

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

-----x In the Matter of Arbitration : Between: :

UNCITRAL Case No.

DAVID AVEN, et al., :

Claimants, : UNCT/15/3
:

and : THE REPUBLIC OF COSTA RICA, :

Respondent. : -----x

Volume2 HEARING ON JURISDICTION AND MERITS

December 6, 2016
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 9:05 a.m., before:

MR. EDUARDO SIQUEIROS T., President
MR. C. MARK BAKER, Co-Arbitrator
PROF. PEDRO NIKKEN, Co-Arbitrator

B&B Reporters
001 202-544-1903

ALSO PRESENT:

MR. FRANCISCO GROB D.

Secretary to the Tribunal

MS. SUSANNE SCHWALB

Assistant to the Tribunal

Court Reporters:

MS. MICHELLE KIRKPATRICK

MS. MARGIE DAUSTER

Registered Diplomate Reporter (RDR)

Certified Realtime Reporter (CRR)

B&B Reporters

529 14th Street, S.E.

Washington, D.C. 20003

(202) 544-1903

SRA. ELIZABETH LORETA CICORIA

SRA. MARTA MARÍA RINALDI

D.R. Esteno

Colombres 566

Buenos Aires 1218ABE

Argentina

Republic of Argentina

Interpreters:

MS. JUDITH LETENDRE

MS. KARIN RUCKHAUS

MS. KELLEY REYNOLDS

MS. STELLA COVRE

B&B Reporters
001 202-544-1903

Page | 317

APPEARANCES:

Attending on behalf of the Claimants:

MR. GEORGE BURN

Vinson & Elkins RLLP International Lawyers

20 Fenchurch Street, London EC3M 3BY

United Kingdom
DR. TODD WEILER
Barrister & Solicitor
#19 – 2014 Valleyrun Blvd.
London, Ontario N6G 5N8
Canada
MRS. LOUISE WOODS
Vinson & Elkins RLLP International Lawyers
20 Fenchurch Street, London EC3M 3BY
United Kingdom
MR. ROBERT LANDICHO
Vinson & Elkins LLP Attorneys at Law
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
United States of America
MR. PETER D. DANYSH
Vinson & Elkins LLP Attorneys at Law
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
United States of America
MR. RAÚL GUEVARA VILLALOBOS
Batalla Salto Luna
San José, Costa Rica
MR. RÓGER GUEVARA VEGA
Batalla Salto Luna
San José, Costa Rica
B&B Reporters
001 202-544-1903

Page | 318

APPEARANCES (continued):

MR. HERMAN DUARTE IRAHETA
Batalla Salto Luna
San José Costa Rica
MR. ESTEBAN DE LA CRUZ BENAVIDES
Batalla Salto Luna
San José, Costa Rica
MR. JEROME HOYLE
Vinson & Elkins RLLP International Lawyers

20 Fenchurch Street, London EC3M 3BY
United Kingdom
MS. CAROLINA ABREO-CARRILLO
Vinson & Elkins LLP Attorneys at Law
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
United States of America
B&B Reporters
001 202-544-1903

Page | 319

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

MR. CHRISTIAN LEATHLEY
MS. AMAL BOUCHENAKI
MS. DANIELA PAEZ
MS. LUCILA MARCHINI
MS. ELENA PONTE
MR. MICHAEL KERNS
Herbert Smith Freehills New York LLP
450 Lexington Avenue, 14th Floor
New York, New York 10017
United States of America
Ministry of Foreign Trade of Costa Rica
(COMEX)
MS. ARIANNA ARCE
MS. ADRIANA GONZALEZ
MS. MARISOL MONTERO
MS. FRANCINIE OBANDO

B&B Reporters
001 202-544-1903

Page | 320

APPEARANCES (continued):

On behalf of the non-disputing party United States
of America:

MR. PATRICK W. PEARSALL
MS. NICOLE C. THORNTON
Attorney-Advisers,

Office of International Claims and
Investment Disputes
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800
United States of America
B&B Reporters
001 202-544-1903

Page | 321

CONTENTS

PAGE

PRELIMINARY MATTERS.....323 WITNESSES:

DAVID JANNEY

Direct Examination by Mr. Burn.....335 Cross-Examination by Ms.
Bouchenaki.....337 Redirect Examination by Mr. Burn.....354
Questions from the Tribunal.....355

JEFFREY SHIOLENO

Direct Examination by Burn.....363 Cross-Examination by Ms.
Bouchenaki.....364 Redirect Examination by Mr. Burn.....372
Questions from the Tribunal.....374

MAURICIO MUSSIO

Direct Examination by Mr. Burn.....378 Cross-Examination By Mr.
Leathley.....387 Redirect Examination by Mr. Burn.....452 Further
Redirect Examination by Mr. Guevara.....481 Further Redirect Examination by
Mr. Burn.....486 Questions from the Tribunal.....490

ESTEBAN BERMUDEZ

Direct examination by Mr. Burn.....526 Cross-examination by Mr.
Leathley.....529 Redirect examination by Mr. Burn.....590
Questions from the Tribunal.....597

MINOR ARCE

Direct examination by Mr. Burn.....615 Cross-examination by Ms.
Paez.....617 Redirect examination by Mr. Burn.....644 Questions
from the Tribunal.....653

B&B Reporters
001 202-544-1903

Page | 322

PROCEEDINGS

PRESIDENT SIQUEIROS: Good morning. If the

Parties, Interpreters, and Court Reporters are ready,
then we will proceed.

I welcome everyone, once again, to the second
day of the hearing of the case David R. Aven, et al.,
vs. the Republic of Costa Rica.

And before we commence with the examination
of the first witness in this case, I would ask the
Claimant and Respondent whether there's any procedural
issues you would like to address before we commence.

MR. BURN: Yes, sir. There were just a couple of relatively small matters to bring
to your attention. You'll recall that we had some document issues that were raised
yesterday, and the Respondent quite reasonably needed an opportunity to consider
those matters relating to three documents.

I think I'm right in reporting consensus on the submission or replacement of certain
documents. So, those can come in. We're happy to provide copies of those now or
at the first break we can leave copies on your desks. As you wish, sir.

B&B Reporters
001 202-544-1903

Page | 323

1 2

3 4 5 6 7 8 9

10

11

12
13
14
15
16
17
18
19
20
21
22

We can also at the same time provide the file of additional legal authorities to which Dr. Weiler referred at the same time.

And there was a matter which--

PRESIDENT SIQUEIROS: Could we just ask Respondent to confirm for the record--

MR. BURN: Sure.

PRESIDENT SIQUEIROS: --that he's in agreement.

MR. LEATHLEY: Yes, sir. We do. And there's one document that I'm happy to explain what that will be with one of the documents in a moment.

PRESIDENT SIQUEIROS: Okay.

MR. BURN: The other matter relates to some translations that we sent over to the Respondent last night. They haven't had the chance, I think, to check whether the translations are right or not. It's basically just tidying up existing translations. We realized a couple of documents weren't translated perfectly.

We sent over the revised translations. I think we have to wait for the Respondent, but I defer

B&B Reporters
001 202-544-1903

Page | 324

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

to Mr. Leathley on this to check our revised translations. And--and once that's completed, then we'll be in a position to deal with those documents too.

PRESIDENT SIQUEIROS: Thank you. Perhaps you could distribute these, then, on the first break.

MR. BURN: Thank you.

There is one other matter, sir. And there's not agreement on this.

You will recall that under the procedural orders, and governing this hearing, the stipulation is that witnesses of fact are--other than those who are parties to the action, are sequestered in that they may not be in the room or reading transcripts or watching online until they have appeared to give evidence.

PRESIDENT SIQUEIROS: With one exception also, which was Mr. Jurado during the examination of Mr. Ortiz.

MR. BURN: Correct. And we wish to put--make the suggestion that there is, it would be right and appropriate that further exception be made in respect

B&B Reporters
001 202-544-1903

Page | 325

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

to Mr. Manuel Ventura, who you will recall is a witness in the proceedings but has not been called to give oral testimony in these proceedings. He is here. If--and I put the point this morning to Mr. Leathley, and he's taken instructions. And the view from the Respondent's side is that they can't consent to any variation of it. The Procedural Order is the procedure order, and they interpret it in that way.

We would say that the Procedure Order is actually silent on this particular point, and we would invite the Tribunal to use its discretion to stipulate, a sensible matter, that Mr. Ventura is able to attend.

The alternative is that he has to leave the room for no real pragmatic purpose for the next two to three days. Which even those witnesses who will be appearing do not suffer from because they have been called and will go through the process of oral testimony.

So, we would say it's sensible, it's pragmatic, it's kind of implicit in the procedure orders that stand that somebody who has not been

B&B Reporters
001 202-544-1903

Page | 326

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

called to give oral testimony should be given enough leeway just to be in the room.

PRESIDENT SIQUEIROS: Okay.

Mr. Leathley, would you care to comment?

MR. LEATHLEY: Thank you, sir. Yes.

This is for us just a strict compliance point, sir. Because first it will start maybe with Mr. Ventura, and we don't know where it will stop.

We believe that when any fact witness testifies--and the temperature has been turned up by the Claimants in this case. We think that any witness should be able to testify in the sanctuary of this room and know that they have no other eyes glaring down on them. We have no way of knowing what the relationships may be.

Some of these people have interacted over a number of years, and there seems to be a lot of animosity.

So, we would say just, first of all, a strict compliance of the Procedure Order. And, secondly, we think it's necessary for you to have unimpaired testimony. And we would suggest that even if it's a

B&B Reporters
001 202-544-1903

Page | 327

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

modicum of impairment, that that could in some way impact.

Just one--also, one point of clarification, if I can, sir.

The point--and I apologize if this is my pure oversight in relationship to Procedure Order Number 5, but I wanted to get the Tribunal's clarification on the attendance in the hearing of those who are the Claimants because, of course, a number of them will be testifying today.

So, that certainly was my anticipation. And apologies if I've misread the Procedure Order. But my anticipation that, for example, Mr. Aven would not be allowed to be in the hearing room today during the testimony of other witnesses.

PRESIDENT SIQUEIROS: Is this Mr. David Aven that you're referring to?

MR. LEATHLEY: Yes, there's also Mr. Shiolen.

To be honest--so we would hope that this room is only filled with the Tribunal, the necessary support that we have, counsel, and the experts. Of

B&B Reporters
001 202-544-1903

Page | 328

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

course, the public, we understand, are entitled to attend. We would respectfully ask for you to police who is in the room at any given time.

But we do think it's important that if the sequestration is to have any meaning, that Mr. Aven, Mr. Shiolen, other of the Claimants not participate during the fact stage--during the fact witness testimony for either side.

PRESIDENT SIQUEIROS: Why don't you allow the--well, are you--do you wish to comment something before we confer?

MR. BURN: Well, yes, sir. I mean, frankly, the points that Mr. Leathley raised--raises now, that ship has sailed. I mean, Paragraph 28 of Procedure Order Number 5 is unambiguous. I don't, frankly, see how it can be misread. It is clear. The words say, "Witnesses other than parties to this arbitration will be excluded from the hearing room."

MR. LEATHLEY: I'm sorry. That's not the full sentence.

MR. BURN: All right. "From this hearing room until they have provided their testimony in

B&B Reporters
001 202-544-1903

Page | 329

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

full." Witnesses other than the parties to this arbitration, Mr. Leathley. It's pretty clear. I don't think I really need to belabor this point.

If they wish to make an application to vary Procedure Order Number 5, they're welcome to do so. There is no reason to do so. There is a very good reason to adopt the balance that is set out in Procedure Order Number 5 already. The Tribunal clearly considered the point, has drawn the arrangements accordingly. That's the appropriate way to proceed.

And as far as Mr. Ventura is concerned, we reiterate, he's--it's going to achieve nothing to exclude him from the room. The idea that he's somehow going to intimidate somebody is a difficult one to make, shall we say.

It's going to achieve nothing to exclude him, and we would invite the Tribunal to accept his presence in the room.

PRESIDENT SIQUEIROS: Okay. Let us then confer.

(Tribunal conferring.)

B&B Reporters
001 202-544-1903

Page | 330

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

PRESIDENT SIQUEIROS: The Tribunal believes that Procedure Order is indeed clear with respect to witnesses of fact who are parties to the arbitration, and there is no restriction on they being present while other witnesses are being examined.

On the question of Mr. Ventura, if he has not yet--if he has not been called to be examined during this hearing, then there should be no restriction for him to be present in the hearing room during the examination of other witnesses.

We would ask, however, Mr. Ventura to conduct himself in a professional manner and do not disclose to other witnesses who have not yet been examined the contents of the testimony of the other witnesses who have or are being examined because precisely that is the objective on sequestration of a witness.

The Tribunal takes note that anyone wishing to avoid the principle of sequestration could simply go online and check the live webcast of this hearing. But the objective, I think, here is for the parties to conduct themselves in a manner which would attempt to follow the objectives of this principle during

B&B Reporters
001 202-544-1903

Page | 331

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

examination of witnesses.

MR. BURN: Thank you, sir.

Just to be clear, on our side we have instructed non-Party witnesses not to watch the proceedings online and not to receive copies of the transcript during the hearing.

PRESIDENT SIQUEIROS: I appreciate that, and that's precisely what we would expect of the parties.

MR. LEATHLEY: So, there is one follow-up point, if Mr. Burn is finished with any preliminary matters this morning, and that is a knockon-effect. .

The C-295 document you have heard referenced yesterday. We would like to admit that to the record, so we will be giving a new copy of that with a proper cover sheet. We believe that the reference will be R-521. We'll confirm. But if we can distribute that during the course of the morning as well.

There's two other requests. And I have to confess I haven't raised these with Mr. Burn, so he may want to take time to consider. And they're in relation to the bios that we would like to admit to the record for Mr. Morera and Mr. Ortiz.

B&B Reporters
001 202-544-1903

Page | 332

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21
22

These bios would only come from their public websites, so we hope their content would not be in dispute. But we're happy to print a copy, share it with Mr. Burn, and then we can hopefully submit that to you later.

MR. BURN: Perfectly happy to proceed in that manner, but we just want to check the documents. But in principle, there is no difficulty on our side.

PRESIDENT SIQUEIROS: Okay. Thank you.

So, we may proceed. If you wish to call Mr. David Janney.

MR. BURN: That's correct, sir. We'll just--we'll bring him forward now.

Can I just ask Mr. Leathley if the cross-examination bundles that he's going to be using with respect to Mr. Janney first, but the witnesses generally, includes the Witness Statements of Mr. Janney?

It does. Okay. That's fine. Thank you.

MR. LEATHLEY: And just for the record, Ms. Bouchenaki will be conducting the cross-examination for the part of the Respondent.

B&B Reporters
001 202-544-1903

Page | 333

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21

DAVID JANNEY, CLAIMANTS' WITNESS, CALLED

PRESIDENT SIQUEIROS: Okay. Mr. Janney, good morning.

THE WITNESS: Good morning.

PRESIDENT SIQUEIROS: As you know, you--your testimony has been offered by Claimants in this arbitration. The procedure will be that you will--there will be a short examination on the part of Mr. Burn or his team, and that will be followed by a cross-examination by the team of Respondent, after which there will be a follow-up by your counsel limited exclusively to issues that were raised during cross-examination.

If you have any question, if you don't understand a particular question, feel free to ask for clarification of that as you wish.

THE WITNESS: Yes, sir. Thank you.

PRESIDENT SIQUEIROS: The Tribunal may at any time also request that you answer any questions during the examination, cross-examination, or afterwards.

THE WITNESS: Okay.

PRESIDENT SIQUEIROS: So, don't be surprised

B&B Reporters
001 202-544-1903

if any one of us does ask you a question.

THE WITNESS: Okay.

PRESIDENT SIQUEIROS: There is a statement that should be in front of you that we would ask you to read for the record.

THE WITNESS: "I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth."

PRESIDENT SIQUEIROS: Okay. Thank you, Mr. Janney.

DIRECT EXAMINATION

BY MR. BURN:

Q. Thank you, sir.

Mr. Janney, you have a file in front of you with various documents.

A. Yes, sir.

Q. If you open the file, at the top it should appear a copy of your first statement. Can you just check that document, just that document, flick through it just to make sure you're happy that that is indeed a copy of your statement.

A. It is.

B&B Reporters
001 202-544-1903

Page | 335

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Thank you.

And are there any changes you wish to make to this first statement?

A. No, I don't believe so.

Q. Thank you.

On the last page of that document, which is at page 14, could you confirm whether or not that is your signature?

A. It is.

Q. Thank you.

I just need to go through the same process in the--your second statement, which you should find behind a white tab. I think you may be looking at the Spanish version of your first statement.

Okay. So, you have a document which should have the title "Second Witness Statement of David Janney." Do you have that?

A. Ido.

Q. Can you go through the same process for this document. Just quickly check that this looks like your second statement.

A. It is.

B&B Reporters
001 202-544-1903

Page | 336

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20
21
22

Q. Thank you.

Are there any changes or amendments you wish to make to this second statement?

A. I don't believe so.

Q. Could you just go to that last page which is on page 4. Is that your signature--

A. It is.

Q. --Mr. Janney?

A. Yes.

Q. Thank you.

MR. BURN: We have no further questions for Mr. Janney at this stage. Thank you.

PRESIDENT SIQUEIROS: Thank you.

CROSS-EXAMINATION

BY MS. BOUCHENAKI:

Q. Mr. Janney, good morning.

A. Good morning.

Q. You explain in Paragraph 3--sorry--13 of your first Witness Statement that, along with Mr. Aven, you found and made the decision to develop the Las Olas property; correct?

This should be some--a fact that you

B&B Reporters
001 202-544-1903

Page | 337

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

testified to, so you should be able to confirm the correctness of this statement--

A. Right.

Q. --fairly quickly.

A. So, please repeat the statement as you said it.

Q. That you made the decision to develop the Las Olas property with Mr. Aven during the trip to Costa Rica.

A. I helped him find the property. The decision in the end was his decision. But, yes, I was in agreement with him on that.

Q. Okay. And you state in Paragraph 8 of your First Witness Statement that at the time of the investment, you were the president and the founder of a Christian charity named World Hope--

A. That was--

Q. --of which you are the president?

A. That is correct.

Q. And also a pastor of the Orlando Baptist Church?

A. At that time?

B&B Reporters
001 202-544-1903

Page | 338

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

Q. Mm-hum.

A. Yes.

Q. Now, in Paragraphs 13 and 14, you indicate that the trip during which you identified the Las Olas property with Mr. Aven was a trip that you were doing for your charity, World Hope; is that correct?

A. It was not for World Hope, but it was missions work, yes.

Q. So, it was for another charity?

A. It was within the context of the missions work of our church.

Q. Okay. So, it was within the context of your work with the Orlando Baptist Church?

A. Baptist Church, yes.

Q. And is it appropriate for you to be scouting for business ventures while on a mission trip for your church?

A. Is it--is it appropriate?

Q. Yes.

A. Yeah, I think it--I don't think there would be a conflict in that.

Q. All right. So you're--when you do these

B&B Reporters

001 202-544-1903

trips for your church, you fund those trips personally with your personal funds?

A. On some of the trips that I do with missions I fund, and with some of them they fund them.

Q. Okay. In Paragraph 25 of your First Witness Statement you say--and I quote--"that you have a good credibility with your humanitarian work and your residential development work."

A. Yes.

Q. And at Paragraph 44 of your First Witness Statement, you--you also state that you built credibility with the members of the church; correct?

A. This is in reference to a church in Atlanta, yes.

Q. Okay. And in the same paragraph, 44, you say that the fact--and I quote again--"The fact that the purchasers of Las Olas lots--within this church community have lost their money in a project that I recommended to them has meant that I have lost that credibility with the church community as a whole," and that you are no longer welcome anymore in Pine Crest Baptist Church.

B&B Reporters
001 202-544-1903

Page | 340

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21

Do you confirm the statement?

A. That is correct.

Q. Okay. Is there any basis on which you would like to qualify these statements regarding your credibility within your church communities and the church communities within which you act?

A. This was a specific church community.

Q. Yes.

A. Pine Crest Baptist Church. Pine Crest Baptist Church had a gentleman there who was the man who brought investors to me, to David Aven, in a meeting who were part and supporters of that church. They supported what we were doing at World Hope and missions.

As a result of the way things have gone on this project, I have lost my credibility with them in reference to recommending this, getting them involved in this project.

Q. Okay. Now, in Paragraph 9 of your First Witness Statement and then in Paragraph 25, you indicate that World Heritage--sorry--World Hope charity has--has built a multimillion-dollar school.

B&B Reporters
001 202-544-1903

Page | 341

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

You--and that it has significant projects around the world and in particular in Kenya.

A. Excuse me. Paragraph 9?

Q. 9 and 25. But this is, again, a fact that you should be able to confirm, your--the activities of your--the charity of which you are the president.

MR. BURN: It's, nonetheless, fair that the witness be given a chance to refresh himself on the two specific references you make before he answers this question.

MS. BOUCHENAKI: It's a reference to what his church is acting and in the areas--and he says that he's still the president of the church--the charity. I'm sorry.

THE WITNESS: And they are separate. World Hope is a separate charity from the church.

BY MS. BOUCHENAKI:

Q. Yes. And I was asking about World Hope and asking you to confirm your statements in Paragraphs 9 and 25.

A. That's why I wanted to look at them so I could confirm them. Paragraph 9 I confirm, yes. And

B&B Reporters
001 202-544-1903

Page | 342

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Paragraph 25, yes.

Q. Is there any paragraph in your statements that you--in your statements that you would not confirm at this stage? I would think not. But you confirmed that your statements are yours, that you prepared them, that's your declaration?

A. That is correct.

Q. Okay. So, are you familiar with Mr. Craig Mateer?

A. I am.

Q. Yes. He is a member of your church--of the Orlando Baptist Church; correct?

A. No, he's not.

Q. Okay. So, he donated money to the two farms, chicken farms, that World Hope--as part of World Hope mission activities in Kenya; correct?

A. Yes, he did.

Q. And he then claimed that the money was not used for those missions?

A. He did make that claim.

Q. And the--he then filed a claim against the charity and you personally; correct?

B&B Reporters
001 202-544-1903

Page | 343

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. No. He filed the claim against the church and the charity.

Q. Okay. And he later--but his claim was directed to you and--and accused you personally, did it not?

A. His claim was that World Hope did not spend the monies on the farms correctly.

Q. Okay. There was an article in the East Orlando Post that reported this particular claim against the church and they said against you. It's in Exhibit 36 of the Credibility Report, and it's Tab 1 of your bundle. And then I can refer you to Tab 2 of your bundle, which is Credibility Exhibit Number 37, which makes a summary of this dispute with Mr. Mateer.

Now, these are fairly widely read newspapers in your region; are they not?

A. No. No, they're not. The East Orlando Post is not widely read. He's a paid blogger. He's a college student who is paid to write what he writes.

Q. Okay.

A. He's paid by Mr. Mateer to write what he writes.

B&B Reporters
001 202-544-1903

Page | 344

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

Q. But it does affect--you know, these were rumors that went to your reputation; right?

A. Rumors affect everyone. Yes, I agree with that.

Q. Okay. So, would you still consider that the Las Olas Project has affected your reputation?

A. At Pine Crest Baptist Church my reputation or credibility was affected as it related to getting people to make that investment.

Q. Okay. And you don't think that people in--in that church ever googled you?

A. That's a whole separate question. I have no idea who googles what.

Q. Okay. Now, in terms of--nine days after your--your First Witness Statement, you filed for personal bankruptcy; correct?

A. Correct.

Q. And your Second Witness Statement does not make any mention of that filing; is that correct?

A. That is correct.

Q. So, could you please read Paragraph 11 of your Second Witness Statement.

B&B Reporters
001 202-544-1903

21

22

A. Yes, I've read it.

Q. Yes, please.

A. Would you like me--

Q. Oh, can you please read it.

A. Oh, yeah.

"From this background, I have a very good understanding of the value that can be added to a piece of land by obtaining proper zoning, planning and permitting approvals. This added value was the niche I developed for myself when I entered this market because of the great margins when you take a property through the entitlement phases."

Q. Okay. Thank you.

So, in Paragraph 10 of your Witness

Statement--of your Second Witness Statement, you refer to a number of properties that you have developed; correct?

A. Correct.

Q. Now, is it correct that in your filing for bankruptcy, five of these six properties are listed as properties that--to which your filing relate? And in particular, Lake Hart, Villa City I, Villa City II,

B&B Reporters
001 202-544-1903

Page | 346

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20
21
22

Villa City, and Lake Jackson Ridge?

A. Yes, that is correct.

Q. And yet you did not disclose that in your
Second Witness Statement?

A. I'm misunderstanding you. I don't know what
you're asking me.

Q. You did not disclose that these

properties--that you filed for bankruptcy in relation to these properties?

A. No, I did not put those in my Second Witness
Statement.

Q. Okay. Now, you said in your First Witness
Statement that you invested \$250,000 in Las Olas. Is
that correct?

A. Correct.

Q. But you didn't report that in your bankruptcy
filing?

A. That was prior to the ten years of reporting.

Q. So, your creditors in that bankruptcy do not
know that you are sitting here claiming for this--for
this money from Costa Rica; right?

A. They absolutely know. Yes, they do know.

B&B Reporters
001 202-544-1903

Page | 347

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

Q. But it's not in your bankruptcy filing.

A. It is in the last filing that was filed.

This--everybody knows about everything here.

Q. But not in your Witness Statement?

A. No, it wasn't asked to be in my Witness Statement.

Q. It wasn't asked by whom?

A. By anyone. My Witness Statement didn't have it in there.

Q. But your Witness Statement represents that you have experience in successfully developing projects--

A. I absolutely have great success in developing. Some of the best and greatest developers in the United States have gone through bankruptcy because of 2007 and '8, which was responsible for why I had to declare bankruptcy.

Q. But your bankruptcy filing was in 2015.

A. Yes, that's right. I spent seven years trying to take care of it so I would not have to do that. And with the exception of one development, I was able to do that.

B&B Reporters
001 202-544-1903

Page | 348

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

Q. Would you not think that this is a piece of information that a Tribunal and the party who is assessing your statement that you are a successful entrepreneur would need to have and assess for themselves?

A. I did not assess it that way. No, ma'am. I don't believe that that had to do with my lack of credibility in being able to understand and develop land.

Q. And you would--and you did not--you were not inclined to letting the persons to whom you were making these representations decide for themselves and give them the full picture of who you are?

A. I did not think of that, no.

Q. Okay. Now, if I can direct you to Paragraph 21 of your First Witness Statement. I'll quote for you while you look for it.

You say, "Before buying the land, we"--and that is you and Mr. Aven--"satisfied ourselves that there were no environmental problems on the Las Olas project site. The piece of land was comprised of gently rolling hills, and Esterillos Oeste was already

B&B Reporters
001 202-544-1903

Page | 349

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

an established community with homes, condos, hotels, restaurants, and other businesses. It was obvious"--I continue quoting--"that there were no environmental problems with the property."

Do you have any technical qualification to make such an assessment?

A. I would not say I have technical, but I have experiential qualifications to do this. I deal in getting lands through the processes to be able to develop. I've had plenty of projects that have been turned down for environmental reasons. And I understand wetlands, and I understand uplands. And I understand all of the issues that involve the environment.

So, I have great experience in doing that and certainly had understanding and insight in looking at this property. Along with that, we were dealing with E-D-S-A, EDSA, out of South Florida, who also is one of the foremost companies in dealing with land use and understanding environmental issues.

Q. But EDSA you did not contract prior to buying the land; correct?

B&B Reporters
001 202-544-1903

Page | 350

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

A. That is correct.

Q. So, at the time when you were making this assessment to which you testified here, you had not contracted any expert--

A. That is correct.

Q. --to make that evaluation.

In Paragraph 9 of your Second Witness Statement, you describe your approach to new land developments. And you state, and I quote, that you--for such new developments, you "do a detailed due diligence exercise to see if it is possible to get the correcting--the correct permitting and entitlements to carrying out the project."

A. That is correct.

Q. Yeah. How many legal and environmental studies did you obtain upon deciding to team up with Mr. Aven in relation to Las Olas?

A. I could not answer that as far as the number of how many. The property was put under contract. We studied the area. When I say "we studied the area," for all of the uses that were going on in the area. This property rolls down. It's very unusual in that

B&B Reporters
001 202-544-1903

Page | 351

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

properties on either side of Esterillos Oeste are flatlands. But this property rolls down from the road all the way to the sea.

Q. We will have--

A. And it's clear that it's not wetlands.

Q. I'm sorry to interrupt. We will have control to--we'll speak to the conditions--

MR. BURN: Sorry. If the witness wishes to answer, he should be allowed to complete his answer.

MS. BOUCHENAKI: But that was not my question.

MR. BURN: Then you can take it up with him

when he's finished. And you can deal with that. He should be allowed to finish his answer. And if it's not relevant to the question, then you can take that up.

BY MS. BOUCHENAKI:

Q. But that was--my question was, did you contract with experts and legal advisers in order to make your assessment, as you say, that this is your approach to developing new properties?

A. Yes. That is my approach to developing

B&B Reporters
001 202-544-1903

Page | 352

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21
22

subdivisions in America whenever I'm buying land. And on this particular piece of property, we looked at the property. The property absolutely passed the visual test of wetlands, of environmental species of tree issues and--

Q. I'm sorry to interrupt. Does it pass the visual test by the--according to the opinion of the experts that you hired or according to your opinion?

A. According to my opinion. I can only speak for me--

Q. So--

A. --but I'm not saying that there weren't other tests done.

Q. Understood. And going back to my question, which was, did you actually contract with advisers--legal advisers?

A. I can't speak to that.

Q. You cannot speak to that because you cannot remember?

A. Yes, because I don't know.

MS. BOUCHENAKI: Thank you.

THE WITNESS: Thank you.

B&B Reporters
001 202-544-1903

Page | 353

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

PRESIDENT SIQUEIROS: You have no further questions for Mr. Janney?

MS. BOUCHENAKI: I'm sorry. No. No further questions.

PRESIDENT SIQUEIROS: Okay. Thank you. Mr. Burn?

REDIRECT EXAMINATION

BY MR. BURN:

Q. Just one question by way of redirect, Mr. Janney.

You were taken at the early part of the cross-examination to Tabs 1 and 2 in the file in front of you, the article from the East Orlando Post and an article from, I think, the Orlando Sentinel. You commented to some extent on those articles and the origin of those articles.

But I just want to ask you whether you think either of these articles accurately reflects anything in relation to the difficulties experienced between Mr. Mateer and the charity.

A. These articles are all a derivative of Mr. Mateer. He's funded everything that's gone on in
B&B Reporters
001 202-544-1903

Page | 354

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

this and his attacks on our ministries and myself personally.

MR. BURN: Thank you.

I have no further questions.

PRESIDENT SIQUEIROS: Thank you, Mr. Janney.

You are free--

ARBITRATOR BAKER: Whoa. Whoa. Whoa. Not

so fast.

brief, but I do have a couple of questions. And the first one is my understanding is that you based your experience in the visual inspection you did of this Costa Rican property on your experiences in Florida; is that correct?

THE WITNESS: Yes, sir.

ARBITRATOR BAKER: Would I have it right that you and Mr. Aven looked at the property from the standpoint of experienced developers rather than from the standpoint of scientific or other engineering perspectives?

THE WITNESS: Yes, sir.

B&B Reporters

001 202-544-1903

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BAKER: Mr. Janney, I will be

Page | 355

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

ARBITRATOR BAKER: And you said--and there was a bit of an exchange, so I want to make sure I got it right that this property was unusual, in your view, physically because of its slope. Would you explain that further to me.

THE WITNESS: Yes, sir. And while my experience in developing had been in Florida at that point, I had been in Costa Rica a lot. I was familiar with how the ecology factors are so important, and it's a part of what makes Costa Rica great.

But this property coming out of Jacó Beach coming down this way is mostly flat and swampy. You come to this piece of property and then beyond it, it goes again flat down toward Quepos and mostly swampy, a lot of wetlands.

This property, however, comes up on a hill as you're coming down the highway. It is vertically high. It comes down vertically all the way down to the water. It was obviously, in looking at it, from--from my standpoint as a developer, you didn't see the issues with the water runoff. You didn't see the issues--it was a pasture. There were cows and

B&B Reporters
001 202-544-1903

Page | 356

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

horses grazing on it.

It was not a wetland. And that I--because I've dealt with wetlands, you can go down and see where the wetland growth is versus growth that is not in a wetland area. And this didn't have any of that.

It was clear to see that it was a good development project. It would be built tiered down vertically because of the way it laid. It was not a flat project.

There's some property that was being developed next to it that was down in the lowlands. But this property is the property that came down and was a highland.

ARBITRATOR BAKER: So, from a developer's perspective, you were unconcerned about potential water accumulation because you believed that the slope of the land would transfer it off the property; is that correct?

THE WITNESS: You would have had to have dug a pool on the property to accumulate any water.

ARBITRATOR BAKER: Okay. You mentioned that there were cattle on the property. Knowing something

B&B Reporters
001 202-544-1903

Page | 357

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

about cattle, how many would you say were on the property?

THE WITNESS: You know, at different times--when we first came there, there was probably 15 to 20 cows on the property--there's a road that divides it--that were fenced in a pasture. And then they had same grazing off ropes down on the part on the other side of the road. There were two or three horses in there also.

ARBITRATOR BAKER: Did you learn how long the property had been used as grazing property prior to your putting in the offer?

THE WITNESS: I could not answer that.

ARBITRATOR BAKER: Okay. Last question. And that is, my understanding from a developer's perspective is that raw land has one set of value associated with it, being for grazing, as this was obviously. Land that is subjected to a permitting process and receives appropriate approvals can have a much different value; is that correct?

