that our sales  
22 efforts were hampered by one of the neighbors of

1 Las Olas, Steve Bucelato."

2 Paragraph 93 continues: "Mr. Bucelato owned a  
3 big house in Esterillos Oeste, which was on the very  
4 top of the hill overlooking Las Olas. I understood  
5 that he wanted to buy Las Olas before David and the  
6 other investors bought it. I felt that he was jealous  
7 of the project and wanted to shut it down."

8 Do you see that?

9 A. Yes.

10 Q. And then--

11 A. Correct.

12 Q. Thank you.

13 We'll go back to the single-page document  
14 again. Line 8 says, "Developer there is no problem  
15 with no work in this zone. Wants to build a park (sic)  
16 and school there now.."

17 Do you see that, sir?

18 A. Correct.

19 Q. And then if we go to Exhibit 206, R-206,  
20 Tab 10 of your binder. This is a letter addressed to  
21 the Environmental Prosecutor and signed by Mr. David  
22 Aven dated 25th of May, 2011.



1           The square on the first page says, "Reparation  
2 plan is presented as possible consolation."

3           Do you see that, sir?

4           A. Yes, sir.

5           Q. And now if you go to Page 4--it's numbered 299  
6 on the right hand at the top.

7           Page 4, 229 at the top. Then it says, "Second  
8 part of the restoration plan."

9           The plan--well, the plan is the reference, but  
10 it says, "Consists of endowing the community of  
11 Esterillos Oeste with a park that will contain,  
12 besides the natural elements that make up a park, a  
13 lagoon. This proposal intends to allocate an area of  
14 approximately 4,000 meters."

15           Do you see that, sir?

16           A. Correct.

17           Q. So, a lot of the key points that are in the  
18 knowledge of the Claimants are contained in this  
19 one-page, badly written Spanish document that was on  
20 your file at the Municipality.

21           And let's look at the English handwritten  
22 notes in the bottom half of this one-page document.

1 And it says, "Please get validity of permits and  
2 transfer" something-or-other. I can't read actually  
3 what it says in the final word. Maybe "one."

4 Do you see that, sir?

5 A. I don't read--well, I'm reading what's in  
6 English here, but I don't know what it says, quite  
7 honestly. It's not my language. I speak Spanish.  
8 So, I cannot say--well, I can see what's written here,  
9 and you're telling me.

10 Q. Well, in listening to the translation--and  
11 your counsel can dispute the translation if they  
12 disagree--the last full written line in the bottom of  
13 the page says, "Write letter that he's familiar with  
14 area 50-plus years."

15 Does that sound like an instruction to you,  
16 sir?

17 A. I cannot give an opinion about this because I  
18 didn't do this. I cannot give an opinion on something  
19 that another person is saying in this document,  
20 because I didn't draft this document, and I cannot  
21 interpret that because I'm unaware of it. I don't  
22 know what that person is trying to say, and I do

1 apologize for this.

2 Q. And you--but you accept that this was on  
3 the--as it's stamped and as it's indicated by this  
4 sworn statement from Mr. Calderon that this is on your  
5 file, this is on the Municipality internal internal  
6 auditor's file that's held at the Municipality.

7 Would you accept that, sir?

8 A. I apologize, sir. This is what the auditor  
9 kind of said was in here; so if the document was here,  
10 well, then, yes. But I am not interpreting the  
11 content of what we see here.

12 Q. Mr. Briceño, in Paragraph 16 of your Witness  
13 Statement, you say that "According to Article 38 of  
14 the Internal Control Act, the order to pose conflicts  
15 before the Contraloría when the entity subject to the  
16 audit does not respond to the recommendations or  
17 indications of irregularity within a certain period of  
18 time."

19 Is that your testimony, sir? Paragraph 16 of  
20 your Witness Statement.

21 THE WITNESS: Mr.--Judge, may I read what it  
22 says here so as to better interpret it? Will you

1 allow me, please, sir?

2 PRESIDENT SIQUEIROS: (Gesturing.)

3 THE WITNESS: In 18, it says that--

4 BY MR. LEATHLEY:

5 Q. No, sir. Paragraph 16. 1-6.

6 A. Yes. Paragraph 16, yes. It says, "The  
7 foregoing means that the Internal Auditor may only  
8 make recommendations, issue warnings about  
9 irregularities that are established during the  
10 investigation process, pose conflicts before the  
11 General Comptrollership of the Republic in those cases  
12 in which the entity subject to the audit does not  
13 respond to the recommendations or indications of  
14 irregularity within the period of time established by  
15 Internal Auditing, in conformance with Article 38 of  
16 Law Number 8292."

17 For your information, this Article refers to  
18 something that is internal. When there is a  
19 recommendation or a warning by an auditor--

20 Q. I'm sorry to interrupt. You're answering a  
21 question I didn't ask. I was just asking if this is  
22 still your testimony in Paragraph 16.

1           If your counsel wishes to raise any other  
2 questions about the internal law and your views on  
3 that, he's entitled to do so.

4           My question is: Is your testimony today  
5 Paragraph 16?

6           A. With respect to what? With respect to this  
7 document?

8           Q. Let me move on, because I think we're treading  
9 water.

10           On the assumption, sir, that you still stand  
11 by Paragraph 16 of your Witness Statement as your  
12 testimony, is it correct that you never raised any  
13 conflicts with the Contraloría arising out of your  
14 investigations with the Las Olas Project?

15           A. The controller, no. I never did send it.

16           Q. Thank you.

17           And could you please turn to Tab 11 in your  
18 binder, the folder in front of you? This is  
19 Exhibit R-548. These are the Contraloría's guidelines  
20 on the filing of reports on facts and criminal  
21 complaints by internal auditors dated March the 12th,  
22 2008.

1           And I'd like you to look at Recital 5 of the  
2 guidelines. And this says--I'm going to read from it,  
3 sir: "Considering that Rule 2.5.1.1 of the Policy  
4 Manual for the practice of Internal Audit in a Public  
5 Sector Number M-1-2004," et cetera, et cetera, "states  
6 that reports on audit services that deal with matters  
7 from which potential liabilities may be derived are  
8 referred to as Reports on Facts, which contain a  
9 recommendation on the opening of an administrative  
10 proceeding or filing of a criminal complaint with a  
11 public prosecutor's office which inform of the  
12 possible commission of a criminal offense."

13           Do you see that, sir?

14           A. Correct.

15           Q. Now, in Paragraph 1.3 of the guidelines, they  
16 give an overview of what's--a Report on Facts and  
17 criminal complaint are; correct?

18           A. Yes, it is true, the Report on Facts.

19           Q. Now, just to be clear, you did not undertake  
20 any of these two steps in your investigation of the  
21 Las Olas Project; is that right?

22           A. No, I didn't take any of those two steps. The

1 reports are internal and follow due process, and then  
2 when they--in 2013, I again directed a final report to  
3 the mayor.

4 But you must first exhaust the administrative  
5 proceedings. You can't do this right off. Rather,  
6 you have to exhaust administrative proceedings.

7 Q. Thank you.

8 And the Contraloria never issued a report or  
9 made any final determination on the alleged  
10 illegalities that you were investigating; is that  
11 correct?

12 A. Well, with regard to the Controllershship, no,  
13 because they did not receive the information.  
14 Everything remained internal to resolve it internally.  
15 The Municipality had to resolve this in keeping with  
16 the reports that were contained in the official  
17 letters, of which you have copies.

18 Q. But you had the opportunity of elevating your  
19 concerns to the Contraloria, but you did not; is that  
20 correct?

21 A. Excuse me. I didn't do it in what period? I  
22 followed the proceeding up to a certain point, then I

1 informed the mayor about this proceeding in a letter  
2 from 2013, then there was a short period where I  
3 resigned. I was not at the Municipality. I could not  
4 follow up on that.

5 Q. And so, the issue was not elevated to the  
6 Contraloría after the 15-day deadline that you set in  
7 your 25th of January, 2013, letter; is that correct?

8 A. No, sir. No, it was not taken to the  
9 Controller's Office. It was not taken to the  
10 Controller's Office, because after that, I resigned.

11 Q. Thank you.

12 And now, Mr. Briceño, in Paragraph 13 of your  
13 Witness Statement, you quote Article 21 of the  
14 Internal Control Act; 13 of your statement.

15 And you say that "Internal Auditing is the  
16 independent objective and advisory activity."

17 Is that right, sir?

18 A. Yes, correct.

19 Q. Now, in Paragraph 21, you describe what your  
20 investigations consisted of; is that right? 21.

21 A. Correct.

22 Q. And you say you met with officers from several



1 departments of the Municipality; correct?

2 A. Correct.

3 Q. And you also went to the TAA to review their  
4 files; is that right?

5 A. Yes, correct.

6 Q. And in Paragraph 23, you say you reviewed  
7 resolutions issued by SETENA; correct?

8 A. Yes. That's what they showed me at the  
9 Tribunal.

10 Q. So, it's fair to say that you obtained  
11 information from the Municipality, the TAA, and  
12 SETENA; correct?

13 A. Yes, because those are resolutions that were  
14 sent to the Municipality.

15 Q. But you did not review any files from SINAC;  
16 right?

17 A. Well, all the files there, I can't tell you  
18 whether it was SINAC or not SINAC, because there are  
19 files that might have arrived subsequent to the  
20 issuance of reports, and so I wasn't aware of them if  
21 they're not mentioned.

22 Well, if they're mentioned, yes; if they're

1 not mentioned, no, because if these are reports that  
2 arrived subsequent to the last report--or the--that of  
3 2012, or the next-to-the-last, if it's referenced here  
4 yes; but otherwise, no.

5 Q. And you didn't meet with any officers from  
6 SINAC; is that right?

7 A. No, sir. From SINAC, no.

8 Q. And in Paragraph 20 of your Witness Statement,  
9 you say that in the Las Olas Project, there was an  
10 area considered as a wetland; is that right?

11 A. I said I heard. I heard that there was a Zone  
12 that is considered to be a wetland. I heard that.

13 Q. And were you aware at the time that SINAC is  
14 the body in charge of the protection of wetlands in  
15 Costa Rica?

16 A. Well, yes. In reality, that is--if that's the  
17 body in charge, yes. Well, they--well, this report  
18 from SINAC or not, if it's not stated here, well, then  
19 I didn't see it.

20 Q. And you were aware that SINAC was also  
21 conducting an investigation into the Las Olas Project;  
22 correct?

1           A. No. No. Because I didn't ask for it at any  
2 point, so I wasn't obliged to know about that. I  
3 didn't ask for information from SINAC or any other  
4 agency, so I don't have references from them at that  
5 point as an auditor.

6           Q. In Paragraph 23 of your Witness Statement, you  
7 say you reviewed the three files from the TAA that  
8 were later consolidated into one file; is that  
9 correct?

10          A. Yes, that is what this statement says.

11          Q. And one of those files arose out of a  
12 complaint filed by SINAC; did you know that?

13          A. As I stated previously, if it's among those  
14 documents, I reviewed it; and if it wasn't there, then  
15 not. Because it says that I reviewed Resolutions 839,  
16 2011; 2858, 2011, from SETENA, the Environmental  
17 Secretariat. That's not SINAC.

18                 We also have the files from the Administrative  
19 Environmental Tribunal. Sometimes if the files are  
20 too large, four or five years later, you can't exactly  
21 remember what you saw.

22          Q. Let's go to Tab 13. This is Exhibit R-73.

1 This is a police report dated March the 1st, 2011.  
2 And this report, prior to your investigation into the  
3 Las Olas Project, addressed to the TAA from an officer  
4 from SINAC.

5 Do you see that, sir?

6 A. March 1, 2011?

7 Q. Do you see that, sir?

8 MR. LEATHLEY: Mr. President, we seemed to  
9 have lost the Spanish transcription on the screen as  
10 well, I'm afraid.

11 PRESIDENT SIQUEIROS: Apparently the service  
12 is down so they're trying to fix it.

13 (Pause.)

14 PRESIDENT SIQUEIROS: I believe  
15 everyone's--and the systems are ready to proceed.

16 MR. LEATHLEY: Thank you, sir.

17 BY MR. LEATHLEY:

18 Q. Mr. Briceño--

19 A. Tell me.

20 Q. --this document which is in front of you--this  
21 is just for the completeness of the record, to make  
22 sure we have the continuity--Tab 13 of 73. This is a

1 document from SINAC. You see the SINAC symbol in the  
2 top left of the page.

3 This is March the 1st, 2011.

4 A. Correct.

5 Q. And the headline of the report says, "For  
6 falsification of documents, elimination of vegetation  
7 in undergrowth and possible backfilling of wetlands in  
8 the horizontal residential condominium project  
9 Las Olas, located in Esterillos Oeste of Parrita,  
10 Puntarenas Province."

11 Do you see that, sir?

12 A. Correct.

13 Q. And this was the SINAC complaint that was  
14 consolidated with the two other complaints at the TAA;  
15 is that right?

16 A. Well, I see that there's a complaint being  
17 presented and that there's a prayer for relief at the  
18 end, but I don't know if there are wetlands or not.  
19 That--I don't know if there are wetlands or not. I  
20 just see that this is a proceeding of municipal  
21 officials.

22 Q. Yes. My point is slightly different, sir.

1 You were testifying about whether or not you had seen  
2 the SINAC report, whether you had been aware that the  
3 SINAC investigation was consolidated--or actually  
4 morphed into one of the TAA complaints.

5           What we're trying to establish is that--was  
6 that this was the SINAC complaint that was  
7 consolidated with the two other complaints at the TAA;  
8 is that right?

9           A. I can't tell you whether that is correct or  
10 not for the--what the Tribunal did. I'm not the  
11 Tribunal. I'm just looking at the actions taken by  
12 municipal officials, not by SINAC.

13           Q. And so, sir, if you had, on your testimony,  
14 reviewed the three TAA files, which was your  
15 testimony, and one of those TAA files was actually the  
16 SINAC complaint, then you must have reviewed this  
17 complaint during your visit to the TAA.

18           A. In 23, it says that I consulted these three  
19 files. But when you say "examined," that's page by  
20 page.

21           Well, there are times when I just looked to  
22 see whether the file exists. I don't go through it

1 page by page.

2 I repeat, my responsibility was to see whether  
3 there was a complaint, to begin the process that I  
4 mentioned in the communiques that I drafted before, I  
5 mentioned.

6 Q. So, you're admitting, sir, that your  
7 investigation was not exhaustive.

8 A. Well, depends on what you mean by  
9 "exhaustive." It was exhaustive with regard to  
10 internal affairs of the Municipality which I was  
11 investigating. I'm not investigating the Tribunal or  
12 SINAC. I am investigating the acts of municipal  
13 officials involved in the investigation.

14 Q. Yes. And in order to draw your conclusions  
15 and recommendations, you would expect to be able to be  
16 aware of all the relevant information that would be of  
17 influence to your determination; would you agree with  
18 that?

19 A. Well, with regard to what you say, this is a  
20 macro view of the affairs. Well, my conclusions have  
21 to do with acts of officials, whether they are  
22 violating due process or other provisions which could

1 lead the Municipalities to have to actually compensate  
2 third parties because of wrongful acts.

3 Well, with regard to the details of SINAC,  
4 ACOPAC, or any of these other agencies, well, this is  
5 for the decisions of the Environmental Tribunal, not  
6 for Internal Auditing.

7 As I repeat, it has to do with the tasks of  
8 municipal officials and the acts that they took with  
9 regard to their jobs.

10 Q. Thank you.

11 If you can go to Paragraph 20 of your Witness  
12 Statements, sir, you say that you started your  
13 investigation into the Las Olas Project in 2012. And  
14 in the same paragraph, you say that what you knew at  
15 the time was that the Las Olas Project was allegedly  
16 located on an area considered as wetland; is that  
17 right, sir?

18 A. No I'm saying that I heard. I didn't say I  
19 knew that. I said I heard.

20 "Heard" is different from "knew," because my  
21 job is not to go and see what a wetland is. I don't  
22 do that.



1 Q. And assuming that was the case and Las Olas  
2 was actually on a wetland, construction of a resort  
3 over a wetland would cause damage to the environment;  
4 correct?

5 A. Yes. The agency that has to do with that can  
6 do that. I'm not assessing construction there. I am  
7 assessing what officials--municipal officials do,  
8 their actions with regard to a specific project.

9 And I said I heard; I would not know with  
10 certainty whether a construction is affecting a  
11 wetland, someone who's an expert in wetlands could say  
12 that.

13 Q. Now, in Paragraph 32 of your Witness  
14 Statement, you refer to the suspension of permits  
15 issued by the Municipal Council on March the 7th,  
16 2010.

17 And in particular, in Paragraph 32A, the  
18 Municipal--you say that the Municipal Council's  
19 decision was based on correspondence; correct?

20 MR. BURN: Just a point of information; it's  
21 2011.

22 A. Yes. It says that it is--with a note received

1 by the council. That was correspondence.

2 BY MR. LEATHLEY:

3 Q. Now, please, can you go to Tab 14. This is  
4 Exhibit R-74.

5 This is the correspondence that you refer to  
6 in Paragraph 32A. And the last sentence of this  
7 letter reads: "Within the conversation, a series of  
8 documents were provided. Reason why I am transferring  
9 those to the Municipal Council, as it was requested to  
10 me by Mr. Masis Campos."

11 Do you see that, sir?

12 A. Yes, sir.

13 Q. Now, let's go to Tab 22.

14 MR. LEATHLEY: And this is Exhibit R-75, for  
15 the record. This is the Municipal Council's accord of  
16 March 7, 2011.

17 BY MR. LEATHLEY:

18 Q. And I'll read the capital letters in bold in  
19 the document. I'm going to read the English  
20 translation, which says, "The Municipal Council agrees  
21 to request that the mayor, Mr. Freddy Garro Arias,  
22 proceed to suspend all types of permits granted and

1 issue no more permits until we proceed to elucidate  
2 what was complained of through the documents provided  
3 by those sirs since, if found to be true, the  
4 construction process should not be continued and  
5 responsibility should be laid on the officers who  
6 participated in the granting of such permits."

7 Do you see that, sir?

8 A. Yes, sir.

9 Q. So, the Municipal Council's accord refers to  
10 the documents that Mr. Bucelato and others provided to  
11 Mr. Nelson Masis and Mr. Marvin Mora Chinchilla; is  
12 that right?

13 A. Well, that's what the Council states. But the  
14 thing is, Mr. Attorney--well, your question--what's  
15 the question for me?

16 Q. Thank you.

17 Let's see what the information was contained  
18 in the documentation brought to the Municipal Council.

19 Let's turn to Tab 23. And this is  
20 Exhibit R-530. And in the first page, we can see the  
21 correspondence you refer to that was sent to the  
22 Municipal Council on March 7th, 2011. And then if you

1 turn to the second page, we see a report from SINAC  
2 dated January the 3rd, 2011.

3 Do you see that, sir?

4 A. Yes. To Carlos Cordero Valverde.

5 Q. Yes, sir.

6 Now, we'll come back to this report from  
7 SINAC; but for the moment, can you turn the pages  
8 until you get to a letter from SETENA dated  
9 January 17, 2011?

10 Just to help you find it, there's a map on the  
11 left-hand page of the file, so that--and then the  
12 letter will appear on the right. You want to go back  
13 towards the front.

14 It's four pages in from the start. From the  
15 start, yes. There, on the right-hand side. You see  
16 this is a letter from SETENA dated January 17, 2011.

17 MR. LEATHLEY: Just to check that the Tribunal  
18 has that in hand as well.

19 BY MR. LEATHLEY:

20 Q. And if you turn the page, the next document is  
21 a letter from SINAC to Mr. Franklin Carmiol Umaña;  
22 correct?

1           You're going to have to turn the page, sir.  
2 There we go.

3           And then the next one is a letter from SINAC  
4 to the General Secretary of SETENA dated 30th of  
5 November, 2010; correct?

6           Do you see that, sir?

7           A. Yes, correct--

8           Q. And the next document is, once again, the  
9 SINAC report from 3rd of January, 2011, that we saw  
10 before.

11           And then, if you keep turning the pages until  
12 you get to a letter signed by Mr. Bucelato dated the  
13 4th of February, 2011; do you see that?

14           A. Yes, correct.

15           Q. And, of course, there are a number of other  
16 documents here we won't go into for the sake of time.  
17 But the point is to ask you whether you reviewed this  
18 documentation while you were performing your  
19 investigation of the Las Olas Project.

20           A. Yes. When you mentioned at first the  
21 municipal agreement about the halting of works, what  
22 is analyzed here is the due process of reaching a

1 municipal agreement, whether due process is occurring,  
2 and what the agreement does when the Municipality or  
3 the mayor says that this must halt, the works.

4           And so, this is a deliberative body, the  
5 Municipal Council. When I say the agreement is  
6 illegal because it is not in keeping with the process  
7 according to the Articles 43 and 44 of the Municipal  
8 Code of Costa Rica, nor is it following due process  
9 that must be provided, and also that the Party  
10 that--to the complaint is not--should not be the  
11 Municipality.

12           Q. And let's go to Tab 15 in your file. This is  
13 Exhibit R-262. This is a SINAC report dated the 3rd  
14 of January, 2011, that we saw twice in the document  
15 that Mr. Bucelato and others brought to the  
16 Municipality on the March 7, 2011, meeting.

17           And we assume that you have seen it recently  
18 because you refer to it in Paragraph 32 of your  
19 Witness Statement. But if you can go to Page 3 of  
20 this report, which lists the conclusions of the SINAC  
21 officers after they conducted a visit to the Las Olas  
22 site--this is SINAC--it reads, Number 1, that "on the

1 property in question, there are bodies of water that  
2 are supposedly classified as wetlands, and it is  
3 important that the national wetland program make a  
4 statement with regard to this."

5           And it continues at Number 3, "In accordance  
6 with Article Number 11, Section II of the Biodiversity  
7 Law, Number 7788, where it is indicated that effective  
8 protection measures must be taken to avoid possible  
9 damage to natural resources and the environment, work  
10 on the site must be stopped immediately and until  
11 proper studies are carried out where it is concluded  
12 that this product does not cause irreparable or severe  
13 damage on the environment."

14           Then it continues, Number 4, that "the  
15 elimination of vegetation in an area greater than 3  
16 hectares had occurred in such a manner that trees  
17 between 5 and 40 centimeters' diameter had been cut."

18           So, here, SINAC is reporting the potential  
19 existence of a wetland and impact to a forest; is that  
20 correct?

21           A. Yes, that is SINAC's opinion.

22           Q. Yes, sir.

1           And just to conclude, this was part of the  
2 documentation that was forwarded to the Municipal  
3 Council prior to adopting the decision to suspend the  
4 construction permits; correct?

5           A. Well, if that's what they considered, yes.  
6 But there's one issue. What I analyzed was, the  
7 procedure to make a municipal accord, it is illegal  
8 because it is based on a complaint of neighbors. And  
9 when a decision is made according to the articles that  
10 I mentioned before, 44, 45 of the Municipal Code, they  
11 must do this processing through a commission.

12           The commission then issues a report to the  
13 council, the Municipal Council, and then they reach an  
14 agreement, and then they send it to the mayor. But  
15 within that agreement, they cannot halt this, because  
16 this is the administration's authority, not the  
17 Municipal Council's authority. They're talking about  
18 alleged wetlands, but I'm not analyzing that.

19           But they make recommendations to ACOPAC.  
20 They're not saying this is true; they're making  
21 recommendations to ACOPAC about their assessment. So,  
22 I analyze a different affair. It is the acts of the



1 council with regard to procedures and due process to  
2 take an accord, which is of great transcendence for  
3 the Municipality.

4 Q. But you did not refer to this document or any  
5 of the other documents that we reviewed in the letter  
6 that you sent to the mayor or to the Municipal  
7 Council, did you?

8 A. Well, for the same reason--what I'm analyzing  
9 is the procedure for taking this accord. The  
10 Municipality cannot jump over these procedures. This  
11 is illegal.

12 Q. In Paragraph 32(e), you say that the Municipal  
13 Council based its actions solely on the comments made  
14 by Mr. Bucelato and Mr. Carmiol in the presence of a  
15 municipal official and a municipal counselor. That's  
16 what you testified; correct?

17 A. Yes, it's correct. I'm sorry, I couldn't hear  
18 you very well. The sound was very low.

19 Q. I'm sorry, sir. We've lost the Spanish  
20 transcription, but we can live without it for just the  
21 final two or three minutes we have if it's being  
22 recorded somewhere.

1 MR. LEATHLEY: No, no. If it's being  
2 recorded, that's all that matters. Yeah. Thank you.

3 If that's acceptable to the Tribunal.

4 PRESIDENT SIQUEIROS: (Nods head.)

5 BY MR. LEATHLEY:

6 Q. One of the public officers that was present in  
7 the meeting with Mr. Bucelato and others was  
8 Mr. Nelson Masis Campos, a member of the Municipal  
9 Council and, in fact, the President of the Municipal  
10 Council; correct?

11 A. Well, that time I mentioned it, he was the  
12 President of the Municipal Council.

13 Q. And, Mr. Briceño, you did not attend the  
14 Municipal Council session on March the 7th, 2011, did  
15 you?

16 A. No, sir, I was not present at that session.

17 Q. So, you were not present during the  
18 deliberations of the members of the Municipal Council,  
19 and you don't know what weight they gave to the  
20 documentation that they had in front of them.

21 A. Well, finally, when the accord is issued, the  
22 accord says everything that happened, for example,

1 that the report was looked at from a municipal  
2 commission. But the Municipality has three kinds of  
3 commissions, one for legal affairs, maritime area, and  
4 the budget.

5 Q. You're answering a slightly different  
6 question. My question is, you just don't know what  
7 was deliberated because you weren't in the meeting;  
8 correct?

9 A. What? They asked me to analyze the municipal  
10 accord, which is the final document, which I analyzed  
11 to determine whether it's legal or it is not legal and  
12 if it followed due process.

13 The accord, as drafted, talks about everything  
14 that was discussed and that there are very succinct  
15 minutes of the meeting.

16 What I was interested in was the final, what  
17 was certified, the municipal accord, and what effects  
18 it could have, and what procedure was followed to  
19 reach that accord.

20 Q. Yes. And in Paragraph 32(f) of your Witness  
21 Statement, you list the reasons why you considered  
22 that the suspension of the construction permits should

1 be annulled. And in Subparagraph 1, you say, and I  
2 quote: "On the 7th of March, 2011, there was not a  
3 single legal or administrative basis on which to adopt  
4 such a decision."

5 A. Correct. There is no decision. There are  
6 only requests for recommendations for inspections, but  
7 there are no SETENA resolutions like the two I just  
8 named. A resolution is needed to reach an accord.  
9 That would be a basis--an administrative basis.

10 But these are recommendations, and they're  
11 internal recommendations. These are external agencies  
12 that are making recommendations to each other.

13 Q. Are you aware of the precautionary principle,  
14 Mr. Briceño?

15 A. Well. There are precautionary principles that  
16 exist. And not just environmental ones, but also--well  
17 terms like that I have heard such as in dubio pro reo  
18 something like that, I--are you referring to--what are  
19 you referring to when you talk about a precautionary  
20 principle? Could you explain it, please?

21 Q. Certainly.

22 Let's turn to Tab 16 of your folder. This is

1 Exhibit C-207. This is the Biodiversity Law and  
2 Article 11, Paragraph 2.

3 Article 11 says, "Criteria to apply this act:  
4 Where there are threats or serious irreversible  
5 damage, lack of full scientific certainty shall not be  
6 used as a reason for postponing cost-effective  
7 measures to prevent environmental degradation."

8 Do you see that, sir?

9 A. Excuse me. In .2--oh, Article 11.2, yes, this  
10 is the precautionary principle. I'm reading it, yes.

11 That's what it says here.

12 Q. And are you aware of that, then?

13 A. Yes.

14 Just to clarify, when these elements exist to  
15 file a complaint based thereon, you must follow the  
16 administrative hierarchy within an organization. So,  
17 an official cannot jump over this procedure. They  
18 cannot jump to a higher rank in the hierarchy.

19 And as I stated at the beginning, analyzing  
20 the acts of officials, if an official who files a  
21 complaint before a Tribunal and has ignored an  
22 internal procedure that is not correct, they must file

1 a procedure to be able to file a complaint. Thus, the  
2 analysis of the acts of municipal officials--and I  
3 repeat this.

4 Q. So, the Municipal Council was facing a  
5 complaint for refilling of a wetland and impact to a  
6 forest, as reported in the SINAC report. The  
7 Municipal Council would not only have had legal or  
8 administrative basis, but it would have had an  
9 obligation to suspend the construction activities that  
10 may cause damage to those ecosystems; wouldn't you  
11 agree?

12 A. Provided that there is a decision by someone  
13 who can justify it. Just because someone said  
14 something, well, the council--

15 Q. Yes?

16 A. --cannot take an accord based on conjecture or  
17 things that are not provided for in a resolution.

18 Q. Such as a SINAC report.

19 A. Well, if SINAC is issuing a resolution. But  
20 if they're making recommendations, they need to be  
21 careful when they take a decision because that  
22 decision can affect third parties, whoever they are;

1 and those third parties then can file a complaint  
2 or--excuse me, a suit against the Municipality  
3 and--for wrongful acts or for not having followed the  
4 procedure.

5 Remember, that administration--public  
6 administration law states that the government is  
7 responsible for the acts of its officials, whether  
8 those are legal or illegal.

9 So, the government must respond--it is  
10 responsible for the acts of officials. So, officials  
11 must be very careful so that they do not cause  
12 problems that could then compromise the Municipality  
13 or the National Treasury.

14 Q. Thank you.

15 MR. LEATHLEY: We don't have any further  
16 questions.

17 MR. BURN: Thank you, sir.

18 We have no questions for the witness. Thank  
19 you.

20 PRESIDENT SIQUEIROS: Okay. Any questions?

21 Well, there are no additional questions on the  
22 part of the Tribunal or the Claimants. You are free,

1 and we thank you for your participation.

2 THE WITNESS: Thank you.

3 MR. LEATHLEY: Mr. President, if I just may  
4 raise one point. We notice in the file, the cross  
5 bundle, we had an incorrect translation of that  
6 one-page document that we spent a little time  
7 referring to. We have a slightly refined attempt to  
8 translate it, if it's acceptable.

9 Can we put that on the record? Of course, if  
10 counsel to Claimants have an objection, we'd be happy  
11 to hear an objection.

12 MR. BURN: Perhaps we could look at it over  
13 the break and--

14 MR. LEATHLEY: Yeah. It's not going to be  
15 material to anything that's been said or discussed  
16 during the cross-examination, but just wanted to raise  
17 that.

18 MR. BURN: I mean--yeah.

19 MR. LEATHLEY: Sure.

20 PRESIDENT SIQUEIROS: Okay. So, it's 11:00.  
21 Should we take a ten-minute break?

22 Okay. Thank you.



1 (Brief recess.)

2 PRESIDENT SIQUEIROS: We're just going to wait  
3 a couple of minutes until some system connections are  
4 made.

5 (Pause.)

6 MANUEL A. ABDALA, CLAIMANTS' WITNESS, CALLED

7 PRESIDENT SIQUEIROS: We are ready to proceed,  
8 then. Mr. Abdala, good morning. We will--as you are  
9 aware in these proceedings, which this is not your  
10 first, there will be an opportunity for you to make a  
11 presentation, a summary of your report after Mr. Burn  
12 has had the opportunity to address some questions to  
13 you, to be followed by cross-examination on counsel  
14 for the Republic of Costa Rica.

15 During examination we would ask that you first  
16 answer the questions being presented by counsel to the  
17 Republic of Costa Rica. You will have the opportunity  
18 to make any clarifications afterwards.

19 As an expert witness, I would ask that you  
20 read out loud the card that's in front of you, and we  
21 may then proceed with the questions on the part of  
22 counsel to Claimants.

1           THE WITNESS: Thank you. Good morning,  
2 Mr. President. Good morning, Members of the Tribunal.  
3 My name is Manuel Abdala. And I solemnly declare upon  
4 my honor and conscience that my statement will be in  
5 accordance with my sincere belief.

6           PRESIDENT SIQUEIROS: Thank you.

7           MR. BURN: And just a procedural matter. I  
8 can't see--and I haven't seen on our side--a  
9 cross-examination bundle from the Respondent.

10                           DIRECT EXAMINATION

11           BY MR. BURN:

12           Q. Now, Dr. Abdala, in that rather  
13 fearsome-looking folder, there should be a copy or  
14 copies of your two reports in these proceedings. If  
15 you could just quickly turn to the top of that file.  
16 Flick through the documents you see there before the  
17 numbered tabs, and let us know if those do indeed  
18 appear to be copies of your two reports.

19           A. That's correct.

20           Q. There are signature pages there. If you could  
21 quickly turn to those signature pages and confirm  
22 whether or not the signatures that you see are yours.

1 A. Yes, on the First Report.

2 Q. Thank you.

3 A. And yes on the Second Report.

4 Q. Thank you.

5 Do you have any changes or additions to make  
6 to either of the two reports?

7 A. Yes, I do have an adjustment on the overall  
8 damage valuation that I plan to go over in my  
9 presentation. So, it will become evident what those  
10 adjustments are as I explain on the slides.

11 Q. Thank you. I invite you to proceed with your  
12 presentation.

13 A. Thank you very much.

14 The way I have organized this presentation is  
15 as follows. And you can see this on Slide Number 2 of  
16 my presentation. I will first comment on differences  
17 in damage methodology between Mr. Hart and I. And I  
18 will also provide an update with adjustments that I  
19 have made out of--vis-a-vis the new information that I  
20 have gathered in preparing for this hearing.

21 You will notice that although counsel to  
22 Claimant has asked me to assess value as of two

1 different dates of valuation, everything that I have  
2 presented today is as of May 2011, which I understand  
3 is the primary legal case for date of valuation. So,  
4 all the numbers that we see will be focused on that,  
5 which is, by the way, the same date of valuation that  
6 Mr. Hart uses so it will facilitate any comparisons  
7 and discussions.

8           The second section of my presentation will be  
9 focused on the discussion of certain key parameters  
10 for setting the value of Las Olas as a pre-operational  
11 asset. And then, as you will notice from Mr. Hart's  
12 Second Report, there are plenty of criticism or  
13 observations to my parameters.

14           So, I'm not going to have time to go all over  
15 them. So, I will invite the Tribunal that if there is  
16 any particular question, that you could obviously ask.

17           Many of these criticisms could have been made  
18 in the first submission of Mr. Hart. But because  
19 there are so many of them, I'm not going to have time  
20 to go over it. That doesn't mean that I endorse or  
21 there's an implicit agreement with the other views.  
22 But I will focus on the key ones.

