

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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

Between: :

DAVID AVEN, et al.,

:
:

Claimants,

: UNCITRAL Case No.
: UNCT/15/3
:

and : : THE REPUBLIC OF COSTA RICA, : : Respondent. : -

-----x

Volume7 HEARING ON JURISDICTION AND MERITS

February 7, 2017
The World Bank
700 18th Street, N.W.
J Building
Conference Room JB 1-080
Washington, D.C.

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

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

B&B Reporters
001 202-544-1903

Page | 2040

ALSO PRESENT:

MR. FRANCISCO GROB D.

Secretary to the Tribunal

Court Reporters:

MS. MICHELLE KIRKPATRICK

MS. MARGIE DAUSTER

Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)

B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903
SRA. ELIZABETH LORETA CICORIA
SRA. MARTA MARÍA RINALDI
D.R. Esteno
Colombres 566
Buenos Aires 1218ABE
Argentina
Republic of Argentina

Interpreters:

MS. JUDITH LETENDRE
MS. KARIN RUCKHAUS
MS. KELLEY REYNOLDS
MS. STELLA COVRE

B&B Reporters
001 202-544-1903

Page | 2041

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

MR. ALEXANDER SLADE
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
MS. CAROLINA ABREO-CARRILLO
Vinson & Elkins LLP Attorneys at Law
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
United States of America
MR. RÓGER GUEVARA VEGA
Batalla Salto Luna
San José, Costa Rica
MR. ESTEBAN DE LA CRUZ BENAVIDES
Batalla Salto Luna
B&B Reporters
001 202-544-1903

Page | 2042

San José, Costa Rica
B&B Reporters
001 202-544-1903

Page | 2043

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

MR. CHRISTIAN LEATHLEY
MS. DANIELA PAEZ
MS. LUCILA MARCHINI
MR. MICHAEL KERNS
Herbert Smith Freehills New York LLP
450 Lexington Avenue, 14th Floor
New York, New York 10017
United States of America
MS. ADRIANA GONZALEZ
MS. ARIANNA ARCE
Ministry of Foreign Trade of Costa Rica

(COMEX)

B&B Reporters
001 202-544-1903

APPEARANCES (Continued):

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

MR. PATRICK W. PEARSALL
MS. NICOLE C. THORNTON
MS. TERRA L. GEARHART-SERNA
Attorney-Advisers,
Office of International Claims and
Investment Disputes
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800
United States of America

B&B Reporters
001 202-544-1903

CONTENTS

PRELIMINARY MATTERS.....2046

WITNESSES:

JORGE ANTONIO BRICEÑO VEGA

Direct Examination by Mr. Burn.....2050
Cross-Examination by Mr. Leathley.....2062

MANUEL A. ABDALA

Direct Examination by Mr. Burn.....2120
Cross-Examination by Mr. Leathley.....2151
Redirect Examination by Mr. Burn.....2207
Questions from the Tribunal.....2214

TIMOTHY HART

| | |
|---|------|
| Direct Examination by Mr. Leathley..... | 2238 |
| Direct Presentation..... | 2239 |
| Cross-Examination by Mr. Burn..... | 2267 |
| Questions from the Tribunal..... | 2331 |

CLOSING ARGUMENTS

ON BEHALF OF THE CLAIMANTS:

By Mr. Burn.....2339

ON BEHALF OF THE RESPONDENT:

By Mr. Leathley.....2364

B&B Reporters
001 202-544-1903

Page | 2046

PAGE

PROCEEDINGS

PRESIDENT SIQUEIROS: Good morning. Are we

ready to proceed?

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

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

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

PRESIDENT SIQUEIROS: Mr. Leathley?

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

One, in relation to the request from the Tribunal regarding the U.S. submissions. You'll recall where we left it. Mr. Weiler produced a large

document which we were reviewing, which we have.

B&B Reporters
001 202-544-1903

Page | 2047

1 2

3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

PRESIDENT SIQUEIROS: Okay.

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

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

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

PRESIDENT SIQUEIROS: And assuming the parties are in agreement, my recollection--although I may be

wrong, but my recollection is that this was a period--the timing that was agreed to by the Parties

B&B Reporters
001 202-544-1903

Page | 2048

1 2 3 4 5 6 7 8 9

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

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

MR. LEATHLEY: Thank you very much.

PRESIDENT SIQUEIROS: Okay.

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

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

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

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

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

PRESIDENT SIQUEIROS: I have no objection.

JORGE ANTONIO BRICEÑO VEGA, CLAIMANTS' WITNESS

Good morning, Mr. Jorge Antonio Briceño Vega.
B&B Reporters
001 202-544-1903

Page | 2049

1 2 3 4 5 6 7 8 9

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

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

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

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

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

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

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

THE WITNESS: Good morning.

