

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

Volume3 HEARING ON JURISDICTION AND MERITS

December 7, 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 9:07 a.m., before:

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

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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)

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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

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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
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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
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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

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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
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PROCEEDINGS

PRESIDENT SIQUEIROS: Good morning to all.

If the parties, the Court Reporters, and Interpreters are ready, then we can proceed with the third day of the hearing of the case involving David R. Aven, et al. versus the Republic of Costa Rica.

And I would first ask the parties whether, before we proceed with the examination of Mr. Damjanac, they would like to raise any issues, procedural or otherwise, before we commence.

MR. BURN: I believe there's a small matter relating to exhibits that the Respondent wishes to tender. For the record, we have no objections to those exhibits coming onto the record.

MR. LEATHLEY: Thank you, sir. These are just two exhibits, the bios from Mr. Ortiz and

Mr. Morera. We're printing copies so that they're available before Mr. Morera's testimony this morning, and we can give you Mr. Ortiz'. And they will be admitted as, I think, R-522 and 523, but we'll confirm that. Thank you.

PRESIDENT SIQUEIROS: Okay. Thank you very

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much.

Then if Mr. Damjanac is ready.

MR. BURN: Can Jovan Damjanac come to the witness desk, please.

DAVID JANNEY, CLAIMANTS' WITNESS, CALLED

ARBITRATOR BAKER: Chairman, could we ask about the comparative exhibit for the U.S. submissions in Article 10 as well that was discussed at the end of the day yesterday?

MR. BURN: Yes, you're quite right. And I defer to Dr. Wieler on that.

DR. WIELER: I spoke with Christian about it. He said he might need some time to look at it. So I'm going to be sending it to him this morning, actually. And then--

MR. LEATHLEY: Yes, sir. We're very grateful for Mr. Wieler's investment of time in this. It's a comprehensive document, so we would like to take our time to look at it and make sure we agree before it's passed both to the United States and to you.

With the best will in the world, that would

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probably be after this week, if that's acceptable to the Tribunal, just because of the intensity of the week in the meantime.

ARBITRATOR BAKER: That's certainly fine by me. I figured I'd see it here or on his website, one of the two.

MR. BURN: Could I just have a copy of the Damjanac cross-examination bundle, please.

PRESIDENT SIQUEIROS: Good morning, Mr. Damjanac.

THE WITNESS: Good morning.

PRESIDENT SIQUEIROS: As you are aware, you are here to be examined based on your First and Second Witness Statements that you have submitted in this arbitration.

As you have been advised, there will be a short direct questioning on the part of counsel for Claimants to be followed by cross-examination on the issues you have testified by counsel to the Republic of Costa Rica. And, thereafter, if there are any questions relating to the cross-examination that was carried out, counsel to Claimants will proceed.

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I would ask you to at the time that a question is made to you that you first respond to that question. You will be able to make any clarifications to your answer. If you don't understand a question, please feel free to request a clarification to that question first.

And, also, before we start, I would ask you to read a statement that is on the table right in front of you with respect to the way you will handle yourself during the examination.

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. Then, Mr. Burn, please proceed.

MR. BURN: Thank you, sir.

DIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Damjanac, you have to your right a file of materials. Could you open that file, please.

Just to explain what this file contains, at the top it will contain--should contain--but we'll go

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through this just to be sure--copies of your two statements in these proceedings.

Behind that, with numbered tabs, are various documents that the Respondent's counsel will take you to during the course of their cross-examination. It will be made clear where you should be looking. Of course, if you can't find a particular document, you should say so. But you should have everything in front of you.

Now, if we could, first of all, turn to the document at the top of the file. In my copy of the file, that is a document entitled the "First Witness Statement of Jovan Dushan Damjanac." Is that correct in your file as well?

A. Yes.

Q. I know it's a reasonably long document. But could you just flick through to the blue page at the back and just check whether that looks like a complete copy of your first statement in these proceedings.

A. It looks like a copy of it.

Q. Thank you. Do you have any corrections or

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amendments to make to that statement?

A. Well, not without looking through all 48 pages. I can't say absolutely but--

Q. Okay. But you don't arrive today with anything that you wish to correct to that statement?

A. No.

Q. Thank you.

Could you look on page 49. Is that your signature?

A. Yes.

Q. Thank you. We just need to repeat that process for the second statement. If you go behind the white tab, you should see--but I'd like you to confirm for the Tribunal--a copy of your second statement in these proceedings. If you could just inspect that document in the same way and confirm whether or not that appears to be a copy of your second statement.

A. Yes, it appears to be my second statement.

Q. Thank you.

Any changes or corrections to make to that statement?

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A. No.

Q. Thank you.

And could you just look at page 16?

A. Did you say 16?

Q. 16. 1-6. Is that your signature?

A. Yes.

MR. BURN: Thank you. We have no further questions for the witness at this time. Thank you.

PRESIDENT SIQUEIROS: Thank you.

Mr. Leathley.

MR. LEATHLEY: Thank you, Mr. President.

And apologies that I always give the Tribunal my back during the cross-examination.

CROSS-EXAMINATION

BY MR. LEATHLEY:

Q. Good morning, Mr. Damjanac. My name is Christian Leathley. I'm appearing here on behalf of Costa Rica this week. I'd like to ask you some questions about your testimony in these proceedings. And you became involved in the Las Olas project on a formal basis from about September 2009 onwards; is that correct?

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A. I had been in touch with David Aven prior to September of 2009 also. So one might say that I was involved with Las Olas prior to that also.

Q. And in December of 2009, you moved to Esterillos Oeste; is that correct?

A. That is correct.

Q. Now, you don't have any qualifications as an environmental scientist or environmental manager, do you?

A. No technical scientific qualifications.
Experiential qualifications.

Q. And you're not a lawyer; correct?

A. No.

Q. Or a wetlands specialist; correct?

A. No.

Q. But you are licensed to do real estate work; correct?

A. I have been licensed in the past to do real estate sales, yes.

Q. Now, you say in Paragraph 102 of your First Witness Statement that "there was no wetland on the Condominium Section or the area next to it"; is that

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correct, sir?

A. Statement 102?

Q. Yes, sir.

A. Sorry. I'm not seeing that. Was that my first statement?

Q. Yes, sir.

A. Paragraph 102.

Q. 102. It's the third line of the four-line paragraph.

A. In this paragraph--

Q. Yes. I'm just asking you to--

A. --I state that on the basis of Mr. Polanco's inspection and in light of Mr. Polanco's report, which stated that there were no wetlands, that there was no wetlands in the Condominium Section.

Q. So do you disagree with Mr. Polanco?

A. Mr. Polanco stated that there were no wetlands apparent in his visit. I do not disagree with that.

Q. Right. So what is your testimony, that you agree or disagree?

A. With what?

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Q. With Mr. Polanco's observation.

A. I agree with Mr. Polanco's observation of no wetlands.

Q. And the areas next to it would have been the easements; is that correct?

A. Could have been, yes.

Q. What else could it have been if it's not the easements?

A. Could have been the 14,400 meters of commercial property which was also located next to the Condo Section.

Q. So there could have been more wetlands on the easement?

A. I don't understand your question.

Q. Okay. Let's go back to Paragraph 102. You say that Mr. Polanco was reporting "there was no wetland on the condominium section"--these are your words in your witness statement--"or the area next to it."

Now, you've included "or the area next to it." I'm trying to understand what you're referring to here. You've, obviously, construed something from

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Mr. Polanco's inspection, and I'd like to understand what your testimony means.

A. Okay. Mr. Polanco's inspection report indicated that there were no wetlands in the Condominium Section or in an area outside of the condominium.

Q. That's not what you testified. You say "or the area next to it." You're being very specific. It's quite clear the condominium section could be circumferenced by many different areas. But you're talking about "the area next to it."

A. Okay. Well, then I would venture to say that I am referring to the area where the easements are.

Q. Okay. Thank you. In Paragraph 102, the same paragraph, the document you cite is the SETENA inspection report. I think that's there at Footnote 44. This was undertaken by Mr. Polanco on August the 18th of 2010; is that correct?

A. I'm not sure exactly what the date was, but I believe that's--that's correct.

Q. Well, your footnote refers to August the 18th, 2010. Is there any reason why we should

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question that, sir?

A. I don't believe so, no. And the date is on his report.

Q. Let's have a look at his report. If you go to Tab 1 of your binder. This is, for the record, C-78. And I wonder if you can go to page 2. And looking at page 2, there's text--printed text on the top half and then there's handwritten text on the bottom half.

A. Yeah.

Q. And I'd like you to go to the bottom half of that page. And there's some handwritten notes which we assume have been made by Mr. Pacheco. And I'd like you to go to the fifth bullet point. It's a little hard to see the bullet points, but there are little dashes that have been made. I wonder if you can see that, sir.

A. I see the dashes.

Q. I'm going to ask you to read it out in Spanish. I wonder if you could read it out for us, please, sir.

A. The fifth bullet point?

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Q. Yes, sir.

A. I believe that starts with "the area."

Q. No, the next--

A. "There is no presence of bodies of water (lakes) in the project area."

Q. Thank you, sir. I wonder just for the benefit of the non-Spanish speakers in the room, could you translate what that means?

A. The presence of bodies of water are not present in the area of the project.

Q. Thank you. And that is what you're referring to when you say in Paragraph 102 of your witness statement that there were no wetlands; correct?

A. Correct. One of the notes. And, also, taking into consideration that I spoke with Mr. Pacheco personally on that visit too.

Q. Now, you know Mr. Mussio; is that right? Mauricio Mussio?

A. I know of Mr. Mussio. And we've spoken a few times on the phone. I don't know--I don't know him personally.

Q. And you're aware he has provided a witness

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statement in these proceedings?

A. Yes.

Q. And Mr. Mussio testifies that he's familiar with the characteristics of wetlands.

A. Okay.

Q. And he goes on to say--referring to paragraph 48 of his witness statement, he said that "'Wetland' is a technical term."

Would you agree with that?

A. Yes.

Q. And yet you take from what Mr. Pacheco says in the SETENA report--where he specifically does not refer to wetlands, you conclude that he actually means wetlands; is that right?

A. Okay. Could you repeat that, please, that assertion.

Q. Sure. You take from what Mr. Pacheco says, what you're looking at where your left thumb is, where he says there's no bodies of water in the project area.

A. Mm-hum.

Q. You conclude--and we're going back now to

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Paragraph 102 of your witness statement, your First Witness Statement, that what Mr. Pacheco is referring to is wetlands. That's your conclusion. Is that correct?

A. Let me just read this again.

Q. Please do.

A. I would say that from Mr. Polanco's statement

in his report, yeah, in my statement, I'm concluding that Mr. Polanco found no wetlands. And I'm also making this statement in Paragraph 102 after speaking with Mr. Polanco on the site. And, you know, when he came to inspect the property and he had finished, he sort of looked at me and he shook his head, and he said, you know, "There's no wetlands here."

Q. That's interesting, sir. It's not in your witness statement, though, is it?

A. Well, I believe I covered it in my witness statement when I said that there was no wetlands according to Mr. Polanco's visit. And I believe at one point I did indicate in my witness statement that Mr. Polanco said that to me.

Q. Right. So you had the opportunity to include

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this. But at Paragraph 102 you specifically say, "I recall at some point shortly after Mr. Polanco's visit reading a document from SETENA confirming, on the basis of his inspection, that there was no wetland."

Now, you would agree with me that Mr. Polanco doesn't actually refer to wetlands in his report, does he?

A. No, not necessarily. I wouldn't agree to that.

And I do believe in another part of this statement I mentioned that Mr. Polanco on that visit asked me if we had any neighbors that had some sort of grudge against us.

Q. Yes. Thank you, sir.

We can talk about what Mr. Polanco may or may not have discussed, and you can talk about the neighbors with Claimants' counsel if you wish.

Let's go to Paragraph 152 of your witness statement--your First Witness Statement. And there you talk about the INTA report prepared by Mr. Cubero. This is the May 2011 report from INTA.

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And in this Paragraph 152--in the second half of that paragraph, you testify that "the mere presence of water, or a wet area, does not lead to the classification of a wetland, especially when the soil analysis provides no evidence of a wetland, as in the case of Las Olas property."

Do you see that, sir?

A. Let me take a moment, please. Okay. I see that.

Q. And then the last sentence in Paragraph 152 says, "There is indeed a difference between a 'wet area' and a wetland."

Is that still your testimony?

A. Yes.

Q. So in order to find a wetland, you decidedly do have to use the specific term. But in order to discount their existence, you do not need to use the specific term. That seems to be your test. Is that right, sir?

A. Please repeat that statement.

Q. Yes. In order to find a wetland, you have to use the specific term "wetland." But in order to

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discount their existence, you do not need to use the specific term.

A. I don't understand that statement. In order to find a wetland, I have to use the term "wetland"?

Would you say that one more time, please.

Q. Yeah. It seems to be your testimony that in order to find a wetland, one has to decidedly say the--use the specific term "wetland."

A. Okay. In order--

Q. But in order to discount--let me finish the question, sir.

But in order to discount their existence, you do not need to use the specific term. That's your testimony?

A. Yeah. I don't understand what you mean "in order to discount their existence."

Q. In order to conclude that there is no wetland. That's what I mean.

A. Okay. In order to conclude there is no wetland what?

Q. In your testimony, sir, you have concluded from Mr. Polanco that notwithstanding the absence of

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a reference to wetland, you can conclude there is no wetland. However, in order to establish that there is a wetland, you need to find--you need to have the specific term referenced. It's an inconsistent analysis, sir.

A. I believe there is a three-prong approach to establishing whether an area is a wetland or not.

Q. And from your analysis of Mr. Polanco's report, without the reference to wetland, you're concluding there is no wetland. Is that still your testimony today from his SETENA inspection report?

A. I am not an expert in wetlands. Of course, we all know that. However, I would say that my conclusion was based on Mr. Polanco's statement to me on the site that there were no wetlands, and also Dr. Cubero.

Dr. Cubero's testimony in our initial trial, he stated that without soil markers for wetlands, the area can't be a wetland. So I guess that's what I was basing my statements on.

Q. And so being aware of this three-prong test, you had also been aware that it wasn't in

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Mr. Polanco's ability to conclude on that inspection

that there was no wetland.

A. Well, I trusted Mr. Polanco's ability to observe wetlands and conclude--he was the technical expert on wetlands and represented the country's foremost authority on environmental issues at SETENA, and I also respected Dr. Cubero's opinion. And that's what I based my statement on.

Q. And these are the same institutions which today conclude that there are wetlands; correct?

A. That is not correct. I do not admit that those institutions have said there are no--there are wetlands on the property.

Q. You don't accept that authority of those institutions?

A. Excuse me?

Q. You don't accept the authority of those institutions?

A. That's not what I said.

Q. That's my question.

A. Okay. I--please rephrase your question.

Q. No, sir. My question is what it is.

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Do you respect the authority of the institutions which have the authority to determine whether there are wetlands or not? That's my question.

A. Well, I respect the laws of Costa Rica and have always.

Q. Okay. Let's go to Paragraph 23 of your Second Witness Statement.

In this paragraph, you say--and I'm going to read it, "I have never refused to sign for any documents or sign my acknowledgment of reports that I actually have received. In fact, I had specific instructions from Mr. Aven to accept any and all documents delivered to our office and immediately forward such documents to him."

Do you see that, sir?

A. Yes.

Q. And do you stand by that testimony today? A. Yes.

Q. And I wonder if we can go to Tab 3 in your

binder. This is in the cross binder. This is Exhibit C-125. And this is a letter from the

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Municipality to SETENA dated the 12th of May 2011.
Do you see that, sir?

A. Yes.

Q. Please have a look at the second paragraph.
It says here--we provided a translation in the--in
this section. I'm going to read from the
translation.

"The project was first notified to Mr. Jovan Damjanac who identified himself to the offices located as Jovan. He is the person in charge of the office in Esterillos Oeste and the person who had always attended visits by representatives of the Municipality, and he is also the same person who had gone before the Municipality to undertake the requisite construction permits procedures. He was the only project representative on the site during the notification process, and he refused to acknowledge receipt of the notification.

"The municipal officers, Gerardo Godinez Chinchilla, and Alexander Elizondo, requested the police presence. As such, Police Officers Mauricio Quesada Mora and Mario Vargas Alvarez were present

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when the notification officers handed Mr. Jovan

Damjanac, who identified himself only as Jovan, the notification.

"The notification process started at 9:30 a.m. on May 11, 2011, when the notification officers presented themselves at the Las Olas Condominium Project offices. The process concluded at 11:50 a.m. that same day when the police officers present gave Mr. Damjanac SETENA's resolution and the Municipal provision."

Do you see that, sir?

A. I see it in Spanish, yes.

Q. Right. Is that a fair translation?

A. No, that's a false--that's a false statement.

I was never involved in obtaining permits for the project. I was the sales manager and on-site manager. The permit processing was done by Mr. Aven and our then-project manager Sebastián Roldán Vargas. I never went into the Muni for any kind of permitting.

Q. So you're contesting the veracity of this document; are you, sir?

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A. Yes, I am. Emphatically.

Q. .

Let's go to the next document where you--in Tab 4 of this folder, Exhibit R-110. This is a letter from the Municipality notifying you and Mr. Aven of complaints of neighbors and requesting documentation. This is dated the 8th of July, 2011. And you can see a handwritten note on the left-hand side of the document near the official stamp of the municipality; correct?

A. Uh-huh.

Q. Now, we provided a translation behind the blue page. And I wonder if, for benefit of the record, you can read out the translation.

A. Okay.

"Dear Sirs: Esterillos Oeste; these emergencies were reported by area residents and the Community Police--

Q. No. Sorry to interrupt you, sir. I think you've got the wrong document. Let me just confer.

Ah, yes, in the left-hand margin. You were in the correct page. But there's a block on the

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left-hand margin which is the translation of text the

handwritten annotation.

A. Okay. Got it.

"At the moment of delivery, Mr. Jovan

Damjanac indicated that because of recommendation of his lawyer, he could only receive the document but he could not sign it."

Q. I wonder if you can go back to the Spanish original and just confirm if you think that is an accurate translation, sir.

A. I guess it is, yes.

Q. So according to this second public record, you refused to receive this notification from the Municipality officers; correct?

A. According to this note, that is what they are attesting. But I don't agree with it. I always received notices and signed for them.

Q. Let's have a look at Exhibit R-396. This is behind Tab 5 of your cross-bundle there. And I'd ask you to look at the--there's a translation as well. I think it's behind the blue page. But, obviously, please look at the original if you wish.

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This is a letter from the Municipality to

Jorge Alvarez Mondragón. Do you know who he is, sir?

A. Oh, yeah, I know who that guy is.

Q. And he's the director of the Municipality of Urban Development; correct?

A. Not anymore.

Q. This is a letter dated the 11th of August, 2011. And the first paragraph of this letter--I'm reading from the translation--says, "On August 10 of this year, a visit was made to the offices of the project horizontal condominium Las Olas. The intent was to deliver documentation sent by your Department to the project's representatives. When the delivery was made, we were seen by Mr. Jovan Damjanac, who stated to us that at the recommendation of his attorney, Mr. Sebastián Vargas, he could only receive the documents but not sign the copies as received. The attorney told us this by phone at the time. He also stated that at the time their position was not to provide information requested in the document delivered to the Department of Urban Development of the municipality of Parrita."

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So according to this public record, you refused to effectively receive documents from municipality inspectors; is that right?

A. According to this public record, but it is not correct that I didn't agree to receive documents and sign for them.

Q. So you contest also the veracity of this document?

A. Yes, I contest it emphatically. I've always received documents, and I always signed for documents and I believe there are a number of documents and records that show that I did, in fact, receive them and signed for them.

Q. You also contest the veracity of injunctions, sir?

A. The veracity of injunction? I don't understand that question.

Q. Let's go to Paragraphs 50 to 51 of your Second Witness Statement.

A. Okay.

(Pause.)

BY MR. LEATHLEY:

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Q. Here, you refer to a report from the Municipality of May the 13th, 2011. And I wonder if you can go to Exhibit R-270. This is Tab 7. You may want to just keep--if you want to keep a pen or a finger in that page of your Witness Statement.

R-270, the Document in Tab 7, is an Inspection Report prepared by the Municipality

regarding works being conducted on the Las Olas Project site dated the 12th of May 2011; is that correct?

A. Well, I see--this is Exhibit R-270?

Q. Yes, sir.

A. And I see a date of the 13th of May 2011.

Q. Yes. And in the first line of the letter, it

says (in Spanish) el día jueves 12 de mayo.

A. Okay.

Q. And this is a report that you're referring to in--in Paragraphs 50 to 51 of your Witness Statement, your Second Witness Statement.

A. Okay.

Q. Correct?

A. Okay.

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Q. So, let's read from the first paragraph of that Exhibit R-270, which says--and I'm going to read from the translation: "That on Thursday, May the 12th of the present year, at 2:00 p.m., a follow-up inspection was carried out at the site of Las Olas Condominium Project located in Esterillos Oeste."

And then I'm going to skip a paragraph, and then in your translation, it's the next paragraph that's there, the only other paragraph that's there. It says: "The presence of a backhoe was witnessed, which was performing leveling of the ballast on the roadways. Also during the visit a light truck proceeded to leave more ballast at the site, which was then leveled by the aforesaid machine. The respective photographs are attached to the report."

Do you see that, sir?

A. Yes, I see that statement.

Q. And then if you turn the pages of the original R-270--and I think hopefully the next page, you can see some color photos showing the truck leaving the ballast at the site.

Do you see that, sir?

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A. Yeah.

Q. Although you say in Paragraph 50 of your Second Witness Statement that this does not show anything, and it's, quote, "impossible to respond."

That is what you say in Paragraph 50 of your Second Witness Statement; is that correct, sir? It's the last line of Paragraph 50.

A. Okay.

Q. Is that still your testimony today?

A. I will say that there is no evidence that these photos were actually taken on the date indicated here in the Report. This --we always came across photos or--photos were always submitted in this case, and there were never any definite markers or verification on the photos as to when work was done or when these photos were taken. So, I don't remember--or I don't know when these photos were taken. They could have been submitted into this Report after having been taken much earlier than this--the Report.

Q. Although on the last page where we have the color photographs, there's a stamp with the date of

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13th of May 2011; is that right?

A. Well, anybody could make a stamp on a document. That doesn't verify that these photos were taken on the 13th or the 12th of May.

Q. Did you or your lawyer challenge this Report?

A. I'm not sure if our attorneys did challenge it or not, but I know once we--when we received Notice of the Injunction, we stopped working on the

site.

Q. Can I represent to you, sir, that from the evidence that's been put in this Arbitration, neither you nor your lawyer challenged this report at the time or any time since until your testimony in this Arbitration?

Could that be true?

A. I don't know.

Q. Could it be true?

A. That--whether our--could it be true that I or our attorney challenged this Report prior to this Arbitration?

Q. No. The evidence at this Arbitration shows that you did not--or neither did you nor your lawyer

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challenge this Report that is identifying works being undertaken on the property.

A. I really can't answer that because I would assume that we did challenge it because we never did any work after any kind of injunction was issued.

So, in that respect, I believe we've always challenged that assertion.

Q. Okay. Well--

A. That assertion, excuse me.

Q. Very good.

Well, then, let me represent to you that the record does not show that, and your testimony is saying that it's impossible to respond to those, but your perfect response would have been evidence of that challenge; correct?

A. This is getting a little confusing for me. Sorry.

Q. That's okay. Let me take a step back to assist you, sir.

Your testimony in Paragraph 50 is that you cannot respond, it's impossible to respond to this evidence of works being undertaken after the date of

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the SINAC injunction. That's obviously the focus. That's why we're talking about this works; right?

A. I believe what I was saying is, given the photos, it is impossible to ascertain whether those--these photos represent work being done on that date.

Q. Understood, sir. And the date stamp on the document is from--from May 2011, which is also when it would have been all produced and stamped. And if

you had disagreed with the date of those photos, you could have challenged or your lawyer could have challenged that, but you did not do that.

A. I believe I disagreed with the date on a number of photos submitted. Whether it was here or in another part of this testimony, I don't recall. But in recollecting, I do believe that I did not agree with dates of photos submitted in this case.

Q. So, you are operating in contravention of an injunction, but you don't challenge the evidence which is showing that you're operating in contravention of an injunction.

A. We never operated in contravention of an
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injunction, sir.

Q. Well, that's not what this document is

telling us. This document is showing works--excuse me--works being undertaken during the period that the property was subject to the SINAC injunction.

A. Well, this document is showing photos of a truck laying gravel and another machinery--another machine on the road; but it doesn't--I don't agree with your statement that work was being done after the injunction, because all I know is, the minute we received the injunction, we stopped working.

There may have been a backhoe--a backhoe moving around the project from time to time after the injunction. There may have been basic maintenance work being done, like the clearing of trees. Sometimes we'd have very bad wind storms, and there would be branches and trees falling, and removing debris does not constitute construction work.

And if you have a machine and you can do it in ten minutes as opposed to four hours with two laborers, it--you know--I don't believe there was a law whereby we couldn't use our backhoe. As long as

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we weren't building or constructing the project, I don't believe there was a law that said our driver couldn't go onto the property with our backhoe.

And--

Q. You were taking legal advice at the time, were you, sir?

A. Yes, I always conferred with our project

manager and attorney, Sebastián Roldán Vargas, at the time, and never did anything without conferring with him and David.

Q. Mr. Damjanac, how old were you when you moved

to Costa Rica in late 2005? If you don't mind me asking.

A. 48, 49.

Q. And you were paid for your work between September and December 2009; is that correct?

A. For which work?

Q. In relation to the Las Olas Project.

A. In 2008, 2009?

Q. And--I'm sorry. Between--I beg your pardon.

Between September and December 2009.

Apologies if I misspoke.

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A. I was paid for my work. Which work are you referring to?

Q. Well, maybe you can help me. What work were you doing at that time, sir?

A. At that time, I was a real estate broker, selling property. And I was also doing, like, marketing consulting and analysis work.

Q. Were you paid a salary or an hourly rate or a commission?

A. I don't recall exactly, you know, what I was

earning in that particular time period.

At times, I did earn a consultant's fee for work that I did. Other times, I was strictly compensated on results, and those results being sales. In most of my career, that's the only way I made money, when I made sales.

Q. You testify in Paragraph 42 of your First Witness Statement that based on your telemarketing calls, Mr. Aven decided to reopen Las Olas in January of 2010; correct?

A. I don't see that. Paragraph 42 of my First Statement?

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Q. Yes, sir. It's the fourth line.

"David and I would have daily conversations about the progress of my marketing efforts. I was generating a lot of interest in the Las Olas Project. This was very encouraging to David, who soon decided, along with the other U.S. investors, to reopen the Las Olas Project in January of 2010."

It's the first part of that Witness--of Paragraph 42. Do you see that, sir?

A. Uh-huh.

Q. And you also testify in Paragraph 41 of the same First Witness Statement that it was your opinion that as of year-end 2009, people were willing to pay from 175,000 U.S. Dollars to 400,000 U.S. Dollars for a two-bedroom condo near the beach in Costa Rica which was half the pre-2008 crash price; is that correct?

A. I don't believe so. I'm looking at Paragraph 41, Page 9, and--wherein, it says: "David had acquired a number of marketing lists, potential U.S. buyers."

Q. Uh-huh.

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A. "Went to David's place, started making marketing calls."

Q. Do you remember how many sales you made in those three months between September and December of 2009?

A. I made no sales between September and December of '09 at Las Olas.

Q. And in Paragraphs 15 and 17 of your First Statement, you testified you worked for about a year

on a sale that failed to close in 2006; correct?

A. I'll have to check that.

Q. Please do.

A. Yes, I see what you're referring to there, yep.

Q. And you also testified that this was a 22-story beach project where you say you found a buyer but the seller decided not to sell; correct?

A. Yes. Yep.

Q. And the seller was, in fact, the developer you were working for; right?

A. One of them.

Q. And, so, in that case, I'm guessing you were

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simply unable to find a price that a willing buyer would pay to the willing seller; correct?

A. No. In this particular instance, I found a willing buyer for the project, but it was before the economic collapse of 2008, and the seller was anticipating that he would be getting a lot more for the property. He had no idea of the crash that was coming, so, he let this deal fall by the wayside.

But it was a great deal for the guy. If he would have taken it, he would have done a lot better than he's doing right now.

Q. And when you moved out of Mr. Aven's house in December of 2009, you became the marketing and sales director and site manager, moved into the office that was on the Las Olas site; correct?

A. Yes.

Q. And in 2010, you were compensated by commission?

A. That is correct.

Q. Can we turn to Tab 10 of your binder.

This is Exhibit C-98. And if you can look at the first page, Mr. Aven reported in this

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letter--it's a letter to investors--prospective investors, reported in the letter that for the whole of 2010, a total of 16 lots were sold; correct?

A. Letter dated December 12th; correct?

Q. Yes, sir.

A. Yeah, that's correct.

Q. And so, \$875,000 for the total sales divided by 16, I calculate just under \$55,000 per lot. Would you agree?

A. On average?

Q. Uh-huh.

A. Uh-huh.

Q. And you were paid commission on all of those sales?

A. That's correct.

Q. And what percentage commission were you receiving, sir?

A. 5 percent.

Q. And you testified that you moved to live in Las Olas' office over the holidays in 2009, and you offered your business plan on December 20th of 2010.

So, it took you a year to create that plan;

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correct?

A. No, I don't believe so. Can you refer me to the documents associated with that statement?

Q. Sure. If you go to Tab 9 in your folder there. This is CLEX-16.

A. Tab 9? Okay.

Q. Tab 9 is your business plan. At the top in

the blue and black block, at the top of the page,
says "December 20th, 2010."

Do you see that, sir?

A. Huh-uh.

Q. And you'd moved to the site in the end of
2009.

A. Uh-huh.

Q. Mr. Damjanac, we need you to say a "Yes"
rather than an "Uh-huh." I'm sorry. It's just for
the transcribers.

A. Oh.

MR. LEATHLEY: I don't mean to say "just for
the transcribers." I apologize. That came across
very badly. The most important people in the room.

Just for the transcripts. The ladies are

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the most important people here with respect to the
Tribunal.

(Comments off record.)

BY MR. LEATHLEY:

Q. Please turn back to Mr. Aven's Christmas
letter. This is the letter you saw before. I think

it was Tab 10. This is the 12th of December 2010.

Now, eight days before your plan that we just saw, Mr. Aven says in the second paragraph of his letter, "This was the most difficult year to be selling real estate down here."

Do you see that, sir?