1           In the third section, I will show the Tribunal  
2 how I have adjusted the so-called land appraisal value  
3 which was based on an assessment by Mr. Calderon in  
4 October 2009.

5           And in the fourth section, I will end up with  
6 my recommendation on damages, including the adjustment  
7 for a prejudgment interest rate value as of the  
8 current date, which I chose as February 7th, 2017.

9           Now, if we could turn to Slide Number 4. Here  
10 is where I summarize the key differences on  
11 methodology. As you might recall from my report, the  
12 way I value the asset is by using a so-called expected  
13 value of two approaches on valuation.

14           On the one hand, I take Las Olas as if it was  
15 a successful project and it will continue according to  
16 the design plan value at market prices, and I attach a  
17 probability of success. And that's fully an income  
18 approach if Las Olas was to be continued as an ongoing  
19 concern.

20           But at the same time, because the asset was  
21 not fully operational as of May 2011, I also assess  
22 the so-called appraisal value of the land, which

1 assumes that the Las Olas Project would not have  
2 continued successfully as planned but, rather, the  
3 willing buyer/willing seller would have to dispose of  
4 the land in the state as of May 2011, which includes,  
5 obviously, certain improvements that were already in  
6 place and, also, all the permits, both construction,  
7 environmental, and a concession for the beach area.

8           Now, the key discussion on methodology is that  
9 Mr. Hart does not attempt to assess the fair market  
10 value of the asset at all as of May 2011 or as of any  
11 other date and instead proposes to just look at  
12 certain amounts of expenses incurred by the project on  
13 what he calls a cost-based approach. But at no point  
14 he attempts or provides either a modification on the  
15 values that I assess on the income approach or the  
16 appraisal value or provides any assessment--attempt to  
17 assess the fair market value of the asset, which is a  
18 main criteria for valuing investments as of the date  
19 of valuation.

20           Now, in his Second Report, Mr. Hart makes  
21 additional criticisms that we have not seen before.  
22 The first one is that Claimants--in his view,

1 Claimants have a very poor track record of performance  
2 at Las Olas or elsewhere. And that because of that,  
3 he claims that it will be too speculative to assess an  
4 ongoing value in the hands of Claimants.

5 My response to that is that when you are  
6 looking at a fair market value assessment, you do not  
7 necessarily establish the value in use with the  
8 current owners, but you also think about a potential  
9 transaction in which someone will buy--a willing buyer  
10 will buy and execute the project.

11 So, although it may be an important  
12 consideration in establishing the probability of  
13 success with the Claimants as managers and developers,  
14 you also need to be able to assess what would be the  
15 value of that project as an ongoing matter if someone  
16 else would have bought the asset as it was in 2011 and  
17 continued with a development project.

18 So, in my valuation, the fair--this identity  
19 of who's going to proceed with the Las Olas process  
20 really does not matter because I look at market prices  
21 for any willing buyer that would assess the Las Olas  
22 development.

1           The second comment, which is new, that  
2 Mr. Hart proposes, is that there is a financing  
3 ownership mismatch in the Claimants' investments and  
4 participations. Likewise, I don't pay attention,  
5 really, to that because my assessment to damages is  
6 for Claimants as a group. So, I have not allocated  
7 damages or value to each of the Claimants in  
8 particular.

9           So, if the Tribunal feels that that needs to  
10 be determined, that will be something that I would  
11 have to explore further or attach value according to  
12 ownership and financing arrangements between the  
13 shareholders. But I have not assessed that. My  
14 recommendation is for Claimants as a whole.

15           The third point raised by Mr. Hart is that in  
16 his view, the evolving nature of the business  
17 plans--in particular the change from 2004 when Norton  
18 Consulting did the marketing analysis and assessments  
19 at the time compared to the 2010 business plan, in his  
20 view, that reflects the speculative nature of the  
21 Project, and it's one of the reasons why he claims he  
22 cannot assess or he does not assess a discounted cash



1 flow.

2           And I view this as exactly the opposite.  
3 Because the 2008/2009 financial crises prompted the  
4 Las Olas developers to really refocus--not the overall  
5 concept of what they were offering, but, rather, they  
6 attempted to diversify the offerings. And they moved  
7 to condos, to add some house developments, and to add  
8 a hotel, and they moved to the business of timeshares.

9           And they also changed the quality of the  
10 offering because before they were thinking about  
11 having a resort that was more comparable maybe to  
12 Los Sueños, which was a very successful but high-end  
13 resort and to a relatively lower quality.

14           And you can see that in the 2010 business  
15 plan. So, I see that adaptation as actually  
16 increasing the probability of success, rather than  
17 calling that a potential failure as Mr. Hart does.

18           And, finally, Mr. Hart says that I invented a  
19 business plan. And I didn't make up any business  
20 plan. The 2010 business plan is the one that I used  
21 because it's the latest just prior to the date of  
22 valuation in May 2011. So, I take the number of units

1 that were to be offered in the different business  
2 segments, but I mark--I price those units at market  
3 prices. And I also make assessments as to what would  
4 be according to the hospitality industry in Costa  
5 Rica. And that's where the likelihood of completion  
6 of sales, timing, and other parameters.

7 But I always use the business plan as the  
8 important point for design.

9 Now, on the appraisal value of land, something  
10 that is new that we have seen here from Mr. Hart is  
11 that he now claims that 22 percent of the land has  
12 already been sold or it's not owned by Claimant and,  
13 therefore, that we should make at least an adjustment  
14 of 22 percent reduction on damages.

15 I will show that that's--that's wrong, that's  
16 an invalid interpretation for many reasons. But I  
17 will also show you what type of adjustments need to be  
18 done with respect to pre-May 2011 sales in particular,  
19 which I had already taken into account partially in my  
20 prior reports.

21 Another consideration with respect to the  
22 appraisal value of land is that it was done in 2009,

1 not in 2011. And I will go over the adjustments on  
2 that and why the prices that I have used for  
3 adjustment are--are reasonable and conservative.

4 And, finally, as to the probability of  
5 success. The Tribunal would have noticed that the  
6 claim that this--Mr. Hart makes, that the probability  
7 shows the speculative nature of the Project, is not so  
8 but, rather, the probability--what it's doing is  
9 accounting for the risk of a pre-operational asset.  
10 So, any willing buyer would know that there is some  
11 chances that you cannot complete the process of  
12 development of Las Olas as it was planned, and it may  
13 not be successful.

14 So, if you are going to pay for the land as of  
15 that time, you--you would have to include that risk.  
16 And that's what this method of expected value is  
17 computing. There's nothing that cannot be assessed.

18 And recall that all investments, obviously,  
19 are speculative, because you are expecting a payoff in  
20 the future. But that doesn't mean that you cannot  
21 assess value, and transactions every day take place on  
22 investments that have this risk of a success or

1 failure.

2           And proof of--the Tribunal may have to assess  
3 on its own what is--whether the 68 percent number that  
4 I offer is a number that you would like to see. But  
5 the proof--the additional evidence that I have shown  
6 you is that all of the resorts that have been similar  
7 or comparable to Las Olas have been successful in the  
8 area. And Mr. Hart has not been able to point out to  
9 any one in particular that might have failed in that  
10 area.

11           So, that area is obviously very attractive.  
12 And this type of development, such as Noches Los  
13 Sueños, Costa del Sol, Málaga, Místico, and six others  
14 that are shown in the Norton Consulting report have  
15 been all developed.

16           Now, if we can move to Slide Number 5. I  
17 would like to say something about the cost-based  
18 approach that Mr. Hart proposes.

19           And I know that although he has the right  
20 definition on the right side here of the charts from  
21 the Litigation Service Handbook, which is that the  
22 cost approach is the money required to replace the

1 future service capability of the asset, then his  
2 implementation is completely off. He defines the cost  
3 approach as the actual amount spent on the project to  
4 date. And those are completely two different  
5 concepts.

6           What I have shown you here in the left-hand is  
7 the definition that Shannon Pratt gives, which is  
8 exactly the same concept as the Litigation Service  
9 Handbook. It's a replacement value of the asset. And  
10 in particular, when you're dealing with land, you have  
11 to be aware that the value of the land is to be  
12 assessed at its highest and best use, and it's to be  
13 added to the replacement cost of the improvements.

14           None of this is present in Mr. Hart's  
15 so-called cost base approach. If he had really  
16 followed the cost base approach, he would have had to  
17 use the value of the land based on comparable market  
18 prices plus the replacement value of the improvements,  
19 which is basically what Mr. Calderón has done. But  
20 none of that is present in his valuation.

21           Now I'd like to move to Slide Number 6, which  
22 is the--it is--here we have a nice--

1 Q. Dr. Abdala, you may want to move the slides on  
2 the screen as well.

3 A. Okay. I'm sorry. Thank you. Thank you for  
4 the reminder.

5 Slide Number 6. This is a map of the plan for  
6 Las Olas. And in red what you see is what Mr. Hart  
7 has identified, in his research of the registry of  
8 Costa Rica, lots that have been sold, both prior and  
9 after May 2011. And they represent 16 percent of 37  
10 hectares that he proposed.

11 And there's also 6 percent of the area, based  
12 on the Concession area, which Mr. Hart understands the  
13 ownership titles are not too clear and, also, that's  
14 why he excludes them.

15 Now, what I say is that the right adjustment  
16 is not a reduction of 22 percent on damages. That  
17 doesn't make sense. Why doesn't it make sense?

18 Because even if you sold the lot prior to  
19 May 2011, on those lots you're still going to have  
20 houses that will be constructed, Las Olas developers  
21 would have participated in the construction of at  
22 least--a significant portion of the houses. There

1 would be HOA fees. There would be revenues related to  
2 rentals--management of rentals. So, that doesn't mean  
3 that you can detach value even if you sold the  
4 ownership of the lot to someone else in--prior to  
5 May 2011.

6 And, of course, all sales post May 2011, we  
7 can see that they have been conducted at a distressed  
8 price. And we will see how we can take care of that  
9 adjustment.

10 Now, the way I propose to adjust for this new  
11 information that I did not have prior to my submission  
12 of the two reports is to do the following. And this  
13 is shown in Slide Number 7. As you can see here in  
14 orange, you have all the lots identified that were  
15 sold as per the registry before May 2011 which is the  
16 date of valuation.

17 And that 21 of these lots I had already  
18 accounted for in my income approach in the DCF, by not  
19 computing a new sale on those lots I already accounted  
20 for. But there's five additional lots that I had not  
21 included. So, I am not adjusting, and that decreases  
22 my DCF value by 0.69 percent. I have also removed the

1 area of these presale lots from Calderón's appraisal  
2 value and the residual land value so as to have  
3 comparable areas in the pure land appraisal value of  
4 Mr. Calderón.

5 But for the post-May 2011 sales, as per the  
6 registry, we see that there are 51 lots, two  
7 commercial sites, for an area of 43,961 square meters  
8 that no adjustment really is necessary because when  
9 you see the prices at which these transactions were  
10 sold after the measures by Costa Rica, they are, on  
11 average, as you see a back-up slide, at around \$4 per  
12 square meter.

13 So, they basically have a very low residual  
14 value, which is not too different from my assessment  
15 based on market value of the land in a virgin state  
16 with no prospects of development.

17 And, finally, I notice that the concession  
18 area is not a sale, so I see no reasons for an  
19 adjustment there. I look at the shareholder agreement  
20 between La Canícula and Claimants, and I can see  
21 clearly that there's been an arrangement so that the  
22 financing was 100 percent provided by Mr. Aven or



1 Claimants, and the profits would have been also  
2 100 percent allocated to them.

3           So, the way I see that ownership is that  
4 although formally there's a 49/51 split, in practice  
5 the shareholders agree that the risk of finances are  
6 taken care of by the minority shareholder and,  
7 therefore, the benefits of that also go to the  
8 minority shareholder.

9           Now, in Slide Number 8 you have the results of  
10 my adjustments to damages once you take into account  
11 this new information for the sales as per the  
12 registry. So, you can see that in total there's a  
13 1.01 percent reduction on damages, and that includes  
14 also a commercial lot that was missing in the  
15 assessment.

16           Now, if we can move to Slide Number 9. Here I  
17 have to report to the Tribunal two other adjustments  
18 that I made. The first one has to do with one  
19 observation that Mr. Hart made in his Second Report  
20 related to the REMAX sample of size of condominium  
21 from comparables in the Puntarenas area. And he's  
22 right that some of these data entries which are shown

1 as square meters, they cannot possibly be square  
2 meters, so they were square feet really.

3 So, once you adjust those, the average price  
4 increases by 2.67 percent on comparables of condos.  
5 So, I have adjusted that.

6 And, finally, I have done two adjustments on  
7 timeshare revenues. One is related to Mr. Hart  
8 commented that there was a formula link that was  
9 incorrect in my model so that it was linked to units  
10 or intervals that were sold rather than--it was built  
11 rather than sold. So, once you correct that, you have  
12 a small reduction on value.

13 And I have also realized that when entering  
14 the information for the comparables of Costa Rica's  
15 timeshare interval prices, I had missed to introduce  
16 the one-bedroom units which are--they sell at a lower  
17 price than the two-bedroom units. So, once you adjust  
18 for that, you have an overall 3.5 percent reduction on  
19 damages.

20 And combined, both the registry and these  
21 adjustments, you have that information on Slide  
22 Number 10. So, that would be my updated damage

1 recommendation as of May 2011.

2           One point that I made also in my First Report  
3 is that there might be consequential losses that I had  
4 not been able to assess. And I said that to the  
5 extent that the Claimants have to return monies for  
6 the lots that had already been sold, that may add to  
7 additional damages, but I--I was not able to assess  
8 quantitatively that amount, so I cannot make any  
9 particular recommendation at this point.

10           Now, let me move to Section Number II now,  
11 which deals with business segments. And first you  
12 see, in Slide Number 12, some information that I think  
13 is useful to the Tribunal. In the middle you see the  
14 bars here showing my methodology for damages. So, my  
15 DCF value discounted at 7.6 percent is worth  
16 \$81.9 million.

17           And you can compare that with the business  
18 plan, a value. I mean, if you take the value of the  
19 2010 business plan, which is not really a valuation,  
20 but it has some projections, but if you were to use  
21 the parameters of pricing that they have estimated and  
22 discounted at the same 7.6 percent rate that I have

1 used for my model, then Claimants would have expected  
2 a net present value of \$150.9 million as of 2011.

3           And my assessment is much lower because I used  
4 market prices that are observable in the marketplace  
5 in Costa Rica.

6           Now, Calderón's appraisal value, you see here  
7 as well that there is an adjustment. You see in the  
8 orange as of October 2009, Mr. Calderón has assessed  
9 \$52 million. And I have adjusted by the fact that the  
10 appraisal value had elements of assumptions of  
11 urbanization with a degree of total completion of the  
12 infrastructure works related to the land, such as road  
13 access, water/sewage treatment, electricity,  
14 provisions, et cetera.

15           Because as of May 2011, only one-third of what  
16 was budgeted was actually executed, I had made that  
17 adjustment that reduces Mr. Calderon's appraisal value  
18 to 34.3 million.

19           Now, if we move to Slide Number 13, here the  
20 Tribunal can see the value components of Las Olas if  
21 it was priced at market, but if it was--if Las Olas  
22 had continued as a successful venture, the

1 81.9 million, you see how it's distributed between the  
2 hotel lots, timeshares, condominiums, and houses. And  
3 there is information here as to the main sources of  
4 market data that I have used for each case.

5 In Slide Number 14, the Tribunal can see the  
6 market information used for lots and the average  
7 prices of lots, of 19 lots that were listed in the  
8 REMAX database, was around \$202 per square meter.

9 I have used that as one of the sources of  
10 information, but I have also used the listing prices  
11 of El Místico, which has lots of relatively smaller  
12 but not too different size, and averaging these two  
13 sources, I get a value of \$217 per square meter for  
14 lot prices as of 2015.

15 And I do two adjustments to get to that value  
16 as of 2011. The first one is that we know that list  
17 prices are not necessarily transaction prices. And,  
18 so, I adjust by looking at evidence in the Florida  
19 Keys in the U.S. as of 2015, and I found that on  
20 average there's a 7.8 percent discount.

21 So, I made that adjustment. Mr. Hart doesn't  
22 like that answer, just that I should have probably

1 used maybe 2009 data, which is wrong because I'm  
2 comparing to 2015 market prices, but it's also wrong  
3 because in 2009 the discount was--they were the  
4 highest ever of serving Florida because of the peak of  
5 the financial crisis. You could not possibly use that  
6 particular year to assess that discount.

7           The second adjustment is that I need to move  
8 from prices from 2015 to 2011. Because we don't have  
9 a real estate index of prices in Costa Rica, I used  
10 general inflation as an approximation. Mr. Hart also  
11 criticized that and says that because of the presence  
12 of the financial crisis, these adjustments may be  
13 different. But I know that the period that we're  
14 looking at between 2011 and 2015 is not directly  
15 contaminated with that and--and that we don't have any  
16 other alternative really, and Mr. Hart has not  
17 proposed any better assessment.

18           Finally, you see that Mr. Hart also criticized  
19 that for lots I should have taken a look at the prices  
20 of the presales which are actual transactions that  
21 Claimants have done with the third parties. And I do  
22 look at that, and you see my backup slides have that

1 information. And the average price of those sales  
2 were at \$143 per square meter, which compares to the  
3 186 that I assess.

4 And the reason these prices--in my opinion,  
5 the reason these prices are lower, which I comment on  
6 my reports, is that they--they do have a discount, as  
7 any developer would do, for presales that are made on  
8 a period of time in which A) construction permits are  
9 not even yet accomplished, or that you don't see  
10 visually any houses being built. So, those early  
11 sales, obviously, they are a little bit riskier from  
12 the perspective of the buyer and, therefore, typically  
13 will conduct a lower price.

14 And that is well established as well in the  
15 pricing policy of Los Sueños and any other developers,  
16 which there will be increasing prices as they move  
17 along in the progress of urbanization and  
18 construction.

19 Now, as it relates to houses in Slide  
20 Number 15, you see that the information that we have  
21 on market observables is even larger. We have 128  
22 listings from the REMAX database. On average, houses

1 would sell for 1,872--sorry, would not sell--would  
2 list for \$1,872 per square meter. I use that  
3 information. I combine that information with the  
4 listing prices of two other resorts, El Místico and  
5 Malaga, and I conclude that the average of the two are  
6 at 1,809.

7           Mr. Hart says here in his latest report that,  
8 well, I should have excluded the two--what he  
9 called--outliers from the REMAX sample. The two  
10 outliers are the two most expensive houses that are  
11 listed, around 128. And there's really no reason to  
12 exclude those. I mean, there's nothing wrong.

13           You cannot exclude the most expensive ones. I  
14 mean, if we exclude then the least expensive ones,  
15 then you will get to an average which is similar to  
16 the ones that I have obtained. So, there is no really  
17 reason to make any adjustment there.

18           And using the same methodology, I find that  
19 the house sale prices as of 2011 is \$274,000. That's  
20 the price at which they could have sold a house. But  
21 because--remember that the business of the developer  
22 here is that they sell first the lot, and then they



1 can act as a constructor for the houses. So, really,  
2 the difference between the lot price and the house  
3 price is what we're interested in establishing the  
4 margins or the revenues for the house business.

5 Now, in the next slide I show you the evidence  
6 on condos. Like houses, we have a good number of  
7 information. And applying the same methodology, you  
8 see that condos would have conveyed a sales value of  
9 \$276 per unit, which is, on a per square meter,  
10 slightly higher than houses, which is what you observe  
11 in the marketplace.

12 In Slide 17, I move to timeshares. And on  
13 timeshares, what you see in this table is the market  
14 information from RCI. RCI being the major exchange  
15 system for timeshare properties. And RCI has  
16 published, for Costa Rica in particular and Central  
17 America in general, average prices from all the  
18 resorts that are affiliated. And in Costa Rica we  
19 have 40 resorts that are affiliated at the time that  
20 they have this price data.

21 And I saw that Mr. Hart has a new criticism on  
22 the timeshare business. His first one is that, well,

1 nobody would be interested in a timeshare in Las Olas  
2 because then they cannot exchange. And, really, the  
3 underlying assumption of my model is that there would  
4 be affiliation with either RCI or with some other  
5 company such as Interval International. And, so, the  
6 affiliation is really inexpensive. It costs only  
7 \$15,000 for getting on board on the RCI system.

8           So, of course, any timeshare to be successful  
9 would have some form of exchange system. And, so,  
10 that is the assumption here as well.

11           The second criticism that is new that Mr. Hart  
12 brings is the lack of seasonality, knowing that some  
13 weeks are less interesting than other weeks, which is  
14 true.

15           But these average prices for Costa Rica  
16 already reflect the seasonality, and so that's  
17 embedded in the market price information.

18           And, finally, he makes some comparisons with  
19 some data that he collected for some big category  
20 hotels. And I say that that comparison of what you  
21 can spend in a hotel versus the upfront payments of  
22 timeshares is not appropriate. Not only because the

1 category of the hotels that he's comparing to are much  
2 lower, but also because these are different products.

3           When people buy timeshares and they pay, say,  
4 10,000 or \$12,000 in advance, they are buying property  
5 for a number of years, 30 years, 40 years, or in  
6 perpetuity; and they are kind of betting on their--the  
7 idea that hotel prices may be too expensive in the  
8 future, so they want to kind of guarantee their  
9 ability to have one week of vacation, not just on the  
10 resort that they're buying, but also have access to  
11 other resorts that they can exchange.

12           So, these two different products need to be  
13 assessed in that way.

14           Finally, on hotels, you see that the--in Slide  
15 Number 14--sorry--Slide Number 18. And here we have  
16 the way I assess the value of the hotel--remember that  
17 the hotel was not meant to be operated by the  
18 developer. The hotel was meant to be constructed and  
19 then sold to a third party.

20           So, what we see here--the way I value the  
21 hotel is what the markup on construction costs that we  
22 would have observed. And that Mr. Hart criticized the

1 construction costs. Again, he says, well, the sources  
2 that I used for Costa Rica which ranged between \$400  
3 per square meter to \$1,000 per square meter, he said I  
4 should have looked at the 2,000 range because the  
5 2,000 is related to the most luxurious and most  
6 expensive construction costs.

7           And the answer to that is that, well, Las  
8 Olas, in particular in the 2010 Business Plan, was not  
9 intended to be the most luxurious one. It was  
10 intended to be, with construction costs, within the  
11 range of that which you normally see for home  
12 constructions in Costa Rica which value from 400 and  
13 1,000.

14           Second, the way I tested the valuation that I  
15 obtained at \$181,000 per room is by looking at hotel  
16 transactions as published by HVS, which you see here  
17 in blue. And you see that my valuation is in the  
18 middle of all this. It's likely lower than the  
19 average and lower than the median. And it also  
20 compares to a valuation report of a proposed hotel in  
21 Panama which is lower at \$176,000.

22           Of course, if you were to construct a hotel

1 using the most--the highest cost at \$2,000 per square  
2 meter, you would also have been able to sell that  
3 hotel to a third party at a much higher price than the  
4 average. So, I mean, if you were to use a  
5 construction that is of higher quality, it would  
6 convey a higher market price as well.

7 Here in my assessment, it's an average  
8 construction cost and it's an average quality of  
9 hotel.

10 Let me move to, then, the land appraisal  
11 value. This is on Slide Number 20. And here, for the  
12 benefit of the Tribunal, I have parceled out the  
13 different lots as valued by Mr. Calderón.

14 And you see here that the most valuable is the  
15 blue area for the condominium lots at 41.3 million.  
16 And adding--the second most valuable is the concession  
17 area at 6 million. And adding all these pieces  
18 together, you would get to 52 million, as assessed by  
19 Calderón, in 2009, with the exception of the orange  
20 piece which are the easements lots which Mr. Calderón  
21 has assessed these a little bit later in 2013. And I  
22 had translated it into 2009 values so as to have

1 comparable amounts.

2           Now, the adjustments that I made are on Slide  
3 Number 21. And I do the following adjustments--three  
4 adjustments. First, you see the white spaces. Those  
5 are the lots that are already sold pre-May 2011. So,  
6 I take those out now from Mr. Calderon's appraisal.

7           Second, the 2009 valuation by Mr. Calderón, I  
8 have to express as of 2011. And, here again, I use  
9 general inflation to adjust and changes in the foreign  
10 exchange rate. This is a particular period in which  
11 it is possible that the financial crisis might have  
12 had an impact in Mr. Calderón's appraisal value  
13 because in 2009 land prices were relatively low and  
14 they were still recovering.

15           So, if anything, you would see an increase  
16 between--from 2009 to 2011 probably higher than the  
17 pace of inflation. But the pace of inflation is what  
18 I have used on the adjustment.

19           And, third, I made the adjustment for the  
20 percentage of urbanization progress which affects  
21 mostly the condominium lots, which you can see they  
22 drop from 41 to 21.4 million. So, as of May 2011,

1 with the state of construction progress, I assessed  
2 the value at 34.3 based on the market comparables  
3 assessment of Mr. Calderón.

4 In sum, I have provided also, finally, a  
5 reasonability test for the Tribunal which consists on  
6 looking at your--if you're in Slide Number 23, at what  
7 is the but-for expected value of my fair market value  
8 assessment at \$66.5 million. If you were to divide  
9 that by the total land area, you get a price of the  
10 whole piece of land at \$170 per square meter.

11 And is that a reasonable number? Well, you  
12 see the next slide compares my 170, which is the green  
13 bar in the middle, with the orange bars, which are the  
14 prices of Las Olas lots as per the Calderón appraisal  
15 with my adjustment in May 2011, that would render \$88  
16 per square meter. Compared also to what the lots were  
17 actually sold for on the presales during 2008/2011,  
18 which are at \$143 per square meter, and compared to  
19 the full Calderón appraisal without any adjustment at  
20 167 per square meter.

21 And if you see, also, the market information  
22 on the right side, you have the blue are the

1 Puntarenas lot sales prices in 2011 and the Místico  
2 lot sales, which is probably the closest comparable to  
3 Las Olas, at 199.

4 And to finalize, the last slide is on the  
5 recommendation of the prejudgment interest. And here  
6 the Tribunal would see that my updated numbers at the  
7 top, the 66 million on damages, and how it would be  
8 valued as of today. You see the alternative theories  
9 on prejudgment rate.

10 The one that I preferred the most is to  
11 combine the--I assigned the 68 percent probability of  
12 success with the opportunity cost of Claimants of  
13 doing business, which is the WACC, at 7.6 percent,  
14 with the idea that if there is a 32 percent  
15 probability of failure, then you would have seen from  
16 2011 to 2017 such the appraisal value of the land, and  
17 I used the same inflation and foreign exchange index  
18 to use as an implicit rate.

19 So, when you combine the two, you get a  
20 6.6 percent on average, which would be my  
21 recommendation and which I think it reflects the risk  
22 of doing business had the Costa Rican measures not



1 been in place and taking into account the  
2 pre-operational nature of the asset. Any other, say,  
3 risk-free rate would not really capture the  
4 opportunity cost of doing business.

5 Thank you very much.

6 MR. BURN: We're happy to hand it over to the  
7 Respondent, sir.

8 PRESIDENT SIQUEIROS: Okay. Mr. Leathley.

9 MR. LEATHLEY: Thank you, Mr. President.

10 CROSS-EXAMINATION

11 BY MR. LEATHLEY:

12 Q. Good afternoon, Dr. Abdala.

13 A. Good afternoon.

14 Q. You have experience in investment  
15 arbitrations; right?

16 A. I do, yes.

17 Q. And you appreciate this Tribunal, as part of  
18 its consideration of jurisdiction and merits in  
19 quantum, will consider the specifics of the investors  
20 and the investment?

21 A. It will. Of course, yes.

22 Q. And that's something you've considered, the

1 investor and the investments, in your two reports; is  
2 that right?

3 A. Well, I did consider the investments. I did  
4 consider also the investors. But as I mentioned  
5 today, when you assess fair market value of an asset,  
6 you are really focused on what a willing buyer/willing  
7 seller would transact for. So, the identity of that  
8 willing buyer does not need to be really identified.  
9 So, you can think about the investment as being  
10 continued by those who already own it or it could be  
11 transferred to a third party.

12 Q. Yes. I think your words were, "It may be an  
13 important factor in establishing the probability of  
14 success"; is that right?

15 A. It might be if the view is just that, say, the  
16 owners of the asset are the ones to continue. But it  
17 also may be not. Maybe that the assessment is done as  
18 to what would be the probabilities of success if  
19 anyone else takes it. And, so, it could be something  
20 that--I think it's more for the Tribunal to decide on  
21 their views on the probability of success.

22 Q. Yes. And, so, information regarding the

1 identity of the investors would be relevant to the  
2 Tribunal in that discretion you've just described that  
3 is available to them?

4 A. I think it would be relevant. It would be  
5 useful for the Tribunal to know that, as well as to  
6 assess what would be the profile of the willing buyer.

7 Q. Yes. No, of course. And then why--in your  
8 two reports you don't disclose material facts about  
9 the investors, do you?

10 A. I have not conducted any, say, research of  
11 material facts of the investors. I only assess value  
12 to--to the asset, and I have provided context as to  
13 what the Investors have done during 2002 when they  
14 bought the land and up to the date of valuation, but I  
15 have not done, say, any extensive research as Mr. Hart  
16 has allegedly done for--or apparently done for, say,  
17 the background of each of the Claimants or of the  
18 owners of the Las Olas development.

19 Q. Right. For example, Mr. David Janney, one of  
20 the investors, filed for personal bankruptcy,  
21 admitting over \$16 million of liabilities in  
22 December 2015. Were you aware of that fact?

1           A. I cannot opine because I don't--I have not  
2 conducted any research on, say, the individual  
3 performance of any of the particular Claimants in this  
4 case.

5           Q. The business management skills of an investor  
6 is not relevant to you; is that right?

7           A. It's not that it's not relevant; it's just  
8 that in a fair market value assessment, you are not  
9 only assessing what the existing owners could do, but  
10 also what the willing buyers could do with the asset,  
11 in particular when you have an asset that is at  
12 pre-operational stage.

13          Q. Yes, and we'll come to the willing buyers.  
14 Let's focus on the investors. Mr. Janney's interests  
15 relate to real estate development, so presumably that  
16 would be a relevant factor in determining his ability  
17 to run a real estate business or a business that  
18 interfaces with real estate.

19                   Wouldn't you agree?

20          A. Could be.

21          Q. It could be.

22                   And you're familiar with the investors'

1 Witness Statements in this arbitration?

2 A. I've seen some, yes.

3 Q. You're aware that Mr. Aven holds 28 percent of  
4 the shares and he was, in fact, involved in the  
5 day-to-day management of the project?

6 A. That's what I have seen, yes.

7 Q. And that Mr. Aven stated that, among other  
8 industries, he had experience or he says he has  
9 experience in the real estate business.

10 Were you aware of that?

11 A. Correct.

12 Q. And that the alleged real estate experience  
13 relates to, quote--I'm reading from his First  
14 Statement--"Fixer up homes, renovating them, and  
15 selling them for profit, building new homes, buying a  
16 farm, subdividing it, selling lots, and developing a  
17 residential property of ten homes."

18 Were you aware of that testimony, sir?

19 A. Sure. Yes.

20 Q. So if we have to summarize Mr. Aven's real  
21 estate experience, then he's really just focused on  
22 building homes; right?

1           A. Well, I don't know if that's all of that, and  
2 I cannot recall whether there's more information or  
3 not.

4           As I said, I have not researched or done any  
5 extensive evaluation of the performance of Claimants  
6 on other resorts or other real estate business.

7           Q. But Las Olas was conceived as a resort  
8 development; right?

9           A. Yes.

10          Q. Which is a lot more than simply buying the  
11 land.

12          A. It is a lot more than simply buying the land.  
13 As you see, in 2004, the Claimants hired Norton  
14 Consulting, and they hired another company as well as  
15 that, to conduct both marketing studies, feasibility  
16 plans, and they have, of course, consulted with legal  
17 teams as well and advisors as to market conditions in  
18 Costa Rica and prospects for establishing a resort  
19 development.

20                 So, it's not that they have done all the work,  
21 preparation, on their own, but they have obviously  
22 outsourced many of those tasks.

1 Q. You said--your testimony just a second ago was  
2 that they have consulted with legal teams. What's  
3 your evidence for that, sir?

4 A. Well, I think if I recall the testimony of Mr.  
5 David Aven, he has mentioned legal expenses and some  
6 legal advice during the process. And I have read the  
7 transcript as well, and I think he has attested to the  
8 same line of having legal advisors within the period  
9 of development between 2002 and 2011.

10 Q. So, you're aware that Mr. Aven doesn't have  
11 any experience in resort development.

12 A. I don't think that's what the records show.

13 Q. Well, where does the record show that he does  
14 have experience in resort development?

15 A. Well, I think the record speaks by itself, and  
16 I--as I say, I have not conducted extensive research  
17 as to--

18 Q. Let's focus on your reports, sir.

19 A. --what he has done before.

20 Q. Let's focus on your testimony. Where in your  
21 reports does it explain what--or show what evidence  
22 there is for Mr. Aven's resort development experience?

1 A. Okay. Well, me look at my First Report, then.

2 Okay. In Section III.1 of my First Report, I  
3 describe the facts as I understood on the purchase of  
4 the land; and then the actions taken by Claimants  
5 later on, in September 2004, when they hired Norton  
6 Consulting, a real estate resort specialist. And  
7 that's a planning and architectural firm--

8 Q. Yes. Thank you, sir.

9 A. --that's been working on planning studies.

10 Q. Sorry to interrupt you. That wasn't my  
11 question.

12 My question was: Where in your evidence or  
13 your testimony, your expert Report, do you show  
14 evidence of Mr. Aven's experience in resort  
15 development?

16 I'm not talking about the Las Olas Project I'm  
17 talking about his experience before Las Olas Project.

18 A. No. As I said, I've not conducted any  
19 exhaustive research of what they have done prior to  
20 Las Olas. That's not part of my opinion.

21 Q. Have you conducted any research, albeit not  
22 exhaustive?



1           A. Well, I have seen the witness testimonies; but  
2 other than that, I have not done much research.

3           Q. And you're aware that Mr. Aven testifies that  
4 he'd never been--never invested outside the U.S.  
5 before Las Olas.

6           A. That's right.

7           Q. And you're aware that he also testified that  
8 he'd never even been to Costa Rica before making the  
9 investment.

10          A. That's right.

11          Q. You're aware that Mr. Aven doesn't speak  
12 Spanish?

13          A. That's what I learned from reading the  
14 transcripts, yes.

15          Q. And you're also aware that--from the December  
16 Hearing, that when Mr. Baker asked Mr. Aven whether  
17 Mr. Aven hired anybody or consulted with anybody  
18 before making the investment, he replied, "No."