THE WITNESS: Absolutely. That's been my story of development, is buying it as a simple piece

B&B Reporters
001 202-544-1903

Page | 358

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

of property that may be grazing land or that kind and then take it through the processes, get all the entitlements, and then it has a whole different value.

ARBITRATOR BAKER: Did you and Mr. Aven at the time you put in the purchase offer put together a plan of action in order to commence the permitting process?

THE WITNESS: We did. And that was where we hired two firms, EDSA and Norton Consulting, to go through the process to help us to determine. We did know enough, having watched the Marriott project at Los Sueños and other projects going in around, that it was suitable for condominium timeshare projects. And so, that was our early look at this project. And when we began to get those that do land planning, consulting, and all of that, we began to see what could happen with it.

ARBITRATOR BAKER: So, I assume you were familiar with the California firm originally because of your work in California. Had they done work on the Marriott property as well?

THE WITNESS: I can't answer that. That
B&B Reporters
001 202-544-1903

Page | 359

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

would be in David Aven's answers.

ARBITRATOR BAKER: Okay. Thank you,

Chairman.

Thank you, Mr. Janney.

PRESIDENT SIQUEIROS: Yes. Mr. Nikken will have questions for you.

ARBITRATOR NIKKEN: Paragraph 14 of the first declaration--you say that this property was a gem and it was amazing cheap for the characteristic and quality of the piece of land.

As a developer, do you ask yourself why it was so cheap, being a gem in the zone that was already in--known for tourism --development, urbanistic then?

THE WITNESS: Well, we had been looking, sir, at a lot of properties. And this was a consistent price range in some of the properties around there. However, the other properties did not lay as this one laid as far as the terrain and the ability to develop it.

Along with that, things that maybe some people did or did not notice when they looked at it, when you came to the beach on this property, it is the

B&B Reporters
001 202-544-1903

Page | 360

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

most, in my opinion, beautiful beach in the whole central coast.

Just above that property, you have all of the jetties from where the lava flowed out into the sea. But in this area, it's a cove beach. There were just things about this that made us realize this would be a very special property.

And it was being offered at a good price. The man selling the property, I'm sure, did not envision the property as we envisioned the property, and that's why we felt like we were getting it at a good price.

PRESIDENT SIQUEIROS: I have no further questions, Mr. Janney. Thank you very much.

THE WITNESS: Do I leave this notebook?

PRESIDENT SIQUEIROS: Yes. Your counsel will collect it.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: Are we ready to proceed with Mr. Shiolen?

MR. BURN: We are, sir. We would invite Mr. Shiolen to come to the desk, witness desk.

B&B Reporters
001 202-544-1903

Page | 361

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

JEFFREY SHIOLENO, CLAIMANTS' WITNESS, CALLED

PRESIDENT SIQUEIROS: Good morning, Mr. Shiolen.

THE WITNESS: Good morning.

PRESIDENT SIQUEIROS: You probably heard me
give some instructions to Mr. Janney--

THE WITNESS: Yes, sir.

PRESIDENT SIQUEIROS: --which, as you have identified, there will be some
direct questions from Mr. Burn or his team, a cross-examination by Respondent's
counsel, to be followed with--perhaps redirect questions from Claimants' counsel.

And as you also identified, if you have any
doubts as to the question that is being made to you,
you can request a clarification.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: If a question is asked
of you, please first answer the question. And then if
you have any comment there too , you may clarify that
response. But you should first respond to the
question.

Thank you.

B&B Reporters
001 202-544-1903

Page | 362

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

DIRECT EXAMINATION
BY MR. BURN:

Q. Good morning, Mr. Shiolen.

A. Good morning.

Q. You have in front of you a card. With the permission of the President of the Tribunal, I will ask you to read what is on that card out loud onto the record.

A. "I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth."

Q. Thank you, Mr. Shiolen.

Could you take the file that is in front of you. In that file, you will find two versions of what should be your first witness statement. The second version is the Spanish language version. The first version is in English. We're just going to quickly check that this is all in order.

Could you look at the document, go through it very quickly, just to familiarize yourself with it, in order to check whether or not that does appear to be a copy of your witness statement in these proceedings?

B&B Reporters
001 202-544-1903

Page | 363

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. It appears to be my copy.

Q. And you didn't make a second statement, did you?

A. No, sir.

Q. Are there any changes you wish to make to this statement?

A. Not at this time.

Q. Could you go to the last page on page 11. Is that your signature?

A. Yes, sir, it is.

MR. BURN: Thank you. I have no further questions.

PRESIDENT SIQUEIROS: Okay.

Mr. Leathley. Thank you.

CROSS-EXAMINATION

BY MS. BOUCHENAKI:

Q. Good morning.

A. Good morning.

Q. I'm going to take you, please, to Paragraph 19 of your witness statement. You state in that paragraph that your work for Las Olas was to find buyers and to develop marketing materials; correct?

B&B Reporters
001 202-544-1903

Page | 364

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. Yes.

Q. So, although you said that you did not remember when you acquired the shares, is it correct that you never invested cash in the Las Olas Project but, instead, received your investment in return for services?

A. Yes, that's correct.

Q. That is what you state, in fact, in Paragraphs 15 and 16 of your witness statement. Were you given any stock certificates?

A. No, I never received any stock certificates.

Q. Your work was done out of Tampa; correct?

A. Yes, ma'am.

Q. And how many hours a week did you work on Las Olas?

A. It varied during different portions of the--of the Project.

Q. So, for example, between 2005 and 2008, how much time would you say you've spent working on developing this project?

A. I really couldn't say approximately how much time. It was less in the beginning when we put

B&B Reporters
001 202-544-1903

Page | 365

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

together the marketing brochures, pamphlets, et cetera. And I collaborated with Mr. Aven. I

wouldn't want to guess.

Q. But you didn't realize any sales during that period; correct?

A. No.

Q. And even though your primary responsibility was to attract new investors for the Project at that time; correct?

A. That is true.

Q. Now, is it the case that while you were given your alleged investment in 2006, you indicate in Paragraph 25 and 26 of your witness statement that you were only preparing to roll up your sleeves in 2007 and get really stuck in? That's what you say in paragraph--

A. In paragraph 25?

Q. 26. Sorry. Last sentence. That is really where you really started, you say, working on this project is 2010. So, I quote, for example, Paragraph 25: "In the first half of 2010, I started to run advertisements in newspapers for the Las Olas

B&B Reporters
001 202-544-1903

Page | 366

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Project."

And you carry on in Paragraph 26 where you say that you were preparing at that time to roll up your sleeves and get ready--and get really stuck in.

A. Yes.

Q. So that's--so, essentially, you would admit that before 2010, you haven't done much for the Project?

A. No, I didn't say that. The Project was shut down during the global financial downturn in 2008.

Q. Right. But you started on this project in 2005; correct?

A. Yes.

Q. Okay. Would you agree with me that no due diligence was made on your part in relation to this investment in Las Olas?

A. When you say there was no due diligence, could you explain that to me.

Q. So, what type of research studies did you review in order to decide that you were going to engage and commit to this project?

A. Well, that was through my conversations and
B&B Reporters
001 202-544-1903

Page | 367

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21
22

discussions with Mr. Aven, to whom I've had a--an extensive relationship and friendship in business over these last many years.

Q. So, independently from Mr. Aven, you did not conduct an independent inquiry into what this alleged investment was going to be for you?

A. The question is rather confusing, when you say I didn't conduct a direct due diligence.

Q. So, let me rephrase this. Your due diligence into this--you're a business person. You're used to business ventures, and you understand that due diligence is legal; correct?

A. Yes, I understand. I understand the term.

Q. So, you understand the concept of due diligence; correct?

A. Yes, I do.

Q. Yes. So, is it correct, then, to say that your due diligence for this particular project was limited to speaking to Mr. Aven?

A. No. I wouldn't say that at all.

Q. So, what other steps did you take to conduct the due diligence for this project?

B&B Reporters
001 202-544-1903

Page | 368

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

A. My position was to be involved in sales and marketing. So, when you say what due diligence did I do, that wasn't my position to do the due diligence on this project. That was done by Mr. Aven.

Q. Correct. So--

PRESIDENT SIQUEIROS: The question was quite clear. So, would you please first answer the question and then make any clarifications that you wish.

THE WITNESS: Sure.

A. So, what was the question again? Did I do any other additional due diligence?

BY MS. BOUCHENAKI:

Q. What due diligence did you do to commit to invest in this project?

A. I had always been associated with Mr. Aven. He's been a very successful business man. When he began to tell me about this project and how beautiful it was in Costa Rica and the opportunities, I was certainly interested.

The--at that time Americans were starting to buy properties in Panama, Costa Rica because of the high cost of real estate in places like Florida.

B&B Reporters
001 202-544-1903

Page | 369

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

Q. That was not my question, though.

So, in terms of--you're a business person.

You say in your statement that you have been engaged in various areas of business. So, you understand what I mean by inquiring into a project before committing either capital or resources to a project; correct?

A. That's correct.

Q. And so, with respect to this particular project, the commitment that you have here in terms of inquiring about this investment was limited to speaking to Mr. Aven; correct?

A. That's correct.

Q. Now, you limited your marketing work for this project to Florida; correct?

A. Yes, that's correct.

Q. And according to paragraph 25, again, of your witness statement, your target population was in Tampa where you lived; correct?

A. That is correct.

Q. Mr. Shiolen, just to summarize your situation here as an alleged investor, you committed no money to this project; correct? And your marketing

B&B Reporters
001 202-544-1903

Page | 370

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

efforts have not resulted in any sales for the Project. Am I stating this correctly?

A. No, I don't believe that's the case.

Q. Did you commit any capital to this project?

A. No. I already stated I did not commit capital.

Q. And your marketing efforts were limited

to--from what we see here--an advertising campaign in your area, in Tampa?

A. That's correct.

Q. Now, Mr.--so, are you aware of the amount of damages that you are asking from Costa Rica in this case?

A. Yes. I've reviewed them.

Q. And your alleged stake in this investment is 2 percent; correct?

A. That is correct.

Q. And the Claimants are asking for approximately \$92 million; correct?

A. I--I don't know if--I'm not familiar with \$92 million. I thought it was 75 or 78 million.

Q. So, you're not sure about how much money

B&B Reporters
001 202-544-1903

Page | 371

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

you're asking the Costa Rican taxpayers to pay you?

A. I think with interest, it might be the figure talking about.

MS. BOUCHENAKI: Thank you.

I have no other questions. Thanks.

PRESIDENT SIQUEIROS: Mr. Burn?

MR. BURN: Just one second, sir. Just a couple of brief questions, sir.

REDIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Shiolen, you've just been asked a few questions relating to the nature of your investment in Las Olas. You confirmed that you did not inject any capital as such. How would you characterize the form of your investment if not a capital investment?

A. Well, I would describe it as being sweat equity based upon an arrangement I made with Mr. Aven, someone that I've done business with for the last 38 years.

Q. Thank you.

And if the Project had not aborted, what do you think you would have been required to do in

B&B Reporters
001 202-544-1903

Page | 372

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

respect of the sweat to which you referred?

A. Well, in addition to helping Mr. Aven with the marketing concepts, putting together the brochures, the literature on the houses that we got from Mussio. In 2010 when the Project started back up again, I began to run advertising in Tampa, to the Tampa Tribune to a million-circulation market.

I received somewhere between 40 and 60 various different phone calls from interested parties who I discussed the project with. And when I felt they had a viable interest, I would refer them down to David and Jovan.

The plan going forward that I discussed with Mr. Aven to get his approval was to begin to bring groups of people down as the Project was coming up out of the ground, maybe groups of 10 and 12, negotiate deals with the hotels and the airlines to bring these groups down. Seeing is believing. When you walk interested parties onto a property such as the Las Olas Project, seeing is believing.

MR. BURN: Thank you. I have no further questions at this time, sir.

B&B Reporters
001 202-544-1903

Page | 373

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

QUESTIONS FROM THE TRIBUNAL

PRESIDENT SIQUEIROS: Mr. Nikken?

ARBITRATOR NIKKEN: Yes. Sir, in Paragraph 31 of your declaration, you affirm that David and the other investors had spent million--millions of dollars in applying for the construction and the environmental permits. Is it true, millions of dollars? To whom?

THE WITNESS: I believe, from what I discussed with Mr. Aven, that there was at least a million, a million five spent with the experts, the engineering firms, et cetera.

ARBITRATOR NIKKEN: But you don't know to whom has been paid? Because applying this--not preparing but to the agencies or somebody in the government or the local authorities or national authorities, ministries? Because the application is filed before the public agencies.

THE WITNESS: Well, I know that he had the engineering firms and various attorneys at the time advising him.

ARBITRATOR NIKKEN: Okay.

B&B Reporters
001 202-544-1903

Page | 374

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

PRESIDENT SIQUEIROS: Mr. Baker?

ARBITRATOR BAKER: Thank you, Chairman.

Dr. Nikken asked most of my questions, but I want to ask one follow-up to his.

You did not have any personal involvement in the preparation of documents for the planning or permitting processes; is that correct?

THE WITNESS: Yes, sir. That's correct.

ARBITRATOR BAKER: Okay. Thank you.

PRESIDENT SIQUEIROS: I have no further questions, Mr. Shiolen. Thank you very much.

THE WITNESS: Thank you.

MR. LEATHLEY: Sir, if I can interrupt. I think Mr. Mussio is next. Could we request just a five-minute break if that's convenient? Because I expect to examine Mr. Mussio for at least an hour.

PRESIDENT SIQUEIROS: Okay. Why don't we take, then, a ten-minute break.

MR. LEATHLEY: Thank you, sir.

PRESIDENT SIQUEIROS: Okay. Thank you.

(Brief recess.)

MAURICIO MUSSIO, CLAIMANTS' WITNESS, CALLED

B&B Reporters
001 202-544-1903

Page | 375

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

PRESIDENT SIQUEIROS: Okay. Are we ready to

proceed? Okay. Mr. Mussio, will you be testifying in English or in Spanish?

THE WITNESS: In Spanish, please.

PRESIDENT SIQUEIROS: In Spanish.

Very well. I will give a presentation in Spanish. There is interpretation into English.

Mr. Mussio, do you know that you are appearing here as a witness for Claimants at this Hearing?

THE WITNESS: Yes, sir.

PRESIDENT SIQUEIROS: The procedure to be followed is the following: The counsel for Claimants will introduce you. They will make some questions--put some questions to you focused on your Statement, and this will be followed by cross-examination by counsel for Respondent.

Any question you may have, any doubt you may have, please raise it and ask for clarification.

Prior to your responding, I will ask you to allow time for the person asking questions of you to finish the question; then you can start with your

B&B Reporters
001 202-544-1903

Page | 376

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

answer. And if you have any clarification to make, you may do so subsequently.

After the Respondent's cross-examination, counsel for the Claimant may ask some further questions to clarify your answers. The Members of the Tribunal may put questions to you at any point in time.

Lastly, there is a card on the table before you, and I would ask you to please read the Spanish version of that statement.

THE WITNESS: I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.

PRESIDENT SIQUEIROS: Thank you very much, Mr. Mussio.

MR. LEATHLEY: I'm not getting all the translation on English. I just wonder if we could do a test of Mr. Mussio's microphone, because I was hearing a translation on yours but not Mr. Mussio.

PRESIDENT SIQUEIROS: There might be an audio problem.

(Pause.)

B&B Reporters
001 202-544-1903

Page | 377

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

(Comments off microphone.)

THE WITNESS: My name is Mauricio Mussio Vargas. I am an architect. Very well. I will read once again the witness statement simply—I solemnly declare upon my honor and conscience that I shall speak the truth the whole truth, and nothing but the truth.

THE WITNESS: Very well. Once again, my name is Mauricio Mussio.

Now you can hear me? Very well.

PRESIDENT SIQUEIROS: Mr. Mussio, I also suggest, since the questions will be made in English, will be asked in English, you have the earphones there, to listen to the question in Spanish. You will have to wear the earphone to listen to the interpretation.

MR. BURN: Excuse me. I just had to retrieve the files that were deposited a distance away.

DIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Mussio, could you confirm for the record that your full name is Mr. Mauricio Martin Mussio Vargas?

B&B Reporters
001 202-544-1903

Page | 378

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. Correct. Mauricio Martin Mussio Vargas.
That's my name.

Q. Thank you.

You've already read onto the record the affirmation regarding the truthfulness of your evidence.

Could you take from the three files to your right the one that is marked "Volume 1."

At the top of the papers, there should be the--a copy of the Spanish original of your first statement.

Do you see that?

A. Yes?

What I want you to do is just flip through the pages just to make sure that you're happy that that is indeed a copy of the Statement that you made for these Proceedings.

Does that appear to be an accurate copy of your statement?

A. Yes, it is.

Q. Thank you.

Are there any changes, any amendments you

B&B Reporters
001 202-544-1903

Page | 379

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

need to make to that Statement?

A. No, sir.

Q. Now, if you look at page 36, there's a signature there.

Is that your signature?

A. Yes. It's my signature.

Q. Thank you.

Before handing over to counsel for the Respondent, I just wanted to ask you a few questions for the benefit of the Tribunal.

Could you describe for the Tribunal a little about your--the company for which you work.

A. Okay. Maybe, if you allow me, I would like to--I'm sorry, in Spanish.

I will speak maybe about the historical part of the company and what it does, what the company itself does; and about the two partners. Mr. Madrigal and I, we are the two partners of this company.

Mussio Madrigal is the company that did the design for Las Olas. It has a prior history. Its name was Mussio Madrigal Arquitectos. This was more or less in 1997, '98, when it began working--when I

B&B Reporters
001 202-544-1903

Page | 380

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

began working with Mr. Edgardo Madrigal, we began doing relatively small projects, and the projects

started becoming medium-sized projects and then large projects; and then we established the first company that is still alive, Mussio Madrigal & Arquitectos, it's a corporation.

And before that, Architect Edgardo Madrigal and I, we were colleagues at some of the university courses. Both Architect Edgardo Madrigal and I, we are, to a certain extent, the first professionals in our families. So, that sort of brought us together.

In 2004, we saw a business opportunity where a Mr. Sebastián Tenore (phonetic), who has a lot of businesses in Costa Rica, invited us to become part of a joint venture where he would be the capitalist partner and we would be contributing our professional services, and we did establish the corporation, Sotela Mussio Madrigal, and at that point, the real estate boom began.

A large amount of work began arriving in our country, and we were in a position--in a good position--or in a good area of the city, and through

B&B Reporters
001 202-544-1903

Page | 381

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Mr. Sebastián, we began making business contacts, and we began working on large projects, 100 hectares, 150 hectares.

The largest project we developed was 238 hectares. At that point, Mr. David's group came and hired us. That's the context I wanted to give you.

Now, as for as Edgardo Madrigal, the architect, he has truly been a blessing. He's an incredible person, very honest, very hard-working, very interested in details. He's truly somebody very moderate in that--well, I'm more impulsive, and he's calmer, and that kind of balance led to very good synergy between us.

Mr. Madrigal, when we became partners, he already had had long-standing experience in the design of neighborhood--or, rather, neighborhood residential sectors. We're speaking about millions of square meters. And my strong point is handling working with customers and the inspection and construction itself.

So, basically, it's been 20 years since we've become partners; and more than a partner--well, we've always seen each other as more than friends, almost

B&B Reporters
001 202-544-1903

Page | 382

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

like brothers. We see each other every day. I see him more than my family. He's someone really incredible, incredibly honest, very correct person.

As for me, I come from a family of builders.
My grandfather came to the country, invited by the
Government of Costa Rica, to build a very beautiful
building, a postal building. It's called--he stayed.
He got married.

All my uncles and father work in construction too. We are a large family, ten
brothers and sisters. Our house was always--something was being built there, a
room or something. So, I've been in construction forever.

In 1999 I went to the Architects Association.
That is compulsory to become a member of the
Architects Association in order to be able to be an
architect.

And in 2001, I went into a bidding process
for social housing done by the University of Lund in
Sweden in which a number of people from Latin America
participated, and I got a scholarship.

And in 2002, I took a graduate course called
B&B Reporters
001 202-544-1903

Page | 383

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

"Housing and Development," always aimed at social
benefit to develop low-income housing.

And by 2004, we began--well, the large boom
of real estate development began.

And recently, and to conclude, I would like to say that I obtained my Master's in Project Development with emphasis in construction based on the PMI, the Project Management Institute of the United States. Basically, that is the context of our experience.

I maybe forgot to mention, and if I may, I would like to add that our company's an adaptable company. It's a company that can build from a house to a project, for instance, of 238 hectares, as I mentioned. That is large. We do the design part while everything having to do with the basic studies, preliminary studies, the draft project; of course, applying all standards and rules and laws and regulations. We do the negotiation part or the paperwork, and we do the inspection normally, if the client so wishes.

Basically, that is what we do.

B&B Reporters
001 202-544-1903

Page | 384

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Thank you, Mr. Mussio.

Just one other question, but I do invite you just to keep your answer relatively brief. I'm sure the Tribunal helped--is helped by the very full answer you gave to this, but before I hand over, I just want to ask you one very brief question.

In your Statement, you refer to being on the Board of Directors of what in Spanish is called the INVU, and in English translates to the National Institute of Housing and Urban Development.

Just for the benefit of the Tribunal, can you briefly explain what the INVU is and what it means to be a board member on the INVU.

A. In--well, by the last year of President Laura Chinchilla's term, I received an invitation to become a member of the board of INVU, I-N-V-U, which is the National Institute for Housing and Urban Development.

And it is an autonomous entity of the Government of Costa Rica. It has its own regulations. INVU, I-N-V-U, makes efforts to carry out low-income housing projects. I've been a member of the board since the last year of President Laura Chinchilla's

B&B Reporters
001 202-544-1903

Page | 385

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

term, and I still have about a year and a half to go as a member of INVU.

INVU, as part of its roles, in addition to manage low-income housing projects, also has to see to all the regulations governing urban development in the country, urban

renewal, the law for land division, rules that regulate urban development in Costa Rica.

It's been an interesting and challenging work. It's actually a moral commitment when we have--when we accept this type of position.

It is a political position.

When Mrs. Laura Chinchilla's administration and--when she and the Government council requested my participation, they did so because of the technical substance of my know-how more than for political reasons. I wanted to clarify that.

Because at that point, the board did not have a technical branch. It sort of was in its teenage years regarding the technical part, the regulations, condominium laws, land division law. It was still in an intermediate term. In other words, those regulations were somewhat old, 30 or 40 years old.

B&B Reporters
001 202-544-1903

Page | 386

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

So, when I became member of the board, it was in order to make contributions in that area, in the technical area.

MR. BURN: Thank you, Mr. Mussio.

I have no further questions at this point.

PRESIDENT SIQUEIROS: Thank you.

MR. LEATHLEY: Thank you, Mr. President.

CROSS-EXAMINATION

BY MR. LEATHLEY:

Q. And good morning, Mr. Mussio.

A. Good morning.

Q. My name is Christian Leathley.

MR. LEATHLEY: Actually, I'm sorry. There's one procedural point which is, sir, in relation to our 521 document we mentioned, I will be using it during the cross of Mr. Mussio. So, can we distribute copies at least so you have a hard copy. We can make sure it goes into your files properly.

PRESIDENT SIQUEIROS: Okay.

MR. LEATHLEY: It is in the documents, and hopefully Mr. Burn will recognize it as what has been previously discussed as C-295.

B&B Reporters
001 202-544-1903

Page | 387

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

I see Mr. Burn looking quizzically at the other folders on his desk. They are simply because--we will be referring to a couple of documents from the record, which we were unable to get into the cross-bundles in time this morning. So, you'll be able to source them from your record. I'll source them appropriately and reference them.

MR. BURN: And I'm sure the copies of the
Witness Statements are properly there as well in the--

MR. LEATHLEY: Oh, yes. Yes.

MR. BURN: Thank you.

BY MR. LEATHLEY:

Q. Thank you.

And good morning, Mr. Mussio.

A. Good morning.

Q. As I was saying, my name is Christian
Leathley. I'm here on behalf of the Respondent, Costa
Rica.

And you've provided one Witness Statement in
this Arbitration; is that right, sir?

A. Yes. Yes.

Q. And that was in August of 2016?

B&B Reporters
001 202-544-1903

Page | 388

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. Yes. I believe so, yes.

Q. And you chose not to present a Witness
Statement to accompany the Claimants' Memorial of
April 2016; is that right?

A. Let me--can you translate, please?

Q. Someone else will.

A. Okay.

Q. Let me repeat the question. You chose not to

provide a Witness Statement to accompany the Claimants' Memorial in April of 2016; is that right?

A. I don't remember having refused to make a Statement.

Q. And your partner is Mussio Madrigal, you said; is that right, sir?

I'm sorry. Edgardo Madrigal?

A. Correct.

Q. And--but he has not provided a Witness Statement in these Arbitration proceedings; is that correct?

A. Actually--

Q. It's a yes-or-no answer, sir.

A. Yes.

B&B Reporters
001 202-544-1903

Page | 389

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. He has provided--

A. With me, together.

Q. I don't understand, sir.

You provided your testimony in your Witness Statement. Where is Mr. Madrigal's testimony in this Arbitration?

Sir, it's a simple question. Does--has Mr. Madrigal submitted a Witness Statement in this

Arbitration? It's a yes-or-no answer.

A. No.

Q. Okay. But you're testifying on his behalf.

A. Yes, as an architectural company, yes.

Q. In Paragraph 61 of your Witness Statement--

A. Could I look at it?

Q. Yes.

61. First Witness Statement--well, only
Witness Statement.

It's on page 30. I'm--I'm going to be
referring, sir, to an English version.

Sorry. Paragraph--look at 61. And there,
you say, "If, in dealing with SETENA, I had decided to
declare a particular area to develop, and then not

B&B Reporters
001 202-544-1903

Page | 390

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

respected that or given false details, this would have
constituted bad faith," in your opinion; is that
correct?

This is in the second half of that paragraph.

Can you see that wording there, sir?

A. I'm reading it right now.

Q. Can I help you at all with finding where it
is in the paragraph?

A. I'm reading the previous paragraph to know

what it was referring to.

Q. If you feel you need to read the paragraph

before, I'll let you to do that, or your counsel can redirect you to Paragraph 60 if he wishes. But let's look at Paragraph 61, because that is where my question is focused.

There you say that "If, in dealing with SETENA"--you can see actually--I think there's only two references to SETENA in that paragraph. So, go to the first reference where SETENA appears, on page 33 of your Spanish version.

"If, in dealing with SETENA, I had decided to declare a particular area to develop and then not

B&B Reporters
001 202-544-1903

Page | 391

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

respected that or given false details," then what you're saying and you're referring in early part of that sentence, you're saying it would have been bad faith; is that correct?

Is that still your testimony, sir?

A. Yes, definitely, what is here and what I'm saying.

I'm going to read it well, and I'll answer--I'll answer you correctly.

Q. To whether that sentence is still your testimony.

A. Yes, it is still my testimony, of course.

Q. Thank you.

And so, providing false details would constitute bad faith, in your opinion.

A. Yes, definitely, of course.

Q. And that would presumably include providing information that was knowingly inaccurate or incomplete.

A. Can you repeat the question?

Q. Yes.

You just said that providing false details

B&B Reporters

001 202-544-1903

Page | 392

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

would constitute bad faith. And so, I asked then whether that would presumably also include that providing information that was knowingly inaccurate and incomplete would also constitute bad faith.

A. As far as I can tell regarding this specific point, yes.

Q. Thank you, sir.

And you discussed in the opening part of your

Witness Statement--and I'm referring generally now to your Witness Statement--the experience that you have had in Costa Rica.

And, in particular, in Paragraph 9, you say--Paragraph 9 is a very short paragraph--you say, "It's normal for problems to occur."

Is that still your testimony today, sir?
It's the third sentence.

A. Maybe the important thing is to give the context of what I'm making reference to.

Q. The paragraph here refers to the preparation for large projects, the development of large projects; and then you say in the third sentence, "It is normal for problems to occur."

B&B Reporters
001 202-544-1903

Page | 393

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Is that still your testimony today?

A. Yes, definitely large project always will include a number of challenges that need to be faced. If, at that point, I gave that perspective and said it's a problem, it could be--also be seen as a challenge, yes, definitely.

Q. Thank you.

A. There are many variables that are involved in a large project, many social, political, economic--in any case...

Q. Yes. And presumably technical and environmental problems; is that right, sir?

A. Yes, totally technical, and the environmental part--well, the company always delegates that to experts.

Q. And this is to be expected when your projects interface with the many stages that you've set out in your Witness Statement. And, for example--and I'm thinking of Paragraph 17. There, you refer--and I'm only going to refer to it generally, sir, so, I think you bold--I think you highlight certain things in these upcoming paragraphs.

B&B Reporters
001 202-544-1903

Page | 394

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

You talk about basic studies in Paragraph 17. In Paragraph 18, you talk about preliminary studies. You talk about preliminary designs in Paragraph 20. And you talk about the drafting of the building plans in Paragraph 21; is that right, sir?

A. With reference to this specific point, these items here--

Q. The question was simply whether those were

what your paragraphs were generally talking to. I'm not asking to go into any further detail than that. You--

A. Not necessarily. Not necessarily. These five items I established by the Federate Association of Engineers and Architects.

In a project this large, the number--

Q. I'm sorry, sir. The question I have to ask--your counsel can always ask later.

My question is whether Paragraphs 17, 18, 20,

and 21 are referring to the basic studies, preliminary studies phase, preliminary design, and the drafting of the building plans. That's what your testimony appears to me. I just want to confirm that that's

B&B Reporters
001 202-544-1903

Page | 395

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

what you're talking about.

A. Correct.

Q. Okay. Thank you, sir.

And in Paragraph 23 of your Witness Statement, you list numerous institutions in Costa Rica that you have to deal with in the course of your work.

Do you see Paragraph 23, sir? It comprises a

lot of subparagraphs, letter A through, I think, to H.

Do you see that, sir?

A. Correct.

Q. And then you--I'm sorry. I need to wait for the translation.

And then you say in Paragraph 24 of your Witness Statement, you say, "Generally speaking, there is a lack of coordination among the government entities involved in the obtaining of the environmental building permits."

That's your testimony, is it, sir?

A. Correct.

Q. And I assume your observations are based on your experience; is that right?

B&B Reporters
001 202-544-1903

Page | 396

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. Totally.

Q. And, Mr. Mussio, I assume that you come across others in your line of work in Costa Rica as well; is that correct?

A. With other professionals who have the same opinion? With many.

Q. Thank you.

And they share your views?

A. 100 percent, yes.

Q. Thank you, sir.

In the opening part of your Witness Statement, you also talk about the care that you take in relation to the environmental aspects of your role; correct?

A. Yes, sir.

Q. And in particular, in and around Paragraph 14 of your Witness Statement, you say that there are cases where you--and I'm now quoting--"have identified an area that might be classified as a wetland."

I think in Spanish, you say "puede ser." Do you see that in Paragraph 14?

A. Yes, sir.

B&B Reporters
001 202-544-1903

Page | 397

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And I assume that at the outset, it could be said--it could be the case that it's not necessarily clear whether there is an--whether the area does have a wetland, which is why you go on in the same paragraph, just after about halfway, you say,

"Nothing is left to chance; thus minimizing uncertainty and therefore reducing risk."

A. Correct.

Q. Thank you, sir.

And nothing is left to chance because if a wetland were to be found, then this has obvious consequences for any project; correct?

A. Correct.

Q. Such as suspension.

A. Well, in case the corresponding entity, which--that is to recommend--

Q. That's not my question. My question is whether in theory, if the consequence of finding a wetland, a project could be suspended.

We'll come on to this project. We'll have plenty of time. We're going to talk about this project in detail.

B&B Reporters
001 202-544-1903

Page | 398

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. Okay. Well, if hypothetically it were a wetland, we would have known that before--

Q. You're answering a question I haven't asked. We will come onto the wetlands themselves.

My question is simple: In theory, if a

wetland were to have been found on any project, then the consequence could be the suspension of the project, by operation of the law.

A. Not necessarily. But not necessarily.

Q. But then you appreciate that it could; maybe or maybe not?

A. Well, I think that your question has more a legal than technical substance, and that is my experience, the technical aspect.

Q. Thank you. Let's move on.

And I wonder, you say that you have dealt with the permitting process, with the technical details. I'm assuming you're relatively familiar with certain of the legal requirements, is that correct, in order to do your job?

A. Yes. We do have a general idea, a general idea, of everything that will happen in the project.

B&B Reporters
001 202-544-1903

Page | 399

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

But in the final analysis, there are some aspects that are not only legal, but also technical, that we necessarily have to delegate to a hydraulic engineer, a geologist, a biologist, a forestry engineer, for legal advice, too. That definitely is done that way.

But we do have a general know-how, but not detailed.

Q. Thank you, sir.

And presumably, that's because ecosystems such as wetlands are protected by Costa Rican law.

A. I also think that that question requires a legal response, and that's what I delegate.

In other words, if the expert, the one we hire, shows through evidence that there's a special situation, then that comes to me, where I do the design. And that is--we do envisage it, we isolate it, or we leave it, or--well, to give you an example, creeks have a characteristic of certain protection that is done by the INVU, and generally set a level curve--papers and designs are given, and then we'll respect the setback. It can be 10, 15, or 50 meters. That is determined by the law, and that is determined

B&B Reporters
001 202-544-1903

Page | 400

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

by an institute--by the Institute itself.

Q. Thank you.

And wetlands are also protected by the law; correct? You don't know?