A. In the second paragraph?

Q. Yeah. So, if you go to the front of that--the first page of Tab 10. There you go.

A. Okay.

Q. Second paragraph--I beg your pardon, no; second page.

A. Second paragraph, second page.

Q. No, sorry. I'm misleading you. My apologies.

Second page, and the penultimate paragraph;

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so, the last-but-one on the bottom.

A. Uh-huh.

Q. There, you see Mr. Aven says, "This was the most difficult year to be selling real estate down here."

A. Yes.

Q. However, in Paragraph 41 of your Witness Statement--this is your First Witness Statement--and I would encourage you to turn to Page 10 of your First Witness Statement.

Do you have that, sir?

A. Page 10 of my First Witness Statement. Yes.

Q. Yes. So just at the top, you can see the

remaining--the continuation of what is Paragraph 41, and it says that from your telemarketing, quote, "Demand for the properties was still there and increasing by the day."

Correct? That's your testimony?

A. Yeah. Uh-huh.

Q. And you also say that you were generating lots of interest, and on your advice, Mr. Aven decided to reopen the project on January 10--sorry,

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January 2010; correct?

A. Yes.

Q. But according to Mr. Aven, the demand was not there, was it?

A. Well, this paragraph and Mr. Aven's statement are not mutually exclusive. The fact is, the market

was very difficult, and it was a very bad time to be selling property. It's just that we were doing it better than most.

Q. So, you are saying that Mr. Aven was correct in saying it was the worst year, but it was--there was still demand there. You can reconcile those two?

A. Yes. It was a very bad market. Practically no one was selling stuff but us.

Q. And by "selling stuff," you mean 16 lots?

A. Lots, yes. Properties.

Q. Which was 16 for the year.

A. Yeah.

Q. Okay. Thank you.

MR. LEATHLEY: I don't have any further questions, sir.

PRESIDENT SIQUEIROS: Thank you.

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Mr. Burn?

REDIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Damjanac, just a few questions by way of reexamination.

You will recall that Mr. Leathley took you to a report of a Mr. Polanco. That was in reference

to your Paragraph 102 in your First Statement.

And the Report itself is behind Tab 1 in the file.

First of all, just for clarity's sake, who is Mr. Polanco?

A. Mr. Polanco was a representative of SETENA and an inspector. He came out to inspect the property after the initial complaint against the property was filed, and he had also come to the property one or two times afterwards.

He was a SETENA authority.

Q. Right. And now, you'll recall that Mr. Leathley put a great deal of weight on the manuscript notes that appear on Page 2 of the Report for Mr. Polanco and the specific words that were used.

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You remember the line of questions on that?

A. Yes.

Q. You made various references to conversations with Mr. Polanco during his visit.

A. Yes.

Q. Mr. Leathley didn't take you to Paragraph 101

of your Statement. I'd like you to just have a look at that and see if you wanted to expand your answers relating to Mr. Polanco's visit.

A. Yes.

Q. Is there anything you'd like to say on the topic of that site visit, what was discussed during it, and how you interpret Mr. Polanco's Report?

A. Yes. I believe this is the statement I was referring to when I said to Mr. Leathley that I had indicated this information in another part of this report.

Mr. Polanco was a very nice gentleman, and he basically--you know, I remember his looking at me and shaking his head like, you know, it was--this is like a witch hunt, so to speak. He was not surprised that we had this problem, and he actually attributed

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it to a--maybe a disgruntled neighbor, because he asked me, you know, "Do you have anybody that's an enemy? Or, "Do you have a neighbor that's an enemy?"

And he just seemed to be sort of--it was sort of an empathic kind of response from him. He

understand--he understood the problems we were having, and he sort of conveyed the idea that he was sorry about it and just shook his head and said, "There's no wetlands here. You guys don't have any wetlands."

But he understood why we could be facing a charge like this due to a disgruntled neighbor, and the fact that in Costa Rica, it is very easy for someone to make a claim that's unsubstantiated, but then it gets the ball rolling on a denuncia process that could leave you in a legal quagmire for the next 15 years.

So--but he seemed to--Mr. Polanco was a very nice guy. He seemed to relate to what we were going through.

Q. Thank you.

And just before we leave the Report, under

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Tab 1, if you want to turn back to it, on Page 3, do you see your signature?

A. Yes.

Q. So you received a copy of this report?

A. Yes, and I signed for it.

Q. Thank you.

Mr. Leathley took you to a document behind Tab 5.

Just a quick question. You'll remember that there was reference to Mr. Jorge Alvarez Mondragón.

A. Yes.

Q. Do you know what has happened to Mr. Alvarez Mondragón?

A. Not exactly, but I understand he left the muni or was fired, so...

Q. If you don't know, you don't know.

A. I don't know.

Q. And finally, you were--a series of questions was put to you about the marketing efforts in the aftermath of the financial crisis.

You described a situation in which you said to Mr. Leathley that you were more successful than

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others in the area in making sales in a difficult market.

Why were you more successful?

A. Well, I would say for a number of reasons, one of which was our project was very well-located.

It was very attractive property on the beach.

You know, on that coast coming from Jaco, down to our property, some 25 minutes, is all flat wetland area. Then you hit Esterillos, which is characterized by rolling hills. And then past Esterillos, further south towards Quepos, again, you have flat, sort of wet terrain.

So, our property characteristics were very attractive, and we were very close to the city, within an hour and a half of San Jose and the airport.

So, okay, we had superior location, for one. We also had a superior beach. It's many people's opinions that our beach is perhaps the nicest beach on the Central Pacific. Our water quality was higher than other beaches.

Like, for instance, Jaco Beach, which is one

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of their most developed beach towns--it's a beautiful beach, but, you know, there's very marginal water quality. You have no central sewage system in Jaco, and there's all kinds of waste and debris that is seeping out to the beach.

So, we didn't have those issues. So, for

one thing, we had a superior location.

Secondly, we had the best-priced product on the Central Pacific.

Mr. Aven is a very good businessman, and unlike many of the competitors around our Project who had gone belly-up after the economic crash because they were in debt, we had no debt on the Project, and we weren't, you know, shackled by mortgage payments. So--and we had--Mr. Aven also did a very good job at buying the property at a good price, so we could afford at that time to come down in our pricing on our lots and still be profitable; whereas, other projects and even our projects before the crash--before the crash I think we sold a number of lots for \$130- to \$160,000. Many projects were at that level before the crash.

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When the crash came, people weren't paying \$130- to \$160,000 for lots anymore. So, the projects that had debt and that were required to sell their properties that level of pricing, they couldn't make it after the crash.

But we were able to lower our prices, still make money, and address the new market that had come

to be after the crash. We dropped our prices 50, 60 percent, and were able to meet the market and the demand. So, that's another reason why we were successful.

And I think another reason was that the buyers who purchased from us or my marketing efforts and my interactions with them, the buyers believed in me and the project, and I wanted to take care of these people. I wanted to give them something good.

Q. Thank you.

MR. BURN: I have no further questions for you, Mr. Damjanac, but you're not finished yet.

The Members of the Tribunal may have some further questions for you before we finish.

Thank you, Mr. President.

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QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BAKER: Could you tell me how--the profile of the 16 buyers that you had in your last set of lot sales? Is there a standard profile that you were looking at and found?

THE WITNESS: I would say a commonality among all of them were that they were probably in their early 50s, mid 40s. They were people that were

going to be retired soon. They weren't--they were looking for a place to retire to, a nice place at the beach.

A lot of them weren't fully retired yet, but they anticipated to be retired, you know, maybe three to eight years later, and they were looking to buy the property and maybe build a house within a few years thereafter and come down to vacation as well as, you know, retire someday.

They were active people. They enjoyed the beach. They enjoyed surfing and the beauty and, you know, the abundant nature of Costa Rica.

And, you know, they were also pretty savvy people, very--a lot of them were entrepreneurial

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backgrounds, and they had shopped quite extensively, and they knew the country, and they knew the different projects and areas; and after reviewing a number of different offerings, they chose to buy from us.

ARBITRATOR BAKER: Did that profile change over time? You told me what it was in the last set of sales; but when you started your marketing efforts, was that your intended audience as well?

THE WITNESS: Yeah, I--I would say that was the audience--that was our--one of our main targets, yes. Uh-huh.

ARBITRATOR BAKER: Were most of the buyers financing this, or were they paying cash, or how was it--

THE WITNESS: Most were paying cash. Whether they were financing their purchase in the States through, like, the refinancing of their existing property up there, I'm not--I can't say for sure. Maybe a few of them did, but I--I'd say the majority of them were paying cash.

ARBITRATOR BAKER: So, as part of your sales

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program, you did not have relationships with local banks, as some developments did, in order to encourage local financing?

THE WITNESS: No. Bank financing in Costa Rica is--

ARBITRATOR BAKER: --hard.

THE WITNESS: --hard, if not null, and bank rates in Costa Rica are much higher than those in the States and other countries.

So--well, it's very difficult to get

financing in Costa Rica, and when a buyer was able--a lot of private financing available, but then you're looking at rates of 14, 18 percent. And when a lot of our educated buyers from up North came to the property, they weren't about to pay those kinds of rates.

So--we, at times, offered financing--in-house financing, to people with enough money down.

ARBITRATOR BAKER: You made the comment in response to one of counsel's questions earlier about the difficulties that come from complaints being made

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against development properties in Costa Rica.

Are you aware of other such complaints affecting other properties?

THE WITNESS: Absolutely. Many such complaints.

ARBITRATOR BAKER: Would you give me a brief description, just for comparison?

THE WITNESS: Oh, well, you know, I know there's one gentleman by the name of Sheldon Haseltine, who I know is in the newspaper down there,

amcostarica.com, and he is sort of spearheading a whole movement in Costa Rica to seek justice for people that have been shut--projects that have been shut down.

His project was shut down, and then he had a bunch of squatters on his land which seemed to have been orchestrated--that whole squatter situation, Sheldon Haseltine claims was orchestrated by some not-so-nice, powerful, rich people down there.

I believe there was one project in Northern Guanacaste which was owned by a gentleman named James Salter from CMI Construction, and he was doing a
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project called Canyon Ranch. Canyon Ranch is a big, high-end luxury resort, holistic health and wellness-type resort, and he had spent a lot of money and gotten approvals for his project, and had started building, and then he got shut down by the authorities.

I believe there's another project revolving around a gold mine that was given a concession to mine gold, and then afterwards, the gold mine was closed down by the Government.

I believe there's a wealth of information on the--there was a company named Millicom--I mean, you'd have to, like, research this yourselves. I'm not absolutely completely positive of all of the--all of the things that happened in that case.

But, for instance, Millicom came into Costa Rica. They created infrastructure for telecommunications with the anticipation that they would be able to make money in that market; and after they completed their infrastructure, Costa Rica kicked them out of the country.

And then at one point, Costa Rica was

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looking for some financing from The World Bank, and Millicom had lobbied with the bank, and Costa Rica allowed Millicom to come back into the country and to continue operations.

Costa Rica received a loan from The World Bank, and then shortly thereafter, Costa Rica kicked Millicom out of the country again.

If you do a Google search, I'm sure you'll find dozens of instances where people profess grievances against the Government of Costa Rica regarding business practice.

ARBITRATOR BAKER: Has this pattern that you've been describing been going on a long time?

THE WITNESS: Yeah, I believe it has. Yeah.

ARBITRATOR BAKER: So, was it going on
before Mr. Aven bought this property?

THE WITNESS: Probably, yes.

ARBITRATOR BAKER: Okay.

Thank you, Chairman.

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

THE WITNESS: Thank you, gentlemen.

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PRESIDENT SIQUEIROS: Can we take a break, a
10-minute break?

MR. BURN: Indeed, sir. We'll return with
the next witness, Mr. Néstor Morera.

PRESIDENT SIQUEIROS: Fine. Thank you.
(Brief recess.)

PRESIDENT SIQUEIROS: If the parties, the
Court Reporters, and Interpreters are ready, may we
proceed?

ARBITRATOR BAKER: We need a witness.

PRESIDENT SIQUEIROS: Indeed.

ARBITRATOR BAKER: Technicality.

NÉSTOR MORERA, CLAIMANTS' WITNESS, CALLED

PRESIDENT SIQUEIROS: Mr. Morera, I

understand you will be testifying in English?

THE WITNESS: No, sir. No, Señor. Español.

PRESIDENT SIQUEIROS: In Español?

THE WITNESS: Sí.

PRESIDENT SIQUEIROS: Okay. Your Witness Statements had been submitted in English, so I had assumed that you would be testifying in English.

THE WITNESS: Español.

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MR. LEATHLEY: So sorry. Yes. I'm sorry to interrupt. We also anticipated it would be in English, given his testimony is in English. We also have an email from the Claimants confirming this. So, we think it a little irregular to change the language at this stage.

PRESIDENT SIQUEIROS: Okay. So I think the Respondents do have a case that they had prepared themselves to make the cross-examination in English. We do notice that you had an opportunity to prepare your witness statement in Spanish as, I believe, Spanish is your mother tongue.

But the fact that you made it in English and that counsel to Claimants did confirm that you would be testifying today in English, is there a major

objection on your part to testifying in English?

THE WITNESS: Good morning to everyone here. Indeed, I do feel more comfortable expressing myself in my native language, Spanish. I've only litigated in Spanish and no other language.

And, yes, I do know English, but I wouldn't dare to think that I speak perfectly or that I can

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express specific legal terminology in English, which I think that the parties would be interested in me expressing.

So I'd like to insist on the importance with regard to the effectiveness of my statement that I do so in Spanish.

PRESIDENT SIQUEIROS: I have to say that you write in English very, very well.

THE WITNESS: I don't think that I speak as well, sir.

MR. LEATHLEY: So could I make a suggestion? Could we proceed in English. And if Mr. Morera has any difficulty with any particular words--if there are words, although I don't think we be will be using any words that are beyond the remit of his testimony,

that he can then consult with translators?

PRESIDENT SIQUEIROS: Do you have a comment on that, Mr. Burn?

MR. BURN: Well, just as a preliminary matter, I don't think there is any irregularity to be alleged here. The language is of the arbitration all Spanish and English. It is absolutely common and

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routine for somebody to have a second language which, for conversational purposes and in many contexts, they're very comfortable.

But when it comes to oral testimony, the precision of the matter, the fact that that it happens in the public domain, the fact there are legal consequences attached to giving oral testimony might prompt that witness, even with in this case very comfortable capability with English, to prefer, just for the sake of certainty, to use a native tongue.

It is, of course, the case that Mr. Morera speaks very good English. But he simply seeks to make sure that he uses precisely the correct language/terminology in his responses in a process in which he could, in theory, be held responsible.

It's no more/no less than that. I don't think there's any prejudice to be suffered with

acceding to his request. Maybe I'm speaking for him.
I'm sure he would--if the Tribunal feels it's
appropriate to invite him to default to English, I'm
sure he will take that invitation.

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But in truth, I don't think there's any
irregularity either on the part of the Claimants or
on the part of the witness.

PRESIDENT SIQUEIROS: Let us confer at this
point.

(Tribunal confers.)

MR. LEATHLEY: Mr. President, with the
greatest apologies for interrupting the
deliberations, we have the email from the Claimants
which confirmed the November 17--thank you, sir.

ARBITRATOR BAKER: That's what we were
looking at.

MR. LEATHLEY: Thank you, sir.

PRESIDENT SIQUEIROS: The Tribunal
understands that native tongue for Mr. Morera is,
indeed, Spanish. But we defer also to the
expectation of Respondent's counsel to examine
Mr. Morera in English, taking into consideration,
however, that Mr. Morera may at some point feel more

comfortable to have a response be expressed in Spanish rather than in English.

If a specific issue is to be discussed, then

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what the Tribunal decides is that Respondent's counsel may cross-examine in English. If Mr. Morera has a specific question as to a specific term or issue that has been addressed, maybe he can wait for the translation or listen to the translation in the meantime.

But the examination should proceed in English. And if you, Mr. Morera, should feel comfortable or more comfortable to respond for specific reference in Spanish, then you can proceed with that language. But, clearly, you did issue a witness statement in English. Your command of the language in written form at least is quite good.

And the expectation in this case was for Respondent to examine in Spanish (sic). We also take note of the fact that even though we could have proposed at a certain other point in time to move your testimony to a different point, the fact that the next witness is precisely the last fact witness, Mr. Aven, then the order would become strongly

affected.

THE WITNESS: May I answer the questions in
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Spanish? Or part of them? I would feel more comfortable.

PRESIDENT SIQUEIROS: Indeed, Mr. Morera, I think you understand English, no matter what. So, let's be frank. If you think you can respond correctly in English, we would ask you to answer in English. If there is some specific point with regard to which you feel more comfortable responding in Spanish, then go ahead and do it.

But we would ask you that you seek to be genuine. If you understand the question in English and you can answer in English, please do. The expectations of the counsel for Costa Rica is that based on what was told to them by the Claimant and the fact that you had your statement in English, well, they expected you to speak English.

THE WITNESS: Thank you very much, sir. I will do that.

PRESIDENT SIQUEIROS: Thank you, Mr. Morera.

And one point before we begin. I will address this in English for the record as well.

You have probably been advised by counsel to
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Claimants that the order will be that they will address a few questions from you initially. Counsel to Respondent will then proceed to examine you on the basis of your testimony to be followed by Claimants' redirect questions exclusively on the issues addressed by Mr. Leathley and his team.

We would ask that you respond first to the question. There will be time to make any clarifications, if you wish. And, of course, as we have commented before, if there is an issue that you do not understand to the question, feel free to ask clarification.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: And, also, there is a statement that should be on the table to your right on a card--printed card to your right. Would you please read that statement in English or in Spanish to your right, the card that is--that one there.

THE WITNESS: I'm going to read it in English following the instructions on the decision of the Tribunal. It says, "Witness Declaration. I solemnly declare upon my honor and conscience that I

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shall speak the truth, the whole truth, and nothing
but the truth."

PRESIDENT SIQUEIROS: Thank you, Mr. Morera.
Mr. Burn.

DIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Morera, you have a file just to your
right. You have your hand on it. Fantastic. I just
need to take you to your two statements in these
proceedings and ask you to verify the copies you have
in front of you.

If we could go, first of all, to the top of
the file to a document in my copy that is entitled
"First Witness Statement of Néstor Morera Víquez."

Do you see that?

A. Yes, sir.

Q. Could you just quickly flick through the
document down to the blue page and confirm whether
that appears to be a good copy of your first
statement in these proceedings. You don't need to
read every word. Just check that it looks like the
right one. That's it. You got to the blue page

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there?

A. This is my first statement.

Q. Let's stop there.

Do you have any changes, corrections, or amendments to make to your first statement?

A. Yes. A couple of clarifications, if possible, at this moment.

Q. Sure.

A. Thank you. It's--okay. Here. Paragraph 15.

Q. Yes.

A. It says that "The strategy in this case is to intervene in this hearing and offer new arguments stating that this conflict is of commercial or civil nature rather than criminal."

I would like to change "commercial" and "civil" for--how do you say "contencioso administrativo" (contentious administrative)? Public branch or the way you call it. But it's not commercial or civil nature.

PRESIDENT SIQUEIROS: Administrative, litigious.

THE WITNESS: Okay. Yeah. That, I think,

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precisely.

A. And in Paragraph 29, I want to make a clarification regarding--regarding this.

"Prior to the trial, Mr. Ventura and I went to a very strange meeting with Sergio Baldelomar, head of the Environmental Prosecution Unit. He suggested that Mr. Aven's case was an important one for the Unit, and that they could not retreat from prosecuting it. He stated that the community was affected and that the prosecution's role was to protect communities."

Okay. Here I just--to put like--in the right--to put it in the right place in the chronology of facts, that this was prior to the second trial I had, which was the one only of Jovan Damjanac.

Q. Could you just clarify precisely the textual change you wish to make to this paragraph?

A. I will--I will add "prior to the second trial" only.

Q. And where does that text go?

A. It is just at "prior to the trial." I would like to add "second" before the word "trial."

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Q. Right. Thank you. I was being a bit dense.

A. And those would be my only clarifications.

Q. Okay. Just so we're clear, Paragraph 15, you're replacing the words "commercial" or "civil" with the words "administrative litigious"?

A. Right.

Q. And in Paragraph 29, you're inserting the word "second" before trial--

A. Yes.

Q. --in the phrase "prior to the trial"?

Okay. Are there any other corrections or amendments that you need to make to this statement?

A. No, sir.

Q. Could you go to the signature page at the back? So it's not on a numbered page, but it's page 20.

Is that your signature?

A. It is.

Q. Thank you. Let me just repeat the process for your second statement. So, if you go over to the white tab.

A. That's my name, yes.

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Q. Okay. Does that appear to be your second statement in these proceedings? Are you sure you're looking at the right--I think you may be looking at the Spanish version of the first statement.

A. Yes.

Q. Over the white tab. There you go.

A. Yes. Thank you.

Yes, this is my--my second statement.

Q. Are there any corrections or amendments to

make to this second statement? A. Not in this one.

Q. Can you go to page 7? A. Yes.

Q. Is that your signature?

A. Yes.

MR. BURN: Thank you very much.

I have no further questions for you at this stage. Mr. Leathley will have some questions for you by way of cross-examination. There isn't much by way of documentation, but he may take you to the document that appears in that file just behind.

But your obligation here is very simple.

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It's to answer all the questions that are put to the best of your ability, whether they come from Mr. Leathley, Members of the Tribunal, or from me.

I have no further questions now. I'll hand it over to Mr. Leathley.

THE WITNESS: Thank you.

MR. LEATHLEY: Thank you. I would just introduce Ms. Paez, who will be conducting the cross-examination.

CROSS-EXAMINATION

BY MS. PAEZ:

Q. Good morning, Mr. Morera.

A. Morning.

Q. Mr. Morera, please go to Exhibit 523 on the first tab of the binder. This is the bio at your law firm's website. Page 2 describes your practice areas as--

A. Which page? Sorry.

Q. Page 2. Page 2, Paragraph 2, describes your practice areas as intellectual property rights, prosecution, and litigations; correct?

A. It's not accurate at this moment, but it was

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at--one of the ones I used at that moment, which was 2012.

Q. This is your--this is the bio that appears in your law firm's website? This is the--

A. I no longer work in this law firm, so that can be one of the reasons.

Q. And you did not clarify that when counsel asked you to amend any of the statements in your First Witness Statement where you say you work at Bufete Morera & Morera; right?

A. Yeah. My statements were rendered in a date in which I still worked at that law firm.

Q. But now you did not clarify that to the Tribunal; right?

A. I can clarify to you. I--I moved from that law firm in April 2016 because that was a family law firm owned and controlled by my dad. And now I work--well, even worse--with my wife. Yeah. Yeah.

(Laughter.)

THE WITNESS: There's a TV? Oh.

(Laughter.)

THE WITNESS: Sorry. Sorry about that.

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Okay.

ARBITRATOR BAKER: Now we see why you wanted to speak in Spanish.

THE WITNESS: Yeah. Yeah.

BY MS. PAEZ:

Q. So, Mr. Morera, the bio on Paragraph 2 of the Exhibit R-523, then, reflects that it was true until April 2016; correct?

A. It was true in 2012.

Q. But you haven't changed--that hasn't changed to date; correct?

A. It has changed. Yeah. It has more--more things. And--I mean, those were my--let's say my things to show. At the moment, especially for about my experience--the only thing that, of course, remained the same is my--my academic education. My postgraduate education and intellectual property, yes, that, of course, remains the same.

Q. So, you would admit that your area of expertise is IP law more than criminal law?

A. No. The academic one. But not my litigation one. There are no--we don't--we don't receive--we

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don't have education, intellectual property. Not even in the best University of Costa Rica. That is the University of Costa Rica.

So I was granted on a scholarship in 2003 to study intellectual property. But I haven't--I never stopped practicing criminal law. For instance, at this moment, I do--my--my biggest area of practice is anticounterfeiting, which are criminal offenses against intellectual property--how do you say?--holders. Yes.

My--my legal law firm is the leader in Costa Rica in criminal anticounterfeiting. So I--I do criminal law every day, yes.

Q. That's not what the bio reflects. But let's move on. Paragraph 56(b) of your First Witness Statement, please.

A. 56 what? (D)?

Q. 56(b) of your First Witness Statement.

A. (b). Okay. Yes.

Q. You say that the prosecutor--this is your final impressions in your witness statement. And in 56(b), you say, "The prosecutor failed to make a

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good-faith effort to settle the case at the proper stage for settlement"; right?

A. Yes.

Q. And in Paragraph 27 of your First Witness Statement--

A. Hold on, please. Can I read it, the full paragraph?

Q. I'll read it for you.

A. Yes.

Q. You can read the full paragraphs, but I'll read what you say.

"Mr. Aven did not want to settle anything as a matter of pride."

A. Uh-huh.

Q. Right?

A. Yeah, because--there were two moments. I have to put that in context.

Q. No. No. I'm not asking for any explanations. I'm just asking you if you say that Mr. Aven did not want to settle anything as a matter of pride; right?

A. I said it in the second moment, not in the

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first one, which is important to take into account,
yes.

Q. And you'll be able to explain to your counsel
on redirect when counsel asks you.

A. Okay. Yes.

Q. Mr. Morera, in paragraph 7 of your First
Witness Statement--

A. 7.

Q. Paragraph 7, you say you started representing
Mr. Aven and Mr. Damjanac in the middle of 2012;
correct?

A. Yes.

Q. This was in the middle of the proceedings;
correct?

A. It was at the end of the first stage, at the end of the investigation stage. Yeah.
Almost--let's say three weeks before the preliminary hearing, around that more or
less, yes, which is the second stage.

Q. And you know Mr. Aven was represented by other attorneys before in these
proceedings; right?

A. Yes. Yes.

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Q. In fact, Mr. Aven was always represented by counsel in these proceedings; correct?

A. That's what I recall, yes.

Q. Thank you. And, indeed, you did not file any motion for lack of legal representation--

A. No.

Q. --correct?

A. No.

Q. Thank you.

Now, Mr. Morera, in your two witness statements, you do not speak about any violations to Mr. Aven's due process rights; correct?

A. In--in--where again?

Q. In any of your witness statements, you do not talk about violations of due process to Mr. Aven's rights; correct?

A. I did it--I did it in the preliminary hearing and in the trial as a--as a part--as part of the strategy because as defend--the defensor--the defendant--is that the way? Defendant, let's say. I--I have the right to choose proper moments to do that. And then those can be more effective if the

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process is more advanced, in fact. Yeah.

Q. Yeah. But in your witness statements, you did not mention any violations to Mr. Aven's due process rights; correct?

A. I do mention some. I don't recall it very well, but I--I think I did, yes.

Q. Okay.

A. Yeah. I don't recall everything I said, but I--I think I did, yes.

Q. So you had an opportunity to raise any violations of due process during the criminal proceedings; correct?

A. The ones I considered important, yes.

Q. Thank you.

A. The ones I considered important.

Q. And, Mr. Morera, you do not say that Mr. Aven was convicted without attending a trial; correct?

A. Sorry?

Q. You do not say that Mr. Aven was convicted without attending trial; correct?

A. Convicted?

Q. He was not judged in absentia. He was always

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present during trial; correct?

A. Yes. Yes, yes.

Q. And now the decision on a potential conviction of Mr. Aven is contingent on his return to Costa Rica; correct?

A. I would like a translation for this. Can you repeat the question, please.

Q. The decision of a potential conviction is contingent in his return to Costa Rica?

A. What do you mean by "contingent" in this case? What? What?

Q. It's pending.

A. Pending. Yes, pending.

Q. Or it depends on it; correct?

A. Yeah.

Q. It depends on his return to Costa Rica; correct?

A. Yes.

Q. Thank you.

And, also, Mr. Morera, you do not say that

Mr. Aven was not provided English translations during the proceedings; correct?

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A. According to me, the translation he received, especially when he rendered the declaración indagatoria--I don't know how to say that in English. His declaration--David Aven rendered a declaration, was not very accurate. Yes.

Q. But you were not present in that--

A. No.

Q. --procedure elect; correct?

A. Yeah, but I can read it. It's in the file.

Yes.

Q. But no motion was filed against--

A. No motion, but I did mention it in the closing statements of the first trial. Yes.

Q. Thank you.

Mr. Morera, let's go to Paragraph 13 of your First Witness Statement.

A. 13.

Q. You explain that after the investigation stage is over and the judge considers there's enough evidence to present the case to trial, he calls for a preliminary hearing; correct?

A. Correct.

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Q. And in Paragraph 14, you say that after the preliminary hearing, a judge decides if the case merits going to trial or not; correct?

A. It's part of what Paragraph 14 mentions, yes.

Q. Thank you.

In Paragraph 32 of your witness statement, you say that Mr. Martinez did not have a case to go to trial because Mr. Aven was granted the permits for the development of the Las Olas Project; right?

A. That's what I--that's what I still think.

Q. And, in fact, in the same paragraph, you say that Mr. Martinez had no evidence of intent of Mr. Aven to commit the crime he was accused of; right?

A. That's the gross mistake Martinez did. Yes.

Q. And in Paragraph--however, in--and in Paragraph 25 of your Second Witness Statement--

A. 30--30-what?

Q. 25.

A. Ah, 25. Hold on, please.

Q. You say that Mr. Aven (sic) Martinez acted improperly in charging Mr. Aven with a crime, given

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the lack of evidence against him--

A. Yes.

Q. --correct?

A. I still think that, yes.

Q. Yes. However, in the preliminary hearing after the prosecutor and the defense presented the arguments to the intermediate judge, the judge allowed the case to go to trial; correct?

A. It's a very bad decision, but a judge did believe that.

SECRETARY GROB: Mr. Morera, could you please put your headset on the table because you're holding it too close to the mic.

THE WITNESS: Okay. Sorry.

SECRETARY GROB: Thank you. Sorry.

BY MS. PAEZ:

Q. Mr. Morera, today the proceedings against Mr. Aven have not gone into the retrial stage; correct?

A. I no longer represent him on the criminal matters, and I'm not up to date. I'm not informed about what's happening right now with regard to the

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criminal liability and even the process against Aven, but that is my understanding, yes?

(Overlapping interpreter with speaker.)

Q. --to Costa Rica; correct?

COURT REPORTER: The question again, please.

A. I don't know.

COURT REPORTER: Please could you allow some time between question and answer.

A. I did not have further contact with David since--it could be around 2014, maybe. And I no longer represent him. I did represent Jovan in--on the second trial, but I'm not in the position to say more information about this ongoing trial on behalf of David Aven because I no longer represent him officially in the file, yes.

Q. Mr. Morera, but you agree with me that the only authority that can decide upon Mr. Aven's criminal liability is a Costa Rican criminal law judge; correct?