19          A. Okay. I'll take your word. I don't recall  
20 that, but I don't have anything to--to say otherwise.

21          Q. You're aware that Mr. Janney in the December  
22 Hearing testified that before buying the land,

1 Mr. Aven and he did not contract any expert.

2 Are you aware of that as well, sir?

3 A. All right.

4 Q. And this is consistent with what you knew  
5 before you wrote your two reports?

6 A. You mean consistent in what way?

7 Q. Well, what I'm telling you is no surprise; is  
8 that right?

9 A. What you're telling me is something that I  
10 wasn't really focusing on when you assess fair market  
11 value of the asset in this case.

12 Q. You're also aware that Jeffrey Shiolenno has no  
13 previous experience in resort developments. You're  
14 aware of who Mr. Shiolenno is?

15 A. Roughly.

16 Q. And when he was asked about the decision to  
17 invest in Las Olas, Mr. Shiolenno stated that his  
18 decision was limited to speaking to Mr. Aven.

19 Were you aware of that testimony provided in  
20 the December Hearing, sir?

21 A. I only learned about that through the  
22 transcripts.

1 Q. And you're aware that Roger Raguso also stated  
2 that he did not have any experience in the residential  
3 market in Costa Rica.

4 A. All right.

5 Q. And, in fact, the rest of the investors,  
6 Samuel Aven, Carolyn Park, Eric Park, do not have  
7 experience or knowledge in investing in resort  
8 developments, or at least not that's been disclosed in  
9 this arbitration.

10 Were you aware of that, sir?

11 A. Of course--yes.

12 Q. Now, you attached in your First Report a paper  
13 written by Brian Headd titled, "Redefining Business  
14 Success: Distinguishing Between Closure and Failure."

15 Do you remember that, sir?

16 A. I do, yes.

17 Q. And you cited this article to justify your 68  
18 percent probability of success of Las Olas as a going  
19 concern.

20 A. Yes.

21 Q. And in that article, Mr. Headd exposes factors  
22 that might influence business success/failure in a

1 project.

2           And on page 53, the first column, Tab 2 in  
3 your folder--I'm sorry, Tab 1, Page 53 in the first  
4 column, at the end of the first paragraph--

5           A. Sorry, which page number?

6           Q. 53.

7           A. Okay.

8           Q. Mr. Headd states, referring to the  
9 characteristics of the investors, quote, "However,  
10 being older, more educated, and having previous  
11 experience are expected to be positively correlated  
12 with survival, as lessons learned often translate into  
13 competent decision-making."

14           Do you see that, sir?

15           A. Which paragraph? I'm sorry.

16           Q. At the top left of Page 53.

17           A. Top left.

18           So you read the characteristics of the owners?

19           Q. That's right.

20           A. Uh-huh.

21           Q. And then about five lines down, it starts,  
22 "However," and that's what I just read, to the end of

1 that paragraph.

2 A. Okay. So the first part that says,  
3 "Apparently gender, race, or starting for personal  
4 reasons seem irrelevant to survival because these  
5 traits are believed to have little impact on business  
6 acumen."

7 And then it says that being older, more  
8 educated, seems to be possibly correlated with  
9 survival.

10 Q. Do you agree with that, sir?

11 A. I have no reasons to disagree with Mr. Headd  
12 on this, yeah.

13 Q. So, you'd agree the background of the  
14 investors is a factor that influences success or  
15 failure.

16 A. Well, here it says something different, right?  
17 Here, it says that some factors such as gender, race,  
18 does not seem to have any impact; but there are some  
19 other traits, such as being older and more educated,  
20 may have some correlation.

21 Q. Yes. And previous experience as well.

22 A. Correct.

1 Q. However, you analyzed neither the background  
2 nor the experience of any of the investors when  
3 assessing your compensation claim on behalf of the  
4 Claimants.

5 A. No, because, as I said, when you're assessing  
6 fair market value, you're looking not just as an  
7 ongoing business owned by the current owner, but also  
8 what a willing buyer would pay for that business.

9 Q. And you're aware of what was the key  
10 contingent element for this resort development, aren't  
11 you, sir? Which was sales.

12 A. Well, sales is just one of the important  
13 elements, but it's not the only one. When you buy  
14 land, obviously, whether you can develop that land or  
15 not, it's important.

16 So, the permitting stage is very important  
17 because it adds significant value to the property,  
18 whether you are able to, say, construct on  
19 a--particular characteristics, depending on the zoning  
20 agreements that there are in place, and some land such  
21 as this may not have preestablished zoning agreements,  
22 so therefore, you may have to engage in obtaining the

1 necessary permits to develop.

2           So, the permitting stage is a very important  
3 stage, and that's one of the stages in which, in real  
4 estate, adds significant value, whether you are able  
5 to access to a particular construction permit at the  
6 end of the road.

7           And that may take a significant amount of  
8 time--

9           Q. Thank you, sir. I think you're answering a  
10 question that I didn't ask, but thank you.

11           If your counsel wishes to follow up, then I'm  
12 sure he'll be able to. I didn't ask you about the  
13 permitting phase at all.

14           The second aspect for the Tribunal to  
15 consider, of course, is the investment itself. We're  
16 talking about the investor and the investment. And  
17 this is also something you considered, of course;  
18 right?

19           A. I did, yes.

20           Q. And the key aspect of your damages conclusion  
21 is that the Claimants actually own the investment, I  
22 suppose; is that right?

1           A. Yes.

2           Q. And have you reviewed, while drafting your  
3 reports, the titles of the property that the Claimants  
4 allege they own in order to submit their claim?

5           A. No, I have not reviewed the titles except for  
6 those documents that I--exhibits to my report, and the  
7 First Report, such as a purchase agreement from Las  
8 Canículas and another entity buying the land in 2002.

9           I have also seen other documents such as the  
10 shareholder agreements with La Canícula, which I  
11 attached to my report.

12           But I have not, say, conducted research as to  
13 the registration of the land. I mean, it was  
14 represented that these are all the investments, and  
15 those are the ones that I included.

16           I've seen the--as I say, the two documents  
17 that I have just mentioned.

18           Q. So, to use your terminology from your  
19 presentation, your recommendation to this Tribunal was  
20 an award of damages based on ownership that you had no  
21 firsthand knowledge of.

22           A. Well, you--you don't--I mean, I'm not an



1 auditor. As a damage expert, I'm not auditing, say,  
2 the ownership titles in particular when it comes to  
3 land. And I may understand either the disputes or  
4 not.

5 And in particular in this case, because it was  
6 brought to the attention that some of that land might  
7 have been sold prior to the relevant date of  
8 valuation, and then I factored that in as how this  
9 should be adjusted in my damage recommendation.

10 And I had asked for that information as well  
11 in preparation for my First Report, which includes 21  
12 of the 26 lots that were sold prior to the relevant  
13 date of valuation.

14 Q. Thank you.

15 Now, sir, faced with investors that have no  
16 experience in resort development and tracts of land  
17 which haven't been proven to be owned by the resort  
18 developers, would you not consider these to be  
19 material facts that should have been included in your  
20 report?

21 You mentioned there was a discretion on the  
22 part of the Tribunal, but you haven't presented any

1 facts to allow the Tribunal to exercise that  
2 discretion. Do you not see that as an omission?

3 A. Well, first of all, I don't agree with your  
4 characterization of no ownership of investment. And  
5 as I said, all the--

6 Q. Sorry, sir. Where is your evidence for their  
7 ownership in your report?

8 A. Well, as I already mentioned, I've seen  
9 the--not only the information in the Memorial, but  
10 I've seen the purchase agreement for the 2002  
11 transaction, and I have also asked for information  
12 about lots that were sold to third parties, and I get  
13 that information from Claimants.

14 And I have used all that information in the  
15 assessment of value of my report.

16 Q. So, your testimony is that you have sufficient  
17 information to say that the entirety of the land, or  
18 all of the lots, is owned entirely by the Claimants;  
19 is that your testimony?

20 A. No, that's not the testimony. The testimony  
21 is that I have used all the information that was  
22 provided to me as it related to ownership, and I

1 specifically asked for lots that would have been sold  
2 so that I could make the adjustments on my income  
3 approach so as to not count those lots as additional  
4 sales if they were already transferred to a third  
5 party.

6           And that doesn't mean that--again, that those  
7 lots would not have generated additional value to the  
8 investors in the form of construction of houses or  
9 collection of association fees. But--

10           Q. So sorry, sir--

11           A. --all that information is--I took into  
12 account.

13           Q. Yeah. I think we both know where we're trying  
14 to go here. It's an important point for the Tribunal,  
15 which is the ownership.

16           And I'd just like to know very clearly, sir,  
17 if your testimony is that you have a whole  
18 understanding of the ownership of all of the plots,  
19 all of the lots, at Las Olas.

20           And from your answer, I'm deducing that the  
21 answer is no, because you say you've seen some, and  
22 you've asked for some information.

1           A. No. That's not correct.

2                   I asked for full information as to Las Olas  
3 lot sales, and I included all the information that I  
4 was given at the time of my First Report.

5                   And now, after Mr. Hart and Respondent  
6 presented additional information which was not  
7 available to me before, I made these adjustments that  
8 imply 1 percent reduction in damages.

9                   So I--with new evidence and new information, I  
10 adjusted. But I have used all the information that I  
11 had in my First Report.

12           Q. So, the information regarding ownership that  
13 we need, that this Tribunal needs, is either in your  
14 opinion already on the record or exhibited to your  
15 report; is that right?

16           A. It is, and if there's any dispute, it will go  
17 beyond of what I can assess of ownership. If there  
18 are, say, disputes about ownership of a particular  
19 plot of land, I mean, that's go--will go beyond my  
20 expertise.

21           Q. Thank you.

22                   The land was acquired in the early 2000s, and

1 over a period of nine years, not one external resort  
2 development company approached the Claimants; is that  
3 also your understanding, sir?

4 That's what the evidence is.

5 A. Sorry. Could you repeat the last part?

6 Q. Yes. Not one--not a single external resort  
7 development company approached the Claimants to  
8 purchase the land; is that also your understanding?

9 A. Well, first, I don't know that the land has  
10 been put to sale, for sale; so whether there's been  
11 interest by others and--that may have approached  
12 Claimants, I don't know. I'm not aware of it.

13 But I understand that the developers were  
14 always intending to develop the land by themselves, so  
15 I don't think they ever put this land for--for sale as  
16 a whole for--for other, say, developer to engage on  
17 the Las Olas Project.

18 Q. So your understanding is the same as mine:  
19 There's no evidence of any approach, irrespective of  
20 whether they put it on the market or not. Obviously,  
21 one doesn't have to put a property on the market to be  
22 approached, as you well know.

1           Your understanding is the same as mine, that  
2 there's no evidence to suggest any approach by a  
3 resort development company?

4           A. Well, I'm not aware of--that there is.

5           Q. So despite having this prime opportunity, as  
6 you report, no one in the same business, along the  
7 same coastline, where you say it was rife with other  
8 developments, no one was interested in approaching the  
9 Claimants.

10          A. Well--

11          Q. That's what the evidence tells us; is that  
12 right?

13          A. Well, I have not seen any evidence of  
14 approaches; but obviously, the approaches may happen  
15 at different stages.

16                 Without--

17          Q. You're talking about the nine-year period,  
18 just to be clear.

19          A. Right, it's a nine-year period. But  
20 without--the permits only come in 2008. The  
21 environmental permits and the construction permits  
22 come in 2010.

1           Obviously, property that is not permitted is  
2 less attractive to investors. So, I mean, if you're  
3 thinking about the timing for approach, it would be  
4 more palatable to investors once they are already  
5 fully permitted.

6           Q. Thank you.

7           Let's consider the plans that the Claimants  
8 compiled as part of this major resort development.  
9 When the investment was made in 2002, Mr. Aven  
10 testified that they did not have any specific plans as  
11 to how to develop the property.

12           Are you aware of that testimony?

13           A. Yes.

14           Q. And so, supposedly, the experienced developers  
15 acquired a large area of land, foreign land, with no  
16 concept. That's what we can understand from  
17 Mr. Aven's testimony.

18           A. Well, I--I doubt that the purchase has been  
19 with no concept at all. I mean, but the concept is  
20 probably something that might have evolved through  
21 time.

22           Q. Mr. Aven's Witness Statement, First Statement,

1 paragraph 21, he says, "At this stage, Mr. Janney and  
2 I did not have specific plans as to how we would  
3 develop the property."

4 A. Right, and "no specific plans" doesn't mean no  
5 concept. I mean, you probably have a concept of  
6 buying land for some sort of development; it's just  
7 that you don't have the precise plans as to exactly  
8 what you want to do there--

9 Q. Right.

10 A. --whether you want to put a hotel, whether you  
11 want to put just houses, or whether you want to build  
12 something else. So that's probably what Mr. Aven was  
13 referring to.

14 Q. Yes, because two years later, in September of  
15 2004, they consulted EDSA and Norton Consulting to  
16 provide a conceptual plan and market analysis; right?

17 A. Correct.

18 Q. And then according to Mr. Aven's testimony in  
19 the December Hearing, the September 2004 plan was just  
20 to give him an idea of what to do in Las Olas; is that  
21 your--that's your appreciation of Mr. Aven's  
22 testimony?



1 A. Okay. Yes.

2 Q. And for this plan, Mr. Aven admitted having  
3 paid a substantial sum of \$150,000 for that work.

4 Is that your understanding as well, sir?

5 A. Okay. Yes.

6 Q. And--but this plan was not used by the  
7 Claimants to develop the project.

8 A. No. I disagree with that assertion. I mean,  
9 the plan was modified; but, of course, that initial  
10 plan was useful as to the contents of the marketing  
11 information that it had at that time. So, it had to  
12 be helpful for them, follow-up; so the 2007 and 2010  
13 concepts that were--in particular, the 2010, which  
14 were modified, as compared to the 2004, but obviously,  
15 the 2004 has--had to serve the foundations of what was  
16 adapted later on.

17 Q. Right. Because three years later, in 2007,  
18 there was another plan drafted by the Las Olas  
19 development team; is that right?

20 A. Correct.

21 Q. And according to your report, the team, quote,  
22 "Redefined the project based on the conditions of the

1 Costa Rica tourist industry and the competitors."

2 Is that right? That's from your First Report.

3 A. Yes.

4 Q. So, five years after the land was acquired,  
5 there was still not a definitive business plan for  
6 these supposedly experienced resort developers; right?

7 A. Well, they was being adjusted to the  
8 conditions and ideas and the plans that they had in  
9 mind which were evolving through time.

10 Q. But this 2007 plan also wasn't the plan used  
11 to develop the site, was it? Because in September  
12 2010, Mr. Aven, who you'll--who you've heard, you  
13 know, me summarize his testimony a moment  
14 ago--prepared another plan titled "Las Olas Project  
15 Overview and Proposed Business Model."

16 That's September 2010; is that right, sir?

17 A. Correct.

18 Q. And so, we've got a reasonable amount of time  
19 passing since the 2008 global economic crisis, when  
20 they decided to come back to the project to develop  
21 it; and yet, then that plan is immediately changed in  
22 December of 2010 with another business plan prepared

1 by Mr. Damjanac; is that right?

2 A. Well, not quite. Let's see. We don't know  
3 exactly what is the timing for the overview that was  
4 put in writing in September 2010. Obviously, the  
5 developers must have been aware of the changes in  
6 market conditions due to the financial crisis right  
7 away in 2009.

8 So, when exactly was the timing of their need  
9 to redefine the target audience and the pricing, and  
10 whether to expand or modify certain of the offerings,  
11 we don't know when that came on board.

12 But, yes, we see a short--

13 Q. Sorry, sir. Sorry to interrupt you, sir.

14 We know that one of the plans is September;  
15 you just mentioned that. And the other one was  
16 December. So, I'm not sure what the uncertainty is.

17 A. Well, what I'm saying is we see the  
18 materialization of that in written form in September,  
19 but we don't know exactly when is that they had  
20 already changed their minds.

21 And what we see in the December 2010 is a more  
22 comprehensive, more detailed plan as to what their

1 offerings were at that time.

2 Q. And you testified that you relied on the  
3 December 2010 business plan as part of your  
4 calculations; right?

5 A. On the design of the number of units and type  
6 of segment business that they were looking at, yes, I  
7 rely on that.

8 Q. So, this is a plan prepared by Mr. Damjanac,  
9 someone with no experience of real estate development  
10 in Costa Rica?

11 A. Well, this is a plan prepared by the  
12 developers.

13 Q. With no experience.

14 A. Well, I don't think that. I don't agree that  
15 with no experience. I mean, we can discuss what type  
16 of experience that he had, but I don't think that you  
17 can say they have no experience whatsoever.

18 Q. Okay. Well, we've sort of gone over this  
19 already, Mr. Abdala.

20 Have you been able to identify any experience  
21 at all in your reports prior to Las Olas Project in  
22 Costa Rica?

1           A. I have said that I have not done any research  
2 in particular for that.

3           Q. Okay. So, you're relying on a business plan  
4 written by someone who doesn't know how to develop  
5 resorts, and that's the basis for your calculations.

6                   And, in fact, the only experience that  
7 Mr. Damjanac refers to is relating to property in the  
8 United States; is that right?

9           A. Well, again, I think you're making statements  
10 and characterizations that I do not necessarily agree  
11 with.

12                   As I said, the developers have consulted with  
13 third parties, and they had been advised by reputable  
14 firms in the real estate development, so they had an  
15 understanding of what they were offering.

16                   So, the fact that they have adapted I see as a  
17 positive, because obviously, in 2010--2009, after the  
18 financial crisis, the market profile and prices in  
19 general had changed. So it's a positive thing that  
20 they have adapted.

21           Q. Interesting, then.

22                   So your reference to consultants, advisors,

1 that's an important factor in your opinion; is that  
2 right? You mention it for a reason.

3 A. I just mention in response to your question.

4 Q. But would you agree, then, that the  
5 consultation with consultants, with--with advisors, as  
6 you're saying, with lawyers, that seems to be an  
7 important factor?

8 A. It is an important factor, and it is normal to  
9 expect that you would have that in place, yes.

10 Q. And is it an important factor because it goes  
11 to the experience and awareness of the business that  
12 they are purporting to run, the going concern, as you  
13 call it?

14 A. It's an important factor because it adds to  
15 the quality of the analysis that you do before  
16 launching certain offerings.

17 Q. So where an individual's experience may be  
18 lacking, the support of consultants would help fill  
19 that gap; correct?

20 A. Could be, yes. Of course.

21 Q. And that's something you would expect, then,  
22 to see manifesting itself in the actual business

1 itself, in its performance; is that right?

2 A. Well, the performance is a little bit  
3 different, right, because the type of consultants that  
4 you need once you are operating is not the same as--I  
5 mean, you don't need planning architects; you don't  
6 need people who may understand how to obtain permits,  
7 et cetera.

8 So it's a different type of advice that you  
9 may need. You may need just advice on management of  
10 the existing properties, and, eventually, on  
11 marketing, say, some of the offerings that are  
12 ongoing, such as timeshares or others.

13 Q. Are you aware that Mr. Damjanac, who wrote the  
14 2010 business plan, began working at Las Olas in  
15 September 2009?

16 A. I'm sorry. I didn't understand the question.

17 Q. Yes.

18 Are you aware that Mr. Damjanac, who prepared  
19 the 2010 business plan, began working at Las Olas in  
20 September of 2009?

21 A. I didn't recall that specific date or  
22 information.

1 Q. And then in January 2010, he became the  
2 marketing and sales director for the overall resort.

3 Were you aware of that?

4 A. Okay. Yes.

5 Q. And even though he made no sales whatsoever  
6 between September and December 2009. Were you aware  
7 of that?

8 A. Between those three months? I don't recall  
9 whether there was any--any sale.

10 Q. Did you look at sales as part of your report?

11 A. Yes, I did, but I don't recall by memory. I  
12 mean, I could look at the charts right now and see if  
13 that's correct or not.

14 Q. Okay. There weren't many sales, so I would  
15 imagine you might have remembered; but you stated in  
16 your Reports that the business plans have been, quote,  
17 "slightly modified in size, pricing, and certain  
18 offerings, to adapt to the market."

19 This is in your Second Report.

20 A. Correct.

21 Q. And if you can go to Table 3.1 in Mr. Hart's  
22 Second Report.



1 A. Which page number?

2 Q. Page 9.

3 Do you have that, sir?

4 A. Table 3.1; right?

5 Q. Yes, sir.

6 A. Yes.

7 Q. This is a comparison of the various business  
8 plans for Las Olas. And looking at the bottom of the  
9 table--

10 A. Yes?

11 Q. Sorry, sir. I'm just pulling it up myself.

12 If you look at the bottom of the table where  
13 the revenues are detailed, Mr. Damjanac's plan  
14 expected to double the revenues that EDSA Norton had  
15 forecast.

16 Do you see that?

17 A. I see that, and I--obviously, this is an  
18 apple-to-oranges comparison; because yes, you can tell  
19 from this table, there is many empty or nonapplicable  
20 or not available marks here. Because, for example, in  
21 2004, you don't have any revenue for timeshares or  
22 hotels because there was no design, or you don't have

1 any revenue for rentals because there was nothing  
2 there.

3           And the same with the others. I mean, there  
4 are some elements that are missing. So, I mean,  
5 adding things that are incomplete doesn't tell you  
6 much.

7           Q. Well, exactly my point, sir. The novice's  
8 opinion is that they're going to double the amount  
9 that the professionals EDSA Norton were referring to  
10 in terms of the business plan.

11           A. No, that's incorrect. Look at the--for  
12 example, look at the prices that the Norton Consulting  
13 on a price for two-bedroom condo, they were expecting  
14 \$672,000; whereas in 2010, the pricing expected was  
15 \$229,000. So, you see, there's significant difference  
16 in pricing, and it goes in the other direction.

17           So the problem with these numbers at the  
18 bottom is that they are not adding the same quantities  
19 of offering, because the offerings are completely  
20 different. So, you cannot compare or add the totals  
21 when the quantities offer are different.

22           Q. Well, thank you. We're well aware.

1           But the bottom line is that Mr. Damjanac's  
2 business plan is proposing double recovery compared to  
3 what the EDSA Norton plan was. I mean, that's a  
4 simple fact of the numbers. Absolutely, they may be  
5 in a different offering.

6           A. No, but what I'm saying to you is that this is  
7 wrong. You cannot compare the 256- or 295 million  
8 with the 155 million because you're adding incomplete  
9 things.

10           There's nothing in the Norton Consulting plan  
11 that would tell you that the total sales are expected  
12 to be 155 million. It's because there's a different  
13 offering as to what you have in 2010, when you have  
14 timeshares or where you have a different business. So  
15 you cannot really compare these two numbers.

16           Q. So you're saying we can't take the number  
17 proposed by Mr. Damjanac in his business plan as a  
18 reliable number.

19           A. No. What I'm saying is that you cannot  
20 compare these two numbers because these are completely  
21 different offerings, so you cannot compare these two  
22 numbers.

1 Q. But these are business plans for Las Olas  
2 Project.

3 A. No.

4 Q. They're not?

5 A. The Norton Consulting is not a business plan.

6 Q. No, it's a consultation with an estimate of  
7 total sales.

8 A. Well, it has estimates of sales for particular  
9 offerings that are different from those in 2010.

10 So that's what you--you cannot compare the two  
11 numbers because they are two different sets of  
12 offerings.

13 Q. And, in fact, Mr. Damjanac's plan was not  
14 completed until December 20th, 2010, which is the date  
15 after Mr. Aven's letter to investors of December 12,  
16 2010. Are you aware of those dates, sir?

17 A. I'm sorry. You made many assertions. Could  
18 you repeat or let me read?

19 Q. Yes.

20 Mr. Damjanac's plan, the December 2010 plan,  
21 was from December 20th, which is after the date of  
22 Mr. Aven's letter to the investors.

1           You're aware of Mr. Aven's letter to the  
2 investors?

3           A. Yes, I'm aware of that letter. Whether it was  
4 completed--

5           Q. Thank you.

6           A. --after or before, I don't know. It was maybe  
7 printed after, but maybe it was completed before. I  
8 don't know.

9           Q. Yes. Well, it was.

10           So Mr. Aven's letters to the investors was  
11 December 12, 2010. Meaning the plan came later.

12           A. No. I disagree with that. I mean, the plan  
13 was printed later, but maybe the plan was already  
14 internal in the making and so that--maybe the  
15 Claimants already were aware of that plan.

16           So it was--the fact that it was published a  
17 few days later doesn't mean that it was not available  
18 or knowledge--was not known by the Claimants before  
19 December 12th.

20           Q. Right. So, these two gentlemen who were  
21 working with each other were talking to one another.  
22 In fact, all of the sales made at Las Olas predated

1 Mr. Damjanac's 2010 plan; is that right?

2 A. All of the sales? Sorry?

3 Q. All of the sales made at Las Olas predated Mr.  
4 Damjanac's 2010 plan. Are you aware of that?

5 A. No, that's--that's not correct. I mean,  
6 there's some sales that--as--that take place after  
7 that plan.

8 Q. Which ones are those, sir?

9 A. Well, let's take a look.

10 I mean, if you look at Slide 27 of my direct  
11 presentation, you see that there's Number 18,  
12 Number 19, Number 20. Those are pre-May 2011, and the  
13 sales agreement are dated between January and April  
14 2011.

15 Q. Which lines are you referring to, sir?

16 A. On Slide 27 of my direct presentation, if you  
17 look at the first column, Number 18, 19, and 20, those  
18 are the sales agreements between January and April  
19 2011.

20 Q. Right. So, we have three sales after the  
21 business plan. The rest are before the business plan;  
22 is that right?

1           A. The rest of the premade 2011 are before the  
2 business plan, yes.

3           Q. So, Mr. Damjanac was in a position to see how  
4 the sales would progress before finalizing the  
5 December 2010 business plan; right?

6           A. Yes.

7           Q. And Mr. Damjanac would have been able to  
8 consolidate the Claimants' opinions on the business  
9 plan; and therefore, this would have been at that time  
10 a fairly definitive business plan, right, based on  
11 sales activity.

12          A. Well, of course you don't base your business  
13 plan based on sales activity to date, in particular  
14 before getting all full permits on construction,  
15 and--which came only in September 2010.

16                   So, the presales that you are able to obtain  
17 as of that date are not necessarily an indication of  
18 what the potentials are for the future, because you  
19 understand that it's difficult to sell when--when you  
20 don't have anything on-site to show, and you still  
21 don't have fully permitted--full permits to begin  
22 with.

1           So, both the developers and the person in  
2 charge of the marketing plan would have been fully  
3 aware of that fact as well.

4           Q. And so, it's also correct to say, then, that  
5 none of the sales that were made were made with the  
6 knowledge of what was in Mr. Damjanac's plan, but for  
7 those three that you mentioned.

8           A. I'm not sure I understand the question. Let  
9 me read it again.

10          Q. Well, is it also--let me just rephrase my  
11 question.

12                 Wouldn't you say it's true that none of the  
13 buyers in 2010 could have seen Mr. Damjanac's 2010  
14 plan, perhaps but for the three that mentioned--you  
15 mentioned in Slide 27?

16          A. Correct.

17          Q. And so, they wouldn't have seen Mr. Damjanac's  
18 plan for a 114-room hotel.

19          A. For those who bought before the end of 2010,  
20 that's right.

21          Q. And so, they would have had--you have no  
22 evidence as to how those real buyers at Las Olas would



1 react to a building of a six-story, 114-room hotel  
2 down near the beach?

3 A. Well, we only know because we only have a  
4 relatively--five-month period or so, between that  
5 information became public and the suspension of the  
6 works in May 2011.

7 Q. And the beach was a critical attraction for  
8 the Las Olas Project; right?

9 A. The beach was an important attraction, yes.

10 Q. And once the land was purchased, Mr. Aven  
11 confirmed in the December Hearing that he relied  
12 totally on professionals. However, the only piece of  
13 legal advice that he received in writing was a memo  
14 that was disclosed during the document production  
15 stage; is that also your understanding, sir?

16 A. I don't recall if that is exactly the only  
17 thing, but--I don't know. I don't recall.

18 Q. Well, I'm referring to Day 3, Transcript 834,  
19 11-14, where the comment was from Mr. Aven, "The only  
20 written legal advice I'm aware I received was this one  
21 piece of--this--this one legal advice that's appearing  
22 in this log."

1           That was the privileged log that was part of  
2 the production.

3           A. Well, I'm not going to dispute that. If  
4 that's--I'll take your representation that that's what  
5 was said.

6           Q. Very good. Thank you.

7           Now, Mr. Aven explained that "They'd just put  
8 documents in front of me and said verbally what they  
9 were for, and I signed them."

10           Do you also recall that from his testimony on  
11 the third day of the December Hearing?

12           A. Again, I don't recall, but I'll take your  
13 representation that that's what was said.

14           Q. And did you ask to see the legal advice the  
15 Claimants had received in advance of planning to  
16 develop the land?

17           A. No.

18           Q. Would it have been relevant to your  
19 considerations?

20           A. No, not really.

21           Q. So, it wouldn't have been relevant to their  
22 ability to build and develop the land along the terms

1 that you had assessed?

2 A. No. Because what I look is whether the land  
3 will eventually obtain the permits or not to be  
4 constructed, so that's what I would be focusing on,  
5 not on the intermediate process of what type of legal  
6 advice the developer may have sought or not.

7 Q. Dr. Abdala, can you name a leading luxury  
8 resort developer, either in Costa Rica or elsewhere,  
9 that would have run its business on the basis of one  
10 piece of written legal advice?

11 A. I'm not aware of the type of legal advice that  
12 others in Costa Rica may have gotten before to develop  
13 their resorts.

14 Q. Are you aware of resort developers in general  
15 and the nature of the legal advice they receive in  
16 order to develop resorts? Is that within your scope  
17 of your expertise?

18 A. Well, yes, in general. I mean Legal advice  
19 would be one of the elements that you need to assess  
20 in order to develop a resort.

21 Q. And would you say that would also be  
22 reflective of their ability to develop a resort as

1 well?

2 A. Well, not necessarily. I don't relate that  
3 with the ability, but it would be one element to bear  
4 into consideration.

5 Q. You said you looked through the costs and  
6 accounts of the Las Olas Project, but you didn't  
7 exhibit anything from their accounting documents, did  
8 you?

9 A. I did. I did exhibit what was--what I was  
10 given as the accounts. It was kind of a layer account  
11 that is part of one of my exhibits in the First  
12 Report.

13 Q. And this is an Excel chart with a listing of  
14 some of the costs; is that right?

15 A. Correct.

16 Q. Which had all been entered in on the same day,  
17 with the same date.

18 A. Well, I don't know when they were entered but  
19 it was on spreadsheet, yes.

20 Q. So, I think this is CLEX-022.

21 Did you see any other regular accounting  
22 documentation from Las Olas?

1           A. No. Only what I had included as exhibit in my  
2 reports.

3           Q. Did you see any U.S. tax returns?

4           A. No, I have not.

5           Q. Are you aware of whether any U.S. tax returns  
6 exist?

7           A. I don't know.

8           Q. Did you ask for them?

9           A. I asked for all the financial information, and  
10 everything that I was given was part of my exhibits to  
11 my report.

12          Q. Would you have expected to see U.S. tax  
13 returns as part of that information?

14          A. No, normally I never get U.S. tax returns. I  
15 mean, normally you get financial statements and  
16 balance sheets and accounts, but not--not tax returns  
17 really.

18          Q. But you don't get those either?

19          A. I didn't get those, right.

20          Q. I wonder if we can turn to Tab 4 of the binder  
21 in front of you. These are documents that were  
22 produced by the Claimants and which are cited in

1 Mr. Hart's Report.

2 MR. LEATHLEY: The footnote reference in his  
3 report, for the record, is AVE 14.9.

4 BY MR. LEATHLEY:

5 Q. Are you familiar with these documents behind  
6 this tab, sir?

7 A. No, not really.

8 Q. You haven't seen them before?

9 A. No. They are part of the record, but I have  
10 not seen them.

11 Q. If you go to Tab 5 as well, if you'd just turn  
12 through those. Also referenced in Mr. Hart's Report,  
13 are you familiar with these documents?

14 A. Let me see. This is 14.15?

15 Q. Correct, sir.

16 A. No. I know of the presence, but no, I have  
17 not reviewed them.

18 Q. These are some of the documents used to  
19 compile the Las Olas Project's investment expenses for  
20 2002 to 2011, which went to form the document that you  
21 exhibited to your report, CLEX-022.

22 A. Right.

1 Q. Would that sound about right, sir?

2 A. Yes. It seems to be the invoices and--and  
3 documents that support those cost expenses.

4 Q. And so, these are the--these are the way that  
5 these documents were produced, the way they were  
6 organized.

7 A. Uh-huh.

8 Q. You can't testify, though, as to whether these  
9 were the documents that you had seen in your  
10 preparation of your two reports, though; right?

11 A. I have not seen these documents in preparation  
12 for my report, no.

13 Q. Okay. So, you took the expenses reports on  
14 trust that the content was correct?

15 A. That's right.

16 Q. And would it concur so with Mr. Aven's  
17 testimony in the December Hearing where he admitted  
18 that he put thousands of documents he had in a box and  
19 sent it to counsel for the Claimants?

20 Let me read Mr. Aven's testimony. He said, "I  
21 remember sending Mr. Burn a huge box of documents  
22 after I got that request"--he's referring to the

1 production request--"so there's thousands of documents  
2 in evidence in this case. And the documents I was  
3 able to find, I sent to Mr. Burn."

4           These are those documents, sir.

5           A. Okay.

6           Q. But they were not consolidated in any report  
7 in any way to make sense of them.

8           A. They were not consolidated, so you would have  
9 to reconstruct by dates and link them to the  
10 classification of the accounts layers that are in my  
11 exhibit in order to tally them.

12          Q. Uh-huh. And is this how you'd normally expect  
13 to see luxury resort developers manage their accounts?

14          A. You would normally expect to have  
15 them--financial statements. But this is the  
16 supporting evidence for some of the cost expenses. I  
17 think this is responding to what was asked on the  
18 Redfern to support that--those cost expenses that were  
19 on the record.

20          Q. Dr. Abdala, I'd like to ask you about your  
21 methodology you employ in reaching your many millions  
22 of dollars' compensation recommendation in your



1 report.

2           You employ a few mechanisms to reach the  
3 compensation amount, first of which is a discounted  
4 cash flow analysis; correct?