A. Well, it would be based on my scarce knowledge, I understand, yes.

Q. Scarce knowledge.

A. With regard to that specific aspect, well, the environmental issue in Costa Rica is a very complex one. So, I would repeat that what we do in this case, specifically in Las Olas, we hired a geoenvironmental business, which is a business that has dealt with environmental issues, big projects, the Highway 27, and the environmental complexity is immense. So, we hire experts.

So, I would repeat that I know it--what it might be, and I have stated in my Witness Statement what we know about the project.

Well, going back to the structure that we use in the business--

Q. Yes, thank you, sir. We'll talk about the structure of your business in a moment.

B&B Reporters
001 202-544-1903

Page | 401

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

I wonder if I can show you Article 45.

MR. LEATHLEY: This is C-185 for the record.

BY MR. LEATHLEY:

Q. This is the organic environmental law. In Tab 2 of that first binder--you probably want to put a pen in your Witness Statement, because you may be going back to that.

And we're looking for Article 45.

Actually, let's look at Article 41.

Do you see that, sir? It says: "Interes Publico"?

A. Correct.

Q. And I'll read the Spanish. (In Spanish.)

"Wetlands are declared to be a public interest in their conservation because of their multiple use where they're protected by--or not protected by the law that governs in this material."

Sorry, sir. Did I read it--there's a translation going on in English, and I want to make sure that anyone who's listening in English can hear the end of that before I ask the next question. It's particularly important for the people who are

B&B Reporters
001 202-544-1903

Page | 402

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

transcribing.

I'd also like you to look at Article 45. I think you may have to turn the page.

Again, I'd like to read this to you.

It says: "Prohibition: Activities are

prohibited that would interrupt the natural cycles of wetland ecosystems, such as the construction of dikes, which would handle the flow of Continental or ocean

waters, their drainage, their drying, their filling, or any other alteration that could cause deterioration or elimination of such ecosystems."

You see that, sir?

A. Would you like me to refer to this?

Q. Is this the first time you've seen those articles?

A. Well, I have really gone into what really most impacted the design as far as the environment is concerned.

Q. So, this is not the first time.

A. No. In reality, though, it's the first time that I studied it in this manner.

Q. Now, even if a protected ecosystem like this

B&B Reporters
001 202-544-1903

Page | 403

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

is found, it is part of Costa Rican law to do what you say in Paragraph 23G? Let's go to 23G of your Witness Statement.

And there, you say--please just read the first sentence of Paragraph 23G.

A. "The National Technical Secretariat for the Environment, this is a body that is under MINAE and has the responsibility to ensure all urban development, construction, or infrastructure, so that it complies with environmental regulations,

must be developed affecting the environment in any way and mitigate adverse effects to the environment that any project may generate."

Q. Yes. To mitigate, we have the--only environment that the project might generate.

And in Paragraph 23G, where you're talking about SETENA, this is your experience of them, correct, that they will want to harmonize any environmental sensitivities with a developer's plan to construct; correct?

A. Can you repeat the question, please?

Q. In this same paragraph, 23G, where you're

B&B Reporters

001 202-544-1903

Page | 404

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

talking about SETENA, this is your experience of them; correct?

So, I tell you what. You spoke a little bit earlier in English. If you're happy for me to speak slowly, it may be easier for me to speak in English, you listen to it in English, and if there's difficulty, we can listen to a translation.

A. Yes. Well, we have been going from one place to another, and I don't really understand the question. I don't know if your question is referring to some of the points that you already mentioned.

Q. My question is referring--just to the question I'm asking you right now. You're talking about SETENA in Paragraph 23G. And you're saying that they will want to harmonize any environmental sensitivities with the developer's plan to construct; is that correct?

A. Yes. Any project has an impact. Any project. The idea is that through SETENA's requirements--for example, some call for very detailed studies; others are more simple in keeping with the impact that the project might generate.

B&B Reporters
001 202-544-1903

Page | 405

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

But SETENA's function is to dictate what the rules are, to see what the impact is, and so, of course, seeking the urban development and project development without it affecting aggressively the environment.

Q. And so, if the common goal of everyone, you--the authorities and environmentalists, is to protect wetlands, then I suppose, if there might be a wetland, one has to ensure that the authorities are given all the relevant information; would you agree?

A. Well, you--your question has two parts. It has two parts. You say--well, perhaps you can repeat

it. I can answer the first part and then I can answer the second part of your question.

Q. Let me ask the second part. If there might be a wetland, one has to ensure that the authorities are given all relevant information; correct?

A. Well, the correct thing would be that the agencies which are experts in the field--well, would tell one, this way you present the information in a less--in the Las Olas project, it was clear--if you would allow me to delve into this here because it

B&B Reporters
001 202-544-1903

Page | 406

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

really supplements the answer I want to give.

Q. That's not my question, sir. And we then

come in a moment. That's not my question Sir and it's very important that you answer my question.

You will have time to talk about the project in a moment, and your counsel can redirect if he feels necessary.

My question is: Building on your comments earlier, you said that it's important--you said that it would be bad faith if there was false or intentionally incorrect or incomplete information. So, I'm asking whether--if there might be a wetland, one

has to ensure that the authorities are given all the relevant information. It doesn't seem to be a complex question to me, sir.

A. No, it's not a complex question, but it needs to be clarified. Well, if you say it's--whether it's a wetland or not, that should be the agency of the State. It's not me, not even expert that I have.

In this case, at that point, it was SINAC, the National System for Conservation Areas. They need to tell us what's going on environmentally, or in the

B&B Reporters
001 202-544-1903

Page | 407

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

case of Las Olas, whether there are wetlands or not.

Q. Are you aware of the burden of proof that a developer is under when submitting a D1 Application?

A. Excuse me. I don't know what you mean by "burden of proof."

Q. Well, let's turn to C-207. This is the Biodiversity Law. And that's in Tab 4 of your binder.

You just said to me you don't understand what's meant by (in Spanish [carga de la prueba]), or burden of proof. Look at Article 109. Do you see that, sir? Is this the--yes. Is that the first time you've looked at this article?

A. Yes. It is the first time that I have seen it.

Q. Let me read it to you, sir.

Article 109--this is C-207. Hopefully the Tribunal will have it to hand--it says, "The burden of proof--the burden of proof of the absence of pollution, degradation, or nonpermitted impacts will correspond to the person requesting the approval, the permit, or access to the--to biodiversity or the person who is accused of having actually caused

B&B Reporters
001 202-544-1903

Page | 408

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

environmental damage."

And so, the risk is on the developer, since the damage--the risk of damage is assumed by the developer and the owners; correct?

A. In the case related to my participation, what we did was a draft project--

Q. We'll get on to your experience. We'll get on to the projects. I'd like to look at Article 109. I appreciate you say you haven't seen it before, but this is a pretty important concept about who has the burden.

And I'm asking you whether, from reading this article, or from your experience with the number of

years that you've explained you've been working in this field, your understanding is that the risk is on the developer. And in fact, sir, the risk is also on you, your consultancy.

MR. BURN: In order to aid Mr. Leathley, can I just suggest that the witness is taken to Article 105.

MR. LEATHLEY: You can ask that on redirect, sir.

B&B Reporters
001 202-544-1903

Page | 409

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

MR. BURN: Well, you're not just not giving the witness the chance to understand the question.

MR. LEATHLEY: Then you can ask on redirect.

THE WITNESS: What I can't find is environmental damage. What environmental damage? In this case? What I don't find is the environmental damage, because we never initiated works on our part.

BY MR. LEATHLEY:

Q. So, is this the first time, sir, that you've

been encountered with this concept of who has the burden of proof?

A. Perhaps, if you would allow me, sir--we delegate this. We have to delegate this. It's materially impossible, in my opinion--not just my firm--rather that of my colleagues--can manage all of these legal conditions or characteristics regarding the environment, when there's a project.

As far as I know, there is no consulting, architectural consulting firm, that generates this kind of master plan or projects for urban development that also have an environmental consulting firm. We always subcontract that. It's always subcontracted.

B&B Reporters
001 202-544-1903

Page | 410

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

The fact that I don't know the concept of the burden of proof and where it is here to say the truth, I don't know it. It's the first time I've seen it. But I am 100 percent sure that the consulting firm, the environmental consulting firm, does understand these concepts. Without a doubt.

Q. But you're the environmental consulting firm.
But you're explaining you don't understand it.

A. No. There's something wrong in your question.

I am not the environmental consulting firm.
I am the architectural firm. I'm the architectural firm.

Q. Understood, sir. But you're giving advice in this context on the D1 Application; correct?

A. No. No, sir. There's a concept that's off here.

Everything that has to do with drawing up D1 and preparation of Environmental Viability is given to a consulting firm. It's Geoambiente. They prepare everything, all the protocols. Clearly, it is a multiprofessional endeavor.

B&B Reporters
001 202-544-1903

Page | 411

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Just to give you an example, just to give you some context, within the protocols, the environmental protocols, for example, there is one on geology. The environmental firm requests that we hire the number of tests stipulated by SETENA, depending on the number of hectares of the project, that we hire a laboratory that is--specialized, does the testing, and then that is passed on to the environmental firm.

Now, with regard to archeology, it is a protocol that must be carried out. We have to attach it to the Environmental Viability.

What we do do is to support the document through our firm--well, through our signatures, excuse me. And I believe that Edgardo Madrigal signed it for

submission to--for the Environmental Viability, but, of course, there are multiple professionals that have prepared this document.

But just to clarify, the firm Sotela Mussio Madrigal is an architectural firm, and Geoambiente is the business that does the Environmental Viability part.

Now, if you would also allow me--

B&B Reporters
001 202-544-1903

Page | 412

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Excuse me, sir.

And in Paragraph 23G, you say that during the period of the application for the Environmental Viability that you considered some sensitive-care areas.

And I think if you go to the last page--Paragraph 23G is a long paragraph, and I would turn on the last page on which it appears.

Do you recall talking about sensitive-care areas?

A. Wonderful that we're here.

Q. Do you remember talking about--

A. Yes, of course. Here, you see the good faith that we have, where we--without being experts, considered where there must be attention given.

Q. Yes, because you want to minimize risk;

correct?

A. Yes, totally.

Q. And minimizing this risk and sharing information with--with the authorities is not just a checking-of-the-box exercise, is it?

A. Can you repeat the question?

B&B Reporters
001 202-544-1903

Page | 413

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Yes--no, I'm not going to repeat the question. Sorry. I won't ask it.

Let's look at your Paragraph 23G. You talked about sensitive areas. And in that paragraph, you mention that there were sensitive-care areas that were designated by your firm; is that correct?

A. May I give you the context?

Q. No, sir. It's a yes-or-no answer as to whether you designated sensitive-care areas.

A. Yes.

Q. And these areas were never disclosed to SETENA, were they?

A. SETENA was there.

Q. I'm talking about the D1 Application, sir.

A. In D1 Application is based on the information

that we have from government entities. If government entities do not--or did not identify these areas as such, then I don't understand why we would have to include it.

Q. Sir, the burden of proof, as we've just seen from Costa Rican law, puts it on the developer.

MR. BURN: Sir, I have to object--

B&B Reporters
001 202-544-1903

Page | 414

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

MR. LEATHLEY: No, I'd like to know--

MR. BURN: No, I'm sorry. I have to object because this question--this line of questioning has been put to the witness based on a fundamental misunderstanding of the law to which Mr. Leathley has taken the witness. There is a fundamental mistake of law that is underlying this line of questioning.

I'm happy for it to proceed. It's a waste of time because it's based on an error of law, but--and we can come back and fix it. But I do need to object to make it very clear to the Tribunal that this is based upon a fundamental error.

MR. LEATHLEY: Mr. President, I vehemently object to testimony from opposing counsel during my cross-examination. I don't think I've ever seen that in my life. If Mr. Burn has a desire to redirect the

witness, he may do so. We're here to examine the knowledge of Mr. Mussio. Let me examine his knowledge.

PRESIDENT SIQUEIROS: Please proceed.

But bear in mind that Mr. Mussio has already acknowledged that he wasn't aware of the burden of

B&B Reporters
001 202-544-1903

Page | 415

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

proof established under--as is established under the Biodiversity Law.

And also, as Mr. Baker wishes to have clear, that the witness is not a lawyer, so, his knowledge of the law or not in this context should be limited as to his experience as a firm of architects in developing a project in Costa Rica.

MR. LEATHLEY: Thank you, sir.

BY MR. LEATHLEY:

Q. The sensitive-care area--so, you talk in your

testimony about the D1 Application. It was your voluntary testimony to describe your involvement in the D1 Application process to SETENA; is that correct?

It's a simple yes or no. Does your Witness Statement deal with the D1 Application?

A. Yes.

Q. This is an application process that is submitted to SETENA; correct?

A. D1, yes. Yes, sir.

Q. Thank you.

And the SETENA--the application, the D1 Application that was submitted to SETENA for Las Olas

B&B Reporters
001 202-544-1903

Page | 416

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Project for the Condominium Section did not identify the sensitive areas that were identified in your witness testimony.

A. Frankly, I don't know.

Q. Thank you.

Let's go to Paragraph 13 of your Witness Statement, sir. Here, you say that your experience with wetlands is extensive. The English version says "broad," but the Spanish version says "extensiva"; is that correct?

A. With all due respect--Is that a yes or no or I may delve into this?

PRESIDENT SIQUEIROS: The answer should be yes or no, and thereafter, if you would like to make a clarification, you may.

THE WITNESS: Yes, and if you would allow me to clarify.

BY MR. LEATHLEY:

Q. Yes, please.

A. Okay. Perhaps here we need context and understand how the dynamics of the climate work--it's tropical. It rains a lot.

B&B Reporters
001 202-544-1903

Page | 417

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

MR. LEATHLEY: I'm sorry, Mr. President. I will interrupt this question. In light of the speech we're about to get, I'd like to rephrase my question.

BY MR. LEATHLEY:

Q. Does the first line of your Witness Statement in Paragraph 13 say that "My experience with wetlands is extensive"?

A. May I expand on this?

Q. It's a yes-or-no question. I'd like to know whether your Witness Statement is correct, as I'm reading that, if that's still your testimony today.

You can correct that sentence if it's--or we can strike that sentence in its entirety. But you affirmed earlier today that that's your testimony. I'd just like to confirm--because I have many more questions, sir. We'll be here all day, if need be,

but I've got many more questions.

I'd like to know if that is still your witness testimony, that first part of your sentence. We'll come on to the details of the project. I know you're keen to talk about it. We're very keen as well.

B&B Reporters
001 202-544-1903

Page | 418

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. Yes.

Q. You go on to say in this same Paragraph 13, that you are familiar with the characteristics of wetlands. That's a little bit further down in the same paragraph.

Do you see that, sir?

A. Yes. Yes.

Q. Now, you refer in your Witness Statement to the report prepared by Mr. Protti. And you criticize Mr. Protti's report. And in particular, you say that his reference to the swampy-type flooded areas with poor drainage does not refer to a wetland.

That was your testimony, wasn't it, sir?

A. No. My opinion is no.

Q. And just so we don't get confused between the

Spanish and English use of "no," you mean no, you agree; but you criticized Mr. Protti's report, and in particular, you say that his reference to swampy-type flooded areas with poor drainage does not refer to a wetland. That was your conclusion or your criticism of Mr. Protti.

A. Yes. I criticized him, and what is difficult
B&B Reporters
001 202-544-1903

Page | 419

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

to not be able to clarify in this same Protti report, in the same notes below, he said that is because of a lack of drainage, that the situation is because of a lack of drainage, which something that I say and what strikes me, and I'll just take a minute, because that is a municipal street.

Q. You weren't present when Mr. Protti conducted his survey, were you?

A. No.

Q. And your conclusion is based on his terminology in his report; correct? There's no other way you could have reached your conclusion; you weren't with him. You've read his report, and that's how you reach your conclusion; is that correct?

A. I read the report, and I consulted with the environmental people to reach that conclusion, yes. But I have my own ideas about why that has happened.

Q. And we'll discuss those now.

You say in Paragraph 48 of your Witness

Statement that "At no time was it stated by Mr. Protti that it is an area known as a wetland." That's down towards the bottom half--the bottom third of that

B&B Reporters
001 202-544-1903

Page | 420

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Paragraph 48.

Do you see that, sir?

A. Yes, correct.

Q. And you stated the term "wetland" is a technical term; correct?

A. Correct.

Q. In fact, let me read that sentence in its entirety. I'm reading the English translation. This is Paragraph 48 still.

"With that, he's indicating that the area is not suitable for developing the project, but at no time was it stated by Mr. Protti that it is an area

known as a wetland, which is a specific technical term that is not stated in the document."

Do you see that sentence--that paragraph--sorry, that sentence?

A. Yes, sir.

Q. So, without knowing what Mr. Protti saw, because you weren't there, you're concluding from the term "swampy"--and I'd like to know what the translation is, swampy. "Pantanososo"?

A. "Pantanososo."

B&B Reporters
001 202-544-1903

Page | 421

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Uh-huh. Flooded and poor drainage.

A. Correct.

Q. That based on the words, whatever Mr. Protti saw could not have been a wetland, in your opinion; correct?

A. Correct.

May I expand on that?

Q. We'll get there, sir.

PRESIDENT SIQUEIROS: If it's a very specific clarification, please go ahead. But we do not want you to digress on this topic.

THE WITNESS: In regard to the very specific question, my reply is equally specific. What Mr. Protti saw is something that we can see today.

As far as I understand it, a wetland has to meet three characteristics, basic ones: "Flora, fauna, and soil.

With my knowledge, my technical knowledge, the three do not appear at the same time, beginning basically, with soil.

BY MR. LEATHLEY:

Q. Thank you.

B&B Reporters
001 202-544-1903

Page | 422

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Could you give me one moment, sir.

(Pause.)

BY MR. LEATHLEY:

Q. If you'd give me one second, sir. Sorry, Mr. Mussio; I'm just going to look through my papers.

A. That's fine.

(Pause.)

BY MR. LEATHLEY:

Q. Mr. Mussio, the Protti report was prepared for Techno Control. Let me show you the Protti report. It's Exhibit R-11. It's--I'm afraid we have to consult the record here, because it doesn't form--

We'll find you the right document and we'll give the proper reference. R-11, for the Tribunal's purposes.

You hired Techno Control; is that correct, sir?

A. Yes, sir.

Q. Techno Control hired Mr. Protti; is that correct, sir?

A. I believe that is--was the case. But let me--may I clarify?

B&B Reporters
001 202-544-1903

Page | 423

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Yes, please do.

A. It might be important--Techno Control is a soils study firm. And Techno Control at the same time, probably, hired Mr. Protti.

I must say that this does refer to soils.

So, the study focused on soils: Support, infiltration, and other characteristics. And why do I criticize Protti's report? Because he's not an expert. He's not an expert to say what's a wetland, what's a pond or a lake.

Even when it comes to surface runoff, there is a department in Costa Rica to say whether it's a river, a stream, or it isn't a river, it's not a stream, or it's the use--

Q. Your counsel or your--Claimants' counsel has kindly explained all the institutions to us yesterday.

The Geoambiente report was submitted with the D1 Application; correct?

A. Could you repeat your--the question, please?

Q. Yes. The Geoambiente report was submitted with the D1 Application; is that correct?

A. It is my belief that that was the case.

B&B Reporters
001 202-544-1903

Page | 424

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. And that is in your Witness Statement.

And you also say in your Witness Statement

that "Geoambiente hired a professional in hydrogeology named Eduardo Hernandez Garcia."

A. Yes, sir.

Q. I wonder if you can turn to the first page of R-11. This is the Protti report. Just inside the--basically, the front cover. You need to go back

to the left-hand--there you go. Yes.

Can you tell me what the first few words are?
Well, let me tell you, sir, and you can tell me if you agree. (In Spanish. [Estudio Geologico Hidrogeologico])

Is that right, sir?

A. Yes. That's what it says here.

Q. And Mr. Protti is a hydrogeologist; correct?

A. Give me a minute, please.

He's a geologist. Geologist. That's something different.

Q. How do you know--where is your testimony that he's a geologist? Where is your source for that, sir?

A. Well, he signs off here as a geologist.

B&B Reporters
001 202-544-1903

Page | 425

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. And the report is a hydrologist report; correct? Sorry, hydrogeologist. That's what it says on the cover and that's what it talks about in the first line. "The content of geological and hydrogeological studies."

A. That's what it says here, but may I clarify it?

Q. And so, Mr. Protti reported to Techno Control; Techno Control reported to you. But the

Geoambiente report was the one that was submitted to SETENA in the D1 Application; is that correct, sir?

A. Correct.

Q. Thank you.

The Geoambiente report did not identify any of the features that the Protti report identified, did it, sir?

A. I do not know.

Q. You testified about the Geoambiente report in your Witness Statement?

A. Yes, of course.

Q. Did you review it before providing your Witness Statement?

B&B Reporters
001 202-544-1903

Page | 426

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. That was my partner. My partner took care of these office matters.

Let me clarify something. I spend a lot of time in the field. My partner spends a lot of his time in the office, and this is office work.

Q. Thank you, sir.

A. My pleasure.

Q. Claimants have said this week that there are wetlands on the land today. You've earlier stated that what Mr. Protti saw is the same as what is there

today.

Do you stand by that testimony, sir?

A. Yes, as long as what happens today continues happening technically, yes.

Q. Thank you.

In various parts of your Witness Statement, you assert that no type of activity was allowed to be carried out in Las Olas without the prior authorization to do so.

A. I do not understand your question.

Q. Let me rephrase it.

You say in your statement that no type of

B&B Reporters
001 202-544-1903

Page | 427

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

activity was allowed or carried out in Las Olas without the prior authorization to do so; correct?

A. Okay. There's a time factor here. When we did our work and when the project for the Las Olas condominium was worked on, there were no works underway. That is what I can say.

Q. And when is your work, sir?

A. We began in 2007, and by 2008, if I'm not mistaken--by mid-2008, we had already obtained the due process prior to presenting it to the Municipality. It was all ready and prepared to submit to the Municipality and that was the scope

of our contract. In our contract we specified that we would deliver to the Las Olas group the plans that had gone through SETENA, "IAM" (phonetic), Ministry of Health.

Obviously, there were some municipal formalities, and this is to give you the context. The construction permit is issued by the Municipality once all these prior steps in the process have been complied with.

We do deliver it with the School of--with the formal authorization and approval of the School of

B&B Reporters
001 202-544-1903

Page | 428

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Architect.

Q. And you say in Paragraph 23G, you mention
that all permits were obtained before initiating works on the site; correct?

A. Just a minute. You said 23G?

Q. Yes, sir.

A. Whereabouts, please?

Q. This is your Witness Statement, sir; you've reread it for today.

Let me try and find it. I'm looking at the

English version, top of page 14. I would suggest it's probably close to the top of the last page.

Well, let me ask you the general question,
sir: Is it your testimony that all permits were
obtained before works commenced on the site?

A. I cannot affirm that, because I performed my
work prior to its presentation to the Municipality.
The construction permit, let me repeat, is something
issued by the Municipality.

We delivered to the Las Olas group all
permits so that they could then submit it for this
last final step. They needed all the other permits.

B&B Reporters
001 202-544-1903

Page | 429

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Then they go and present it to the Municipality, and I can perfectly assert that they
had all of the prior documents. The Municipality will give them the permit for
construction. That's when they can begin. But that was not done while we were
working for them, because it is prior to the construction permit.

Q. Well, I'm confused, sir, because this doesn't
square with what your testimony is. Maybe this is Mr.
Madrigal's testimony rather than yours.

In paragraph 23G, you say that all of the permits were filed and then you italicize "before starting the works and the respective authorization was obtained from SETENA."

This is page 14--look down at the last six lines of page 14. Is this your wording or is it Mr. Madrigal's wording?

A. If you'd allow me a moment, I'd like to find it, read it, and then I can answer.

(Pause.)

THE WITNESS: Okay. I've found it.

BY MR. LEATHLEY:

Q. Is that still your testimony today, sir, or

B&B Reporters
001 202-544-1903

Page | 430

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

would you like to correct that?

A. No, I don't want to correct it, but I would

like to clarify what I mean, because perhaps it's a matter of a conceptual issue here, if I'm allowed to.

Very well. What I am saying, and I'm going to read it, is that in this case, it is--no, I apologize. No.

Because as I indicated before, in the case of Las Olas Project, all of the permits were filed before starting the works, and the respective authorization was obtained from SETENA when it granted the Environmental Viability.

What I am seeing here conceptually is that everything is ready. Now, perhaps--and maybe could clarify here--what SETENA issues is a license. What the other government entities provide are authorizations.

The permit, per se--and maybe I'm trying to put it into English. It's a permit, not a license. For instance, a driving license gives you the authority to drive. The permit is that they can then begin work.

B&B Reporters
001 202-544-1903

Page | 431

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

We delivered everything ready to begin. What I'm trying to say, the concept behind all of this is that once they have paid for the construction permit at the Municipality, then yes--and that will then be in force for one year, and it's important to understand that. It remains valid for one year.

Q. So, let's be clear about our terminology. When I say "permit," I mean a construction permit, which follows on from an Environmental Viability.

Would you agree, sir?

A. And other documents, the Environmental Viability and other documents.

Q. Let's turn to Paragraph 70. 70 of your

Witness Statement. You see at Part 7--just about Paragraph 68, it's titled, "Construction." And Paragraph 70 says: "No unauthorized work was carried out while I was involved in the Las Olas Condominium Project which was also proven by SETENA in the visits they made, as there was no paved highways; likewise, in the easement area, since everything that was done therein had a construction permit and was implemented prior to the specified dates."

B&B Reporters
001 202-544-1903

Page | 432

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

You see that language there, sir? I don't have a question; I'm just asking if you can see that.

A. Correct. I do see it.

Q. And you say in Paragraph 42 of your witness statement that Mussio Madrigal was in charge of processing the construction permits and supervising the works; is that correct, sir?

A. Yes. But, here again, I think I need to clarify something. We have the Las Olas Condominium as a condominium, as a legal entity that appears as

the term "condominium."

Then we have the easements. This is another structure that is allowed by the division law or the fractioning law. For the Members of the Tribunal, what I'm trying to make clear, we can't really have a jigsaw of one figure with the other one because legally they are very different.

Environmental Viability construction permits for the Las Olas Condominium belong to the Las Olas Condominium. The permits obtained for the easements are physical figures with cadastral numbers, all different, and the owners are different.

B&B Reporters
001 202-544-1903

Page | 433

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Perhaps that clarifies or--or perhaps you'll tell me if you need me to expand further on this.

Q. I'm just interested now in your understanding of the--the fragmentation. This is a legal term. Is that a legal term you're familiar with?

A. Physical fragmentation of the division of the land--well, I brought with me the Urban Code. It's a compendium of all the law in Costa Rica.

Q. I apologize. Have to keep--time is our only asset in our week, so I have to keep you to our

questions which I've prepared very carefully. And if your counsel wishes to ask you a follow-up question, they can do so.

Let's go to R-521.

PRESIDENT SIQUEIROS: Perhaps

Mr. Leathley--can you just repeat the number of the paragraph.

MR. LEATHLEY: Yes. This is--I'm now in an exhibit. This is--I'm sorry. I give the Tribunal my back. My apologies.

This is R-521. And, yes, it was what was previously known as C-295. This is a document that

B&B Reporters
001 202-544-1903

Page | 434

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

has two letters. The first is a request for construction permits.

BY MR. LEATHLEY:

Q. Have you seen this document before?

A. No. No, sir.

Q. So, this is a request from Claimants' Costa

Rican lawyers making requests for construction permits for the easements. And then the response from the municipality says--and let me read it into the record because I don't think we have a translation.

"In response to your request to certify construction permits granted to conduct work on the easements that affect the properties of the Province of Puntarenas and that affect the cadastral"--and there are a series of numbers--"I'd like to inform you that it cannot be issued because, according to our records, in this property there has not been any permit--there are no approvals for construction permits."

My question is, this is confirming there are no construction permits for the easements in 2008 and 2009. Is that right, sir?

B&B Reporters
001 202-544-1903

Page | 435

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. No, sir. From documents it might be so, but we did obtain the construction permits for two easements.

Q. And could you take me to those documents, please, sir.

A. Unfortunately--let me see. I'll be brief, but I do need to provide a context.

Q. No, sir. My question is, do you have those construction permits? Because we don't have them on the record in this arbitration. So, I would be interested to know if you still keep a copy of those

documents.

A. The permits are very old. Ten years old practically.

Q. Sir, I appreciate that. It's a simple yes or no .

Do you in your possession or does Mussio Madigral have those construction permits?

A. We have what we obtained from the Association of Engineers and Architects. They gave us the permit. And this is the process that I explained. First the association and then the municipality.

B&B Reporters
001 202-544-1903

Page | 436

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Yes. The municipality permits that were requested—because the municipality issues the permits.

A. Correct.

Q. You asked in the days before--I will ask you to take a note of the date of this letter, 9th of November 2016. That's barely three weeks ago. They ask for construction permits for 2008 and 2009. And the response is that none were ever approved.

A. Correct.

Q. Are you contesting the response of a municipality? Are you saying they're wrong?

A. Unfortunately, I must say yes. Definitely yes. Because they even lost documents--a significant number of documents due to the flooding after the Alma Hurricane. And I was in the area at the time. And I'm sure that they lost many documents.

Unfortunately, I don't have the permit per se. I said that we looked at the historical documents, and we did find the permits that we presented to the Association of Engineers and Architects.

Q. So, of all of these documents in the entire

B&B Reporters
001 202-544-1903

Page | 437

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

arbitration, we have everything except for two permits from 2008 and 2009 which you say were lost in a flood; is that right, sir? Is that your testimony before this Tribunal?

A. As far as I understand it, yes. That's what I am stating, yes.

Q. Okay. Let's go to C-295. We'd like to go to the Claimants' C-295. This is the document that was submitted onto the record this morning.

PRESIDENT SIQUEIROS: Just a question of procedure. How long would you estimate your examination to continue? Otherwise perhaps we could consider a short break at this moment. I don't want to interrupt if--

MR. LEATHLEY: If I can just finish this immediate line of questions, and then I'll find an natural break.

PRESIDENT SIQUEIROS: That's fine. Thank you.

MR. LEATHLEY: C-295. And I wonder if we could request Claimants' counsel to deliver to the witness a copy of C-295 from their files, please.

B&B Reporters
001 202-544-1903

Page | 438

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

BY MR. LEATHLEY:

Q. This is a request again from Claimants'

counsel--Costa Rican counsel--sorry. This is a response to a request. It's addressed to Claimants' Costa Rican counsel. It's from the municipality, and it follows up on the 29th of November, 2016. This is days ago. And it refers to the hurricane that you're referring to; is that right, sir?

A. I haven't read it.

Q. Please read it. Are you ready, sir?

A. Yes.

Q. And you were aware of this request being made, weren't you, sir?

A. This?

Q. Yes, sir.

A. No, sir.

Q. You didn't phone or approach Kattia Castro Hernandez after the receipt of this document I previously showed you, which was R-521?

A. I don't know Ms. Kattia. I have never spoken to her.

Q. So, if we were to get a witness statement

B&B Reporters

001 202-544-1903

Page | 439

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

from Ms. Kattia Castro testifying that after the delivery of this letter of the 14th of November, 2016, you or someone from your firm requested a more general reference to construction permits, you--you wouldn't anticipate that testimony to be correct?

A. We--by refreshing my memory regarding the documents we found. We had ten binders such as this one of the Las Olas process. Unfortunately, we only recovered four. One second, please. We only

recovered four.

And we did try--as a matter of fact and very possibly, my partner called the municipality. But not only that, we also obtained a certification from the Federated Association of Architects and Engineers of all projects from 2004, 2005, until that date just to refresh our memories because, basically, ten years have gone by. It's a long time.

Q. Thank you, sir.

And so, Mussio Madigral approached Kattia Castro Hernandez after the 14th of November which said that there were no construction permits because you weren't happy with the answer, and so you asked

B&B Reporters
001 202-544-1903

Page | 440

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

for the files; correct?

A. What might--what may have been requested or

asked was if they did have that information. That's what we asked, if they had that information.

Q. Although they had said very clearly that those permits--the construction permits for the easements had not been approved in 2008 and 2009. That's what they were telling you. But you went back.

And then let's look at this document, C-295.
And here it refers to the hurricane. This is
presumably the same Hurricane Alma that you were
referring to; is that correct, sir?

A. Just a technical clarification. It wasn't a
hurricane. It was a tropical storm. That's it.

And as--with regard to these two documents, I
don't know them. I don't--I also don't know when the
request was made as far as we're concerned.

Now, what I don't understand, and with all
due respect--what I don't understand how--in this
first document of November 14th it says that there are
no permits, but then in this document it says that
everything was taken by the floods.

B&B Reporters
001 202-544-1903

Page | 441

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

So, obviously--and that's why I'm repeating
my position that we did get the construction permits.
My firm is one which, as you yourself said, minimizes
risk.

Q. Thank you, sir.

So, let's look at the C-295 document where it
refers to the construction permits, Number 154 of
2007. And it's that file that they say was lost in
the flood. And 154-2007 is actually the Concession,

isn't it, sir? It's not the easements.

A. You're asking...

Q. 154 of 2007, the paragraph that you're looking at, the last paragraph where it says the file had been damaged or lost in the flood, that construction permit relates to the Concession. It's an entirely different plot of land to the easements?

A. Yes, totally different.

Q. And so, it's quite possible that the construction permit for the Concession was lost, and the affirmation from the municipality that there were no construction permits approved for the easements is also true. These two letters can perfectly coexist

B&B Reporters
001 202-544-1903

Page | 442

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

without contradicting one another; correct?

A. I wouldn't be able to tell. I don't know what the internal processes are of how they control the process having to do with municipality permits.