A. Correct. The Tribunal.

Q. And that has not happened yet; correct?

A. That has--that's what I understand, yes.

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Q. And that is because Mr. Aven absconded from the proceedings; correct?

A. That's because Mr. Aven fears for his safety, which is a normal thing to happen.

Q. But the criminal trial has not restarted because Mr. Aven is not in Costa Rica; correct?

A. Yes. And, moreover, they haven't provided what I specifically asked at a moment that was for security measures, given the fact that he received six shots that I saw myself because that was the night that the car was inspected. So we asked and also tried--

Q. Mr. Morera, sorry to interrupt you, but that was not my question.

My question was if the proceedings are pending upon Mr. Aven's return to Costa Rica, and you already said yes.

A. And I say yes, but it's pending his security guarantees as well.

Q. Thank you.

A. Yes.

Q. Mr. Morera, in Paragraph 16 of your first--

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A. 16, yes.

Q. --16 of your First Witness Statement--

A. Uh-huh.

Q. --you explain that a decision from the first--from the criminal court can be appealed to a superior tribunal; right?

A. Let me read it, please.

Yes, it can, indeed.

Q. In the same paragraph, you also say that the appeals decision of that superior tribunal can be in turn upheld to the third chamber of the Supreme Court of Justice; correct?

A. (In Spanish. "[recurso de casacion]"))

Yes, it's like an extraordinary appeal.

Q. And neither of these appeals proceedings have taken place in Mr. Aven's case; correct?

A. No. I am not aware because I was stopped in the--I mean, my participation stopped during the process while the process was in the criminal tribunal of Quepos. So I haven't raised by myself any other appeals before higher judges.

And the appeal--I mean, let me--let me

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explain that a little bit, if it is important. The appeal is--once you have a decision. And--

Q. Mr. Morera, let me cut you off there. We don't have a decision yet; correct?

PRESIDENT SIQUEIROS: If we could, I think it would be interesting for the Tribunal to listen to what the process would be.

THE WITNESS: Thank you. Yes. I really appreciate it.

Yes, there must be a decision that assesses all the merits, all the grounds, all the substantive issues. And in--in the moment I was still representing David Aven, there was no such--such a decision. That was the big problem, in fact, that the process was suspended more than ten days; and after that suspension, he--he received the shots, six shots.

Okay. If there was a decision taken by--by a court, such a decision can be appealed.

And on top of that court, which is a higher one, there is the highest, and that's what we call recurso de casación, which is like an extraordinary

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appeal, yes. Yes.

BY MS. PAEZ:

Q. Mr. Morera, so hearing to your explanation, everything is still in process in Mr. Aven's case; correct?

A. That's--that's what I understand. But as--as I told you before, since I am no longer his criminal lawyer, I cannot say or assure 100 percent to you. That's what I understand, yes.

MS. PAEZ: Thank you. No further questions.

THE WITNESS: Thank you.

(Pause.)

MR. BURN: Thank you for your patience, Mr. President.

REDIRECT EXAMINATION

BY MR. BURN:

Q. Just a few questions, Mr. Morera.

A. Yes.

Q. You'll recall that counsel for the Respondent began the cross-examination of your evidence with some questions relating to your experience and your professional background?

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A. Uh-huh.

Q. How many criminal files are you handling right now?

A. Only in the anticounterfeiting practice, we have like 80. Okay?

And besides that we have other kinds--other types of criminal litigation, environmental. I still have a couple of cases of homicides, lesiones--I don't know how to say "lesiones." Like--yes, damages to the health of somebody. I mean, I--I do a lot of criminal litigation. The only--the only crimes I don't like to handle are drug dealing cases. I don't like that. It's very profitable, but I don't like it.

And sexual cases, I--I don't do that.

Besides that, I have already done, I think, all the other fields of the criminal law--possible criminal law, litigation in Costa Rica, yes.

Q. Thank you.

And how often are you in criminal courts?

A. Every week or every couple of weeks at least. At least every couple of weeks I have a hearing in my

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country. It can be a trial hearing. It can be a preliminary hearing. Medidas cautelares, preliminary measures. I don't know if you call it like that. Hearing, yes.

My--my focus now is especially anticounterfeiting, which is--it's kind of new in Costa Rica. It started--the prosecutors restarted the prosecution in 2014. So we saw a very good opportunity there, and this is my most important area of criminal litigation practice at this moment. Yes.

Q. Thank you.

On a separate topic, you'll recall that
Ms. Paez took you to Paragraph 56 and Paragraph 27 of
your first statement in relation--

A. 56 and 57.

Q. And she asked you some questions in relation to your criticism of Mr. Martinez and his attitude towards settling the complaint. And you'll recall she took you to 56(b) in which--and this is a list of criticisms--of examples of criticisms that you make in respect of the criminal process.

A. Yes.

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Q. And you say at 56(b), "Second, the prosecutor failed to make a good-faith effort to settle the case at the proper stage of settlement."

And Ms. Paez took you to the point where you recorded that Mr. Aven had indicated that he was not interested in settlement. Do you recall that line of questions?

A. Yes. It's--it's very important to have a proper chronology because I think with the proper chronology, you can understand the good-faith comment I did here in--especially in Point B. According to--according to me, the settlement proposal was something to be expected from the Costa Rican State prior or during the preliminary hearing, which is, in my experience, in the--the best and the--and the proper stage to--to handle that.

Why? Because in that case, you avoid to go to trial, which is the third stage. And you avoid the cost and all the, you know, the personal things that are involved to a criminal litigation.

There can be a lot of time from the preliminary hearing to trial. And during that time,

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there is always desgaste. It's like--how can I say?
I don't know how to say desgaste.

Okay. It's--it's--by definition, the preliminary hearing is the best way. So, if there was an interest from the State taking into account the small amount of--of damages claim that was included by the State and taking into account that David Aven was what we call the delincuente primario. It was the first time he was charged in the criminal branch in Costa Rica; taking into account that also he was an American citizen, a foreigner that is not familiar with the--with the Costa Rican proceedings; and taking into account that with all the documents that are still in that file, you can see that there was no--I think you call it intent, dolo. We call it dolo in Spanish.

There were conditions enough for the Costa Rican State to seek a proper settlement at that moment in which there was no still possibility to advance to a costly trial. And why costly? Because as you can see in the trial, in both times we spent almost 15 days of effective days. Working days were

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the first time like 10 and the second time around 7 days.

Every day of trial costs a lot of money to the Costa Rican State. And I can say only the first trial has consumed more than the \$12,000--around that was the amount that the Costa Rican State was claiming at that moment.

So it was a matter of proportion. I mean, what is going to cost more to you--all these days of trial which, as the State pretended to receive 17 witnesses submitted by the Prosecutor Martinez, or instead seek a settlement with a man--an old man that was--that was also at that moment what we call "adulto mayor" like an--like an elder man, that once he has 65 years, he also deserves some little special treatment by--by the State, especially if he's a foreigner . I mean, all the conditions were--were there to seek a settlement.

And you have to take into account that at the end of the day, the purpose of every proceeding, either civil, labor, but especially the criminal ones, is--is to solve a problem, that his case was a

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problem to nature. And maybe the best way to solve it was at that moment, including like a plan and a remedy plan and a payment of damages. I mean, that was the proper stage.

But never happened. Never happened. I mean, there was no--no proposal, no plan. And moreover, there were needed approvals from superiors of Mr. Martinez--that's what we understood at the moment--that were not--that were not previously consulted in order to explore the possibility of the settlement at that moment.

Then we have one of the most strange experiences I had. And I say "we" because I was together with Mr. Manuel Ventura. We were in Quepos the first day of the trial, which was--this trial started in--in December 5, 2012. We had our four-year anniversary a couple of days ago.

Yes.

That day I recall very well that we arrive early to the--to the Tribunal of Quepos. And we were asked by the clerk of the judge, "Hey, listen. The judge wants to speak to you."

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And the name of the judge is Rafael Solis Gullock. I know this judge because I--I did represent two years before this case Cargill, the American company, for criminal crimes. And he was a judge in Alajuela, a neighboring court of the international airport. And I say, "Yes. I think he want to like say hello," or something like that, just like a polite thing before the trial.

When we entered the room, inside the room, there was Mr. Martinez already. And the judge asked us to--to have a seat. And he promoted the idea of achieving a settlement at that moment, on trial stage, which is not normal, which is not the regular proceeding, which is very strange. And especially very strange in the way it--it has happened, promoted by the judge in his office prior to the trial.

So it was a little bit, you know, shocking to me, I have to say. But it was still something I have consulted to my client, to David. And I said, "Listen, these people are not interested in doing something. And, you know, we have all these days of trial, and you're going to spend all this amount in

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hotels, meals, whatever. Are you interested in

achieving a settlement?"

And at that moment he said he was not interested because it was already a matter of--of a personal thing, a matter of pride to wipe out his name, to clean his name before he, his family, and his investors and the society because David Aven was already an investor and with other investments in Costa Rica with other businesses.

So I did understand it was a matter of clean up his reputation. That can be something--well, it can be one of the most valuable things a man may have. So I--I respected that at that moment. So that's--that's the way it happened. Right?

Q. Okay. Thank you for that.

And you recall that you were asked various questions by Ms. Paez relating to what she characterized as being Mr. Aven's absconding from Costa Rica in relation to the criminal proceedings.

A. Uh-huh.

Q. You recall being asked questions by Ms. Paez?

A. Yes. Yes, indeed. I do.

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Q. Now, you--your answer to the specific question--this is on page 745 of the transcript. The question in that context that was put to you was the criminal trial--it's a little rough in the transcript at this stage. I know the transcribers need to--will be tidying it up in the final form.

The criminal trial has already started--has not started because--well, not restarted because Mr. Aven is not in Costa Rica; correct?

So she was putting it to you that the reason that it's not restarted was his absence.

And you then went on to say, but you were interrupted, "Yes. Moreover, they haven't provided what I specifically asked at a moment that was for security measures," and you refer to the shooting incident, and then you were cut off.

I just wanted to give--given that you were cut off, despite the fact, actually, you were answering the question that was put to you--I just wanted to give you a chance to give a full answer to that question.

Why--and I'll put it in slightly different

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words, but I think it's the same. Why do you think the criminal trial has not restarted?

A. Well, I can say about what--of what I did in order to--to, you know, have the possibility to have David back in Costa Rica to face another trial. That was the night that David was shot with him in the--in the "OIJ" (phonetic) and in San Jose--it's like the judicial police--together with Mr. Shiolen, I think, is the name of the other investor.

They were very scared. They were very afraid. There were six shots in the--in the car. And it was a shocking spectacle to see that car.

And he has no idea where those shots come from. I mean, the shots, according to the version, were--were done in the--in the road after a neighboring town to Quepos called Jaco, going to San Jose, which is a--it's a very lonely road, yes.

He has no idea who--who did that, what was the purpose. But there was always like--like this feeling that there was somebody strongly committed to remove David from--from--well, physically and, from the economic point of view, his investment from

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Quepos.

So I can understand the reaction of the person that understands that somebody that sees that

the prosecution and the trial maybe did not went that well for the Costa Rican State, because it didn't go that well to the Costa Rican State, the way they wanted. Maybe the best way was to kill him, you know.

Given that, we--I, myself, I coordinated--I asked two--two bodies. I asked the Court to explore the possibility to provide specific security, policemen and--policemen in the hotel and security for--for a possible David coming.

And I also asked that to the American Embassy--there was a lady there called Mrs. Sylvia Cabezas. Sylvia Cabezas is the head of the--I don't know if she still is--of the legal department or legal affairs of the American Embassy, if she may help us to--to get this kind of security.

And the two of them just say that that was not possible to have this--this special security because they see it like a--like a special treatment.

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You know, like a--like a VIP or something treatment. It's not like that. It was a matter of a man that is a foreigner that wasn't trying to get killed.

So, from that moment on, I think David

desisted from the idea to returning to Costa Rica because, basically, there are no guarantees for his personal safety in the country, given that there was no proper response for that issue, neither from the Costa Rican State, neither from the embassy of his own country. Yes.

Q. Just to be clear, in relation to the Costa Rican State, you made a request, I think, is what you're saying--

A. Yes.

Q. --for--for police guards to be available while he returned to trial?

A. Yes. And I--I also did it by--by--in a more informal way by phone calls and trying to speak. We--we--we try to speak to higher prosecutors and--to higher authorities to explore such a possibility and it never happened. So--

Q. What--specifically, what responses did they
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give you?

A. It was a problem of resources, which is something I--I also understand. I mean, it is

not--Costa Rica, as you know, is not a wealthy country. And there are limited resources as far as the police and as for other bodies that we have there.

But there is case law, even from the Constitutional Court, that--even in the cases of problem of resources, the State has to find a way to provide security and guarantee basic human rights to a person like in this case that was intended to--to be killed.

I mean, David Aven, he did not take a flight the day before the trial and never come back to the US. That's an important thing to take into account. David Aven refused to return to Costa Rica because of the shots. Otherwise, knowing him, he--he--he's a man of--how can I say? He's a brave man. He's an hombre valiente.

So, I more from a human way, understood his decision of--of not coming back to the country, given

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the problem to his security. Yes.

Q. And are you aware of any extradition proceedings having been brought to bring Mr. Aven back to Costa Rica?

A. No. No. I mean, I--I--I was--I understood that there were--there were those. And, also, there was a petition arised from the Court still when I was representing Jovan, asking David to come to--to Costa Rica and declaring him in rebeldia which is the natural consequence, of course, for not being on trial.

But I'm not aware of the particulars of the extradition proceeding. I--I was not appointed to represent him in that.

Q. Thank you.

Last topic. Ms. Paez took you to some points in relation to your criticisms of due process observance in respect of the proceedings brought against Mr. Aven. She indicated that you could give a fuller answer in redirect, so it forced me to ask you to reflect on what generally due process failings you saw.

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You may want to look back at your two statements and just quickly refresh and, for the benefit of the Tribunal, just give a rough characterization of the scope and nature of the criticisms you make.

A. Yeah. One of the manifestaciones--one of the ways the due process is reflected, let's say, in

the--in the criminal proceeding is something that is specifically provided in our procedural criminal code, código procesal penal, we call the principle of objectiveness.

And according to the principal of objectiveness, the prosecutors are not only intended to go and prosecute somebody with the permission of one of the parties. In this case, with the permission of Mr. Bucelato or with the version of part of the employees of one body, like SINAC.

Why part? Because there was--there's still a very strange thing that I don't understand. And that strange thing is that SINAC, the environmental administrative bodies that handle Mr. Aven's permits and requests since, let's say, 2006 or 2007 until

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2010 in which all those employees and visits and reports stated that there were no environmental problems in the property, no wetlands, no forests, no nothing. Basically, no nothing.

And because--and relying on those reports--other more powerful in terms of reports were granted like the SETENA one.

One day, suddenly because of, according to

me, the fear of the director of the ACOPAC, Mr.--I think the name Carlos Vinicio Cordero, appointing Mr. Luis Picado. Luis Picado changed all that technical--so-called "technical criterion" to suddenly state that there were wetlands and that there was a huge damage to the environment and that there were a lot of irregular things happening in the property. That things happened one day to the--to the other.

In the case of the wetlands, for instance, that things happened from August to January. So according to Picado, for instance, there can be a wetland that is borne in August and, you know, it's--it becomes a wetland in February, in six or

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seven months before.

The thing is that I still don't get the

sudden change of technical criterion. I still don't get how the prosecutor didn't understood

Mr. Martinez, with all due respect to him. I still don't understand why he didn't pay attention to the fact that while Mr. Aven was getting all those permits, there were specific reports from the environmental agencies from Costa Rica stating that there was no problem.

So, there is no intent. There is no dolo. There cannot be an intent from Mr. Aven? Why? Because it's not possible for him to represent the possibility of a crime if the bodies--the bodies entitled by the Costa Rican State to say that say the opposite.

So how--you have to be like PhD biologist or--or a PhD in wetlands to contradict those criterions. And it's not the case. He's a developer, and he's an American citizen.

He has to rely on two things: in the criterions of the environmental bodies that were

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consistent during three years and in the criterions of the people he has hired during more than three years, like six or seven. And all those criterions met in the fact that there was no trouble.

So one day somebody--Mr. Picado thought that there were wetlands, there were forests. And upon that only version, Mr. Martinez built a criminal case.

Upon--upon that only version, Mr. Martinez thought that there was dolo, that there was an intention. How come? How come all those years? Are

those going to be erased? Nothing that happened?
There were no reports?

If there is still a contradiction--because there is still a contradiction--the permits are still valid. This Costa Rican State hasn't promoted the nullification proceedings to nullify those permits. Those permits are still binding and enforced in Costa Rica.

And on the other hand, you have criterions
that were issued after those permits saying the
opposite. So Mr. Martinez never ever paid attention

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to the fact that there were permits. Mr. Martinez
never ever paid attention to the fact that Mr. Aven
hired experts. So that was according to me.

PRESIDENT SIQUEIROS: Mr. Burn, aren't we
moving a little bit away from the question and the
topic that was being questioned of Mr. Morera.

MR. BURN: I think that's fair, sir.

THE WITNESS: Okay.

MR. BURN: I think--I think, Mr. Morera,
you've given a very full answer to the question. The
Tribunal will bear that in mind.

And I have no further questions for you at
this stage. The members of the Tribunal may have

some questions for you as well.

THE WITNESS: Okay.

MR. BURN: So you must remain where you are and deal with any questions they put to you.

Thank you.

THE WITNESS: Sorry if I get excited. After two trials, you can behave like this.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT SIQUEIROS: We understand.

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Mr. Nikken, do you have any questions?

ARBITRATOR NIKKEN: Yes, I do.

I'm going to ask the questions in Spanish.

THE WITNESS: Thank you very much.

ARBITRATOR NIKKEN: What penalty is envisaged by the Costa Rican legal system in the case of violations of due process or violations to constitutional human rights during a criminal procedure?

THE WITNESS: Effective procedural activities or annulments? Well, it's called--we don't call it really annulment. We call it defective

procedural activities.

ARBITRATOR NIKKEN: Yes, but what action--what remedy exists?

THE WITNESS: It can be an "amparo" remedy. It can be one for defective procedural situation. Can be also within the framework of an appeal process, or it can be--which was part of my strategy, to reserve this for two major intents, which was the Preliminary Hearing, which didn't really proceed because it was a very superficial coverage; or it

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could be--which was my idea to do it--as part of the closing of the arguments during the first trial of David Aven.

ARBITRATOR NIKKEN: Yes, but a subject such as this one, which arose regarding the poor translation--defective translation of Mr. Aven's position, could that be invoked immediately?

THE WITNESS: Yes, it could have been, but it could also have been part of the strategy to reserve it for later.

ARBITRATOR NIKKEN: But not because he had to defer it for a given time? The remedy could have--or the recourse could have been found immediately--in other words, what would the penalty have been? Annulment?

THE WITNESS: Yes. The thing is that the act--or the investigation happens, again, but if in this case--

I have to speak English here. I lost the Spanish, and--

(Comments off record.)

THE WITNESS: I'm going to respect what I

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said before, so, I'm going to reply in English. You can ask me in Spanish, and I'll do my best to reply in English.

So, as I was saying in Spanish, yes, the remedies can be immediate, and you can have a nullification at the moment, and you can have the--what is--what has to happen is that that declaration issue has to be given again. Okay? It has to be repeated.

But I will be fully sincere with you, and it was not part of my strategy, and as a defendant, I--I can define it that way for a matter of convenience, but also because

it was not my most powerful argument. My most powerful argument was the lack of intent. The lack of the demonstration of the intent by the disregarding of the objectiveness principle. Yes. A more substantive issue.

ARBITRATOR NIKKEN: Okay.

PRESIDENT SIQUEIROS: Mr. Baker?

ARBITRATOR BAKER: Thank you, Chairman.
Could you tell me a little bit about this

10-day rule?

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THE WITNESS: Uh-huh.

ARBITRATOR BAKER: That seemed to be quite extraordinary, actually. I mean, from a--from a U.S. lawyer's perspective, it seems that this is a rule that is designed in order to protect the defendant.

THE WITNESS: That's it.

ARBITRATOR BAKER: And the defendant would have been entitled to waive the protections of that rule if it were up to them since it was for their protection.

Is that not the case in Costa Rica?

THE WITNESS: No. Unfortunately, it's not.

And it was--I raise the point exactly the same way you have suggested, that--I mean, we wanted to finish the trial because we felt confident about the outcome we were supposed to receive in the first trial.

And there was already a lot of resources invested. I consulted David, and he said, "I want my case finished. I want to have a decision."

And I told him about this provision, 3.36 of the Criminal Procedural Code, that, in fact, the philosophy behind that provision is to protect the

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rights of the accused party. Okay?

So, I--I do think, as well, that is part of

the rights of the--of--it's also a constitutional right to resign that document--that possibility and say, okay, if this is intended to protect me, don't protect me. I can protect myself. And I can--and I can decide by my own, which is my own convenience in this case, but it's not--unfortunately, is not the way it works in the Costa Rican system.

In the Costa Rican system, there is also--this is a not-peaceful--there is no peaceful case law. There is case law that states that there is no possibility of resignation--sorry, possibility of an agreement of the two parties, because the two parties have to agree to resign. And there is case law that admits that if the two parties set into

an agreement to--to--for this resignation, that term can be prolonged, yes. And that's what we try to seek with the prosecutor, and they didn't want to. Yes. They didn't want to.

So, it's--it's a very--it's a very strange--but it's old. This provision comes from

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the--from the former Criminal Procedural Code prior to a big amendment that was introduced to the Costa Rican criminal system in 1998.

ARBITRATOR BAKER: So, tell me a bit about how it actually works in practice. So, does the judge raise the issue that there's a problem with the 10-day rule, let's just call it; or is it that the lawyers from both sides are aware of it, and they either seek an agreement, and if an agreement is not possible, then they tell the judge about it?

How did it work in this case?

THE WITNESS: I have to say that this is the only case I have with such a problem of more than 10 days, you know, that lapsed, and--yeah, we--in our case, we tried to seek the agreement of the prosecutors.

And I think that it has to be--it has been the way that the parties, by themselves--not the judge promoting it, not the Tribunal--by the parties, approached each other to get into this agreement and to file a joint request or complaint, writ, stating the possibility that the two of them want to continue

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with the trial, yes.

ARBITRATOR BAKER: And my understanding of your statement is that the reason for this was an injury with the judge's--one of his hands; is that correct?

THE WITNESS: The left hand. And the judge was hand right--

ARBITRATOR BAKER: Right-handed?

THE WITNESS: Right-handed. Yes, thank you, right-handed. And that was also very strange, and that's why also called him lazy, a little bit, because during all that trial, Mr. Rafael Solís Gullock, who was about to retire, he never used, like you, for instance, his computer or take notes. He was just standing there, eventually took some notes. But there was a clerk, you know, like, taking note of everything that the parties were saying.

So, I never got the point about how the

left-hand injury was something that will, you know, wipe out all the effort of the State, of David, of everybody. Yes.

So--I ask also for the appointment of a new

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tribunal, a new judge, and there was no possible--no positive outcome of that.

I mean, if we have a rule, then we will have, as the State--as the system, we will have to guarantee the possibility to always be able to appoint a substitute.

And it happens that we have the rule, but we don't have the--that possibility, so, that's a very arbitrary thing we have, to get over the possibility of not being able to resign from that term. Yes.

ARBITRATOR BAKER: So, who would have to make that appointment? Is it a superior judge, an administrative judge, or is it the judge who, in fact, had the injury that has to appoint a substitute?

THE WITNESS: The tribunal. The tribunal in coordination with other judicial authorities; they would have to seek a substitute. Yes.

ARBITRATOR BAKER: And you're saying that you applied for a substitute from that tribunal?

THE WITNESS: I officially applied for that and was part of the arguments--I filed two appeals

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for that, and I asked for that. And they told me that there was no people coming from Puntareñas, which is the neighboring judicial circuit, that were able to be there all those days or the--the specific dates to substitute Mr. Solís Gullock and continue with the trial. Yeah. That didn't happen.

ARBITRATOR BAKER: I have one last question, Chairman, if I may, and that is to take advantage of the witness' knowledge and criminal expertise.

Would you describe for me--or comment, rather, on the position that Costa Rica has taken that the red-flag warning is automatic that was filed in INTERPOL against Mr. Aven?

THE WITNESS: No, it's not automatic. It is not automatic. Especially--it's--it seems to be very strange that it's automatic for environmental crimes now. It's not automatic.

ARBITRATOR BAKER: So, if it's not

automatic, who makes the decision in order to flag someone at INTERPOL on behalf of the Costa Rican--if you know?

THE WITNESS: I guess it must be a political

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decision rather than a technical one.

ARBITRATOR BAKER: So, it would not be one of the Environmental Ministries. It would be someone from the Justice Ministry, you think?

THE WITNESS: I think.

ARBITRATOR BAKER: Thank you, Chairman.

ARBITRATOR NIKKEN: If I understood, you said that you asked for the substitution of the judge?

THE WITNESS: Yes.

ARBITRATOR NIKKEN: After the hearing?

THE WITNESS: Yes.

ARBITRATOR NIKKEN: Does Costa Rican law allow a judge to decide on matters of--about the hearing he didn't preside, he didn't hear?

THE WITNESS: I don't understand.

ARBITRATOR NIKKEN: You don't understand?

THE WITNESS: No.

ARBITRATOR NIKKEN: Does Costa Rican law

authorize a judge to make decisions on issues dealt with at a hearing which he did not attend?

THE WITNESS: No, not him, but there are
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superiors who have to make decisions for him and who, in principle--well—administrative judicial bodies that should decide that case, and they are in the possibility of also solve the problems of the substitution.

Of course, not Mr. Solís that was, I don't know, in the hospital--at home. I don't know where he was.

(Overlapping interpreter channel with speaker.)

ARBITRATOR NIKKEN: But isn't there a principle of immediacy; in other words, that a judge has to decide on something he has heard in the hearing?

THE WITNESS: There is this kind of principle, but if we want to continue with the case, there should be someone else that has to be there. Otherwise, what is the reason of this rule?

ARBITRATOR NIKKEN: Right.

THE WITNESS: Yeah.

ARBITRATOR NIKKEN: And what answer did you obtain to your request for substitution of a judge?

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THE WITNESS: One of the reasons was the principle you just quote, and lack of resources, and that there was no possibility. Yeah.

PRESIDENT SIQUEIROS: Mr. Morera, I would like to ask you about the--you also represented Mr. Damjanac--

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: --on the appeal?

THE WITNESS: Uh-huh.

PRESIDENT SIQUEIROS: Not on the appeal; on the second trial.

THE WITNESS: Second trial, yes.

PRESIDENT SIQUEIROS: And from your Statement, you mentioned that he was acquitted during the second trial and that this acquittal has been appealed by the prosecution in Costa Rica.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: Is this correct?

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

PRESIDENT SIQUEIROS: And as I understand,

this occurred in 2014.

THE WITNESS: '14.

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PRESIDENT SIQUEIROS: Is the appeal still pending?

THE WITNESS: No. The appeal was accepted because the decision--even though it was in favor to our "thesis," the decision was very bad drafted from the point of view of the technique of the--"fundamentación." I don't know how to say "fundamentación" in English. Like--

THE INTERPRETER: Grounds.

THE WITNESS: --to put all the grounds in a very clear and ample manner. And the problem was that that decision that was about more than 60 pages--let's say 80 percent of that decision was the reproduction of the literal statements of the witness, and there is ample case law stating that there--this is not enough. This--this--this procedure cannot constitute "fundamentación."

So, due to a bad drafting technique, it was--the appeal was accepted. But as far as I know, there is no trial date yet. There is no--there has been no rescheduling for Jovan's new trial.

PRESIDENT SIQUEIROS: So, he will need to

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have a new trial as well.

THE WITNESS: Yes. New trial.

PRESIDENT SIQUEIROS: Okay. Thank you very much.

THE WITNESS: Uh-huh.

MR. BURN: Sir, if you'd forgive me, I just have a couple of questions arising out of Professor Nikken's questions that were put about how the process should work with respect to finding a new judge, and Professor Nikken was exploring how that would really work if the new judge had not been in the hearing in question. And if I could just follow up on that with a couple of questions, if that's okay.

PRESIDENT SIQUEIROS: You may do so.

FURTHER REDIRECT EXAMINATION

BY MR. BURN:

Q. So, Mr. Morera, you'll recall that

Professor Nikken had some questions for you around this principle. If I heard correctly, I think Professor Nikken called the "Principle of immediacy of the Law," or something along those lines.

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ARBITRATOR NIKKEN: Uh-huh.

BY MR. BURN:

Q. And now, first of all, just as a practical

matter--because I understand what you were saying, in response to me, that you made requests for this.

A. Yeah.

Q. But you didn't get a positive response.

A. No, sir.

Q. Just to finish off, I think, the point that Professor Nikken was exploring with you, if they had said "Yes, here is a new judge," how would that have worked with respect to the hearing that had been presided over by a different judge?

A. Yes. I guess it will be a new scenario for the new judge--and you may think about conflicts with the immediacy Principle, the way you want to call it. But according to me, there are higher principles that are heard with this kind of provision.

The fact that the accused party is willing to finish the case, the fact that the accused party who has done a huge effort to face a case, is now,

you know, exposed to a new trial because of the

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negligence of the Costa Rican State--because this is actually a negligence, according to me--would allow a second--a second judge to be in the courtroom.

You have to take into account that now, since many years ago, all the hearings in Costa Rica are videotaped, full--four cameras are in the room. So, even--for instance, if we want to raise appeals or if we want to raise motions, whether you think our--is our most important input, the videos.

So, I don't think that there is a huge conflict regarding the immediacy Principle, given the fact that--if we have to appeal, or if the higher court wants to know what happened, even the higher court has that possibility.

So, why not think about that possibility for another judge.

Q. So, your point is that it could have worked because there's videotape--

A. Yes.

Q. --recording of the complete hearing?

A. Everything is videotaped.

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been cases--if an entire hearing or a hearing took place and the videotape did not work, the hearing will be nullified. The videotape is indispensable now, as a ; technological resource in Costa Rica.

Q. Okay. And just so we're absolutely precise about this, you explained that you had--you made certain requests for another judge to be allocated, maybe from a neighboring circuit or wherever, frankly.

A. From wherever.

Q. But precisely, what was the response?

A. The response was very, very--how can you say--(Spanish [laconica]), very--(Spanish [laconica]), you have (Spanish, [laconica]).

Q. There's a word in English laconic.

A. In English, it's like very--it was a very small and formalistic response in the sense that--so sorry for you, but the ten years--the ten days have passed, and this is the natural consequence of a trial.