5           A. That's one of the elements, yes.

6           Q. And as the Tribunal will be well aware, the  
7 DCF analysis essentially projects a cash flow from a  
8 certain moment for a period of time; correct?

9           A. Yes.

10          Q. And that indication of that DCF analysis is  
11 premised on what one could say are two fundamental  
12 elements if you wish to establish damages assessment  
13 with any certainty.

14           The first is the successful launch of a  
15 business that must generate a cash flow in the first  
16 place that constitute a going concern; and second  
17 would be the successful positive operation of that  
18 business to continue to generate cash flow.

19           Would you agree with that?

20          A. No, I disagree. The DCF analysis is a tool  
21 that is used in valuation for--not just to value  
22 ongoing businesses, but also to value assets that are

1 at an earlier stage. And you can value assets that  
2 are not yet operational, all the time, and  
3 transactions are based on DCF recommendations for  
4 assets that are still completely preoperational. And  
5 that happens in many sectors.

6 In particular, it happens in real estate  
7 because in real estate development you know that you  
8 cannot be right away into an operational mode until  
9 you exhaust all the preoperational phase of  
10 construction permits, planning, developing, et cetera.

11 So, it takes a lot of time to get to the first  
12 stage in which you can establish sales. But that  
13 doesn't make the DCF analysis unsuitable for that when  
14 you can project what are the expected revenues and  
15 costs based on comparable market information and based  
16 on the industry parameters in general.

17 Q. And so, according to Exhibit 5, where Mr. Hart  
18 documented sales and reservations--and this is based  
19 on the documents provided by the Claimants--only 16  
20 lots of the total project that encompassed the 352  
21 lots were sold by December of 2010. Would that square  
22 with your understanding?

1           A. Well, the fact is that you have to understand  
2 what presales mean in a development that yet is not  
3 fully permitted, so--

4           Q. And I'm sorry to interrupt. I'm just focusing  
5 on the numbers for a moment, if I may. We'll come to  
6 the analysis in a moment. But 16 of 352 was the ratio  
7 of what had been sold.

8           A. Well, that is an incorrect number. I mean, as  
9 we have seen, there is 26 lots; so it's not 16.

10           But what I was going to say is that it is  
11 obviously expected that before you get fully permits  
12 to construct, you would not be selling a huge amount  
13 of lots in the marketplace until the development  
14 starts going on. So, this should be seen as presales,  
15 as with any other real estate development.

16           Q. So, the 16 or 26 representing about 5 or 6  
17 percent of the total number of lots, and only one  
18 house from among those lots had actually been built on  
19 the resort. Is that also your understanding, only one  
20 property had been built?

21           A. Well, I understand that there's only 26 lots  
22 that were sold before May 2011.

1 Q. And so, no construction--to state the  
2 obvious--on any of the unsold lots either; is that  
3 also your understanding?

4 A. Correct.

5 Q. And no hotel had been built.

6 A. No.

7 Q. And no other aspects of the resort had been  
8 developed, apart from maybe some of the roads that  
9 were being cut.

10 A. Well, the--I made--in my report, I inform as  
11 to what is the stage of development. This includes  
12 not only roads, but also other infrastructure works,  
13 including pluvial system, including cordons, including  
14 some of the preparations for water, et cetera.

15 Q. So, the resort wasn't open for business, there  
16 were no completed roads, there's no flowing water,  
17 there's no electricity, there's no people, there's no  
18 resort; and, yet, your opinion is that this is a going  
19 concern; is that right?

20 A. No. No. You're mistaken. I mean, I always  
21 characterized this as a preoperational asset, so it's  
22 not--as of May 2011, it's not an ongoing concern

1 because it's not fully yet developed. It's at a  
2 preoperational stage.

3           What the discounted cash flow method analysis  
4 is, recognized that if it continues, it will become a  
5 fully developed resort. And so, you attach certain  
6 probability that that happens. If it doesn't  
7 continue, as it states, as is, then it has to be sold  
8 with a state of partial urbanization and with the  
9 value of the land as appraised by Mr. Calderón at that  
10 stage.

11           Q. So, is to buy a car tire a preoperational  
12 stage of building and running a car?

13           A. No, no, no. You cannot compare with--with  
14 that.

15           Q. Well, sir, we have one house on undeveloped  
16 land; and from that, you're extrapolating a going  
17 concern worth tens of millions of dollars. Your  
18 preoperational phase seems to be, "If you state it, it  
19 will become." And I'd like to understand how you can  
20 say that without engaging in profound speculation.

21           A. Okay. It's very simple. Preoperational stage  
22 means that you are still on the phase of developing.

1 You're still investing. You have not finished  
2 investing before you can start selling and producing  
3 most of the revenues. And assets get transacted at  
4 those stages all the time, not just in real estate,  
5 but in any other businesses--in mining, in crude oil.

6 I mean, you are at exploration stage, and then  
7 you move on to the next stage. And so, you have  
8 transactions at preoperational stage all the time, and  
9 real estate development is one of them.

10 Q. And in that case, sir--

11 A. So, the value that you add to the land is the  
12 permitting, the zoning, the infrastructure works, and  
13 the offerings that you plan to do in the future.

14 So, there is no speculative element. The only  
15 risk is of completion and, in time, completion of what  
16 comes next.

17 Q. So, sir, is it your testimony--

18 A. That's what you need to assess that risk.

19 Q. Is it your testimony, then, that there is no  
20 speculation whatsoever in your analysis?

21 A. Correct. There's no speculation as to what  
22 you can sell these lots--or you can sell those houses

1 for because the market is telling you what the prices  
2 are.

3           The only risk is not--risk is not the same as  
4 speculation. The risk is that you cannot complete it  
5 in time as planned; and for that, you adjust in my  
6 model by two ways. One, you adjust by the risk of  
7 doing business with a discount rate. But second, you  
8 adjust with the probability of success or probability  
9 of failure. So you have two--two ways of reducing the  
10 expected value.

11           Q. Why, if--if you have a business, would you  
12 say, at a preoperational phase, is capable of being  
13 assessed as a business, why on earth do you need a  
14 probabilistic factor for a DCF calculation?

15           A. Well, you do need the probabilistic factor  
16 because that's one of the ways to assess the risk of  
17 not full completion. And all the possibilities--

18           Q. But you said there's no speculation, sir. You  
19 said there's no risk with the--the market is telling  
20 you what the prices are. From your assessment, it  
21 seems to be that all you do is plug in time, and time  
22 will tell you to project your cash flow to a certain

1 level.

2 A. No. You're confusing speculation with risk.  
3 I mean, all assets have a value. They can be  
4 transacted at any time, regardless of whether you are  
5 completed or not completed in your stage of  
6 development. It's just a matter of putting a  
7 transaction price.

8 And the valuation expert is able to put that  
9 measuring risk, either through the discount rate or,  
10 as I've done in my analysis, via the expected value,  
11 taking into account the probabilities that things go  
12 sour, and then you cannot complete the development.  
13 And so, you account for that risk.

14 Q. If your analysis of the market, sir, was based  
15 on the December 2010 business plan, why did you feel a  
16 need to supplement their business plan?

17 A. I didn't supplement the business plan. I used  
18 the design of the 2010 business plan, but I did not  
19 use the developer's view on pricing at that time. I'd  
20 rather go to the marketplace and see what lots are  
21 being sold for, what houses are being sold for, what  
22 condos are being sold for, what rental weeks can be



1 sold for in the RCI in Costa Rica. So, I used market  
2 information to price the offerings.

3 Q. Uh-huh. Thank you.

4 MR. LEATHLEY: Thank you. We have no further  
5 questions.

6 PRESIDENT SIQUEIROS: Will your redirect be  
7 extensive? I'm thinking simply of a break--taking a  
8 break right now, especially for interpreters and  
9 transcribers.

10 MR. BURN: I would estimate we'd be needing 10  
11 to 15 minutes, that sort of thing. Happy to take a  
12 break now or proceed.

13 PRESIDENT SIQUEIROS: I think that if--would  
14 you be willing to go for the 15 minutes; is that okay?  
15 Or would you prefer to take a break now?

16 Okay. Let's continue, then. Thank you.

17 REDIRECT EXAMINATION

18 BY MR. BURN:

19 Q. Okay. Dr. Abdala, you'll recall, in fact, a  
20 good deal of the cross-examination concentrated on  
21 issues relating to the characteristics of the  
22 Claimants and those associated with them as being

1 significant for valuing the project. You recall  
2 the--there were various questions relating to how one  
3 approaches valuation, given their characteristics and  
4 experience.

5 A. Correct.

6 Q. Why would you say--well, how significant is  
7 it, in your opinion, the characteristics of the  
8 specific sellers for the purposes of the exercise  
9 you've undertaken in assessing a fair market value?

10 A. Well, what I look at the features of the  
11 sellers when assessing fair market value is exactly,  
12 first of all, what the sellers' expectations are.  
13 These are normally translated into the contemporaneous  
14 business plans at the time. And you need to match  
15 that with the expectations of the willing buyer. And  
16 so, for that, you look into market information as to  
17 what--how much someone would pay for, for this  
18 particular asset.

19 And you'd need to value a price that you know  
20 that the willing seller would be really willing to  
21 sell. So the willing seller may have a reservation  
22 price, and you also need to understand that the

1 willing buyer will have a price that may be different  
2 from the--what that reservation price may be.

3           And that's the part that I look at on the  
4 willing seller. I mean, I look at their expectations  
5 as to what they think their asset is worth for, and  
6 that's normally reflected in their business plan  
7 projections. That's the main feature.

8           Q. And when you were taken to the Brian Headd  
9 Article, which is Exhibit CLEX-002, which is at Tab 1  
10 in the cross-examination bundle--and specifically at  
11 Page 53 of that article--what do these factors that  
12 Mr. Headd, Dr. Headd--I'm not sure of his correct  
13 description--what do these factors in the first column  
14 in Page 53, to which you were taken, tell you for  
15 understanding the seller's position for the purposes  
16 of assessing fair market value of an asset?

17           A. Well, first, let's understand that Mr. Headd  
18 here is talking about the survival rates; right? He's  
19 not trying to assess, say, fair market value  
20 transaction prices.

21           So, he's looking at--at that and the  
22 relationship between the characteristics of the owner

1 of the asset in their decision to, say, continue or  
2 close the business. And those are traits that he  
3 found some of them not being correlated and some of  
4 them to have some correlation with survival rates.  
5 And that's all we need to take from his findings here.

6 Q. And for the purposes of the fair market value  
7 assessment, the sale by a hypothetical seller of an  
8 asset to a hypothetical buyer with no interfering  
9 extraneous factors, the factors Mr. Headd refers to,  
10 to which party in that hypothetical transaction are  
11 those factors most relevant?

12 A. Well, I think Mr. Headd here is talking about  
13 the willing--the seller. I mean, it would be about  
14 the seller. But, again, in a transaction, you don't  
15 really pay too much attention to the identity of the  
16 seller or the buyer unless you're trying to assess  
17 value in use, because it could be that for a  
18 particular investor, the asset has more value because  
19 it has synergies with other assets that they may have;  
20 therefore, you will know that the reservation price of  
21 that seller would be higher than a normal buyer.

22 But unless you have that synergies, what you

1 really care about is what the market would pay for  
2 this asset. And that comes from kind of a neutral  
3 assessment as to who really holds the asset at that  
4 time because you know that someone else can take over  
5 and extract the value of that asset. And that's what  
6 the market would pay for it. Regardless of whether a  
7 company, say, is mismanaged or whether it's  
8 beautifully managed, it doesn't matter. What--the  
9 value of the asset is what someone would pay for it.

10           If I want to buy a company and I see that  
11 those who run the company are doing a very poor job, I  
12 would still be competing with others that have the  
13 same perception as I do, that this company's more  
14 valuable if it were in the hands of someone who's  
15 managing that company differently or better, optimize,  
16 and that the market price is, then, independent of the  
17 identity of the actual owner of the asset.

18           Q. Thank you.

19           You were also asked about the quality of the  
20 2010 business plan.

21           A. Uh-huh.

22           Q. And various questions were put to you. You

1 were invited to comment on Mr. Damjanac's ability to  
2 draft the business plan, and so on.

3 Now, setting to one side whether or not you're  
4 in a position to answer those types of questions,  
5 how--in a situation where you are looking outside of  
6 the objective factors and looking at the subjective  
7 capabilities of hypothetical sellers--so, setting your  
8 other points to one side for a moment--how would you  
9 expect owners and would-be sellers who lack skills and  
10 experience that are necessary to perform certain  
11 exercises in relation to an asset, how would you  
12 expect them to respond to that absence of ability?

13 A. Let me see if I understand the question. Hold  
14 on a second.

15 Q. The last word in that--

16 A. It's a long question. I'm not sure what  
17 you're referring to. When you say, "How would you  
18 expect them to respond to that absence of ability," by  
19 "them" you mean who?

20 Q. The Claimants in this--in this scenario.

21 A. The Claimants? So, how Claimants would  
22 expect--hold on.

1 Q. Maybe I should have another go at formulating  
2 the question in a clearer fashion.

3 If owners don't have a particular skill--

4 A. Right.

5 Q. --what are they going to do?

6 A. Well, I see--I see your question now.

7 Then--I mean, if you are the owner and if you  
8 think your manager is eventually putting forward a  
9 plan that may not conform to what is optimal or what  
10 the market think can be done, then you will fire that  
11 manager, right, and you will hire someone else in  
12 order to get a different view or a more professional  
13 view or a different undertaking.

14 That's--I mean, that's what the owner would  
15 do; it's like a board of directors will replace their  
16 management if they think they are not capable of doing  
17 something.

18 Q. And in terms of--again, certain assertions  
19 were put to you in relation to the drafting of the  
20 2010 business plan, and you responded along the lines  
21 of you understood that Mr. Damjanac had taken advice  
22 in respect of the drafting of that business plan. You

1 recall that?

2 A. Okay. Yes.

3 Q. Did you read, for the purposes of your  
4 analysis, Mr. Damjanac's Witness Statement, his first  
5 Witness Statement?

6 A. I did, but a long time ago, so I may not  
7 recall.

8 Q. Do you recall--do you recall Mr. Damjanac  
9 describing in that Witness Statement what he did with  
10 respect to the preparation and finalization of that  
11 business plan? Just in general terms; I'm not  
12 examining asking for specifics.

13 A. Right.

14 No, I don't recall. Sorry.

15 Q. Okay.

16 MR. BURN: I have no further questions, sir.

17 PRESIDENT SIQUEIROS: Tribunal, any questions?

18 QUESTION FROM THE TRIBUNAL

19 ARBITRATOR BAKER: Dr. Abdala, would you  
20 please tell me a little bit about the search for  
21 comparable real estate sales and the process that you  
22 went through that? I know you've explained it in your



1 report, but it seems like there is a rather limited  
2 amount of data for comparative purposes.

3 THE WITNESS: Right. The way I approached  
4 this was twofold: First, I didn't try to identify any  
5 particular resort that--where to obtain prices, but I  
6 just went to the database of this website called REMAX  
7 that would have all of the listings of prices that  
8 were offered in the Puntarenas Province. And I did  
9 this research in October, November 2015.

10 And I looked at both houses, lots, and  
11 condominiums because we had prices on these three  
12 dimensions. And I also looked at information on  
13 rental prices for houses, which was another parameter.  
14 So, I extracted all the information that was relevant  
15 to the region and the characteristics of the  
16 properties that would conform to resorts on similar  
17 type of offerings with beachfront or with the type of  
18 amenities that it would be so we would have a universe  
19 of observations from which then use an average listing  
20 price, which I then convert into a selling price.

21 That's one part of the analysis. The other  
22 part of the analysis is I look at the more targeted

1 resorts that were more comparable or similar to Las  
2 Olas. And then I searched for listing prices or  
3 selling prices for those particular resorts, such as  
4 Místico and Málaga, for which those two I will say,  
5 Will you contact them directly and get their listing  
6 prices or information that was specific to the market  
7 prices that I was looking for.

8 ARBITRATOR BAKER: Next question: Walk me  
9 through, briefly, how you determined the weighted  
10 average cost of capital in your Slide 25.

11 THE WITNESS: Right. Well, the WACC, or  
12 weighted average cost of capital, has two components,  
13 cost of equity and cost of debt. For the cost of  
14 equity, I follow the standard methodology of the  
15 capital asset pricing model, which is to add  
16 the--there's three different components.

17 One is the risk-free rate, which I use a  
18 ten-year U.S. Treasury bond as an indication of a  
19 risk-free rate; and then I add the industry risk,  
20 measured by the so-called "parameter beta" of the real  
21 estate industry; and the market risk premium, which I  
22 use from the standard sources.

1           And then I add a country risk premium for  
2 Costa Rica by looking at the spread between a  
3 bond--sovereign bond issuing dollars in Costa Rica  
4 against the risk-free rate. That is the sum of the  
5 cost of equity, which, if I'm not mistaken, as of 2011  
6 was around 11 or 12 percent.

7           And then you add the cost of debt. For the  
8 cost of debt, I used the so-called "synthetic  
9 approach," which is to, again, go from the bottom, the  
10 risk-free rate plus the industry risk for the profile  
11 of borrowers in that industry, and the country risk  
12 premium as well for Costa Rica.

13           So I get to the cost of that, and then the  
14 average between the typical leverage that you see in  
15 the industry with so-called "the optimal leverage  
16 ratio" I used in order to weight cost effect with the  
17 end cost effect.

18           ARBITRATOR BAKER: So, that is an imputed  
19 attribution of the capital structure. Because, here,  
20 as Mr. Hart as pointed out repeatedly, it was an  
21 equity investment by the investors rather than an  
22 actual leveraged investment.

1           So, you used what is typical for these types  
2 of developments; is that essentially what you're  
3 saying?

4           THE WITNESS: That's right. And the  
5 difference is--again, it has to do with the concept of  
6 fair market value because what the recommendations are  
7 is that you don't necessarily look at the actual  
8 leverage ratio because some companies may be--or  
9 projects, developments may be more leveraged than  
10 others.

11           And what you tend to see is that the willing  
12 buyer will eventually use the capital structure that  
13 is common in the industry. That's why you look at the  
14 industry leverage rather than the project-specific  
15 leverage. So that's the recommended practice. And  
16 that's what I have used, regardless of the fact that  
17 the project was intended as an equity--100 percent  
18 equity financing.

19           Now, I also said in my report that if you were  
20 to, say, value this at a discount rate that was  
21 100 percent equity, what the recommendation is is to  
22 look at the so-called "unlevered cost of equity,"

1 which takes into account in one of the parameters of  
2 assessing industry risk the fact that you're going to  
3 be fully financed on equity.

4           And I think I computed that as well in a  
5 footnote, so you're--compared to the WACC, the  
6 unlevered cost effect would be slightly higher; I  
7 think at 8-point-something, 8.5 or so, which is an  
8 alternative view in which you value the asset,  
9 assuming that not only the owner is already developing  
10 the project with 100 percent equity, but also willing  
11 buyer would kind of respect the same structure and  
12 would not inject that, and, therefore, the cost of  
13 equity becomes the relevant discount rate.

14           ARBITRATOR BAKER: And I've tried to follow  
15 the discussion between you and Mr. Hart over what is  
16 the appropriate risk-free rate between the 10- or the  
17 20-year bond.

18           THE WITNESS: Right.

19           ARBITRATOR BAKER: Has there been a move in  
20 valuation analysis to seek something other than a U.S.  
21 Treasury as a risk-free rate? We've seen some pretty  
22 wild market conditions over the last ten years. I

1 mean, we've gone through an area where we actually  
2 have seen, depending on which sovereign was involved,  
3 negative interest rates.

4 THE WITNESS: Right.

5 ARBITRATOR BAKER: What does that do to the  
6 concept of a risk-free rate?

7 THE WITNESS: Right. I agree. It's  
8 interesting times because what you see is that central  
9 banks of many of the western countries and also Japan  
10 has been actively trying to pursue monetary policies,  
11 that it reviews the interest rate at levels that we  
12 have not seen before for such a sustained, long period  
13 of time.

14 So, the practice is that we're still using  
15 that as a reflection as risk-free because there is a  
16 correlation with the returns that you can obtain in  
17 the marketplace, also at the corporate level.

18 So, in general, in times when the interest  
19 rates are so low, as they are right now, the expected  
20 returns are also relatively low, or at least lower  
21 than what they used to be. Because now lending is  
22 cheaper; therefore, the expectations of returns of a

1 company are, on average, lower.

2           So, I mean, the practice is that people still  
3 use a U.S. bond and--although in different regions,  
4 you can think about using other sovereign bonds as a  
5 reference. In Europe, for example, if you value an  
6 asset in Europe, sometimes you look at the German  
7 bonds, which is even lower than the U.S.

8           But some valuers could also look at the  
9 yields of the bonds in a hard currency but issued by  
10 the sovereign of the country where the asset is  
11 located. The thing is that if you do that, that yield  
12 may be higher than the U.S. bond, but it includes also  
13 a component of country risk already implicit in that  
14 particular yield of--of that bond. So, that can be  
15 done as well.

16           But, in general, I have not seen much of a  
17 disagreement among experts on keeping using the U.S.  
18 bond rate as a reference for the risk rate.

19           ARBITRATOR BAKER: And what was the--

20           THE WITNESS: Despite the abnormal low  
21 rates--not abnormal, but sustained low rates that we  
22 see in the marketplace.

1           ARBITRATOR BAKER: Yeah. I mean, it calls  
2 into real question--I mean, we have to have some  
3 measure, obviously, to do this analysis. But given  
4 the way there has been a pretty substantial  
5 intervention and manipulation of interest rates in  
6 concerted action around the world, it does call into  
7 question whether or not that's still the best rate.

8           THE WITNESS: Well, one thing that you can  
9 think of, then, adjustments that may come naturally  
10 with this is that the risk rate could still be very  
11 low, and that reflects market reality because that  
12 impacts the interest rates that banks charge against  
13 each other, it impacts the interest rates that banks  
14 charge to corporations.

15           But you may think that--say if the expected  
16 return of the corporations is so much higher than the  
17 1 or 2 percent that we see in these rates, that would  
18 be--at some point be captured by the expected market  
19 premium that you add to the risk-free rate in the  
20 competition of the cost of equity.

21           And there's been some academic discussion,  
22 which is interesting, which may imply departing from



1 the traditional way of computing market risk premium,  
2 which is by looking at the--either the geometrical or  
3 arithmetical average of long periods of time of  
4 history, which takes time for those measures to  
5 capture what is the expected market premium that a  
6 company may obtain from now on.

7 I mean, the theory would be that eventually,  
8 if the interest rates now are so low, maybe that the  
9 market risk premium may be a little bit higher  
10 forward-looking. But it's not really being captured  
11 in the traditional way that you're computing the  
12 market risk premium if you're only focusing on  
13 historical premiums.

14 ARBITRATOR BAKER: Last question: On the  
15 country risk, at what date did you determine to use  
16 for the country risk, and what number did you use?

17 THE WITNESS: Okay. If I can just--to give  
18 the precise answer, let me go to my report, the First  
19 Report.

20 And the number--let's see. Trying to get to  
21 the appendix of the WACC section.

22 Okay. The number is 189 bases points or 1.89

1 percent. And the way it's been computed is--

2 MR. BURN: You may want to refer to Page 92.

3 THE WITNESS: I'm sorry?

4 MR. BURN: Page 92.

5 THE WITNESS: Page 92. You're looking at my  
6 First Report or my Second Report?

7 MR. BURN: First.

8 THE WITNESS: I'm not--well--

9 MR. BURN: Apologies.

10 THE WITNESS: I'm looking at the one in  
11 Spanish. That's why maybe this is a different Page  
12 number.

13 But the way I do this is by looking at the  
14 spread between the average yield of Costa Rican bonds  
15 for the 12-month period before the date of valuation,  
16 so it would be in the 12-month period before the  
17 before 12th of May, 2011. So it's the spread between  
18 the Costa Rican bond of ten-year duration issued in  
19 dollars against the U.S-dollar bond issued by the U.S.

20 ARBITRATOR BAKER: Okay. Thank you very much.

21 ARBITRATOR NIKKEN: I'm going to ask you in  
22 Spanish, your native language. Perhaps I'm

1 simplifying, but perhaps this can help in general. In  
2 paragraph 2 of your statement, you assume that the  
3 Claimants prevail in their principal claim.

4 I'd like to see, what is the scope of this  
5 assumption? Because as you have seen, and simplifying  
6 a lot, there have been many points in debate at this  
7 Tribunal, and some of those, it could be said, have to  
8 do with the substance of the lots in question. In  
9 other words, are there wetlands on this real estate?  
10 And then others that are a procedural due process  
11 contradiction between Costa Rican agencies.

12 When you say "prevail," you mean prevail in  
13 all points--well, have you actually thought about  
14 whether the Claimants are right with regard to some  
15 points, procedural points, but perhaps they're wrong  
16 about the fact that there are wetlands on the  
17 property?

18 THE WITNESS: My valuation exercise assumes  
19 that the Claimants prevail with regard to all points,  
20 with regard to the economic valuation, the permits  
21 that Claimants had they had in order to construct  
22 environmental permits and construction permits, which

1 meant that they could launch this to the market, they  
2 could continue with development, they could construct.  
3 It was understood that these had been obtained and so  
4 there is no further thought about whether there is  
5 doing to be a delay in issuance or whether the permits  
6 had to be modified. This has not been considered in  
7 my valuation.

8           PRESIDENT SIQUEIROS: I have questions. And I  
9 am grateful for the patience of court transcribers and  
10 interpreters.

11           You analyzed the value of the damages for the  
12 hotel investment. And you make that value, and you  
13 make a comparison with respect to other properties  
14 located in Costa Rica and outside of Costa Rica, and  
15 you determined that it's a value 181,000 per room, as  
16 I understand correctly the tables on page 18 of your  
17 summary in the presentation today.

18           Have you taken into account whether the hotel  
19 was going to be built on the concession where it is my  
20 understanding that there will not be a true ownership  
21 of the land in that area?

22           THE WITNESS: I have--

1           PRESIDENT SIQUEIROS: Because it is precisely  
2 a concession.

3           THE WITNESS: Right. It is a concession.  
4 Yes, you're right. The way I interpret the ownership  
5 rights is in function of the shareholder agreement  
6 that I understand was also in place which basically  
7 asked for the minority shareholder to finance all the  
8 construction of the hotel and any other development  
9 that was planned for that area, and in exchange they  
10 would get 100 percent of the profits related to that.  
11 So--

12           PRESIDENT SIQUEIROS: But that relates to the  
13 profits of the company of La Canicula, which was going  
14 to be the company that holds the concession.

15           THE WITNESS: Right. But I understand that  
16 the--I mean, we have--I think we have a back-up slide  
17 that would be helpful which is at the very end of my  
18 presentation. But my understanding is that this is an  
19 agreement between Mrs. Murillo--

20           PRESIDENT SIQUEIROS: Indeed. Indeed it is.

21           THE WITNESS: --and the U.S. investors.

22           PRESIDENT SIQUEIROS: But that relates--and

1 you have a copy of that in, I believe, the final page  
2 of your presentation on page 33.

3 But this relates to the profits that are being  
4 earned in the company holding the concession. My  
5 question is, if you're going to value a hotel room,  
6 you would normally have to take into  
7 account--especially if you're comparing to other  
8 properties outside--whether these properties are  
9 outside of--this is different than this Las Olas  
10 Project--owned the land or whether they do not own the  
11 land.

12 THE WITNESS: Right.

13 PRESIDENT SIQUEIROS: In Las Olas the  
14 concession rights are a concession of the land, but  
15 there's no ownership of the land. So the only thing  
16 that would be owned would be the construction. Am I  
17 correct?

18 THE WITNESS: Well--

19 PRESIDENT SIQUEIROS: Because if this is so,  
20 then it would not own the grounds, the gardens which  
21 most likely the other properties that you're comparing  
22 which--when they take into account a per-room value

1 would have to necessarily take into account also  
2 the--the other elements, not only the construction,  
3 but also the grounds, the gardens that make up that  
4 development.

5           THE WITNESS: Well, I think that your question  
6 is right, and there is a distinction to be made, say,  
7 if the land is owned by the same company or developer  
8 that is trying to sell a hotel or whether the--the  
9 land is sitting on a Concession rights.

10           From an economic point of view, both can be  
11 valued, and they can have similar prices to the extent  
12 that, A, the Concession terms are sufficiently long  
13 enough so as to net present value of the revenues,  
14 less cost of a hotel are sufficiently long in order to  
15 be kind of equivalent to owning the land; or--and B,  
16 to the extent that you expect that the Concession  
17 rights would be renewed at the end, say, you have a  
18 10-year or a 15-year Concession term, and so you would  
19 factor in the expectations of renewal of that  
20 Concession and whether you have to pay any fee  
21 for--for being the--the Concessionaire, whether it's a  
22 one-time fee or whether it's an annual payment that

1 you have to pay to the owner of the land or the--the  
2 Concession--the party that grants the Concession.

3           So that's what we would do. In my particular  
4 valuation--I mean, the Concession rights are I think  
5 for 20 years, with expectation of renewal. And I  
6 understand that there's no payment or at least no  
7 significant payment for obtaining such Concession  
8 rights.

9           If I knew of such payment, I would have  
10 incorporated as a cost in the--

11           PRESIDENT SIQUEIROS: The annual fees?  
12 Because--there are annual fees?

13           THE WITNESS: I think the annual fees I've  
14 seen, but they are very, very small, so they're not  
15 really making a difference on--on valuation.

16           But that's a type of distinction that you  
17 would make between a, say, Concessionaire as opposed  
18 to ownership of the land.

19           PRESIDENT SIQUEIROS: Okay. And the following  
20 question--I notice also that you provide a--an  
21 estimated value on the--per lots of \$170 per square  
22 meter.



1           But when I look at the list of properties that  
2 were sold before May 2011 and even thereafter, I see  
3 that the prices per meter are--you know, except for  
4 some sales that were made in 2008, the prices are  
5 substantially--very substantially lower than your  
6 estimated value of the properties as of May 2011.

7           Could you explain that, or--there might be  
8 something that I'm not understanding well here.

9           THE WITNESS: No. Your observation is  
10 correct, but let's distinguish the two periods:  
11 Pre-May and post-May. I mean, all of the values that  
12 you see post-May are--are really very low, but they  
13 are implicit that you cannot construct or you cannot  
14 develop because there's already an order.

15           So you should be disregarding those for market  
16 price purposes, and--but if you look at the prices  
17 pre-May 2011, it's true that on average, the per  
18 square meter is around 143, which is lower than the  
19 186 that I find as of May 2011.

20           And that my understanding is that this is  
21 normal for presales, that you would be discounting in  
22 order to get attraction to the--to the sales. So, you

1 would be selling to those who are there to buy very  
2 early on, even before the permits are in place, so  
3 that they can have the--some of the benefits of the  
4 uprise in prices in value once you're completing the  
5 permitting process and once you start deploying the  
6 construction of the infrastructure.

7           So, one of the uncertainties that those who  
8 buy very early on have is the timing as to when the  
9 project will really look like a resort development so  
10 that they can start constructing their houses or  
11 moving in with their condos.

12           And that is the--kind of the risk that you see  
13 in lower prices. I mean, in order for them to be  
14 attractive for early sales, you have to sell at  
15 relatively lower prices.

16           In addition, you see here that--of course, you  
17 have the financial crisis in the middle as well. So,  
18 you see some impact on relatively higher prices before  
19 the financial crisis and after as being another  
20 element to take into account.

21           PRESIDENT SIQUEIROS: There are those that I  
22 see, indeed, even as of January 2011 are almost

1 one-half--50 percent of the value that you estimate.

2           So you would still include that very  
3 substantial--you would attribute this very substantial  
4 amount of difference to the elements that you have  
5 described on the need that the developers would  
6 identify to undercut the prices before the project is  
7 fully operational?

8           THE WITNESS: Yes. And that's my  
9 understanding. And the reason I say so is also  
10 because I look at the prices that other resorts are  
11 offering. And say for the same size or very similar  
12 size or even a smaller size--you have El Místico  
13 offering lots for \$120,000 rather than \$60,000.

14           So it's not credible to think that a developer  
15 in Las Olas would be completely off the market going  
16 forward. So you--you have to adjust to market prices  
17 of similar quality or similar offerings sooner or  
18 later. So the way I interpret those lower prices in  
19 2010 and 2011 is on that direction of trying to make  
20 it very attractive so as to get some sales going on at  
21 the predevelopment stage.

22           PRESIDENT SIQUEIROS: Thank you. Thank you

1 very much. I have no further questions.

2 None from parties? Okay. Thank you very  
3 much, Mr. Abdala.

4 THE WITNESS: Thank you.

5 PRESIDENT SIQUEIROS: You are released.

6 THE WITNESS: Thank you.

7 PRESIDENT SIQUEIROS: Thank you.

8 So it's roughly 5 minutes to 2:00. Are the  
9 parties in agreement if we return at 3:00?

10 MR. LEATHLEY: Yes.

11 PRESIDENT SIQUEIROS: Okay. Thank you very  
12 much.

13 (Whereupon, at 1:53 p.m., the Hearing was  
14 adjourned until 3:10 p.m. the same day.)

AFTERNOON SESSION

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PRESIDENT SIQUEIROS: Mr. Burn.

MR. BURN: Yes, sir. There are a couple of administrative matters, I just wanted to turn to, before we hand it over to Mr. Hart.

And, first of all, Dr. Abdala forgot to mention this, but with respect to the valuation model that you would have seen exhibited as CLEX-82 to his second report, which is an Excel spreadsheet--a live Excel spreadsheet, he does have versions of that updated to reflect the modifications that he referenced in his--his presentation.

And those are available for the Respondent and for the members of the Tribunal in--on a USB stick if those are required. I'm happy to distribute those at the end of proceedings today. They highlighted--the modifications that he referenced are highlighted on the spreadsheets, so it's pretty clear where the further modifications have been made.

PRESIDENT SIQUEIROS: Okay. I think it would be useful to have those to reflect the changes that were done to his model. Yes, I think that would be

1 desired.

2 MR. BURN: Indeed. We'll distribute those at  
3 the end of the day.

4 The other thing is I just wanted to check  
5 where we were on timing.

6 PRESIDENT SIQUEIROS: Francisco, if you may,  
7 please.

8 SECRETARY GROB: Sure. The Claimants have  
9 used 74 minutes and the Respondents have used 142  
10 minutes, and you have three hours each.

11 MR. BURN: Thank you.

12 PRESIDENT SIQUEIROS: Anything from the other  
13 side, Mr. Leathley?

14 MR. LEATHLEY: No, sir. Thank you.

15 I'm tempted to plant the seed in the mind of  
16 the Tribunal of the generosity from Costa Rica to  
17 Claimants at the last minutes of the--of the hearing  
18 in December, but I don't know if the Christmas jollity  
19 extends into February.