But what I can recall--because that had a large impact, not only in Las Olas but also in other projects that we had in that area. And that was something major as far as floods are concerned in the Tarcoles part. It was also very bad in the Parritas part too. So much so that as far as I know, the--the whole information of

construction permits, computers, designs, basically, 1 or 2 meters of flood at the municipality.

Q. And--and that flooded the depository that stored the construction permits for the Maritime zones, but it didn't for the easement section? You don't know?

A. No, I don't.

MR. LEATHLEY: Thank you. Maybe this is a good point for a break, sir. I'll try to then clarify how much time I have left.

If we could perhaps just ask

B&B Reporters

001 202-544-1903

Page | 443

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the--respectfully, the Tribunal to remind the witness not to converse with others during this break.

PRESIDENT SIQUEIROS: Do you--since we anticipate that the line of questions will still continue and there will be perhaps a substantial redirect and the Tribunal does have some questions, why don't we take the opportunity to--it's 10 minutes past 12:00--to take the lunch break. And we will return in one hour to continue with Mr. Mussio.

Mr. Mussio, I would like to ask that through the lunch break you abstain from speaking to any member of your team, the lawyers, the Claimant, or anyone else on any issue having to do with the examination and cross-examination, and I would simply like to ask that you be careful with that. Thank you.

THE WITNESS: Yes, of course.

PRESIDENT SIQUEIROS: So, we will break until 1:15.

(Whereupon, at 12:09 p.m., the Hearing was adjourned until 1:21 p.m. the same day.)

B&B Reporters
001 202-544-1903

Page | 444

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

B&B Reporters
001 202-544-1903

Page | 445

1 2 3 4 5 6 7

AFTERNOON SESSION

PRESIDENT SIQUEIROS: Are we ready to proceed? Yes.

MR. LEATHLEY: Yes, sir. Thank you.

I'm going to continue, in the interest of time, probably only for just a few minutes. I'd like

to do the rest in Spanish, so if I may save time.

PRESIDENT SIQUEIROS: Yes.

BY MR. LEATHLEY:

Q. Mr. Mussio, in Paragraph 8 of your statement, you're talking about the Costa Montaña Project; is that correct?

Were you aware that the TAA, the Environmental Administrative Tribunal, had investigated this Project? Is that correct?

A. Yes, sir.

Q. As well as the Association of Engineers and Architects had a disciplinary process issued against you and your partner, Edgardo Madrigal; is that correct?

A. Against the company, against my partner, and against me, yes.

B&B Reporters
001 202-544-1903

Page | 446

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And in Paragraph 10, you also complain or you stated that it did not result in any decision against you; is this correct?

A. Right now I don't have a single document from that association that says anything to the contrary.

Q. Could you please look at Exhibit 412. It's

Tab 25. This is the first resolution of the Federated College of Engineers and Architects for this disciplinary process; is that correct?

A. Did you say at the end? Did you say at the end?

Q. Yes.

And it's about 26 pages; is that correct?

A. Approximately.

Q. And taking you to the last sentence on Page 25.

Do you have it there?

A. Yes, I do.

Q. And it states: "For Architect Mauricio Mussio Vargas."

That's you; correct?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 447

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. It says: "In accordance with the analysis established, this Tribunal recommends unanimously to the Honorable General Board to apply according to the regulations--the effective regulations the penalty of admonition because it has demonstrated that, with your actions, you violated the ethic code of the school or the Association of Engineers and Architects of Costa Rica.

Do you see that there? Do you agree with what I have just read? Is the document correct?

A. What I can tell you--

Q. No. My question is if the document is as what I read.

A. Yes.

Q. And if I may, sir--if I can read what we believe is the translation, just to be clear for the record. "In accordance with the established analysis, this Honorable Court unanimously recommends to the Honorable General Board of Directors to apply, as per the regulations in force, the penalty of confidential reprimand as it was established by their actions that they violated the Code of Professional Ethics of the

B&B Reporters
001 202-544-1903

Page | 448

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Federate Association of Engineers and Architects of Costa Rica."

And, so, the Association of Architects and Engineers did admonish you?

A. I don't know. You have to finish the sentence. Because it says, "However, in spite of the fact that the cause has expired, it should be filed."

The procedure was not only known, it was poorly managed, poorly handled. And right now, unless you show that there is a document to the contrary, I have not received any document by that association.

Q. Understood.

So, due to the statute of limitations, you cannot continue. But that's what the final resolution of the Association says?

A. I don't know if that is correct.

It says so here. But what I'm saying is that

I even made a consultation on the basis of this--this document that you're looking at. I spoke with one of the attorneys of that Association--of the Association of Architects and Engineers. I made a consultation. As a matter of fact, my record is intact.

B&B Reporters
001 202-544-1903

Page | 449

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Yes.

But your statement says that there is no decision against or to the contrary. What you're trying to explain, then, is that there was no decision because of the statute of limitations but that the final resolution did punish you because of questions of ethics?

A. It isn't correct. Because when I made my statement, I ignored. I did not know this result. The Association never gave me any document where it states that I was admonished/reprimanded. I have no document. On the contrary. By that time I would have been able to say yes, it was punishment. But I don't know what they mean by a "confidential reprimand."

Anyway, I simply do not know what a "confidential reprimand" means.

Q. You did not research it after finding out about the resolution?

A. I spoke to an attorney. His name is Mike. I called him and I said, "What does this mean?"

And he said, "Your record is clean. This is not going through. It has no substance."

B&B Reporters
001 202-544-1903

Page | 450

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

I am still analyzing on the basis of this situation--still analyzing if I will legally proceed against the Association of Architects and Engineers because this proceeding was baseless. It was based on the news in the newspaper.

Q. Very well.

So, Mr. Mussio, the Administrative Tribunal, the TAA, as we know it, by its acronym, also regarding the Costa Montaña Project, punished you because of

environmental damages; is that correct?

A. I don't know.

Q. Can you go to Exhibit R-419. It's in Tab 27, cross-bundled.

This is a resolution by the Administrative Tribunal issued against the Costa Montaña Project; correct?

A. I don't know.

Q. So, you don't know. So, let us go to page 20. And here it states in the last paragraph--

Sorry, sir. I'm just looking for the reference. Excuse me. The question is whether you are aware of this argument.

B&B Reporters
001 202-544-1903

Page | 451

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. No, sir.

Q. And you're not aware of this Project with which you worked as an architectural firm. And it said there had been a severe impact on the environment.

A. The Project had capricious characteristics with regard to soils. I'm not talking about the Project; rather that--the document.

Q. Did you know that there was a resolution that existed from the Administrative Tribunal that there had been a severe impact on the forest, and in this case also it was determined that the rules of subdivision of INVU do not replace the criteria for the environmental regulations that need to be used in its entirety?

A. What?

Q. That the rules for INVU--well, you know what? INVU, the Institute, National Institute for Housing and Urban Development. It does not replace the evaluation criteria.

A. I don't understand that word. "It does not replace"--

B&B Reporters
001 202-544-1903

Page | 452

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. It does not replace the evaluation or environmental evaluation criteria that must be used in its totality. You're not aware of this resolution about a project where your firm is named?

A. No, I don't know this document. Well, I don't understand the relationship between INVU subdividing and the other part you said. That's what I don't really understand.

MR. LEATHLEY: Well, that's okay.

PRESIDENT SIQUEIROS: Mr. Burn. Redirect?

REDIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Mussio, I just have a few questions for you. You need to treat the questions that I put to you with the very same seriousness that you treat questions put by Respondent's counsel and questions that are put by the Tribunal.

All of my questions relate to matters to which Mr. Leathley has taken you.

If you cast your mind back to the beginning of the cross-examination process with counsel for the Respondent--and this is a relatively small point to

B&B Reporters
001 202-544-1903

Page | 453

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

begin with. But it was said that problems--and I'm quoting from the transcript. From the transcript, "Problems are to be expected when your projects interface with many stages." You've set that out--that you've set out in your Witness Statement.

You weren't given the opportunity to comment on that proposition. I just wanted you to reflect on whether you accept that.

Do you accept that when there are projects

that interface with many stages that there will inevitably be problems?

A. Perhaps. It's a conceptual opinion. It could be said in that I have had the opportunity to give classes at the university. And you can give a context to a construction project as a problem that needs a solution for the soils, the technical solution, sidewalks, a project. That's the concept--that's the context in which I use the word "problem."

I could use a word like "challenge," which would be the same thing.

If I understand the question, the large-scale

B&B Reporters
001 202-544-1903

Page | 454

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

projects, like Las Olas or even larger impact projects, you have to see them from a construction and technical point of view, but there's also a social perspective. There's also a political perspective, even municipalities.

When a project is presented that has certain characteristics, the political part goes--also intervening because it's going to impact the community. Las Olas--well, Esterillos is a community that needs employment. And, of course, some people see it positively; some see it negatively.

But to respond to the question, if it's a problem or not--well, it needs a solution based on laws, standards, regulations, basically.

I don't know if I'm answering the question or if I need to go on.

Q. That's satisfactory from my point of view, so I will not ask you to continue. The Tribunal members may have their own questions relating to that topic or any other topic.

Now, you were asked a series of questions, of course, because it's an important issue in the case,

B&B Reporters
001 202-544-1903

Page | 455

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

about the suggestion of there being wetlands at the Las Olas site in the time that you worked on the Project.

You recall being asked questions about that?

A. Again, please.

Q. So, just to remind you, Mr. Leathley put various questions to you relating to the topic of wetlands and whether or not there were wetlands on the site in the time that you were working on it.

Do you remember those--being asked those questions by Mr. Leathley?

A. If you would like, we can go through them one by one. That way I can clarify. In general terms, it's been said that there has been bad faith on our part. Well, frankly, I don't understand where there's been bad faith. What we stated in our statement--and I support this 100 percent--there are important zones which need to be paid attention to without being an expert.

One thing is, of course, the gully which then has a setback that you can fill in. And then with regard to the other points, it's been said and I read

B&B Reporters
001 202-544-1903

Page | 456

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

that we were hiding something. No, I don't understand that. I don't understand that. And I don't know what that refers to when it said that we were hiding something. That we were hiding something? This is out in the open.

The points that we brought up--there is a technical reason for this, the issue that this situation has risen because there's a technical issue that needs to be resolved at the level of central government and the municipal government with the engineering part.

Now, simply, how can you hide something that's clear? How can I? Since I'm an architect, not an expert in wetlands, but I do know what is, for

example, different kind of wetlands, for example.

I did say that during the boom that they didn't buy--they shouldn't buy property because everything was a mangrove.

I was in a project in the south where we told the clients that is a wetland based on what the experts say.

And the point is that we have--it has been

B&B Reporters

001 202-544-1903

Page | 457

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

said that we've been hiding something. These are evident points. We don't need to even get out of the car. I don't know how you can say that when an expert or anyone can see that from 100 meters away.

We have never hidden anything. We did do our due diligence in SETENA when they asked for the prior deed.

Let me explain that. When we submitted all the documents to SETENA, the full body studies that their people from ICT and from many of the State agencies, and they asked us--they say, "We need these points to be clarified."

And within those points they requested an opinion about the forest of SINAC.

And through facts that my associate sent and the facts--well, that I took--"Well, are you going to respond to us?" They responded to us. And it's 2 April--I know the date--of 2008 they responded to us, and then we submitted it.

So, given--well, what's been said, that we were hiding something, this is not a project of 700 hectares. We can walk around it in one day, and
B&B Reporters
001 202-544-1903

Page | 458

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

it's there.

What I can't understand, how in some way and according to the words of the gentleman from Costa Rica, how I could fool so many experts? How could I have an entire ministry? There must be thousands of people there, hundreds of experts that studied this. And they were with me several times, and I recall that one of the first times I rented horses for them for questions of security and so it could be quick.

And MINAE came to the place and went around the entire place.

And that accusation--I cannot accept that--that in some way we were deceiving anyone or hiding information. The person from SETENA, the technical expert who gave this to the Plenary and said that this Environmental Viability can be granted, he

was there, and this was evident.

There are not thousands of streets to get there. There's one street. The people who work in MINAE and Quepos, they go by there every day.

Q. Now, you referred to identifying that there were some areas on the site around which you needed to

B&B Reporters
001 202-544-1903

Page | 459

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

be careful and the developers needed to be careful. You refer in your statement to a report by Geoambiente that's appended to your statement.

Would you turn to that statement--to that report that's appended to your statement.

If you go to the Spanish version of your statement, the original. Page 36 of the last page of your actual statement. And then after that you will see a report.

If you turn to the last page in that report. Not the last page of your statement. Carry on going. The report. You go to the last page of that report. What do you see?

So, what do you see? Bearing in mind your comments just now that you identified that there were some sensitive zones on-site, what do you see here?

A. These are the areas that we pointed out.

THE REPORTER: Can you repeat?

A. Those were the same areas--those are the areas that preliminarily we considered to be areas to be studied, that there needed to be care taken.

BY MR. BURN:

B&B Reporters
001 202-544-1903

Page | 460

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And you've also been asked questions about the D1 Application that you filed.

Now, before filing it, what inquiries have to be made either by you as consulting architect or by one of the agencies? What inquiries have to be made before the D1 Application is filed?

A. Well, quite a bit. Quite a few. We have a list of the--checklist of the letters and the studies that are required by SETENA, protocols of SETENA. Road alignments, setbacks from rivers, soil studies, topography, that's with regard to the technical part. Setback from municipal streets. Permits for stormwater drainage.

When there's a development you also have to impermeabilize the soil. That means that the Municipality in this case--that's why I stated before--before the construction permit, you have to consult with the Municipality, as I've said in my Statement. You have to ask for permits for the treatment plants, also for

stormwater, for water, potable water. A project is not a project without potable water.

B&B Reporters
001 202-544-1903

Page | 461

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

The land use, that's an administrative document. In the case of Las Olas it's important to highlight that there is a regulatory plan.

Now, this is a plan which is more specific than the general law or the general standard, and it's my understanding that it is a law--regulatory plan becomes law because when the plan goes into effect, it refers to the maps of the regulatory plan, and so you don't use the construction code because the regulatory plan has that encompassed within.

But there are many studies, yes.

Q. Thank you.

Does one of those inquiries relate to whether the land is within a Wildlife Protected Area?

A. Yes, sir.

Q. And which agency would give an answer to that question?

A. In this case, that we consulted with ACOPAC

and SINAC. SINAC is the National System of Conservation Areas, for purposes of translation.

Q. Right. And would you be consulting with the central offices of SINAC or the local offices of SINAC

B&B Reporters
001 202-544-1903

Page | 462

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

for the purposes of this project?

A. The office in Quepos. That's where we

presented the applications, the questions, also the visits.

Q. So, the local offices?

A. Local, yes, sir.

Q. Okay. Can you turn to Tab 4?

MR. BURN: I'm hearing it in Spanish. I think someone needs to flip the channel.

BY MR. BURN:

Q. Can you go to Tab 4 in Volume 1 of the

cross-examination bundle. You will remember that Mr. Leathley put various questions to you about this law on biodiversity. This is Law Number 7788.

Do you remember the questions that were put to you? I'm not asking you to repeat your answers.

But do you remember being asked questions?

A. Yes.

Q. Do you recall that Mr. Leathley took you to Article 109 headed "Burden of Proof"?

A. Yes.

Q. And he also put a series of propositions to
B&B Reporters
001 202-544-1903

Page | 463

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

you about the importance of this provision for the way in which developers and those working with developers need to conduct themselves in relation to environmental matters? You recall that?

A. Yes.

Q. Could you just look on the previous page and read onto the record the heading starting with Capitulo IX. Nueve. So, this is the page before, the heading immediately above Article 105. I think you're going the wrong direction.

A. What article?

Q. Look at 105.

A. Okay.

Q. Do you see a heading?

A. Okay. Procedures, processes, and penalties in general.

Q. And do you see an Article 105 immediately below it?

A. Yes.

Q. Could you just read the text out loud?

A. "Everyone will have standing to present a case in administrative or courts or in the regular

B&B Reporters
001 202-544-1903

Page | 464

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

courts to defend and protect biodiversity."

Q. Now, bearing in mind the sage words of the Tribunal that you are not a lawyer in Costa Rica or elsewhere, you are not--I am not putting questions to you to check whether you--you have an understanding of law as such but bearing in mind what you've just looked at, the heading of this section and the text of Article 105, what would your understanding be as to the scope of application of this part of Law 7788?

A. Well, any person--practically any person that believes that they are defending biodiversity can present a complaint before SINAC or the municipality or agencies. It's a bit vulnerable because, as I said, any project is going to have people who are

against it and people who are for it.

I did not know this article, but I knew that it's true that a person could put in danger a project that had everything in order. But I understand the spirit of the law, that you can intervene before any agency. So, any person can arrive and say, "There is environmental danger."

Q. Okay. Thank you.

B&B Reporters
001 202-544-1903

Page | 465

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Now, you were asked a series of questions about the Protti Report. You recall that?

A. Yes, sir.

Q. This is the report, of course, that the Respondent considers has great significance for this case. I want to take you to--back to that report. So, if you could have Exhibit R-11 in front of you. I think you will probably find it in that red folder. Yeah. It's not in the cross-examination folder.

A. 11?

Q. That's correct. Yes.

Now, you were asked various questions about what this report means, what it is saying. I want to spend a little time just--so bear with me. Be

patient--going back to this report so that it is clear to you and you can explain to the Tribunal what you consider this report to be about.

If you could turn, first of all, to the page that has in manuscript, in handwriting "125" at the top. This is the second page of text.

Now, I want you to read--I want to ask you to read out loud various sections of the text starting

B&B Reporters
001 202-544-1903

Page | 466

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

with the last sentence in the first section of that report. Starting in Spanish, "Los terrenos en estos."

If you just read that sentence and then you read all the way down to the end of the last section on that page. Just read that out.

A. The land in these projects show good drainage conditions. However, we're in the central area. There are flooded areas that are swampy and have poor drainage.

Hydrogeology. The site has different morphology according to the terrain. But in most of these, the indicated level is found 10 meters down, and it has a level saturation, a local saturation which is aqueous, which are in sedimentary soil. So,

these are different aquifers which are under the sedimentary rock which are saturated and have been altered.

The parameters, the hydrogeological parameters of this sedimentary rock are permeability, .16 MD. And I see the reference, porosity, also hydraulic level, and also 0.07. The index of

B&B Reporters
001 202-544-1903

Page | 467

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

vulnerability of aquifers in sedimentary rock for most of the Project is .20 which corresponds to low vulnerability with regard to pollution.

The time of transit for percolation in these areas is--and so that these percolated waters is T equals 70 days, could be at 2 or 3 meters. And it is commented this has a treatment plant for stormwater, so there is a minimized risk of percolation for these waters, especially in the south of the Project.

MR. LEATHLEY: Sorry, Mr. Burn, to interrupt. Going to make it clear on the record. There's a slight mistranslation on the record. In the first sentence, it was read the transcript said "and drainage." It should have been "poor drainage."

Thank you.

BY MR. BURN:

Q. So, if you could continue.

A. Excuse me. I want to be clear. It says:
"The terrains of this site have good drainage
conditions. This is a study with regard to the
transit of pollution."

Shall I continue? Morphology--

B&B Reporters
001 202-544-1903

Page | 468

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Just to make it clear, I don't think there's
any disagreement between the two sides on this. That
sentence at the beginning to which Mr. Leathley refers
does say "good drainage in general," but in the second
part of that sentence it identifies a certain area
with poor drainage.

Do you see that, "con pobre drenaje"?

A. Yes, with poor drainage. If you would allow
me, what they're referring to there, two concepts.
There's a percolation drainage, and then there's
surface water.

And the second one, when there are areas that
are flooded and poor drainage and marshy, it's because
the--the tube that would have to take the rainwater

from one side of the street to the other is blocked.

Q. Bear with me.

I just want you to go back to reading text.

If you could just pick up from the heading that begins "geomorfología," and just read the heading and the first two paragraphs, and then we'll move on.

A. "Geomorphology and natural threats. The general relief of the area with the convex, rolling

B&B Reporters
001 202-544-1903

Page | 469

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

hills going south-south--south-southwest, these lands"--

I do apologize.

"Geomorphology and natural threats. The general relief of the land under the rolling hills with convex gradients of low slope running south-southwest. These lots do not have any threat of seasonal flooding because they are located outside of the area of influence of any river system that can generate such conditions. Nonetheless, in the western portion, there is a swampy area, possibly developed by the drainage"--no. I'm sorry--"possibly developed by the poor drainage conditions in this sector."

Q. Thank you. Now, if you just go on a couple of pages here to page 128. And you'll see about three-quarters--four-fifths of the way down that page, there's a sentence that begins "Se deduce de la aplicación."

If you'll just read that paragraph.

A. "One can deduct from applying the previously

described methodology that construction and operation of this project raises a threat of--low to no

B&B Reporters
001 202-544-1903

Page | 470

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

contamination threat for the aquifer, underground aquifers. Nonetheless, given the closeness of the project with surface water areas that are susceptible to contamination, it is recommended that a treatment plant be built to treat the waters in order to minimize the discharge--direct discharge risk of untreated water into these bodies of water and, in particular, towards the Aserradero Swamp that are a few meters southwest of the project site."

Q. Thank you.

And if you just turn over the page, you'll see in Section 7 there are some observations. Can you read just the third paragraph there starting " Estos terrenos."

Sorry. This is section--I may have made a mistake. I apologize. Section 6. Apologies.

A. "These lands, these lots do not appear to be the under the threat of seasonal flooding because they are outside the area of influence of any river system capable of generating such conditions. Nonetheless, to the west there is a swampy area potentially caused by the poor drainage conditions of the sector. The

B&B Reporters
001 202-544-1903

Page | 471

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

natural slopes have good stability conditions."

Q. The last part of this document I want you to

go to, if you do down to Section 7 in which the principal conclusions are set out. Could you just--there are--there isn't a numbering for this, but there are effectively seven principal conclusions--main conclusions that are set out there.

I just want you to look at the--from the fourth down. So, fourth, fifth, and then going over to the next page, the sixth and the seventh.

Do you have those?

A. Yes.

Q. If you can read those for me.

A. The one beginning with the "aquifers vulnerability index"?

"The aquifers vulnerability index for the sedimentary rock units under the alteration coverage of the IUVA equal 20. That corresponds to low vulner--low contamination vulnerability."

Do I continue?

Q. Yes, the next three.

A. "It has been recommended that this project

B&B Reporters
001 202-544-1903

Page | 472

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

have a wastewater treatment plant such as that in normal operating conditions they ought not to be a contaminating charge that could percolate towards the underground.

"In the event of problems with the operation of the treatment plant that allows wastewater percolation into the underground, it is necessary to have a distance of 2.0M gradient under the site where the percolation occurs.

"In order for there to be natural disinfection of the percolating water, the land on this project are not subject to geological risks of a short return period, such as flooding, slope instability. Based on the Costa Rican seismic code, the Project area is located within Seismic Area 3 with

an S1 soil profile, such as the structural design of the work with an effective peak acceleration value of AE equal to 0.3 minimizes the seismic risk for the civil works of the Project."

Q. Thank you.

You see, as you observed when you were first taken to this document, that it's signed "Roberto

B&B Reporters
001 202-544-1903

Page | 473

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Protti, Consultant Geologist."

Now, having gone through all of that--and I do apologize to you and to the Tribunal, and especially to the court reporters and translators.

What would you say this report is actually about?

A. It's basically a technical study that is called the Transit of Contaminants. The purpose of such a study is to identify whether bacteria in treated water could perhaps contaminate an aquifer.

In the case of this report, it clearly states that it's low risk. Nonetheless, the recommendation is that there be a treatment plant.

This is a healthy recommendation that, in any event--and it's worth mentioning this here that it was indeed done. There was a--on the design a treatment plant was included. A treatment plant was--design was contracted. This is a study--or it's an indirect cost that the developer incurs.

It was done. The location was sought because you need a permit for the location. You can't just put the treatment plant wherever you want. There are

B&B Reporters
001 202-544-1903

Page | 474

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

rules--preset rules.

So, we did that. And hopefully the document is available because we did do that also. And this is issued by the Health Ministry. So, the Ministry of Health issues the location permit, and this was done.

And the aim is for these waters to be treated. And one of the characteristics of the water--treated waters are called DBOs in Spanish--should be acceptable before it can flow into a constant-flow body. And it says so in the documents. It talks about constant-flow waters.

Q. And looking at the--those principal conclusions in Section 7, do you observe any that relate to suspicions of there being wetlands on the site?

A. No.

Q. Thank you.

You have noted the various references in the report to poor drainage.

From your work on the site, do you know or suspect what the cause of the poor drainage that's referred to might have been?

B&B Reporters
001 202-544-1903

Page | 475

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. It's definitely lack of maintenance. So, the situation occurs because when roads are built, when the local government or the central government builds the roadway going towards the north or the street that goes to the west, which is a municipal street, there needs to be civil work carried out based on specific calculations. And that was not done. It was not done in any of the two, not only here, but all along the coastal area.

And I don't want to sound arrogant, but we see all along the coastline there's a lot of civil work that's being carried out. And for cost reasons, it is perhaps not correctly done.

And not only do you have to build it correctly, but it has to be maintained correctly also. And this is a situation--and I've seen it since our very first studies when we speak about the preliminary

or the basic studies.

And when I say that we are committed to this project that we--it's because we know the Project. Obviously, there are some deep technical aspects that I left in the hands of the experts. There are other

B&B Reporters
001 202-544-1903

Page | 476

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

things that are obvious, such as this situation, that we call sewers or waterways that simply were not properly built. But it was obvious that the calculations were not quite right because the diameter of the tubes was ridiculous.

So, with time and lack of maintenance, these pipes clog up; and then the surface waters are trapped, both in the north area and the area that we are referring to that we say needs to be studied. And it's important to bear in mind that the work I'm talking about that is technical engineering are for the public roads and so on that's not a part of the private property.

We see this in the roadway going to the north. 15 meters are in the hands of the Ministry of Public Works and Transport. And on the western side, they belong to the municipality. And here, again, it is public land.

So, common sense dictates that, first of all,

they ought to be constructed correctly and, second, that they need to be maintained. And, unfortunately, neither one happens.

B&B Reporters
001 202-544-1903

Page | 477

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

And it is on the property belonging to somebody else, in this case the property of the State or of the municipality.

Q. Thank you.

You can now have Volume 3 of the cross-examination bundle in front of you. Turn to Tab 25 in that file. You will recall that Mr. Leathley put various questions to you in relation to this document, which is Exhibit Number R-412.

Do you remember the questions that were put to you?

A. Yes, sir.

Q. Hold on a second. I just want to make sure that members of the Tribunal have the document.

Now, on the very first page of that document, which has a couple of different numbers on it--15608 at the top and 1094 on the bottom right. But on that page you

will see that in the middle there, there is a description of what this document is starting "Informe Final De Minoria."

Can you just read the whole of that line onto the record?

B&B Reporters
001 202-544-1903

Page | 478

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. Do you mean where it says to resolve--to decide to issue the final report? Is that the word?

Q. No. If you just look--so, do you see where it says "Expediente Administrative No. 156" and so on? Do you see that? And then immediately under it says "Informe Final De Minoria A La Junta Directiva General."

Do you see that?

A. On page 1?

Q. Look where I'm pointing.

A. Okay. Okay.

Q. What does that say?

A. Okay. "Final Report of the Minority to the General Board of Directors.

Q. The Minority?

A. Correct.

Q. So, when we see at the back end of the document on page 26, internal numbering page 26 of the document, when Mr. Leathley referred you to the words under (f), in particular the unanimous recommendation of this Tribunal, do you understand that to mean the unanimous recommendation of the Minority of this

B&B Reporters
001 202-544-1903

Page | 479

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Tribunal?

A. I understand, but perhaps you can clarify

this a little bit further, because it says "minority"; right? It says: "Final report of the minority to the board," and then afterwards, it talks about a unanimous agreement, and that unanimous agreement is of the minority.

Q. Correct. Now, if you could--back on the first page--so, back on the first page, I just want you to check--read one sentence.

If you go two paragraphs down--so, there's--after the heading that you've read, in the sentence that begins (in Spanish), see that? Just go to the very last sentence in that paragraph. Just read out that sentence.

A. Where it begins, "Once the investigated facts were analyzed"?

Q. Yes.

A. "Once the investigated facts were analyzed and the applicable standards or rules and the evidentiary elements, and once we"--"the discussion was carried out to be presented for consideration by

B&B Reporters
001 202-544-1903

Page | 480

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the general board. This act is carried out pursuant to the law, observing the legal procedures and prescriptions. This is drafted by Engineer Olman Vargas and Architect Ricardo Fliman Wurgaft."

Q. And just--just back to finish on this document, back to the--the end of it, if you go to page 25--

A. Okay.

Q. --if you look at Paragraphs A and C, you don't need to read out the--the takes here, but what do you understand Paragraphs A and C to do?

A. Let me read them.

(Pause.)

A. Okay. Concerning Paragraph A, that's--regards my partner, it says that there was no founding--that--well, I understand that having not found sufficient criteria to determine some kind of reprimand, he is released; there is nothing brought against him.

With regards to myself, they recommend unanimously to impose a confidential reprimand, but this does not occur because of the time prescription,

B&B Reporters
001 202-544-1903

Page | 481

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

because this was already a case that had been filed away; and therefore, that sanction--that reprimand could not be enforced.

Q. That's right. This is the minority report.

A. That's right.

Q. In the same file, and this may be the last topic I have to take you to--or there may be one very small point after that.

But while we're close to this document, you--this is at Tab 27. This is a TAA Decision. It's Exhibit R-419.

You'll recall that Mr. Leathley put some questions to you in relation to this document.

Now, I'm going to hand over and delegate

briefly to my colleague, Mr. Roger Guevara, who's just got a couple of questions for you in relation to this item.

FURTHER REDIRECT EXAMINATION
BY MR. GUEVARA:

Q. Mr. Mussio, I'm going to ask the Tribunal to look at document R-354. And I would like Mr. Mussio to be handed a copy.

B&B Reporters
001 202-544-1903

Page | 482

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

R-354.

MR. LEATHLEY: My cross-examination--I'm sorry, my cross-examination, as far as I'm aware, and so, could not form part your redirect.

MR. BURN: It forms part of the redirect because it's in rebuttal, examination topics on Exhibit R-419, as will become clear.

MR. GUEVARA: It's part of the question relating to the document R-419 that was responded to.

BY MR. GUEVARA:

Q. Could you please read the content of this document? If so, we can compare it.

(Pause.)

A. I'm ready.

BY MR. GUEVARA:

Q. This report about a tribunal--the TAA's activities. I would like you to tell us how many projects did the Tribunal shut down, given that news?

A. Well, the news clearly said that they closed 360 condominiums.

Q. Are they referring to any specific area?

A. Yes. In Tarcoles and Esterillos.

B&B Reporters
001 202-544-1903

Page | 483

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Tarcoles, is that close to Esterillos?

A. No, sir. Tarcoles is at--some good 40 minutes to one hour away.

Q. And Esterillos, is this referring to Esterillos and the location of the Las Olas Project?

A. No, sir.

Q. Based on the news, the name of José Lino, is that a name you're familiar with?

A. Yes, sir.

Q. Can you tell this Tribunal who he is?

A. At the time, he was the President of the TAA.

Q. At the time? You mean in 2008?

A. Yes, sir.

Q. And he was responsible for these closures, all of them? Or was it under different administrations that the closures occurred?

A. No. As far as I understand--at a curious time, if I can describe it that way, when he was President of the TAA.

Q. Could you elaborate a little bit more what you mean by a "curious time"?

A. Yes. And not one--a very pleasant memory, I

B&B Reporters
001 202-544-1903

Page | 484

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

must be honest, if I may be allowed. I know that your time is extremely valuable, but I do feel it's necessary to provide a context.

When this situation arose, especially with the Costa Montaña project, I was there. I, as I have often told you, was working on the project. So, when this happened, the first thing that reaches the press doesn't get--reach the TAA, it hits the first press. And when I mean the media, it's because there were more than 20 reporters. 20 minutes later, Mr. Lino came at the head of caravan cars, sort of in a threatening manner. So, the first thing I did was ask who he was, because I didn't know him. He's

introduced to me.

José Lino comes and I say, who are you to ask for the project permits? What I'm going to--about to tell you I recall as if it happened yesterday, because these were words that raised a lot of--made me very indignant. And he said, I'm coming to close the project. I don't come to look at the permits.

From many common sense, logically one should say let's look at the permits. Let's look at what's

B&B Reporters
001 202-544-1903

Page | 485

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

happening. But it's--it really was like a circus. I do apologize, but it was a circus.

And ultimately, the project was shut down, without even at the time--well, I don't know what happened afterwards, because the--counsel or attorney for that developer turned it into a case. It's obviously something that I'm not involved in, but all of this then happened. But it was arbitrary. It was untoward. It was not consistent.

And you can even see in the news, it says that José Lino himself--and I don't want to say something that's wrong.

He says, we did have the permits, and the project of Esterillos don't have them. But that's

another story. That's not--has nothing to do with us.

And opening of parentheses here because I want to make myself clearly understood.

The guiding organ, or the tribunal of honor of the Federated College of Architects-Architects is so arbitrary that they put all the projects into a single case. And I just wanted to mention that, and I close that parenthesis.

B&B Reporters
001 202-544-1903

Page | 486

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

But in my opinion, it was incorrect behavior. I could summarize it that way, but I could go on and on, because many different problems arose, but I think that that is--

Q. With regard to the evidence on--by the counterpart, R-419, which is Annex 27 of Volume 3--that is Tab 27 of Volume 3...