So, they didn't go deep into my arguments at all. They didn't. So, it's--

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Q. Were you--sorry. Were you explaining to them the precise context--

A. Of course.

Q. --in terms of the amount of time that had been invested--

A. Of course.

Q. And that Mr. Aven wanted--was very happy for this to be concluded--

A. Especially--

MR. LEATHLEY: Objection. I mean, that's leading.

MR. BURN: I do apologize. That's fine.

(Overlapping speakers.)

BY MR. BURN:

Q. Perhaps you just want to explain.

A. Yeah, especially the part that--the particular situation here was that the person for which--for which this provision was designed was the person interested in resigning to that possibility.

So, it's--it's--it's a higher thing; it's more like a constitutional thing to think about, and a human's right thing.

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I didn't explore, like, constitutional remedies or human rights. It's not that--that is not my field at all. But I--I had the frustration to argue there for trying specifically to point that thing out; that is, this is David Aven. This is the accused party. And this is the accused party that wants to continue with the trial. So, either appoint a new judge or suspend the ten days in order to have a new trial.

And once the left hand of Mr. Rafael Gullock is in place, okay, let's have also Mr. Rafael, but let's finish this trial. That's what I asked. Yeah.

MR. BURN: Thank you.

PRESIDENT SIQUEIROS: Mr. Leathley, do you care to address this final line of questioning from Mr. Burn or not?

MS. PAEZ: No. No further questions.

PRESIDENT SIQUEIROS: Okay. Then you are released, Mr. Morera. Thank you.

THE WITNESS: Thank you. All of you.

Okay. I did my best. Good morning,
everybody.

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PRESIDENT SIQUEIROS: So, the next witness
is Mr. Aven. How would the Parties wish to proceed?

MR. BURN: We're utterly relaxed. If
everyone wants to take a five- or ten-minute break
and begin immediately, that's fine. If we want to
break for an early lunch, that's equally fine. I'm
happy to go with whatever the Respondent and Tribunal
would prefer.

MR. LEATHLEY: Thank you, sir. Also, happy
to make progress. Maybe a five- or ten-minute break
might be convenient right now.

But just so you know, I do plan to
cross-examine Mr. Aven for probably about an hour.

PRESIDENT SIQUEIROS: So, why don't we take,
then, a five-minute break? Five-minute break. And
then we will continue.

Thank you.

(Brief recess.)

PRESIDENT SIQUEIROS: If the parties are
ready, Court Reporters and Interpreters, then we may
proceed.

Good afternoon, Mr. Aven.

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THE WITNESS: Good afternoon.

PRESIDENT SIQUEIROS: You have witnessed several of the prior examinations; and although I believe you have likely heard me mention the process for the prior witness, I will nonetheless state these for the record.

There will be a brief examination on the part of the team for Claimants to be followed by cross-examination on the part of counsel to the Republic of Costa Rica; and then a redirect, which may be made by your counsel.

The Tribunal may at any time make any questions of you.

I would ask that your answers be first to address the questions that is presented, and you may thereafter, as you have witnessed, make clarifications at a later time.

If you do not understand a specific question, please do not doubt in making sure you do ask for any clarification from the person making the question.

THE WITNESS: Yes, sir.

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PRESIDENT SIQUEIROS: And before we proceed, I would ask you to read the statement as to your responses, how we will conduct yourself in the examination.

THE WITNESS: Okay. 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. Aven.

MR. BURN: Thank you.

DAVID AVEN, CLAIMANTS' WITNESS, CALLED
DIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Aven, you have a file in front of you. – You already have it opened. We need to go through some matters of verification.

Now, at the top of that file, before the numbered tabs that run down the right-hand side, you should find copies of your two statements in these proceedings.

Now, the first thing to do is to--if you could take the document at the top, which on my copy

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is entitled "First Witness Statement of David Richard Aven, I'd like you to inspect that document and flick all the way through to Page 81, which is the final page, and let us know if that does indeed appear to be a copy of your First Statement.

A. Yes, it does.

Q. Are there any changes, corrections, or amendments you wish to make to this First Statement?

A. I don't know if there's--the--there's a date that I want to modify--change. I don't know if it's in the first or second. The April 1st date.

Q. Well, perhaps you could explain the correction, and we might be able to locate where that goes.

A. Okay.

Q. Just explain, and--

A. There's a--there is a first--April 1st date for a document that--I think it--

Q. If you could speak up, Mr. Aven--

A. Yeah.

Q. --for the benefit of those in the room and for the transcribers who are taking the record of the

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proceedings.

A. There was a document that I believe was--went back to 2002 where I put an April 1st date in there, 2002, and it should have been April 30th.

Q. Okay.

A. 2002.

Q. So, this is one of the contracts, I think you--

A. I think it was one of the initial purchase agreements or whatever.

Q. While we're dealing with other matters, we'll find the appropriate reference in your Statements, and we'll take you back to that. But thank you for flagging that.

Are there any other corrections or amendments you wish to make?

A. Yes. Any reference that I made regarding the fact that Juan Carlos Esquivel owned 49 percent, I want to change that to say Juan Carlos--at all times, Juan Carlos Esquivel owned 49 percent or more, or that--of the Concession; or that Paula Murillo owned the 49 percent or more interest in the Concession at

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all times.

Q. Is there a paragraph number for that?

A. I'm not sure.

Q. Okay.

A. But if they ask it, that's what I'm referring to.

Q. Understood.

A. Okay.

Q. And we'll endeavor to find the references to take you back. Subject to those comments--

MR. LEATHLEY: Sorry. Can I interrupt?

I think this is material evidence that is being offered. So, I would like that to be clarified on the record, not just in the event there's a question on the cross. If this is the testimony in chief of the witness, we need to have that very clear on the record, sir.

PRESIDENT SIQUEIROS: Yes. This relates to ownership in the La Canícula company?

THE WITNESS: La Canícula, yes.

PRESIDENT SIQUEIROS: Okay. Could you please clarify what--the statement you wish to make

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with respect to ownership--who owns 49 percent of the company?

THE WITNESS: There a statement I made in the--in one of my statements that Juan Carlos owned, at all times, 51 percent. All right? And after he--and I want to change that to say, "At all times, Juan Carlos owned 51 percent or more shares in La Canícula"; or--after he became, you know--resigned from that ownership, then at all times--from that time on he resigned or taken out of the share book, Paula Murillo owned the 51 percent or more interest in La Canícula.

PRESIDENT SIQUEIROS: So, at all times, he has owned the percentage that you have stated.

THE WITNESS: Say again?

PRESIDENT SIQUEIROS: At all times, he has owned the percentage that you have stated.

THE WITNESS: The 51 percent. There is--

PRESIDENT SIQUEIROS: 51 percent.

THE WITNESS: There's a claim by the

Respondent that--alleging that at some point in time, I was the owner of that--those shares, which

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is--I--which is not true.

So, I--but I--I made a statement in there--somewhere in my Witness Statement that he owned--at all times, he owned 51 percent. And I want to just clarify, "51 percent or more."

BY MR. BURN:

Q. So, you may wish to refer to Paragraph 37 of your Second Statement. We'll come to that shortly. So, don't go there just yet, because we're still on the First Statement.

A. Okay.

Q. But we will return to this in a moment in order that we get your primary evidence correct on this point.

Okay. So, still in the First Statement, subject to the comments you've made, but will, I hope, satisfy you when we look at the Second Statement, are there any other matters you wish to raise by way of correction or amendment in the First Statement?

A. No.

Q. Looking at Page 81, is that your signature?

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A. Yes, it is.

Q. Thank you.

Now, if you could go behind the white tab.

Now, the Spanish and English versions of your Second Statement appear in opposite order of the First. So, what you need to do is find a blue page; and behind that blue page, you should find a copy of your--the original English version of your Second Statement.

A. Yes. I have it.

Q. Could you go through the same process quickly, just flick through, check whether that appears to be a copy of your Statement.

I'm going to take you back to a couple of points with respect to the matters you've raised.

A. Okay.

Q. Okay. Now, if you could turn to--first of all, to Paragraph 27, which begins on Page 6, continues over to Page 7 of that Second Statement.

You referred a moment ago to the date, April 1, 2002.

A. Uh-huh.

Q. You'll see in this paragraph, there are two

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references to that date.

Could you just read the text of that?

A. Which paragraph is that again?

Q. 27, beginning on Page 6. Read through the whole paragraph.

If you're satisfied that that is the point at which you need to insert a corrected date, let us know. If it's not, we'll find the right place for you.

A. Yes, we entered into a purchase agreement--purchase and sale agreement with Mr. Monge to purchase all shares of La Canícula from him. On payment for the purchase of the non-Concession property, the title was transferred to--by Pacific Park Condo on April 1st of 2005 to Inversiones Cotsco.

Q. So, that's 2002.

A. I'm sorry, 2002, yeah.

And as a result, the U.S. investors owned the entirety of both La Canícula and Inversiones Cotsco as of April 1st, 2002, including three properties mentioned above.

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Costa Rica is required that 51 percent of the Concession be owned by a Costa Rican, and from the very inception until today, a Costa Rican has owned 51 percent, despite Costa Rica suggesting that we owned 100 percent.

So, I just want to change that to "51 percent or more."

Q. So, first of all, on the dates--

A. I'll change that--yeah, April 30th, 2002.

Q. Is that correct, both of those April 1sts should be April 30s?

A. Yes.

Q. And is this also the paragraph in which you seek to insert the words "or more" after "51 percent"?

A. Yes.

Q. And there are two occasions in which you use 51 percent. Does the insertion apply to them both?

A. Yes.

Q. Okay. Thank you.

Could you just go down on that second point to Paragraphs 36 and 37, just over the page, on Page

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A. Okay.

Q. Could you just read those paragraphs to yourself--no need to read them out--and let us know if there's any change that needs to be made there.

A. Again, it says, "At all times, a Costa Rican national owned a 51 percent interest"--that should be "51 percent or more interest"--"in the Concession."

Q. Yep. Again, you need to speak more clearly, Mr. Aven, for the benefit of the record.

A. Okay. You want me to read Paragraph 37 as well?

Q. Just read it to yourself again. If there is a need for a change, you need to indicate that.

A. Again, "The above held the 51 percent or more Concession interest on the Trust for U.S. investors until 2005, at which time Paula Murillo, a Costa Rican national, was appointed to hold that 51 percent, and Ms. Murillo has held that 51 percent interest from 2005 until the present."

That's--we can leave that alone.
That's--that's good.

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Q. Okay. Thank you very much.

Subject to those changes, are there any other corrections or amendments to this Second Statement that you wish to make?

A. Not that I know, but let me reserve the right to--if I see something on the fly here that is incorrect, I'll change that as well.

Q. Okay. If you could turn to the last page of that Second Statement, which is not numbered, but it's the 50th page.

A. Okay.

Q. Is that your signature?

A. Yes.

Q. Thank you.

That completes the formalities. But just very briefly, I wanted to ask you a question or two.

I don't think you were in the room, but did you witness the Opening Statements made in these Proceedings?

A. Yes, I did, and I was--I wasn't here Monday or Tuesday because I was suffering from severe migraine headaches; and maybe some of you saw, I have

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these blue glasses on, and the--was prescribed by my doctor because the blue filters out the white light that triggers the migraine headaches. So, I wear those all the time. I'm not wearing them now because you suggested I wear these, which I appreciate, but--so, I took a couple--and I'm taking medication for those migraine headaches.

I'm also being treated for PTSD by a doctor--the letter's in evidence--after the--the attempt at my life in Costa Rica.

And basically, you know, my life is quite different now than it was when I moved to Costa Rica, because of the happenings down there and the developments--unfortunate developments that occurred in that country.

So, I did hear--but when I was in my hotel room, I did see some of it, but I heard a lot of it. And I was very dismayed when I heard the counsel for the Respondents--what I recall was--attacked me quite viciously with respect to my engagement in duping the country, committing all kind of crimes, illegalities; and that's very hurtful, and--because none of it's

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true.

And I want to categorically reject all of

the--those accusations, and--and I would like the panel to know that, you know, there's--there's a number of investors that--like buyers, okay; and they purchased nearly \$2 million in lots from us, and there's another two investors that put \$900,000 into the project, and because of the illegal shutdown, we are liable for that.

One of the investors--I got sued by one of the investors, and I settled with him under the representation that this wasn't our fault; and therefore, we are committed to returning those monies to the investors.

I could have been facing 20 lawsuits right now, and I want to thank the investors and also the people that are watching, livestreaming it, that--and this is why you have to be careful with accusations you make that are false, that it went out on livestream all over the world that I'm a criminal again, picking up the mantra that Mr. Martinez started in 2011 and continues to this very day.

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And I got numerous calls that day--you know, Monday and Tuesday, from buyers, from family, from friends, saying, "What's going on? Are you a criminal?" I mean, it was so embarrassing to have to listen to those people. And a lot of them were angry, that they thought I deceived them.

So, everybody out there that's listening to this stream, I'm categorically denying that the charges that--of the Respondent's counsel that I engaged in any criminal activity. I want to again confirm that it is our full intention, if we prevail, to return all the monies to the people that invested in our project. Because they were collateral damage.

We were the--we received the--the bomb, right, that went off and destroyed the project. But all those people that invested, those people that put their hard-earned money into this project lost it as well. Nobody's talking about that, but that's a reality.

And the U.S. investors are--I made a promise that we want to return those funds with interest. And so, for everybody listening--and there's

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many--many of those U.S. investors that we gave those links to, and our friends and family that are listening to this, and we want to make that commitment, that we intend to return the money. Because it's not fair that they lost millions of dollars because the project was illegally shut down.

So, one more thing. When James Comey, in July of this year, dismissed the criminal charges--or didn't charge Hillary Clinton with the crime--he said--he said this: He said--and I'll never forget it, because when he said this, this hit me hard. He said: "The most valuable thing I have is my family and my reputation."

And my family's back there, some of them. My friends are back there. And my reputation is in shatters because of what this Respondent Government done--has done to me.

And I'll never get that back. So, I just want to say again, I categorically deny all these charges I heard when I was listening to counsel for the Respondent.

And I think you should be more careful with
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your words. Because words do have meaning, and they do have effect.

That's all I want to say. Thank you.

Q. Thank you very much.

MR. BURN: And I have no further questions for Mr. Aven at this point.

PRESIDENT SIQUEIROS: Mr. Leathley?

MR. LEATHLEY: Thank you, Mr. President.

CROSS-EXAMINATION

BY MR. LEATHLEY:

Q. Good afternoon, Mr. Aven.

A. Good afternoon.

Q. My name is Christian Leathley; I'm appearing on behalf of Costa Rica. I'd like to ask you a few questions in relation to your two Witness Statements you provided in this Arbitration.

In Paragraph 235 of your First Witness Statement, you say that you left Costa Rica in around May 2013; is that correct?

A. What--what--

Q. Yes. Your First Witness Statement?

A. Page what?

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Q. Paragraph 235.

A. Oh, I'm sorry.

Q. If you look at the last line of 235.

A. Back here, right? Okay.

Yes, that's correct.

Q. And you traveled to and have remained in the United States ever since that time; is that correct, sir?

A. That's correct.

Q. And, in around September of 2013, you listed yourself as having an address in New Castle, Pennsylvania; is that right?

A. Where is that located?

Q. That's in your Notice of Intent to Submit a Claim to Arbitration.

A. Yes.

Q. And nowadays, am I right in thinking you reside in the Clearwater, Florida, area?

A. I'm not saying where I reside because of my safety concerns.

Q. And you're aware that your testimony here today, sir, is of potential impact on any criminal

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proceedings that are taking place in Costa Rica?

A. Is potentially what?

Q. You are aware that the evidence and the

testimony you are providing today could have potential implications on your criminal proceedings in Costa Rica; is that right?

A. I am not aware of that. I'm not a lawyer, and I'm not a criminal lawyer, so I'm not aware of that.

Q. Okay. And you don't speak Spanish, do you, sir?

A. I donot.

Q. And all the officials you've dealt with in Costa Rica only speak Spanish; is that right?

A. No, I would say not all of the--all--no, not all of them. A lot of them do speak Spanish--do speak English.

Q. Then let's work through. So, does Ms. Mónica Vargas--does she speak English?

A. You know what? I don't know, because I never spoke to Mónica Vargas in my entire life.

Q. Does Hazel Díaz speak English?

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A. Never spoke to her either.

Q. Does Mr. Luis Martinez speak English?

A. I don't think he does, no.

Q. So, all of your dealing with advisers, to the extent you had any direct dealings, have been filtered through other people?

A. All of my dealings with who? These three people?

Q. For example--yes.

A. Well, I don't--I had no dealings with Helen Díaz that I know of.

Q. Hazel Díaz.

A. Hazel Díaz.

I don't really remember much interfacing with Mónica Vargas. And the only one of the three that you mentioned, Mr. Martinez, to my knowledge, does not speak English.

Q. So, all your communications to them would have been through somebody else, and all the communications from them would have been through somebody else, is that right, sir, because you don't speak Spanish?

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A. Well, you keep saying "from them?" Is it "from them" that I hear? From him?

Q. Let's take Mr. Martinez, as an example.

A. Yes, he--the only time I--yeah, that's true. It had to be through an Interpreter.

Q. And the communications and the correspondence that you received in Spanish would have had to have been translated by somebody else; correct?

A. Yes.

Q. And would that have been translated to you in writing, or would it have been translated in oral communication?

A. I would say generally in writing.

Q. Generally in writing.

A. Yes.

Q. But those--those English translations haven't been provided in this Arbitration, have they, sir?

A. English translations of what?

Q. The documents we're referring to. Your

communications that have been received from various entities, you cannot read. So, we've just established that you would have had to have them

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translated and you said they would have been translated in writing. And I'm asking you whether those documents have been submitted in this Arbitration.

A. If you have a document that you want to refer me to--I don't recall off the cuff. You're asking--you're asking me questions that happened years ago, so if you have a specific question about a document, then I'd like you to ask that question about a document.

Q. Have you been involved in this Arbitration with your counsel, sir?

A. Yes.

Q. Are you aware of the disclosure phase in July of this year, sir?

A. Yes.

Q. And were you asked questions to produce certain documents during that phase?

A. Yes.

Q. And did you provide any of those translations, those written translations that you received?

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A. What I remember doing--and you're asking--asking--counsel's asking these questions, there's--I remember sending Mr. Burn a huge box of documents after I got that request.

So--there's thousands of documents in evidence in this case. And the documents I was able to find, I--I sent to Mr. Burn.

Q. Did you send those translations that you received, those written translations, to Mr. Burn?

A. I don't recall what was sent. I mean, we're talking thousands of documents, and--you know, I hardly remember what happened last week. And with this condition I have with my migraine headaches, it's getting more difficult. So, I don't recall.

Q. No, I sympathize, sir.

And my question is really whether you would accept my representation that there are no translation of those official documents.

A. I'm not going to accept that because I can't verify it. I don't recall.

Q. Okay. Thank you.

Let's go to Paragraph 54 of your First

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Witness Statement, and here you say that you were well aware of the demands of the environmental permitting regime in Costa Rica.

A. Okay.

Q. Is that still your testimony today?

A. 55?

Q. 54, sir.

A. 54. Let me read it.

Yes.

Q. And I assume with your advisers, they would have informed you of those demands; correct?

A. Yes.

Q. And--such as not providing false information.

A. I reject the assertion that I ever did provide false information.

Q. Don't worry, sir; I'm not making that assertion.

A. Well, you just said it.

(Overlapping speakers.)

BY MR. LEATHLEY:

Q. Let me repeat the question, and then we can answer it again.

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So, I assume with your advisers that they would have informed you of the demands of the environmental permitting regime in Costa Rica; is that correct?

A. Yes.

Q. And they would have advised you in relation to whether or whether you should not provide false information. Just the--the standard of whether or not one provides false information or not in any permitting process.

A. To be--in recalling what--you know, quickly recalling the conversations I had with my initial adviser, Juan Carlos Esquivel, I don't recall ever having that conversation with him, to tell--

Q. And were you ever advised what your obligations were when submitting the D1 Application?

A. Well, again, I'm not Costa Rican. I don't speak, read, or write Spanish. At all times, I relied upon professionals: Attorneys, people that were--that were engaged in the activities of taking a project through the Environmental Impact studies and on to the permits.

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So, I was relying on these professionals. I never actually was involved in any of that. And I relied totally on the professionals. As you said, I don't speak Spanish, I don't read Spanish, I don't write Spanish. And so, I relied totally on the professionals that I had employed.

Q. And you do not recall or it didn't happen--this is my question--whether you received any advice regarding your disclosure obligations in the D1 Application.

A. I don't recall any of that whatsoever, because my understanding from the lawyers, and later, Mr. Mussio, was that they were the team that had expertise in shepherding a project through the permitting process, and they knew the requirements.

Frankly, during that whole exercise, I never even spoke to anyone from SETENA, at all. I--you know, because except--with the exception of Luis Chávez, who was director of operations much later, which I talked to him with my attorney, Manuel Ventura later, we had discussions with him, but during the early phases of this whole permitting

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process, I never even talked to anybody at these agencies ever.

Q. No, and we'll come on to the agencies in a moment, sir. My questions are in relation to your discussions with your attorneys.

A. Excuse me. You do understand those discussions are privileged, don't you?

Q. We'll come to that in a moment, sir.

A. Well, no. The moment was right now. You just said it.

Q. That's okay, sir.

A. Are those discussions--are attorney-client privileged discussions privileged or not?

Q. I'm the one asking the questions, please, sir. We'll come to that in a moment.

(Overlapping speakers.)

PRESIDENT SIQUEIROS: Mr. Leathley is the one asking the questions at this moment.

THE WITNESS: I'm sorry. Excuse me.

PRESIDENT SIQUEIROS: So, please restrict yourself to answering questions. If there are some issues that your counsel wished to object, he will do

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so in his own time.

THE WITNESS: All right. My apologies to the panel.

BY MR. LEATHLEY:

Q. And the process this week, sir--sorry, I would like an answer to my previous question.

We're talking about the exchanges you had with your attorneys. I'm just going to ask about the existence of those conversations.

A. Okay.

Q. Did you have conversations with your attorneys regarding your duty to disclose in the D1 Application? You may not remember the content of the conversations, but do you remember them actually occurring?

A. I honestly do not remember any of those conversations. What I remember is conversations like what--the steps you had to take. My understanding was that initially you had to get the SETENA approval--and SETENA, my understanding, was the only agency that was given the authority by the Government and the Courts to issue Environmental Viability

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permits, and the resolutions for those project permit, and once they were issued, then they had the force of law.

And what I remember was--

Q. I'm sorry to interrupt you, sir.

A. I'm getting there. Excuse me.

Q. And just--just so I can help steer you.

A. I'm getting there. My next statement--okay.

Q. Okay. Very good.

A. So, my understanding was from my--the professionals, the lawyers, was that SETENA had a bunch of check-the-boxes. You know, they had to get approvals from various agencies all the way down the line, from--and one of the important ones was from MINAE, who had to give SETENA a clearance letter stating there was no environmental problems with the Project site.

So, my recollection, Counsel, is that the--the lawyers that I engaged went through in detail with me about the requirements that we needed--what we had to do to--from, you know, A to Z, to get the--the permits. And there was a lot of

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check-the-boxes in there.

Q. Let's turn to the first tab, Tab 1, in the folder sitting on your desk. And this the D1 Application, which is Exhibit R-13.

A. Okay.

Q. And just keep it on the first page.

Do you recognize this document, sir?

A. Yes. Well--well, okay. I recognize my signature on the document.

Q. Right.

A. Okay.

Q. And so, you recognize that this is the D1 Application that was filed in relation to the Condominium Section; is that right?

If you look at the top left box, Box 1.

A. Okay. Yes.

Q. Do you see that, sir?

A. Yes.

Q. And you've just confirmed that's your signature at the bottom.

A. That's my signature, yes.

Q. And there was a--and there's a legal

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Declaration in the middle of the page, where you see that paragraph where the text starts.

Do you see that, sir?

A. Yes.

Q. That's in Spanish; I won't ask you to read what it means, but were you ever advised what that meant?

A. No.

Q. Okay. Thank you.

Did you ever receive any legal advice in relation to the box-checking exercise that you described? And I mean written legal advice.

A. I don't recall, but if there's a document in evidence that you can refer me to, I'd be happy to look at it.

Q. Well, that's where I'm going, sir. I'm assuming as a prudent businessman, you would have received the advice in writing because you're making these applications on behalf of a number of investors or potential investors; correct?

A. I'm not denying that I received the advice. I'm just--I can't recall every document that I signed

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or reviewed.

Q. Now, your counsel has advised during the course of this Arbitration--they've advised you to provide all documents that were requested by this Tribunal; correct?

A. Yes.

Q. And have you disclosed all the documents to your lawyers that you were asked to disclose in this Arbitration?

A. I believe I have.

Q. But your lawyers didn't disclose any Memoranda of Advice or letters of advice in this Arbitration, did they?

A. What lawyers are you speaking about?

Q. Well, first of all, I'm saying, your counsel who's sitting on your left, Mr. Burn and his team--

A. All right.

Q. --that they did not in this Arbitration disclose any Memoranda of Advice or Letters of Legal Advice from you to or from your attorneys in Costa Rica; is that correct?

A. I don't recall. If you--as I said, if you

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have a document that I can look at, I'd be happy to.
But I don't recall.

Q. Well, sir, there's a document--have you heard
of the phrase "Redfern Schedule"?

A. I don't believe so.

Q. So, Redfern Schedule is a name which is given to a document helps the
disclosure phase in this Arbitration, and there was a request that Costa Rica made
in that process. The request was--and I'd like to read out--this is Request--
Respondent's Request Number 4.

A. Is it in this book?

Q. It isn't, sir. Yes, I believe it is. I beg
your pardon. Yes. Tab 2, Page 12.

A. Tab 2, Page 12. Are these pages numbered
here? Oh.

Q. We'll help you with it, sir, because it's
going to have to be read sideways, I'm afraid.

A. All right. Thank you.

Q. So, page 12, there's a little page 12 down at
the bottom, and you'll see--yes, the page you're
holding, sir. And I'm going to read out to you the

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Request. So, this was a Request that was made from us to your attorneys in this Arbitration.

And the Request is for "Documents or communications received by Claimants, including, without being an exhaustive list, advice provided to the directors, representatives, agents, and employees and/or related persons between 2000 and 2010 relating to aspects of the legal and regulatory regime of real estate development projects in Costa Rica and/or the requirements and enforcement of environmental laws in Costa Rica, including, by way of example, opinions, legal notes, and due diligence reports, indicating the authors of such documents and communications."

And the Tribunal requested by response, respecting the privilege that can exist and obviously does exist between an attorney and a client, that there be what's called a privileged log. And that's a standard procedure.

Were you told about this privileged log process, sir?

A. By whom?

Q. By your attorneys in this Arbitration.

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A. I don't recall.

Q. So, let's turn to Tab 3, and this is Exhibit R-399.

This is the privilege log that your counsel submitted to the Tribunal on July the 22nd of this year; is that correct, sir? Or can you recognize that?

A. Okay.

Q. And there's only one entry in that box, and that's dated the 6th of March, 2006, from a firm called "Lacé & Gutiérrez Abogados," sent to you, and it's in relation to the ownership structure at Las Olas; is that correct, sir?

A. I'd have to see that document before I answer that question. I'm not sure what that--what this advice was about.

Do you have a copy of that document?

Q. Actually, that document is not the focus of my questions. It's the lack of any other documents that's the focus of my questions.

A. Oh. Well, you didn't tell me that.

Q. So, you've just testified that there was

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advice, there was written legal advice that you received, but we've received nothing in this privilege log, which you, yourself, you're about to assert privilege.

So, I wonder, sir, you either violated the Tribunal's orders or you're not telling the truth now, but I'd like to know which one it is.

A. I reject both of those assertions.

Q. You understand that--the framing of my question, though, sir. You were under an obligation, as were your attorneys, to disclose, at least in a privilege log, all legal memoranda that qualified under the Respondent's Request Number 4. That's how these Arbitrations function.

A. As I told you--I'll restate this again. I sent a--a huge box of documents to the attorneys that--what I could find in the files, and those documents--whatever documents I had was in that box.

Q. And so, would you say those legal advice that you received would have been in that box, the written legal advice that we were talking about before?

A. Well, sir, I mean, I can't say that this is

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not the only legal advice I ever received. I mean, I can't say for a fact that this was not the only thing that I ever got.

Q. You didn't have a discussion with your lawyers about what legal advice you'd received?

And when I say "your lawyers," I mean Mr. Burn and his team.

A. Yeah, we had discussions about what legal advice I received. But a lot of that legal advice was in the form of conversations.

Q. And in writing, was your testimony earlier.

A. Well, this is one of the ones in writing; I do recognize that.

Q. Yes. And there are others, then, sir, was that right?

A. What?

Q. There were other written communications as well. You testified earlier there were other written communications.

A. Don't put words in my mouth.

(Overlapping speakers.)

THE WITNESS: I'm sorry. You want to ask

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or--

MR. LEATHLEY: I don't know who's got the ball, sir.

Let me ask a question and then we're clear.

BY MR. LEATHLEY:

Q. Let me take a step back, because I don't want to take too long on this. You should have been consulted by your lawyers to disclose any legal advice to be provided in that privileged log. And I'd like to understand what your testimony is. Is it that you did not receive any written advice at all or that you did, but it just doesn't appear in that log?

A. My recollection is that I do recognize this, this document. And I don't recall any other documents I ever got from an attorney right now. I may have, but I don't recall any, that it was a written legal advice. Most of the time, the attorneys I dealt with would just give me verbal advice, and verbal directions. So, I can't--you know, this--I think, if there's nothing more than this, that's the only thing I had in the way of legal advice.

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Q. Okay. Well, that's quite different to the testimony you just provided a moment ago, sir.

A. Well, maybe I--okay. Let me slow up, because I want to--then I misunderstood you.

Q. Let me rephrase a new question.

A. Well, I misunderstood you prior to what--to this.

Q. Have you received written legal advice from Costa Rican lawyers or any other lawyers regarding your development of the Project that would have squared with the Request that I read out to you from that Redfern Schedule?

A. My recollection--my recollection is, if this is the only thing here in this log, that's all I--that's all I've gotten that I can recall.

Q. That you can recall.

A. That I can recall, yes.

Q. And I'm asking you whether you received written legal advice from your attorneys in Costa Rica.

A. I can confirm, I got this written legal advice. I can't confirm I got any others.

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Q. You just don't know.