20 MR. BURN: I mean, that's up to you. Fine.  
21 The 15 minutes we had additional in December, that  
22 absolutely ought to be provided, if they need it, to

1 the Respondent. So, yeah, there will be no objection  
2 on our side to an extra 15 minutes, but no more than  
3 that.

4 PRESIDENT SIQUEIROS: As I mentioned, the  
5 civility and the courtesy that each party afforded the  
6 other in December I'm sure would be reciprocated  
7 anytime.

8 TIMOTHY HART, RESPONDENT'S WITNESS, CALLED

9 PRESIDENT SIQUEIROS: Dr. Hart, good  
10 afternoon. I believe this is not the first time that  
11 you are before a Tribunal such as this, so you likely  
12 know what the procedure will follow.

13 After a few confirming questions on the part  
14 of counsel to Costa Rica, you will be permitted to go  
15 through a summary of your report, to be followed then  
16 by cross-examination on the part of Claimants.

17 Should counsel to the Respondent of Costa Rica  
18 decide to make any redirect questions in respect to  
19 that examination, they will do so. The Tribunal may  
20 at any time ask any questions from you, although we  
21 will normally, but not be required to do so, wait  
22 until the parties have ended their exchange.

1           Please proceed to answer the questions. You  
2 will be afforded the opportunity to make  
3 clarifications afterwards.

4           Also, as you have witnessed me ask Mr. Abdala,  
5 please, between the question and the answer, allow  
6 just a second or two to go by so that primarily  
7 interpreters can make any--you know, allow them time  
8 to do their job. I don't expect that there will be  
9 any Spanish examination right now. But, still, it's  
10 best to allow them a few seconds just between answer  
11 and question.

12           And, finally, I would ask you to read the  
13 statement that's in the card right in front of you.

14           THE WITNESS: I, Timothy Hart, solemnly  
15 declare upon my honor and conscience that my statement  
16 will be in accordance with my sincere belief.

17           PRESIDENT SIQUEIROS: Thank you very much.

18           MR. LEATHLEY: Thank you, Mr. President.

19   DIRECT EXAMINATION

20           BY MR. LEATHLEY:

21           Q. Good afternoon, Mr. Hart. Just to confirm in  
22 the binder in front of you, if you could check the two



1 expert reports which have been submitted. If you can  
2 just verify those are yours, please.

3 A. They are.

4 Q. And do you have any changes you wish to make?

5 A. I have one small change in my second report,  
6 and it's been distributed as an errata sheet with the  
7 presentation. It's on page 12, paragraph 32, where we  
8 strike where it says "we're down," and we replaced  
9 "did not increase at the same rate." And we changed  
10 the minus 15 in the table to a positive 15 percent.  
11 That's all.

12 Q. Thank you.

13 MR. LEATHLEY: Mr. Hart will be making a short  
14 presentation at this stage.

15 So, please, Mr. Hart.

16 DIRECT PRESENTATION

17 THE WITNESS: Thank you.

18 Good afternoon. Briefly, my qualifications  
19 are here for the review of the Tribunal. But I am  
20 president and founder of Credibility International  
21 which I founded in 2010. I've got 32 years assessing  
22 damages. By background, I'm an accountant as well as

1 a certified fraud examiner.

2           If you would turn to the summary of opinions.  
3 From a financial standpoint, the Claimants'  
4 interactions caused Las Olas to be a failure to date.  
5 They bought the property with no plan and minimal due  
6 diligence. The Project has a history of numerous  
7 business plans with widely varying specifications.  
8 The management did not have the proper experience to  
9 add value to Las Olas in those business plans.

10           I identified several red flags related to this  
11 project which undermine its financial viability.  
12 Dr. Abdala ignored the lack of due diligence and  
13 experience as well as the red flags in his valuation.  
14 And Dr. Abdala's hybrid, probabilistic approach damage  
15 methodology is incorrect. I've never seen it before.  
16 And it's just as inapplicable in this case in  
17 particular.

18           Even if his entirely flawed approach were  
19 accepted, his underlying calculations in his DCF have  
20 multiple flaws and, again, do not reflect the market  
21 or any sort of measure of fair market value.

22           The cost approach, the least speculative

1 method to calculate the value of raw land in this  
2 case, because it does take into account the actual  
3 transaction of that land, albeit nine years before,  
4 but it is the actual property.

5           The Claimants have not put forth a claim under  
6 the cost approach. They gave us an unorganized group  
7 of documents that look like shoebox accounting, which  
8 precludes me from putting forth a reasonable or a  
9 reliable cost claim. And Claimants' expert testified  
10 he saw one accounting document from a project that  
11 lasted for nine and a quarter years. It's really  
12 quite unheard of.

13           Given the documentation provided, my best  
14 estimate of damages under the cost method is  
15 2.72 million. But, again, there's a good chance that  
16 this will significantly overstate the value. Given  
17 the circumstances of the original investment, the  
18 multiple changes in the plan, Claimants' background  
19 and lack of experience, and the lack of the proper  
20 accounting system, again, makes it hard to figure out  
21 what costs actually added value to this project during  
22 that period of time.

1           The reason the claim has no relationship with  
2 the investment. The investment was 1.647 million in  
3 the property. We oddly have nothing but--from the  
4 Claimants' Witness Statement of what was actually  
5 invested in the project, alleging to be in total  
6 7.66 million, although we've seen balance sheets that  
7 suggest only a total of 2.2 million was put--or  
8 2.4 million was put into the project as of  
9 September 30th, 2007.

10           But the claim itself at \$69.1 million for this  
11 9 1/2-year--or 9 1/4-year project plus 28.3 million of  
12 interest. That's \$97.4 million, which is 12 times the  
13 alleged investment, which, again, I think the  
14 investment is overstated. 60 times the cost of the  
15 land. The Claimants don't own 22 percent of the land  
16 they're expecting to get paid for.

17           Let's talk about observations on Las Olas.  
18 The assets Claimants owned in May 2011 is what we need  
19 focus on. They had raw land purchased with limited  
20 due diligence. Again, for \$1.647 million. That they  
21 appeared to equate to the value of an 800-square-meter  
22 plot of land in Florida. They had no specific plans

1 for it. And it sounded--they thought they could hold  
2 it for a few years and maybe make a decent return on  
3 investment if they flipped the property.

4 They don't own the lots on the property. So,  
5 that's what they have, raw land, but less of it than  
6 they paid for back in 2002.

7 They got a poor business plan. This valuation  
8 by Dr. Abdala is built on a very poor plan.

9 Mr. Damjanac quickly prepared--his own words--in his  
10 plans to give a general overview of profitability can  
11 be later refined is what his plan said. He lacked  
12 proper experience and any success in real estate in  
13 Costa Rica.

14 You know, this plan is not put together by an  
15 experienced professional who can point to success in  
16 Costa Rica in resort development. And it's supported  
17 by rendition drawings and admittedly still needing  
18 permits as of December 2011.

19 All four iterations of the business plan were  
20 failures. There's no evidence of any offers or  
21 interest of investors to buy all of Las Olas. Again,  
22 if this is worth \$100 million, as Dr. Abdala says,

1 somebody would have come along at some point and tried  
2 to buy this. We've just got no evidence of that.

3           The evidence of lack of demand with low lot  
4 sales and subscriptions over a nine-plus-year period.  
5 They tried to sell the property, virtually nobody was  
6 interested, and they were sold for a much lower value  
7 than Dr. Abdala testified to.

8           Las Olas is not beachfront property. The  
9 property has 150 meters of beachfront that you walk  
10 through a property they don't own onto a concession  
11 area. I mean, they have 750 meters of highway. So,  
12 this is not really prime beachfront property.

13           The rendering of the Beach Club included in  
14 the December '10 Plan certainly looks misleading as  
15 the buildings can't possibly be built that close to  
16 the water. Again, it shows the preliminary nature of  
17 the drawings they had as of the date of the alleged  
18 taking--I'm sorry--of the problems.

19           In December 2010, Claimants admit Las Olas was  
20 at low value, speculative, raw land in a dead market.  
21 That's their own admissions. The December 12, 2010,  
22 David Aven letter to investors says, "Since that time

1 after the economic crisis, we have sold an additional  
2 16 lots and taken deposits on a few more."

3 So, in about one year's time, they've have  
4 closed \$875,000 in sales and taken deposits on 387 in  
5 sales and should close in the next few months.

6 I've seen some agreements for these alleged  
7 sales but limited evidence of cash received. I saw  
8 instructions to wire money through Switzerland for no  
9 apparent reason. But we can't seem to get any real  
10 accounting for what the real sales were.

11 Mr. Damjanac's Witness Statement evidences  
12 that not one of the seven deposits became a sale as of  
13 May 2011 because his number of sales agree exactly  
14 with Mr. Aven's back in December 2011. So, all these  
15 deposits fell through also.

16 And it is very difficult to sell a raw land  
17 product which is not improved, to Mr. Aven. This was  
18 a most difficult year to sell real estate down here.  
19 Mostly all of their deals are dead in the water. He  
20 said there's little market for their improved raw land  
21 and the market was dead. That's his own words. So,  
22 the value should be based on raw land in a dead

1 market.

2 He also said in the same letter, "The more the  
3 land is developed, the more it's worth." This land is  
4 virtually undeveloped at that point in time.

5 The low value, raw land required further  
6 speculative construction to add unproven value to Las  
7 Olas.

8 Again, in the same letter he talked about this  
9 house being built by Mr. Tory Mills of being of  
10 critical importance. How the house going up will  
11 increase interest rapidly, you know, high sales  
12 velocity. They want to see construction progress, he  
13 said. People jump into the deal. He said that Tory  
14 assured him that the minute the house sells, he will  
15 probably buy a couple more lots.

16 That doesn't sound very certain. He will buy  
17 another lot when Tory's house sells, another person.

18 So, again, they're hoping this one single  
19 1,300-square-foot home was going to change the entire  
20 trajectory of this project. If they truly believed  
21 that, as real developers, they would have been  
22 building houses and homes to sell. They clearly



1 didn't have the financial resources to be developing  
2 as real developers would.

3           The multiple failed business plans for Las  
4 Olas. Let's start back--February 6, 2002, they bought  
5 the land. They then hired professionals in Norton and  
6 EDSA to do a plan in 2004.

7           2007, they came up with a more definitive plan  
8 with resort development marketing international on it.

9           We go to 2012--2010 and Mr. Aven prepared his  
10 own project overview and proposed business model. It  
11 appears to be superseded by Mr. Damjanac's business  
12 plan for Las Olas Beach Community. And that is the  
13 plan that Dr. Abdala relied upon for all of the--the  
14 unit sales, in essence, the footprint of the Project  
15 is what came from Mr. Damjanac's plan.

16           That's 9 1/4 years. We've got four different  
17 plans. None of them which worked. As you know, to be  
18 successful in business means you have sales. You have  
19 no sales; you have no business. And they tried to  
20 sell this on two occasions, and the sales were very,  
21 very thin, showing very little market interest in Las  
22 Olas.

1           Let's look at the evolution of the plan.

2           Look at the number of condo units in 2004 from  
3 Norton Consulting and EDSA, 345 units. We go to  
4 Mr. Damjanac's plan. And between the single-family  
5 homes, the condo units, the timeshares, and the number  
6 of hotel rooms, we have 708 units. That's 105 percent  
7 more than the professionals at Norton and EDSA  
8 recommended developing the property.

9           And look at the--how timeshare also becomes a  
10 huge portion of the business model as we go over time.  
11 There is none of it in the Norton Consulting/EDSA  
12 plan, and eventually it's the lion's share and a huge,  
13 huge driver of Mr. Damjanac's plan. Mr. Aven had a  
14 little bit of it in there also.

15           But it also focused on hotel sales.  
16 Mr. Damjanac expected an \$18 million sale in Year 2 on  
17 a hotel for 114 rooms that they had a single drawing,  
18 just a rendering of it. And it's planned to be built  
19 not on the concession area. It's on the parcel across  
20 the street, the 14,000 square-meter area that is not  
21 owned by the Claimants.

22           So, it's not where the hotel condos were--I'm

1 sorry--the hotel timeshare, 66 units at the beach. It  
2 was the next parcel back is where they planned. But  
3 they expected to sell an \$18 million hotel in Year 2  
4 when all they had was a rendering. And the first time  
5 it ever appeared in a plan was in Mr. Damjanac's  
6 December 2010 Plan.

7           Technical difficulty. We're back. All right.  
8 Sorry about that.

9           Now, if we look at the planned undeveloped  
10 land plummets. 2004 Plan had 43 percent of the land  
11 undeveloped, so lots of green space and bigger areas  
12 for people to enjoy. Mr. Damjanac's plan is the  
13 maximizer plan that fits as many people as you can on  
14 the plot of land, leaving 7.1 percent unoccupied.

15           So, therein is the magic of the unit sales is  
16 you put a bunch more--assume a bunch more people fit  
17 in the same space and multiply it by alleged market  
18 prices and you get a much higher value.

19           So, the total units, again, increase  
20 substantially. And if you add the hotel to that, the  
21 comparison would be 345 to 708 for a 105 percent  
22 increase.

1           The Claimants do not own all the lots on the  
2 Las Olas property. Again, I heard Dr. Abdala's  
3 testimony this morning which didn't seem to comport  
4 with the facts. In the red you can see that's the  
5 property not owned by the Claimants, and it's inside  
6 the area they're planning to develop. And it's a much  
7 larger number of lots than Dr. Abdala says he  
8 subtracted. We don't know if they're selling lots on  
9 the side, what happened. But they did not own those  
10 lots as of the date of the May 2011.

11           The green area is where they planned to build  
12 the hotel. I don't think there's a dispute about them  
13 not owning that land. And then there's a dispute  
14 about the ownership out of the concession, what can be  
15 done with the Beach Club and the hotel condos down  
16 there. And the blue signifies what's been sold  
17 subsequent to the filing of the--of the case.

18           So, again, just on--on square meters, it's  
19 22 percent overstated in terms of what the--you know,  
20 the land they have to sell from, you know, 2011  
21 forward.

22           The Claimants did not mitigate the risk of

1 investing in the hotel leisure industry.

2 Down on the left side of this chart shows the  
3 risk category being occupancy, product, and investment  
4 provider, developer, management company.

5 And then the Claimants' lack of experience and  
6 action where they failed to mitigate. And I'll walk  
7 through each point.

8 Under occupancy, the key to the success of the  
9 investment in achieving returns. Well, the Claimants  
10 failed in nine-plus years to make meaningful sales, so  
11 it's highly doubtful that occupancy is going to be  
12 successful.

13 Demand dictates whether the property can hit  
14 its occupancy targets. Well, they demonstrated low  
15 demand. And by their own admission, it was a dead  
16 market at the valuation time.

17 Their product investment provider. Clear  
18 responsibility of inability to provide ongoing  
19 investment. There's no trace of actual funds with  
20 these investors in terms of having the bankroll to  
21 build the common amenities, build the hotel, to build  
22 the other--the condos and things. So, you know, they

1 didn't appear to have the financial wherewithal at  
2 that point in time to really push the development  
3 forward.

4           The previous success of the investment  
5 property is critical. Had no success at Las Olas. In  
6 9 1/4 years of ownership to show no success--or  
7 anywhere else.

8           And for the developer, a track record of  
9 meeting build targets and standards. Well, they never  
10 developed a resort, and they lack any real progress  
11 over nine years at Las Olas.

12           The management company is essential to the  
13 success of the investment. In charge of the  
14 day-to-day running of the property, room rates, and  
15 occupancy. They have no management experience running  
16 a resort.

17           The track record and performance of the other  
18 properties managed by the company. They have no other  
19 properties managed.

20           So, they fail on every single element of the  
21 scorecard as to whether Claimants actually mitigated  
22 the risks in the hotel leisure industry.

1           Now, the particular risk factors at Las Olas.  
2 Again, they entered this with minimal, if any, due  
3 diligence and buying the property more on a lark.  
4 Evolving business plans with varying specification and  
5 longtime intervals between each version shows they  
6 weren't making progress.

7           They presented no evidence that a market  
8 exists for this project. In fact, their own  
9 contemporaneous evidence shows the market was very  
10 poor, no demand. Investors, developers, and  
11 management are comprised of generally the same group  
12 of individuals who lack experience in the local  
13 market, experience in the industry, proven track  
14 records, and international experience.

15           Claimants' backgrounds exhibit numerous red  
16 flags that would have concerned legitimate, diligent  
17 investors. Because this is a real estate investment.  
18 So, whoever you're going in with, you necessarily get  
19 tied together in their financing and their background.

20           Mr. Janney's background had red flags. He  
21 filed for personal bankruptcy in December 2015,  
22 primarily driven by real estate failures. Engaging in

1 conduct of questionable professional integrity. He  
2 failed to mention his involvement in Las Olas in his  
3 Federal bankruptcy filing. He has accusations against  
4 him on a personal level and accusations of defrauding  
5 donors of the World Hope organization. And we also  
6 saw hotel receipts for, you know, hotel stays for  
7 World Hope in Nairobi in the accounting documents in  
8 this case.

9           Now, the Aven family background and red flags.  
10 David Aven has no experience in resort development or  
11 management. He never invested outside of the United  
12 States prior to Las Olas, and he added no strategic  
13 value in the points I've got listed.

14           Samuel Aven, somehow the largest stakeholder  
15 with the \$700,000 claimed investment, granted a  
16 44 percent stake, yet there's no witness statement or  
17 testimony. He's got no known real estate experience  
18 and a passive investor with no strategic value.

19           Carolyn and Eric Park, they invested on the  
20 advice of David Aven. No known relevant experience or  
21 knowledge. And, again, passive investors.

22           Mr. Shiolen, no financial investment.



1 Instead, he was given lots by David Aven in exchange  
2 for marketing work which produced zero results. He  
3 also filed for personal bankruptcy.

4           And Mr. Raguso is the one person who looked  
5 like he had experience for the role he was slotted to  
6 do, which would have been helping construct the hotel  
7 and other common buildings; however, it never  
8 progressed to that level of services, yet he still has  
9 equity in the project even though he never worked on  
10 it.

11           Let's turn to damages and Dr. Abdala's flawed  
12 methodology. He applied a hybrid methodology based on  
13 the income approach, a probabilistic DCF, and market  
14 approach. Preexisting appraisal and comparables is  
15 what he's done. A probabilistic DCF is not  
16 appropriate. It was never a going-concern project.

17           The estimated cash flows for the new project  
18 in the pre-operational phase cannot be reasonably  
19 certain. You heard this morning Dr. Abdala took  
20 Mr. Damjanac's plan, used the units from that plan and  
21 he went--he ignored what was happening in Las Olas and  
22 allegedly applied his market values to that plan.

1 That's not reasonably certain. There's--the plan they  
2 were trying to sell at Las Olas was not selling.

3 There's no figures upon which to base critical inputs  
4 such as sales volume, unit sales prices, construction  
5 costs, and operational costs.

6 They just don't exist. Dr. Abdala applied a  
7 speculative probability of success of 68 percent  
8 versus 32 percent based on U.S. data of the real  
9 estate segment. Not a Greenfield resort that had been  
10 languishing for over 9 years.

11 So, he's basically telling you it's twice as  
12 likely to succeed by this alleged success. They  
13 didn't succeed in 9 1/4 years. But these things  
14 you're going to see going forward.

15 He presented two valuation dates. It sounded  
16 like this morning he abandoned the other ones and  
17 talked only about 2011. He intertwines own  
18 assumptions of the Claimants' 2010 quickly prepared,  
19 general, unsupported and untested business plan.

20 He estimated cash flows are unreliable and not  
21 reasonably certain. They contain numerous unsupported  
22 assumptions. And, again, he applied U.S. data to a

1 Costa Rican project for his supposed success ratio.

2 The discount rate does not properly account  
3 for the risks faced by Las Olas.

4 Valuation date I'll skip. It looks like he's  
5 gone back to the May 2011 date. But if we look  
6 at--now, these next two pages are pretty important to  
7 look at.

8 Under the lots, we look and see, under  
9 Dr. Abdala's world, that you have total revenue from  
10 the lots of \$37 million, up 15 million from  
11 Mr. Damjanac's own plans. So, Mr. Damjanac was  
12 assuming they would be selling 60,000 per lot on a  
13 go-forward basis, very close to the 55 that they were  
14 already selling, on the lots closest to the beach.  
15 That's what they sold historically were the lots  
16 closest down to the beach for, on average, 55,000.  
17 Mr. Damjanac assumed 60-. But he's inflated the  
18 revenue substantially on the lots, getting a net  
19 profit of \$28.5 million on the lots alone.

20 Then on the houses he's come down a little bit  
21 from Mr. Damjanac in terms of what he thinks that  
22 portion of the profit would be. But on a net basis

1 between the house and the lots, he's--he's much  
2 greater. It looks like Damjanac was looking at  
3 30 million. He's looking at \$47 1/2 million.

4 Now, when we look at the condos, it's quite  
5 interesting. He said this morning that it's normal  
6 that a condo would cost the same as a house. Condos  
7 normally cost less than the house. His own model  
8 shows that the--that the condo price is within \$2,000  
9 on the low end and almost identical on the high end.  
10 It just doesn't make sense. So, he ends up driving  
11 almost a \$23 million profit on selling these condos.  
12 Again, a higher profit than Mr. Damjanac had  
13 projected.

14 Look at the timeshares. I think he recognized  
15 how crazy Mr. Damjanac's estimate of timeshares were  
16 where he thought he could get \$139 million of profit  
17 off timeshares. Dr. Abdala reduced it, but he's still  
18 saying on \$40 million of revenue, they're going to  
19 make \$33.7 million of profit.

20 It just doesn't make sense. They didn't sell  
21 a single timeshare historically at this property, and  
22 you heard this morning for the first time that he had

1 assumed that they had joined an international group  
2 sharing timeshares. That was not in his evidence  
3 before today.

4 We get next the hotel. Dr. Abdala increased  
5 the sales price from Mr. Damjanac from 18 million to  
6 20.6, a hotel that they have a rendering of that was  
7 first in the business plan in December 2010. They  
8 assume it was going to sell in Year 2 for  
9 \$20.6 million and a profit of 9 million.

10 I mean--and this is the ultimate in a  
11 speculative claim. Each element of it, you go down  
12 it--if this was anywhere near worth \$103 million of  
13 undiscounted cash flow, somebody somewhere would have  
14 come along and tried to buy this, and we'd have some  
15 evidence that there would have been some interested  
16 investors that would have done exactly that.

17 We look at the historical versus projected  
18 sales. Here's the real world, what really happened at  
19 Las Olas. Dr. Abdala's numbers show it's 12 lots.  
20 I'm going to go with Mr. Aven and Mr. Damjanac's  
21 testimony of saying 16 lots sold to a grand total of  
22 12 different individuals, because some people bought

1 more than one.

2           Okay. They then assumed right away, the next  
3 year, they'd sell 42 lots, even though the evidence  
4 that they showed you said that three lots sold in  
5 January and nothing thereafter. But they're going to  
6 have a huge jump up in lots, up to 63 the very next  
7 year.

8           But then we add on top of that the house  
9 sales, they're now assuming--even though they were  
10 building no houses--Tory Mills is the only guy  
11 building a house there, but we've got to assume that  
12 someone is going to be building houses on top of these  
13 lots and half of them are getting built by a  
14 developer.

15           Then you go to condo sales. They're going to  
16 sell 8 of those right away in 2011. But then the  
17 magic comes in with the timeshare sales. All of a  
18 sudden there's going to be 330 weeklong sales of  
19 timeshares right away in that first year.

20           So, you can see reality on the left and the  
21 magic of the spreadsheet on the right.

22           Historical versus projected revenue, it's even

1 worse. You got, by all accounts, less than a million  
2 dollars of sales, less than 900,000 in 2010. But just  
3 the lots by themselves, we see them multiplied to more  
4 than 5 million in the very next year. We get a lot of  
5 revenue from building houses. The condo revenues  
6 would come right in. We then get timeshare revenues  
7 for \$15 million of revenue in the very next year.

8           So, we go more than 15 times what was going on  
9 in the real world in 2010. And then the very next  
10 year, 49.9 million. Add 2011 and 2012 together, it  
11 says they're expecting \$65 million of revenue in the  
12 first two years.

13           The discount rate. Again, I've got--the  
14 criticisms have been there. I won't spend time today  
15 going through them since I don't think it even  
16 applies. DCF is the wrong method, so, we don't have a  
17 place for discount rate in this case.

18           Dr. Abdala's value of Las Olas as a failed  
19 project. He refers to the value of the property as  
20 partially developed land with environmental and  
21 construction permits in place, a portion of the lots  
22 already sold to third parties and certain

1 infrastructure and urbanization works completed and  
2 others in progress.

3           Based on an appraisal prepared in 2009. And  
4 Dr. Abdala implemented adjustments for inflation,  
5 currency devaluation and partial urbanization. He  
6 ignored the change in the real estate market between  
7 2009 and 2011.

8           But the other thing I would say with this  
9 approach is necessarily the plan by the appraiser is  
10 taking into account the plan they had. If they're  
11 going to measure the urbanization of this property,  
12 it's under the plan the Claimants had when the  
13 appraiser came in.

14           Again, it's a very summary report, and you  
15 don't see the work of the appraiser, but it's clearly  
16 following the blueprint of whatever Claimants were  
17 planning at the time.

18           Applied unsupported 32 percent probability of  
19 failure. It's just the inverse of his unsupported  
20 68 percent based on the U.S. data.

21           His value of the land in the current state.  
22 This is where he takes his deduction. I don't think



1 it's really--he presents three comparables but doesn't  
2 identify them, so, we can't even, you know, find out  
3 if they're right.

4 Does not adjust between real estate market in  
5 2015 when he followed them back to May '11. He  
6 applied an arbitrary discount of 7.81 percent to the  
7 difference between listing prices in Key West,  
8 Florida, versus sales prices. That has nothing to do  
9 with what's going on in Costa Rica.

10 The basis of the claim in May 2011. This is  
11 something you'll have never seen before. The value of  
12 the Las Olas as a going concern at his discounted  
13 103 million down to 86, times a 68 percent probability  
14 of success, and the value of Las Olas as a failed  
15 project, 35.2 million times 32 percent equals  
16 69.6 million but-for expected value.

17 If this were a real damages method or a real  
18 valuation method, you would see it in court cases  
19 around the world. Every preoperational business would  
20 go to court saying, "I've been in a breach of  
21 contract. I've been harmed." And I'd say, "The  
22 probability of success in my industry is this much,

1 and let me do a DCF."

2 But that's not the way it's done. You  
3 wouldn't do this for a client asking you to help value  
4 something before you go buy it. This is just not a  
5 method that's used.

6 Equals--you know, minus half a million dollars  
7 for the value of the land without the permits equals  
8 69.1 million in damages plus 28.3 million of interest  
9 gives you 97.4 million of claim.

10 So, again, it's a methodology you've not seen  
11 before because it's not used out there. You'd have  
12 seen it in U.S. courts, UK courts. You'd have seen it  
13 in arbitration. But people try to show you get over  
14 the line to have an actual operational business to  
15 apply a DCF, and that does not apply here.

16 Here's the summary of Dr. Abdala's various  
17 claims. He went through them this morning. I won't  
18 belabor them.

19 Let's look at reasonableness check of the  
20 timeshare cost compared to local hotels. If we look  
21 and take the prices to rent a hotel for a week, which  
22 would be the comparable of saying I own a timeshare

1 that I share with 49 other people, you take 35 years  
2 of the timeshare, it would be less costly than renting  
3 at a hotel. Or 80 years until the timeshare is less  
4 expensive than the next most expensive.

5 That would just tell you that everything about  
6 their timeshare model makes no sense if it takes a  
7 lifetime to have the most expensive one be less  
8 expensive than the timeshare.

9 The invested cost approach. This is the least  
10 speculative valuation methodology. They're admittedly  
11 raw land and never a going concern. And it's the way  
12 businesses actually account for these properties in  
13 fair value statements. It's the way it's done.

14 The only prudent value-added expenses should  
15 be considered under the cost approach. And they've  
16 put forth--you know, they put forth no claim under the  
17 cost approach. They've said it's not appropriate, but  
18 they gave us the poorly organized box of documents.

19 As I said earlier, I think there's a  
20 significant chance that this will overstate the value  
21 because the drop in prices is the financial crisis,  
22 the lack of due diligence in the original investment,

1 multiple changes in the plans, the Claimants'  
2 backgrounds and lack of experience and track records  
3 in real estate, which is implicit in the plan that  
4 Dr. Abdala used to value, as well as the lack of the  
5 proper accounting system.

6           You know, people out there couldn't get  
7 comfortable with his project about what its financials  
8 were given they don't have contemporaneous accounting  
9 or financial statements.

10           So, in the invested cost method, I've taken  
11 account the original purchase price plus those  
12 expenses I've identified as being related. Given the  
13 invested amount of 3.5 million less the 22 percent for  
14 the property not owned brings a \$2.72 million invested  
15 cost approach.

16           The interest. I think asking for WACC is not  
17 appropriate. The prevailing rate from the study that  
18 we did at Credibility in 2014 is more the ten-year  
19 U.S. Treasury rate or the six-month LIBOR plus 2 is  
20 the, you know, most prevalent rates use by tribunals  
21 up through 2014. And that concludes my prepared  
22 remarks.

1 MR. LEATHLEY: Nothing further. Thank you.

2 PRESIDENT SIQUEIROS: Mr. Burn.

3 MR. BURN: Thank you, sir.

4 CROSS-EXAMINATION

5 BY MR. BURN:

6 Q. Now, Mr. Hart, we're very grateful for what  
7 are two very colorful reports that you've provided in  
8 these proceedings. I'm going to take some time to  
9 take you to various of your criticisms and your  
10 assertions in order to test them against the evidence  
11 and the testimony of Dr. Abdala.

12 Now, first of all, if one looks at your CV,  
13 and we can obviously go to the updated CV in your  
14 second report if we need to, you describe yourself--if  
15 you could confirm this--as a forensic accountant, and  
16 you say that you've testified in matters primarily  
17 relating to accounting, to damages, finance, fraud and  
18 valuation and the like. Does that sound fair?

19 A. Yes.

20 Q. So, one thing you're not is an economist; is  
21 that right?

22 A. That's correct.

1 Q. So, you don't have the training of an  
2 economist; is that right?

3 A. I have some economics training, but I'm not  
4 a--I'm not a degreed accountant--economist.

5 Q. Thank you.

6 And you're also not a real estate development  
7 expert, are you?

8 A. I have dealt with a lot of real estate  
9 development particularly.

10 Q. Sorry. If you could just focus on the  
11 question as I put it to you. You're not a real estate  
12 development expert, are you?

13 A. I'm going to explain to the Tribunal what my  
14 expertise is with real estate development.

15 Q. Well, that you could start by answering the  
16 question, and then if you need to extend, you can  
17 extend.

18 A. It's not for me to decide if I'm an expert in  
19 something or not. I have dealt with multiple real  
20 estate portfolios and multiple real estate projects  
21 over my 30-year career and many in the context of very  
22 large insurance companies that own substantial real

1 estate portfolios that I've been involved in valuing  
2 and helping work out.

3 Q. You're not an expert in resort development,  
4 are you?

5 A. No.

6 Q. So, you cannot give any evidence to the  
7 Tribunal as to what it takes to develop a resort  
8 development or a real estate development because those  
9 are matters outside your expertise; right?

10 A. No. Again, I was involved in two very, very  
11 large, what turned out to be successful resorts that  
12 were troubled real estate projects that I was directly  
13 hands-on involved in.

14 And I've, again, been involved in multiple  
15 cases and troubled situations that have involved real  
16 estate. So, that--that's my experience.

17 Q. Right. And I, as a jobbing lawyer, have been  
18 involved in numerous cases relating to real estate  
19 development as well. Doesn't make me an expert in  
20 what it takes to make a real estate development a  
21 success, does it?

22 I'm not talking about the valuation issues.

1 One would expect that you would have some degree of  
2 expertise in relation to valuation issues on real  
3 estate development projects.

4 I'm talking about what it takes to make these  
5 projects a success. And you do not have and cannot  
6 offer that expertise, can you?

7 A. As I said, I've been involved in multiple real  
8 estate projects, including large resorts, that I have  
9 been intimately involved in, workouts and other  
10 situations. So, that's for the Tribunal to decide  
11 what the expertise is.

12 Q. But you cannot, for example, speak to the  
13 practical issues of making a successful development,  
14 the planning, the permitting, the marketing, the  
15 construction, and so on. You can't speak from an  
16 expert's point of view on any issue like that, can  
17 you?

18 A. I was involved in virtually every one of those  
19 aspects, except for the permitting, with two very  
20 large, you know, multi-hundred million dollar resorts  
21 that my client was on the hook for.

22 Q. Now, if we were to turn to the list of



1 cases--and I would invite you now to turn to Tab 3 in  
2 the folder, where you'll find a copy of your second  
3 report.

4           If you turn to the CV, which I think you will  
5 find is at about--it's at tab--oh, sorry it's just the  
6 CV you've got in Tab 3.

7           So, if you look in Tab 3 there, you'll see  
8 your up-to-date CV. Is there anything that you need  
9 to add to this CV, just so we're fully up-to-date?  
10 You see the Poland case at the top there?

11          A. There are a number of cases since Poland that  
12 I've issued testimony in.

13          Q. Are there any investor state cases to add?

14          A. In that time frame I do not recall that there  
15 are new investor state in that window since  
16 September--since September 2016. There may have been.  
17 I just don't recall which reports went out in that  
18 time frame.

19          Q. But if we look at this list, and just starting  
20 chronologically in that first section at the  
21 bottom--so, this is on page 2 of 7 as it's marked.  
22 Sorry. Actually go to page 3 of 7.

1           So, what we see here is your experience as it  
2 develops over time. And what we see right at the  
3 bottom there is the first investor state case in which  
4 you were involved where you sat as arbitrator in  
5 relation to a case relating to Guyana.

6           A. Mm-hum.

7           Q. And then you have a couple of instructions on  
8 the part--on the side of--to Claimants, one in the  
9 Slovak/CSOB case, and then in the GAMI Investments and  
10 Mexico case. So, we see those two. And those--those  
11 cases began at the end of the '90s; correct?

12          A. Yes.

13          Q. And then if we work our way up that list and  
14 over to--over the page to page 2 of 7, we see the  
15 remainder of your investor state experience blended in  
16 with various commercial cases.