PRESIDENT SIQUEIROS: Please bring the mic

Page | 2050

1 2 3 4 5 6 7 8 9

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

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

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

PRESIDENT SIQUEIROS: Very well. Thank you.

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

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

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

DIRECT EXAMINATION

BY MR. BURN:

B&B Reporters

Page | 2051

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

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

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

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

Is that all clear?

A. Yes. Right.

Q. Thank you.

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

1 2 3 4 5 6 7 8 9

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

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

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

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

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

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

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

Q. Thank you.

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

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

paragraph 9. Is that correct?

A. Yes, it's in paragraph 9.

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

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

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

A. That is correct.

Q. Thank you.

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

A. That is correct.

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

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

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

So, those two should be swapped around?

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

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

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

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

A. That's correct.

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

B&B Reporters
001 202-544-1903

Page | 2055

1 2 3 4 5 6 7 8 9

10

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

interpreters.

THE WITNESS: Thank you. Yes.

BY MR. BURN:

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

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

Q. Thank you.

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

A. No, just with regard to these issues.

Q. Thank you.

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

A. Yes. Correct.

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

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

B&B Reporters
001 202-544-1903

12
13
14
15
16
17
18
19
20
21
22

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2057

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

14
15
16
17
18
19
20
21
22

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

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

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

Q. Thank you.

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

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

B&B Reporters
001 202-544-1903

Page | 2059

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2060

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

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

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

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2061

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

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

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

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

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

And in that evaluation of the nine

B&B Reporters
001 202-544-1903

Page | 2062

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

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

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

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

CROSS-EXAMINATION

BY MR. LEATHLEY:

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

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

B&B Reporters
001 202-544-1903

Page | 2063

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

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

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

A. No.

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

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

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

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

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

A. No, sir.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2064

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

A. No, sir.

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

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

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

A. That is correct.

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2065

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

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

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

BY MR. LEATHLEY:

Q. Yes, sir.

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

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

Q. Okay. Thank you.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2066

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

didn't have any contact.

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

A. No.

Q. Or with Mr. Jovan Damjanac?

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

Q. How do you know him, sir?

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

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

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

B&B Reporters
001 202-544-1903

Page | 2067

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

Q. Thank you.

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

A. Probably that is the case.

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

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

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

And furthermore, Parrita is a relatively small

B&B Reporters
001 202-544-1903

Page | 2068

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2069

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

my last report for 2012.

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

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

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

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

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

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

Q. Okay. Thank you.

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

A. Correct.

B&B Reporters
001 202-544-1903

Page | 2070

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20
21
22

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

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

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

BY MR. LEATHLEY:

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

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

Do you see that, sir?

A. Correct.

B&B Reporters
001 202-544-1903

Page | 2071

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21
22

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

Do you recall running for that role, sir?

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2072

1 2 3 4 5 6 7 8 9

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

22

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

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

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

Do you see that, sir?

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

Q. Yes. Article 34(e).

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

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

B&B Reporters
001 202-544-1903

Page | 2073

1 2 3 4 5 6 7 8 9

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

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

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

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

A. To document?

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

A. Yes. Any information has to be documented.

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

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

B&B Reporters
001 202-544-1903

Page | 2074

1 2 3 4 5 6 7 8 9

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

Do you see that section there, sir?

A. Yes, correct.

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

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

But with regards to your question . . .

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

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

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

B&B Reporters
001 202-544-1903

Page | 2075

1 2 3 4 5 6 7 8 9

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

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

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

Q. Thank you.

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

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

B&B Reporters
001 202-544-1903

Page | 2076

1 2 3 4 5 6 7 8 9

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

066. These are identified in the upper right corner with the seal of this office and my signature for the purposes of verifying that this certification

corresponds to the entirety of the pieces and documents that comprise it on the date of this certification."

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

A. Yes. Correct.

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

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

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

Q. Thank you.

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

B&B Reporters
001 202-544-1903

Page | 2077

1 2 3 4 5 6 7 8 9

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

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

Would you agree with that, sir? Yes, the page

you're looking at now.

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2078

1 2 3 4 5 6 7 8 9

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

what that person was trying to say.

Q. Yes. And, so, this document, which was on your file, continues on the fourth line. "Esta canteria, tuberia fue installer de Muni. Las Olas donar 100,000 por eso. Ahorita en calle centro in

Esterillos Oeste no hay inundación."

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2079

1 2 3 4 5 6 7 8 9

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

But at paragraph 108 it says, "The storm drains started to be put in in August of 2010. This was done as a joint effort by the local municipality and Las Olas. The local municipality had run storm drains from the soccer field, which was about 100 meters from our office, to the estuary that ran

into the ocean. The municipality asked us to help them complete the storm drains along the rest of the public road. They needed to run another 450 meters of storm drains along the road in front of our office, then turn right before running up the road on the west of the project that connected the community to the main highway."