A. I don't--my answer is that most of the legal advice I received from my attorneys was verbal.

Q. So, now it's "most."

A. Most--okay. I understand that lawyers like to pick at words here.

Q. Sir, I'm just trying to establish what advice you received, because I think it's quite important for your case, and I'm wondering whether--

A. Well, if the question is what advice I received, then--we're talking about written legal advice--

Q. Yes, sir. Absolutely.

A. Here's my answer. The only written legal advice I'm aware I received was this one piece of--this one legal advice that's appearing in this log.

Q. So, in relation to all of the years that you've gone through, which has clearly had its toll on you, from your earlier testimony, you never received any written legal advice, never any written legal advice in relation to the enforcement actions

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that were taken against you, no written legal advice in relation to the injunctions that were placed on you and the property, never had anything in writing from your lawyers; that's your testimony today, sir, is it?

A. Not that I can recall it, at this point, no. If it's not in here--I sent everything I had to my attorney, and if this is the only thing here, then that's all I have.

Q. Could you turn to Tab 4, sir. This is Exhibit C-113. This is a letter addressed to SINAC.

A. Uh-huh.

Q. Do you have that document, sir?

A. Ido.

Q. And the stamp of MINAE-SINAC indicates--the top right-hand corner--23rd of February 2011.

A. Uh-huh.

Q. Do you see that, sir?

A. Yes.

Q. Now, if you'd just turn the pages, and you'll see that the--if you look at Page 4--

A. Uh-huh.

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Q. --you see it is the Master Plan of the Project?

Yes, there on your left, sir.

A. Yes.

Q. That's the Master Plan for the Project; correct?

A. Uh-huh.

Q. Or an illustration of.

A. Okay.

Q. And the penultimate page of the document--let's go to the back--to the last page of the entire document, sir.

You'll see your signature; is that right?

A. Yes.

Q. And then there's a--I'm going to read the--refer to Page 13 of that same document, and I'll try and identify it--if you look at the top right-hand corner, you'll see a stamp. And you should be looking for 330.

A. Okay.

Q. Do you see--you've got that page there, sir? A. I do.

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Q. And we have a translation, so, if you want to turn up to the last page in Tab 4--yes. So, you're in the right tab, sir. Last page, behind the blue sheet of paper. And keep going. There, sir.

We've prepared a translation of what I want to read to you. And your counsel can, obviously, raise any questions of my translation.

Now, the page that we were on, Page 13, which I would invite Members of the Tribunal to keep on, has a list.

Now, there's a--in the middle of the page, there's a (in Spanish, [pruebas]). And then there's a sentence in upper caps, and it says, "Evidence that demonstrates the legality of the construction process undertaken by my company."

This is, of course, your document you've signed. And go down the list, you see A, B, C, D, and E.

And then here, it says, "Copy of the geological survey conducted by the company Geotest that concludes that there are no wetlands or floods within the property."

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Do you see that, sir?

A. Yes.

Q. And this is the Protti Report.

A. Okay.

Q. Are you familiar with that term, sir?

A. I am.

Q. And according to this letter, you submitted

the Geotest Protti Report to SINAC; correct?

A. No, not correct. This was prepared by--well, as you see, Sebastián Vargas, Attorney at Law.

I believe this letter was written in response to the illegal shutdown notice I got from SINAC in a previous date in February.

So, he--he drafted this letter and had me sign it.

Q. Right. You signed it, and it's saying that the evidence that was submitted, the proof, rather--

A. Well, you know what--

Q. --it demonstrates that you have a legal construction. You included the Protti Report; right?

A. As I said, I signed this letter. I did not send it. This was sent by Sebastián Vargas.

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Q. Was the content explained to you before you signed?

A. No, it was not.

Q. Now, this Geotest Protti Report was not submitted as part of your D1 Application, was it?

A. I think the D1 Application should speak for itself. I have no idea.

Q. Okay. Well, then I think, sir, it's been fairly well-established--or I'm happy for your counsel to ask you any questions if he disagrees--that the D1 Application that we were looking at before, which is at Tab 5, which I think you've seen already, does not include the Protti Geotest Report.

A. Documents speak for themselves. If it doesn't, it doesn't.

Q. Thank you, sir.

In fact, the only time that this

document--the Protti, the Geotest Protti Report, was submitted, was sent--was sent after you had obtained the Environmental Viability for the Condo Section; correct?

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A. Repeat that question again.

Q. Yes, sir.

The only time that the Protti Geotest Report went to a public authority was when you sent it after you had obtained the Environmental Viability for the Condo Section; is that correct, sir?

A. I don't--I never sent the Protti Report to anybody. As this document demonstrates, this letter was written by my attorney, Sebastián Vargas. He had me sign it. He didn't do a translation of this document. He just told me this was a document that we were objecting to--objecting to the illegal shutdown letter he sent me on--earlier than this February 23rd date.

So, you know, I never sent this letter. It was--I signed it.

Q. Yes, sir.

A. But he sent it. And he wrote it. I didn't write this letter. As you know, I don't read--write--read or write or speak Spanish.

Now, again, this is a situation where I'm relying on attorneys. All right? Now, maybe the

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best thing for him to have done was give me a translation in English and say, "David, read this thoroughly, and make sure you understand it thoroughly, and then sign it."

He didn't do that. He just wrote it. He told me--again, confirming, like, what I said, that most of the time, this was--what the attorneys told me were verbal--maybe they didn't want to take the time to explain it, you know, do the translation from Spanish to English and explain things to me. They said--they just put documents in front of me and said verbally what they were for, and I signed them, and he sent them.

And if you look at the fax number, that's not my fax number. That's his fax number.

Q. And let me just--to conclude the point, so, what I would--also you said the documents speak for themselves. We obtained a copy of the Protti Report, the Geotest Protti Report, because it was part of the document you've got in your hand, but it was not from the D1 Application.

Would you--would you have any basis to

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disagree with that, sir?

A. I have no basis to disagree with it. I mean, the documents speak for themselves. The facts speak for themselves.

But what's important to know is, I never read the Protti Report. I never even became aware of that Protti Report until it was brought up by the Respondent in their--one of their Memorials.

Q. So, you have been sitting in this room this morning during the testimony of Mr. Morera; is that correct?

A. Yes.

Q. And you would have heard him testify in relation to the shooting that you were subject to; correct?

A. I did not have to listen to his testimony about the shooting. I lived through it.

Q. I'm sure, sir.

And there was a--an exchange about security. I wondered, did you ever contract a private security or look into a private security firm in order to return to Costa Rica?

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A. Well, I think Mr. Morera testified he was the one that was inquiring about that in Costa Rica.

Q. He did, sir. In fact, he said two things. The first was that he consulted with the public authorities for security; and secondly, he consulted with the U.S. Embassy. And what struck me, sir, is I wondered whether you have sought any private security arrangements.

A. What time frame?

Q. Whatever time frame you wish.

A. When I was in--after the shooting, when I was in Costa Rica? Yes, I did.

Q. Uh-huh. And what did they say to you?

A. No, what--it's not what they said to me. It's what I said to them; that, "Look, I want you to protect me. I was just almost killed a few--a couple days ago, and I need to engage you to protect me."

Q. And what did they then say?

A. Well, that's their job. I mean, they had guns and they--you know.

Q. So, you hired a private security firm.

A. I did.

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Q. Uh-huh. And did they do their job?

A. I'm sitting here today, so, I think they did.

Q. Okay. Thank you, sir.

Now, Mr. Aven, you say in Paragraph 74 of your Second Witness Statement that you were working in good faith with the Government. That's your Second Witness Statement, Paragraph 74.

A. 74, okay. You want me to read it?

Q. No, sir. I just want to take you to a--yeah, so, the third line down--I'm just going to read a part of this sentence. "This is a multimillion dollar project and we were working in good faith with the government."

Do you see that sentence?

A. 74?

Q. Yes, sir. It's with the quotes--

A. Whoa. Whoa.

Q. Second Witness Statement.

A. 74 says--oh, I see. Okay.

Q. Yes. So, the third line down of that last part of Paragraph 74.

A. Okay.

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Q. And so, you say that "We were working in good faith with the Government."

Do you see that?

A. Yes, I do.

Q. And in the same Paragraph 74, you say that you never ignored notifications from local agencies; correct?

A. Yes, that's correct.

Q. And is that still your testimony today?

A. It is.

Q. And in Paragraph 150 of your First Witness

Statement--Paragraph 150, you say that "On the 14th of February 2011, you received a letter from Mr. Luis Picado, requesting an injunction against the Las Olas Project."

Is that right?

A. That's right.

Q. And this is what's been known as the SINAC injunction; correct?

A. Yes.

Q. And in Paragraph 157, in the First Witness Statement, you say in the immediate aftermath of

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receiving the SINAC injunction that, quote, "At this point, we were advised that the SINAC notification contained in the letter sent by Mr. Picado, sent out to me in February of 2011, was of no legal effect because SINAC did not have jurisdiction over construction permits or developments operation."

Do you see those words there, sir?

A. Yes.

Q. And I assume this was legal advice you said you took.

A. Okay. Now, this--this is going to be one of those on-the-fly adjustments I want to make to this.

I agree with that statement, but the--what I was told by my attorney was that SETENA was the agency that was granted the powers by the Government and the Courts to issue environmental--Environmental Viability permits.

Q. I am sorry to interrupt Sir, but I have a very specific question. So, we'll see if we need to come to this.

A. Okay.

Q. My question was that you referred to advice.

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You say in the first line of Paragraph 157, "At this point, we were advised."

A. Yes.

Q. And my question is simply: Was that legal advice?

A. Yes.

Q. Okay. Thank you.

Because ignoring an injunction was going to implicate both you and your fellow investors, correct? So, it obviously made sense that you sought legal advice.

A. My attorney, Sebastián Vargas, said that this injunction that SINAC sent out was not valid.

Q. I'm sorry, sir?

A. The legal advice I received from my attorney, Sebastián Vargas, said that the SINAC notification to shut down the project in February of 2011 was not a legal document.

Q. Was that provided in writing, sir, that legal advice?

A. No. Again, it was--it was represented to me verbally.

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And that--that resulted in the letter that we just reviewed that Sebastián Vargas wrote to SINAC.

Q. Yes.

A. Which was many pages, as you know. He briefly--and basically, he said, look, this is illegal, and I'm going to file something with whoever, and he drafted that letter, and he had me come in, explained basically what this is. It's not a legal document, and he said "Sign this, and I'm going to get it filed." And that's what he did.

Q. Uh-huh. But no written legal advice to you or your fellow investors.

A. Just verbal.

Q. Okay. Thank you.

Let's go to Paragraph 107 of your Second Witness Statement. 107.

Do you have that there, sir? Here, you say, quote, that you "never received notice of a subsequent trial date." We're in the context of your criminal proceedings here. This is your Second Witness Statement.

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Do you remember this, sir?

A. Yes.

Q. Do you wish to make any changes here?

A. No, I don't think I--I don't recall ever getting notice.

Normally, the notice was sent by the Court, e-mail to me.

Q. So, can you turn to Tab 6 in your binder. And this is Exhibit R-350. And there's a translation which I would encourage you to look at.

So, this is--R-350 is the notification of a new trial to you dated the 16th of October, 2013. And this is an e-mail the Court sent to your registered e-mail; correct?

A. Where is the e-mail address?

Q. So, if you go to the last page of the original, and then you see it's circled, and that's David3A@gmail.com?

A. Yes. That's my e-mail address.

Q. Okay.

A. But I never received this e-mail.

Q. You never received that.

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Can you turn to Tab 7. This is Exhibit C-166.

A. Uh-huh. Okay. Yes, I see it.

Q. In fact, you refer to this e-mail, this document, in Paragraph 237 of your First Witness Statement, and this e-mail was sent to you, to the same e-mail address--

A. That's correct.

Q. --as the criminal court's notification?

A. That's correct.

Q. So you did get this one, but you didn't get the other one?

A. Well, we all understand that any e-mail can go into a spam folder, it can get bounced, and it's not a guaranteed way of communication.

So--so, that's why I--I did get this one, but I did not get this one.

Q. And then in Paragraph 240 of your First Witness Statement you say that after Costa Rica issued the international arrest warrant--so your First Witness Statement, Paragraph 240.

A. Slow up. I'm not there yet.

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Q. Okay.

A. Just a minute.

Which one is this, now?

Q. Paragraph 240.

A. Okay.

Q. And you say that after Costa Rica issued the international arrest warrant, you heard, quote, "Rumors that the Court was also considering making a request that INTERPOL issue a red notice against you."

A. Yes.

Q. And, Mr. Aven, you and your criminal counsel reviewed the international arrest warrant; correct?

A. What criminal counsel?

Q. You didn't have a criminal lawyer?

A. What date--what time frame are you talking about?

Q. The time that you received this document, sir. Let's go to it.

Tab 8, Exhibit R-150.

A. Okay. I'm there.

Q. Yes. And this is the international arrest

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warrant issued by you--sorry, against you. And I wonder if you can turn to the last page, last line. And there's a translation.

This is Tab 8, Exhibit R-150. There's a translation there. And we have a translation of the last line, which is to say, "It is hereby ordered to communicate INTERPOL of the resolved."

A. I see it.

Q. Did you see that at the time, sir?

A. No. I never saw this document before.

Q. You never saw this before.

A. I don't believe so. I may have seen it in

production, but I--how was I supposed to get this document?

Q. You didn't receive it from your attorneys?

A. Which attorneys?

Q. You were being represented during the criminal proceedings; right, sir?

A. What's the date of this document? Do you know? Is it dated?

Is this document dated? I don't see a date.

Q. I don't have a date with you here, sir, but--

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A. So, how am I supposed to answer a question if we don't know a time frame?

I don't mean to ask you a question, but I'm--

Q. Let's move on, sir.

A. Okay.

Q. In Mr. Burn's opening remarks about the

Las Olas Project, he remarked that you'd hired a consultancy group called Norton Consulting and EDSA?

A. Yes.

Q. And he said that they looked at your investment, quote--and I'm quoting from Mr. Burn's remarks, "which included a conceptual design with luxury beachfront villas, mid-range townhomes, smaller villas, and a beach club"; correct?

Is that a fair summary from Mr. Burn?

A. I don't recall. Did he just say that recently or just now?

Q. He said it on Monday, sir.

A. Oh. Then I missed it.

Q. Okay.

MR. BURN: Sorry. I think he's

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misunderstanding the question. The question from Mr. Leathley is: Does the description that I made sound accurate to you?

THE WITNESS: Oh. Yes. Yes. I--yes.

BY MR. LEATHLEY:

Q. Okay. Thank you, sir. Thank you.

And he said that based on this view of the Las Olas Project, you and other Claimants made the decision to develop the project; is that right, sir?

Let me assist you. Let's go to Paragraph 41 of your First Witness Statement.

A. All right.

Q. I'm sorry, yes. Your First Witness Statement.

A. 41? You want to read it?

Q. No. I'm just going to summarize it, if I may, sir, but you can correct me if you think I'm mis-summarizing it. You say that you hired Norton Consulting and it's as part of your assessment of the business options available to you and your co-investors.

A. Yes.

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Q. And just so I'm right in the timeline, Norton Consulting was hired in 2004; correct?

A. Correct.

Q. Which was after you'd acquired the investment for \$1.647 million, \$1,647,000; is that correct?

A. Yes.

Q. And as part of Norton Consulting and EDSA, they went--sorry, as part of that, Norton Consulting and EDSA went to visit Las Olas.

A. Yes.

Q. And this is around September 2004; correct?

A. I'm not sure about the time frame. I'd have

to see when the report came out. They--Marco Larrera and Rick Norton--my recollection is they came down to Costa Rica a couple of different times, and they were on-site. They studied the site.

At one time, there was a guy from EDSA's office in--from Fort Lauderdale, and they're a renowned land-planning company, and we were talking,

and they were looking at the site, and--and I--and
this one guy--I forget who he was, but he was with
Marco Larrera, and he made a comment--I was asking

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about the--what he thought about the topography and
the lay of the land. He said it was beautiful.

I said, "You think"--you know, "You don't think there's any environmental
problems with this, do you, I hope?"

And he says, "No." He says, "I don't see
any problems with that visually," just visually.

Q. And they spent time surveying the property
and taking photos of the land; right?

A. Yeah.

Q. And I want to put up on the screen for you,
sir--this is one of the pictures they took. That
looks like some of the terrain of Las Olas to me.

Would you agree, sir?

A. I can't confirm that. I mean, it's--terrains
down there, as you know, they--a lot of them look the
same. But I--

Q. This is from the Norton Consulting Report.

A. If you--if you represent it's in the Norton Consulting Report, then I'd say yes.

Q. You'd say yes?

A. Yes.

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Q. And let's look at another photo. This is also in the Norton Consulting Report. That looks like the beach.

I've also been to the site, sir. I wondered if you'd agree that looks like the beach view. Very difficult to, of course, say. I'm asking you to define waves.

But--so, they charged you a substantial sum.

A. Yes.

Q. 150,000 U.S. Dollars; correct?

A. Yes.

Q. And they were assisting you in planning how to maximize the land use and to, obviously, make it a profitable investment; correct?

A. There was a dual purpose with that. They did provide some of that kind of advice. But there was two parts to that. There was EDSA and there was Norton. So, there was an extensive marketing study

done to determine what the values were of the real estate projects and what--you know, what things were selling for in what areas.

And Marco Larrera's job with EDSA was

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specifically to look at the Las Olas site and to determine what could be done with it.

Q. Uh-huh.

A. And, also, to determine--so, we were trying to figure out two things: The types of structures we could build--condos, homes--and also the price range that we could sell them for.

Q. And, I mean, these guys are experts, right, in terms of integrating the natural features of the land so as to help with the design of the overall project.

A. Yeah. They were--they were land-planners. I wouldn't say that they were experts in project development. They were more, like, land-planners, and they gave me kind of an initial read of what possibly could be done with the land.

Q. I wonder if you can turn to Tab 9. This is

Exhibit C-30, and I can sense the eyes burning into the back of my head from the Tribunal.

PRESIDENT SIQUEIROS: And it's more a concern--not as regards to counsel and Mr. Aven, because I'm sure there's a lot of adrenaline running

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in both. But it's more of a concern for Reporters and Interpreters. Because it's way past lunchtime, and they've been going on for almost five hours now, four hours and a half.

So, whenever--if you're going to conclude within the next very few minutes your examination, I'm sure they would be satisfied with taking a break in just a very few minutes. Otherwise, perhaps we should find a break--

MR. LEATHLEY: Thank you, sir. There will be a very natural breaking point at the end in two minutes. Thank you.

BY MR. LEATHLEY:

Q. Let's look at Tab 9. This is Exhibit C-30.

Do you have that there, sir?

A. Is this the EDSA? Oh, no. Wait. Sorry. Yes.

Q. And you see the front cover there, sir?

A. Yes.

Q. And there are photos--the first two are the ones you've already seen.

A. Yes.

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Q. Can you tell me what we're looking at on the right photo, please?

A. I don't know. I can't place any of these--I can't place any of these photos. I...

Q. We're putting it on the screen.

Looks quite like a wetland, doesn't it, sir?

A. No. How could--

Q. No?

A. That's--I don't--I can't place that. I really can't. I mean, I know--I know the project fairly well.

Q. Okay. Well--

A. But I really can't place that.

Q. Let's turn to Slide 5 of the Report. Let's get into the Report. This is the Report they prepared.

And this slide is called the Land Use Summary.

A. Are we on a page number?

Q. So, we want to go to Slide 5, which is not page 5. It's Slide 5. The number is on the bottom right. And this introduces the property before the

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Report analyzes the options available to you as investors.

Do you see that, sir?

A. Which--what part are you looking at now?
I've got the Slide 5. Are you talking about the graphic on the left?

Q. Yes, the graphic on the left.

A. Okay. Uh-huh.

Q. You see the water features there, sir?

A. Yes.

Q. And on the screen, what I'm going to do is put up from Tab 10--this is Figure 2 from the KECE Report, just so we can compare and contrast.

A. Oh, this one?

Q. No. Keep your finger in Slide 5 for now.

Now, look at Slide 5. Do you see that, sir?

A. Yes.

Q. And if you can look up by comparison--so, I can count about five of the water feature areas that also match the wetlands that have been identified by

KECE's Report.

For example, the southwest, which is around

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KECE Wetland 1 on the west side, which is around the area of KECE Wetland 2 on the southeast, which is where KECE Wetland 8 is. The northeast, which is where KECE Wetland 6 is. And the northwest, which is where KECE Wetland 5 is.

Would you agree with that comparison?

A. I don't agree that they're wetlands.

Q. Okay. That's fine, sir. But you would agree with the comparison?

A. What are you asking me to agree to?

Q. I am asking you whether the location of the water features that have been included in the water--in the Land Use Summary match where the wetlands are that have been identified by the KECE experts.

A. Well, you know what I would say with that? Maybe KECE saw this graphic and he just copied it. I don't know. I have no idea.

Q. Well, your lawyers can ask that question of Mr. Erwin when he's here.

A. Yeah, I don't--I don't know. To be sure,

Marco Larrea and EDSA was not an environmental firm.

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They were a land-planner.

Q. Right.

A. So, this was their plan.

Q. And, in fact, if you read on the design, it's a little hard to read, but on the southwest and the west side, it says, "Existing low-area drainage, potential lake feature." For the southeast and the northeast, it says, "Existing low area and drainage corridor." And then in the northwest, it says, "Existing low area, potential lake feature."

So, these--these specialists are identifying areas that at least would be suitable to develop what would be natural or water features for the property; right?

A. Well, that was--that was their concept, apparently--you know.

Q. Uh-huh. And just for the record, Slide 6, Slide 45, and Slide 47 identify similar features. Slide 45, which is a conceptual land use.

A. Keep my finger here--

Q. Do you have Slide 45 there, sir?

A. Uh-huh.

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Q. That includes four features, four water features, including--look at the southwest corner, sir. Quite a large area of water that's proposed.

A. Well, let me just say that my recollection is this was a report done many years ago--but my recollection was that--

Q. I'm sorry. Could you speak a little bit more into the microphone--

A. I'm sorry. I'm sorry.

My recollection--this was many years ago. My recollection was that we--Marco Larrea and I visited the Los Sueños site. And he liked the water features. I don't know if any of you gentlemen were--the Los Sueños site, but they have many water features in that resort as well.

So, he may have gotten some inspiration from the water features that Los Sueños put in around the--around their project and incorporated them into this project. I don't--but I can tell you that the areas that are indicated on this Graphic 5, on the left and on the right, the--specifically the ones on the left, was an area that both Mr. Baillie and

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Mr.--Dr. Cubero both examined extensively, and they said that was not a wetland area. So, that's their expert opinion.

Q. Oh, so, they're experts in wetlands now.

A. Who?

Q. Your--these designers you're referring to.

A. No. No. I said Mr. Baillie--

Q. Mr. Baillie.

A. --and Dr. Cubero.

Q. Yes. We'll hear from them later this week.

I'm just wanted to--

A. I am just making a distinction that there's a difference between a wetland and a wet area, but--but this could have been just a conceptual rendering of what you--you could do with the area if--something like what Los Sueños did with their project.

Q. Absolutely, sir.

A. They had a lot of water features.

Q. Absolutely, sir. And just for the record, I'm not suggesting that this map is representing defined wetlands as defined by Norton Consulting. I'm just identifying the fact that they are proposing

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water features in exactly the locations where wetlands have been identified by KECE. And in Slide 43 of the study, they say, "This is the proposed integration of water features into the land plan."

A. Yeah. That's what I said. We visited Los Sueños, and I think they liked the water features of Los Sueños. And, so, they wanted to incorporate some of the water features into the Las Olas Project.

Q. So, does it strike you as coincidental, purely coincidental, then, that these water features, some of them of which are significant size, happen to be where the wetlands are--been identified in this Arbitration?

A. Not--those areas have not been identified by our experts. They've been--

Q. Well, we'll--

A. --identified by your experts, right? I'm sorry. I don't mean to ask you questions.

Q. I know. We're disagreeing about that as well, sir, but--

MR. LEATHLEY: Okay. I don't think I have any other further questions. Thank you, sir.

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MR. BURN: Any further questions at all or just for now? Just so I know.

MR. LEATHLEY: No further questions at all. I've finished my cross-examination. Thank you.

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

Now would be a good time to take a break, and the break should be lunch break. So, I would ask that Mr. Aven is sequestered.

You understand, Mr. Aven, that during the next break, lunch break, you will be asked to be by yourself. So, simply to avoid any contact with any of your attorneys or other colleagues, because you're still under the period of examination.

You will--we will continue, as I had anticipated earlier, with the redirect on the part of your counsel; any questions further afterwards from the Tribunal.

So, we will start at--when we--at quarter to 3:00.

Thank you.

(Whereupon, at 1:38 p.m., the Hearing was

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adjourned until 2:45 p.m.)

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AFTERNOON SESSION

PRESIDENT SIQUEIROS: If everyone is ready to proceed, then I would ask Mr. Burn to proceed with redirect, please.

MR. BURN: Thank you, sir.

REDIRECT EXAMINATION

BY MR. BURN:

Q. Mr. Aven, just a few topics to revisit arising out of your cross-examination. First of all, there was a series of questions that was put to you about the documents that you have or had in relation to the Project.

Where were the documents relating to the project stored while you were living in Costa Rica?

A. What time frame?

Q. Well, while you were living in Costa Rica.

A. Well, there's different time. The time frame just, say, from 2010 to 2012, '13 is--they--we were

keeping them at our office.

Q. And before--

A. You know, a lot of them. Not all of them but many of them.

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Q. And before that?

A. We kept them in the--some of them are maintained in my attorney's office and some of them in my home.

Q. And by your home, you mean your home in Costa Rica or--

A. Yes. Yes, Costa Rica.

Q. And what happened to the documents when you left Costa Rica?

A. Before I left Costa Rica in July of 2012, our office got broken into and a file cabinet full of documents were stolen plus a laptop. And then what I had in my home, I--which is what I shipped to you, some of it I--I FedEx'd back to the States.

Q. Okay. Thank you.

Now, again, on the question of documents,

you had asked questions relating to your understanding of Spanish language documents that are relevant in this case and so on. And, indeed, there are numerous

documents to which you refer in your statements which are Spanish language documents and so on.

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Have you ever had reason to doubt your understanding of what those documents say? Do you feel you understand those documents?

A. The relevant ones I definitely do understand. The relevant ones were the 2004 SETENA resolution and 2006 SETENA resolution, 2002--April 2nd, 2008, the MINAE letter. It's "Clear the land of all the--of all the environmental problems." The 2010--2008 resolution. I think June 2nd, 2008.

The--the MINAE reports that were done in the summer of 2010. The SETENA resolution that was done in September of 2010. And up until that time, you know, those were the relevant documents that I was very well familiar with.

Q. You'll recall that in relation to the D1 application, you were asked various questions about the advice you took at the time.

A. Yes.

Q. And various questions were put to you along the lines to interrogate whether you took advice as to the significance of being truthful in that D1 application. Do you recall those questions?

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A. Yes.

Q. Did you need to take advice to understand the significance of being truthful in an official application?

A. No, I don't need to take advice to be truthful. I generally act that way--acted that had way most of my life. In that particular--like when he--the documents like the D1 document--most of the documents--official documents that I execute, I signed, was in Spanish.

I'm relying on the professionals that I engaged to do various things for me. And all of those official things were done in the Spanish language. And, you know, when they got something--like the D1 is a perfect example. It was presented to me by the professional. And I--I signed it as something that was necessary to--to get

executed and submitted.

Q. And subject to that point that these were documents--the D1 application was prepared by others and you relied on others and so on and so forth, which you've made clear, is it your understanding

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that the D1 application was accurate?

A. Of course. Absolutely.

Q. Now, Mr. Leathley took you to some questions about the so-called "Protti Report." It's a report on the headed paper of an outfit called Geotest.

Do you remember that?

A. Yes.

Q. Is it your understanding of that report--or what do you understand that report says about wetlands on the site?

A. Well, what I read about that report in terms of later--I didn't find--I really didn't become aware of that report until the Respondent brought it up. I've never seen that report.

But after becoming aware of it and reading it, I--I didn't find anywhere--and I think I got a translation--I got--it was translated in English for me. I didn't see anywhere that it mentioned in that report that there's a wetlands.

So I really--I really was befuddling about what they were talking about and relying so heavily in that report saying that there's a wetlands. And

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I--and they used that as a basis of saying that I duped SETENA.

Look, I don't--I didn't dupe anybody. You know, duping the federal government is a very serious crime. Deceiving a government is a very serious crime.

And what I would say is this: I think--I still think SETENA is a governing--an agency that is still in business in Costa Rica. I haven't heard that it's closed its doors. And when you--when you make a serious charge like that, where is SETENA? Where is their statement?

Where is somebody--you know, they could--the government could go--they work for the government. They could go to their office--SETENA office and say, "Look, we have evidence that David Aven duped you.

We want do get a statement from you to confirm that."

Isn't that what you do normally when you try to--before you start accusing somebody of serious crimes? Go get your evidence to prove it.

Everything I read in the memorial statement, in all the witness statements and everything thing in

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this--from what the Respondent said that I've heard is what I would call fabricated, fake stories. Like you've heard about fake news. They just create it. None of this stuff that they're saying now was in the criminal trial record.

Q. Okay.

A. This is all newly created stuff. So--

Q. Well, I think anybody who has been following Donald Trump's election campaign will be very familiar with fake news.

Suffice it to say--I would like to take you back, though, to the Protti Report. And you'll remember that Mr. Leathley took you to the document at Tab 4 in the file.

A. You want me to refer to it?

Q. Yes, please. And this is the submission from Sebastián Vargas after the shutdown.

A. Where is that located, please?

Q. Tab 4 in that file. And if you just turn back, Mr. Leathley took you to this page, the page that has in manuscript at the top the number 330. The numbering is actually in reverse order--

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A. Yeah.

Q. --for some reason--historical reason. But if you just go to that page for me quickly.

A. Yes.

Q. Was the Geotest or Protti Report filed? If you go down to E, at the bottom of the page.

A. Yes.

Q. Do you know whether or not you, as the lead developer, if you like, were obliged to submit that report to SINAC?

A. As I told the counsel for the Respondent, I had no idea that this report was even--the Protti Report was even submitted to SINAC. I mean, this is--because this is--this is a lengthy letter that Sebastián Vargas presented or prepared and just told me what it's basically about. He was making--lodging a complaint against--against the--the illegal Shutdown Notice, that he felt that it was illegal and that he asked me to sign it because he was going to file it. So I said, "Okay," and I signed it.

Q. Okay.

A. But I didn't even--I didn't know that he was

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even supplying--what he sent along with this letter.