17                 Now, I've done a bit of arithmetic. I would  
18 invite you to accept my arithmetic. But we can go  
19 through it more methodically if you wish. I reckon  
20 that there are--after the--the GAMI Investments case,  
21 there are 19 references to investor state cases. Does  
22 that sound right to you?

1 A. That's in the neighborhood.

2 Q. Right. And every one of those remaining 19 is  
3 on the side of the Respondent. Does that sound right  
4 to you?

5 A. It does.

6 Q. So, it's fair to say--and this CV reflects  
7 what you show on your website; right?

8 A. As most recently updated. I mean, every  
9 expert report I send has an updated CV. I don't  
10 update the website as religiously as I do what gets  
11 attached to my reports.

12 Q. I think you do yourself down. I checked your  
13 website and it does have this information on it.

14 A. Well, it may have this one, but it does not  
15 have--I know it's not been updated in the last few  
16 months.

17 Q. So, if we were looking at your international  
18 work, especially bearing in mind how frequent the  
19 investor state instructions from Respondent states  
20 become in--as this list develops, it's fair to say,  
21 isn't it, that you are a respondents' expert? Yes?

22 A. No, that's just who has called and who has

1 engaged me. So, it's--I'm not a respondents' expert.  
2 I've done historically U.S. and some UK cases. I've  
3 done ICC cases, and I've done--

4 Q. There are commercial cases. I'm not talking  
5 about commercial cases.

6 A. Oh. If you're talking just in the--yes, the  
7 large number in investor state is on the respondent's  
8 side, but I'm not a respondents' expert.

9 Q. Right. But it's certainly fair to say that  
10 over the last 15 or 16 years, virtually your entire  
11 investor state practice, in fact your entire investor  
12 state practice and a good proportion of your  
13 international practice, has been involved in appearing  
14 as the damages expert on behalf of states. You would  
15 accept that?

16 A. In that portion of my practice, yes.

17 Q. Now, turning to questions of methodology now.  
18 If we could just turn to methodology. You would  
19 accept, wouldn't you, that the primary objective of  
20 the damages assessment exercise in this case is to  
21 identify the fair market value of the Las Olas  
22 Project; right?

1           A. Yes.

2           Q. And you would accept that the standard  
3 definition of fair market value is the price at which  
4 property would change hands between a hypothetical  
5 willing and able buyer and a hypothetical willing and  
6 able seller. Does that sound right to you?

7           A. With all of the requisite or all of the  
8 relevant knowledge on both sides.

9           Q. Right. And that's been widely endorsed in the  
10 international case law and in the practice handbooks  
11 and so on. So, I don't think that there will be much  
12 disagreement between us on that.

13           So, the benchmark for the quantum exercise  
14 here is the price at which a willing buyer and a  
15 willing seller would agree on the sale of the Las Olas  
16 Project outright; correct?

17           A. Yes.

18           Q. But your reports don't mention that this is  
19 the relevant benchmark, the transaction between a  
20 hypothetical willing buyer and a hypothetical willing  
21 seller, do they?

22           A. They don't need to. I know the standard.

1 Q. It's not a question of whether you know the  
2 standard. It's a question of the benchmark for the  
3 exercise you're undertaking for the benefit of the  
4 Tribunal.

5 Now, you would agree that it's important to  
6 keep that objective in mind all the way through the  
7 process; right?

8 A. Yes.

9 Q. But there's no dispute, is there, that the  
10 transaction being valued is a sale of the whole Las  
11 Olas Project? You've already accepted that, right?

12 A. Well, the whole, less what they don't own.

13 Q. Right. We'll leave that particular issue to  
14 one side. But it's a sale of the Project. Whatever  
15 they own, it is the--a way of identifying fair market  
16 value is to understand in these hypothetical terms  
17 what it would sell for at a particular point in time;  
18 right?

19 A. Yes.

20 Q. So, I'm sorry to belabor the point, but it is  
21 important that we get this absolutely fixed. The  
22 underlying premise of the valuation is that a

1 hypothetical willing buyer comes in and buys the whole  
2 project in May 2011; right?

3 A. Yes.

4 Q. And that means that the hypothetical buyer  
5 would then continue the Project development itself;  
6 right?

7 A. Yes.

8 Q. So, that obviously means that the sellers of  
9 the Project at that point in time fall out of the  
10 equation because they've sold their entire interest in  
11 the Project; right?

12 A. In a complete sale, yes.

13 Q. Which, in turn means, from the point of view  
14 of a valuing expert such as yourself, that we're  
15 looking for the objective parameters that feed into  
16 the valuation; right?

17 A. I guess I didn't understand that question.

18 Q. So, let me rephrase just to make it a little  
19 clearer perhaps. So, for the purposes of valuation,  
20 having accepted the objective and the importance of  
21 hypothetical willing buyer, hypothetical willing  
22 seller, in order to do that, in order to put meat on

1 the bone, what we need to do is find the objective  
2 data, objectively verifiable data that goes with that;  
3 correct?

4 A. Yes.

5 Q. Now, in your report, and in particular in your  
6 second report, you invest a lot of time and effort  
7 making comments about the subjective characteristics,  
8 capabilities, qualities and so on of the Claimants in  
9 this case and those associated with them. Do you  
10 accept that?

11 A. I do.

12 Q. But you've just accepted that they would fall  
13 out of the equation. That's the whole point of this  
14 exercise. They would no longer be relevant, they  
15 would no longer have anything to do with the Project  
16 in the hypothetical transaction. You've already  
17 accepted that; right?

18 A. However, in this case--

19 Q. Yes or no?

20 A. No, it's not a yes-or-no question.

21 However, in this case what's being valued is  
22 the business plan put together by those very same



1 people. So, it is--it's their work product that  
2 Dr. Abdala just said he put different prices on. It's  
3 exactly their layout, it's exactly their number of  
4 units that they thought they could sell.

5 So, it has their footprint on it, as well as  
6 the history of that particular land of people knowing  
7 that for nine-plus years that they owned it and sold  
8 nothing carries forward in the value of that land.  
9 It's been for sale lots for at least--

10 Q. Okay. Thank you. Thank you.

11 A. --for at least five years.

12 Q. Thank you for that. It was a yes-or-no  
13 question. You chose to not engage with the question.  
14 That's your prerogative, but it certainly gives me  
15 reason to cut you off.

16 And again, counsel on your side can certainly  
17 follow up on these matters later.

18 The business plan, the 2010 business plan, is,  
19 indeed, a relevant source of information for  
20 Dr. Abdala's valuation, but I put it to you that it is  
21 absolutely not the case and has never been the case  
22 that the valuation of damages in this case put forward

1 by Dr. Abdala is a valuation of the business plan, as  
2 you say. It is nothing of the sort.

3 A. He tested--

4 Q. He got certain information from the business  
5 plan, explains what it is, and then takes objective,  
6 verifiable data from the market. Would you accept  
7 that?

8 A. No. You must not have been listening to his  
9 testimony this morning. He said he took the units  
10 from their plan and he took what he believed to be  
11 market prices and applied them to it. So, he  
12 implicitly has used their business plan as the base of  
13 his valuation.

14 And he further went on to say that the willing  
15 buyer/willing seller is influenced by what the willing  
16 seller thinks the property is worth at that time.

17 And just as Mr. Damjanac testified to, he  
18 worked on a transaction in Costa Rica in 2006 where he  
19 said he had a willing buyer, but his employer was not  
20 willing to sell at the price that he bought. So, it's  
21 absolutely influenced by the value that the seller  
22 thinks they have, whether it's grounded in the real

1 world or not.

2 Q. Now, at various points in your two reports,  
3 you use some very colorful--some very disrespectful  
4 language in relation to Dr. Abdala's analysis.

5 You speak of him hiding things, sneaking  
6 things in, misleading, being deceptive, and so on  
7 multiple times. There are dozens of examples of you  
8 making all sorts of colorful accusations against your  
9 opposite number.

10 Now, I'll put it to you that it's nothing of  
11 the sort. He just approaches the valuation exercise  
12 in a particular way and does not consider the type of  
13 information that you point to as being relevant.  
14 You'd accept that, wouldn't you?

15 A. You can put it to me, but I don't accept it,  
16 no.

17 Q. Do you think you went over the top with some  
18 of your accusations against Mr. Abdala?

19 A. Not in the least. I've seen his work multiple  
20 times, and this is--

21 Q. So, you think he's been lying to this  
22 Tribunal?

1           A. I don't think he's been straightforward with  
2 this Tribunal about what the value of this property  
3 is. Not even in the least.

4           Q. You think he's been sneaking things in, hiding  
5 things, misrepresenting things? That's your honest  
6 evidence?

7           A. Those sound like your words.

8           Q. No, they're--I can take you to your words if  
9 you really want me to.

10          A. Sure.

11          Q. Perhaps we could turn in your second report to  
12 paragraph 60 where you use a phrase as follows: "This  
13 letter tells me the true state of Las Olas as a  
14 troubled raw land deal in a poor local real estate  
15 market, not an asset in the hospitality industry with  
16 no speculative elements as grossly mischaracterized by  
17 Dr. Abdala."

18                   Do you see that?

19          A. Yes.

20          Q. Paragraph 107: You say, "Las Olas and  
21 high-growth companies are in no way comparable, and as  
22 such, Dr. Abdala's attempt to mislead the Tribunal

1 should be disregarded."

2 Do you see that?

3 A. I do, and I believe that's an appropriate  
4 statement.

5 Q. If you turn to paragraph 150, we see the  
6 phrase, "Dr. Abdala sneaks in a miscalculation to  
7 increase revenues." Do you see that?

8 I could go on. But I put it to you, my  
9 characterization was perfectly fair that you have, on  
10 multiple occasions in your reports, used abusive  
11 language in relation to your opposing experts.

12 And I put it to you that that is  
13 inappropriate, unnecessary, and that all--the  
14 difference between you and Dr. Abdala is simply a  
15 difference of approach.

16 A. That may be your opinion, but it's not  
17 correct. Someone who takes a model like you got from  
18 Mr. Damjanac and then turns it into a \$100 million  
19 free cash flow project is misleading the Tribunal as  
20 to what the value of this property is. He's been  
21 misleading across the board.

22 Q. Well, I'll put it to you that the very same

1 accusations could easily be made about your analysis.

2 A. Is that a question?

3 Q. I don't think it is.

4 Now, you seem a little confused given what you  
5 already said in oral testimony this afternoon and what  
6 appears in your reports and what appears in your  
7 opening presentation, because you have already  
8 accepted that the basis of Dr. Abdala's valuation is a  
9 sale, a clean sale between a hypothetical buyer and a  
10 hypothetical seller. You've already accepted that.  
11 And you had to accept that because that's the correct  
12 way of understanding the assessment of fair market  
13 value.

14 But you have also referred, in your opening  
15 presentation today, and in your reports, to it not  
16 being a sale but being an investment, that we're not  
17 talking about a hypothetical buyer of the project,  
18 we're talking about somebody who comes in and invests.

19 You said in your opening presentation they  
20 would be tied together and that that is what makes it  
21 relevant to understand the qualities, the merits and  
22 demerits of the Claimants in this case.

1 I'll put it to you, given the obvious  
2 contradiction between those two positions, that  
3 whether somebody is a hypothetical investor or not is  
4 utterly irrelevant, isn't it?

5 A. That was an awful long speech. But, no, an  
6 investor is a different word for a buyer.

7 Q. No, it isn't.

8 A. It is in the world of finance. Someone who  
9 comes in and invests and buys a company is an  
10 investor.

11 Q. Mr. Hart, Mr. Hart, you have already accepted  
12 that this would be a clean sale, that it would be a  
13 simple sale of everything, the whole Las Olas Project.  
14 You made the point, "Yeah, but it wouldn't include the  
15 22 percent," and I said, "We'll come back to that."

16 It wouldn't include the 22 percent, but it  
17 would--you then accepted that it would be a clean sale  
18 of the entire project. Whatever they owned would be  
19 sold.

20 So, whether somebody is investing or not is  
21 not relevant. It's about a hypothetical buyer and a  
22 hypothetical seller.

1           Now, do you want to clarify things in order  
2 that we can try and deal with the contradiction  
3 between your different statements?

4           A. There is no contradiction. You can invest in  
5 100 percent of something, or you can invest in part of  
6 it. I mean, an investor and a buyer are the same.

7           You can buy shares, you know, some portion of  
8 them. You can buy assets. But you're an investor in  
9 either category. It ends up on your balance sheet  
10 once you have made the purchase in whole or in part.  
11 There's no contradiction.

12          Q. I suggest to you you're plainly confused as to  
13 the difference between, in this context, what a buyer  
14 is and what an investor is.

15          A. I am not confused.

16          Q. Now, in terms of Dr. Abdala's methodology,  
17 we've already established, and you've accepted, that  
18 the aim of the damages assessment exercise is to find  
19 the fair market value of the Las Olas Project as at  
20 May 2011.

21           Now, you say, Dr. Abdala has used the wrong  
22 methodology to reach--to identify that fair market



1 value; right?

2 A. Yes.

3 Q. And you characterize Dr. Abdala's approach as  
4 being a DCF valuation of the Project. Yes?

5 A. Yes.

6 Q. And just so we're clear--I think probably most  
7 people in the room have dealt with DCF analyses any  
8 number of times. But just so we're absolutely clear,  
9 in the simplest lawyer-friendly terms possible, a DCF  
10 is a technique that values a business, an asset,  
11 using--by arriving at a present value of estimated  
12 future cash flows; correct?

13 A. That's fair.

14 Q. So, the starting point is to profile those  
15 expected--the expected revenues and costs. Yes?

16 A. Yes.

17 Q. And then to build a model of the expected  
18 future income of the project; right?

19 A. Based on reasonable inputs, yes.

20 Q. Right. And one then makes adjustments for the  
21 time value of the money and for the risks that arise  
22 from making a forward-looking valuation. Does that

1 sound right to you?

2 A. Generally.

3 Q. So, the aim of a DCF is to work out the future  
4 income-generating capacity of a project and give it a  
5 value for that future income as at a particular date;  
6 right?

7 A. Starting from a business that has a track  
8 record, yes.

9 Q. Well, we'll come back to that.

10 DCF is obviously a commonly used example of an  
11 income approach to valuation; correct?

12 A. It is.

13 Q. The other primary approach is being market  
14 approaches or asset approaches; right?

15 A. Yes.

16 Q. And as you've already observed, you say that  
17 Dr. Abdala conducted DCF valuations of the Project.

18 Now, that's not quite right, is it? Because  
19 what Dr. Abdala does is do a DCF calculation that is  
20 one element that goes into his overall assessment of  
21 fair market value of the project. That's correct,  
22 isn't it?

1           A. In his hybrid approach as I explained to the  
2 Tribunal, yes.

3           Q. Because his overall valuation of the project  
4 does take account of a DCF calculation, but then  
5 combines it with an asset valuation, and then weights  
6 the two according to an overall--in order to arrive at  
7 an overall valuation; right?

8           A. No. It takes each separately, multiplies  
9 them, then combines them.

10          Q. Right.

11                 So, DCF is just one input into the overall  
12 valuation; right?

13          A. It's the driver, the big number.

14          Q. It's one element in the overall valuation;  
15 right?

16          A. It's the biggest one, yes.

17          Q. Thank you.

18                 Now, Dr. Abdala's methodology is supported by  
19 academic writing, specifically that of Professor  
20 Damodaran; correct?

21          A. So he says, but it's warned not to use the  
22 broad brush, which he's used here, in terms of the

1 application of the--of the approach. So--

2 Q. Right. Well, we'll come back to the reference  
3 to "broad brush" and your reading of the Damodaran  
4 analysis momentarily.

5 Now, perhaps you could just have to hand  
6 Paragraph 56 of Dr. Abdala's First Report, which is at  
7 Tab 5 of the file in front of you, and also have in  
8 mind--

9 A. Which paragraph?

10 Q. That's Paragraph 56 at Tab 5 and also Tab 6;  
11 you'll see a copy of the article written by Professor  
12 Damodaran. And specifically, I'd refer you to Page  
13 42.

14 So, you can see, at Paragraph 56 of  
15 Dr. Abdala's First Report, he describes the approach:  
16 "Damodaran's approach, which I adopt for this matter,  
17 is essentially an expected value calculation in which  
18 the expected transaction value of the business is the  
19 average value between an outcome that assumes success  
20 and an outcome that assumes lack of success weighted  
21 by the probability of success."

22 And he describes it with a mathematical

1 formula below that.

2           So--and he goes on in Paragraph 57 to say, "In  
3 other words, to value Las Olas as a preoperational  
4 business, I assess two values, the value assuming Las  
5 Olas ultimately evolves as a successful business,  
6 generating positive cash flows as a going concern,  
7 which are discounted to the valuation date at a rate  
8 reflecting industry risk, and the value assuming that  
9 Las Olas does not become a viable commercial  
10 operation."

11           Now, that's consistent, isn't it, with  
12 Professor Damodaran's article. Yes?

13           A. That's consistent with that part, yes.

14           Q. And you don't provide any alternative evidence  
15 as to financial writings that provide the Tribunal  
16 with anything different or that questions the  
17 Damodaran approach or anything like that. You haven't  
18 put forward anything of that type, have you?

19           A. No. Just criticize the application of his--of  
20 this one single paper.

21           Q. Right.

22           So--exactly. Your position is the DCF element

1 can't be undertaken because the inputs are too  
2 uncertain; right?

3 A. All of them, yes.

4 Q. But you would accept, as a hypothesis, that if  
5 the inputs are sufficiently certain, the DCF element  
6 can be used to arrive at a good valuation of an  
7 income-producing project which is being operated  
8 successfully.

9 You'd accept that, yes?

10 A. It's a big "if". Yes, if--you know, if you  
11 have reasonably certain inputs, DCF is the--you know,  
12 is an appropriate tool. But that's a--that's what you  
13 do all the testing for, to see whether you can use DCF  
14 or whether, very similar, you can use lost profits.  
15 You know, in a damages context, you've got to test to  
16 see how reasonable the inputs are to use that method.

17 Q. So it's just essentially a question of the  
18 inputs; make sure the inputs are solid, and you will  
19 get a decent valuation out of the process.

20 A. Well, it's typically the--it's more  
21 complicated than that because you typically have to be  
22 able to test history, the ability of that particular

1 business, and the steadiness of their--or first--in  
2 the first instance, their capability to make sales,  
3 because you don't value anything if you--if you show  
4 that it can't make a sale.

5           And then you want to be able to understand  
6 what kind of profit margins you would actually earn  
7 out of each segment of the business based on history;  
8 so that your history is going to inform your  
9 reasonable certainty in terms of whether or not the  
10 underlying plan and business model, whether you're  
11 building a factory or you're doing resort development.

12           Q. Right. And--but if the project isn't fully  
13 operational, there is a risk, isn't there, that the  
14 project might not succeed at all. So--

15           A. If--

16           Q. --in that circumstance, a willing buyer is  
17 going to take that into account in its valuation of  
18 something it might be willing to buy; right?

19           A. No. The--the rational, willing buyer is going  
20 to understand it's preoperational; and just as  
21 Mr. Aven himself said, that the lack of development--I  
22 mean, it's so undeveloped, it's worth less. So they

1 say this is a project that's not operational, and they  
2 wouldn't value it using DCF because every single input  
3 into it is a variable.

4 Q. Right. But Professor Damodaran chose--and you  
5 don't challenge it because you don't offer any  
6 alternative academic writings--a way of understanding  
7 that, rooting it in solid data and valuing  
8 preoperational projects, doesn't he?

9 A. Well, it's--it's got two defects with that  
10 statement: One, the preoperational based in solid  
11 data; and then, the lack of application of his theory  
12 in the real world.

13 Having been involved in the valuation of  
14 multiple companies in the real world, you know,  
15 portfolios in the real world, private equity deals in  
16 the real world, it's just not--this is not a  
17 methodology that's used in the real world. I've never  
18 seen it.

19 Q. Right. You've never seen it. I think  
20 that's--that's the relevant element to take away from  
21 that.

22 A. And I have never--I've never seen writings



1 about it by anyone else.

2 Q. Right. But as you say, you're not an  
3 economist, so you're probably not as aware of the more  
4 sophisticated economic techniques that are available;  
5 right?

6 A. He's a professor of finance, and I've been  
7 practicing as an accountant for 32 years and  
8 dealing--doing finance deals, leverage deals in the  
9 real world. If someone walked in and tried to sell  
10 you on this methodology, they would not get the  
11 business, in my opinion.

12 Q. Right. I'm not sure what your expertise is  
13 for that particular statement, but leave that to one  
14 side.

15 And you accepted already that if all of  
16 the--the inputs are solid, then it is possible to  
17 arrive at a valuation. I put it to you that all that  
18 Dr. Abdala has done is to take an asset and to look at  
19 what all of the relevant inputs are to go out and find  
20 market data on what those inputs would be and to  
21 derive a very solid valuation from that analysis.

22 Would you accept that?

1           A. No. He started and, with blinders on, ignored  
2 the sheer lack of sales of the real property. And  
3 then, in turn, the chairman was exactly right in terms  
4 of the value of the property sold in 2010 was at \$93  
5 per square meter and not at the 143 that he testified  
6 to.

7           So, he's put the blinders on to the only real  
8 evidence we have of success/failure in the fact that  
9 their own business plan, the one that he is valuing,  
10 said their plan to sell these at 40--at 50 to 70  
11 percent lower than market because they had a downscale  
12 product. And that's what he valued was that business  
13 plan, without taking into account that there was--the  
14 plan itself was downmarket. So, he's taken upmarket  
15 prices and tried to apply it to Las Olas prices.

16           Q. Right.

17           A. We know the real land there was not selling.

18           Q. Now, if we--if you want--have you got a copy  
19 of Dr. Abdala's presentation to hand--

20           A. I don't.

21           Q. --or do you want one to be provided very  
22 quickly?

1           Because you've just referred to an exchange  
2 between President Siqueiros and Dr. Abdala towards the  
3 end of Dr. Abdala's testimony, but you've provided an  
4 incomplete summary of what Dr. Abdala said.

5           If you turn to page--just one second.

6           So, if you could--when you eventually get  
7 it--apologies--can you turn to Page 27. This was a  
8 chart in the backup slides that Dr. Abdala referred to  
9 when answering President Siqueiros.

10          A. The ones he didn't show on the screen--or  
11 didn't show on the screen?

12          Q. These are the backup slides that did not show  
13 onscreen but he referred to when discussing this with  
14 Mr. Siqueiros.

15                So--and Mr. Siqueiros' question was, when one  
16 looks at the penultimate column, the price per square  
17 meter and looks in the 2011 period, one sees the  
18 values of land at that stage that are substantially  
19 lower than the \$170-odd per square meter that  
20 Dr. Abdala had derived from various sources.

21                And what Dr. Abdala said was, "Yes, that's  
22 right. At that point in time, there was indeed a low

1 price. But if one looks up the chart to the period up  
2 until the financial--the global financial crash, one  
3 sees much, much higher prices, going up to \$264 per  
4 square meter."

5 You see that?

6 A. I do. That's exactly how he answered the  
7 question.

8 Q. And then if one just flips back a couple of  
9 pages to Slide 24, you see--in green in the middle,  
10 you see Dr. Abdala shows his \$170 per square meter;  
11 and then over on the right, he's compared it with  
12 prices that have been enjoyed in the real world by  
13 projects in the area.

14 Now, El Místico, the one on the far right of  
15 that list, that project only began construction after  
16 May 2011. So that's a real-world project that began  
17 construction after the measures taken against Las  
18 Olas, they're completed, and that it's sold at almost  
19 \$200 per square meter in the real world.

20 Bearing all of that in mind, I suggest to you  
21 that when Dr. Abdala uses a price of \$170 per square  
22 meter, it is clear that it is a very reasonable,

1 pretty conservative estimate.

2 Do you accept that?

3 A. I don't. The comparable value, as been  
4 established here, is what did the lot next door sell  
5 for? I mean, is someone really going to move in and  
6 say, great, I paid--I paid three times--or, you  
7 know--what the guy next door paid for my lot?

8 That's not the way the--I mean, real estate is  
9 very localized in terms of values in neighborhoods.  
10 So, the fact that Las Olas was selling the--the plots  
11 closest to the beach for \$93 on average per square  
12 meter in 2010 is much more telling than what was sold  
13 somewhere else with an actual real development with  
14 actual, probably real financing, and a real chance of  
15 survival.

16 Q. Now, you've already referred to this in  
17 cross-examination today; but in your Second Report,  
18 you say that "Dr. Abdala chose to ignore the caveats  
19 presented by Professor Damodaran, and Professor  
20 Damodaran cautions that using sector data averages  
21 from a study as the probability of survival for an  
22 individual firm or project is, quote, 'painting with a

1 broad brush' and generalizing findings from a specific  
2 time frame to the firm or project in question."

3 Do you recall saying that in your Second  
4 Report?

5 A. I do.

6 Q. And you say that because of that caveat, that  
7 Dr. Abdala is wrong to, quote, "insist that this  
8 methodology is consistent with financial literature."

9 You say that; right?

10 A. Yes.

11 Q. But that caveat doesn't say what you say it  
12 says, does it? Doesn't have anything to do with the  
13 overall use of the methodology that Damodaran suggests  
14 as being appropriate, does it?

15 A. I think it does.

16 Q. Okay. Perhaps you could turn to a copy of the  
17 article. You'll find it at Tab 6 in the file before  
18 you.

19 A. Which Page?

20 Q. Page 42, I think.

21 So, if we look at the bottom of the first  
22 paragraph on Page 42 of the article--sorry. It's at

1 the--the first paragraph--the paragraph itself was  
2 started over the page. But the sentence I want to  
3 read to you--or the couple of sentences start, "For a  
4 software firm that"--

5 A. Which paragraph are you in? I'm just--

6 Q. So this is on Page 42. If you go back to Page  
7 41, you'll see that in the heading, "Survival," you'll  
8 see the subheading, "1, Sector Averages." And then he  
9 continues down, and just right at the end of that  
10 Subparagraph 1, he says, "We are painting with a broad  
11 brush in this case and generalizing findings from a  
12 very specific time period, 1998 to 2005, to all  
13 firms."

14 You see that?

15 A. I do.

16 Q. So that's what Professor Damodaran was talking  
17 about. He was talking about the broad brush in the  
18 context of--go back to the previous page--survival;  
19 right?

20 So, what he's saying is, when--when discussing  
21 the possible ways of assessing the probability of  
22 failure, that one needs to be careful. So, his caveat

1 is, when looking at issues of survival, there is a  
2 danger of using a broad brush.

3           So, I put it to you that what Professor  
4 Damodaran is saying is not that generally there is a  
5 danger of using a broad brush, but there is a danger  
6 in relation to the assumed survival of a company.

7           A. Well, that's exactly what we're talking about  
8 here. The 68 percent chance of survival is what he's  
9 put forward, and that's the broad brush he's painting  
10 with. He's saying from U.S. data with the real estate  
11 sector, 68 percent chance of survival, then applied to  
12 this particular point in time, to this Greenfield  
13 resort development in Costa Rica; that is the ultimate  
14 broad brush.

15           Q. Right. Okay. Well, I'm pleased we're  
16 actually of one mind on this. It's one element of the  
17 Damodaran--I'm sorry.

18                   Need some water?

19           A. Yeah, please.

20                   (Pause.)

21           Q. So it's--you would accept it's just one  
22 element of the Damodaran thesis that's--to which the



1 description "using a broad brush" relates. It's not  
2 the entire description, the entire thesis that he puts  
3 forward.

4 A. It's an element, but an awful critical  
5 element. When you're trying to talk about the  
6 survival of an individual firm, I would say the  
7 survival of that individual firm is much more  
8 dependent upon the business model as put together for  
9 that firm. The prospects of that firm, the history of  
10 that firm, the capital of that firm in looking at the  
11 real estate survival rate in the United States and  
12 applying it is the ultimate broad brush.

13 Q. Right. But--we've already gone to this, but  
14 the business plan of the company that owns the asset  
15 that's being bought is neither here nor there, is it?  
16 The business plan falls away because the hypothetical  
17 buyer comes in and does what it wants to do with the  
18 project.

19 A. In your hypothetical, that could happen;  
20 that's not what's happened in this case. Dr. Abdala  
21 valued their exact business plan. He took the exact  
22 density, the exact number of units, and went and took

1 prices that he applied to their business plan.

2           If a--if he'd come in and said, no, I assume  
3 this is a bad business plan, it doesn't work, and I'm  
4 going to do something else, that's different. But he  
5 has taken exactly their business plan, which was what  
6 he valued, and changed the prices.

7           Q. Now, in relation to the use of the DCF  
8 component in his valuation--I'll put it to you that  
9 Dr. Abdala mitigates the uncertainty that's inherent  
10 in any forward-looking valuation technique; but by  
11 accounting for that risk in the way he describes, that  
12 there is a percentage to it. He doesn't say that this  
13 project is bound to succeed; he says, looking at the  
14 data in the market, it has got a 68 percent chance of  
15 succeeding.

16           So, he's already taken the possibility of  
17 failure into account; you'd accept that?

18           A. He's applied a U.S. figure of the entire real  
19 estate industry, which is not Greenfield resort  
20 development in Costa Rica that had been languishing  
21 for over nine years. So that's--he put in a factor,  
22 but it's a complete guess; it doesn't--does not apply.

1 Q. Right. But it's certainly corroborated by  
2 real-world experiences of neighboring projects, all of  
3 which have completed, all of which have sold, and are  
4 successes.

5 So, the real world only corroborates precisely  
6 the analysis that Dr. Abdala puts forward.

7 A. That's not correct. He's, again, applied a  
8 success factor from the U.S. to this particular  
9 project. And who's to know how many tracts of land  
10 have been bought over time and someone had a dream to  
11 develop it into a resort and that dream failed?  
12 There's lots of big tracts of land for sale that  
13 people have bought and thought about that and failed.  
14 So, that logic doesn't follow.

15 Q. You'd accept, wouldn't you, that Dr. Abdala  
16 has gone out and researched unit sale prices,  
17 construction costs, operational costs, and so on, and  
18 has fed those into his report; yes?

19 A. He has--he has, in each of those areas, done  
20 some analysis. But what we have here is trying to  
21 take averages from 2015 of sales, applied--we've found  
22 individual properties that sold in that period of time

1 and assuming that 352 lots of land at Las Olas would  
2 sell at that price.

3           Because you found a transaction at that price  
4 does not bring you back to think that this densely  
5 populated plan that he valued is going to sell at  
6 those prices. You need to do a full comparable  
7 analysis to see how each of those prices compared with  
8 being offered in his business plan at Las Olas.

9           Q. Now, I suggest to you that what Dr. Abdala  
10 really did was to go to the 2010 business plan,  
11 identify--and also the Master Site Plan, and  
12 identified the basic description of the site, the most  
13 contemporaneous description of what was going to  
14 happen, in order to work out what--how this was going  
15 to develop.

16           He didn't adopt any other data from the  
17 business plan; right?

18           A. He adopted the number of units that were  
19 planned to be sold by Mr. Damjanac, and inherently, he  
20 was buying into the density that was going to be, you  
21 know, a 93 percent build on this property; and he also  
22 bought into the fact that Mr. Damjanac put a 114-room

1 hotel into the plan, planned to be built on land they  
2 didn't own.

3 Q. And you say he--Mr. Damjanac inserted it; but  
4 actually, the 2008 Master Site Plan prepared by--the  
5 architect--the architects Madrigal and Mussio,  
6 provides the density of development. So, by the time  
7 Mr. Damjanac arrived, it was already well-settled,  
8 wasn't it, how dense the projected development was  
9 going to be on-site?

10 A. He's the first one who quantified it all the  
11 way out. They may have put the Master Site Plan in,  
12 but it's the first attempt to quantify it into a  
13 business plan that I'm aware of. I think that  
14 Mr. Aven's attempt was kind of partial, and then  
15 Mr. Damjanac maximized every one of those lots in  
16 terms of his valuation.

17 Q. All right. Well--would it surprise you if I  
18 put it to you that the Málaga development, which had a  
19 smaller land area, had over 400 homes on it?

20 A. It depends upon how it's designed, and I don't  
21 know how much green space they had. If they were, in  
22 fact, stacking up condos, you've got more green space

1 in there. So, I don't know what their remaining space  
2 was after the plan.

3 Q. But the layouts and usage of the site, given  
4 the 2008 Master Site Plan as adopted and used over the  
5 course of the next few years, meant that the usage of  
6 the site wasn't an uncertain element; right? You can  
7 see from the 2008 Site Plan how the site was going to  
8 be developed; right?

9 A. Well, because there's a--a plan of how they  
10 planned to develop it doesn't make it at all certain.  
11 I mean, there's been an awful lot of failed real  
12 estate developments in the history of, you know, the  
13 world.

14 So, the fact that that site plan exists in  
15 2008 tells you that that's the basis of what--any  
16 appraisal that happened thereafter and also is the  
17 underlying basis of the failed sales in 2010.

18 Q. But the Tribunal's already seen evidence in  
19 the December Hearing showing that--a very significant  
20 amount of work had already been done--cutting the  
21 roads, shaping the land, terracing in certain areas,  
22 building drains, and so on.

1           So, far from this being speculative, the site  
2 was already very much taking shape by the time May  
3 2011 came around. You're aware that they had done a  
4 lot of that infrastructure work already?

5           A. I'm aware they've done some of that  
6 infrastructure work. I'm aware that Dr. Abdala seemed  
7 to have extracted from the only accounting document  
8 produced that he saw in this case and tried to do a  
9 rough calculation of how much of that had been done,  
10 which is, again, not the proper approach.

11           So, there was work that had gone on, but  
12 you're missing my point, which is--

13           Q. No--

14           A. No. You are missing my point of the  
15 development plan itself. Because someone says that  
16 you could have room for 708 different units to be sold  
17 does not mean it's nonspeculative. It means that  
18 somebody plotted it out on the land; it doesn't mean  
19 that somebody wants to buy those lots or buy the units  
20 put on those lots.

21           Q. Mr. Hart--Mr. Hart, the question I put to you  
22 was that the fact that a good deal of infrastructure

1 work had already been done on-site, consistent with  
2 the plans that had been in place for some years, shows  
3 that there is much less uncertainty as to what this  
4 site was going to be than you would represent to the  
5 Tribunal; do you accept that?

6 A. Not at all. Again, the number of times you'll  
7 see abandoned early-stage roads or sewer or electric  
8 poles and then abandoned, completely, developments,  
9 that happens all of the time. And I wouldn't say,  
10 from all the pictures and the other things that I've  
11 seen, that they were at all far advanced.