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

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

B&B Reporters
001 202-544-1903

Page | 2080

1 2 3 4 5 6 7 8 9

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

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

A. Yes. Correct. I see it here.

Q. Thank you.

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

this?

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

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

Q. That's fine and understood, sir.

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

B&B Reporters
001 202-544-1903

Page | 2081

1 2 3 4 5 6 7 8 9

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

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

But if you can go now, sir, to Tab 6. This is Exhibit 532. So, we're back to the handwritten note. And on the fourth line of the page, that says--I'm

looking at the handwritten notes in blue. "Muni approves the work and does this, not Las Olas."

Do you see that, sir?

A. Correct.

Q. Is that your writing?

A. No, that is not my writing.

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

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

B&B Reporters
001 202-544-1903

Page | 2082

1 2 3 4 5 6 7 8 9

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

interruption, if I may.

BY MR. LEATHLEY:

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

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

Paragraph 44 says, "The Municipality has, for

years, had poor infrastructure to deal with rain on the public roads near our property, especially rainwater that would run downhill."

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

Do you see that, sir?

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

B&B Reporters
001 202-544-1903

Page | 2083

1 2 3 4 5 6 7 8 9

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

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

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

Do you see that?

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

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

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

(Pause.)

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

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

B&B Reporters
001 202-544-1903

Page | 2084

1 2 3 4 5 6 7 8 9

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

condition.

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

PRESIDENT SIQUEIROS: Please. Or I can advise him.

During this period, if you need to rest or if

you need to use the facilities, kindly do not contact any individual to talk about this matter. I would ask you to please remain separate from all the other participants.

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

THE WITNESS: Yes, I understand. Thank you.
(Brief recess.)

PRESIDENT SIQUEIROS: You may now continue.

MR. LEATHLEY: Thank you, sir.

BY MR. LEATHLEY:

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

B&B Reporters
001 202-544-1903

Page | 2085

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Mr. Briceño.

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

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

A. Yes, sir.

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

Do you see that, sir?

A. Yes, correct.

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

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

(Interruption by Spanish Reporter.)

BY MR. LEATHLEY:

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

B&B Reporters
001 202-544-1903

Page | 2086

1 2 3 4 5 6 7 8 9

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

Las Olas, Steve Bucelato."

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

Do you see that?

A. Yes.

Q. And then--

A. Correct.

Q. Thank you.

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

Do you see that, sir?

A. Correct.

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

B&B Reporters
001 202-544-1903

Page | 2087

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

Do you see that, sir?

A. Yes, sir.

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

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

The plan--well, the plan is the reference, but

it says, "Consists of endowing the community of Esterillos Oeste with a park that will contain, besides the natural elements that make up a park, a lagoon. This proposal intends to allocate an area of approximately 4,000 meters."

Do you see that, sir?

A. Correct.

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

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

B&B Reporters
001 202-544-1903

Page | 2088

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

Do you see that, sir?

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

Q. Well, in listening to the translation--and

your counsel can dispute the translation if they disagree--the last full written line in the bottom of the page says, "Write letter that he's familiar with area 50-plus years."

Does that sound like an instruction to you, sir?

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

B&B Reporters
001 202-544-1903

Page | 2089

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

apologize for this.

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

Would you accept that, sir?

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2090

1 2 3 4 5 6 7 8 9

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

allow me, please, sir?

PRESIDENT SIQUEIROS: (Gesturing.)

THE WITNESS: In 18, it says that--

BY MR. LEATHLEY:

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

A. Yes. Paragraph 16, yes. It says, "The foregoing means that the Internal Auditor may only make recommendations, issue warnings about irregularities that are established during the investigation process, pose conflicts before the General Comptrollership of the Republic in those cases in which the entity subject to the audit does not

respond to the recommendations or indications of irregularity within the period of time established by Internal Auditing, in conformance with Article 38 of Law Number 8292."

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

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

B&B Reporters
001 202-544-1903

Page | 2091

1 2 3 4 5 6 7 8 9

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

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

My question is: Is your testimony today Paragraph 16?

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

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

On the assumption, sir, that you still stand by Paragraph 16 of your Witness Statement as your testimony, is it correct that you never raised any conflicts with the Contraloría arising out of your

investigations with the Las Olas Project?

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

Q. Thank you.

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

B&B Reporters
001 202-544-1903

Page | 2092

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

Do you see that, sir?

A. Correct.

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2093

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

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

Q. Thank you.

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

A. Well, with regard to the Controllershship, no, because they did not receive the information. Everything remained internal to resolve it internally. The Municipality had to resolve this in keeping with

the reports that were contained in the official letters, of which you have copies.

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

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

B&B Reporters
001 202-544-1903

Page | 2094

1 2 3 4 5 6 7 8 9

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

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

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

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

Q. Thank you.

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

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

Is that right, sir?