A. 27?

Q. Yes, 27, in Binder 3. Yes, the resolution of the TAA.

A. Yes.

Q. Could you indicate if you or your firm, Mussio Madrigal, was a party to that process?

A. No. No, sir.

FURTHER REDIRECT EXAMINATION
BY MR. BURN:

Q. Thank you. And just to resume with one--one very brief topic to which you were talking, you recall that Mr. Leathley asked you questions relating to--well, I think in the relevant document, it was called Hurricane Alma but you corrected it to be, I think, Tropical Storm Alma, or something along those

B&B Reporters
001 202-544-1903

Page | 487

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

lines. And you will recall that there was reference to Municipality having lost various documents in--in Tropical Storm Alma.

But you will be familiar, from your day-to-day work, with the office buildings in municipalities such as Parrita. Yes?

A. (Witness nodded.)

Q. Do you--how would you describe those office buildings physically and their condition?

A. Physically--well, it was a house, actually.

A wood--house made out of wood. You can't really say that it was something that would protect--well, first of all, human life, of course. But it simply did not--in my opinion, it did not--it did not comply with the idea of--or it was not consistent with a building that should be for a local government service. So much so, that when the flooding happened, the first building that had to be evacuated was the Municipality because it is simply in the most vulnerable area, even as shown in maps, maps established by the National Emergency Commission, and the Municipality is simply in the most dangerous area in the case of flooding.

B&B Reporters
001 202-544-1903

Page | 488

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

And Hurricane Alma did not only lead to this type of tragedy; but also as a result of that, it led to a recalculation, going into more technical details, of the calculations regarding rain--stormwater drainage. But the building was not only the most dangerous area, but it was made out of wood. Simply made out of wood.

And I clearly remember that the engineering department was on the first floor; and once the hurricane went by, the Municipality had to leave. They now rent part of a building in downtown Parrita.

Q. Thank you.

And did they keep--do they keep or did they keep electronic copies of the documents?

A. Well, this is important, because a short time

ago--well, I'll try to be more precise. About two years ago--well, yes, about two years ago, the plans have been looked at both--digitally, both by the--the Association of Engineers and Architects and by some municipalities, not all. And some municipalities everything having to do with this process is digitally.

B&B Reporters
001 202-544-1903

Page | 489

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

But at that time, it was simply rows of paper that were taken. Everything was done physically.

Q. Thank you.

And then final question. The--how often, or at what periods, does your firm dispose of documents in its possession?

A. Well, we follow the standards of the Architects and Engineering Association, and that is that our responsibilities are for five years, so, that anything that is civil, be the infrastructure works or plans, it's five years. And we have the moral responsibility to keep them for ten years.

Now, we like to go even beyond that as to--well, these are files. And files take up space, of course. And after the real estate boom, the market fell, things changed. We also changed--we went from

having 50 people in our consulting firm to practically five.

Because at that point, that was what was required. So, we changed offices--or offices changed, and we simply kept the documents as long as possible.

It should be five years. It should be five
B&B Reporters
001 202-544-1903

Page | 490

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

years. But in this case, unfortunately, for reasons due to climate, to weather, we lost some files.

But normally, it's five years. And we keep everything we can, at least up to now.

MR. BURN: Thank you. I have no further questions.

QUESTIONS BY THE TRIBUNAL

PRESIDENT SIQUEIROS: Mr. Nikken? No questions?

Mr. Baker?

ARBITRATOR BAKER: I have several.

Mr. Mussio, my name is Mark Baker, and I have some questions.

You have lived this story; I'm still trying to learn it, so, perhaps you can help me.

Can you tell me, sir, when you--your firm was

first hired by the Claimants in this case for any purpose?

THE WITNESS: I think it was by the beginning--sorry. The group--well, we were first approached because we were developing a number of projects in the area in Esterillos. We had about five

B&B Reporters
001 202-544-1903

Page | 491

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

projects there. And Mr. David Aven contacted us. He showed us some plans, some designs that he had--some maps, sorry--and we--well, these were condominium plans, and we made him see that there were some mistakes in the conceptual implementation of the condominium design.

So, that was more or less beginning 2007 or mid-2007. Then at some point, we made an offer and then we were contracted.

ARBITRATOR BAKER: So, I understand, Mr. Aven brought some conceptual design drawings to your firm for you to review and to consult with about helping him go forward on the project? Is that right?

THE WITNESS: No, not quite that, no. Those plans that were shown by David Aven were plans that had been prepared by a well-recognized firm of Costa Rica.

Now, these were well-designed plans. Well-designed--in other words, diagrams, drawings, technical specifications. They were well-done. But conceptually, the project had been poorly envisioned. Because there are 28 hectares, and they basically had

B&B Reporters
001 202-544-1903

Page | 492

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

26 hectares in common area. If they sold the condominium, those 26 hectares were immediately--or would have immediately become part of that condominium. And that's what we showed him or told him.

ARBITRATOR BAKER: So, when you agreed to work with Mr. Aven, was it on a fixed-fee basis or was it on an hourly basis? What was the basis your contractual relationship?

THE WITNESS: We established a fixed price for a certain amount and for a certain time.

ARBITRATOR BAKER: Then the concept would be after those fee-for-service agreements were completed, if further work was necessary, you would revisit the fee at that time?

THE WITNESS: We established the scope, and it was the plans for a condominium of individual houses, a condominium on lots. In other words, that

process would conclude, and then, eventually, we would offer more services for building houses, designing houses.

ARBITRATOR BAKER: So, in the scoping

B&B Reporters

001 202-544-1903

Page | 493

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

document, help me, and try to be as precise as you can.

In the scoping document, it was agreed that you would assist with the condominium and the Concession and the Easements and then do houses later? Do I have that right?

THE WITNESS: First the condominium, then we spoke about the Easements, and then in--after that, we spoke about the Concession--or doing that, we spoke about the Concession. But always with the expectation that at a given point, when they started doing their sales--because we had generated preliminary plans for houses, and--so that people could see it, so that if they were interested in houses, we could generate the plans, the permits, and the construction.

ARBITRATOR BAKER: So, again, sticking with the scope of the representation for a moment, you were also going to provide--in addition to the revised architectural drawings, you were also going to provide permitting application services for the project; is that correct?

THE WITNESS: Correct. Yes. Yes, sir.

B&B Reporters
001 202-544-1903

Page | 494

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

ARBITRATOR BAKER: So, help me understand, as a non-Costa Rican, the levels of this process. This is your area, and you're in the field being.

So, my understanding is that EVs must be required--must be obtained before construction permits? Is that correct?

THE WITNESS: What is EV?

ARBITRATOR BAKER: The Environmental--

MR. BURN: --Viability.

THE WITNESS: Yes. Yes. The answer is that it depends on the size of the project, depending on the size of the project, there's certain environmental instruments.

For instance, a house of up to 300 square meters requires a very small study. But if the house does not go beyond this 300 meters, it's not even required. It's simply a house, a residential house. And it does not require an environmental instrument.

But if it goes beyond 300 and up to 1,000, it's called a V2, that instrument, that environmental instrument, I mean.

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

hired by the Claimants in this case and agreed on the scope of work, what had been the largest project that your firm had done Environmental Viability studies for?

THE WITNESS: The largest project at that point was 238 hectares. In that area, as a matter of fact, just by chance, about 3 kilometers away from Las Olas.

ARBITRATOR BAKER: We heard some testimony about Mr. Janney this morning about a Sheraton area development. Is that that area or is it another region?

THE WITNESS: I don't know where the Sheraton is.

ARBITRATOR BAKER: So--so, having been hired to do this project, was there anything that stood out in your mind when you first saw the land, as an experienced environmental professional, that alarmed you or gave you any concern when you looked at the property for the first time?

THE WITNESS: As a matter of fact, I've even mentioned it in my Statement. For me, to this day, I

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

believe that it is one of the most manageable projects, because it is not so large and it's not so small. And it also has a very technical and legal characteristic, which is quite important in that it's surrounded by roads.

It has public roads all over the place, and for a development, of course--well, for land planning, that is really a strong point. Sometimes we find situations where the project has excellent and beautiful characteristics, but there are no public roads. So, that, of course, limits and simply chokes a project.

But in this case, the Las Olas Project had the Costanera, which is one of the most important highways going south from the capital to--to the south of the country that was in the north, and in the east, it has a public road. In the west, it also has a public road, as well as in the south. So, that is one characteristic.

The second characteristic is that it has what in English what would--would be called rolling hills. These are--a soft topography, which is not dangerous,

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

very easy, and near the sea at a distance of--at a walking distance--one can walk from anywhere in the project to the beach. A beautiful beach, as a matter of fact.

It had another strong point and that is that had 2 hectares to do a clubhouse. For any project, that is something desirable. If you have a condominium development and houses, you would like to be able to offer the clients a clubhouse with a pool near the sea.

As I mentioned in my Statement and as far as I believe and know, this was not a project that at first glance would entail major technical challenges. No. Rather, it was a project--because the type of soil was also very good, the view of the sea.

So, every time I think about it, and I continue thinking about it and still maintain that and I still comment that to my partner, with Edgardo, this is--well, this project has incredible potential.

ARBITRATOR BAKER: I'll return to the scope questions in a minute, but you've mentioned the important concept of public roads and easy access to

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the property.

You testified about the construction

deficiencies and maintenance difficulties on public roads that surround this property in response to some of the questions that you were asked before I started my questions.

Did you believe that the lack of proper construction and the lack of proper maintenance is responsible for water intrusion onto the Claimants' property? Is that what you're saying?

THE WITNESS: Definitely, yes. I'm 100 percent sure that that is the cause.

ARBITRATOR BAKER: Let me return to the scope questions for a minute.

My understanding is that your firm had the responsibility for the preparation of the D1 Application? Is that correct?

THE WITNESS: Yes, sir. We--what we do--it's actually a very technical document of an environmental nature. And as I said--and as I said before, this is subcontracted. This is--

ARBITRATOR BAKER: And let me stop you and

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

ask you some specific questions about that subcontracting process.

So, my understanding is that you told

Mr. Aven's group, the Claimant group, that there were skills that were going to be required to properly complete the D1 Application, which would require your firm to subcontract parts of that to other experts. Is that correct?

THE WITNESS: Yes, that is the case. Yes, sir.

ARBITRATOR BAKER: Okay. And so, in that situation, your firm would be coordinating the overall submissions from each one of those experts; but it was your firm that was, in fact, signing the application; is that correct?

THE WITNESS: Yes, sir. Yes. That is correct, that assessment.

We coordinated, yes, but--yes.

ARBITRATOR BAKER: So, could you give me a list, as you sit here today, of the different experts who were retained by your firm who had input into the D1 Application and tell me their area of expertise,

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

please.

If there's a document that would help you to

do that--my purpose is to get the information; it's not a memory test.

THE WITNESS: Yeah, I was just trying to--I was simply trying to--well, I think there were two professionals, two of them, who had expertise in the areas of how to evacuate rainwater related to the project under D1. Mr. Guillermo "Amador" (phonetic), a civil engineer with 30 years' experience in that area of how to design everything having to do with culverts and water, and then I don't remember the name--the last name was Vaca, also in our list, who gave information, calculations. And after that--I think that is the end with regard to your question.

But after that--or--depending on the project, you may need more or fewer professionals in biology maybe, geology, hydrogeology, forestry engineer, soil engineers for soil studies.

ARBITRATOR BAKER: So, let me make sure I understand what you're saying. Are you saying in some D1 Applications, all of these other specialties would

B&B Reporters
001 202-544-1903

Page | 501

1 2 3 4 5 6 7 8 9

10

11

12
13
14
15
16
17
18
19
20
21
22

be required, but they were not in this particular D1 Application; or are you saying that input from all of those extra disciplines that you just named was required for this D1 Application?

THE WITNESS: All these disciplines were required for the D1 process for Las Olas, yes.

ARBITRATOR BAKER: So, with the exception of the civil engineer and--I think you said Vargas--I haven't gone back to look--the second gentleman, you had this other expertise in your firm; is that correct?

THE WITNESS: No, sir. Geoambiente was providing them.

ARBITRATOR BAKER: Before the D1 Application was submitted to the appropriate authority, were all of these professionals involved in its preparation presented the opportunity to review the complete D1 submission?

What I'm really asking you was, was the entire team of people that were involved in the D1 Application in agreement with all aspects of the application as it was submitted; or was it simply each

B&B Reporters
001 202-544-1903

13
14
15
16
17
18
19
20
21
22

group was responsible for its own area of expertise,
and only your firm as the coordinating agency was
responsible for the entire Application?

THE WITNESS: What we practice as--for structure--or as far as structure's
concerned, is that in this case, Edgardo, my partner, would coordinate with Mrs.
"Ursula" (phonetic) and Mr.--another person from Geoambiente; I don't remember
his name--they would meet, and if Geoambiente needed studies or required that
information, we would coordinate that.

But they, in turn, coordinated with the
forestry engineer, with the biologist, with the
hydrogeologists, and that was sort of--Mrs. Ursula
would direct that.

ARBITRATOR BAKER: So, let me take you to the
notion, then, of fragmentation for a minute. We're
not finished with the D1, but I'm trying to do this,
at least in my mind's logical order.

THE WITNESS: Okay.

ARBITRATOR BAKER: Where did the concept of fragmentation come from?
Where did the recommendation to the Claimants to fragment, as we've talked
about,

B&B Reporters
001 202-544-1903

Page | 503

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

originate? That was at your firm or somewhere else?

THE WITNESS: Well, maybe as far as this is concerned, it's important to say the following because I read something. When we speak about fragmentation or--when we speak about fraction, we're talking about division of land; correct?

So, when we conceptualized the project--well, each project has parallel requirements. For instance--and this was part of a discussion we had with the Las Olas group, because--well, and obviously, they had their idea of this business. They came in with one idea--for instance, in the northeast section, they wanted to--well, it would be fragmented, the land would be subdivided, in order to do a commercial project where there could be a bank, maybe a store, a convenience center, something like that. That was in the north side--in the northeast side.

And then we have the fragmentation--well, first of all, we have the analysis of the fragmentation for Easements.

And this--because regulations or national laws allow you--authorize you to fragment the land

B&B Reporters
001 202-544-1903

Page | 504

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

before--that's next to roads and new sales.

That initiative comes from the Las Olas group, of course, definitely; but I should say that it fully complies with the law. That is fully and completely legal.

ARBITRATOR BAKER: So, was the land development concept of fragmentation that we've been talking about, was that discussed with attorneys prior to the filing of the D1 Statement?

THE WITNESS: No, sir. No, because--we did do consultations, we did prior consultations. As a matter of fact, the local government is one--well, it's a Municipality. We went there. We told them about it. They had no objections to develop this kind of fragmentation.

But from a legal point of view, no, because that is something that we simply do and it was--you know, it was done and we continue doing it. And with all due respect, if next week a customer comes and says, Mauricio, I have a lot in front of a public road, I want to do some fragmentation, some land division there, it can be done.

B&B Reporters
001 202-544-1903

Page | 505

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

ARBITRATOR BAKER: So, that is my next question, and that is: If a client was coming to you today with a tract of land to be developed that was about this size, in your mind, the concept of fragmentation would be appropriate. Even after having lived through this case.

THE WITNESS: Well, it is important to clarify one thing. First, we have what the client wants. So, the purpose of what the--of the client, what the customer wants for his project, that is Number 1, of course.

Now, assuming that he wants to do that, and in spite of that, it's something that is within the law. It's something that--apart from that, it's something that is in the law, it's something allowed by the law. So, I would be a poor adviser, from my point of view, and given my knowledge if, next week, somebody comes with a property before a public road that does comply--and that, of course, is very important. If it does comply with what is there--when I say "with what is there," I mean the rules, regulatory plan, a very detailed regulatory plan, or

B&B Reporters
001 202-544-1903

Page | 506

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

the construction law, which is very broad, very general.

So, basically, it allows for very small fragmentation. And in that case--well, the regulatory plan of the La Parrita canton is a very visionary type regulatory plan. It's a regulatory plan, which if I remember correctly, was implemented in 1997, and there's a relationship between the slope and the size of the lot.

What do I mean by that? That today, we have regulatory plans which the only thing they do is be confusing regarding coverage, density, et cetera. But that regulatory plan is very visionary, and in my opinion, and in spite of the fact that it is a rather old regulatory plan--in spite of that, it is quite intelligent.

ARBITRATOR BAKER: Let me go back to something you observed a minute ago, and I want to make sure I heard this correctly.

I understood you to say that prior to the filing of the D1 that you or members of your firm traveled to the township of Parrita in order to

B&B Reporters
001 202-544-1903

Page | 507

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

discuss with them and seek their knowledge and consent to the fragmentation plan; is that correct?

THE WITNESS: Yes, sir.

ARBITRATOR BAKER: Okay. So, now let me take you from the D1 to the actual application for construction permits, which I understand comes next in the process; is that right?

THE WITNESS: Yes, sir.

ARBITRATOR BAKER: Do I understand your prior testimony from cross-examination this morning that the plans for--or the permits for construction are actually issued by the Municipality, not by one of the other environmental agencies?

THE WITNESS: The local government issues the construction permits, yes.

ARBITRATOR BAKER: And did I also understand you to say this morning that you did not--or your firm did not appear on behalf of the Claimants to seek those construction permits; but you gave the completed forms to the Claimants, and they themselves went?

Did I get that right, or did I misunderstand that this morning?

B&B Reporters
001 202-544-1903

Page | 508

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19
20
21
22

THE WITNESS: I think you misunderstood.

ARBITRATOR BAKER: That's why I'm asking you
for clarification.

So, it was your firm that went forward to
Parrita to obtain the construction permits as well?

THE WITNESS: In 2008?

ARBITRATOR BAKER: Yes.

THE WITNESS: No. We gave the group, David,
everything that was ready so he could go to the local
government and obtain the permit. He had to take the
plans to the local government. They do an evaluation,
and then they charge taxes on that. It's 1 percent.

ARBITRATOR BAKER: So, was that simply a ministerial process, that if my
plans are in the right shape and form, and they have all the engineers and architect
stamps that I need on them, is it simply a registration process with the municipal
authorities and the payment of the fees; or is there a review or a planning
commission or something more substantive than just registering and getting a
permit?

THE WITNESS: Yes. There is a review by the
Municipality. This process exists. They review the
B&B Reporters
001 202-544-1903

Page | 509

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

Environmental Viability, and it must be in force. It must be approved. It must exist. There must be compliance with many regulations.

And in Las Olas' case, and the specific case of the Municipality, there is a regulatory plan. And this plan talks about land use, and it must be in keeping with what is presented.

For example, with regard to the relationship of the slope, for example, and other factors and--yes, they do review it.

ARBITRATOR BAKER: Okay. So, let me make sure I have this correct.

My understanding of what you've just told me is that the Parrita municipal authority is the last action necessary in order to obtain a construction permit; but it is within their power to decide to deny such a permit if they believe that any of the environmental standards which must be done as a prerequisite to the application have not been correctly done.

Do I have that correctly from your testimony?

THE WITNESS: Yes, sir. Even if there--well,

B&B Reporters
001 202-544-1903

Page | 510

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

I understand that if it has a regulatory plan, the Municipality has even more power, much more power, to deny or endorse what is being submitted.

ARBITRATOR BAKER: Okay. In discussions with counsel on both sides of the aisle, there was some discussion earlier today about the environmental law of Costa Rica apparently authorizing anyone to make a complaint against a project at any time for any reason for an alleged breach of an environmental regulation; is that correct?

THE WITNESS: Yes, that is correct.

ARBITRATOR BAKER: Okay. So, if that complaint is made, does the Complainant have to make it to a particular agency; or can they pick from any one of the multiple agencies that have a stake in regulating and protecting the Costa Rican environment; or do they have to make it to the permitting authority, the last act in the chain, if you will, at the Municipality?

THE WITNESS: Let me see. Perhaps if I can frame it in this way.

For example, if the works--if the complaint

B&B Reporters
001 202-544-1903

Page | 511

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

is about something that's being constructed, then they would go to the Municipality. If the works are beginning or the person who wants to present the complaint--for example, with regard to environment--I think they have to go to Quepos, to the Office of MINAE. That would be the correct thing.

ARBITRATOR BAKER: So, your history as an environmental consultant and professional in Costa Rica, how many projects, in your firm's history, have received complaints throughout the life of the project? Every one? None? Some number in between?

THE WITNESS: Well, if I understood you correctly, we are an architectural consulting firm.

ARBITRATOR BAKER: Sorry for misspeaking. Because I'm not interested, really, in the characterization of the firm; I'm trying to find out how common these complaints are against projects in Costa Rica, in your experience.

THE WITNESS: Well, I'm trying to remember. Well, there's so many actors involved when a project begins. There are always people who are for it, people who are against it.

B&B Reporters
001 202-544-1903

Page | 512

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Personally, what we do is we approach the

people that have a complaint, and we explain it to them. Well, because of a complaint--

ARBITRATOR BAKER: Let me stop you for just a minute, because a--"complaint" can be used in many different ways, and so I--you know, we all know the concept of "not in my backyard" or "don't put it here," that's not what I'm talking about. The fact that people may be unhappy or they don't like the fact that the project is being developed next to them, many of them just grumble quietly and never say a thing.

What I'm trying to find out is how many people avail themselves of the statutory and constitutional framework of Costa Rica that allows somebody to make a complaint at any time against any project, an official complaint that leads to official action or dismissing of the complaint. I just--

THE WITNESS: None of my projects.

ARBITRATOR BAKER: So, let me make sure I'm--none of the projects that you or your firm have been involved in since the formation of the firm have ever had an official complaint filed like the one in

B&B Reporters
001 202-544-1903

Page | 513

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

this case; is that correct?

THE WITNESS: No, none, sir.

ARBITRATOR BAKER: Okay. Thank you.

That's it, Chairman. Thank you.

PRESIDENT SIQUEIROS: I have just a few additional questions. I'll try to be brief. I know our Parties are tired after this process.

Mr. Mussio, I have a couple of questions. Some of them have been answered, the ones that I had in mind--well, you responded to some of them when you responded to Mr. Baker.

I understand that the fragmentation--when we talk about fragmentation of the land, in the proposal that was made, this is a proposal that entails subdivision of the land for the Condominium Project? Or is it actually subdividing the entire land mass and then within those sections, you fragment more?

THE WITNESS: Now, let me see. I'm going to try to describe it to you in this way.

In the case of Las Olas, it's a condominium, which at the same time, has lots. We have individualized lots--well, we can all have part of

B&B Reporters
001 202-544-1903

Page | 514

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

that fragmentation or subdivision because--within the framework of the law.

Now, in this case, we can take this island, which has streets around it, which is Las Olas, and we can segregate it or fragment it.

In Las Olas' case, there was the intention to provide further services when the project was further along, when people were already there. We could fragment part of the land.

PRESIDENT SIQUEIROS: Yes. Let me show you the document which is the drawing which is with your Statement.

When you talk about fragmenting--so, there's subcondominiums or just one condominium?

THE WITNESS: It's just one condominium.

PRESIDENT SIQUEIROS: Which is going to be developed in portions, or are you going to construct it--everything at the same time?

THE WITNESS: That depends how the owners want to develop it. For example, you can do a first part, sell it, and then continue.

PRESIDENT SIQUEIROS: But the license and the
B&B Reporters
001 202-544-1903

Page | 515

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

permits is one for the entire project?

THE WITNESS: No, the entire condominium.

PRESIDENT SIQUEIROS: And now with regard to

the easements, I understand that they're called easements because there are easements that connect the land to the local road. Why are they called easements?

THE WITNESS: Why is that part called easements? Well, the easement is a private road. It's a--and that is, in a general way, the regulations state that it's allowed so you can access the lot through a--using a street as long as it's not more than 60 meters.

PRESIDENT SIQUEIROS: Well, normally, when a lawyer--and you are not a lawyer; you stated that.

When we think about easements, we think that it would be on the land of a third party. I have an easement over the land of another person, whether I am a company or an individual, and there is the right to access.

Now, the land that was contiguous to the west section is called the easement--easements, because

B&B Reporters
001 202-544-1903

Page | 516

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

it's over the land of a third party?

THE WITNESS: No. It's created. You create the easement. But--really, what you say is correct, because--

PRESIDENT SIQUEIROS: --the street belongs to everyone.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: But who creates the easements that--you do it on your own land?

THE WITNESS: Well, you could say that it's on yours and on everybody's land.

PRESIDENT SIQUEIROS: And another issue that we have to discuss is that there are different entities that are owners of the land that make up the entirety. But the easement is just in reference to--there is an access road, but it's part of this same complex, development.

THE WITNESS: Yes, it's something common for everyone.

PRESIDENT SIQUEIROS: Well, just to clarify one last--well, the last question Mr. Baker posed.

You mentioned that as a firm, you put

B&B Reporters
001 202-544-1903

Page | 517

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

together the file, you presented it, you got the environmental authorizations and other kinds of authorizations, the ones you listed in your Statement, and that you would give the owners the packet so that the client, the only thing that they had to do was to get the construction permit; is that correct?

THE WITNESS: Yes, that is correct.

PRESIDENT SIQUEIROS: But the person responsible--the person that could subcontract just as you would, for example, subcontract different companies, but the person responsible for the entire project was your firm, Mussio Madrigal Architectos?

THE WITNESS: Well, I'm sorry, but really, we presented it as a firm, but there's several professionals that have that responsibility. I don't know if I'm explaining myself clearly.

PRESIDENT SIQUEIROS: I just mean responsibility vis-à-vis the client--vis-à-vis the client, was there any--if there was any technical statement that needed to be made?

Well, for example, a civil engineer that had to make calculations, the civil engineer that has to

B&B Reporters
001 202-544-1903

Page | 518

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

issue an opinion, they will be responsible vis-à-vis

authorities.

Now, the person that does the reports for SETENA, who presents the information to SETENA?

THE WITNESS: Yes, it would be our firm.
Yes, it would be our firm.

PRESIDENT SIQUEIROS: So, you would be supported with studies that were done by Geoambiente, for example? But you are responsible vis-à-vis SETENA just as you would be responsible vis-à-vis the other agencies of the State?

THE WITNESS: Well, I feel that--well, this has a legal response that's necessary.

We present this to SETENA. We do the paperwork, and we make sure that that is approved. And--well, if it's a permit, for example, at some point--

PRESIDENT SIQUEIROS: So, you just manage the paperwork on behalf of the client, and it's on behalf of the client, not on behalf of your firm, but--so, you're going to put together the file, get the information, D1, present it to the authorities, and

B&B Reporters
001 202-544-1903

Page | 519

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

once that permit is actually obtained, you will give it to the client so that it can be developed.

And you do that with all projects? Las Olas is not an exception to the other projects that you're involved in? Your general rule is--

THE WITNESS: Well, the general rule is that we almost always do the entire process. Almost always. But that doesn't mean that a client can tell us, well, we have a company that does the environmental part; perhaps we could work jointly.

But in Las Olas case, yes, we did the process.

PRESIDENT SIQUEIROS: Thank you. I don't have any further questions.

I'm not sure whether the parties, in light of the questioning from the Members of the Tribunal, have any additional questions?

Professor Nikken has a question.

ARBITRATOR NIKKEN: I think in different submissions, you referred to the political effect with--vis-à-vis developers. What do you mean by this "political effect"? That can be understood in many

B&B Reporters
001 202-544-1903

Page | 520

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

ways. More specifically, does it have to do with the concern that might be created in the community with regard to the changes brought about by developments;

or do you mean the intervention of political actors in this process?

THE WITNESS: I think--no, it is the intervention of the political actors in projects of this kind.

ARBITRATOR NIKKEN: How is that?

THE WITNESS: Well, they get involved--they get involved because eventually, this is going to create employment, revenue for the Municipality.

So, in some way, the Municipality--one of their obligations is to provide benefits to the area. So, you--it's something you--that must be done. When we have a project in hand like this, we go to the municipal council a lot, we go to the mayor and the active groups in the area, explaining to them--for example, just--by way of example, because I think this works.

When the Costa Montaña project was beginning to be developed, one of the first comments to the

B&B Reporters
001 202-544-1903

Page | 521

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

developers was, we have to go to the town, you can have a marvelous project, but, of course, the town is really in decline. And so, in Esterillos, we also did that. In Esterillos, I remember that we did that at

schools, in Tarcoles. We went to talk to single mothers. There's a large group of single mothers, and so, we did interesting work to garner that support.

So, we need to have society involved and the political sector involved as part of the project. But of course, there are other sectors that perhaps are not pleased with developments.

ARBITRATOR NIKKEN: Okay.

PRESIDENT SIQUEIROS: Mr. Baker, do you have any other questions?

ARBITRATOR BAKER: I have one last question that I forgot to ask, so, I apologize.

Under Costa Rican law, in your understanding as a design and development architectural professional, do municipal authorities have to comply with the environmental law? Do they have to apply for and receive EVs before they do something for the Municipality?

B&B Reporters
001 202-544-1903

Page | 522

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

THE WITNESS: Yes, they do. Yes. The Municipality also has the obligation to also generate these permits, yes.

ARBITRATOR BAKER: And does the--in your understanding, does the same right of the ability of anyone to complain about a violation or potential violation of one of the environmental laws or regulations also extend to governmental authorities in Costa Rica?

THE WITNESS: Yes, sir.

ARBITRATOR BAKER: Have you ever seen a government that received official complaints?

THE WITNESS: Yes.

ARBITRATOR BAKER: Is it more common for these official complaints to be made against governmental-sponsored projects or against private projects, in your experience?

THE WITNESS: I don't know about the private projects. I know that when it's a complaint against the government, it's in the news. And--yes. In fact, if you would allow me to comment--and this is just my opinion as a Costa Rican.

B&B Reporters
001 202-544-1903

Page | 523

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

I believe that one of the problems we have in infrastructure, why we're behind, it has to do with these environmental processes--well, in my understanding, should be more objective.

Our country now is 40 years behind with regard to infrastructure, and we are all living through that. And if Costa Rican say that's not true, then they don't live in Costa Rica. 40 years where there's been an absence of infrastructure works.

And personally, I am praying that a large project called the Canal Seco is going to be developed because it will bring us many benefits. And I've been hearing about this since 1984. And the thing is that the environmental issue--well, I--if someone raises their hand, I don't agree, and then everything comes to a halt. And so, the government also faces barriers because of these environmental issues.

ARBITRATOR BAKER: Thank you.

Mr. Chairman?

PRESIDENT SIQUEIROS: Mr. Burn? Mr. Leathley?

MR. BURN: We have no further questions at
B&B Reporters
001 202-544-1903

Page | 524

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

this point.

MR. LEATHLEY: No, thank you, sir.

PRESIDENT SIQUEIROS: Okay. Thank you.

THE WITNESS: I'd just like to thank you.

And, of course, I committed the error of not thanking you when I began my presentation. It's not very

common to be in this situation, but I thank you for having had me here and letting me explain our intervention in the Las Olas Project. Thank you.

PRESIDENT SIQUEIROS: Thank you very much, Mr. Mussio. You may go.

If you would like to, you may stay here. You don't have to go outside.

So, is now a good time to take a break, a 10-minute break?

MR. BURN: Indeed, sir.

PRESIDENT SIQUEIROS: Okay.

MR. BURN: And we will be resuming with the testimony of Mr. Esteban Bermudez. Ten minutes is perfectly satisfactory.

PRESIDENT SIQUEIROS: Okay.

(Brief recess.)

B&B Reporters
001 202-544-1903

Page | 525

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

PRESIDENT SIQUEIROS: Are we ready to proceed on the Claimants' side?

MR. BURN: Yes, sir.

PRESIDENT SIQUEIROS: On the Respondent's side?

MR. LEATHLEY: Yes, sir. We're just organizing the folders so that we can present them to

Mr. Bermudez.

PRESIDENT SIQUEIROS: Would you like a couple of minutes?

MR. LEATHLEY: I think we may need one minute, yes, sir. Thank you.

PRESIDENT SIQUEIROS: Thank you.

(Pause.)

MR. LEATHLEY: Thank you, sir.

ESTEBAN BERMUDEZ, CLAIMANTS' WITNESS, CALLED

PRESIDENT SIQUEIROS: Mr. Bermudez, I understand you will be testifying in English. You have submitted your Witness Statement in English?

THE WITNESS: That's correct.

PRESIDENT SIQUEIROS: Okay. I will just give you a few directions as to how this will proceed, as

B&B Reporters
001 202-544-1903

Page | 526

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

you may have been already advised by counsel.

Counsel for Claimants will have the

opportunity to make some brief questions of you. This will be followed by cross-examination by counsel to Respondent and redirect on the part of Claimants' counsel on those issues--limited to those issues which were addressed during cross-examination.

If you have--if you don't understand any question, feel free to ask a clarification. But when you're asked a question, please answer the question first. And then if you need to make any clarification, the clarification will follow.

And you have a card there in front of you, which is a statement that the Tribunal asks you to make before we begin the examination.

THE WITNESS: Should I read it?

PRESIDENT SIQUEIROS: Please do, out loud.

THE WITNESS: (In Spanish.)

PRESIDENT SIQUEIROS: Thank you. And, also, just one point, when you speak, try to speak close to the microphone. Because even though the Tribunal might be able to hear you, the interpreters and the

B&B Reporters
001 202-544-1903

Page | 527

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

court reporters need to have you close at the microphone so they can listen well. Thank you.

DIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Bermudez, you have a file immediately to your right. If you could take that file and open it.

Now, just so you understand, this file contains copies of various documents.

And during the course of the Respondent's cross-examination of your evidence in these proceedings, you'll be taken to documents by reference to the tab numbers that run alongside.

For current purposes, all I need to do with you is just to take you to your two statements in these proceedings, and we just need to confirm those statements for the record, in the formal sense, and check whether you have any changes or amendments to make.

So the--your first statement should be right at the top there. What I want you to do is to flick through the text to the blue page and just make sure that it does, indeed, look like a complete copy of the

B&B Reporters
001 202-544-1903

Page | 528

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

first statement that you made in these proceedings.