12 What I would say is that what was completely  
13 lacking was any investment in the actual common  
14 amenities, the beach club, the thing that actually  
15 draws somebody to coming by. The fact that you're  
16 cutting in dirt roads and putting in some sewers is  
17 not--is not telling.

18 Q. Okay. Can you turn to Tab 10 in the file in  
19 front of you.

20 Now, this is a copy of--

21 PRESIDENT SIQUEIROS: Mr. Burn?

22 MR. BURN: Yeah.



1           PRESIDENT SIQUEIROS:  When would be an  
2 appropriate time to take a small break?  I don't want  
3 to interrupt your--

4           MR. BURN:  No, no--

5           PRESIDENT SIQUEIROS:  But just whenever you  
6 think.  If you were thinking of continuing for some  
7 time, perhaps now would be a good time.  If it's a  
8 short time, then, you know, we could continue till  
9 then.

10          MR. BURN:  No, let's--let's--if you--

11          PRESIDENT SIQUEIROS:  If you want to conclude  
12 a question or so, please go ahead.  But--

13          MR. BURN:  Okay.  I'll be just two minutes, I  
14 think, and--

15          PRESIDENT SIQUEIROS:  That's fine.

16          MR. BURN:  --with one question, and then  
17 perhaps we'll take a break.

18          PRESIDENT SIQUEIROS:  That's fine.

19          MR. BURN:  Thank you.

20          BY MR. BURN:

21           Q.  Mr. Hart, this is a copy of CLEX-82; it's the  
22 first page of the valuation model that Dr. Abdala

1 provided.

2           Now, if you'd just run down the list on the  
3 left-hand side, you can see precisely what Dr. Abdala  
4 has done. On the first--first item, "Lot Pricing," if  
5 you see the lots and you see the pricing, you'd  
6 accept, wouldn't you, that that--his figures for that  
7 are drawn from market data, aren't they?

8           A. Yes, the market pricing is. That's where  
9 he's--

10          Q. That's all I'm asking.

11          A. Yeah.

12          Q. And then the development costs, you see he's  
13 referred to an Engineer Manuel Calvo as being the  
14 source of data there. So, he's explained a source of  
15 data.

16          A. Yes.

17          Q. And then for house rental prices, you see his  
18 house--the rental price assumption, a little way down?  
19 It's market data again, isn't it? And so on, we could  
20 run down all of these items, and we can see that  
21 Dr. Abdala has explained that this is all market data.

22                 So, given that his financial assumptions are

1 all stated of being researched, he's explained where  
2 he's got the market data from, the fairest  
3 characterization is that this isn't based on his--his  
4 valuation isn't based on the Claimant's projections at  
5 all; his valuation is based on market data; right?

6 A. That's not fair at all. No. It's--it's based  
7 on their plan, and he's then tried to change the value  
8 that we know Las Olas properties were selling for to  
9 be something else by this approach. And there's  
10 multiple assumptions in here, including the assumption  
11 that 90 percent of the homes would be built by Las  
12 Olas when they hadn't built a single home or shown  
13 that they had a capability or a building company.

14 So, I--it's full of baseless assumptions, and  
15 it is directly strapped on top of the 2010 Las Olas  
16 business plan.

17 Q. Well, Mr. Hart, I was going to leave it there.  
18 But, I mean, once again--I'm not sure whether it's  
19 deliberate on your part or it's just confusion on your  
20 part.

21 But, again, you are conflating what the  
22 Claimants and their people would have done with the

1 project had they continued uninterrupted by the  
2 Republic of Costa Rica with what a hypothetical  
3 willing buyer of the project would have done, bearing  
4 in mind market conditions.

5 Now--

6 A. And--

7 Q. What--when you say it's full of baseless  
8 assumptions and is directly on top of the 2010 Las  
9 Olas business plan, I put it to you that that is  
10 absolutely irrelevant for the purposes of this  
11 valuation, other than for understanding the basic  
12 components of the development.

13 A. No, that's false. Dr. Abdala's valuation--he  
14 had said it this morning. He used their units, and  
15 then he went and found what he thought to be market  
16 prices to apply it to.

17 So, it is directly intertwined with what  
18 Claimants are--you know, had available to sell is what  
19 he tried to value.

20 MR. BURN: Thank you, sir.

21 That concludes this part of my questioning, so  
22 I'm happy to break now.

1           PRESIDENT SIQUEIROS: Why don't we take a  
2 break for ten minutes? Is that fine? Thank you.

3           (Brief recess.)

4           PRESIDENT SIQUEIROS: Thank you for the break.  
5 Please continue, Mr. Burn.

6           MR. BURN: Thank you.

7           BY MR. BURN:

8           Q. Mr. Hart, I want to turn to your preferred  
9 valuation methodology for this case, the costs  
10 approach.

11           Now, you say that this is derived from the  
12 asset approach and say that it's commonly used for  
13 real estate valuations; right?

14           A. Yes.

15           Q. But you haven't provided any evidence to  
16 support that proposition, have you?

17           We can turn to your report, if you want.

18           A. No. I am recalling that there is the document  
19 of--regarding the appraisal of one of the properties  
20 in this case where they do, in fact, say that the  
21 approved--the preferred method in real estate, when  
22 you can't use a DCF, is real estate--I want to say

1 it's the HVC, but I don't recall it particularly.

2 Q. Yeah. I think you're probably talking about  
3 the HVA--HVS Report, which we'll come back to, and  
4 we'll see that it doesn't quite say what you'd like it  
5 to say.

6 Now, you quote the--at Paragraph 217 of your  
7 Second Report, the Litigation Services Handbook  
8 definition of the cost approach. And we can turn to  
9 that if you want or I can just give you the words, but  
10 what you say is--or what the Litigation Services  
11 Handbook says, and you quote it, "It's a general way  
12 of determining a value indication of an individual  
13 asset by quantifying the amount of money required to  
14 replace the future service capability of that asset."

15 Do you accept that quote?

16 A. I do.

17 Q. So, the Litigation Services Handbook looks at  
18 the replacement cost of an asset; right?

19 A. In that definition, yes.

20 Q. So--but your approach is to look at the amount  
21 that has been spent in terms of costs on an asset  
22 rather than the replacement cost; right?

1           A. No. I mean, in this instance, we have--starts  
2 with a transaction of the real property that we're  
3 trying to value here, which is Las Olas, plus the  
4 costs we can identify to develop it.

5           Q. Right. But it's fair to say that the  
6 Litigation Services Handbook does not accord with the  
7 approach that you take, does it? It talks of a  
8 replacement cost; right?

9           A. No. I mean, the cost approach--I mean, what  
10 they're saying there is the cost approach most  
11 oftentimes will replicate what the replacement cost is  
12 unless there's been a major change in the cost of,  
13 say, building a factory or some other type of asset.

14          Q. But I'll put it to you that the reality is  
15 that the costs spent are rarely an indicator of  
16 substitution value; would you accept that?

17          A. No. As was testified here today, you know,  
18 that you have the--you know, the purchase of the land  
19 in the first instance, and then whatever costs were  
20 incurred to get the permits or to do any improvement  
21 to the land would give you a good idea of what the  
22 fair value when you--when you bought the property,

1 plus the improvements, absent any other method to  
2 determine the value.

3 Q. Now, Dr. Abdala pointed to what Shannon Pratt  
4 said, and the quote from Paragraph 109 of Dr. Abdala's  
5 Second Report is, "In fact, accounting book value is  
6 not a business valuation method at all. The values  
7 presented on the cost-based balance sheet are usually  
8 not representative of a current economic value for  
9 business valuation purposes."

10 Now, you didn't provide any evidence to  
11 contradict that proposition, did you?

12 A. No, other than the use of fair value  
13 accounting, and the way that does work and it is, you  
14 know, fair value, that an asset is held on your  
15 balance sheet at the cost you've acquired it until  
16 it's moved into operation, it's in construction across  
17 the--across the spectrum; and then once you put it  
18 into operation, you are subjected to basically  
19 impairment testing using DCF once it's been put  
20 into--so, it is the--the fair value way to account for  
21 an asset when it's preoperational.

22 Q. Right. But let's test this in terms of some



1 real-world basics. And if I buy a house in, say--I  
2 don't know, the year 2005, and I pay \$1 million for  
3 that house, and in the intervening period, the next 11  
4 or 12 years, I spend, let's say, \$100,000 on that  
5 house.

6           If we followed your methodology, when I was  
7 looking to understand the value in 2016/17 of my  
8 house, I wouldn't go out to the market and check what  
9 the market told me about the values of houses in my  
10 area. I would look at my expenditure, and I would  
11 say, oh, "Well, my house is worth \$1.1 million now,  
12 because that's what I spent."

13           Doesn't sound very realistic, does it?

14           A. No, and in the hypothetical you just posed, if  
15 you're able to go out to the marketplace and say,  
16 "I've got comparable properties," which you do all the  
17 time in real estate appraisal, you'd be able to say  
18 I've normalized the number of bedrooms for the size of  
19 the lot, for the size of the building itself, and  
20 say--you can then do a comparable analysis that's  
21 truly comparable, and that's what you would do.  
22 That's not possible here with the data available on

1 Las Olas.

2 Q. Well, no. What Dr. Abdala demonstrates very  
3 well is that it is indeed possible, because there are  
4 all sorts of sources of market-verifiable objective  
5 data that can be used to understand the value of this  
6 asset in 2011.

7 A. That's absolutely false. I mean, again, it  
8 fails with the--the sales premise. The fact that this  
9 has been on the market for as long as it had, and they  
10 had sold so few lots, are showing there's something  
11 fundamentally unattractive about what they were trying  
12 to sell at Las Olas, and he valued that very same  
13 plan.

14 So, no, he's taken market data from a  
15 different place and a different resort--different  
16 resorts or properties, and tried to apply it to  
17 Las Olas's exact business plan. That's not  
18 demonstrated at all.

19 Q. No, I think you misunderstand, actually,  
20 Mr. Hart. And that's the criticism you make in  
21 respect to the income part of the equation.

22 His source of data in respect to the real

1 estate value part of the equation is an actual  
2 appraisal made by Mr. Calderón that is on the record  
3 and that he has updated in a proper and transparent  
4 fashion.

5           And so, what we can see is the Calderón  
6 appraisal provides a very solid real estate assessment  
7 of the value of that land. You'd accept that?

8           A. No. I would accept that there's a report that  
9 he provides his summary findings, and implicit in that  
10 report would be reliance upon the 2008 site plan that  
11 we were just talking about. So, he went and said,  
12 "Let's assume we can sell all of these lots if you  
13 develop it," because he's talking about the  
14 urbanization under that existing plan.

15           So, you know, it's, to me, not a valid  
16 approach because, again, it's been tested in the  
17 market that Las Olas was not selling lots. It fails  
18 because if he's talking about a \$35 million valuation,  
19 or 54-, that would presume these lots would sell, and  
20 the market in 2011 was dead.

21           Q. Again--

22           A. Wasn't selling.

1 Q. Again, you're confusing things here.

2 But perhaps we can look at the Calderón Report  
3 now. You'll have to forgive me, Mr. Hart and the  
4 Tribunal; I had not anticipated going to this in  
5 Cross-Examination, but there is a further exhibit to  
6 put in front of the witness which was not in the  
7 Cross-Examination bundle. Copies are just being  
8 distributed now with flags to the relevant page  
9 because it doesn't have page numbers. So I apologize  
10 for that.

11 So, this is Exhibit--I think it's CLEX-70.  
12 The page that is flagged--there are actually two  
13 reports in the same document. The first one doesn't  
14 relate to--right.

15 If we go to the second one of those--and I  
16 would take you to the green tab that is there, perhaps  
17 the 32nd page out of 53. I'm not asking everybody to  
18 read through the whole thing.

19 We can see 12th of November 2009. We see Mr.  
20 Calderón introducing his Report, and he talks of his  
21 methodology.

22 Now, the portion I would refer you to,

1 Mr. Hart, is the fourth paragraph down on that page,  
2 on page 32, 32nd page after 53, which reads as  
3 follows:

4 "With respect to the methodology used in our  
5 estimates, we talked about comparables--apologies for  
6 the English--but we talked about comparables within  
7 the Zone and with comparables that present the same  
8 type of characteristics, which is--by which we made a  
9 study of the present market of the Zone of Esterillos  
10 and compared present projects of the Zone, like Coast  
11 Reserve, Costa Esterillos, and Pacific, et cetera."

12 So, bearing that in mind, you would presumably  
13 not maintain your characterization, Mr. Hart, that Mr.  
14 Calderón was following the Claimant's business plan.  
15 You can see that he says expressly that he's looking  
16 at the broad state of affairs in the market.

17 Do you accept that?

18 A. He--he does, in fact, say he's looked at the  
19 comparables, but then he applies it to the property as  
20 designed by Claimants.

21 Q. Right. His appraisal is based on the value of  
22 comparable land, isn't it?

1           A. That's what he says, but the--he does apply it  
2 to the site plan at Las Olas.

3           Q. But it's not tied to a particular business  
4 plan, is it?

5           A. Well, it's tied to the site plan, and the site  
6 plan underlies the business plan.

7           Q. Right, but they're not the same thing. You  
8 may think this is pedantic, but it's important that we  
9 don't mislead the Tribunal by suggesting, as you did  
10 in your opening presentation, that Mr. Calderón's  
11 appraisal of the land was tied into the business plan.  
12 That's what you said.

13           A. It's tied into the--the site plan which  
14 underlies the business plan. That's where  
15 Mr. Damjanac takes it from.

16           Q. Now, you don't need to keep that document  
17 open. I don't have too many more questions for you.

18                        But your approach would have the Tribunal  
19 believe that the Claimants, having taken the project  
20 through permitting and start of construction and even  
21 some sales having begun, and with this prospect of  
22 significant income generation on the horizon, and

1 there are successful projects in the area, that they  
2 would have agreed to sell the project for the costs  
3 they had incurred up to that point.

4 That's what you're saying to the Tribunal,  
5 isn't it?

6 A. No. I'm saying something different. I'm  
7 saying the evidence shows that they were having no  
8 success selling, that the plan that they first put  
9 together didn't work; the second one was not working;  
10 and I've seen many times in the real world, people be  
11 happy to get their money back and get out. So, it  
12 would not be unusual for someone to say, "That's what  
13 I've put into it, I get paid that, and I walk away."

14 But all the indications of them trying to  
15 operate and develop this project was, they weren't  
16 developing it; they were having no success selling.  
17 It was a tiny amount of sales. They showed no ability  
18 to construct anything on the land except for a few  
19 roads and sewers.

20 So, that's the state of the project, not  
21 someone having put together a business plan that  
22 doesn't have a basis in the real world.

1 Q. Well, I put it to you that your approach  
2 commercially is utterly lacking in credibility.

3 Now, historic cost isn't a market valuation at  
4 all, is it?

5 A. It is where you fall back to if you can't do a  
6 reasonably certain approach to provide damages or  
7 prepare a value. So, that's where you go to.

8 And we're in a situation here where there's no  
9 way you can take this business that had failed and try  
10 to cast it as a profitable business into the future.

11 And that's why you revert to cost method, as  
12 Investment Treaty Tribunals do all the time, when you  
13 can't prove reasonable certainty and you can't use  
14 market or DCF methods.

15 Q. Now, bear in mind what you said at the outset  
16 of your Cross-Examination. You agreed with me that  
17 the object of this exercise is to identify the fair  
18 market value of this asset in May 2011.

19 What you've just said is that, well, what I'm  
20 suggesting is not a market valuation, but it's the  
21 best that could possibly be hoped for because of the  
22 subjective conditions of the project, as you perceive



1 them.

2 A. It's the best proxy for fair market value, and  
3 it's been widely accepted by Investment Treaty  
4 Tribunals when you've got a nonoperating business that  
5 has been harmed in some way.

6 Q. Now, you referred to the HVS valuation report  
7 for a Panamanian hotel. You refer to this at  
8 Paragraph 225 of your Second Report. And you say that  
9 that report provides support for your use of the cost  
10 approach; right?

11 A. Yes.

12 Q. I'd like you to turn to Tab 13 in the file in  
13 front of you. This is a copy of CLEX-69, which is the  
14 HVS Report to which you refer.

15 I believe the relevant part of the text in  
16 that very long Report is on page 129. So, in the  
17 conclusion section, the very last words of that  
18 conclusion section--because if you turn over, you can  
19 see that a new section begins--you see that in this  
20 Report relating to a completely different project, HVS  
21 indicated, "This estimate has been rounded to  
22 \$22.6 million. Due to the hotel's proposed status,

1 this value estimate is considered applicable to our  
2 appraisal analysis."

3 Do you see that?

4 A. I do.

5 Q. Just move on--flick over to Page 131. And you  
6 see on the left-hand side, there are, in bold  
7 subheadings, there is one that is marked "Value  
8 Conclusion."

9 Now, what we see here is interesting, because  
10 what the authors of the Report say is, "Careful  
11 consideration has been given to the strengths and  
12 weaknesses of the three approaches to value discussed  
13 above. In recognition of the purpose of this  
14 appraisal, we have given primary weight to the value  
15 indicated by the income capitalization approach."

16 Do you see that?

17 A. I do.

18 Q. So, actually, what HVS is saying is that  
19 the--what is to be preferred is an income approach,  
20 not a cost approach; right?

21 A. Well, that's--in this--when they've looked at  
22 the various strengths and weaknesses in this case,

1 where they're saying they felt they could do an income  
2 approach that was reliable and valid, they preferred  
3 it.

4 Q. Right.

5 A. But when they can't, that's why they're  
6 presenting the cost approach. But in this instance  
7 and in our case, you can't do an income approach  
8 that's valid given we have a failed project and a  
9 failed history.

10 Q. Right. But what I'm putting to you is that  
11 you are being very selective in the way you are  
12 referring to this report, because you have looked at  
13 the--the portion of text just above, which says "Cost  
14 approach," and it says this methodology is applicable  
15 to this property. What you omitted to point out to  
16 the Tribunal is that immediately below, the authors of  
17 this report say, "But the better method is the  
18 income-based approach."

19 You did not say the authors found that both  
20 could apply and that therefore, both being available,  
21 the income approach is to be preferred; you simply  
22 said the cost approach is endorsed by the HVS Report.

1 I put it to you, that is being selective, at best.

2 A. That may be your contention; I don't think so.

3 Q. But what we see with Dr. Abdala is that his  
4 approach performs both an income and an asset  
5 valuation and provides a mechanism for weighting them.

6 You accept that, yes?

7 A. He's not done a cost approach, no.

8 Q. He's done an asset approach and an  
9 income-based approach, and has weighted the two  
10 accordingly and has explained precisely how he's done  
11 that and on what basis.

12 You accept that, don't you?

13 A. I don't know.

14 Q. You don't accept that that's what he's done?

15 A. No. I mean, his appraisal is a--I mean, as  
16 you showed, trying to apply comparables, so they're  
17 both market approaches.

18 Q. Just one second.

19 (Pause.)

20 MR. BURN: No further questions. Thank you.

21 THE WITNESS: Thank you.

22 PRESIDENT SIQUEIROS: Mr. Leathley?

1 MR. LEATHLEY: We have no questions either.  
2 Thank you, sir.

3 PRESIDENT SIQUEIROS: Mark?

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR BAKER: In your survey of the  
6 investment jurisprudence awards that you were talking  
7 about earlier--

8 THE WITNESS: Yes.

9 ARBITRATOR BAKER: --could you give us an  
10 indication as to the number of cases that have used  
11 the cost approach?

12 THE WITNESS: Well, the--there were far fewer  
13 cases that used DCF when we did the study than we had  
14 suspected.

15 I don't have the exact percentage, but lots of  
16 the cases reverted back to the invested cost as well  
17 as lost expenses, you know, improper taxes--you know.  
18 This was just a study of the ICSID public awards to  
19 date at that time.

20 But the income approach was not in the--the  
21 majority. And a lot of them did revert. I mean, I  
22 can get that number out of the study, but, you know,

1 there is the summary in the back of the study that  
2 shows it.

3 ARBITRATOR BAKER: And so, from your  
4 perspective, the key point is to determine whether or  
5 not a particular project or a particular investment  
6 has a track record suitable for application of a DCF  
7 or a modified DCF approach; and if it doesn't, then  
8 your position is that the cost approach must be used.

9 THE WITNESS: Yeah, and it's completely  
10 consistent with what you do in a typical commercial  
11 case, where you say, is there historic history that  
12 you can look at, that you can rely upon, to reasonably  
13 project the future for, you know, a DCF approach, or  
14 can you find a truly comparable transaction to value  
15 something.

16 Absent that, courts fall back to saying, No,  
17 you really can't use lost profits and we'll award you  
18 your lost, you know, historic costs.

19 ARBITRATOR BAKER: So, in terms of using sales  
20 data in Costa Rica for similar projects, would it be a  
21 valid approach to take a look at what other  
22 master-planned developments of a similar size had done

1 from the standpoint of determining what would have  
2 been a comparable value, as opposed to using the  
3 cost-based approach?

4 THE WITNESS: Again, key in your question  
5 there is--you used "similar" twice. So, to say how  
6 can we apply and say are these other properties  
7 similar in the right dimensions to be able to say I  
8 can then come up with a cost.

9 But there is something seemingly defective at  
10 Las Olas. In May 2001, they say the market is dead.  
11 "Nothing's selling anywhere around," is the exact  
12 words used by Mr. Aven.

13 So, that's the market at the time. And that's  
14 the date we're valuing. So, that's the critical  
15 feature, as opposed to Dr. Abdala takes data from 2015  
16 with--and then backcasts it by just the simple rate of  
17 inflation.

18 ARBITRATOR BAKER: So, having looked at all of  
19 this data, in your view, what was this jinx? What was  
20 this thing, whatever it is, that made Las Olas hard to  
21 sell?

22 THE WITNESS: They didn't know what they were

1 doing. You've got people who are inexperienced and  
2 brought this--you know, just bought the land without a  
3 plan, and brought it to market in 2007, after years of  
4 holding it, and they sold three lots or four lots,  
5 whatever it was. And then the financial crisis came  
6 along; they don't have any capital.

7 So, they didn't do anything that a real  
8 developer would do, which would be truly cut the  
9 roads, build the beach club to attract people. And  
10 so, there you were with this property that they tried  
11 to sell lots, and they just weren't getting buyers.

12 And their business plan that they put together  
13 was for much more cut-down, you know, less luxurious  
14 properties, and that's what was, in fact, valued here.

15 So, you know, is there really a market for  
16 things that are 50 to 70 percent less than--less  
17 expensive in the market that are not luxury, that are  
18 very concentrated with 7 percent green space? And the  
19 market seemed to say no, with nobody buying in  
20 2010--or early 2011.

21 ARBITRATOR BAKER: Did you study or look at  
22 comparable sales in the 2011 period at other



1 developments as part of your exercise? I know it's  
2 not the subject of your report, but did you look at  
3 that data?

4 THE WITNESS: We looked to find them. But  
5 just as Claimants said themselves, the market was  
6 dead. They're basically saying there were no lots  
7 being sold, let alone anything that would be a  
8 comparable transaction.

9 ARBITRATOR BAKER: And so, in your view,  
10 that's why the most current sales data was used,  
11 because the market had recovered and, therefore, there  
12 was data that was available?

13 THE WITNESS: Well, again, I mean, taking data  
14 from across the--you know, the entire province and  
15 trying to apply it back to Las Olas as configured is,  
16 again, a broad-brush method. It's not saying, "Okay,  
17 I've now found--and I'm going to tell you, Tribunal,  
18 that this is a comparable property. And this is what  
19 the condo sold for. It's nearby. It has all these  
20 features that we can show you are the same."

21 It's saying, "Here's just, you know, houses,  
22 condos, lots in the entire province that sold." And

1 each one of those data points is really, you know, a  
2 sale of one. Or trying then to apply that to a--350  
3 lots. You know, 90 percent of those, you know, being  
4 houses they're going to put in, a whole bunch of  
5 condos.

6 So, it's the application that's problematic.

7 ARBITRATOR BAKER: Well, help me with this  
8 last question, then. So, under the academic writings  
9 that Dr. Abdala cited to us, there is a factor that is  
10 taken for the success or failure of a venture. And  
11 you're familiar with that; you've talked about that in  
12 your report.

13 So, isn't one way of looking at this that if  
14 you used a DCF method and you applied that failure  
15 perspective, what you're really saying is that you  
16 disagree with him on the 68 percent/32 percent split,  
17 and that you would have it--have those numbers at a  
18 90/10 or maybe 100 to 0? I don't know.

19 But, in other words, you get to your outcome,  
20 but you could also use the DCF method to get there  
21 because your point is, as I understand it, that there  
22 is something wrong with this property that did not

1 lead to successful sales.

2 THE WITNESS: Yeah, it's--well, A) the  
3 68 percent is just literally picked out of the air to  
4 try to apply to this property. You know, more  
5 relevant is that two of the key people involved  
6 here--the main person bankrupted himself through a  
7 number of real estate transactions. He is the main  
8 real estate person in this transaction.

9 So, they really don't have the experience of  
10 the way this was put together and the way this was  
11 developed. And, so, I wouldn't--and, so--but the  
12 underlying DCF--I mean, the first thing that you check  
13 with business is: Do you have sales? You know, can  
14 you show that there's demand for this?

15 In 2011, they say themselves there was no  
16 demand. So, if you've got no demand, there's no basis  
17 to say that I'm going to run a DCF. Because if you  
18 don't have sales, the rest of it is just nonsense.  
19 It's going to drive a loss. You'll get a negative  
20 number.

21 ARBITRATOR BAKER: Thank you, Chairman.

22 PRESIDENT SIQUEIROS: I have no questions,

1 Dr. Hart. Thank you.

2 THE WITNESS: Thank you.

3 PRESIDENT SIQUEIROS: And you are released.

4 So, before we go to any Closing Statements,  
5 could you advise us, Francisco, how we're doing with  
6 the allocation of time? And based on that, the  
7 parties may wish to consult with each other.

8 SECRETARY GROB: Sure. The Claimants have  
9 used 152 minutes. So, that means that they have 28  
10 minutes left. And the Respondent has used 174  
11 minutes, meaning that they have 6 minutes left.

12 MR. BURN: Just to confirm, I'm perfectly  
13 happy with an additional 15 minutes on the other side  
14 because that was afforded to us last time.

15 SECRETARY GROB: In which case they would have  
16 21 minutes left.

17 MR. LEATHLEY: Thank you very much.

18 PRESIDENT SIQUEIROS: So, are you ready to  
19 proceed now? Okay. Are the transcribers and  
20 interpreters also ready? If we are, then let's go on.

21 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

22 MR. BURN: Members of the Tribunal, you have

1 heard today from Mr. Briceño, the municipal auditor of  
2 Parrita, and you've heard from Dr. Abdala, and from  
3 Mr. Hart, the quantum experts engaged by the Parties  
4 in these proceedings.

5           In these short Closing submissions, I'll take  
6 you to some of the key points arising from both  
7 Mr. Briceño's evidence and from the quantum evidence.

8           Mr. Briceño I will turn to first. You've now  
9 heard from him in person. He was the municipal  
10 auditor of Parrita at the time of the Respondent's  
11 unlawful actions in relation to the Claimants'  
12 investment.

13           The examination he has undergone today reveals  
14 Mr. Briceño to be a careful and knowledgeable official  
15 who took his professional role as auditor and the  
16 responsibilities of his public office very seriously.  
17 And it's obvious that he simply has nor has ever had a  
18 horse in this race.

19           The Respondent argues that Mr. Briceño's  
20 findings have no bearing on Costa Rica's liability  
21 under the DR-CAFTA treaty because he is allegedly just  
22 a low-ranking employee whose recommendations are not

1 binding and have no bearing on the rights of third  
2 parties. I'll put three points to you in response to  
3 that.

4 Article 39 of the Internal Control Act, which  
5 governs people sitting as municipal auditors,  
6 establishes administrative liabilities for  
7 Municipality employees if they unjustifiably decide  
8 against implementing an auditor's recommendations.

9 So, his recommendations were, in effect,  
10 binding as a matter of Costa Rican law.

11 Second point. The Respondent's noncompliance  
12 with Article 39 of the Internal Control Act has not  
13 been raised as a DR-CAFTA breach, so the Respondent's  
14 criticism misses the point in any event.

15 Thirdly, Mr. Briceño's statement was presented  
16 to the Tribunal because it provides that rarest and  
17 most precious of things, the evidence of an objective  
18 and professionally knowledgeable observer of  
19 contemporaneous events.

20 He is and was quintessentially independent and  
21 objective. You heard him confirm when challenged that  
22 he had not met the Claimants, he did not know the

1 Claimants. He was aware of Mr. Damjanac, somebody who  
2 lived in the same community as him, but no more than  
3 that. And he describes to you having seen him in an  
4 office during a site visit with other Municipality  
5 employees.

6 This is somebody who had no connection to the  
7 Claimants whatsoever. And indeed, the very lateness  
8 of his being tendered as a witness in these  
9 proceedings only confirms that. The Claimants, and  
10 therefore we as the Claimants' lawyers, had no idea of  
11 Mr. Briceño before trolling through the document  
12 production provided by Costa Rica. They knew of his  
13 existence. They knew he had relevant information. We  
14 didn't.

15 Perhaps the most important aspect of  
16 Mr. Briceño's testimony is that it reminds us of an  
17 undeniable weakness in the Respondent's case. I'm  
18 talking about the gaping hole in the evidentiary  
19 record. There are no witnesses from the ministry that  
20 was actually responsible for issuing Environmental  
21 Viability permits: SETENA.

22 SETENA is an agency whose officials served the

1 Investors professionally and in good faith and from  
2 which, certainly, no solicitations for bribes were  
3 made. SETENA is the agency whose officials were all  
4 inexplicably absent from these proceedings. It's a  
5 point I've made before, but it's a point I will  
6 continue to make to you: That relevant witnesses have  
7 been kept from you, and that speaks volumes in terms  
8 of liabilities in these proceedings.

9 Lest we forget, SETENA is also home to the  
10 officials who counsel for Costa Rica now claimed were  
11 duped, even defrauded by the Investors. Indeed,  
12 that's the very crux of the Respondent's defense. It  
13 paints a picture of deceitful foreigners defrauding  
14 SETENA officials whose greedy plans for the utter  
15 despoliation of a pristine wetland were foiled by the  
16 heroic efforts of a small band of officials:

17 Mr. Martínez, Mr. Bogantes, Hazel Díaz, and Mónica  
18 Vargas.

19 Of course, Mr. Bogantes was the official who  
20 sought to take advantage of the opportunities that  
21 existed in the tangled web of rules and regulations  
22 and extorted bribe--in an attempt to extort bribes.



1           And Mónica Vargas, whose work Mr. Briceño had  
2 to analyze--well, we all enjoyed the extreme good  
3 fortune of having found Mr. Briceño, a retired  
4 municipal auditor, whose unimpeachable evidence was  
5 that Ms. Vargas and the Municipality acted illegally  
6 and in gross violation of the procedural rights of the  
7 Investors.

8           There were important details in Mr. Briceño's  
9 evidence that ought not to be lost in the haze of  
10 cross-examination. Let's just quickly touch on a few  
11 of them.

12           Mr. Briceño's high standing as an employee of  
13 the Municipality of Parrita and his excellent working  
14 relationship with his colleagues was in evidence  
15 before you. His exceptional performance record was in  
16 evidence before you. The huge number of municipal  
17 employees who wrote in support of him when he resigned  
18 in 2012 is in evidence before you. And the fact that  
19 the Mayor and Municipal Council were prepared to  
20 recognize their own shortcomings and to even give  
21 assurances as to their future conduct in an effort to  
22 persuade him to stay. You'll recall his evidence on

1 these points.

2           But the dysfunction and inertia that  
3 Mr. Briceño uncovered at the Municipality was what  
4 was--is what precipitated his first attempted  
5 resignation in 2012. He did leave for good in 2013  
6 because the situation had not improved.

7           One of the cases of maladministration that  
8 vexed Mr. Briceño, as the Municipality's auditor, was  
9 the Las Olas file. It wasn't the only thing, but it  
10 was one of them. And it was in 2011 that Mr. Briceño,  
11 an independent auditor with oversight of the  
12 Municipality, concluded that the Municipality's  
13 decision to shut down the project on the basis of a  
14 meeting with and a couple of communications from  
15 Mr. Bucelato was unlawful.

16           This was the contemporaneous finding of an  
17 independent government-appointed auditor that the  
18 Respondent violated its own laws by closing down Las  
19 Olas on the basis of little more than supposition and  
20 without regard to the Claimants' due process rights.

21           It's not the post facto evidence of--of the  
22 official whose conduct he rightly impugned or of a

1 senior official, such as the country's sitting  
2 Attorney General provided exclusively for the purposes  
3 of defeating a CAFTA claim.

4 For the avoidance of doubt, Mr. Briceño's  
5 contemporaneous review of the Las Olas case concluded  
6 unequivocally that the Municipality had acted  
7 unlawfully.

8 First, in suspending Las Olas's construction  
9 permits and then in failing to give effect to SETENA's  
10 resolution reinstating the Environmental Viability for  
11 the Project. And that was on the 6th of November,  
12 2011.

13 Mr. Briceño also made three recommendations to  
14 the Mayor and to the Council at the time, none of  
15 which had been implemented by the time of his final  
16 resignation. Even today, only one of those  
17 recommendations has received partial implementation.

18 He ordered the Municipality to reverse its  
19 suspension of the Las Olas permits which Mr. Briceño  
20 considered to have been undertaken without any basis  
21 in law. He ordered the Municipality to respect  
22 SETENA's resolution reconfirming the Environmental

1 Viability for the Project as it was legally bound to  
2 do, and he ordered the establishment of an  
3 interdisciplinary commission which he said should  
4 include members of the--developers as members to  
5 expeditiously resolve any contentious issues.

6           It's only that last one that has been given  
7 any effect, but it was a commission without the  
8 developers.

9           We might just pause for a moment to consider a  
10 question. Query whether Mr. Briceño hasn't just  
11 overwhelmingly demonstrated that he possesses a  
12 significant amount of relevant firsthand evidence that  
13 bears directly on the case. So, why didn't the  
14 Respondent offer as witnesses the SETENA officials it  
15 alleges to have been originally duped by the  
16 Investors?

17           Where is Sonya Phillips, the SETENA official  
18 who issued the binding declaration reaffirming the  
19 original findings of viability on 11 November 2011?  
20 Not just after all of Bucelato's allegations had been  
21 aired, but even though Mr. Martínez's witch hunt was  
22 in full stride.