Q. Ok .

A. He didn't show it to me. I didn't see it.

Q. Right. Thank you.

Now, another document that you were taken to is at Tab 9. And you'll recall this is the Norton Consulting EDSA PowerPoint presentation.

A. Yes.

Q. Now, I'd just like you to turn back to page 5 in that PowerPoint pack. And you'll recall that Mr. Leathley made various--put various points to you in relation to the site plan--the land use summary

that appears there.

A. Yes.

Q. Now, first of all, do you know what Norton Consulting and EDSA were seeking to communicate with this--this land use summary at this point in time?

A. I think it was a general design of what they would think would--would include a--the--their concept of a--the Project that they were looking at. And, like I said, we visited Los Sueños, and they were quite impressed with the--the water, amenities

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that Los Sueños had. And I think that's why they designed some of these, you know, areas where they had some pools and things like that.

But--but I--but it's not--it's not to indicate that there's a wetlands there but just an area where there could be some water projects.

Q. Right.

A. In fact, it says that the ponds and water

features are 3.6 hectares out of a total land use of 37.3 hectares.

Q. Right. And to be absolutely fair to Mr. Leathley, he did in the end point out to you that the water features are marked on the plan, but in very small print there, "potential lake feature," and so on.

Do you see that?

A. I can't--I can't read it. I really can't.

Q. You can't read it?

A. I can't see it.

Q. Okay. And, again, if you would just turn up

to page 45 in the same pack of slides. Now we see something different from Norton Consulting and EDSA

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at this point. Do you have any comments about what is represented in this slide in relation to the presence of wetlands on the Project site?

A. Well, I think it's a representation of where the units were going--the same--looks like similar water features and just a conceptual land use plan for the Project.

Q. Okay. Thank you.

Now, I just want to put a couple of quick points to you in relation to the criminal litigation. If you could turn, first, to Tab 7. Now, you'll recall that Mr. Leathley took you to a couple of emails sent to your gmail address.

A. Yes.

Q. And in the email there, we see a rather aggressive, verging on racist, message that was sent to you by somebody. Is the--do you remember if there was an attachment to this email?

A. I don't--I don't think so.

Q. All right.

A. I don't remember one.

Q. Can you see any reference to an attachment to

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that email there?

A. No, I don't.

Q. Okay. And if you would just turn back to Tab 6, but the last page. Mr. Leathley pointed this out to you and pointed to the references to your email address again.

Do you see that?

A. Tab 6, last page. Okay. Is that the one that says "Court of Puntarenas"? "You are summoned again for trial," is that what you're talking about?

Q. At the top it says "Delivery Status Notification (Relay)." You may have to turn over another page. So the very last page of Tab 6.

Can somebody help him, please.

A. Yeah, I'm here. Oh, wait a second. Okay.

Q. Okay. Yes, you have the page?

A. Okay.

Q. So you see your email address appears on this automatically generated message?

A. Yes.

Q. And Mr. Leathley pointed that out to you?

A. (Nodded.)

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Q. Now, the actual--behind that--so if you go back to the front of the document, does that document look like it is an email?

A. Is this 9(c) I'm looking at?

Q. Yeah.

A. No. That looks like a--a letter sent on the Court's stationery.

Q. Right. And if you turn over, you see some images there. Do those look like emails?

A. No. They look like stamps or something.

Q. All right. Do you think those might be attachments to the email that's recorded on page 997?

A. It could be, but I'm not--I'm not certain.

Q. When you--have you ever had difficulty receiving an email because it's got an attachment?

A. All the time.

Q. Okay.

A. Even from you.

Q. Surely not.

A. Yes, I'm telling you.

Q. Now, Mr. Leathley asked you the question in

relation to security arrangements that you might have

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put in place after the shooting incident?

A. Yes.

Q. And he put it to you that you--he asked you about private security arrangements that you confirmed you did make in the immediate aftermath.

A. Yes.

Q. You remember that?

A. Yes.

Q. Now, I'm not asking you as a lawyer because you're not a lawyer. But just as a--as a layman, do you--do you consider yourself familiar with the concept of the general protections that an accused person in criminal proceedings is provided in law, whether it be Costa Rica or the United States or most countries around the world? Do you think generally you have an understanding of the types of protections an accused person is provided?

A. Let me make sure I understand the question. Under what circumstances? A similar--

Q. If a person is accused of a crime--

A. Yes.

Q. --and is subjected to--and is charged with a

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criminal offense, do you think you understand roughly the types of protections that person will get at law?

A. Are you talking about security protections?

Q. No. General. General protections and safety--in the general sense. Not the sort of

"personal security against a shooting" sense. But the general presumption.

A. You mean like during the course of the trial?

Q. During the entire process. Just in general terms.

A. I understand. Okay. So would I--

Q. I'm not asking you to enumerate them. I'm just asking whether you're generally aware of the types of protections--human rights-type protections/ due process-type protections that a person has.

A. Yeah, I'm generally aware of it.

Q. Right. And is one of those usually that a person is, generally speaking, presumed to be innocent?

A. Presumed to be innocent?

Q. Yes.

A. I think that's--yes, that's my, definitely,

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understanding.

Q. So speaking from a layman's point of view, does it seem reasonable to you when a State is prosecuting a person, is putting them through a criminal process, that they should look to that

person to protect themselves, bearing in mind they are at all innocent?

MR. LEATHLEY: Objection. I think this is a leading question. "Does it seem reasonable to you"? I'm afraid it suggests exactly what the answer should be. I think we should strike that entire question, and we shouldn't have an answer.

BY MR. BURN:

Q. What is your view?

PRESIDENT SIQUEIROS: Mr. Leathley is right.

MR. BURN: I'm happy to rephrase, sir.

BY MR. BURN:

Q. What do you think of a situation in which a person is being accused that may be encouraged or expected to make their own security arrangements?

A. Well, it--okay. It depends upon the circumstances of--I think. In other words, if I'm

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accused--I was accused. If I'm accused. I was accused of a crime I didn't commit.

Okay. So we show up at the courthouse. There's a guard at the courthouse protecting you there. I didn't have any security. You know, I didn't expect security there in terms of--you know,

to and from there. I mean, I went there with my attorney and Jovan, and everything is fine.

However, once the--the shooting happened, that whole--you know, that's a whole different ball game. And I did expect that some type of security procedures to be put in place because I was almost killed.

And, actually, I was--you know, so--and so I--we--I--we tried to get some security, and we tried to get some help and--as Néstor told you, as you heard his testimony. And I went to the US embassy. "Hey, look." Told them what happened. And Néstor called them.

And this was a time of the ambassador in Benghazi was killed along with three other people. And the embassy said, "Look, we can't protect you."

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And I took it, well, okay, if they can't protect their own ambassador, who am I? I'm a nobody. So, you know, I'm insignificant compared to the US ambassador.

So I was--who's going to--so, to me, there's nobody to look after me except me.

And I think if this happened to anyone in

this room, that you would have done the same thing I did, get out of danger, very simply.

So I had to kind of take--you know, take steps of my--that I could take to get out of danger. And my family, they were--they were petrified of what happened and pleaded with me to leave the country before I got killed.

So--and then after I left, there was--I think Nestor testified he tried to get additional assurances.

Now, one thing I want to make--you know, make note of, which hasn't been raised here. But in January of 2014 when that hearing happened--when Jovan was put on trial the second time, I was in the hospital in the States and had surgery within a week

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or so, virtually the same time.

And I sent letters from my doctors, from the hospital. I sent them to Manuel Ventura, who was my attorney, and he forwarded them to the court. And they didn't care. They didn't care.

And they put out the arrest warrant immediately. And the next thing I know, you know, there's an INTERPOL report. And it was--it was a

total--so they just kept ramping it up.

And after I looked at the INTERPOL report, which we got from the Respondent, INTERPOL clearly told them, "Look, according to 83.1.1," I think, as I remember reading it, "this is not a crime that rises to the level of reporting people to INTERPOL."

It's like somebody steals a candy bar from a 7-Eleven and they don't show up for hearing, so you report them to INTERPOL. No, that's not what INTERPOL is for. They're for serious crimes.

And this--and they told them. I read it myself after Mr. Burn sent it to me. And--and--and they still insisted. They still, you know, tried to get--tried to appeal to INTERPOL to, you know, get

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the Red Notice issued for me.

It was--it was--you know, it was mind-boggling. I mean, nobody can believe. I tell this story to people. They don't believe it. They think I'm kidding them when I tell them what happened.

Q. Okay. I'll just come back very briefly to INTERPOL in a moment.

But before that--before we leave the topic

of security arrangements, I just wanted to ask whether the Costa Rican police did anything in relation to the shooting incident.

A. Again, Manuel Ventura--you know, thank God for Manuel. I mean, I don't know what I'd do without him. But he went, as you know, to get these reports, trying to get the police report, trying to get the report from the prosecutor in Quepos where I filed the complaint against Cristian Bogantes. And he had difficulty getting them. And when he finally did get them, there was nothing much in them.

Q. Okay. And just on that point about INTERPOL. You were taken to the document at Tab 8. You will

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recall this was the international arrest warrant for extradition purposes. And you indicated that you--you did not receive that document or see a copy of it or you weren't aware of it. Is that--

A. No.

Q. That--that's--

A. No.

Q. That was your evidence.

Perhaps you want to go back to your First Witness Statement. Have a look at Paragraph 240.

And just comment on--just--if there's anything further you wanted say in relation to the INTERPOL reference.

A. Paragraph what?

Q. 240. 2-4-0. It is on page 73 of your first statement. You may feel you've already covered these points officially. But I just wanted to give you the opportunity, given that you were taken to the arrest warrant itself.

A. 240?

Q. Yeah.

A. You want me to read this?

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Q. Just read it quickly.

A. Okay.

Q. If there's anything further that you wish to say, given what appears there, please let the Tribunal know.

A. This was really amazing. I was--I was talking to Louise Woods over there at one time, and I was talking to her about my--rumors about an INTERPOL notice being issued for me. And Louise--the next thing I know, she's--she looked it up. And she says, "You're there. Your name is there."

I says, "You're kidding me?"

So, no, that's--that's a--that's an accurate--

Q. That is the first time you--you learned that you were on the--

A. Yes.

Q. --the Red list at INTERPOL?

A. Yes, exactly. First time. Yeah.

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

PRESIDENT SIQUEIROS: Pedro, do you have any

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questions?

ARBITRATOR NIKKEN: No.

PRESIDENT SIQUEIROS: Mark Baker?

ARBITRATOR BAKER: Thank you.

PRESIDENT SIQUEIROS: Please.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BAKER: Mr. Aven, the first question concerns citizenship.

THE WITNESS: Yes.

ARBITRATOR BAKER: Allegations have been made that you represented yourself in your business dealings in Costa Rica as an Italian citizen. Would

you comment on that, please.

THE WITNESS: Well, if you look, there's a--I think many times that I was--represented myself as a U.S. citizen. In fact, if you look at the first documents that we initiated the purchase agreements in 2002, it clearly says--identifies me as a U.S. citizen.

I do have dual nationality. But I don't have any attachments to Italy. My dominant residence has always been the United States. I don't do any

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business in Italy. I don't have any bank accounts, own property. I don't vote there. I don't have anybody I correspond with over there.

I haven't been there in ten years. I mean, been totally to Italy probably five times in my life. So--so my dominant residence is, no question, United States.

I was born in New Castle, Pennsylvania, graduated high school there. Graduated college from Baylor University in 1964. So--and been living and working in the United States all of my life except for the time period I was living in Costa Rica.

ARBITRATOR BAKER: So, as you sit here

today, do you remember ever representing yourself in any of the transactions in Costa Rica as an Italian citizen?

THE WITNESS: Yes, I do. And I--I did it as a--you know, just as an option. You know, I just had the Italian passport. And I, you know--on a number of occasions I did. But, I mean, I think for the Project, it was mostly--I was--I was held--I held myself out as a U.S. citizen.

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ARBITRATOR BAKER: Do you have an EU passport too?

THE WITNESS: Say again.

ARBITRATOR BAKER: I said, "Do you have an EU passport"?

THE WITNESS: I do not. Oh, wait a second. I have an Italian passport. So that's an EU passport, I think; right?

ARBITRATOR BAKER: Yeah. Right.

THE WITNESS: Yeah.

ARBITRATOR BAKER: I didn't know if there was still a separate Italian identity card that went with the EU passport or not.

THE WITNESS: No. I think they're all EU

passports now.

ARBITRATOR BAKER: Yeah, that's what I thought too. Okay.

So the next set of questions, then, comes to what due diligence you did before you bought the property. So, as I understand your testimony, you and Mr. Janney were in Costa Rica, and you saw this property. And you came to the decision pretty

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quickly that--you saw--spotted a lot of opportunity there; is that right?

THE WITNESS: Yes. Well, let me--yeah. Let me explain that. This is an interesting story. I was living in Fort Lauderdale at the time. And David Janney was living in Orlando. And we had been friends for many, many years.

And so--and I was looking around Florida, you know, to do something. And it was so expensive. I mean, this was in the--2000, and things were really expensive. And, you know, it was kind of booming. And a lot on a canal--I remember this clearly. A lot on a canal in Florida in 2000 on a--not a nice canal. Maybe, I would say, 200 by--200 by 200 square feet,

something like that, not big--was a million dollars.

So when David Janney asked me to go down to Costa Rica--I had never been there. And he was doing some mission work down there. So I said okay. So I went down there, and we just started looking around. I went down with him a number of times.

So we found--so one of the trips we made was to Esterillos. And we hit--and we looked at a number

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of properties. But a lot of them were inland, and they didn't appeal to me. And I knew--I knew the real value of property was near the water because that's where people want to be. They want to be near the water.

So when we saw this property in Esterillos, it was like 100 acres on a beautiful beach in an area that had roads all around it, gently rolling hills, and built up community around it with restaurants and shops and homes and condos and everything. And this was in an area that was elevated. It was gently rolling hills. For a little more than what they wanted for this small lot in Fort Lauderdale.

So I said, "David, this is--this has to be a good deal." And it was--it's two hours from the

States.

So part of the due diligence you asked about is looking at Costa Rica as very close to--access to the United States, Canada. Had--I think at the time I checked, 2 million visitors a year were coming. A lot of American expats were moving there. A lot of Canadians were moving there. It had a huge expat

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presence.

So we, you know, immediately--you don't have

to be a rocket scientist to figure this out. You get 100 acres for what they're selling a small lot on a canal in Fort Lauderdale for. And people are coming down and moving down there. It was to us a no-brainer that this--this could be a very profitable investment.

So, that was, you know, the basis of our reasoning and the due diligence we did comparing what was two hours from Costa Rica and that people were coming there.

And, also, don't forget another thing was happening. This was right after 9/11. So, people weren't traveling that much. And there was things ramping up quickly in the Far East and Mid East.

People weren't traveling. So we thought that there would be more people traveling down to Central America.

Because, really, Costa Rica--I love Costa Rica. I was their biggest fan. I mean, I was telling everybody, "Costa Rica is great. The people

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are wonderful. They're friendly." You know, and I was encouraging people to move to Costa Rica because I believed in it so much.

And so we--I was--and I became a resident there. So, I was in--full in with Costa Rica. But I did do a lot of due diligence before I, you know, moved down there.

ARBITRATOR BAKER: So specifically, did you hire anybody or consult with anybody before you made the purchase about land development restrictions or environmental regulations in Costa Rica, or did that come after you all had secured the purchase?

THE WITNESS: No, I think before--before I bought. I mean, I--you know, it was considered by. I mean, you don't invest that kind of money without doing your due diligence. And I--I met the owner of

Los Sueños, Bill Royster. Had conversations with him. There was another development down from us, Mr., I think, Ramirez was running it, Rancho Santa Fe Development.

Juan Carlos Esquivel, who I was introduced to in Escazú, San Jose. He had a lot of experiences.

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His great-grandfather, I think, was ex-president of the country. So--and we talked a lot about what the procedures would be to do a development project. And he stepped me through that. And he was a key guy--the key attorney that--that really handled things from 2002 until I moved down there in 2005. He was the one handling everything for me after we bought the Project--the property.

ARBITRATOR BAKER: So after you acquired the property and you began to retain land use development firm in order to assist where the development of your ideas and then you began to hire the other professionals that you've told us that you've relied upon for the beginning of the EV process--right?

THE WITNESS: Yes.

ARBITRATOR BAKER: How did you--those

professionals come to your attention? How did you decide to hire the people that you did hire?

THE WITNESS: Well, some of them came to my attention through Juan Carlos.

And--and then Mauricio Mussio came to my

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attention because I knew he was--he was working on the Costa Montaña project, which was a huge project not too far from Esterillos. And I actually, frankly, met Mauricio. I remember meeting him at the--this La Sirena Hotel that was in Esterillos when we were having a meeting there--community meeting there about just community problems, right. And Mauricio happened to be there. And so we were talking. We struck a--you know, started a conversation. He told me what he was doing and--with Costa Montaña.

And, I--you know, I did some checking on him. And he had a fairly good reputation. So, that's how I started a relationship up with him.

ARBITRATOR BAKER: So when the process really got going in terms of the applications being made--we heard from Mauricio yesterday about the way in which the team contributed to the development of

the D1.

Did you have the D1 explained to you since you are not capable of operating in the Spanish language? Or tell us how that happened before it was

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filed.

THE WITNESS: Okay. So the process was depending upon how big of the--big of a project you have, what kind of density you have for homes--say, for example, you have a home you want to put on 5,000 square meters. That takes nothing--there's no even checking--not even checking on that. It's just, "Okay. 5,000 square meters, one home, get a permit."

The more dense--the more density you have, the more--then there's more requirements. The D1 was for the most-dense type of projects. And that was the most extensive type of approval process you had to go through. And so Mussio came up with the--the conceptual design for the condo project. And there's a lot of talks about the easements. And I heard--I heard every--all the conversations, and Mr. Nikken was asking questions about it.

But let me be clear about this because it's--it's talked about a lot. And--like we did

something--another something we did illegally.
There's no illegal things going on here. Before we
did anything with the Project I--I got a--my attorney

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at the time, Gavridge Pérez, gave--recommended that I--that this--the law in Costa Rica was that you could subdivide off parcels from the main highway. And this is the law. And that you could put a 60-meter easement into--into the--off of the main highway and build--and put four lots off of each side of the road.

So I heard Mr. Nikken question about--like what is--you know, the easement. The--the thing with that is it's--the easement means that the road is an easement to the lots. It's not an easement into the proper--you know, into the condo property, but it's an easement that will go through the center, and then that easement will permit the lot owners to access their lots. Once the homes are built, I think there was a plan to donate the street to the municipality. That's what our plan was.

So those lots were subdivided along the main road. And once those lots were subdivided, then--then Mussio--Mauricio Mussio applied for the condo permit. Did the--the concept, the master site plan for the condo project. And that's what was

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submitted.

And there was--and I don't want there to be

confusion because there was confusion at the criminal trial where Mr. Martinez was accusing me of subdividing the Project after we got the permit, which was totally wrong. All right. Totally just wrong.

But that's what was being purported. And I got, you know, a--legal advice from an attorney again. Look, as I said, I don't know what the laws are in Costa Rica. So I have to depend upon the legal professionals to do things. And this was--this was one of the suggestions that was made by Gavridge Pérez, the attorney I was using at the time. And he handled everything. He did all the legal work on that.

ARBITRATOR BAKER: So if I understand the point of the easements--I understand the access point. But is it also--was it done that way because the law gives you a right to do the subdividing up to a certain number? Did I hear that right in your testimony?

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THE WITNESS: The subdividing up to a certain number. You mean on the--on the easement?

ARBITRATOR BAKER: For the easements.

THE WITNESS: Yeah.

ARBITRATOR BAKER: For the lots for the easements.

THE WITNESS: Yeah. The easement was 60 meters.

ARBITRATOR BAKER: Right.

THE WITNESS: This is the law. And off of those--off of that road you can put four lots. And so that was--that's what was done. And that's what Mr. Pérez set up. He registered the whole thing, and we got--we got it subdivided. He took care of all the legal aspects of that.

ARBITRATOR BAKER: Okay.

THE WITNESS: And another--another point I want to make because I heard this yesterday. That they were--the counsel was making a big deal about the--with Mr. Bermúdez about him getting a permit to move earth for the--for the easement. And he--I think I heard--I think I heard this. Now, if I'm

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wrong, I can be corrected on this.

But I think I heard that we represented that

to get--to get the construction permits. But, actually, that earth-moving permit was on--I checked it this morning--was on July 22nd, that--that exhibit they were looking at. And we got the construction permits on July 16th.

So--and we immediately wanted to work on one of the easements.

And this just goes to show you. I didn't need to get that earth-moving permit. There wasn't a lot of dirt we were moving. But I said, "Look, Esteban. This is more dirt than we're permitting to move legally. I mean, it's a little bit more dirt. But I don't want to be doing anything illegally. Let's get--could you get me the earth-moving permit?"

And he says "Sure." And that's what he made the application for. Like--like he was saying yesterday--which I was viewing--that it doesn't matter if you get an earth-moving permit for a project or--or a single--a single home. They're all the same. So--but I just wanted to make it clear

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that that was not misrepresented because at the time he got that earth-moving permit, we already had the construction permits for the easements.

ARBITRATOR BAKER: Also yesterday, and the first day for that matter, we heard the terms "fractionalization" and "fragmentation." And I've come to understand, I believe, that one of those is fully permissible, the other apparently may not be.

Would you comment on the Mussio plan to either fractionate or fragment or whatever you'd like to say about that.

THE WITNESS: Well, actually, that wasn't Mussio who came up with it. But my lawyer, Gavridge Pérez, is the one that actually did it. It wasn't Mussio that did that. The lawyer recommended that whole--and I'm not a lawyer. I'm not--I don't know the distinction between what--fractionalization or fragmentation. I mean, I don't know. I mean, I have no clue. And that's why I depended on lawyers at all times.

So, at all times I relied upon attorneys,
Costa Rican attorneys. I didn't just go out there

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and just do things because I want to do them. You know, we have a multi-million-dollar project. You have to be having--making the right moves and doing the right things and getting the right advice and getting the right legal work and getting the right professional work that you need done.

And we're not--I'm not going to be doing--like--like the earth-moving permit. I didn't need it. I didn't need to get it. Nobody would know it. But I knew it. And I said, "Look, I'm not going to do--I'm not going to--it's not worth doing something wrong and having problems with it.

Another thing I want you to point--to share with you is that Minor Arce testified yesterday. And--and I think--you know, they went into great detail about the September forestry report he had done for it. I ordered that out of an abundance of caution. I wasn't required to get that. I--we--but were starting the development in the--in that--in the Project. We were going to be starting it. And I wanted to know, "Hey, what is permit-able under law with regard to what trees can be cut down?"

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And--and so that's why that report--I commissioned that report by Minor Arce. And he told me. He says, "Look, any trees planted along the fence line can be cut. Any fruit trees, any planted trees, anything under 15 centimeters." And he was, I think, pretty specific with me in terms of what we could do.

And this--this notion--another--this notion that we cut 400 trees down illegally is another fabricated fake--fake news story that's been going around there. I don't remember seeing any pictures of huge amounts--of 400 trees cut down. In fact, on May--on May 15th, when the prosecutor, Mr. Martinez, came down to the project site two weeks after the INTA report was, you know, had gotten to us.

I thought we were going down there just--and I thought we were going to meet Mr. Martinez and he was going to say, "Look, based upon the INTA report, you know, we can't proceed because now we've got two"--think about this. You're attorneys.

We've got two contradictory reports, and he's trying to make a claim about--accusing me for a

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crime. Now we've got two contradictory reports. One from INTA saying there's no wetlands, which counsel said he couldn't understand why they did that.

Well, INTA is the professional. I mean, they're the professional organization. So-- and the MINAE report said wetlands. How can you proceed with a criminal case against the person when you've got two contradictory reports by government agencies that you asked for? I mean, it's mind-boggling. So--

But what I wanted to say, I remember asking the prosecutor when he said--and then he said--he had a group of--a team of MINAE people there. And he said, "We're going to--can we borrow some of your guys?" We want to go stake out the wetlands?"

I said, "What? Stake out what wetlands? Didn't you read the INTA report?"

And Mr. Martinez said--and that was translated--my attorney was there. And he said--and this is what he said to me. "I don't believe that report."

Now, I want you to think about that statement coming from the mouth of a criminal

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prosecutor. "I don't believe that report." Is the law based on a belief system, or is the law based on facts and evidence?

A prosecutor, one that's competent and operating the right way is--that's objective evidence. You don't have an option to not believe. You have to believe it. In fact, when we talked to Esaú Chavez, Manuel and I, and I was telling him all about this, and I showed him the copy of the April 2nd MINAE report that they needed to--before they cleared the land environmentally, and I said to him--Mr. Chavez--I said, "Mr. Chavez, did you get this report?"

"Yeah, we got that."

I said, "Did you believe it?"

Know what he said? "We have to believe it. We have to believe it. We have no choice."

But yet when Mr. Martinez gets a copy from a government agency that he ordered, he says he doesn't believe it? I mean, that's just mind-boggling.

Now, one more--in that same--I don't mean to belabor, but it's so interesting. I kept saying to

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him--he says--he started out, "You cut 400 trees."

I said, "Where's the 400 trees we cut? Show them to me. Where are they?" I kept insisting.

So, finally, he says--he takes us to the far end of the project. We walk from the end of the Project all the way to the road, which was a long way, all the way back. There was nothing there. Nothing. And it was pristine because we weren't even working back there.

So--so he--so I get back to the beginning where we started. And I was so frustrated. And Esteban Bermúdez was with me and Jovan. And I--I was mad.

I says, "Where's the 400 trees? Where's the 400 trees you said we cut?"

And so him and Mr. Picado--they got mad now. They got mad because I was calling them on "Where's the 400 trees?"

They go 50 meters into the property, and they go--they go like this (indicating). Okay. So Esteban and I walk in. And he points to a tree, and it's like this big (indicating).

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And I said, "That's a small tree." And here's what he says to me. And to get an idea into the mentality of this guy, he says, "Well, if you kill a small child, isn't that murder?"

And I said, "Are you relating cutting a small tree with killing a child?"

He says "Yes."

Now, what are you going to do with this kind of thinking?

ARBITRATOR BAKER: Well, I'm going to ask you a different question. That's what I'm going to do.

THE WITNESS: Okay.

ARBITRATOR BAKER: So what I want you to react to is a slide that I saw in Respondent's opening.

THE WITNESS: Okay. Which one is it?

ARBITRATOR BAKER: And if I could ask for this to be handed to the witness. It's not in the binder in front of you. But I want you to comment on this, please, so that the record is clear--

THE WITNESS: Okay.

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ARBITRATOR BAKER: --with your testimony.

Thank you.

So, what we have--this was in Respondent's opening remarks, and it's a chart which has three columns. And the first column is labeled--or headed as "Site," and then it has "EV" across the top, and then "Construction Permits."

It's a simple chart. If I get this wrong, I'm sure my friend will correct me. But it's--I take this chart to mean that the first condominium site--it says an EV was granted. Do you agree with that?

THE WITNESS: Sir, you know, why can't the Respondent put in dates here? Because there was--there was EVs--a number of EVs issued by SETENA. And when he was going through his chronological order that I saw, he left off a number--he left off a SETENA resolution. He didn't include that. He left off a--the November 15th SETENA resolution. He didn't even include that.

So without some kind of--the Condominium Section, unlawfully obtained, unlawfully obtained.

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This is--

Yeah. Yeah. I have it. Yeah, I've got it here.

MR. BURN: All right.

THE WITNESS: So--

ARBITRATOR BAKER: Well, you've anticipated what was going to be my next question after I had gotten on your answer on the EV. Because it seemed to me that there were a whole series of documents that took place at different points in time that had expirations, that had requirements for things to be done in certain periods of time.

But as you sit here today, you can't tell me, without having something in front of you, as to which ones were granted when and where for each one of the parts of the development?

THE WITNESS: Well, there was--there was numerous ones. Okay? And I'll tell you what I can recall.

ARBITRATOR BAKER: Okay.

THE WITNESS: 2004 SETENA resolution, 2006 SETENA resolution, 2008 SETENA resolution, 2010

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SETENA resolution, an April 2nd, 2008, MINAE clearance letter for the--for the EV that we got in--and when I say "resolution," it's an EV. Okay?

Because once the permit is--I call it a permit--is issued into a resolution, then at that point in time, according to Julio Jurado, it becomes a government order that everyone is required to comply with, all public and private institutions are required to comply with.

And the problem, as I said in my statement, is that none of the functionaries in the Costa Rica government complied with it.

And we have the testimony--you don't have to--and so--"Okay. David Aven is saying this. Don't--don't--you know, he doesn't know what he's talking about. He's"--you know.

But there's a guy that we got a statement from, Mr. Jorge Briceño from the Municipality, who dug deep into what was going on in Las Olas and even went to the TAA in San Jose to do his due diligence. And this is a guy that--and you probably read his statement. And what did he say? What did he tell

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the government functionaries?

"Everything you're doing is illegal, and it-and it even can cause civil and criminal penalties on you--on you--on you guys, and it could cause serious damage to the treasury."

What happened? Nobody paid attention to him. So, this is not David Aven saying it. This is not George Burn saying it. This is a guy in the government saying it.

If you look at Fernando Zumbado's statement. And he was an ex-president--an ex-foreign minis--I'm sorry--ex-housing minister. His statement--and I know--I knew him personally. Got to know him in 2006.

And I was working with him, when he was a housing minister, to put low income housing down into the Esterillos area. What did they do? He wanted to run for president. So, what do they do?

They falsely charge him with a crime, just like they did with me, and he had to resign. And that killed his ability to run for president and also killed his reputation.

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What did he say? Here's what he said. This is--this is a guy that was an ex-U.S. ambassador, ex-UN representative, two-time foreign minister and was going to run for president of the country, and they did the same thing to him as they did to me. They charged him falsely with a crime.

And here's what he said in his statement that I remember. "This kind of criminality has to stop because if it doesn't, it's going to really impair the ability of Costa Rica to attract foreign investment."

Now, these aren't U.S. investors saying this. These are seasoned Costa Rica dignitaries and high-ranking government officials. Well, Jorge Briceño wasn't high ranking, but Mr. Zumbado certainly was.

ARBITRATOR BAKER: Same discussion with--my understanding is that the construction permits were ultimately issued by the Municipality; is that correct?

THE WITNESS: That's correct.

ARBITRATOR BAKER: Okay. And to your

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knowledge, were construction permits obtained as required for each section of the development?