A. Yes.

Q. And you see there on the last page there's a signature.

Is that your signature?

A. Yes, it is.

Q. Do you have any changes or amendments you need to make to this first statement?

A. No, I don't.

Q. Okay. You see the white tab. If you can go behind that. There ought to be a copy of your Second Statement. If you could go through the same process. Just flick through, make sure it looks like a good copy of your Second Statement in these proceedings.

A. Yes.

Q. And are there any changes or amendments you need to make to this Second Statement?

A. No.

Q. You see there's a signature on page 5 of that document. Can you confirm whether that appears to be your signature?

A. Yes, it is.

B&B Reporters
001 202-544-1903

Page | 529

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. It does?

A. Yeah.

Q. Okay. I have no further questions for you.

But just to reiterate the President for the Tribunal's instructions to you: Your obligation here is very simple. It's to answer all the questions that are put to you to the best of your knowledge, whether those questions come from counsel for the Respondent, from me, or from members of the Tribunal.

A. Yes.

MR. BURN: Thank you very much.

I have no further questions.

CROSS-EXAMINATION

BY MR. LEATHLEY:

Q. Good afternoon, Mr. Bermudez.

A. Good afternoon.

Q. My name is Christian Leathley. I'm here on

behalf of Costa Rica this afternoon. I'm going to ask you a few questions. If I don't look at you as you're answering, it's no disrespect. I may be looking at my papers or the screen so...

A. Okay.

B&B Reporters
001 202-544-1903

Page | 530

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Paragraph 9, sir--by the way, you provided two statements you said. Paragraph 9 of your First

Witness Statement, you say you regularly act as the Environmental Regent; correct?

A. Yeah.

Q. And you were, in fact, appointed as the Environmental Regent for the Condo Section in around June 2010; is that right?

A. Correct.

Q. And the same paragraph--and we can go there if you want, but please--maybe you don't need to look at it to answer the question.

You explain, "An Environmental Regent is appointed on every project to ensure that the project complies with any environmental undertakings detailed in the Environmental Permit."

Is that right?

A. That's correct.

Q. And you also mention that the role of the Environmental Regent is to inform SETENA of the results of its environmental monitoring of the project, its activity and any construction work; is

B&B Reporters
001 202-544-1903

Page | 531

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

that right?

A. That's right.

Q. But SETENA does not pay the Environmental Regent; right? The--

A. No.

Q. --the fees.

And those fees are paid by Mr. Aven?

A. By the developer, yeah.

Q. By the developer.

In your role as an Environmental Regent for the Condo Section, you say you prepared reports every two months; correct?

A. Yes.

Q. And those reports would consider the environmental issues as detailed in the Environmental Viability; correct?

A. Correct.

Q. And you say, in Paragraph 27 of your first statement, that you would write up your reports following your visits and send them to Mr. Aven; correct?

A. Yeah.

B&B Reporters
001 202-544-1903

Page | 532

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17
18
19
20
21
22

Q. And you say that, at the same time, "I cannot recall Mr. Aven ever asking me to make any changes."

A. Yeah.

Q. And all your reports are exhibited to your First Witness Statement, I think. That's correct?

A. I'm sorry?

Q. And all of your--all of those reports, those bimonthly reports, were exhibited to your First Witness Statement?

A. Yes.

Q. Mm-hum. And all of your reports are in Spanish; is that right, sir?

A. That's right. Yeah.

Q. But Mr. Aven doesn't speak Spanish, does he, sir?

A. No.

Q. And so, Mr. Aven would never have been able to give you comments on your reports, would he?

A. No.

Q. Would others have given you comments, sir?

A. No.

Q. Okay. In Paragraph 8 of your First Witness

B&B Reporters
001 202-544-1903

10
11
12
13
14
15
16
17
18
19
20
21
22

Statement, you talk about your experience in particular at DEPPAT. And you say that you helped to arrange applications for environmental permits; correct?

A. That's correct.

Q. And you've been working for about 15 years in this sector?

A. 16. Q. 16.

And you testify, in Paragraph 8 of your First Witness Statement, that you coordinate with all the experts who need to carry out studies to be presented to the various government institutions; correct?

A. Correct.

Q. And you continue, in the same Paragraph 8, that this is a complex process involving lots of different steps for different institutions; is that right?

A. That's right.

Q. And that's still your testimony today, is it, sir?

A. (Nodded.)

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. You say also, in Paragraph 16 of your First Witness Statement, that the process can get complicated of presenting information of, quote, different agencies, quote, sometimes take contradictory positions.

And that's all in your first statement, I think it was.

A. Yes.

Q. But you said that even though that's the market's expectation, you can work your way through with different agencies and different standards; correct?

A. Yes.

Q. And in Paragraph 11 of your First Witness Statement, you say you are very familiar with Costa Rican laws and regulations relating to the environment; correct?

A. Correct.

Q. And the Biodiversity Law is part of Costa Rican law relating to the environment; is that right?

A. Yes.

Q. And so, you'd be familiar with the

Page | 535

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

precautionary principle?

A. Yes.

Q. Okay. Thank you.

And the precautionary principle requires the person who wishes to carry out an activity to prove that it will not cause harm to the environment?

A. Yes.

Q. Thank you.

And according to Article 109 of the Biodiversity Law, it was for the Claimants, as the developers, to prove any potential impact to the environment in their EV Application; right?

A. Yes.

Q. Now, Mr. Bermudez, in Paragraph 8 of your Second Witness Statement, you say that, quote, The responsibility to submit all necessary studies is shared by the developer and the environmental consultant; is that correct?

A. Yes.

Q. And "the environmental consultant," you mean those consultants that are hired by the developer?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 536

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. So, for example, Mr. Mussio of Mussio Madrigal, who signed--whose name the D1 Application was in.

A. Actually, they are not environmental consultants.

Q. Okay. Sorry. Maybe you could explain.

A. I believe they hired another company to do so.

Q. You don't recall?

A. No. Because I wasn't involved in that process so--

Q. I see.

Now, we mentioned the precautionary principle. And in the Environmental Organic Law, I think it's expressed in Article 99--and I'd be very happy to show you. But maybe I can read it. And you said you're very familiar with Costa Rican laws. And

I'm happy to represent this is a reading of
Article 99.

It's, "In the event of a violation of the
regulations for environmental protection or conduct damaging to the environment
established in this law,

B&B Reporters
001 202-544-1903

Page | 537

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

the Public Administration would apply the following protective measures and
sanctions."

And then there's a shopping list of sanctions
that might flow from that. Is that right, sir?

A. Yes.

Q. And so, this is probably what you're aware of
in your role as the Environmental Regent because, of
course, those laws could lead to the suspension or--or
the checking in some way of the--of the project if
there's a risk of harm to the environment; is that
right?

A. Yes.

Q. And so, you say, in Paragraph 8 of your Second Witness Statement, that, quote, The responsibility to submit all necessary studies is shared by the developer and the environmental consultant--that was a point I just read a moment ago--and necessary.

So, let me reread what comes from your statement Paragraph 8. "The responsibility to submit all necessary studies is shared by the developer and the consultant."

B&B Reporters
001 202-544-1903

Page | 538

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Would you include reports that are necessary to prove the absence of pollution, unauthorized degradation or impact?

A. Yes.

Q. And that would be consistent with the precautionary principle, essentially?

A. Yes.

Q. And so, "necessary" would include reporting about wetlands if any existed?

A. Yes.

Q. And because the precautionary principle applies even if there isn't scientific certainty, then it would be necessary even if you had reason to suspect the existence of a wetland; correct?

A. Correct.

Q. Now, if you're expected to do your job, then you would have also known that those applying for the EV permits--and when I say "do your job," as an Environmental Regent"--to do--those that are applying for the permits would have also had to comply with Costa Rican law?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 539

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And in Paragraph 10 of your Second Witness Statement, you say that "SETENA has a, quote, shared responsibility to identify any additional studies or data that are needed to evaluate a site and a project."

Is that correct?

A. Yes. SETENA has to do a thorough study of all the--all the documents that are submitted to them. It also has to do a site inspection to make sure that everything that was submitted is okay with the regulations.

Q. And in Paragraph 9 of your Second Witness Statement, you say that it was SETENA's responsibility to ask for a detailed biological study if they thought it necessary; correct?

A. Yes.

Q. And you say that you're aware of the process, sir, because you, obviously, know this as your role as a Environmental Regent, and the developer submits the D1 EV Application with the reports that it has selected for that application; correct?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 540

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And so, at this point, your testimony is that those reports with the D1 Application must be the ones necessary to discharge that responsibility on the developers; correct?

A. Yes.

Q. So, how can you reconcile your remark earlier, sir, about the shared responsibility for SETENA if SETENA doesn't know of the gaps that exist in the reporting that the developers have accumulated?

A. Well, they are supposed to resolve that on the studies of the--of the documents and with the site inspection. They are supposed to say, "Okay. These studies are enough to grant the permit to the developer." Or if not, they--they should say, "No, we need some other studies that should be submitted before we--we grant the permit."

Q. Have you read the D1 Application for the Las Olas Project?

A. A long time ago.

Q. And that was E1--sorry--that was the D1 Application for the Condominium Section; is that right?

B&B Reporters
001 202-544-1903

Page | 541

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. Yes. Yes.

Q. And there was not an application for any

other part of that Las Olas Project?

A. No.

Q. And then you haven't seen the report. You may want to see it--sorry. You haven't seen the D1 Application. We'd be happy to show it to you. But do you recall if the Protti Report was part of that D1 Application?

A. No, not that I recall.

Q. You don't recall.

Would you agree with me that it does not form a part of that D1 Application?

A. No.

Q. Would you like to see the D1 Application to verify, sir?

A. No.

Q. So, would you take my representation that the D1 Application does not include the Protti Report?

A. Yeah.

Q. Okay. Thank you, sir.

So, how would SETENA, taking the

B&B Reporters

001 202-544-1903

Page | 542

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20
21
22

D1 Application, be able to identify the lack of anything if it wasn't there?

A. Well, as I mentioned, SETENA has the obligation to do site inspections. In the site inspections they are supposed to see if there is any gap or any missing study in the documents that were submitted, and they should--they should act on behalf of that.

Q. Well, that's not strictly true, is it, sir?
Because SETENA doesn't have an obligation. SETENA has the right to do an inspection but not an obligation; is that right?

A. It's an obligation. They are public--they are public agents. They are.

Q. And what's your authority there's an obligation on SETENA?

A. My authority?

Q. Yes. So, you said earlier that you're very familiar with Costa Rican law. You're saying SETENA has an obligation to inspect the site. I wondered what your--what your basis was for that statement.

A. Well, it's just basic procedures. I mean,

B&B Reporters
001 202-544-1903

Page | 543

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

I've been doing this for 16 years. I know when they are reviewing a project and they get all the studies and documents submitted by the developer, they can--they can choose not to do a site inspection, if they--if they feel it's not necessary.

But in most cases, they feel it's necessary to do inspections so they do it.

Q. And they would do--and they would do such a site visit after having received the D1 Application; right?

A. Yes.

Q. And so, they would be verifying the various statements and affirmations that have been made in that D1 Application with the various details there; correct?

A. Yeah.

Q. And so, if there wasn't something contained in the D1 Application, it wouldn't necessarily occur to them to verify that missing fact, would it?

A. That's what the--why the site inspection is--is needed for. You know, they're--they cannot approve a project without knowing what they are

B&B Reporters
001 202-544-1903

Page | 544

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18
19
20
21
22

approving. They have to visit the site, get familiar with the property, inspect the areas that are going to be affected by the development. And based on that knowledge, they--they can say, "Okay. We approve the project with these studies, or we need other studies to evaluate and to assess."

Q. Absolutely. So, they can if they wish to visit the site. But the obligation, as you agreed--in fact, as you testified a moment before, was that it's the obligation on the developers; correct?

A. Yes.

Q. So, ultimately, the buck stops with the developers.

A. Sorry.

Q. Ultimately, the buck stops--that is to say, ultimately the responsibility lies with the developers, as you've testified a moment ago.

A. Yes.

Q. In Paragraph 13 of your Second Witness Statement, you say that "The Protti Report showed an area of poor drainage located on the Condominium Site and the area of the easements"; correct?

B&B Reporters
001 202-544-1903

Page | 545

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

A. Yes.

Q. Now, just pausing there for a moment.
Mr. Protti--you're familiar with the Protti Report,
are you, sir? You refer to him in your Witness
Statement?

A. I have read it once. Not long ago. Like a
month ago. I read it, and that's pretty much what I
know about that report.

Q. Okay. Thank you.

I'd like to show you a document. I don't
think we have it in your bundle. This is R-371 on the record.

MR. LEATHLEY: Apologies to the Tribunal and
opposing counsel. We don't have it on our bundle.

ARBITRATOR BAKER: But it is in your big
book; right?

MR. LEATHLEY: It's in--it's on the record.
R-371, yes.

BY MR. LEATHLEY:

Q. So, R-371, sir, is a list of--this is from
the College of Geologists of Costa Rica. And if you
turn to page 2, there's a list of hydrogeologists.

B&B Reporters
001 202-544-1903

Page | 546

1 2 3 4 5 6 7 8 9

10

11
12
13
14
15
16
17
18
19
20
21
22

And if you look in the--it consists of three columns, in the middle of the page, and at the bottom of the third column it has Mr. Protti there. Do you see that, sir?

A. Yes.

Q. So, he's registered as a hydrogeologist?

A. Yes.

Q. And that's the same title as

Mr. Eduardo Hernandez, who presented a report on behalf of Geoambiente; is that correct?

A. Yes.

Q. Now, going back to your recital of what the Protti Report found. On Paragraph 13 of your Second Witness Statement--let me just repeat--it was the point I'm--the quote I took from your statement before.

"The Protti Report showed," in your words, "an area of poor drainage located on the Condominium Site and the area of the easements"; correct?

A. Yes.

Q. But that's not exactly what the Protti Report provides, is it?

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. That's what I recall.

Q. Did you read the--

A. It mentioned--it mentioned on a paragraph.
That's what it mentioned.

Q. Did you read the Protti Report before
providing your Witness Testimony?

A. Not right now but--

Q. No. I'm sorry. When--just before the time
you signed on the respective dates you signed your
Witness Testimony, had you read the Protti Report?

A. Yeah.

Q. So, it was a contemporaneous comment in your
Witness Statement in that respect?

A. Yes.

Q. And would you say, sir, someone in your
position as an environmental adviser should be very
precise in their terminology?

A. Yes.

Q. So, why did you misquote Mr. Protti?

A. In what way?

Q. Well, you don't use the correct language that
he uses in his report.

001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. Well, that's what I--that's what I--that's the idea I got from the report. I don't know if that's exact wording that he used. But that's the idea that I got from--from what I read.

Q. But you had not been with Mr. Protti when he visited the land back in 2007, had you?

A. I'm sorry?

Q. You did not accompany Mr. Protti when Mr. Protti visited the site, did you?

A. No.

Q. So, can we look at the Protti Report together, please.

A. Yes.

Q. It's in--it's Tab 7 in your binder. This is for the record Exhibit R-11. Please go to page--I'd like to take you to page 3. At the top of the page you'll see "1, 2, 5" written in handwriting.

Do you see that, sir?

A. Yes.

Q. And then the first paragraph at the top, it's starts "TecnoControl"?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 549

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Then it says--I'm going to read it in Spanish. The Tribunal will be familiar with this section, it having been read in relation to Mr. Mussio's testimony.

"The lots for this land show good drainage sections. But towards the central area, they are flooded, swampy areas with poor drainage."

A. I think I'm missing the page.

Q. Oh, I'm so sorry. I'll give you mine.

A. There's no page numbers, so I don't know which ones--

Q. So, if you look at the very top of the page, you'll see in the top left corner of each page "Geotest," and you'll see in handwriting--

A. All pages say the same. They have "Geotest" on the--

Q. Yes. So, just next to that, you'll see the

numbers handwritten at the very top. 125 is the page I'd like you to turn to.

A. Okay.

Q. So, you see the first paragraph and the last two lines of that first paragraph?

B&B Reporters
001 202-544-1903

Page | 550

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. Okay. Yeah. I got it.

Q. So, what I just read out there--just take a moment to read it yourself, sir, from "los terrenos" up to "pobre drenaje."

A. Yes.

Q. And "swampy-type area" appears a number of times throughout his report; is that right, sir?

A. Yes.

Q. And that would be translated, perhaps, as a swamp-type area; correct?

A. Yes.

Q. Now, are you familiar with Mr. Barboza?

A. No.

Q. Mr. Barboza is an expert who is providing testimony in this arbitration on behalf of the Claimants. And I wonder if we can turn up his report, sir, and in particular go to page 13. This is in Tab 8 of the cross-bundle.

Do you have that, sir?

A. Yes.

Q. Page 13 has a long list. And this is Mr. Barboza's report, having visited the site.

B&B Reporters
001 202-544-1903

Page | 551

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

I beg your pardon. No. This is his first report. And he was summarizing the MINAE Decree 35803 Standards. You're familiar with those standards; are you, sir?

A. A little bit, yeah.

Q. Okay. Look at page 13. And you'll see a run of about seven bullet points.

A. Yes.

Q. And this is the decree's definition of palustrine wetlands.

Do you see that?

A. Yes.

Q. And just look at the first one, two, three, four, five bullet points.

You see the first word that's used?

A. Yes.

Q. What is that, sir?

A. "Pantanos."

Q. That's the same word used by Mr. Protti; correct?

A. Yes.

Q. Now, can you go to page 11 of the Protti

B&B Reporters

001 202-544-1903

Page | 552

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Report. This is back to Tab 7 in your cross-bundle.

A. Which page? I'm sorry.

Q. So, I'm sorry. We're looking at the handwritten numbers at the top. It's 133. Now, this should have a map.

Do you see that, sir?

A. Yes.

Q. And there's a map, and it shows the--would you agree that that shows the dimensions of the Las Olas Project?

A. Yes.

Q. And that's the totality of the Las Olas Project, not just the Condominium Section; isn't it, sir?

A. Yes.

Q. And there you see on the left with a little arrow pointing, there's a sort of a differentiation between the--the hashing. There's a sort of a brick trestle pattern.

A. Yes.

Q. And then there's a left area. And it's called "zona anegada (Aprox)."

B&B Reporters
001 202-544-1903

Page | 553

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. Yes.

Q. Do you see that, sir?

Now, you didn't mention these references in your Second Witness Statement, did you?

A. No.

Q. And you say in Paragraph 10 of your Second

Witness Statement that SETENA must have known that the Project site was within a few meters of the Aserradero River; correct?

A. Yes.

Q. Although you qualify, "if that is indeed the case."

A. Yes.

Q. You don't know yourself whether that's true?

A. I don't understand the question.

Q. Okay. So, let's have a look at Paragraph 10 of your Second Witness Statement. And about halfway down--this is on page 3 of your Second Witness Statement.

A. Yes.

Q. Okay. So, you should have the top--Paragraph 10 starts at the bottom left of page 2,

B&B Reporters
001 202-544-1903

Page | 554

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

and then continues on the top of page 3. And about halfway down, you'll see a sentence, "For example."

Do you see that, sir?

A. Which number?

Q. One, two, three--about the eighth line down.

And the word actually on the left margin of that paragraph is "project," and then there's a new sentence that says "For example."

Do you have that, sir?

A. No.

Q. Let me read it whilst you're looking, and then you can verify. The sentence reads, "For example, SETENA must have known that the project site was within a few meters of the Aserradero River, if that is indeed the case."

Second Witness Statement. I think--

A. This is the First Witness Statement.

Q. I think you're in the First Witness Statement.

Do you have it now, sir?

A. Okay. Yeah. I got it.

Q. Okay. Great. Thank you.

B&B Reporters
001 202-544-1903

Page | 555

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

And so, there you say at the end of that sentence--I'm just curious as to why you say, "SETENA"--this is where you're talking about the responsibility for knowing what. You're saying,

"SETENA must have known that the project site was within a few meters of the Aserradero River, if that is indeed the case."

And I asked you, do you know that yourself, if it is true?

A. Yes.

Q. You do?

A. (Nodded.)

Q. So, why were you saying "if that is indeed the case"?

A. Is this the English version? Because I believe I wrote this in Spanish, so I don't know if there is--

Q. No, sir. If you turn to the last page, you signed this English version.

A. Okay.

Q. Did you write this statement, sir, or was it--did you have assistance of anyone?

B&B Reporters
001 202-544-1903

Page | 556

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. Yes, I wrote it, but I don't remember this sentence.

Q. The point being, sir, if--if SETENA must have known about the river, then presumably the developers also knew; correct?

A. Yeah.

Q. And so, if you're saying that this serves to suggest that a possible wetland area was a risk, then it should equally have been known to the developers; correct?

A. Yeah.

Q. Although you don't mention the references to "pantanos" or "zona anegada," you still concluded in Paragraph 16 of your Second Witness Statement--very emphatically you say you do not accept that the Protti Report provides any indication as to the existence of wetlands. That's your statement.

A. Yeah.

Q. But how--how is this possible, sir? When the very words that the Claimants' expert to define wetlands is this very word that Mr. Protti uses?

A. Well, if you see the map that you just--that

B&B Reporters
001 202-544-1903

Page | 557

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

you just talked about--what it says here is "zona anegada." In Spanish that's--in English that will be flooded zone--

Q. Yes, sir.

A. --which is not the same as a wetland. You can have a flooded zone that is a wetland, or you can have a flooded zone that it's not a wetland.

So, that's why I said that. This is not an indication that there is a wetland. He's just mentioning that probably this could be the wetland--

Q. Okay. Thank you.

A. --because it gets flooded.

Q. So, probably or it could be a wetland?

A. It could be, yeah.

Q. Thank you, sir.

Mr. Bermudez, you testify in both your witness statements that you were Environmental Regent for the Condo Section; correct?

A. Correct.

Q. And then you say in Paragraph 23 of your First Witness Statement that there were easements to the west of the project site running off the public

B&B Reporters
001 202-544-1903

Page | 558

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20
21
22

road; correct?

A. Yes.

Q. And so, the project site for you was the
Condo Section?

A. Correct.

Q. Okay. And, in fact, you testify in Paragraph
17 of your Second Witness Statement that "I am not
familiar with the other sections of the Project."

Is that correct?

A. Correct.

Q. And you also say in Paragraph 24 of your
First Witness Statement, "As part of this role, I
looked at all the condominium properties on the site,
except those abutting the public road that were not
located on the main project site and were not covered
by SETENA's Environmental Viability."

Correct?

A. Correct.

Q. So, there's no Environmental Viability
covering the Easement Section; correct?

A. Not that I know.

Q. And just to be clear, sir, because during the

B&B Reporters
001 202-544-1903

Page | 559

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19

20

21

22

course of this hearing so far, we've heard some different terminology.

I'd like to explore the use of the difference between fraccionamiento and fragmentación, which is like the fractioning or subdivision and the fragmentation of property.

Are you familiar with these terms, sir?

A. In what context? In--

Q. In the development of property.

A. In the development context, yes.

Q. Right. And would you agree with me, sir,

that fraccionamiento--so the subdivision of property, which is dividing a given plot of land into particular plots--is perfectly legal?

A. Yes.

Q. And so, for example, with the Condo Section, that would be dividing it up on a plan as to identify all the condominiums and houses and plots and gardens that would actually be designed; correct?

A. Yes.

Q. And fragmentación is implicitly an illegal act. Would you accept that, sir? So, it's different

B&B Reporters
001 202-544-1903

Page | 560

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15
16
17
18
19
20
21
22

from fraccionamiento. Fragmentación/fragmentation is actually embodied in Article 94 of the Biodiversity Law. Are you familiar with that? You said you were familiar with Costa Rican law, so I would assume so.

A. Yeah. But, I mean, you can use fragmentation in different contexts. If you use it in the biodiversity context, then you're talking about fragmentation as habitats or whatever. If you use it in the urban planning context, you may be talking about subdivision.

Q. Mm-hum. Well, let's try and work our way through that linguistic challenge, sir.

Because I'd like to take you to Article 94 of the Biodiversity Law. This is in Tab 4 of your file, hopefully, in the cross-bundle.

Do you have that there, sir, Article 94?

A. Yes.

Q. So, just checking. The Tribunal has a huge bundle, so it's very heavy going.

I'd like to read that to you because Article 94 is about the stages of evaluation of the environmental impact. That's the title there. Would

B&B Reporters
001 202-544-1903

Page | 561

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

you say that's a fair translation? I'm reading a Spanish version like you.

A. Yeah.

Q. And then I'm going to read it into the record and, hopefully, then the translation can be--can be communicated, which is, "The assessment of the environmental impact in the area of biodiversity should be carried out completely, even if the program is scheduled to be carried out in stages."

Do you see that, sir?

A. Yes.

Q. So, let me try and paraphrase and let's see if we agree. That's saying that the environmental impact evaluation in terms of biodiversity and environmental assessments, essentially, should be undertaken in its totality, as a whole, even when the Project is being programmed to be developed in stages; correct?

A. Yes.

Q. And this project, Las Olas, was to be developed in stages, notably the Concession, which was--I don't know if you recall. The Concession was a

B&B Reporters
001 202-544-1903

Page | 562

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

little bit down by the beach.

A. Yes.

Q. The Condominium Section, of course, that you are familiar with and then the Easement Section.

And so, the mere division of those lands within themselves--so just the condominium--let's just focus on the condominium. Dividing that up into the little houses, the little plots, that would have been fraccionamiento. Perfectly fine.

Would you agree with that, sir?

A. Yes.

Q. But to divide the entire plot with the purpose of avoiding the environmental obligations and, therefore, to divide the Environmental Viability applications would not be permissible according to Article 94.

Would you agree with that?

A. No.

Q. You would not?

A. Well, actually, I'm not an urban planner.

That's their--that's not my--not my specialty. I'm a biologist. And I--I know some things about the urban

B&B Reporters
001 202-544-1903

Page | 563

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

planning and the urban planning laws.

What I know about these laws is that easements are figures that allow people to segregate small portions of the property in lots.

And according to the regulations, this figure doesn't need an Environmental Impact Assessment because of the size of the--of the--of the project itself.

But when you talk about the Condominium Project that is largest and that it's going to have a more impact on the--on the--on the environment, then you--you're talking about a bigger project, and then you need an Environmental Impact Assessment.

Q. Right, sir. But I'm interested in what Article 94 tells us. Because in this proceeding, we've heard from a lawyer on behalf of Costa Rica, who now is currently the attorney general. His testimony is that this provides that you cannot divide up a property along the lines of--as the Las Olas Project has been done--easements, condo, concession in order to avoid the Environmental Viability process. And--

A. Well, from my knowledge, I would think that

B&B Reporters
001 202-544-1903

Page | 564

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

the easements are a separate project from the Condo Project.

Q. They are adjacent to one another, sir.
Would you agree with that?

A. They are adjacent. And there are other projects adjacent to the Las Olas Project. That doesn't mean it's the same project.

Q. But they're all owned by the same entities, correct, or the same groups of investors?

A. I'm not sure.

Q. So, there may be different entities--

A. There may be different owners or same owners, but they are different projects.

Q. Were you aware that the easements were owned by Mr. Aven and his colleagues?

A. That's what I understand.

Q. And you're aware that the condominium was owned by Mr. Aven and his colleagues?

A. Yes.

Q. So, this whole Las Olas Project included the Easements, the Concession, and the Condominium; correct?

B&B Reporters
001 202-544-1903

Page | 565

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

A. For me, Las Olas Project is the Condo Project.

Q. Right. That's the title that it was given in some of your reports. But the Las Olas Project as a whole included the Easements and the Concession Project.

Do you recall that, sir?

A. Later on, I was a little bit confused of--of

that. But later on, I--I realized that the Condo Project was another thing separate from the easements.

Q. So, would your understanding of how Article 94 operates change if I were now to tell you that the Las Olas Project actually included the Concession, the Condominium, and the Easements? And, in fact, that's exactly what the Claimants describe as their project.

A. Yeah. For me it's three different projects: the Concession, the Condo, and the Easement. The Concession had a different process. It got Environmental Viability. It was close to the Condo Project. The Condo Project is another one. And the Easement is another figure.

B&B Reporters
001 202-544-1903

Page | 566

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

And there were other numerous projects adjacent to Las Olas that were already construct--built there.

Q. Let's go back to the wording of Article 94. Could you read it again, sir, and tell me what you think it tells you.

A. Yeah, I read it. I'm familiar with that--with that article.

That means that you cannot divide a project in smaller fractions. For example, if--if the developer wanted to develop the Las Olas Condo Project in different phases--let's say one portion then and then one portion another--still they should have--submit the Project as a whole because that's one project.

Q. And so, by the same measure, taking the Las Olas Project as a whole, the logic applies the same to protect the environment because the environment is being protected by Article 94 so that you don't slice up the land and then decide, well, this part needs an Environmental Viability but this part does not. Article 94 is getting at the whole--it

B&B Reporters
001 202-544-1903

Page | 567

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

says "en su totalidad," in its entirety; correct?

A. Not if it's the same project.

Q. Right. So, if you'd agree that if you--

A. The same project--I mean, when I talk about the same project, it's that it's a group of activities that are going to take place in one site at one time--one particular time.

Q. Okay. So, who defines whether it's the same project or not? Is it the developers?

A. Yeah, the developer.

Q. Okay. Thank you, sir.

A. And SETENA also.

Q. Really, sir?

A. They can--they can, for example, have a--two different projects submitted at the same time. And they--they can say, okay, this is a different project from the other. Or--or this is a whole project.

Q. Right. Absolutely. And that's the precautionary principle, presumably?

A. Yeah.

Q. But SETENA doesn't actually tell Mr. Aven and his colleagues how to divide up Las Olas Project.

B&B Reporters
001 202-544-1903

Page | 568

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

That was presumably their decision, correct--

A. Yeah. Yeah.

Q. --and their ownership decision.

A. (Nodded.)

Q. Okay. Thank you.

Yes. I'm sorry. You nodded. And I just wanted to check that there were--yeah. So, you were in agreement with my last question? Were you, sir?

I'm sorry. I'm just reminded that you're nodding, but we actually need audible responses for the record.

A. I agree that one project cannot be fragmented in different projects. But I do not agree that the Las Olas Project is the same project as the easement.

Q. What do you base that on, sir?

A. Just common sense.

Q. According to you, on what logic?

A. On the logic that the Condominium Project is going to take place in different time, in different context of the other projects, whether that's the Concession or the--the easements.

Q. So, the condo was going to be realized in a

B&B Reporters
001 202-544-1903

Page | 569

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

different stage to the easement; correct?

A. That's my--my knowledge.

Q. Which is the language in Article 94; correct?

A. Yeah.

Q. So, okay. Let's leave it there, sir. I think we've got the point. I hope we have.

And you were agreeing a moment ago, sir, that there was no EV obtained in relation to the easements section; is that correct?

A. Not that I know.

Q. And you're aware of this fact because, as you explain in Paragraph 24 of your First Witness Statement, you were only involved as Environmental Regent on the condominium section; correct?

A. Correct.

Q. And in Paragraph 11 of your Second Witness Statement, you refer to the Environmental Contingencies Plan for land movements prepared by DEPPAT for the Claimants on the 22. Of July 2010; is that right?

A. Yeah. That's correct.

Q. Let's go to that document. It's R-42. And

B&B Reporters
001 202-544-1903

Page | 570

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

that's Tab 10 in the cross-bundle.

(Pause.)

BY MR. LEATHLEY:

Q. Do you have that document with you, sir?

A. Yeah.

Q. So, you prepared this plan--it's only a few pages--you prepared this plan for the purpose of the construction works that were to be undertaken in the Easement Section of the Las Olas project; correct?

A. Actually this--this document, for what I recall--David told me that their--that the Municipality wanted a mitigation plan for the land movements of the project itself. And at that time, I wasn't familiar with what the Condo Project was and what the Easement Project was. So, I got kind of confused when I prepared this document because I was just getting familiar with the--with the project.

Q. So, let's go to page 1 of R-42. So, that's the document you have there.

And I'd like you to look at the first two paragraphs. There should hopefully be a translation behind the blue page. And I'll read the translation.

B&B Reporters
001 202-544-1903

Page | 571

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

I'm happy for you to look at either version.

It says: "This document contains an

environmental assessment for the earth movement works and construction of access easements for the Villas La Canícula project.

"It's important to note that the project as a whole has respected Environmental Viability granted by SETENA. However, only by--only one of the components of the project is evaluated in this report, which is the access easements for the public street in the western zone of the property."

Do you see that letter?

A. Yes.

Q. And just pausing there for a moment, you're referring to the project as a whole in that second paragraph; correct?

A. Yes.

Q. And you're including both the Condominium and the Easements there--

A. Yes.

Q. Now, you say here in paragraph 24 of your first Witness Statement that the Easement Section was

B&B Reporters
001 202-544-1903

Page | 572

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

not covered by the EV issued for the Condominium Section--and this is something you've affirmed a moment ago; correct?

A. Yes.

Q. In fact, the Easement Section wasn't covered by the EV issued for the Condominium Section at all; correct?

A. Correct.

Q. But, in the July 2010, this environmental contingencies plan, you're telling the--the Municipality the opposite; right?

A. Yeah. As I told before, that was a mistake, because I thought that was just one project as a whole. But then after I got familiar with the project, I realized that one thing was the Condo Project and the other thing was the easement. And that the Environmental Viability only included the Condo Project.

Q. So, you were confused, which obviously you must have meant the Municipality was misled in this regard; correct?

A. No, not really, because I believe the

B&B Reporters
001 202-544-1903

10
11
12
13
14
15
16
17
18
19
20
21
22

Municipality had clear that there was the Condo Project and then the Easements.