1           Similarly, instead of asking Mr. Briceño about  
2 various nonbinding SINAC reports, the Respondent might  
3 have asked him about Resolution 2850-2011 from SETENA.  
4 Rather than assisting this Tribunal by making  
5 available witnesses under its control who possess the  
6 best evidence for a resolution of this case, the  
7 Respondent has opted for unjustly impugning  
8 Mr. Briceño's honor and professionalism.

9           The Respondent claimed that Mr. Briceño  
10 overstepped his bounds to become a de facto  
11 co-administrator, but the evidence just doesn't bear  
12 this out, even if it were relevant.

13           The Respondent has challenged Mr. Briceño's  
14 objectivity and independence, but its attempts to  
15 paint him as a political partisan obviously fell flat.

16           The Respondent stepped more lightly today in  
17 respect of Mr. Briceño's resignation attempt probably  
18 because they saw the folly in challenging the  
19 principal decisions of a manifestly honorable  
20 professional.

21           The Respondent's unfortunate attempt to attack  
22 Mr. Briceño's pension entitlement also fizzled out

1 during cross-examination.

2           So, in summary, none of the Respondent's  
3 allegations concerning Mr. Briceño withstand the  
4 slightest scrutiny. The Tribunal should recognize  
5 them as just another attempt to revamp the historical  
6 narrative recasting itself as the innocent victim of  
7 the Investors' so-called trail of illegalities.

8           In much the same way that the Respondent  
9 failed to impugn Mr. Briceño's character and  
10 credibility, we submit that the same is true of the  
11 efforts the Respondent has undertaken to blacken the  
12 names of Mr. Aven and other investors, especially  
13 given that it failed to produce any witnesses from  
14 SETENA who could have spoken to this alleged fraud  
15 perpetrated on them.

16           It's, therefore, my final submission in  
17 relation to Mr. Briceño that the Tribunal ought to  
18 draw an adverse inference against the Respondent for  
19 its failure to produce witnesses from SETENA.

20           We submit that if Sonya Phillips, the SETENA  
21 official responsible for issuing the 21 November 2011  
22 declaration, had been made available to the Tribunal

1 by the Respondent, her evidence would have clinched  
2 the fact that work on the Las Olas Project should have  
3 been back underway by the end of 2011.

4           Turning to damages. You've heard today  
5 evidence from two very contrasting experts. We don't  
6 have time to discuss all of the issues raised in oral  
7 evidence or in the expert reports, but I will look  
8 briefly at some of the key points that arise from the  
9 evidence put forward by the experts.

10           The contrasting approaches of Dr. Abdala and  
11 Mr. Hart are clear from the expert reports they have  
12 filed in these proceedings. But today's live  
13 testimony emphasized what should already have been  
14 evident from the written reports. Dr. Abdala has  
15 presented logical, defensible, and measured evidence  
16 rooted in financial literature and scholarship and  
17 objectively verifiable market data.

18           By contrast, Mr. Hart, for the most part  
19 eschews scholarship, relying instead on saying he  
20 thinks Dr. Abdala's approach is wrong without ever  
21 providing a cogent reason why or supporting that  
22 opinion with authority from the financial literature.

1           Many Claimants claim damages based on their  
2 own plans and projections. But if these Claimants had  
3 done that in this case, they would be claiming, as a  
4 minimum, \$150 million.

5           The Claimants will never get what they were  
6 expecting to get from this Project. They've been  
7 denied that.

8           What they are claiming now is the market value  
9 at the time of the Measures, having been denied the  
10 possibility of completing their Project and enjoying  
11 the benefits of that.

12           They have formulated that market value through  
13 the work of Dr. Abdala in a conservative manner to  
14 ensure it is rooted in the market. This is what  
15 Dr. Abdala does. He puts together a careful valuation  
16 model. He roots it in market data and financial  
17 authority, and he finds a fair market value for the  
18 Project.

19           The noise generated by Mr. Hart lacks  
20 credibility and has been put forward in a self-serving  
21 manner and with no attempt to assist the Tribunal in  
22 arriving at a fair market value.



1           Mr. Hart's expert report provides an extremely  
2 Respondent-friendly analysis, which he combines with  
3 numerous ad hominem attacks on witnesses and throwing  
4 dirt to distract attention from the real issues.

5           The fundamental aim of the quantum exercise in  
6 this case is to arrive at a fair market value for the  
7 Las Olas Project immediately before the Measures  
8 complained of, namely May 2011.

9           It's not disputed, nor could it be, that the  
10 fair market value is measured by the price a willing  
11 buyer and a willingseller would agree for the sale of  
12 that project.

13           The concept is not controversial, but it is  
14 critical to the quantum exercise. It's the question  
15 the Tribunal will need to determine. What price would  
16 a willing buyer and a willing seller have agreed?

17           Mr. Hart's approach is to assess the absolute  
18 lowest price a willing buyer might think about  
19 offering to purchase the Project, the amount of money  
20 that the Claimants have sunk into the Project.

21           In a very distressed situation, that might be  
22 something a seller would consider. But then that

1 wouldn't be a willing seller. That would be a seller  
2 under compunction, under compulsion to sell.

3           There is no conceivable scenario in which a  
4 willing seller would agree to sell the Project for  
5 that amount of money.

6           The approach Mr. Hart advocates ignores the  
7 market value of the physical land and the permits that  
8 the Claimants had obtained. His approach assumes the  
9 value of the land is the same in 2011 as it was in  
10 2002 when the Claimants purchased it.

11           Clearly, at an absolute minimum, a willing  
12 seller would only agree to sell if it received the  
13 market value of the physical land at the time of the  
14 sale.

15           That's assessed by a land appraisal.  
16 Dr. Abdala's approach uses a third-party land  
17 appraisal as part of his analysis.

18           The approach Mr. Hart advocates  
19 clearly--sorry--also ignores the income-earning  
20 potential of the Project. It's not credible to  
21 suggest that a willing seller would sell an  
22 income-producing project without any consideration of

1 the potential value in the sale price. The seller  
2 would simply say no to the sale and continue to  
3 develop itself.

4           So, straightaway, it's clear that Mr. Hart's  
5 approach does not accord with the aim of the quantum  
6 exercise. He's not trying to find the market value of  
7 the Project. Quite transparently, he is trying to  
8 find the lowest possible number. It's not a valuation  
9 of the Project, it's a valuation of what he thinks the  
10 Claimants spent.

11           Mr. Hart can only put this approach forward in  
12 the first place by committing two sleights of hand.  
13 First, he doesn't establish, anywhere in his reports,  
14 the fundamental parameters of the exercise he's  
15 undertaking. He doesn't spell out that his job is to  
16 assist the Tribunal in determining the fair market  
17 value of the Project. And he doesn't spell out that  
18 this is achieved by finding the price at which a  
19 willing buyer and a willing seller would transact.  
20 This enables him to slide past this crucial step in  
21 the analysis.

22           And, secondly, he describes three valuation

1 approaches, income, market, and asset approaches. And  
2 he says he will adopt the asset approach. But--and  
3 here is where the sleight of hand comes in. He  
4 doesn't actually perform an asset valuation of the  
5 Project.

6 Ignoring the very definitions he cites,  
7 himself, from the financial literature, he says that  
8 his cost approach is a variation on the asset  
9 approach.

10 Quite simply, his approach is not an asset  
11 valuation at all. It does not seek to value the  
12 assets of the Las Olas Project. It merely values the  
13 funds the Claimants have spent, which is not the same  
14 thing at all, when only he has to look at the fiscal  
15 land itself to realize that. And, of course, the  
16 physical land is only one asset of the Las Olas  
17 Project.

18 It's obvious to anyone who has ever bought a  
19 property that the market value of that property bears  
20 no relation to the value paid for it. The value might  
21 go up, it might go down, or it might stay the same.  
22 But it requires an appraisal at the time of sale to

1 know the market value at that point in time. Mr. Hart  
2 does not do that.

3           By contrast to Mr. Hart, Dr. Abdala's approach  
4 throughout is conservative, thoughtful, responsive to  
5 valid criticism and above all, seeks to find an  
6 objectively sustainable market value. He makes  
7 adjustments when they're needed to increase certainty  
8 and conservatism, to ensure he's not presenting a  
9 price at which a willing buyer would refuse to  
10 transact.

11           He presents a damages analysis, which is much  
12 reduced from the Claimants' projections of what was  
13 achievable with the Las Olas Project, and, therefore,  
14 much reduced from what a willing seller in May 2011  
15 would have used as the value of the Project.

16           But crucially, it is a value which both a  
17 willing buyer and a willing seller would have agreed  
18 because it takes account of both the potential of the  
19 Project and the risks inherent in pursuing it to  
20 completion.

21           You heard Dr. Abdala explain clearly the  
22 difference between risk and speculation. All

1 transactions involve an assessment of risk and a  
2 pricing of risk. That does not make all transactions  
3 speculative.

4 This approach intuitively describes the  
5 process a willing seller and a willing buyer would go  
6 through when assessing the value at which they would  
7 be prepared to transact. It's logical and rooted in  
8 the real world, but it's also supported by the  
9 financial literature and scholarship.

10 Dr. Abdala describes all of this in detail,  
11 and Mr. Hart cannot point to any scholarship that  
12 casts any doubt on the theoretical basis for  
13 Dr. Abdala's approach.

14 Mr. Hart tries to deflect attention from the  
15 fundamental/philosophical problems with his analysis  
16 by spending a great deal of time, in his Second Report  
17 and in today's evidence, in arguing that the Claimants  
18 didn't have the requisite experience or expertise to  
19 develop the Project successfully.

20 It's notable that Mr. Hart's lengthy and  
21 highly prejudicial assessments of the Claimants  
22 appeared only in his Second Report, despite the fact

1 that virtually all of the material on which he based  
2 his criticisms was available to him when he was  
3 preparing his First Report.

4           Mr. Hart clearly didn't consider it important  
5 enough to the quantum exercise to consider it in his  
6 First Report. The cynical conclusion is that it was a  
7 deliberate decision to hold this back until a  
8 Rejoinder stage when the individuals concerned would  
9 have no opportunity to respond to the allegations in  
10 witness statements.

11           Be that as it may, the whole exercise is  
12 misconceived because the Claimants' merits and  
13 demerits as developers are simply not relevant to the  
14 quantum exercise before you.

15           You heard Dr. Abdala explain that in an  
16 analysis of the fair market value of this Project,  
17 it's assumed that a new buyer comes in and takes over  
18 the Project. The Claimants would not, in the but-for  
19 scenario, have any involvement in the Project going  
20 forward. And, so, their capacity to complete the  
21 Project plays no part in the valuation.

22           When one strips out the ad hominem attacks on

1 Dr. Abdala and the Claimants, the bluster around  
2 methodology, which is not backed up by authority and  
3 the relevant issues, Mr. Hart's principal objection to  
4 Dr. Abdala's methodology is he thinks the inputs to  
5 the DCF calculation are too uncertain.

6           Never mind the fact that the methodology  
7 already accounts for the risk of failure of the  
8 Project, which seems to be the focus of Mr. Hart's  
9 criticisms, this objection doesn't withstand any  
10 scrutiny.

11           Dr. Abdala presents a careful and objectively  
12 verifiable DCF calculation. In order to establish the  
13 physical layout of the Project, how many properties,  
14 of what type, and the proposed income streams that  
15 will be pursued, he refers to the 2010 Business Plan,  
16 a business plan completed only five months or so  
17 before the date of valuation.

18           As regards the layout of the Project site, the  
19 2010 business plan is based on the 2008 master site  
20 plan. So, these plans had already been around for  
21 over two years before the date of valuation, and they  
22 are the basis on which the construction permits were



1 issued.

2           Moreover, by May 2011, the Claimants had  
3 started construction of the roads, the infrastructure,  
4 the services necessary to deliver the layout of the  
5 2008 master site plan.

6           These basic inputs to the DCF calculation are,  
7 therefore, very much certain. Construction had  
8 started. Of course, it would have been possible to  
9 alter the plan slightly mid construction, but it's  
10 unlikely that this would have happened absent a reason  
11 not anticipated in May 2011.

12           But when it comes to the financial drivers of  
13 the DCF calculation, Dr. Abdala does not rely on the  
14 Claimants' business plan.

15           Rather, he ensures certainty by relying on  
16 independent third-party data or market data. There's  
17 no uncertainty here at all. Dr. Abdala's data is  
18 objectively verifiable and is market driven. That  
19 accords with the approach a hypothetical buyer would  
20 take.

21           Mr. Hart has no difficulty engaging with these  
22 inputs because they derive from objective and

1 available data, and apart from some minor adjustments,  
2 he does not propose anything by way of alternatives.  
3 This underlines the confidence and certainty which the  
4 Tribunal--with which the Tribunal can approach the DCF  
5 valuation.

6           The final element of the--once one factors in  
7 the appraisal value, which you've heard me already,  
8 the final element in the valuation methodology is the  
9 probability of success.

10           This is, again, something on which the  
11 Tribunal can be confident of certainty. Not only is  
12 Dr. Abdala's 68 percent probability derived from  
13 verifiable and reliable data, which is relevant to the  
14 Las Olas Project, but, again, Mr. Hart provides no  
15 meaningful challenge to it or alternative opinion.

16           Moreover, in terms of probability of success,  
17 the Tribunal only need look at the neighboring Rock  
18 Construction Malaga Project, less than 10 kilometers  
19 away from Las Olas. In the period from 2012 to 2016  
20 the Malaga Project had virtually completed  
21 construction of a development of over 400 properties  
22 and had sold out of its Classico house model.

1           You can see for yourselves the development of  
2 the Malaga Project. Mr. Hart's Exhibit CRED-63 is a  
3 printout of the page from the Las Olas website, which  
4 contains a number of aerial photographs of both the  
5 Las Olas Project site and the Rock Construction  
6 Project site. And I encourage the Tribunal to go to  
7 that website. And the address is at the bottom of  
8 Mr. Hart's Exhibit Number 63.

9           Amongst the videos, there are--you'll find  
10 footage of the Malaga Project, footage of the current  
11 state of the Las Olas Project site and a drive-thru  
12 video of the Las Olas Project from the time the  
13 construction was in progress.

14           There's a series of aerial photographs  
15 charting the development of the Malaga Project from a  
16 bare, undeveloped site in 2012 to the virtually  
17 completed development in 2016.

18           Had Costa Rica not shut down the Las Olas  
19 Project, Las Olas would have been over a year ahead of  
20 the Malaga Project in terms of development and was  
21 offering much bigger plots than the Malaga Project.

22           Success of the Malaga Project in the period

1 since Las Olas shut down demonstrates that ascribing a  
2 68 percent probability of success to Las Olas was  
3 certainly a very conservative proposition.

4 Now, I'm going to conclude there because I  
5 think I'm out of time. But I will want to address, in  
6 post-hearing briefs, the questions of moral damages  
7 and consequential damages, which there's been minimal  
8 reference to today, but, nonetheless, come into the  
9 damages analysis.

10 All I would say by way of conclusion is that  
11 Costa Rica's approach to the evidence we've heard  
12 today has followed the approach it took in December  
13 and in its written submissions. The approach is to  
14 make unjustified and unsupported personal attacks on  
15 witnesses and experts put forward by the Claimants.

16 We've seen it today with a public servant of  
17 the Respondent itself against whom they have seen fit  
18 to throw all sorts of unjustified allegations and  
19 insults.

20 We've also seen this, unfortunately, in the  
21 written and oral evidence of Mr. Hart, who makes,  
22 quite frankly, unprofessional accusations against

1 Mr. Abdala in arguing that he has misled the Tribunal,  
2 when that could not be further from the truth.

3           The Claimants are confident the Tribunal will  
4 see these tactics as the transparent and undignified  
5 distraction that they are since they have permeated  
6 the Respondent's entire presentation of its case in  
7 these proceedings.

8           The Tribunal ought to ignore these attacks and  
9 instead focus on the clear, independent, and careful  
10 evidence we've heard today from Mr. Briceño and from  
11 Dr. Abdala, who have both sought to do nothing more  
12 than assist the Tribunal to the best of their ability.

13           Thank you.

14           PRESIDENT SIQUEIROS: Thank you, Mr. Burn.

15           Mr. Leathley?

16           CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

17           MR. LEATHLEY: Thank you very much.

18           Thank you, Mr. President.

19           And members of the Tribunal, we do not believe  
20 that Mr. Briceño's testimony today has served any  
21 particular purpose.

22           Mr. Briceño was proffered as some smoking gun

1 at the 11th hour, rushed into these proceedings, and  
2 necessitating a late exchange of witness testimony,  
3 and we see nothing of persuasion in this arbitration  
4 from his testimony.

5           First, Mr. Briceño's testimony points to  
6 recommendations he made and which he said were  
7 ignored. The evidence shows this is untrue. From our  
8 submission, we made clear that steps were taken to  
9 address the recommendations, and there was a  
10 rationalized conclusion reached, which turned on the  
11 ongoing nature of the criminal proceedings.

12           As a result, the complaints raised by the  
13 Claimants disappear with this evidence. Steps were  
14 taken, and a conclusion was reached. It is not the  
15 conclusion the Claimants want, but it was reasoned,  
16 and it was based on Costa Rican law.

17           Second, Mr. Briceño, his recommendations far  
18 exceeded what he was authorized to do.

19           Third, Mr. Briceño's credibility is  
20 significantly flawed. And we do not say this to  
21 attack his personality. We do so because he showed a  
22 lack of diligence and care. He claimed a pension when

1 he should not have; and in our Post-Hearing brief, we  
2 will deal with Mr. Briceño's errors in his analysis of  
3 Costa Rican constitutional law.

4 He engaged in political activity when he  
5 should not have. Mr. Briceño had accepted the  
6 nomination; otherwise, his name would not have  
7 appeared in the official papers. And he engaged in  
8 political activity on behalf a party that opposed the  
9 mayor's party, being the mayor he has admonished in  
10 this arbitration.

11 We've also shown Mr. Briceño's lack of  
12 independence and objectivity during his performance as  
13 Internal Auditor. Mr. Briceño admitted that even  
14 though it was available to him, he failed to review  
15 the files pertaining to the investigation carried out  
16 by SINAC, while at the same time admitting that SINAC  
17 is the competent body to determine the existence of  
18 wetlands in Costa Rica.

19 A macro review, as he described it, macro  
20 review of the files in actual fact means that  
21 Mr. Briceño ignored critical evidence that would have  
22 given him the legal and administrative basis to

1 support the Municipality's decision.

2           Fourth, we have unanswered questions as to why  
3 a document talking to the Claimants' view of the  
4 project and seemingly directing the auditor to  
5 undertake certain action was found and verified  
6 independently by officials to be on the Auditor's  
7 file.

8           Let me look at the recommendations that  
9 Mr. Briceño referred to. Mr. Briceño made four  
10 recommendations: The first, the intervention of a  
11 Municipality in the TAA investigation. Mr. Briceño  
12 was concerned about potential liabilities for the  
13 Municipality if it decided to intervene as a  
14 complainant in the investigation proceedings initiated  
15 by the TAA.

16           First, the intervention or not of a  
17 Municipality in the TAA investigation had no relevant  
18 legal consequences for the Municipality. Under  
19 Article 111 of the Environmental Organic Law--this is  
20 Exhibit C-184--the TAA can conduct investigations ex  
21 officio; that is, without the need of a formal  
22 complaint.



1           Second, the intervention or not of the  
2 Municipality in the TAA investigation currently does  
3 not represent any liability for the Municipality. In  
4 case the TAA finds no liability on the part of  
5 Claimants, the Municipality would not be liable.

6           Under Article 6 of the Environmental Organic  
7 Law, municipalities have a duty to undertake actions  
8 to protect the environment.

9           Third, if Claimants still thought that the  
10 municipality's actions were unlawful, they had plenty  
11 of legal routes available to challenge those acts  
12 before Costa Rica's administrative courts and seek any  
13 compensation for any damages arising out of the  
14 Municipality's conduct. And much like we saw as we  
15 concluded in the December Hearing, Claimants simply  
16 have not pursued them.

17           The second recommendation, the unlawfulness of  
18 the suspension of construction permits issued by the  
19 Municipal Council.

20           Mr. Briceño has admitted that he did not give  
21 any importance to SINAC's findings on the existence of  
22 wetlands on the site and the potential impact by

1 Claimants' construction works on the site.

2 He also admitted that he was not present  
3 during the Municipal Council's deliberations, so does  
4 not have any knowledge of what was discussed and what  
5 were the grounds on which the Municipal Council based  
6 its decision to suspend the construction permits  
7 granted to the Las Olas Project.

8 What we know is that the Municipal Council was  
9 aware of the SINAC Report, whereas he seemingly was  
10 not.

11 Mr. Briceño acknowledged the importance of the  
12 precautionary principle on the issuance of injunctions  
13 against activities that may cause harm to the  
14 environment.

15 In light of the findings of SINAC and the  
16 neighbors' concerns, the Municipality was obliged to  
17 suspend any activity that could cause damage to  
18 protected ecosystems under Costa Rican law.

19 We urge the Tribunal to marginalize  
20 Mr. Briceño's view of the system when compared to  
21 Dr. Jurado's testimony on the functioning of the state  
22 apparatus when it comes to environmental protection

1 enforcement.

2           If the Municipality decided to suspend the  
3 construction permits, it was because a greater  
4 interest was at stake: The protection of the  
5 environment against unlawful works by the Claimants.

6           It is not a coincidence that every agency  
7 involved in the investigation into the Las Olas  
8 Project issued injunctions when they became aware of  
9 the risk of environmental damage: SETENA, SINAC, the  
10 TAA, criminal courts, and the Municipal Council.

11           This is how Costa Rica's legal system  
12 operates, and Claimants' oath to abide by it since the  
13 first day they decided to invest in the country.  
14 Mr. Briceño's neither a lawyer, nor even well  
15 informed; hence, his mistaken conclusions.

16           Today, Mr. Briceño has come up with a new  
17 criticism of the Municipal Court's decision of March  
18 the 7th, 2011, that we have not heard before.

19 Mr. Briceño said today that according to Article 44  
20 and 45 of the Municipal Code, a proper procedure was  
21 not followed by the Municipal Council, and that  
22 because the Municipal Council is not part of the

1 active administration, they could not take this  
2 decision.

3           We want to reiterate that neither in his  
4 Witness Statement nor in the recommendations that he  
5 made to the Municipality, Mr. Briceño ever raised this  
6 procedural flaw. However, neither is this true under  
7 Costa Rican law, and we will show in our Post-Hearing  
8 briefs by reference to opinions of the  
9 Attorney General's office, and we will show, apart  
10 from not being a lawyer, that he is anything but  
11 careful.

12           The third recommendation, the confirmation of  
13 an inter-institutional group.

14           Mr. Briceño advised the Municipal Council how  
15 to undertake this task, rather than being just a mere  
16 recommendation. Mr. Briceño's opinion overrides an  
17 internal order to the prohibition not to  
18 coadministrate. This is a task exclusively assigned  
19 by Article 34(a) of the Internal Control Act to the  
20 Municipal Council. Mr. Briceño, therefore, exceeded  
21 his authority when he tried to tell the administration  
22 how to act.

1           The fourth point, the reversal of the  
2 injunction after SETENA lifted its injunction against  
3 the Las Olas Project for the forgery of a public  
4 document.

5           Mr. Briceño recommended the Municipal Council  
6 reverse its injunction, given that SETENA had found  
7 that there was--that there were insufficient elements  
8 to find Mr. Aven responsible for the forgery of a  
9 SINAC official letter which cleared the developer's  
10 project before SETENA.

11           The Municipality, in fact, embraced  
12 Mr. Briceño's recommendation and reversed its  
13 injunction against the Las Olas Project. The  
14 Municipal Council's decision is Exhibit R-129.

15           However, what the Claimants forget to mention  
16 is that by that time, three key things had happened:  
17 First, the SINAC injunction had been confirmed by  
18 SINAC and the contentious Administrative Tribunals.  
19 This can be found in Exhibit C-114 and R-193.

20           Second, the TAA injunction was in force, as  
21 can be found in Exhibit C-121.

22           And third, and very importantly, the judicial

1 injunction issued by the criminal courts of Parrita  
2 was in place. This is Exhibit C-146. And this is  
3 key.

4 Now, the Tribunal, of course, should ask  
5 itself, what is the relevance of Mr. Briceño's  
6 testimony? What is the relevance on Costa Rica's  
7 international responsibility under the DR-CAFTA?

8 I'm confused by Mr. Burn's comment that it  
9 seemingly doesn't have a bearing under the DR-CAFTA,  
10 but maybe I misheard him.

11 The answer is, there is no bearing on Costa  
12 Rica's liability. And that is quite apart from the  
13 profound flaws that I've already identified in the  
14 Claimants' offering of Mr. Briceño's testimony.

15 Mr. Briceño issued mere recommendations to the  
16 Municipal Council and nothing more. His letters to  
17 the Municipal Council do not amount to final  
18 determinations or administrative acts capable of  
19 declaring any rights of third parties.

20 Mr. Briceño has admitted today that he had the  
21 opportunity to raise any of his concerns with the  
22 Contraloría, but he chose not to do so. Absent a

1 final determination from the Contraloría, the  
2 Municipality, or a judicial body, who could have  
3 backed up Mr. Briceño's concerns if they shared them,  
4 no right has accrued in favor of the Claimants.

5           The fact that some of Mr. Briceño's  
6 recommendations are favorable to Claimants' case does  
7 not automatically imply that those are decisive or  
8 that they are conclusively established or that they  
9 conclusively establish a wrong under Costa Rican law.  
10 In the same way, Mr. Briceño's recommendations cannot  
11 be the basis for a finding of international wrong.

12           I'd like to make a number of points in this  
13 regard: First, whether the Municipality did or did  
14 not participate as a proper plaintiff in the TAA's  
15 investigation cannot be deemed a breach of an  
16 international obligation. The TAA investigation  
17 against the Las Olas Project would continue regardless  
18 of the Municipality's intervention.

19           Whether the suspension of the construction  
20 permits was undertaken with the proper legal basis is  
21 a question for a local court rather than an  
22 International Tribunal. Claimants had at the time,

1 and still have, administrative and judicial recourses  
2 available to challenge any injunction against them.

3 Third point, whether an interdisciplinary  
4 commission formed within the Municipality addressed  
5 one or all of the nonbinding recommendations of an  
6 Internal Auditor falls outside the sphere of  
7 international law.

8 And finally, even if the Municipality was  
9 delayed in reversing its injunction after knowing of  
10 SETENA's lifting of its injunction, other injunctions  
11 issued by SINAC, the TAA, and the criminal courts were  
12 in force and had exactly the same effects over the  
13 Claimants' construction permits.

14 Nothing would have changed if the Municipality  
15 had rushed to reverse its injunction, because other  
16 agencies had already suspended the project until a  
17 final determination on liability was issued. That  
18 determination is contingent on Mr. Aven's return to  
19 Costa Rica to face his ongoing criminal proceedings.

20 It's appropriate for me at this point to  
21 address a point that Mr. Burn has made and emphasized  
22 significantly in his closing. He asked this Tribunal



1 to draw an adverse inference for the lack of  
2 witnesses.

3           And we've--we would refer you to our opening  
4 remarks, where we addressed this point very clearly.  
5 The documents speak for themselves. The Claimants  
6 had, and still have, an opportunity to test the  
7 alleged violations of Costa Rica law, and they have  
8 ignored comprehensively those chances.

9           This is not the forum for a he-said/she said  
10 dispute that the Claimants have chosen to pass up  
11 under Costa Rican law.

12           And finally, members of the Tribunal, I want  
13 to deal very briefly with the testimony you've heard  
14 today in relation to damages. I want to make a couple  
15 of closing remarks in relation to Dr. Abdala's  
16 testimony. Of course, we will supplement in our  
17 Post-Hearing brief.

18           Inasmuch as of a finding of liability against  
19 Costa Rica would be a ground-breaking decision under  
20 international law, never seen before, so too would the  
21 use of Dr. Abdala's methodology. It is untested and  
22 it is unreliable.

1           First, to employ DCF in the absence of a track  
2 record immediately places you in the realm of a  
3 Tribunal that is speculating. International law is  
4 very clear that that is not your job, and to ask that  
5 of you is to grossly distort how international law  
6 assesses damages.

7           Second, to employ a probabilistic outcome  
8 factor on top of a DCF calculation is tantamount to  
9 admitting that DCF on its own does not function, which  
10 it does not.

11           But as much as the probabilistic factor is a  
12 fig leaf on an embarrassed DCF calculation, it is also  
13 flawed. Dr. Abdala testified that experience may be  
14 an important and relevant factor to determining the  
15 probability of success. The evidence is clear. The  
16 Claimants didn't know what they were doing, and the  
17 evidence showed they didn't know how to sell.

18           Therefore, this means one of two things:  
19 First, either it means that the project was never  
20 going to take off, in large part due to their  
21 inexperience and lack of skill in the resort  
22 development business; second, and the alternative--and

1 this is Dr. Abdala's view of the world, where he tries  
2 to ignore the lack of expertise--the lack of sales  
3 that we know occurred proves that the business simply  
4 wasn't going to take off at the time we've analyzed  
5 it.

6 In short, there is no evidence that Dr. Abdala  
7 could find a willing buyer for his fair market value  
8 tests, because Claimants struggled so much to find a  
9 willing buyer. The market was dead, as Mr. Aven  
10 testifies.

11 Finally, Dr. Abdala builds his damages model  
12 on their business plan, which is the--which, as the  
13 cornerstone of Dr. Abdala's damages assessment, is  
14 fundamentally flawed.

15 Precisely because of the Claimants' lack of  
16 experience, the Tribunal should be very nervous of  
17 going anywhere near a methodology that relies on their  
18 plan. If a scrappy and unproven business plan is a  
19 sufficient foundation to establish a  
20 multimillion-dollar claim for damages in a market that  
21 barely moved in their favor and in relation to a  
22 project for which there was no outside interest shown,

1 then we can rapidly retire from the law and mock up a  
2 rough business plan in the hope of elevating a  
3 nonstarting or failing business into a financial gold  
4 mine just because we can state in theory, but not  
5 proven in practice, that there must surely be a  
6 willing buyer somewhere.

7           Finally, Members of the Tribunal, we're  
8 putting on the slide--on the screen slides taken from  
9 Mr. Hart's presentation today.

10           Dr. Abdala's analysis takes fact and converts  
11 it to fiction. His assessment is far from  
12 conservative, as Mr. Burn presented. It is radical,  
13 finding a cash flow that has never existed and for  
14 which there is no evidence of it ever coming into  
15 existence. These diagrams illustrate this perfectly.

16           Mr. Hart's approach is the market approach,  
17 and the support for this is the deafening silence when  
18 it comes to showing Dr. Abdala's methodology being  
19 relied on by anyone else. Dr. Abdala cites U.S. data.  
20 Members of the Tribunal, we are Costa Rica. In 2011,  
21 to quote Mr. Aven, the market was dead.

22           Thank you very much for your time. No further

1 submissions.

2           PRESIDENT SIQUEIROS: Thank you very much, Mr.  
3 Leathley.

4           So, just to confirm, you had requested a  
5 two-week extension to produce the post-Hearing briefs.  
6 The two weeks--let me just try to get Procedural Order  
7 Number 5--were supposed to be delivered on Friday,  
8 February 24th, but you are making reference to a  
9 two-week extension.

10           Does this mean that it would be Friday,  
11 March 10th?

12           MR. BURN: Sir, that's our understanding, yes.

13           MR. LEATHLEY: Yes, sir. Yes. That's right.

14           PRESIDENT SIQUEIROS: Okay. The Tribunal  
15 might wish to request from the Parties to place  
16 specific interest on certain topics on your briefs.

17           Would you be amenable to allow the Tribunal to  
18 deliver these points by early next week?

19           MR. BURN: If it's only next week, absolutely.  
20 That's fine for us, yeah.

21           MR. LEATHLEY: Yes. We'd be happy to address  
22 any issues the Tribunal wishes.

1           PRESIDENT SIQUEIROS: Okay. Because the  
2 Tribunal might--it's not certain that it will do so,  
3 but--and we will advise you, of course--if it does or  
4 if it does not wish to raise these issues with you.  
5 But if we do, we'd be proposing to submit these to you  
6 by early next week.

7           MR. BURN: Thank you, sir.

8           MR. LEATHLEY: Thank you.

9           MR. BURN: I just want to take the opportunity  
10 to, of course, thank the Members of the Tribunal for  
11 the--their attention before and during the two  
12 Hearings we've had and, of course, to thank everybody  
13 else who's contributed to these proceedings, and  
14 certainly Mr. Grob and to the transcribers and  
15 translators, even to my opponents and their experts  
16 and witnesses.

17           Thank you very much, sir.

18           PRESIDENT SIQUEIROS: Thank you.

19           MR. LEATHLEY: Thank you very much.

20           That allows me to say I echo Mr. Burn's  
21 remarks. However, one small housekeeping point.  
22 There was a reference I think I made to a translation,

1 a revised translation. We would, whilst we have the  
2 Tribunal here, like to hand a copy to the Tribunal.

3 I don't know if the Claimants have had an  
4 opportunity to review it. If not, we'll hopefully  
5 circulate it, if there is objection from the  
6 Claimants, by e-mail.

7 MR. BURN: Yeah. Could we do that by e-mail?  
8 I mean, we've had a brief look at it, but not  
9 sufficiently.

10 That does remind me, though, we do have the  
11 USB drives with the updated model. My colleague is  
12 going to distribute those now.

13 PRESIDENT SIQUEIROS: Okay. I would also like  
14 to thank the Parties, as I did at the closing of the  
15 Hearing in December. Sometimes the statements made  
16 and the arguments and the passion that is brought out  
17 in these hearings would almost lead a Party who is not  
18 experienced in these types of hearings or one who is  
19 alien to the Hearing itself to think that they become  
20 personal in nature; but certainly, they are not, and I  
21 commend both counsel for the professionalism in which  
22 they have conducted themselves, not only today, but

1 also during the December Hearing.

2           Thank you for your patience, at times, with  
3 the other Party. Thank you for allowing the other  
4 Party additional time when that time was necessary for  
5 the other Party to conclude the argument. And from my  
6 end, it's been--the case is certainly not over, but up  
7 until now, it's been truly a satisfaction to hear both  
8 arguments, both written and oral, from the Parties  
9 thus far.

10           MR. LEATHLEY: Thank you very much.

11           PRESIDENT SIQUEIROS: Thank you.

12           And thank everyone involved: Francisco, the  
13 court transcribers, and the interpreters, and everyone  
14 else involved. We appreciate your support.

15           (Whereupon, at 6:28 p.m., the Hearing was  
16 concluded.)



## CERTIFICATE OF REPORTER

I, Michelle Kirkpatrick, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.




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Michelle Kirkpatrick

## CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



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MARGIE R. DAUSTER