THE WITNESS: Yes, they were. Absolutely. And this nonsense about the Condominium Section unlawfully obtained. This is--this is just false. Easements and other lots. What does that X mean? I don't even know what this X means. It's not explained. It says "X."

ARBITRATOR BAKER: I think that means the allegation is that there were no EVs.

THE WITNESS: There what?

ARBITRATOR BAKER: That there were no EVs.

THE WITNESS: Well, they weren't required. The EV--and this is--look, this is not my rules. This is Costa Rica's rules.

If--if--we followed the rules. It's like--look, what is this business about if you follow the rules and you do the things the right way, they come along and say, "Oh, those weren't the rules"?

No. I mean, the lawyers we got advice from told us what we--what the rules were, and we followed them. And then when we followed them, they

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arbitrarily turn around and say, "Oh, that's a different interpretation. That's not what it means."

So I totally reject this kind of arbitrary, capricious decision-making where they can just arbitrarily--you know, look, when governments issue valid permits, the developers have to be able to rely on those permits. You can't make it a game of now you see it, now you don't. It's not a magic trick. You have to be able to rely on those.

You're spending millions of dollars developing a project, and it has to be stable. You have to have a stable environment, a stable government that when you know you follow the rules, you pay a lot of money to get permits, they're not going to be yanked away by some rogue prosecutor that for whatever reason decides he's not going to follow the government law.

ARBITRATOR BAKER: When for the first time did you become aware that environmental processes, in your words, could be used in order to cause previously issued permits to be canceled? Was that before or after you bought the property?

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THE WITNESS: Oh, much later. Much later.

We bought the property in 2002.

ARBITRATOR BAKER: So none of your due diligence before buying the property had shown you that there had been the use of environmental laws in the way that you're just describing?

THE WITNESS: I'm not sure I understood that question.

ARBITRATOR BAKER: I'm just trying to find out what you knew and when you knew it--

THE WITNESS: Oh, okay.

ARBITRATOR BAKER: --about the way in which the environmental laws you say could be used in a capricious fashion, if you had seen examples of that prior to making your investment. That's my first question.

THE WITNESS: Okay. Good--okay. I'm glad you asked that question. It started becoming apparent to me when--when Mr. Martinez came on the scene in February of 2011. And I want you to understand this clearly.

Because when he came on the scene in

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2011--something you've seen in this chronology--a couple things--a couple--things were happening. And there's a certain situation with respect to the project where it was.

In 2000--summer of 2010, Mr. Bucelato started making complaints. He's a competitor, so he made a complaint with SETENA. And other agencies. But SETENA.

So, what does SETENA to? SETENA and MINAE. So, what did they do, SETENA and MINAE? SETENA sends down an inspector to say, "Okay. We got a complaint."

And I'm going to tell you what. SETENA absolutely was the proper agency. I never had a minute's problem with them except one time when they canceled the permit in--in April.

But they came down and did the inspection. They issued the permit. I mean issued the resolution in--September 1st, 2010. They rejected Bucelato's complaint. And now that resolution was another law--another government order that the functionaries were--and public and private people were required to

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comply with.

Bucelato was a private person. Martinez was a public official. So they rejected. And specifically Bucelato is mentioned in that resolution. So, what happens? Five months later Bucelato takes his complaint to Martinez, the prosecutor, according to his statement, on February 2nd, I think he says. And he started a complaint.

And six days later he gets a complaint from, I think, Picardo. Luis Picardo. Or vice versa. I'm not sure which comes first, but one of--I think it was--Bucelato made his complaint on the 2nd and Picardo makes his complaint on the 8th.

Now, think about this? Is that a coincidence that Martinez got those two complaints six days apart?

And what did Martinez do next? The very thing he said he--on the February 8th, he immediately seized the SETENA files. Is that a normal reaction? Would you think somebody would call SETENA, would call me, would call somebody, talk, say "What's going

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on here?"

No. He immediately seizes the files, which

has to tell you something. So when he sees the files, what did he have to see? He had to see that September 1st resolution that SETENA rejected Bucelato's complaint.

Now, to me, a competent prosecutor, after seeing the resolution that SETENA issued on September 1st--and now Bucelato is making the same complaint to the prosecutor five months later. It would seem to me a competent prosecutor would say, "Mr. Bucelato, you made this complaint to SETENA five months ago. They--they ruled on it. They made a determination. They rejected your wetland complaint. So why are you--so I must tell you something. That do you know by law that you're required to comply with this complaint? You're a private citizen, and you are required to comply with government orders."

He didn't tell him that. He should have said, "And I am required to do that too."

What did he do? He takes Bucelato's complaints and runs with it, and he refuses to comply

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with a government order. This--he could have stopped it right there and then. If he would have let--if he would have let SETENA and MINAE would have let SETENA just carry out their prime directive in being the agency that was given the authority by the government

and the courts as the only agency that has the power to issue these EVs and they put the force of law behind it to--to make sure everybody would be required to follow it.

And I said in my statement what the government was trying to do is to stop the dysfunction that's happening--happened in our case that has led us here.

So if--if Mr. Martinez would have just followed the law and complied with his own law, we wouldn't be here.

ARBITRATOR BAKER: Thank you, Mr. Chairman.

PRESIDENT SIQUEIROS: Thank you, Mr. Aven.

I just have a few questions for you.

You describe in your statement--and in Claimants' Memorial there is a reference to the participation that each one of the Investors has.

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And roughly it reads that you have 28 percent of the investment whereas Samuel Donald Aven has 44 percent and others complete the 100 percent of that investment.

But I note in your statement that in the overall investment that has been placed in the

Project, you have invested roughly 50 percent of the amounts of the Project, and this includes the investments and the income earned by lot sales.

Because you state that your initial investment was \$797,000, and you made an additional \$4 million roughly. This is in Paragraph 32 of your First Witness Statement.

THE WITNESS: Okay.

PRESIDENT SIQUEIROS: How is it that if you have made a very significant amount of investment in the Project, way beyond what the other Investors you have stated have made, you have 28 percent of the investment only?

THE WITNESS: Well, this is a family-type business. My sisters, my brother, good friends, a cousin. And this was just a decision that was made

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among the family. And I--and I was going to--I was going to profit when the Project was developed, all right, when it was successful.

So this was a decision how we were going to, you know, divide it up between us. But my--the revenue I would really--I was really going to earn, as well as David Janney and Roger--my cousin Roger

Raguso was going to be doing the construction management and also the management of the facility once it was built.

And I was going to make my money on the back end. All right. And I was willing to put additional money up to get this thing going and get my--make my profits on the back end of the Project, which I thought--you know, I thought would be fair.

So, I didn't take--you know, I didn't take any money out. I didn't take a salary. I didn't take any money out of this for--for my services. I didn't make a penny on this. So I--and David Janney didn't either. Nobody did. None of the U.S. Investors took any money out of this.

All the money that we got from the sales was

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plowed back into the Project 100 percent. So this was just a family decision, how we wanted to divide the profits up. But, again--I know what you're talking about. But I was going to make my money on the back end, and, you know, I--significant money.

PRESIDENT SIQUEIROS: When you referred to "back end," could you please explain just--

THE WITNESS: When it was finished. When it

was developed.

PRESIDENT SIQUEIROS: When it was developed.

THE WITNESS: When it was developed, yes.

PRESIDENT SIQUEIROS: You would be making 28 percent--I understand 28 percent of the whole business profits on the venture?

THE WITNESS: Yeah. Well, that. But also, then, I was--I would--we had arranged what we call success fees, you know. In other words, when you're successful at something, you get paid for it. And so I was going to take my success fee, which was significant, on the back end.

And, like I say, this was just a family arrangement. And we were, you know, assigned to

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various interests based upon--

PRESIDENT SIQUEIROS: Do you recall what your success fee was going to be?

THE WITNESS: Based upon the profits. Based upon the profits.

PRESIDENT SIQUEIROS: Was there a specific percentage, or were you going to identify it later, or were the Investors--

THE WITNESS: Well, we were--I was thinking

in the neighborhood of 25 to 30 percent. But, look, everything is fluid. Everything is adjustable. Nobody knows what the future is going to be. So, you know, just like when the crash came in 2008, we had to adjust. So--but, you know, the plan was to--you know, between 25 and 30 percent success rate on the back end.

PRESIDENT SIQUEIROS: Okay. The other question that I have deals with what you were mentioning that you wanted to correct, and this was on the ownership of La Canícula--

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: --the company that has

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the ownership of the Maritime Zone property.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: My understanding, and I believe your understanding also, is that a Costa Rican national must have 51 percent--no less than 51 percent of the shares of a company which holds property in that area. Is this correct?

THE WITNESS: That's correct.

PRESIDENT SIQUEIROS: And you mentioned and you accompanied a copy of an agreement that was

executed with Ms. Paula Murillo.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: But as I read this agreement, then--perhaps it's my training as a lawyer, I--do you identify this--I'm not sure this is attached to the cross-binder in your case.

But it is the exhibit that your lawyers have submitted as C-242. And perhaps your counsel may provide a copy of that to you. But you may recall that this is the agreement whereby 51 percent of the shares of La Canícula presumably transferred to Ms. Paula Murillo.

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THE WITNESS: Yes. Yeah, I'll explain that. I mean, let me get a copy of it and I can look at it.

PRESIDENT SIQUEIROS: Yes. I think it would be best if you had a copy.

THE WITNESS: Okay. Thank you, Louise. Okay. What is your question on this now?

PRESIDENT SIQUEIROS: My question is, as I read this document, I see that there is no transfer of ownership because there's reference to a service that Ms. Murillo is going to provide. That she is not the true owner because she will neither receive

the income of any business gain and you have the opportunity at any time to replace her with another person without payment of any purchase price by appointing a different owner.

THE WITNESS: This is one of those quirky things in Costa Rica you have to understand. That they have this law that if you--foreigners invest--buy property on the Concession, that a foreign national has to have 50--own 51 percent.

But it's understood that this--and normally the foreign nationals are attorneys or people--you

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know, people, you know, you have confidence in. They won't steal it. But normally it's understood that they're just holding it. You know, it's like a placeholder. Okay.

And you generally have an arrangement where, okay, they're holding this as a placeholder, but they're holding it like--almost like in trust for the--the person that bought it, the foreigner that bought it.

So, you're right. I mean--but there's--this is the way they do things down there. I mean, this is--before--okay. So before Paula. Let me--let me

explain the chain of events in here.

The first person that owned the--the Concession, the 51 percent interest, was Juan Carlos. Because he's the--he's the guy that was handling everything for me from 2004 until--I mean 2002 until 2005 when I moved down there.

So--so he was the--he was the 51 percent owner. But, actually, there was a--I don't know if you saw the purchase agreement, the trust agreements, and all. Well, we did--Roger Guevara, who is

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the--one of our--one of probably the top attorneys in Costa Rican with the Batalla Law Firm, looked at that very carefully. And he--and I'm not a lawyer, and I'm not--you know.

But he critiqued the documents. And his conclusion was that at all times a Costa Rican held the--the interest in that. And he got--he had some other documents--he found some other documents somewhere that it shows that Juan Carlos held--was holding 100 percent in trust for the Investors.

And so what happens when--when-the way you register the ownership is there's a shareholder book in the corporate books. And you record the shareholders' interest

in those shareholder books. So, when you make a change, you just--you know, you have a meeting, and you have a resolution. This person is going to transfer their shares to another Costa Rican.

So this was just a letter of intent between Ms. Murillo and my--my--the U.S. Investors. But the actually event took place when Juan Carlos resigned and Paula's name was entered in the shareholder book

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as the 51 percent owner.

PRESIDENT SIQUEIROS: But when you transferred this to her, she did not pay a purchase price to you? It was, rather, the other way around. You would be paying to her for her services.

THE WITNESS: It's--yeah. Okay. Now for--exactly. So look. Of course, anybody that does this, it's just--I'm sure a lot of attorneys hold things in trust for their clients or they do things, you know, for their clients. And, you know, you charge them the service fee too. Attorneys charge them a service fee too. And we paid Juan Carlos a service fee for that, of course.

But it was always under the assumption--under the understanding that, look, the Costa Rican didn't put the investment in. The Costa Rican didn't put any money in. This was just a--one of the quirky things in Costa Rica law. And it's done commonly. This is the way it's done down there. We didn't invent this, the way things are done. We--again, another example of following the rules that are established in Costa Rica. So this is the

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way it's done.

PRESIDENT SIQUEIROS: I think there's a big risk there that Ms. Murillo or--indeed, if she were to predecease you if she decided she wouldn't sell or assign back. I think that--your attorneys, I think, weren't being very careful in advising you or you yourself because this would be almost a common-sense issue of the risks that you would have if Ms. Murillo decided not to, quote, sell back that percentage to you.

THE WITNESS: You're right. And that's why you have to be careful who you do business with and assign the 51 percent to.

PRESIDENT SIQUEIROS: Now, I--the final question. And I know you've been through a long day, and everyone is ready for a break. Just the last

question.

You had mentioned in a response to Mr. Baker about how the easements were separated from the rest of the property.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: As I understand, but,

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you know, please correct me, when the Property--and I'm referring right now to the several lots that were acquired that comprised the Property except the Concession. Let's leave the Concession aside--or the Concession area--the property owned by La Canícula aside.

The rest of the Property was comprised by several lots that you, through the companies that were established, acquired Inversiones Cotsco and--you acquired through different periods of time.

THE WITNESS: That's right. Correct. From Carlos Monge.

PRESIDENT SIQUEIROS: Correct. Why was it--and you mentioned how it was not Mr. Mussio but an attorney who carried out the separation--the--let me call it--because I think that's the word that has been used before--the fragmentation of the easement from the whole of the property, the development.

What was the business purpose of separating that area from the rest of the property? Was there a business decision, or was this the legal decision? Because there was not a project decision, as I

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understood you to say, because this was not the idea of Mr. Mussio but, rather, was the idea of the attorney.

THE WITNESS: Yes.

PRESIDENT SIQUEIROS: What was the business rationale?

THE WITNESS: Okay. That's a fair question, a good question.

PRESIDENT SIQUEIROS: Because it has been an issue in this arbitration. It's not--my question is simply because this is an issue that has been raised in the arbitration.

THE WITNESS: Absolutely.

So, getting back to your first--first observation. You're right. After we made the initial purchase from Carlos Monge, he had, I think, three more parcels in there that we--we bought.

And--and then later--I believe it was Juan Carlos. And they were in separate, you know,

cadastrals. And Juan Carlos then merged them into one--one property. So, we had this one property that was--that we bought from Carlos Monge.

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In discussions with the--my attorney, Gavridge Pérez--and I think maybe I had some discussions with Juan Carlos about this as well. But they said, "Look, you got road frontage all around the Project."

And the law in Costa Rica is if you're on a road that you can get access to, you don't--you don't need to get--to do extensive permitting processes with--with EV--EV process. But you can, you know, just come off of the main road, put a--put a--get a permit for that for whatever reason you want to get and--and build.

So that's why it was done. Because it was easy to get to along the main road, you could have access to these various lots. And you could--and the business plan was that you could develop these things fairly quickly because according to Costa Rican law now--you know, again, I want to stress that we followed the law.

This--we didn't do something illegal. I

mean, again, they're jumping on all this illegal stuff we did. But all of this was done with the
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advice of counsel. And so I'm relying on the attorneys down there. And the one document that the prosecutor showed me was from Rolando Laclé. And his father is a famous--they know him all around Costa Rica--famous politician.

And we were--and he--I said--I said, "Look, come up with a, you know, a plan for, you know, something." I forget what he--what I asked him to do but--it was years ago. But he came up with a formal plan of doing something on the Concession.

So--so the same thing with--with Gavridge Pérez. We were talking. And he said, "Look," he says, "the law is if you have property on the main road, you can subdivide it out, and you don't have to be concerned with the EV because it's along the main road."

And things along the main road--they have access to everything. They have access to electric. They have access to the road. They have access to the water. The water main runs along the road.

So it's not like you're developing something

on the interior where you have to put heavy

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infrastructure in like, you know, roads and underground electricity and sewage treatment plants and all of that--all of the rest of it.

So that was the--that was the motivation for that. It was--but it was based upon legal advice from an attorney. And as far as--as far as I was told, it was perfectly legal. And from what I've heard from our legal experts, and I think you'll hear from Mr. Ortiz later, but it was perfectly legal.

PRESIDENT SIQUEIROS: Those are the only questions I have, Mr. Aven. I don't know if counsel for--your counsel or counsel for Costa Rica have any follow-up questions on those that have been presented by the Tribunal.

MR. BURN: Not really a question, sir. But just for the record, when you took Mr. Aven to the document at C-242, you heard him refer to other related contracts. And just for your reference, those documents--there's a trust agreement which is at C-237, and there's the agreement for purchase which is at C-8.

PRESIDENT SIQUEIROS: Correct.

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MR. LEATHLEY: Nothing further from us, sir.
Thank you.

PRESIDENT SIQUEIROS: Thank you very much,
Mr. Aven. You are now released as a witness. And,
of course, you can continue to remain here in the
hearing room.

THE WITNESS: I want to thank the panel for
listening to me. And maybe--I apologize for any--any
things I did that was a little bit, you know--I don't
know--out of the way . But I appreciate your--

PRESIDENT SIQUEIROS: Nothing that anyone
else in your position would not have done.

THE WITNESS: Thank you. Thank you.

PRESIDENT SIQUEIROS: So should now be a
good time to take a ten-minute break?

MR. BURN: Indeed, sir.

PRESIDENT SIQUEIROS: Okay. Thank you.

(Brief recess.)

HAZEL DÍAZ, RESPONDENT'S WITNESS, CALLED

PRESIDENT SIQUEIROS: Okay. So, we continue
the Hearing, and we will now proceed with the first
Respondent witness of fact in this case, which is Ms.

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Hazel Díaz.

MR. BURN: So, just to avoid any

confusion--because obviously, Mr. Leathley needs to introduce the witness. But just to make the logistics clear, given it's our pack of materials from which the witness will be reading, the First Witness Statement of Ms. Díaz in its English and Spanish versions appear under Tabs 1 and 2; and the second will be much further down in the pack at Tabs 53 and 54.

PRESIDENT SIQUEIROS: Okay. Ms. Díaz, you have signed Witness Statements both in English and in Spanish. Could you advise the Tribunal whether you will be examined in English or in Spanish?

THE WITNESS: In Spanish.

PRESIDENT SIQUEIROS: In Spanish. Very well.

The Hearing, as you must have heard from the legal team of the Republic of Costa Rica, will be carried out in the following way: You will first hear some introductory questions from the legal team of the Republic of Costa Rica, followed by the

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counter-examination by the attorneys for the Claimant; and then you will have a recross that will be carried out by the attorneys for the other Party.

Then the Tribunal may have some questions. It could be during, but it could also be at the end of all the questions. If you hear a question that you do not understand clearly, you will have an option to seek clarification of the question.

When you answer, I will ask you to first respond to the question; then, if you have any additional comment, you can do so following your answer to the question.

Lastly, I would like to ask you--you will have on the right--find on the right-hand side of the table, there is a card--that one, yes--with a statement that we ask you to kindly read.

Please speak fairly close to the microphone, and--we maybe hear you well, but it has to be heard clearly also for records and for the Interpreters, who are translating your words into English.

Thank you.

THE WITNESS: Thank you very much. I

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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. Leathley?

DIRECT EXAMINATION

BY MR. LEATHLEY:

Q. Good afternoon, Ms. Díaz.

I would like you please to first confirm that the two Statements contained in this binder are yours, and are the ones that you signed during the process of this Arbitration.

A. Yes, indeed, they are my Statements.

Q. And I have a question, just one question, before handing over to the counterpart.

Could you explain a little bit about your role and what the ombudsman does of the Defensoría de los Habitantes?

A. Well, this is an institution that controls the legality in the Costa Rican public sector. Furthermore, we're responsible to ensure the respect of human rights of people in Costa Rica.

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Furthermore, we are a national institution for human rights based on the United Nations' principles.

In the institution, I'm responsible right now for the administrative management control; and at the time of the case under consideration, I had oversight over quality of life that, among other things, had to do with the environment, health, et cetera.

Q. Thank you very much.

MR. LEATHLEY: I have no further questions.

PRESIDENT SIQUEIROS: And a last request to

you. Because of there being simultaneous interpretation, if the question is in English, please wait to hear the interpretation into Spanish before responding. Otherwise, there is overlapping of the two languages, and it becomes very difficult for the Court Reporters and others.

Thank you.

MR. BURN: Thank you, sir.

And Ms. Woods, to my right, will be conducting this cross-examination.

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MS. WOODS: Thank you, sir.

CROSS-EXAMINATION

BY MS. WOODS:

Q. Ms. Díaz, I think I'm right in understanding that that you've worked in Defensoría your whole career?

A. Yes, indeed. I have worked at the Defensoría for 22 years now.

Q. You mentioned before that you are currently at the level of special advocate; and that's the case since 2004, if I'm not misunderstood?

A. Indeed. I have the level of special defense--defendants since 2004.

Q. So, it's fair to say that you're experienced in the general functioning of the Defensoría?

A. That is correct.

Q. And I know you've just touched on this a little bit with counsel for the Respondent; but just to confirm my understanding, that is to supervise independently the functioning of the public sector to ensure that the various administrative institutions carry out their roles and responsibilities in

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accordance with the applicable law.

A. That is correct, with applicable law, and also compliance of human rights.

Q. Thank you.

And you do that by examining the legality of the institutions' acts or, in some cases, omissions.

A. Yes, it could be an examination of the action or the omission and actions undertaken by public administration.

Q. And so, the end game with your investigations is to determine whether or not the administration has acted properly; and if not, to make recommendations to rectify the position?

A. Correct. What we want to do is determine that the administration's actions are legal.

Q. And in your First Witness Statement, you explain how this works in practice. So, the Defensoría, if it receives a complaint, will transfer that to the relevant institution, such as SINAC, for example, and request information from them?

A. That is correct.

Q. And you or the Defensoría have a period of

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two months in which to consider a complaint and respond, but there is a--an extension available if the case is complex.

A. That is correct. The Defensoría's law provides that in more complex cases, the defender, the defensor, can allow the office hearing the case to extend the period in order to resolve and settle the complaint that has been filed with them.

Q. Thank you.

Now, talking about the specifics of this case--and I believe you mentioned that you received Mr. Bucelato's complaint on the 20th of July of 2010; is that correct?

A. Not entirely correct. The Defensoría received the complaint on that date; but I am not the person within the Defensoría who directly receives requests for intervention of this office, but it is received by the admissibility office. That is the first one to receive and take care of such requests.

Q. Thank you.

So, as far as the Defensoría is concerned, I think we can agree that the two-month period in which

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to investigate and respond to the complaint would have expired on the 20th of September, 2010.

A. Indeed, if we consider the original date of the request, the period would have lapsed on the 20th of September.

Q. And there was no outcome within this period in this case, was there?

A. No. In this case, the Defensoría did not finalize its general investigation, because one of the conditions of the Defensoría to suspend its actions is that they be outstanding judicial case or a case that is presented to the courts, and there was a criminal case in this instance, which meant that we have to abstain from conducting the investigation and concluding it.

Q. Right. But I understand that that wasn't until much later.

A. Much later than the two months, you mean?

Q. Yes.

A. Yes. It was after the two months, yes.

Q. I think you say in your Witness

Statement--your First Witness Statement at Paragraph

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28, that the notification of suspension of the Defensoría's investigation was not sent to Mr. Bucelato, whom you refer to as the complainant, until the 28th of February, 2011?

We can look at that, if you like. That's your First Witness Statement at Paragraph 28.

A. Yes, if you'll give me a moment, please.

What I say in this Paragraph 28 is that we

informed the complainant--in this case, Mr. Bucelato--that the investigation was being suspended.

Q. So, this two-month period was extended, then?

A. Yes. In this case, and in many other cases, the Defensoría finds that the two-month period is insufficient and, therefore, it is extended until one can hopefully reach the truth of events; and otherwise, the necessary corrective measures are adopted during that period.

But it's a two-month period that even the judicial tribunals say that it is valid to seek an extension of that period.

Q. Thank you.

There's no evidence of this extension having

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been sought or granted in the papers that you've given us in this Arbitration, is there?

A. It's not--there's no written request for the extension. It's an institutional practice that, as the formalities continue, and--if the Defensoría de los Habitantes doesn't receive the document, then the period is automatically extended.

Q. Coming back to the Defensoría's role in transmitting the complaints that they receive to the various authorities involved--I just want to make sure I'm clear on the process.

We've already agreed that the Defensoría--not you--received Mr. Bucelato's complaint on the 20th of July, 2010, and it was transferred to your department--I think that's the directorate for the quality of life--sometime to the prior to the 7th of the August, 2010, when your colleague, Ms. Alejandra Vega, sent the initial letters to the TAA, the Municipality of Parrita, SETENA, and SINAC; is that right?

A. It is correct. Ms. Alejandra Vega, to who I assigned the research and the investigation,

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requested the transfer of request for information to the different institutions; and as the director, I verified those requests. This is the normal action of the Defensoría de los Habitantes; it's how we proceed usually.

Q. Thank you.

I'd like to look briefly at Tab 16 of the

bundle you have in front of me, so that's the Defensoría's letter to the Municipality of Parrita. And that's dated 7th of August, 2010.

And you can see, if you look at the top, the date, 7th of August, 2010. And it's addressed to--I believe that's the mayor at the time of the Municipality. It's from you, and it's copied to Mr. Steve Allen Bucelato. Do you see that?

A. Yes.

Q. And what you're doing here is you're notifying the mayor, as was your duty, of the contents of Mr. Bucelato's complaint. And we can see that from the third paragraph on the first page through to the end of that page, where you essentially summarize the basis of the complaint

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that's been made; is that right?

A. That's correct.

Q. And you note towards the bottom of that

page--I think it's the penultimate paragraph--that Mr. Bucelato had presented a complaint approximately three weeks earlier to the Municipality, and that it was received by Ms. Mónica Vargas; but that as of the date of your letter, she had not received a response.

Do you see that?

A. Yes, that's correct.

Q. So, at this point, your colleague, Ms. Vega, who was in charge of the day-to-day aspects of this file, if I understand correctly, she had spoken to Ms. Vargas about the complaint.

A. No, that's not correct. In this case, Ms. Vega was conveying the facts of which Mr. Bucelato had personally reported in the Defensoría de los Habitantes when he filed his claim.

The director to my office hadn't yet taken any action. All we're doing is conveying--it's to convey to the institutions the complaint as submitted by Mr. Bucelato.

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Q. Okay. Well, let's just look briefly at Mr. Bucelato's complaint to the Defensoría, which is at Tab 14 of the bundle in front of you, and that's R-40. And I'd just like you to look through this document.

I don't see any mention of Mónica Vargas in here, do you?

A. No, ma'am.

Q. So, in your letter of the 7th of August, which is the first communication from the Defensoría to the Municipality, which, according to you, just sets out the basis of Mr. Bucelato's complaint based on that complaint, there's a specific reference to Ms. Vargas having received it.

A. Well, if you know about the process--and here, I'm referring to the process within the Defensoría and how complaints are processed--Mr. Bucelato personally goes to the Defensoría to file his complaint.

What does the civil servant do, the one receiving that complaint, and what Mr. Bucelato is complaining about? They listen to him, they hear

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him. And that is what we are conveying in our report to the institutions.

To, that report, we attach the documents left by Mr. Bucelato's evidence. He's alleging two things. He says two things at first. First, there might be a violation to the response that the complaints were filed by the neighbors; and second, potential damages caused in the region through construction and other works.

What we do in this case, then, what the admissibility professional does at the Defensoría, what that person wrote down about the complaint at that time; and then the person to bring in the evidentiary documents. Then he brings these documents, and these are the ones that, together with the report, we convey to the other authorities or institutions.

Q. Thank you.

So, when you convey to the other authorities or institutions, you convey more than just the content of the complaint.

A. We convey both the content--it might be an

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oral or telephone complaint, because we also receive complaints by fax, by phone, verbally, orally, et cetera.

Plus, the evidentiary documents that the person attaches to the complaint that they're filing with the institution. All of this is to ensure that the public institution may see the context of the complaint filed by the neighbor.

In this case, what it further indicates is that no response had been received concerning the situation.

Q. Thank you.

I'd like to turn back to Tab 16 now, and that's your Defensoría letter to the Municipality of the 7th of August 2010 that we were just looking at. And if we can just look at the second page, at the very top.

I think we see that you notify the mayor that Mr. Bucelato's complaint has been admitted. And you go on to request a response to the allegations contained in the complaint within five working days. I think your exact words are--sorry. I'm translating

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from the Spanish, so--I'll let you tell me what your exact words are. But I understand it to mean that you're requesting that the Municipality remit to this institution--and by "this institution," you mean the Defensoría--the corresponding report; is that correct?

A. Yes, indeed. What we're doing in this paragraph is refer to what is provided in Article 20 of the Defensoría law, where it says that the civil servant has five business days to send the report that is being requested by the Defensoría.

Q. Thank you.

And if we go on, we see that that's not all

that you ask the Municipality, is it? You--you state that aside from referring to the acts that make up the aforementioned complaint, your account should contain the corresponding proofs and details of the following.

And then you go on to list five separate points, and I think you can see them numbered 1 to 5 in the letter.

Do you see that?

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A. Yes, I see it.

Q. Now I'd like to look at Tab 17, which is just the next tab along in the binder. And this is your letter of the same date to SETENA. And the letter is in your name again, and it's copied, again, to Mr. Bucelato.

Do you have that?

A. Yes, I see it.

Q. And, again, you're notifying SETENA this time, as was your GC, of the contents of Mr. Bucelato's complaint. And here, you've set out, actually, in--in full, I believe, the complaint that he made in bold; is that correct?

A. If you just allow me a moment to look at the document.

Q. Yes, of course. Take your time.

A. Incomplete, and why incomplete?

Q. I'm sorry. Perhaps you misunderstood my question, and that might be my fault; it was rather a long one.

All I want to ask you is: This is essentially you doing exactly the same thing to

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SETENA as you did to the Municipality in the letter we just looked at. You're transmitting the complaint to them.

A. Yes, correct. We're conveying the complaint to each institution, depending on their competences. For each institution, we have a series of questions that we ask, things that we need to know based on the institutional competences of each of the institutions, because, after all, they don't have the same.

Q. Thank you.

And then just on the second page at the top, I can see that, again, you inform SETENA that the complaint has been admitted by the Defensoría, and you request a response within five working days.

And then you go on to list, this time, three items that you would like SETENA to address.

Do you see that?

A. Yes, I see it.

Q. Thank you.

Now, if we could just turn to Tab 18. And this, again, is dated the 7th of August, 2010, is the

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same letter, and it's to the TAA. Again, a copy to Mr. Bucelato. And this is you doing the same thing again.