Q. Well, off the back of that, sir--off the back of this plan, which--you didn't correct your understanding, did you, sir, with--you say you're confused, but there was no correction to this report.

A. No.

Q. So, the Municipality would remain confused if there was a confusion.

A. I believe there was no confusion.

Q. But you just testified there was a confusion for you.

A. For me on the--on the wording.

Q. Yes, there was a confusion as between the condo and the easements.

A. Yes.

Q. That's what you said a moment ago.

A. Now I'm clear that this document was probably

requested by the Municipality to--to the developer in order to cover the--the easement because since the easement doesn't have any environmental impact assessment as of the regulations--that's what the

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

regulation says, they wanted some environmental management of these activities, so that's why they asked for this document.

Q. That's right, sir. And, in fact, construction permits were issued off the back of this document; correct? Because the Municipality had understood that there was an Environmental Viability in place.

A. I'm not familiar with the construction permits process, so...

Q. Well, according to Paragraph 11 of your second Witness Statement, the July 2010 Environmental Contingency Plan was, according to Mr. Aven, required by the Municipality of Parrita before construction could commence.

A. Yeah.

Q. Right.

A. That's what David told me, but I'm--I'm not--I'm not sure what was the process if--if the Municipality used this document or not for the process.

Q. But really, the construction was for the

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

easements; right?

A. Yeah.

Q. Which is why you were referring to the easements having the Environmental Viability of the Condominium Section.

A. Yes.

Q. Because you thought they were all one project.

A. Yeah.

Q. So, the easement's construction work was portrayed by you as part of the construction works for the Condo Section; albeit you--you say you misunderstood--you--you mistook this.

A. I'm sorry?

Q. The easement's construction work was portrayed--was represented by you as part of the construction works of the Condominium Section.

A. No. What do you mean with "portray"?

Q. Let's go back to this document, sir.

Here, you're talking about the construction works of the easements. I'd like to get us very clear, sir, because this is hopefully not a

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

complicated point.

The first two paragraphs that you had read from that document, R-42, suggested that the easements benefited from the Environmental Viability of the project as a whole. That's correct; right? That's what these two paragraphs are saying?

A. Yes.

Q. And you also testified a moment ago that only the Condominium Section had an Environmental Viability; correct?

A. Yes.

Q. So, the easements that you were applying for construction works for did not have an Environmental Viability; correct?

A. Correct. Right.

Q. So, you were, then, misleading the Municipality, because they had understood that the easements benefited from an Environmental Viability when they did not.

A. No, because if the Municipality thought that the easements needed Environmental Viability, they should have asked for one. And they issued the

Page | 577

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

permits without--as I understand, without asking for Environmental Viability. They only asked David for an environmental management plan for the earth movement, and that's--

Q. And that's the--

A. That's the--that's the document that I prepared for him.

Q. But you'd understood before--in fact, it was your testimony that the responsibility's on the developer; correct--

A. Yes.

Q. --for the environmental obligations that you have to exercise; correct?

A. Yes.

Q. And it's also your testimony that it was SETENA to review the information they received, and presumably the same would be for the Municipality, to review the information they receive.

A. Yes.

Q. So, when they receive something from you that tells them that there's already an Environmental Viability for the easements, then they could be just

B&B Reporters
001 202-544-1903

Page | 578

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

as confused as you; correct? In fact, you testified today that you were confused.

A. I was confusing identifying the different components of the project. And I believe the Municipality was clear that for the easements, they don't have to ask for Environmental Viability because of the size of the--of the project.

Q. How could they be clear about that from your first two paragraphs, sir? Because you say exactly the opposite.

A. Because that was a mistake.

Q. Did you correct it? Your testimony a moment ago was that you did not.

A. No.

Q. Okay. Thank you, sir.

And the--Mr. Bermudez, going back to the Environmental Regent's duty to inform SETENA of the activities and the construction work that you undertook as a--that

was undertaken by the developer, in Paragraph 19 of your second Witness Statement, you deny that the Claimants kept engaging in construction works after they were ordered to stop all works by

B&B Reporters
001 202-544-1903

Page | 579

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Costa Rican agencies.

That was your testimony; correct?

A. Yes.

Q. And in the same paragraph, you refer to your bimonthly reports that you prepared on your visits as Environmental Regent for the Condo Section. Correct?

A. Yes.

Q. And these along with your notes and your logbook and your other records is what you maintained in your files on the Las Olas project; correct?

A. Correct.

Q. But, Mr. Bermudez, you testify on paragraph 20 of your second Witness Statement that your files were destroyed because the file was

inactive; is that right?

A. The physical files.

Q. Yes. So, you had electronic versions of the files.

A. Of--of the reports? Yes.

Q. Yes. Okay. So, can we--what was the point of your referencing about whether the physical files were destroyed? Why did you testify to that if you

B&B Reporters
001 202-544-1903

Page | 580

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

had an electronic copy?

A. I believe somebody asked that--if we can--if we could provide all the physical files of the project.

Q. Uh-huh. Have you provided all of those to counsel to the Claimants?

A. I provided them the--the digital files.

Q. Okay. And you mentioned that only the works that were undertaken were minor maintenance works; is that right, sir?

A. Yes.

Q. And I'd like you to go to Exhibit C-112. This is Tab 11 of the cross-bundle.

This, while you're pulling it up, is the SINAC injunction issued by Mr. Luis Picado Cubillo on the 14th of February 2011 against the Las Olas Project; is that right, sir?

A. Yes.

Q. And given your testimony regarding what you saw as the site at the time, you're Environmental Regent, and you've just submitted your report before, you saw the site now as the Condominium and the--the

B&B Reporters
001 202-544-1903

Page | 581

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Easement Section as well; right?

A. No. I was the Environmental Regent for the Condo Project.

Q. For the Condo Project?

A. So, I--my inspections were covering all the duties that happened inside the Condo Project.

Q. Okay. So, let's go back one step.

You had said in your plan--mitigation plan that you were requesting permit--construction permits. That was the purpose of the mitigation plan. Correct?

A. Yeah.

Q. And that was for the Easement Section.

A. I guess--

Q. And so, presumably following--I am sorry. I needed to let you answer. I didn't let you answer. That was a "yes"?

A. Yeah, I suppose it was for a construction permit.

Q. And so, with a construction permit, that would have been with the purpose to construct; would you agree?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 582

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. Right.

And so, at that point in time, sir, you've got the Condominium Section that's being built on, and you've then got works on the Easement Section that's being built on; correct?

A. No, not that I recall. Because when I got to the property in--for my first inspection, I noted that there were two easements already built.

Q. Thank you, sir.

Now, the Government order issued by

SINAC--excuse me, sir.

The Government order issued by SINAC was mandatory; would you agree with that, sir?

A. Yes.

Q. Which must have meant the suspension of all works; correct?

A. In the Condo Project.

Q. In the condominium. But although the construction works had been granted, the permits had been granted for the easements; correct?

A. Yeah.

Q. Off the basis of your mitigation plan?

B&B Reporters
001 202-544-1903

Page | 583

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. I guess so.

Q. Okay.

A. Once again, I--the easement construction process was not covered by the environmental inspections, because there's no Environmental Viability for that part.

Q. Absolutely.

A. So--so, that's why my inspections were for the Condo Project, not for the easements.

Q. Okay.

A. And also, when I got there in June 2010, I noticed that there were already two easements built. That reinforced my--my knowledge that this was a separate--this was a separate segregation or fragmentation that was already done, and that the Condo Project was another--another project that was going to--to start from that time.

Q. And I want to take you through some of the minutes of inspections. Before I do, just to confirm, though, the construction work that you had seen on the easements was for Easements 8 and 9; right?

A. I don't know the number of them.

B&B Reporters
001 202-544-1903

Page | 584

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Were they down in the southwest corner of the plaza?

A. They were down in the southwest.

Q. Okay. Thank you.

I wonder if you can go to Exhibit R-510.

510. It's at Tab 12 in the cross-bundle.

This is--do you have that there, sir?

A. Yes.

Q. 510. This is a minute of inspection Number 3 dated April 12, 2011.

Do you have that, sir?

A. Yes.

Q. And so, this is after the date of the SINAC injunction.

A. Yes.

Q. And this is a construction log for the Las Olas Project; correct?

A. Yes.

Q. And you can see from the document that it was prepared by an engineer, Mr. Manuel Calvo; is that right?

A. Yes.

B&B Reporters
001 202-544-1903

Page | 585

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And this construction log documented works on the project site on the 12th of the April; and if you go to page 1 of this document--I don't believe we have a translation, so, I'd like to read onto the record--yes. I'm sorry. We do have a translation.

And so, I'm going to read out the observations--this is the project progress of the (in Spanish ["avance de obra"])).

Do you see that, sir?

A. Yes.

Q. And here it says: "Work is being done on embankments in lots on Street Number 1, and work is being done on pipes and potable grid in Easement Number 7."

A picture is attached that details the installation of a valve cover. And we've already encouraged the Tribunal just to look at the photos in the original language version.

Is that all correct, sir? Does that look like your logs?

A. Yes.

Q. And these are contemporaneous photos of the
B&B Reporters
001 202-544-1903

Page | 586

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

work undertaken at the time.

And then also--just turn the pages, if I can ask you to do the same, R-511--that's Tab 13--and R-512--that's Tab 14--similar reports. And if I might just say, just sort of similar work to what was being undertaken in April.

R-511, that's Tab 13, is from April 18, and R-512 is the minutes of inspection from May 2nd.

Is that correct, sir?

A. Yes.

Q. And so, you agree that this construction log documented any works on the project site after the SINAC injunction; correct?

A. I believe it's related to the easement, not the Condo Project. Because there was some photos of the easement that--one easement that was being built at that time.

Q. That's right, sir.

A. Yeah.

Q. Without the Environmental Viability.

A. Yeah.

Q. Now, I wonder if we can go to Paragraph 20 of

B&B Reporters
001 202-544-1903

Page | 587

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

your first Witness Statement, and you refer to how you helped Mr. Aven apply for the Environmental Viability for the Concession site; is that right?

A. The Concession.

Q. Uh-huh. And in the same paragraph you mention that DEPPAT was also retained by Mr. Aven to

act as the Environmental Regent for the Concession site; is that right, sir?

A. Yes.

Q. And so, the same Paragraph 20, you mention that after DEPPAT was retained as Environmental Regent for the Concession site, Mr. Aven hired someone else to do the job; is that right?

MR. BURN: I've just been informed that the Spanish feed may not be working. It obviously doesn't affect you and the witness, but I'm not sure that everybody's getting this.

MR. LEATHLEY: May I ask Professor Nikken--
(Comments off microphone.)

MR. BURN: This is not my original observation, but--

MR. LEATHLEY: I would say the most important
B&B Reporters
001 202-544-1903

Page | 588

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

lady in the room is the lady sitting behind Mr. Burn, in terms of Spanish.

(Comments off microphone.)

BY MR. LEATHLEY:

Q. So, let me repeat the question, sir, because

I've actually forgotten the question.

In the--we're in Paragraph 20 of your first

Witness Statement, and in that same paragraph, you mentioned that after DEPPAT was retained as the Environmental Regent for the Concession site, Mr. Aven hired someone else to do that job; correct?

A. That's what I understand, yeah.

Q. And so, in fact, Mr. Aven replaced DEPPAT for another consultancy company to act as an environmental regent; right?

A. I believe so. I'm not sure about it, but--that's what I--that's what I understand.

Q. Yes, and you don't mention that in your--in your statement.

But I'd like to take you to Exhibit R-36, Tab 15 in the cross-bundle. And this was a request to replace DEPPAT as the Environmental Regent dated the

B&B Reporters
001 202-544-1903

Page | 589

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

1st of June 2010.

I'd like you to go to Paragraph 3 of the letter where it starts with (in Spanish [nuestra solicitud]).

A. Yes.

Q. And it says here--I'm afraid we don't have a translation so I will read this onto the record. (In Spanish [nuestra solicitud])--and I hope actually now, Mr. Baker, you can hear it.

"Our request is based on the omissions and breaches which the Environmental Regent has incurred within his or her management; and because of the character of the responsible, pertinent environmental laws and regulations that regulate the environmental matters that the Regent must know, recommend, and execute, and also follow up on, this situation exposes our business to--well, it could actually compromise us with regard to acquired environmental commitments, which we want to ensure their compliance."

And this letter explains the reason why
DEPPAT was replaced as the Environmental Regent for
the Concession site; correct, sir?

B&B Reporters
001 202-544-1903

Page | 590

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. It only kind of copy/paste the responsibilities of the Environmental Regent. It does--I don't see any particular reason or explanation of--of what were these omissions.

Q. Uh-huh. Okay.

MR. LEATHLEY: Thank you, sir. I don't have any further questions.

MR. BURN: Sir, just a couple of things I would like to take the witness back to very briefly.

PRESIDENT SIQUEIROS: Okay.

REDIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Bermudez, you--you'll recall that you looked at the so-called "Protti Report."

A. Yes.

Q. A report made by a Mr. Roberto Protti. That's at Tab 7 in the file. If you could turn back to it.

And, at the same time, can you just go back to Paragraph 13 of your Witness Statement--your second Witness Statement. You were asked questions in relation to the Protti Report, and your

B&B Reporters
001 202-544-1903

Page | 591

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

characterization of the Protti Report at Paragraph 13 of your second Statement.

So, keep your finger at Tab 7 so that you can move between the two.

A. Yeah.

Q. And looking at Paragraph 13, can you just remind yourself of what you said in that paragraph very quickly. You don't need to read it out loud, but I just want you to have in mind what he said in that paragraph.

A. Yes. I read it.

Q. Okay. Now, if you could go back to the Protti Report at Tab 7.

Now, this isn't your fault, because--but I'm not going to spend an enormous amount of time going through the precise text, because the Tribunal and everybody else in the room has already done that once today.

But I do want to give you a fair chance, given the challenge that was made to the way in which you described the Protti Report, to have a quick look at the report in order to answer a question on it.

B&B Reporters
001 202-544-1903

Page | 592

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

So, what I would invite you to do, again, without reading this onto the record, is to read as quickly as you can, but read it, especially the second page, you'll see the-- the handwritten numbering at the top starts 125. If you could just read down that page, just remind yourself what is said in that--I'm going to ask you to read a couple of other sections in this report, and then I'm going to ask you a question.

A. 125?

Q. Yeah. Just quickly read through that.

(Pause.)

BY MR. BURN:

Q. And then once you've done that, if you could turn over to page 128.

(Pause.)

THE WITNESS: 128.

BY MR. BURN:

Q. Yeah. If you'd go right down about two-thirds of the way down, three-quarters of the way down, you'll see there's a paragraph beginning (in Spanish [se deduce de la aplicacion]).

Just start reading from there, and then over

B&B Reporters
001 202-544-1903

Page | 593

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the page, and read to the end of Section 7. Again,

reasonably quickly, if--if you can.

A. I'm sorry--

Q. Starting--starting from (in Spanish [se deduce de la aplicacion]). You see that paragraph there? And if you just read everything from there on--until the end of Section 7, which is over on page 130.

A. Okay.

(Pause.)

THE WITNESS: Yes. You've--yeah.

BY MR. BURN:

Q. Okay. Having reread those sections which together constitute a fair chunk of this document, do you think your characterization in Paragraph 13 of your second Statement is a fair one or not?

A. Yes.

Q. You think it's a fair one?

A. Yeah.

Q. What do you think this report is about?

A. This is a geological survey of the--of the

property; geological and hydrological survey of the

B&B Reporters
001 202-544-1903

Page | 594

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

property.

Q. Now, if you could just go back to the page marked "125," you'll remember that Mr. Leathley took you specifically to a phrase that appears in the very first part that both he and I have taken you to.

So, if you look in that section near the top which in the sentence starting (in Spanish [Los terrenos en estos]) at the top of 125; do you see that? If you go back to 125.

A. Yeah.

Q. Now, the phrase that Mr. Leathley took you to is right near the end. He referred to the phrase "People (in Spanish [tipo pantanoso])." You remember that?

A. Yes.

Q. The point that was put to you was by--by reference to Mr. Barboza's expert report was that there was some precise technical meaning to be taken from Mr. Barboza's analysis, and that that should inform the understanding here.

Do you accept that? Did you accept that--that the use of that phrase in this document has

B&B Reporters
001 202-544-1903

Page | 595

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the same technical meaning that Mr. Barboza adopts in his Expert Report?

A. No.

Q. Looking at the reference there in that entire sentence, and also looking a bit further down the page, to the paragraph starting (in Spanish), what would you say he--Mr. Protti was saying?

A. I believe that means Mr. Protti was saying that this specific area has poor drainage, because--well, he doesn't mention the--the reason, but he said that for some reason, this area has poor drainage and that this is a swampy kind--kind of swampy area. That's--that's what I get from this paragraph.

Q. Indeed.

And you see at the--near the bottom--I think this is what you have in mind, but perhaps you would like to confirm. He talks about swampy-type area perhaps caused by the drainage problems in this sector.

That's what you had in mind.

A. Yeah.

B&B Reporters
001 202-544-1903

Page | 596

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

Q. Okay. And did you--you visited the site for the purposes of your duties as Environmental Regent on a fairly regular basis. Did you ever observe any evidence of potential wetland?

A. No. Not in the Condo Project. I did observe that there was some area with poor drainage and that the water was not--the runoff water was not being evacuated because maybe previous water from the main road that goes to Esterillos that kind of created like a--like a dam effect that didn't allow the runoff water that's coming from the land--from the hill, from the hillside, to run off this way through the--through the road. That's what I believe was creating this poor drainage area.

Q. Thank you.

Just one last point, and then we'll be done--subject, of course, to the Tribunal's right to put questions to you.

You remember that Mr. Leathley put some question to you--questions to you with respect to the relationship between the Easements and the Condominium Section.

B&B Reporters
001 202-544-1903

You recall that you were asked various questions on that topic?

A. Yeah.

Q. And in terms of relationships with the Municipality, would--do you think they would have known there was a relationship between the Easements and the Condominium Section?

A. No.

Q. Do you think SETENA would have known?

A. Relationship in which way?

Q. That's--that the project was being developed

with--in one part, in this condominium part, that there was also an easement part--that--would those agencies have been aware that these different projects were happening at the same time?

A. No.

Q. If you don't know, that's fine, but--

A. Yeah. I--I couldn't tell, because I was not

involved in all the permitting--construction permits processing.

MR. BURN: Okay. I have no further questions. Thank you very much.

B&B Reporters
001 202-544-1903

Page | 598

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20
21
22

THE WITNESS: Yeah.

PRESIDENT SIQUEIROS: Pedro, do you have any questions?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR NIKKEN: Yes. I have a couple of questions.

When it comes to strictly legal matters,

there is some confusion about easement. An easement is a functional relationship between two properties, one that is dominating and one is a servant, and the owner of the dominant has the right to get some use--utilities from the servant.

One of these important easements is that of passage. When the lot is enclosed, they have the right to go through the others to reach the public area or public road.

Now, here, "easements" is being used in one sense--and perhaps you can correct me if I'm mistaken, but--as synonymous as an internal communication of internal roads, an internal network of passages.

And that would actually be common to all owners or those who had an interest, either through

B&B Reporters
001 202-544-1903

Page | 599

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

the Concession or the condominium.

So, in that sense, it's somewhat difficult to understand how one can view that the road project is different from the rest of the subdivision into lots.

Perhaps you could explain why they're different, because roads obviously could neither be sold nor rented, nor can they be subject to any right different to the common right of all condominium holders.

How can one then understand that it is something different?

THE WITNESS: Well, first, let me make it clear--I'm not--neither architect nor engineer.

My specialization is not in the subdivision of a land, but I do have some knowledge. My knowledge about how land is subdivided in Costa Rica is that it can be done through an easement. This is a road of no longer than 60 meters long that makes it possible for owners of the parcels resulting from the subdivision.

And, as I said, they cannot be more than 60 meters in length. That is how we understand easement for the subdivision of parcels—into parcels in Costa

B&B Reporters
001 202-544-1903

Page | 600

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

Rica. Now, in a condominium project, there may be internal roads or what--the size required to segregate the number of lots desired.

So, in this sense, the notion of "easement" is very different to condominium when you're talking about the subdivision of land.

In the specific case of Las Olas--and here again, let me make it clear that I don't clearly understand the process of the easements, because I didn't fully participate in that development. But I understand that the easements were to provide access to lots that were abutting the public road, whereas it--they might want to have roads in the internal and divide it into the amount of lots that they wanted in the subdivision.

So, the easement streets are not connected to the condominium streets. They are separate. That, for me, is the chief indicator that these are two different projects.

I hope I answered your question.

ARBITRATOR NIKKEN: No, but as you say, you're not an expert, but you have made some

B&B Reporters
001 202-544-1903

Page | 601

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

statements but--it doesn't matter.

Now, the other thing I'd like to hear from

you is how many times have you been appointed, or your company--were you appointed--and I believe that your company was appointed, then you quit because there hadn't been an approval, and then once you were later on, again, appointed--according to what I've read in the documents.

Tell us a little bit about the history behind this.

THE WITNESS: Well, actually, I--my knowledge is from 2010 forward. Prior to 2010, I was not involved to a great extent with these matters of the company.

My understanding is that the company was appointed as Environmental Regent for the Hotel Project in the Concession area on the coast area. One thing is to be appointed as Regent; another thing is to act--or work as Regent. I can be appointed Regent, but perhaps I'll never be acting as such, as in this case.

So, we were appointed Regent for the
B&B Reporters
001 202-544-1903

Concession areas, but we never actually worked as Regents. Why? Well, because we never conducted project inspections. There was no activity as Regent, as-- contrary to what happened in the condominiums, because there, we were told that the works were beginning, and we conducted inspections.

I have no idea why they changed us and removed us as being the Concession's regents, but I do know for sure that we were appointed; but before we started working as Regents, they changed us out.

ARBITRATOR NIKKEN: But your resignation--why? Because the work hadn't begun--well, I don't have it here--I didn't make a clear notation of that.

THE WITNESS: I believe it was 2009. Yes, it would seem to be that.

ARBITRATOR NIKKEN: You resigned in 2009--in April 2009.

THE WITNESS: I think it refers to something that was prior. My understanding-- because here again, I was not personally involved, but this project at La Canicula was a different project. It was prior to the

B&B Reporters
001 202-544-1903

Page | 603

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Las Olas Condominium. It's on the same property, the

same land, but it was a different project.

ARBITRATOR NIKKEN: Yes, I understand.

THE WITNESS: We were appointed as Regent--that's my understanding, but since the project--well, we were never told if it was going to begin or not. We decided to send a letter saying that we wouldn't act as Regents.

ARBITRATOR NIKKEN: And following the acts of 1 June 2010, when the--I don't know what the correct word was, that you were separated or terminated or--you stopped being the Regents. What happened after that?

THE WITNESS: Well, after that--I had no knowledge about that till recently. But after that, we never had anything to do with the Concession Project. Nonetheless, in late 2010, if I recall correctly, Mr. David Aven asked us to prepare a report on the current status of the Project.

ARBITRATOR NIKKEN: When was that, please? I don't know if I heard you.

THE WITNESS: I believe it was in August or

B&B Reporters
001 202-544-1903

Page | 604

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

September 2010.

ARBITRATOR NIKKEN: Despite the fact--

THE WITNESS: Yes, despite the fact that we'd been--they changed us. I don't really understand why, but I do recall that he asked us to prepare a report.

ARBITRATOR NIKKEN: Mr. Aven never notified you of this letter that had been sent to the Regent, to Mrs. Sonia Espinosa?

THE WITNESS: No.

ARBITRATOR NIKKEN: That letter--

THE WITNESS: You mean the one signed by Paula Murillo?

ARBITRATOR NIKKEN: Yes.

THE WITNESS: No. We never knew about that letter.

ARBITRATOR NIKKEN: Well, thank you very much.

ARBITRATOR BAKER: Can you help me understand what the environment--where the Environmental Regent's primary duty lies? You're hired by the developer, you're paid by the developer; but the law says your first duty is to whom?

B&B Reporters
001 202-544-1903

Page | 605

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

THE WITNESS: Yes.

ARBITRATOR BAKER: To who? The developer or--

THE WITNESS: To SETENA.

ARBITRATOR BAKER: To the environmental agency?

THE WITNESS: To the environmental agency.

ARBITRATOR BAKER: So, we can get a clear record, so, the law says, as I understand it--and I'm asking you for your understanding, not as a lawyer but just as someone who's been doing this for a long period of time--that your duty--first duty of allegiance runs to the environmental agency; is that correct?

THE WITNESS: Yeah, my main role is to make sure that all the environmental measures that were presented to the--to the environmental agency are complied with by the developer.

ARBITRATOR BAKER: So, when you would file your periodic reports with the agency, did you ever have discussions, did anyone from the agencies ever call you to discuss the reports?

B&B Reporters
001 202-544-1903

Page | 606

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

THE WITNESS: No. Oh, I'm sorry, yes.

After the first or two inspections that when--I believe there was a--there was a complaint before SETENA for alleged environmental damage of the project. Then SETENA review my--my reports and send like a feedback of--of the reports,

saying some things that needed to be adjusted or updated to the reports. And we complied with that.

ARBITRATOR BAKER: So, that was a change in the way in which they wanted you to report the information that you were sending to them on a monthly basis.

THE WITNESS: Yeah.

ARBITRATOR BAKER: Is that unusual, for an Environmental Regent to never get a site visit or to never get an in-person inspection from the environmental agency?

THE WITNESS: It's--it's usual to not get inspections from SETENA unless there is a complaint. Usually, when--if the process goes--all along the construction project without complaints or things that need to be reviewed by SETENA, they don't go to the

B&B Reporters
001 202-544-1903

Page | 607

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22
site.

ARBITRATOR BAKER: And the reason for that is because they are, in principle, relying upon the reports that you're sending them each month.

THE WITNESS: Yes.

ARBITRATOR BAKER: Okay.

With respect to--I think it is Respondent's Exhibit 42, which is behind Tab 10 in your hearing bundle. You had some discussions with counsel about that earlier.

But he didn't ask you the following question, and so, I'd like to, and that is: After this report was prepared at Claimants' request, as you've told us, did you ever personally have any discussions with, either on the telephone or in person, with anyone from the Parrita Municipality who received this report?

THE WITNESS: No, sir.

ARBITRATOR BAKER: That's it for me, Chairman. Thank you.

PRESIDENT SIQUEIROS: I have one final related question.

In respect to that mitigation plan that is in

B&B Reporters
001 202-544-1903

Page | 608

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

the record as R-42, you were mentioning earlier that this was at the original stage of your involvement with the project; is this correct, when you prepared--

THE WITNESS: That's correct.

PRESIDENT SIQUEIROS: Okay. Because you started working in the Las Olas project in June/July

2010?

THE WITNESS: That's correct, yes.

PRESIDENT SIQUEIROS: You describe in this mitigation plan how the project consists of a condominium, residential condominium, of approximately 300 homes plus a segregation of 72 lots where there will be urban easements developed.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: So, at this stage--at least at this stage in time, and when you submitted this report, which was one whole development with different entrances, as you describe, but it was your view that this was--and the view of the developers, that this was one project? And the mitigation was to apply with respect to both projects, the condominium and the easements?

B&B Reporters
001 202-544-1903

Page | 609

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

THE WITNESS: What I understand now is that--well, at that time, I didn't know there was two separate projects.

PRESIDENT SIQUEIROS: Yeah. But at that time--

THE WITNESS: Now I understand that there were two separate projects.

PRESIDENT SIQUEIROS: At that time--I want to understand when you submitted this report in 2010 what you understood back then.

THE WITNESS: I understood the easements were part of the--of the whole project, but--because I didn't know the nature of the project. Now I understand that this mitigation plan was only for the easements. Right?

PRESIDENT SIQUEIROS: But the mitigation addresses mitigation of the building--or the construction, I'm sorry, of roads, the entry roads, for the condominium and also the roads for the easements.

THE WITNESS: Yeah, because this is a general plan that can applied to the easement and to the

B&B Reporters
001 202-544-1903

Page | 610

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

condominium project as well.

This is just a general plan for earth movement. It's not a complete evaluation of the project or a complete management plan for a project.

PRESIDENT SIQUEIROS: No, I understood. But it does have very specific measures that would be taken in order to mitigate any impact for the whole project.

THE WITNESS: Yeah, it can be applied for--for any project, because this is a general plan for earth--earth movements. It's not specific for the earth movements of the easements or the earth movements of the--of the condo.

But now I understand that this was used only for--you know, in purpose for--for the easements works that were going to be done.

PRESIDENT SIQUEIROS: Just so I understand your response correctly, so, when you prepared these mitigation measures, they were not mitigation measures for this project. You would have said the same thing for any other project?

THE WITNESS: Yeah. It was
B&B Reporters
001 202-544-1903

Page | 611

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

general--that's--that's what I was asked to do. I mean, it was supposed to be just general measures to mitigate effects of earth movements of any kind.

PRESIDENT SIQUEIROS: That would apply to any other project?

THE WITNESS: Yeah.

PRESIDENT SIQUEIROS: Okay. I have no questions. Thank you.

No follow-up questions on the part of

Claimants or Respondent?

MR. BURN: Nothing from the Claimant, sir.

MR. LEATHLEY: Nothing from the Respondent.

Thank you.

PRESIDENT SIQUEIROS: Thank you very much.

Thank you very much, Mr. Bermudez.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: You are free to leave
now.

Would the Parties be ready to continue?

Well, Mr. Minor Arce, would you like a break?

It's 5:30.

MR. BURN: I think we're in--we would put

B&B Reporters
001 202-544-1903

Page | 612

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

ourselves in the hand primarily of the Tribunal, but frankly the Respondents as well. 5:30 is late in the day on the one hand; and on the other hand, there were originally scheduled to be six witnesses heard today, and we've only heard from four.

Mr. Minor Arce has been waiting all day. So, I'm sure he would be perfectly happy to come now; but really, I'm in your hands as to whether we should begin in the hope of at least achieving something or

whether we should wait until tomorrow morning. We're pretty relaxed. As I say, we would invite comments from Respondent's counsel at this time.

PRESIDENT SIQUEIROS: I think it would be preferable that his testimony not be divided; but having said that, we do have a very full schedule this week, so, preferably, if the Court Reporters and Interpreters would allow--I'm not sure--I would have to ask Mr. Leathley and his team how much time they would expect this examination to take.

MR. LEATHLEY: Thank you, sir. I--

PRESIDENT SIQUEIROS: And based on that, we can check the availability and resistance of the

B&B Reporters
001 202-544-1903

Page | 613

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

group.

MR. LEATHLEY: No, thank you, sir, and we appreciate the quandary.

I think the examination would take only 30 minutes, so, we can try to aim for that. Ms. Paez would be conducting the examination.

I share your sentiment, Mr. President, that--well, and actually that of Mr. Burn, we do have a full week, and so, half an hour may become very valuable come Friday evening and Monday evening. And

so--but I'm conscious of the sequestration and, you know, what that means for the gentlemen.

PRESIDENT SIQUEIROS: I would ask--I have more concern over Interpreters and Court Reporters. Would you like to take a five-minute break or would the Parties wish to continue?

Okay. Why don't we take, then, five minutes, but let's try to be punctual. Five minutes.

Thank you.

(Brief recess.)

PRESIDENT SIQUEIROS: Are the parties ready?
Court Reporters and Interpreters?

B&B Reporters
001 202-544-1903

Page | 614

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

MINOR ARCE, CLAIMANTS' WITNESS, CALLED
PRESIDENT SIQUEIROS: Mr. Arce, good

afternoon. I will try to briefly give you some indications regarding the statement and examination on the basis of your statement that the parties will carry out.

As you've probably been told by the representatives of the Claimants, they have the right to first do a brief examination, to be followed by a small--a brief cross-examination on your statements to be carried out by the Respondent.

After that, the Claimant will be able to ask you questions related directly to those that you answered during the cross-examination.

The Tribunal can at any point ask questions, although it will probably only do so at the end if it has any.

And, finally, I would like to point out that if you have any questions regarding a question, that is, any doubts regarding a question, please don't hesitate to ask for clarification.

And once you hear the question, first answer

B&B Reporters
001 202-544-1903

Page | 615

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

the question. And then if you would like to make a clarification, you can do so.

And before giving the floor to Mr. Burn, you will find the document in front of you. Please read it aloud so that it is recorded.

THE WITNESS: "I solemnly declare upon my honor and conscious that I shall speak the truth, the whole truth, and nothing but the truth."

PRESIDENT SIQUEIROS: Very well. Thank you.

DIRECT EXAMINATION

BY MR. BURN:

Q. You will see to your right there is a file.

I would like you to take that file, please.

Now, at the top of that file there are going to be copies of your two Witness Statements in these proceedings.

As a matter of procedure, we need to have you confirm these statements.

So, if you could take the first document, which is the original Spanish version of your First Statement, I believe. But I'd like you to just flick through the document and let the Tribunal know if the

B&B Reporters
001 202-544-1903

Page | 616

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

document does, indeed, appear to be a copy of your First Witness Statement in these proceedings.

You do not need to do it in detail.

A. Yes, it is the first one.

Q. Do you have any corrections or changes to make to this First Statement?

A. No.

Q. Looking at the last page there, on page 11, does that appear to be your signature?

A. Yes.

Q. Thank you.

We just need to repeat the exercise for your Second Statement. So, if you just go over the white

tab--I think you're now looking at the English translation of the First Statement.

If you could pass the white tab, you'll see, I hope, Spanish-language version of your Second Statement. If you could just flick through that and let the Tribunal know if that appears to be a copy of your Second Statement in these proceedings.

A. Yes, that's correct.

Q. Do you have any changes or corrections to

B&B Reporters
001 202-544-1903

Page | 617

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

make to this statement?

A. No.

Q. Thank you.

Finally, on page 12, last page of the document, does that appear to be your signature?

A. Yes, that is correct.

MR. BURN: Thank you, Mr. Arce. I have no further questions at this time.

CROSS-EXAMINATION

BY MS. PAEZ:

Q. Good afternoon, Mr. Arce.

Mr. Arce, you were hired by the Respondents--sorry, by the Claimants for this procedure to do an initial visit to the site; correct?

A. Yes.

Q. And you produced a report in September 2010?

A. Yes, that is correct.

Q. That is Annex 082 on Tab Number 1 of this binder. Can you confirm that that is the report that you prepared for the Las Olas Project developers?

A. Well, it is somewhat--the pages are somewhat not in order, but I have the impression that it is. I

B&B Reporters
001 202-544-1903

Page | 618

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

simply don't know if it is there in its entirety.

Q. That is the report that was annexed to your Witness Statement. Did you not review this report when you prepared your statement?

A. What I wish to say, actually--and maybe you misinterpreted what I wanted to say--is that page 1 appears there. That is--but it says there Number 10. And then the one that says--well, the next one there is not really--does not correspond to that point. It is simply another aspect.

What I mean is that there's some kind of--well, the order seems to have been inverted there. You may see--I don't know if you have it there--that the conclusions are not at the end, which is why I have the feeling that when the photocopy was made,

some kind of mistake was made.

Q. Mr. Arce, I will guide you on the basis of the numbers that appear on the top of the document, 10.2--that is 10, 10.2, 10.3, and 10.4.

On Page 10.2 of your report, you recommend to the developers that--that is in the first paragraph--that for the building of internal roads in

B&B Reporters
001 202-544-1903

Page | 619

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

the property, you say that one can request a small permit in the MINAE offices of Parrita; correct?

A. Yes.

Q. And in that same paragraph, in parenthesis, you recommend to the developer that if more than ten trees should be cut, you need to do a procedure with a forestry professional; correct?

A. If I may, I would need to explain a bit about what the process is.

Q. The explanations, you can give them later. These are questions only to be answered yes or no.

Then in the last paragraph of page 10.2--in the last paragraph you state and you recommend to the

developer that the permit can only be done once a year and, therefore, a small permit can be requested for internal roads to be built that year; correct?

A. That's what it says there, yes.

Q. These were the recommendations that you made to the developer in September 2010; correct?

A. It is part of the recommendations, yes.

Q. Thank you.

Finally, we go, now, to Page 10.4 of your

B&B Reporters

001 202-544-1903

Page | 620

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

report.

In the last paragraph you mention that the

Forestry Law establishes protection areas where even if there are trees for which no permits are required, these cannot be eliminated; correct?

A. The Forestry Law establishes different types of protection areas which, undoubtedly, are protected and one cannot do any kind of intervention in these protected areas. That is completely correct. And that's what I state there.

It is indicated in Article 33 and 34 of the 7575 Forestry Law.

Q. Thank you.

I'm glad you mentioned that Forestry Law

because we can then go to the next annex, which is the Forestry Law.

A. Correct.

Q. Annex C-170. And Article 33(a) establishes as protected areas those areas that border--or Article 33(b), rather--strip of 50 meters in the rural area and 10 meters in the urban area measured horizontally at both sides in the riverbanks of the

B&B Reporters
001 202-544-1903

Page | 621

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

ivers, creeks; correct?

A. Yes, correct.

Q. Mr. Arce, care to explain what is the importance of the protection of these areas under the Forestry Law?

A. The importance of areas indicated by the Forestry Law basically is--or it's based on two things. The effort to protect part of the environment involves the following: First, strips of land are created around the water flows--the permanent waterways that here are 15 meters, or it could even be up to 50 meters.

And these strips are places where we will

still have biodiversity and certain types of flora and fauna that need to be protected. Part of that is also--has also to do with the protection of waterways, of water resources.

And another essential aspect associated mainly to social and cultural aspects is that these strips are also protection against roads, that is, against the growth of flows, which is why they are established, so that there will be no construction

B&B Reporters
001 202-544-1903

Page | 622

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

there or any other kind of infrastructure.

Basically, that is the purpose that we have there for these protection areas. Not only of these types, but in everything having to do with protection areas.

Q. Thank you.

And do you agree with me that Article 33 does not mean--is not conditioned to the fact that these areas be wetlands?

A. I don't think it is mentioned here.

Q. It does not speak about wetlands, does it? A. No, I have not seen it. At least I don't

remember now that it speaks of wetlands because it speaks about water banks, rivers, creeks, streams, and then lakes and ponds in subparagraph (c).

Q. Thank you.

So, it does not refer to wetlands; correct?

A. No, not here. At least not here.

Q. But the protection does not depend on these rivers, streams, or creeks be wetlands?

A. I don't understand what you mean.

Q. The protection of these three, rivers,

B&B Reporters
001 202-544-1903

Page | 623

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

creeks, and streams, does not depend on the fact that these are wetlands; correct?

A. I'm not an expert in wetlands. I simply wanted to say that, at least in practice, we do not necessarily equate rivers and wetlands or creeks and streams because these are sources of water that permanently circulate. In other words, they have movement.

So, I don't think--well, I don't think we want to apply or decide that a river, creek, or stream is a wetland. I'm not an expert, but I don't think that a river, a creek, or a stream is a wetland.

Q. Thank you.

Mr. Arce, in paragraph 11 of your First Witness Statement you say that the first time you visited the Project, you walked near the southwest of the property next to the public road; correct?

It's Paragraph 11 of your First Witness Statement. The southwest area of the property; correct?

A. Yes.

Q. Mr. Arce, I'm going to show you Figure Number

B&B Reporters
001 202-544-1903

Page | 624

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

2 of the Second Report by Kevin Erwin which shows the image of the Project.

It is in this area here, the southwest area, around which you walked in September 2010; correct?

A. Yes, correct.

Q. And for the record, I am--or the witness has mentioned that the area where he walked in is the area--it's in the southwest area of the property.

Mr. Arce, do you agree with me when I say that in this area is where Mr. Erwin identified what he calls Wetland Number 1?

A. No, I don't handle that information.

Q. Could you please--could you go to Tab Number 3 where we have Kevin Erwin's report.

In this image--well, this is Figure 2 that has been projected on the large screen. There it's shown as a wetland. That is the area where you just indicated that you walked about during your visit in September in 2010. It has been indicated it is a wetland; correct?

A. It's correct.

Well, basically, it was on the banks or next

B&B Reporters

001 202-544-1903

Page | 625

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

to the Project, and it's really next to the highway that goes to the town or to the beach.

Q. Thank you.

If we can go back to the first page of your report, 10.2. You point out that for purposes of the soils, there is accumulation of humidity in this area; correct?

In the second-to-the-last paragraph, you said that for purposes for formation of soils, there is accumulation of humidity; is this correct?

A. Well, I'm going to tell you about this paragraph. What there is, is a very flat topography.

Q. But the question was, did you mention that there is accumulation of humidity during the visit?

A. If you would allow me, I wanted to clarify just one point for you. Since it's a very flat

topography and it's very close to the coast and since it was the rainy season, it's possible that it--at any part of the property or properties there is accumulation of water. So--and that's what I indicated.

So, because of the fact that the slope was

B&B Reporters
001 202-544-1903

Page | 626

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

very flat, there was accumulation of humidity and precipitation at some point.

Q. In paragraph 9 of your First Declaration you say DEPPAT contacted you so you could visit Las Olas; is that correct?

A. Yes, that is correct.

Q. When you refer to "DEPPAT," are you referring to Mr. Esteban Bermudez?

A. I can't confirm that because the business DEPPAT is made up of several persons. One of them contacted me, but I can't tell you if it was Esteban.

Q. You never did--you didn't do any forest surveys before this on this property?

A. Well, I went to do a very specific surveyor study.

If you notice, that in the first report I made, it was a specific report about the need of felling trees. And I said that in keeping with legislation and regulations that are applicable in the country, they had no problem in felling the trees that were next to--

Q. Well, you're not responding to my question.

B&B Reporters
001 202-544-1903

Page | 627

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

The question is whether you--before your visit, had you ever seen any of the forest study?

A. No, since I was doing a specific study, I had no need to look at any other studies.

Q. So, DEPPAT did not show you any other studies about the property?

A. No. The work I was going to do was so specific, and I knew it very well, and so I had no need to look at anything else. That's all.

Q. So, you don't know whether, before you visited the property, if the developers had spoken with another forest engineering consultant?

A. No, I don't know.

PRESIDENT SIQUEIROS: Excuse me. Mr. Arce, if you could speak a bit louder or get closer to the microphone, because those who are taking it down, the

transcription and for the interpreters, it would be helpful.

BY MS. PAEZ:

Q. Mr. Arce, in paragraph 6 of your First

Statement, you said frequently you work with different environmental businesses to prepare documents to

B&B Reporters
001 202-544-1903

Page | 628

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

obtain Environmental Viability from SETENA; is that correct?

Paragraph 6 of your First Witness Statement.

A. It's correct.

Q. So, you know how the application process works with regard to Environmental Viability; is that right?

A. Well, I only do the forestry component. I do not part--I collaborate with different businesses. I just do the forest component when it's necessary for whatever paperwork they want to do.

Q. And so, did you see--well, you did the forest component for the application for the condominium

section of Las Olas; correct?

A. No. I was not hired to do a study for any kind of environmental paperwork. I went and you can see why I went in my report.

Q. And when DEPPAT and the developer--when you contacted them, they didn't tell you that there was a study of this kind; is that right?

A. A study of what kind?

Q. The one you mentioned that is done with

B&B Reporters
001 202-544-1903

Page | 629

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

regard to vegetation coverage in order to apply to SETENA?

A. No. I went to do a specific study that had to do with felling trees, and it's not related to that. They asked me--well, can we cut that tree? Yes or no.

Q. Thank you. You responded to my question.

Let's go to Annex C-52. It's under Tab 4 in

the binder. This is the Environmental Viability that was granted for the horizontal condominium project, Las Olas. The first page you can see that it is Environmental Viability for the Residential Horizontal Condominium Project, Las Olas; correct?

The title is "Las Olas Residential Horizontal Condominium Project"; correct?

Can you look at the next page and look at Point 7, please. And I'm going to read 7.

"The basic studies conducted establish a series of recommendations that must be followed as indicated as part of the environmental commitments of the project. If removal of any trees is required, the appropriate permit must be obtained from the MINAE

B&B Reporters
001 202-544-1903

Page | 630

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

office."

The Environmental Viability requires that the Claimants obtain a permit from MINAE if they removed any tree; is that correct?

A. I should indicate that the legislation--

Q. My question is yes or no.

What does this Environmental Viability set forth? It indicates that it has to get permits to cut trees.

A. Well, the question calls for an explanation, not a yes-or-no answer because the legislation--

Q. Well, you can explain that later, Señor Arce, when our counterpart asks questions.

I want to know whether this requires that the developers have a permit to cut any kind of tree within the property.

A. I cannot answer that question because this is part of what is provided for in all environmental resolutions that are provided, but the legislation indicates that there are trees that do not need a permit to be cut down.

So, given that condition, if there is a tree

B&B Reporters
001 202-544-1903

Page | 631

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

that doesn't need any kind of permit to be felled--and let me explain this to you--then no paperwork needs to be done before any agency because the legislation is a novel or new one that indicates that trees that have been grown or planted, that have been regenerated do not require any kind of permit to be cut down or to be harvested or to be transported, even to be processed in industrial process or to be exported, and that is indicated by Article 28 of Law 7575.

Q. I'm sorry to interrupt you. But that is the exception to the general rule. Usually you need a permit. That is an exception to the general rule.

A. Yes, this is in the section about tree permits for felling.

Q. Mr. Arce, have you ever seen any permit to cut down trees that were obtained by Las Olas Project or by its developers?

A. No, I don't know that.

Q. So, you never saw any permit to cut trees that was obtained by Las Olas Project; correct?

A. I haven't seen it, and I would repeat that some trees, even the ones I recommended that could be

B&B Reporters
001 202-544-1903

Page | 632

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

cut down, do not require any permit to be cut down.

Q. The developers never hired you to obtain permits from MINAE to cut down trees; correct?

A. No, not for that.

Q. And they didn't hire you as a forest regent either.

ARBITRATOR BAKER: Excuse me, Counsel. Because you're doing this in Spanish, you're speaking so quickly over, the Interpreters cannot keep up with you. So it's--just give it a second before you go to the next question.

Thank you.

MS. PAEZ: Sorry about that.

BY MS. PAEZ:

Q. Just to repeat the last question.

Didn't they hire you--did they hire you as a forest regent during the development of the project?

A. The figure of the forest regent--I don't know if this is understood.

Q. You can explain it later.

Did they hire you or not to be a forest regent?

B&B Reporters
001 202-544-1903

Page | 633

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. No, not as a forest regent.

Q. Mr. Arce, in Paragraph 26 of your second statement, you refer to a report from SINAC, 3rd January, 2011, paragraph 26.

You refer to the SINAC report from 3rd January 2011; is that correct?

A. Yes, that is what it says.

Q. And you say afterwards that this report is about the illegal felling of approximately 400 trees at Las Olas Project; is that correct?

A. Yes, that is correct.

Q. And the Environmental Viability required that the developer had a permit in order to fell any tree; is that correct?

A. Well, I should explain, first of all, that this is a report--well, I--I didn't say they were cut

down, as it says here in this report. And, as I stated, there are trees that can be felled without a permit and thereafter. Since there is no information about the trees that were cut down, there's no kind of information about them. And we just have an approximation of trees.

B&B Reporters
001 202-544-1903

Page | 634

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Well, it's very subjective. There are trees that do not require a felling permit. And there are places where you can clear the land when it's used, for example, for cattle. If you don't clean or clear the land for the cattle, you won't be able to use it. And so, that might have been part of it. Since there's no information about what is the size of the trees, the species, how high, the diameters, I don't know how to define this.

Q. Mr. Arce, let's go back to your report from September 2010. You have testified that you recommended that if more than ten trees were going to be felled in a year, a permit from MINAE was required. You just said that 10 or 15 minutes ago; is that correct?

A. Yes. That was my recommendation.

Q. And the report from January 2011 after that reported that there had been 400 trees cut down;

correct?

A. I did not report that.

Q. No. The MINAE report from January 2011?

A. It's just what I explained. This report is

B&B Reporters
001 202-544-1903

Page | 635

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

not conclusive. It doesn't say what kind of species there are. And what it does even is say--well, approximately how many trees were cut down? But it doesn't specify. There are species that do not require permits to be felled. There are species that can be considered trees when they're not really trees. And then--so there are no parameters indicated here. And since they don't exist, that's the issue. We don't know if a permit was required or not.

Q. Mr. Arce, you made recommendations for the southwest part of the property; is that right? That's what you stated?

A. You're talking about--

Q. Your report from September 2010. You refer to the southwest part of the property; is that correct?

A. Yes, that is correct.

Q. Please, now look at Annex R-626, this is

Tab 5 in the binder.

MR. BURN: R-262?

MS. PAEZ: Right.

BY MS. PAEZ:

B&B Reporters
001 202-544-1903

Page | 636

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. This is the report from SINAC of January 3, 2011, that you looked at to prepare your statement; is that correct?

A. Yes.

Q. Mr. Arce, this is the report that you reviewed when you had to prepare your witness statement?

A. Yes, it's correct.

Q. If you could look at the first observation in the report it says, first, that in those inspections and on that residential project, we walked around the southeast thereof.

Do you agree with me that the southeast part is on the opposite side of the property from where you visited? And do you agree that this is the part that I'm indicating in--on the map, that this is the southeastern part of the project here on the map,

approximately, let's say.

Q. It is not the part that you visited in September 2010; is that right?

A. I went to the southwest. No, it's not the same.

B&B Reporters
001 202-544-1903

Page | 637

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. So, you did not verify the area? You didn't visit the area where it was reported that there had been 400 trees felled in 2011?

A. Well, the first time I went it was just to look at the cutting of trees in the southwest ever area; that's all.

Q. Thank you.

PRESIDENT SIQUEIROS: Just for the record, you mentioned the report of 3 January 2010.

But it was really 2011; is that correct?

MS. PAEZ: Yes.

BY MS. PAEZ:

Q. Mr. Arce, I want to refer to your Second Witness Statement where you refer to the report prepared by Ms. Mónica Vargas from the Parrita Municipality.

In paragraph 12 of your Second Witness Statement, you say that you have reviewed some complaints that were submitted to the municipality in 2009; is that correct?

A. It's correct.

Q. And in the same paragraph, you say that they

B&B Reporters
001 202-544-1903

Page | 638

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

were presented by residents of La Parrita, the third line of paragraph 12.

A. What I understand is that the complaint was filed by the resident--residents of Parrita.

Q. Thank you. Yes.

You also mention in Paragraph 12(b) that the complaints referred to the felling and burning of trees; correct?

A. It is correct.

Q. And in 12(a), you say that the complaint doesn't mean that these residents are experts in forests or wetlands; is that right?

A. Yes.

Q. Mr. Arce, let's look at tab 8, and we're going to look at Exhibit AR-214--or R-214.

This is the Costa Rican constitution. And I'd like to have you look at article 50 of the constitution.

Q. I'm going to read Article 50 of the constitution.

Article 50: "The State will seek the greatest well-being to all inhabitants of the country

B&B Reporters
001 202-544-1903

Page | 639

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

organizing and stimulating the production and the most appropriate distribution of its wealth. Everyone has a right to a healthy environment that is ecologically balanced. For that, everyone has standing to file a complaint about acts that would violate this right and to claim reparations for damage caused."

Q. Article 50 of the constitution does not impose any restrictions on those who file complaints with regard to violations regarding the environment; is that right?

A. I cannot answer that question because I must refer to the context of what was stated here.

Q. Well, let's talk about the context. There was a complaint that was filed with the municipality of residents of Parrita. We agree with that; correct?

A. Yes. But if you would allow me--excuse me. We only read one part of the 12 paragraphs in

my statement.

So--and we just read two sentences.

Q. But the important thing, Mr. Arce, is that you have accepted and you have stated that you criticized the complaints because the neighbors--or

B&B Reporters
001 202-544-1903

Page | 640

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

excuse me--the residents did not have any kind of technical qualifications.

A. If you would allow me to conclude.

Q. Well, you can give explanations later when our counterpart asks questions.

I don't need you to explain anything to me. Just after having read Article 50 to you, can you tell me whether Article 50 of the constitution requires a complainant to have technical qualifications to file a complaint for environmental damages?

A. If you would allow me--I have not questioned that.

What I'm questioning here--well--well--that the trees--it's indicated here they were cut down, but we don't know what trees were cut down.

Q. But according to Article 50, everyone has a right to file a complaint about an event that might be

illegal; correct?

A. Yes.

Q. I understand that completely, but I don't think that there's any basis to say that someone committed an infraction or violation because they

B&B Reporters
001 202-544-1903

Page | 641

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

can't. And that's what the institutions are for.

A. Yes.

Q. Now, in Paragraph 8 of your Second Witness Statement, you said that during your visit in September 2010, at paragraph 8--you do not see any sign of burning or any burnt material. You just saw that there had been clearing of weeds; correct? Paragraph 8 of your Second Witness Statement.

A. Yes. What I saw was that they were actually clearing out pastureland.

Q. And you only went there for a day.

A. Yes, only a day.

Q. Mr. Arce, in Paragraph 12 of your Statement, you refer--of the Report of Ms. Mónica Vargas from 26 April 2009; is that correct?

A. Yes, that is the date that appears here.

Q. Thank you.

And in Paragraph 12, too, which is on page 4 of your Witness Statement, you say that--with regard to Figure 4, you say you--you reviewed Figure 4 of Mónica Vargas's report from 2009; is that right?

MR. BURN: I think the reference, just so

B&B Reporters

001 202-544-1903

Page | 642

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the--second Witness Statement Paragraph 12(d) sub para 2, if I'm correct.

BY MS. PAEZ:

Q. Yes. Paragraph 2, you said that you referred to Mónica Vargas's Report of April 2009.

Let's look at this Report. It's Exhibit R-26, and it's under Tab 11--no, excuse me, Tab 10 in the binder.

If you can please go to the last page, where we have Figure 4 from the report, and this is also on the screen.

Mr. Arce, can you see that the terrain has a gray color or a dark coffee color?

A. Correct.

Q. And you can see that some parts of the terrain, they are white portions that look like ash.

A. I don't know what it's from, but yes, I see this white part.

Q. Could these areas be that color because trees have been burned? If the terrain is dark and then there are gray areas, could we say that there had been a burning of that vegetation, based on your

B&B Reporters
001 202-544-1903

Page | 643

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

observation of this photo?

A. It's possible.

Q. Thank you, Mr. Arce.

However, in Paragraph 14--no, 18 of your second Witness Statement, you refer to Figure 4, and you say that it does not show any sign of burning; is that correct?

A. Quite honestly, what this paragraph says needs to be viewed in the context, and based on my 52 years' experience working as a forestry expert, with this image, I can determine whether there is a forest on the sector or not.

Q. Yes, sir, but I'm not asking you whether there's a forest or not. What you say in Paragraph 18 is that there are no traces.

A. Well, referring to the existence of a forest. What I was really trying to say is that what cannot see that there has been burned forest, because Figure 4 says, one can see here that there was tree-burning in the back, and I don't see any. And that is why it was very difficult for me to say that it was a burned-down forest in here.

B&B Reporters
001 202-544-1903

Page | 644

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Well, perhaps you can see because it was burned.

A. No, because the structure does not indicate that there was a forest. To say there's a forest, we really need to conduct an exhaustive analysis of a number of characteristics. And we have a doubt that this is a forest.

Q. But you never conducted that detailed analysis in Las Olas; you never did this analysis you just mentioned. You never did one in the Las Olas.

A. I do not understand you.

Q. You never did a technical analysis that required surveying lots and measuring tree diameters; is that correct?

A. The studies that I conducted were very

specific. I explained the first one; and the second one was based on information provided by MINAE.

Q. To answer my question, you did not measure tree diameter. You didn't take any samplings on the project; is that correct?

A. Well, in my second report, I did gather information as to diameter, species, et cetera.

B&B Reporters
001 202-544-1903

Page | 645

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

MS. PAEZ: Thank you. No further questions.

PRESIDENT SIQUEIROS: Thank you.

Mr. Burn?

MR. BURN: Thank you.

REDIRECT EXAMINATION

BY MR. BURN:

Q. Now, just a couple of questions, Mr. Arce.

You've been taken by Ms. Paez to various

issues relating to your understanding of Forestry Law and forestry regulations.

You've been taken to the report at Tab 1 in the file that you appended to your first Statement.

One of the references you were taken to in your--in this Report, on the page marked "10-3," referred to your recommendation in the third bullet

point, to the--the developers not cutting more than ten trees per year. You--you see that recommendation in your Report?

Just the third bullet point down. So, if you look at the Conclusions, and in the third bullet point...

A. I see it, and I see it correctly. But--well,
B&B Reporters
001 202-544-1903

Page | 646

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

yes, I see it, but--I don't know what your question is.

Q. Fantastic.

From your point of view, as a forestry expert, as somebody with five decades of experience in forestry work in Costa Rica, what does the term "tree" mean?

A. Well, first, let me say, it's not that many decades. Despite me looking that old, it's only been three decades.

Next, the law is clear. We have to take into account one issue. The Forestry Law in Costa Rica is a very specific law. It's a law that focuses on forests and on trees, and very specifically on forestry trees. Obviously, we're talking about the Forestry Law and forest trees.

In that context, we needed to refer to the definitions that exist under the law as to what a forest tree is. And that means--and I'd like to explain a little bit here--that this law does not include--and of course, it cannot include a fruit tree or an ornamental tree or any other kind of tree that

B&B Reporters
001 202-544-1903

Page | 647

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

is not an actual forest tree.

Why? Because the law, being so specific, refers just to these trees. And it clearly defines what is a forest tree. It's a ligneous plant with ligneous trunks, certain height, more than 2 meters, and it is important because it is the source of raw material for industries such as sawmills or timber plants or whatever the law indicates. And therefore, it defines what a forest tree is.

I would also like to refer to this--because there's a confusion about getting permits and cutting down more than ten trees, et cetera.

In Costa Rica, you can obtain a permit to cut down as many trees as you wish. We're not limited to ten trees at all. There is no limitation.

If you comply with all the requirements under the law, you can fell as many trees as you wish. But the only thing is--and here, we mentioned the ten trees because the formality for cutting or felling ten trees is different to that of felling more than ten trees. If you're going to cut down 11 trees, there's a different kind, and it is what we saw earlier when

B&B Reporters
001 202-544-1903

Page | 648

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

we spoke about the forestry regent.

So, when you want to cut ten trees, all you need to do is present a request at the Forestry Office of the State. This office issues a permit without there being any need to have an external professional involved.

If you need to present a formality, or the paperwork, for cutting 11 or more trees, then you need an external professional to conduct the necessary studies so that they may be submitted to the Forestry Office of the State that will then review the document presented by the professional in his quality as Regent and then will grant the permit or will maybe request some corrections to be made. That is the only difference.

Why do I talk about ten trees here? Well, I'm saying that if you don't need to cut more than ten

trees, then it is a very easy formality that you can do on your own. But if you need to cut more than ten trees, you can do it, you are able to do it; but the paperwork is a little bit more costly, because you need to hire a Forestry Regent, and it takes a little

B&B Reporters
001 202-544-1903

Page | 649

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

bit longer to process.

In this case in the Project, not many trees needed to be felled, and that is why we made this recommendation. One can only obtain one permit per year. That is why this is mentioned here.

It says here: This year you can ask for ten; next year, if necessary, you can ask permission for another ten.

So, I think that helps to clarify this section.

Q. Thank you. It does.

You were also asked various questions by Ms. Paez in relation to the Report at Tab 10 in the file.

Now, what I'd like you to do, sir, is to turn to Tab 10, but also to keep a finger in your second Statement so that you can go between the two.

I apologize. There's a fair amount of paper in the file, but I think it is manageable.

So, if you just keep your finger there where you are with your Statement, and go to Tab 10. It's most of the way through the file.

(Pause.)

B&B Reporters
001 202-544-1903

Page | 650

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

BY MR. BURN:

Q. So, you'll recall that you were asked questions in relation to Figure 4, which is on the last page of this--this exhibit. And you were asked questions in relation to Paragraph 18 of your second Statement.

Now, you said in Paragraph 18 that "Forest in the background"--which is the legend underneath--anyway, in your--in Paragraph 18, you said forest in the background is not technically correct to state that. "The area in question is a forest since there is no evidence whatsoever to determine the legal requirements are met for such conclusion."

And then you go on to say in Paragraph 18:
"From an examination of Figure 4, no forest can be observed, and there are no signs of burning."

When you were answering questions from Ms.

Paez, you agreed that it was possible that the patch of white over on the left-hand side of Figure 4 might relate to burning. How do you explain the--what you have said at Paragraph 18 of your second Statement and what you have said in relation to that little patch of

B&B Reporters
001 202-544-1903

Page | 651

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

white in that photograph?

MR. LEATHLEY: Mr. President, we'll let that slightly leading question go on this occasion, but if we can raise the red flag for the next type of question.

MR. BURN: I've asked him how he--this is not a leading question. These matters were taken to--he was taken to in cross-examination. I've not led him to an answer at all.

MR. LEATHLEY: But you're taking him to two pieces and to draw the lines between them.

MR. BURN: The question is related to Paragraph 18. The question is in relation--related to Paragraph 18. Direct connection. It's a perfectly legitimate reexamination topic. There's no leading whatsoever.

PRESIDENT SIQUEIROS: Please go ahead and respond, sir.

THE WITNESS: What I am indicating here is an important aspect. We have the problem of attaching some--too much importance to certain some aspects; and sometimes, we think any type of vegetation is a

B&B Reporters
001 202-544-1903

Page | 652

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

forest, and we have a tendency to overvalue the concept of "forest."

However, the concept of "forest" is clearly defined in the law. So, it is not a romantic concept. It is a legal concept. It is not a technical concept. It is a legal concept. Sometimes, we look at it a bit differently.

I was born in a forest. I studied this career, and I have practiced it for 32 years. I love forests. But I have to abide by what is indicated in the law; and sometimes, thinking about that--I have to say, there is no forest here, because the law does not allow me to say that there is a forest, although that is what I would like to do.

So, after having lived all my life with the forest and in forests, I have to do that because that is imposed on me by law.

Law tells me that in order for there to be a forest, three basic conditions need to be met. There

has to be a type of vegetation. Three parameters need to be considered:

1, that it be a native autochthonous

B&B Reporters

001 202-544-1903

Page | 653

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

ecosystem with over 2 hectares of area; next, it must have mature trees of different species, different sizes, covering--one or two canopies covering over 70 percent of the surface; and 3, it must have more than 60 trees per hectare with a diameter greater than

15 centimeters at breast level, which we know as the DBH.

Sometimes, we want to force the issue that a certain type of vegetation is not a forest, and with simple observation, this cannot be done. With a simple photograph, we cannot do it. Why? Because I cannot say with this same photograph that I took today that this vegetation--yeah though I would like it to be a forest, I can't say it's a forest, because I have to stick to the definition provided in Article II of the Forestry Law and Article 3 of the regulations of that law.

So, that is what I'm referring to here. I cannot with certainty say that this photograph--not even I, who have spent 32 years looking at forests, I cannot say that this is a forest that somebody burned. I cannot say that. Looking at the vegetation, I can

B&B Reporters
001 202-544-1903

Page | 654

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

practically say, looking at it, that it is not a forest.

MR. BURN: We have no further questions.

QUESTIONS FROM THE TRIBUNAL:

PRESIDENT SIQUEIROS: I had just one question.

You indicated that the concept of "tree" has a very precise definition. Where does that definition arise from?

THE WITNESS: It is in Article 3 of the regulations of the Forestry Law, if I'm not mistaken.

Perhaps somebody would need to verify that or correct me.

There are just two articles that define things in the forestry legislation, and it's Article II of Law 7575 and Article 3--3 of its regulation.

It's in one of the two. But it's well-defined. A forest tree is this--a forest tree.

PRESIDENT SIQUEIROS: Very well. Thank you very much.

If there will be no further questions from

B&B Reporters
001 202-544-1903

Page | 655

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the Parties, and before we close for the day, are there any procedural issues the parties would like to address? From the side of Claimants?

MR. BURN: No, sir. Not now, sir.

PRESIDENT SIQUEIROS: On the side of Respondent?

MR. LEATHLEY: No, sir, just for the accommodation to go a little later due to the Reporters and the Translators.

PRESIDENT SIQUEIROS: Especially the Interpreters and Reporters. We appreciate very much their time.

It was well over half an hour, but it--I'm glad that we did it today.

Thank you much, and then we continue tomorrow morning at 9 o'clock in the morning.

Thank you very much, Mr. Arce.

MR. BURN: Sorry to interrupt, sir. I slightly misspoke. There is one small point that Dr. Weiler needs to address in relation to the submission to the United States. I think it's a--it's a minor practical matter, but he nonetheless needs to address

B&B Reporters
001 202-544-1903

Page | 656

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22
it.

PRESIDENT SIQUEIROS: Okay. Please.

DR. WEILER: I've had a little time on my hands today, and so, to save the U.S. some effort and to assist everybody, I looked up U.S. submissions, and I then color-coded where they overlapped or didn't overlap.

And what I'd like to do--oh, and then I also added--found the--the awards for each and coordinated the awards so that you can just click on and link it and get from one to the other.

What I would suggest to do first, though, is that I give this large file to my friends so that they can confirm my work and make sure that I've not made any mistakes; and if it's suitable, then you can just have it.

So, it's just one big PDF file that allows you to click on whatever the reference is. And I only

did it, obviously, for 10.5 and one 10.7. The U.S. only ever made 10.7 submission, but there was four 10.5 submissions.

They were in Corona this year, Spence last

B&B Reporters
001 202-544-1903

Page | 657

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

year, and Railroad Corporation, and then one other that's escaping me, but--

PRESIDENT SIQUEIROS: That's all right.

MR. BURN: --there were four.

PRESIDENT SIQUEIROS: We should also give opportunity to the U.S.--

DR. WEILER: I can forward it to Patrick as well.

PRESIDENT SIQUEIROS: Okay. Thank you.

MR. LEATHLEY: Excuse me, just to say I look forward to getting the document first before it goes anywhere beyond Respondent. I've not quite grasped what your document is and--thank you.

MR. BURN: So, sir, just to confirm, we will be presenting Mr. Jovan Damjanac at the beginning of Proceedings tomorrow, and we will then have Mr. Nestor Morera and Mr. David Aven.

PRESIDENT SIQUEIROS: Perfect.

MR. LEATHLEY: Can we just confirm the time

with the Secretary--we can do that offline, and then if there's a dispute, we can raise it.

PRESIDENT SIQUEIROS: The time that we--

B&B Reporters
001 202-544-1903

Page | 658

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

MR. LEATHLEY: The time remaining.

PRESIDENT SIQUEIROS: Okay.

SECRETARY GROB: Sure. So, the Claimants, they have used today 1 hour and 53 minutes, and the Respondent--the Respondent has used 3 hours and 53 minutes.

So, in total, Respondent has used 7 hours and 1 minute; and the Claimants, 4 hours and 57 minutes.

(Whereupon, at 6:51 p.m., the Hearing was adjourned until 9:00 the following day.)

B&B Reporters
001 202-544-1903

Page | 659

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

B&B Reporters
001 202-544-1903

Page | 660

1 2 3 4 5

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.

Michelle Kirkpatrick

Page | 661

B&B Reporters
001 202-544-1903

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.