The only difference here, I believe, is that you--you simply ask the TAA whether they're already aware of the complaint and what actions they've taken; is that correct?

A. Yes, it is correct.

Q. Okay. And finally, very quickly, I'd just like to look at your letter to SINAC, which was also cc'd to Mr. Bucelato. Unlike the other letters, this is dated the 9th of December 2010, and that's at Tab 28.

Do you have that? Tab 28.

A. Yes, I do have it.

Q. This isn't the first letter that the Defensoría sends to SINAC about this complaint, is it?

A. No, it's not the case.

Q. So--I don't believe we have an earlier letter on record, so, if you could just point me to that.

A. No. What we have, you can see in the second
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page. It's a paragraph where it says, "According to our conversation with Mrs. Alejandra Vega on 9 December, please refer to a copy of the technical report carried out in the area."

What does this mean? It means by law, we can do all the necessary procedures that we require, formal and informal, for the investigation process, which means that Mrs. Vega communicated with this official, asking or requesting to find out if an inspection had been made in the area. That official says that it has, and--she says--oh, he says ask for me--ask for it in writing and then this way we will tell you. You see that is where this document arises, this document.

Q. Thank you.

So, you formulate your questions to the different institutions, I think you said a little bit earlier, based on their different competencies?

A. Yes. That is the case, depending on what we want to investigate. And based on the specific work or duties of each institution regarding the case we're working on.

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Q. So, for example, you'd ask the Municipality about construction permits and SETENA about an Environmental Viability.

A. Yes. That was the case, as you can see from the way we conveyed this.

Q. Now, you touched a little bit earlier on the admissibility process for complaints, and you mention it in your First Witness Statement. If I've understood you correctly, that's not something you had anything to do with.

A. In effect. It is an independent process of the Defensoría, which what it tries to do is to channel all complaints that are received continuously.

Q. Thank you.

I'd just like to look at the Notice of Admissibility, which is appended to your First Witness Statement. So, you'll find that at Tab 15, and that's R-43 for anyone else.

So, we can see that this is dated the 23rd of July 2010, three days after the complaint was filed. And the Notice summarizes the content of the

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complaint as it was received; correct?

A. Yes, that is correct.

Q. And then at the bottom of the page, we can see that after having analyzed the complaint, the director of admissibility resolves to admit the complaint. That's the penultimate paragraph on the first page.

Do you see that?

A. Yes, I do see it.

Q. The notice doesn't explain the admissibility

criteria or how those criteria were applied, though, does it?

A. No, that is not the case.

Actually, if you look at the law of the

Defensoría, it states that the Defensoría must receive complaints received by all--or presented by all inhabitants of the country. It only provides exceptions for specific cases that have to do with actions that may be before the judicial branch and with questions having to do with private--the private sphere, as well as topics having to do with election subjects or decisions that should be taken by a judge

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of the Republic.

Apart from that, all complaints initially

must be admitted. What we have done is actually to regulate this process through an internal manual that we have.

Q. Okay. So, aside from those specific exceptions that you just referenced, the admissibility process is essentially a bit of a formality?

A. Well, it's not a formality, because it is a process that allows the Defensoría to do a number of things. It can find out what are the main violations that are being complained about. It allows it to give an immediate response to the person about who will be receiving his or her complaint, before whom the person can request information, and also the administrative--internal administrative processes begin, which is also under a number of regulations and that allows us to report on that process.

Q. I appreciate that obviously when--what you're saying is that when a complaint is admitted, there are a number of processes or procedures that flow

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from that, and you've just described them.

But what I'm asking you is, in terms of the

decision to admit a complaint, unless it falls within those limited exceptions that you mentioned earlier, it is, essentially, a formality.

A. Well, I don't have the power to refer to that. It would be the advocate who would--this is a personal decision, where this is delegated to the office or director of admissibility, who's the only one who can admit the complaint themselves.

Q. Okay. So, we have no way of testing that with you or by reference to this notice of admissibility.

A. That's correct.

Q. Now, we just talked a little bit earlier about how Mr. Bucelato's complaint was received on the 20th of July 2010. I just want to look again at the complaint in a little bit more detail, and that was at Tab 14, R-40.

And I'd just like you to look at the signature block, where it says, "Muchas gracias," and it's signed by "Los"--excuse my pronunciation--"Los

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Vecinos de Esterillos Oeste e," the Neighbors of the City of Oeste .

A. Yes, in effect.

Q. There are around a dozen signatures underneath that?

A. Yes. 12 signatures, yes.

Q. And those signatures don't include Mr. Bucelato, do they?

A. In effect, they do not include that name.

Q. But all of your letters that we've just looked at sent on the 7th of August 2010 and the one on the 9th of December 2010, they're all copied to him.

A. Yes, that is the case.

I would like to remind you that who came to the Defensoría to bring the complaint. It was Mr. Bucelato. And what he brings are the different steps that the community had taken that have not received the reply; but in addition, he brings before the Defensoría an alleged environmental damage.

So, our obligation is to determine if this was happening or not.

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Q. So, there are interactions between the Defensoría and Mr. Bucelato that are not recorded in the documents.

A. Well, the first interaction is recorded. We have a system at the Defensoría that records these first interventions, which is when he came to bring the complaint. That is recorded.

And then any other intervention that happened within the administrative file of the Defensoría would--could have been when he came with a neighbor and wanted to consult to see where his file was. Well, there, there will also be a note in the file that states this person came to consult on his affair.

Q. Well, we haven't seen any notes in any files. So, are there such notes? And if so, where are they?

A. The administrative file of the Defensoría may include margin notes--that is, the physical file includes this margin notes, where the professional in charge of the investigation brings--or has a chronology of the actions taken. So, that when the case is seen--well, it is something independent. The

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professional is carrying out an investigation, and

that investigation, which we, and I as the director, also must respect, generates a number of actions that the person himself or herself will take note of as formal or informal actions.

Q. And did you provide these physical files to Respondent's counsel in this Arbitration?

A. Well, the files of the Defensoría are public. Anyone can have access to these files. There's no secret there.

(Overlapping interpreter channel with speaker.)

BY MS. WOODS:

Q. I'm sorry. I just said that would include the notes that you were referring to, the notes in the margin, I think you said.

A. Yes. These are notes that are in paper and pencil, saying: I called so-and-so. This person did not answer. I did such and such. There was no answer. These are the notes that any professional does during an investigation. But this is perfectly normal. It's normally--that is normally in any file,

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and in this case, it is in the Defensoría's file.

Q. I'm just going to ask you my question again.

Did you provide these physical files to the Respondent's counsel?

A. We supplied the information to the Ministry of Foreign Trade, which is the one that has led this process of Costa Rican institutionality, and they, through the Ministry--

THE INTERPRETER: Can you go a bit slower, please?

THE WITNESS: Yes. And they, through the Ministry, had access to the document.

BY MS. WOODS:

Q. Is that COMEX you're referring to?

A. Yes, in effect.

Q. And that's the files, the file--the physical files themselves, the documents? You gave them to COMEX?

A. Well, a certified copy of the administrative file was given, the file that is at the Defensoría.

Q. The one that you just said had all of those notes in the margin?

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A. Well, let's see. What I'm trying to say here--maybe, if I may, I may elaborate on this explanation, what I'm indicating is that in the investigation that the advocate's

investigator does, it's very likely that within the investigation, in his or her documents, she takes notes. If one day he called someone, if that person did not answer, that must be--so, if he took notes on the margin, they must be there.

This is not something that I need to follow up on, if he did or--if he did take notes within the file or not. That file--that is, the person may work on it. He may generate those notes that will allow him to then find documents and resolve issues more easily.

Q. Perhaps you misunderstood my question. I wasn't asking if you followed up with other people within Defensoría to see if they took notes and put them on the file.

I was asking you if the file that you referred to earlier that would contain these notes was given to COMEX or the Respondent's counsel in

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this Arbitration.

A. The administrative file was provided. That is, a copy was provided, in effect.

Q. Turning back to--

PRESIDENT SIQUEIROS: If I may, let me just clarify because I've been listening to both the

question and the answer, and I think there might be a misunderstanding. I'll address the question in Spanish.

The question is: If the file with notes on the margin was provided, this would presuppose that the file includes certain notes; however, from what I understand from what has been said here, it's not that necessarily that file had notes.

So, if that file had no notes on the margin, that must be clarified to the attorney, because she has the impression that you stated that there were notes on the margin in this file.

So, it wasn't quite clear if the notes were there or not, and if your comments make reference to this specific file or that once in a while files have notes.

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THE WITNESS: Thank you very much for that clarification. In effect, I will try to then reply in greater detail.

The administrative file, of which a professional is in charge in general, that as a whole was photocopied, provided, and certified and given to COMEX.

However, if that file--I'm not saying that that file specifically had notes. I'm saying that if there had been--were notes there that the professional put down in the file, they would be there. I'm not saying that I reviewed it and that I can suggest, in effect, the file had notes in the margin. What I'm saying is that if the file did have notes, they would be there. They're not put anywhere else.

MS. WOODS: Thank you, sir.

BY MS. WOODS:

Q. So, if we were to proceed for a second on the basis that perhaps there are no notes relating to conversations with Mr. Bucelato in the file, because we haven't seen any, how did you know to write and

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copy to Mr. Bucelato on the 7th August, 2010, when he's nowhere to be found on this complaint?

A. Well, I repeat that Mr. Bucelato was a person who appeared at the Defensoría to present the main complaint.

The first thing we ask a person when they come to bring a complaint is that they leave their address where we can communicate with him.

Otherwise, how can he find out about the stage of the process? That's what Mr. Bucelato did; and from then on, our legal obligation is to send him a copy of all interventions that we do, of all actions carried out.

Q. And if we can just look at the body of this complaint, it's largely about the existence of a supposed wetland at Las Olas that was allegedly impacting wetlands through an illegal construction; is that correct?

A. Yes, in effect, that is one thing; the other, the possible floods that had happened in some houses in the area. And in one way or the other, they're asking the--the institution make a decision on that.

Q. Thank you.

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Now, at Paragraph 22 of your First Witness Statement, you also mention that the Defensoría received a note signed by several neighbors of the project on the 23rd of November, 2010.

I can take you to your Witness Statement, if you like, but it might be easier to just go straight to the document that I'm talking about, which is at

Tab 24.

So, we can see that this is addressed to SINAC, and it's on the headed paper of the San José law firm called "Jimenez" (in Spanish, [y Asociados]); is that correct?

A. Yes, it is correct.

Q. And the date of this letter is the 18th of November, 2010, almost four months after Mr. Bucelato's initial complaint.

A. That's correct.

Q. And this time, the group of individuals that signed this included Mr. Bucelato.

Do you see that?

A. Yes. It is the last name there.

Q. And if you look at the first name, Franklin

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Carmiol, do you know who he is?

A. No, I don't.

Q. And Rosemary Chamberlain, who's the third name on the list, have you ever met or spoken with her?

A. I've not spoken to any of the people who are in this list. Never.

Q. And if you go to the bottom of the letter,

you can see that the Defensoría, SETENA, the legal department of the Ministry of Environment, and the Environmental prosecutor, are all copied.

Do you see that?

A. Yes, in effect, I see it here, the copy to each one of these institutions.

Q. Now, I'm afraid we don't have an English translation of this document, so, for the purposes of the transcript, I'm just going to ask you to read from where it says "Nosotros" all the way to the end, where it says, "David Aven," please, if you would.

A. Okay. We--the signatories, we come before you for your good offices to request if the attached document that makes reference to the following:

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"SINAC Report 67389RNVS-2008, National Wildlife Refuge Area of Conservation, Esterillos Oeste."

It is an official and valid report or document given that the signature of the people who sign it show great questions, especially--or after having consulted biologist Gabriel Quesada Avendaño, who indicated categorically that it is not his signature and he has never issued said report, and the signature of Mr. Ronald Vargas Brenes, comparing it with the signature on other documents, does not appear--seem

to be his signature, closed parentheses, as well as the numbering of the report and the type of report--

(Overlapping speakers.)

THE WITNESS: We believe it is not consistent with the sequence--the numerical sequence of SINAC.

And finally, as far--in addition, and as far as we know, there is no regional office in Esterillos Oeste. This alleged Report that we attached has been the basis for SETENA granting an Environmental Viability to the residential condominium project, Las

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Olas, Administrative File Number DI-1362-2007-SETENA on behalf of Cotsco--Inversiones Cotsco C & T, S.A., represented by Mr. David Aven.

BY MS. WOODS:

Q. Now, I'm sure you've heard in the context of

this Arbitration about an allegedly forged document. This complaint is about that document; right?

A. Yes. In effect, this complaint refers to

that.

Q. There's no mention of flooding or alleged wetlands or illegal construction.

A. In effect, that is not mentioned.

Q. And on the basis of this complaint, you immediately wrote to SINAC, requesting an explanation?

A. Yes, that is the case. We must bear in mind that we have an investigation that has been opened for which require all the elements that will allow us to determine if there is others--there is no irregularity by the administration.

In this case, this matter, on--to which this document refers, is related to the investigation that

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we were carrying out.

For us, it was important to find out if the

administration was aware of what the inhabitants told them and what actions had been taken.

Q. So, if I've understood you correctly, you say

this was related to your investigation. You viewed this complaint as part of the same investigation that you were already conducting?

A. Yes, that is the case.

Q. Even though the subject matter is completely different?

A. In an investigation related to any human right, we can find a whole breadth of interrelated subjects.

In this case, environmental--in the environmental area, we have to see what the inhabitant asks and what is the relationship that can be generated on the basis of the investigation.

In this case, they let us know about the fact that there is an administrative complaint; and what we ask is, was this complaint admitted or not? Do we need to consider it in our investigation in

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doing the substantive analysis, or do we not consider it, or is it something different?

Q. I think you mention in your First Witness Statement that you have a Master's in Environmental Law; is that correct?

A. Yes, that is correct.

Q. But your main professional experience has been in administrative law issues.

A. Yes, I do have experience in administrative law and governance and human rights, and subjects also relating to environmental law.

Q. I see from your personal website or blog that you take a particular interest in human rights.

A. Yes. I am a university professor of human rights.

Q. Is that what drew you to the Defensoría or is it, perhaps, the other way around; that as a result of that career focus, you became more interested in those sorts of issues?

A. Well, actually, I became--I went into the Defensoría because I was really fascinated by the idea of improving Costa Rican institutional; and

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once I found out about human rights, as happens to most of us, it's impossible not to fall in love with that.

Q. And the fact that the Defensoría's role, as you described, is to ensure the proper functioning of the different public institutions and to make sure

that they're adjusted for legality, morality, and justice, that's--that's important to you?

A. Yes. In effect, that is the essence of the actions of the Defensoría and of mine as an official there.

Q. And the Defensoría essentially does that by keeping an independent watch over the various public institutions and passing recommendations to improve their compliance with Costa Rican law; correct?

A. That is correct, on that basis and on the basis of the other work the Defensoría does, which has to do with education regarding human rights.

Q. You described the Defensoría as a court of conscience in Costa Rica. By that, do you mean that it exists to hold institutions to account on behalf of Costa Rican citizens and other citizens in Costa

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Rica?

A. Well, I would like to clarify that I do

not--I'm not the author of that description. The Defensoría is a kind of ombudsperson. What they do is do mediation. They are a channel to improve relationship between public administration and people in general.

Q. And that's because it's important that public authorities comply with their legal obligations and that citizens' rights are respected.

A. Yes, that is the case. In effect, the center of the actions of public administration are people and the protection of their rights.

Q. So, when individuals are dealt with by State entities in a capricious way, that could have negative consequences. That's something that you would try and avoid.

A. I didn't quite understand your question. Maybe if you could rephrase it.

Q. When individuals are dealt with by State entities or public institutions in a poor way, a capricious fashion, that can have negative

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consequences for those individuals. You would agree with that?

A. Yes. If I understand what you're trying to say, is that the action of administration is--is incorrect or does not comply with the law, that will have an impact on people's rights. Of course, it will.

Q. So, if bribery were allowed to go unchallenged, for example, that would pose a serious risk and threat to a transparent and predictable environment?

A. Yes. Bribery is a crime. It is a crime and, as such, it has to be punished. And, of course, it has to be denounced.

Q. So it's important that as part of a stable and predictable regulatory environment, each State institution does what it's intended to do.

COURT REPORTER: I'm sorry. I didn't hear the interpretation. Please repeat.

BY MS. WOODS:

Q. I just asked you--

MS. WOODS: Are you getting that?

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BY MS. WOODS:

Q. I just asked whether it's important that as part of a stable and predictable regulatory environment each State institution does what it's intended to do.

A. Yes. That is called governance, that every institution complies with its role, the role that

corresponds to it.

Q. So that is that institutions must respect the limits of their jurisdiction, their authority?

A. The institutions should act within the limits of their competencies.

Q. And as we've already discussed, your knowledge of the different responsibilities of the various institutions--SINAC, SETENA, the TAA, MINAE--shaped the questions that you asked each of them in your letters of the 7th of August 2010?

A. Those questions were the questions that were proposed by the professional that was investigating the case and that this director had endorsed. Because they were part of the investigation, and it was the strategy of the investigation that the

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professional had with regard to the case.

Q. Presumably, you endorsed those questions

because you agreed with them. So, for you it was logical to ask SETENA about the Environmental Viability and, for example, the Municipality about the existence of construction permits. You were recognizing the limits of each of those institutions' remit and authority.

A. The questions that are initially posed if you look at what was forwarded from the Ombudsman--well, first, it's "Tell me everything you know about this case." And then there are questions that for us as investigators are important in many cases to actually--in addition to everything they can tell us, well, to ask them guiding questions, and those are the questions that we pose.

Q. Right. And I think this is just quite a simple question, and I don't think we'll disagree.

But you used your knowledge of the various institutions' different roles within the Costa Rican government to inform how those questions were put.

So, Ms. Vega said to you, "I'm going to
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write this letter to SETENA, and I'm going to ask them about an Environmental Viability." And that seemed sensible to you because that's what SETENA deals with?

A. Indeed. The questions that were posed were endorsed.

Q. Are you aware of a SETENA resolution dated the 1st of September 2010 that relates to the Las Olas case?

A. Is it a document that is in this file?

Q. Yes, it is. I was just asking if you were aware of its existence.

A. We transmitted documents to SETENA about the case, and then they forwarded us to--forwarded us a report where the secretary had indicated that they were going to make an inspection. They send us a report that was done in the area. I don't know if you are referring to that report.

Q. No, I wasn't. Let's turn to Tab 44. Do you have that? So, this is a SETENA resolution. And you can see in the heading it's dated the 1st of September 2010. And I imagine this is what--in terms

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of the form, this is what most SETENA resolutions look like.

If you just glance down the page under the first heading, "Resultando," which I think means "whereas," the sixth item in that list. And you will say it says "sexto." If you would just read that out for the transcript, please.

A. "6: On 13 August 2010, Letter Number 08949-2010-DHR is received by which the Ombudsman forwards an environmental complaint to the Secretariat against the Las Olas residential horizontal condominium project, Administrative File

Number D1-1362-2007-SETENA, filed by Mr. Steven Allen Bucelato, resident of the area of the Project due to the impact on the wetlands and lakes in the area as well as the vegetation in the place because there was land that was filled and also the trees on the site were cut."

Q. That's a reference to your letter of the 7th of August 2010 to SETENA; correct?

A. Yes. SETENA refers to the request for the report that we had sent to SETENA.

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Q. And if you could just turn over to page 5 of that resolution, please, and you'll note this is now the substantive section of the resolution where the Plenary Commission resolves. And if you could just read Item 1 which is "Primero."

A. "First, the complaint filed by Mr. Steve Allen Bucelato has been dismissed. Mr. Bucelato is a resident of Esterillos Oeste. This has been dismissed because it's considered that in the area of the Project there are no movements of soil nor was there evidence that there were bodies of water, lakes, or wetlands in the area of the Project or in the areas that are adjacent to it."

Shall I continue?

Q. If you could just turn over the page. And on the next page there's Item 6. If you could just read that one out loud.

A. "6. Notified the Office of the Ombudsman with respect to Letter Number 08949-2010-DHR.

Q. So here the SETENA Plenary Commission resolves, amongst other things, to dismiss Mr. Bucelato' 20th of July 2010 complaint on the

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basis that there's no evidence of land movement, bodies of waters, lakes, or wetlands on the site?

A. Yes. In keeping with the resolution that you have mentioned, yes.

Q. You don't mention this resolution in either of your witness statements. Presumably, you received it at the time, though.

A. Let me see. Let's recall. What we had at the Office of the Ombudsman was an open investigation, an investigation that was closed because there was a suspension, what we call a suspension because there's a pending judicial proceeding. So, we don't go in to look at the analysis of the proof. In other words, this has been

suspended.

Q. I asked you if you had received the letter the--sorry, the resolution. It clearly says at Item 6, as we just saw, that SETENA was resolving that you be informed at the Defensoría of the contents of the resolution. Did you receive the resolution at the time?

A. No. In the file of the Ombudsman what we
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have is the notification that the--that SETENA makes where they send us the inspection done in the field. But--perhaps later, yes. We were notified but not at that point.

Q. That's interesting because you seem to have received other communications from SETENA. But we'll move on.

I just want to ask you whether you'd agree with me that for the purposes of an investigation, such as the one that you knew that was ongoing into potential wetlands and unlawful construction at Las Olas, this would have been a significant document.

Because here it shows SETENA, the agency with jurisdiction over Environmental Viability permits, dismissing Mr. Bucelato's complaint on the basis of a lack of evidence.

A. At this time I don't have the competence or am I authorized to refer to this for the following reason, the investigation of the Ombudsman's Office is suspended. It's not closed.

So the Ombudsman's Office--when the judicial proceedings finalize, we could take this up again at

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the administrative level. So I cannot issue an opinion about this. I am not the Director of Quality of Life now, and I don't have the competence to refer to these matters.

Q. Perhaps I could ask you in a slightly different way. In your--so not in your capacity as Director of Quality of Life. As someone with experience working in government institutions and with a vast knowledge of how these different institutions interact, would you not agree with me that a resolution from SETENA, the agency that has jurisdiction over Environmental Viability permits, dismissing in its entirety a claim about wetlands made by Mr. Bucelato, the very same claim that was the subject of the Defensoria's ongoing investigations and multiple other investigations--would you not agree that that is significant?

A. I am here to refer the facts that relate to me in the investigation. I think everything else is speculation.

: I would ask the Tribunal if you have to

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answer the question that has to do with technical criteria and that don't have to do with the file.

PRESIDENT SIQUEIROS: It seems that the witness statement you gave is with respect to the facts. The cross-examination should refer to, of course, the facts.

MS. WOODS: I have no further questions.
Thank you.

PRESIDENT SIQUEIROS: Mr. Leathley.

MR. LEATHLEY: No. We have no further questions. Thank you.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT SIQUEIROS: Pedro?

ARBITRATOR NIKKEN: I have a question, Ms. Díaz. Throughout this did you receive any pressure from any political or social sector to lean one way or another, or did the Ombudsman not have to defend itself from any undue interference?

THE WITNESS: Well, this case was a very

fluid case with regard to its processing. We weren't pressured by anyone. We began it. We asked for the reports. We were sent the information. And we

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suspended it when we found out that there was pending judicial proceedings, but there was no problem with the ordinary processing of the case.

PRESIDENT SIQUEIROS: Mr. Baker.

ARBITRATOR BAKER: Is there anything in the investigation, to your knowledge as the Ombudsman in this case, that is different from the way you would have treated any other environmental complaint?

THE WITNESS: No, sir. This is a typical case of environmental complaints that are received. There is usually community participation. People complain about issues that is really their belief about what's happening, and we don't find anything really in particular about this case that's different.

ARBITRATOR BAKER: Let me see if I understand. Is it the pendency of the criminal matter itself that deprives the Defensoria of its ability to act? Is that your testimony?

THE WITNESS: Yes, sir, in as much as our law hinders us from the beginning or we have to

suspend as soon as we find out that there is any

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pending legal matter. We cannot in a parallel way be dealing with this matter if it is in our court system.

ARBITRATOR BAKER: So the Defensoria doesn't do anything to police or investigate complaints against prosecutors or judicial officers, for instance?

THE WITNESS: In the case of the judicial branch, the competencies of the Ombudsman's Office--well, if there are violations of administrative regulation, yes. But not--we never interfere in what is judicial--at the judicial level.

ARBITRATOR BAKER: So, hypothetically speaking, without regard to anything that may or may not have happened in this case, if a prosecutor exercises his discretion to commence a criminal action against someone, that has the--or always has the follow-on effect of depriving you of jurisdiction to do anything, even if it turns out that that prosecutor was off on a frolic of his own and did not bring a case in a proper way. Do I have that right?

THE WITNESS: I don't know if I understood

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the question in this case. Could you repeat it, please.

ARBITRATOR BAKER: I'll give you a silly example to maybe illustrate the point.

Let's say that I'm a prosecutor and I decide that anyone that has blond hair is automatically guilty of something and so, therefore, I charge them with that, which on its face is pretty silly and stupid. But that would deprive you if there was an ongoing complaint just because I have done that, right, of jurisdiction to act?

THE WITNESS: Well, directly, no. What could eventually happen is that we could let the judicial branch know that internally that there should--there should be a supervision process of their own officials because that exists. Well, that we--this is not our competence or jurisdiction, however.

ARBITRATOR BAKER: Okay. So, in my crazy example, the fact that the prosecutor, or I as prosecutor in my example, decided to bring an action for whatever reason has to be investigated only by

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the judicial branch itself?

THE WITNESS: Yes. If you are analyzing the action of the official, we cannot intervene. For example, if there is a judicial officer--I'm going to give you also a crazy example--who applies torture, of course, the Office of the Ombudsman could intervene to protect someone's human rights, the person who might have been tortured.

But within the discretionality and a hearing, for example, or being involved in a judicial matter, we cannot intervene unless there are procedural steps that we could take.

ARBITRATOR BAKER: Okay. Thank you. Chairman, thank you.

PRESIDENT SIQUEIROS: Mr. Nikken, do you have another question?

ARBITRATOR NIKKEN: Yes, there is something else. I suppose that SETENA is under the jurisdiction of the Ombudsman's Office.

THE WITNESS: Yes.

ARBITRATOR NIKKEN: If the proceedings have been suspended at this point, when they are

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re-established, Mr. Bucelato, could he file a complaint about what SETENA decided?

THE WITNESS: Yes, Mr. Bucelato could complain or Mr. Aven or any inhabitant.

ARBITRATOR NIKKEN: But since Mr. Bucelato's complaint was dismissed, could he go to the Ombudsman's Office and complain? When does this end? That's my question.

THE WITNESS: Well, the first thing we try to assure--well, is we want the public sector--Public Administration to respond in a timely way. If Mr. Bucelato complained again, he'd have to do this with SETENA.

And SETENA would respond and say, "This issue has been answered with this resolution." He will go to the Ombudsman's Office. "Well, SETENA said it's been resolved."

Well, we can say, "Yeah, it's been resolved."

There's been no omission on the part of the Public Administration. The only possibility is that he could go to SETENA to reactivate the process.

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SETENA doesn't respond. And then he goes to the Ombudsman's Office and says, "My right to a response is being infringed." We're getting involved because of the fact that he has a right to be responded to not because of the matter itself.

PRESIDENT SIQUEIROS: I don't have questions, Ms. Díaz. You are released from this examination. Thank you.

So being a little before 5 to 6:00, I would ask the parties what they would propose for the rest of the day.

MR. BURN: Sir, we have, of course, had a discussion, Mr. Leathley, you, and I, briefly about needing to finish today at 6:15. Perfectly happy to begin with Mr. Martinez, if that's the preference, but equally happy to begin first thing tomorrow.

Again, I appreciate the difficulty. If we begin Mr. Martinez, it creates the overlapping evening issue. But from our side, there will be no issue either way.

PRESIDENT SIQUEIROS: Correct. For the record, you mentioned that we did have a

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conversation. Indeed, we identified that in following the procedural order establishing the timetable and concluding at 6:00 for this evening. We could not replicate yesterday's event when we went for an additional hour, a little bit over.

But, yes, considering that it is the turn of the Respondent to cross-examine the next witness, I would ask whether Respondent has a preference to started today or start and conclude tomorrow morning.

MR. LEATHLEY: Thank you, sir. Can I just consult because I'm being told something, and I didn't want to interrupt listening to you. So, I'd like to just--

PRESIDENT SIQUEIROS: Of course.

MR. LEATHLEY: Thank you.

(Pause.)

MR. LEATHLEY: Mr. President, I'm so sorry to interrupt. And this is purely--we don't feel strongly one way or the other. Just a thought, though. Given the lateness of the day, it might be more convenient to go all the way through in one session.

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And I know from our conversations, we're also going to have to be buying flowers and wine for perhaps our Reporters and Interpreters if we may squeeze more out during the course of the week given some other immovable milestones. So--

PRESIDENT SIQUEIROS: I see some smiles.

MR. LEATHLEY: We're entirely in your hands, sir. But our only consideration--perhaps it makes sense to do Mr. Martinez all in one session.

PRESIDENT SIQUEIROS: I think it does, especially for Mr. Martinez. So, we should, if the parties don't have an objection, start tomorrow.

MR. BURN: That's--for our side, that's absolutely fine. Just one point to put on the record. I think given his earlier comments today, Counsel for the Respondent already owes the Court Reporters bottles of wine and flowers.

PRESIDENT SIQUEIROS: And some flowers.

MR. LEATHLEY: Noted.

PRESIDENT SIQUEIROS: Should we then commence tomorrow morning at 9:00?

MR. LEATHLEY: Thank you. Yes, sir.

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PRESIDENT SIQUEIROS: Thank you.

Any issues before we conclude? There might be some on the part of Claimants.

MR. BURN: Just to say, as a matter of logistics, Mr. Ortiz when he is giving his expert testimony will give a presentation in Spanish, and I believe will--is happy to have cross-examination in English. But I'm sure there will be a bit of fluidity around that. But that's just to manage expectations.

PRESIDENT SIQUEIROS: Okay. You do not have an objection to that, Mr. Leathley?

MR. LEATHLEY: No objection. Thank you, sir.

PRESIDENT SIQUEIROS: So the presentation would be in Spanish. Cross-examination would, nonetheless, be in English. Okay. Fine.

Don't have a problem with that?

ARBITRATOR BAKER: Nope.

PRESIDENT SIQUEIROS: That's fine.

(Whereupon, at 5:57 p.m., the Hearing was adjourned until 9:00 a.m. the following day.)

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