A. Yes, correct.

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

A. Correct.

Q. And you say you met with officers from several

B&B Reporters
001 202-544-1903

Page | 2095

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

departments of the Municipality; correct?

A. Correct.

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

A. Yes, correct.

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

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

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

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

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

A. Well, all the files there, I can't tell you

whether it was SINAC or not SINAC, because there are files that might have arrived subsequent to the issuance of reports, and so I wasn't aware of them if they're not mentioned.

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

B&B Reporters
001 202-544-1903

Page | 2096

1 2 3 4 5 6 7 8 9

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

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

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

A. No, sir. From SINAC, no.

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

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

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

A. Well, yes. In reality, that is--if that's the body in charge, yes. Well, they--well, this report from SINAC or not, if it's not stated here, well, then

I didn't see it.

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

B&B Reporters
001 202-544-1903

Page | 2097

1 2 3 4 5 6 7 8 9

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

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

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

A. Yes, that is what this statement says.

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

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

We also have the files from the Administrative Environmental Tribunal. Sometimes if the files are

too large, four or five years later, you can't exactly remember what you saw.

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

B&B Reporters
001 202-544-1903

Page | 2098

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

Do you see that, sir?

A. March 1, 2011?

Q. Do you see that, sir?

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

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

(Pause.)

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

MR. LEATHLEY: Thank you, sir.

BY MR. LEATHLEY:

Q. Mr. Briceño--

A. Tell me.

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

B&B Reporters
001 202-544-1903

Page | 2099

1 2 3 4 5 6 7 8 9

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

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

This is March the 1st, 2011.

A. Correct.

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

Do you see that, sir?

A. Correct.

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

A. Well, I see that there's a complaint being presented and that there's a prayer for relief at the end, but I don't know if there are wetlands or not.

That--I don't know if there are wetlands or not. I just see that this is a proceeding of municipal officials.

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

B&B Reporters
001 202-544-1903

Page | 2100

1 2 3 4 5 6 7 8 9

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

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

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

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

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

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

page.

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

B&B Reporters
001 202-544-1903

Page | 2101

1 2 3 4 5 6 7 8 9

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

page by page.

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

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

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

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

A. Well, with regard to what you say, this is a macro view of the affairs. Well, my conclusions have

to do with acts of officials, whether they are
violating due process or other provisions which could

B&B Reporters
001 202-544-1903

Page | 2102

1 2 3 4 5 6 7 8 9

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

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

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

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

Q. Thank you.

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

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

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

do that.

B&B Reporters
001 202-544-1903

Page | 2103

1 2 3 4 5 6 7 8 9

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

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

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

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

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

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

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

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

Page | 2104

1 2 3 4 5 6 7 8 9

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

by the council. That was correspondence.

BY MR. LEATHLEY:

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

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

Do you see that, sir?

A. Yes, sir.

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

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

BY MR. LEATHLEY:

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

Page | 2105

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

Do you see that, sir?

A. Yes, sir.

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

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

Q. Thank you.

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

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

1 2 3 4 5 6 7 8 9

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

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

Do you see that, sir?

A. Yes. To Carlos Cordero Valverde.

Q. Yes, sir.

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

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

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

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

BY MR. LEATHLEY:

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

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

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

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

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

Do you see that, sir?

A. Yes, correct--

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

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

A. Yes, correct.

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

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

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2109

1 2 3 4 5 6 7 8 9

10

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

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

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

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

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

A. Yes, that is SINAC's opinion.

Q. Yes, sir.

B&B Reporters
001 202-544-1903

Page | 2110

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2111

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2112

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

MR. LEATHLEY: No, no. If it's being recorded, that's all that matters. Yeah. Thank you. If that's acceptable to the Tribunal.

PRESIDENT SIQUEIROS: (Nods head.)

BY MR. LEATHLEY:

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2113

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2114

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

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

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

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

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

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

Q. Certainly.

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

B&B Reporters
001 202-544-1903

Page | 2115

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

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

Do you see that, sir?

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

That's what it says here.

Q. And are you aware of that, then?

A. Yes.

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

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

B&B Reporters
001 202-544-1903

Page | 2116

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

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

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

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

Q. Yes?

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

Q. Such as a SINAC report.

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

B&B Reporters
001 202-544-1903

Page | 2117

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

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

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

Q. Thank you.

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

MR. BURN: Thank you, sir.

you.

We have no questions for the witness. Thank

PRESIDENT SIQUEIROS: Okay. Any questions?

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

B&B Reporters
001 202-544-1903

Page | 2118

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

and we thank you for your participation.

THE WITNESS: Thank you.

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

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

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

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

MR. BURN: I mean--yeah.

MR. LEATHLEY: Sure.

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

Okay. Thank you.

B&B Reporters
001 202-544-1903

Page | 2119

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

(Brief recess.)

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

(Pause.)

MANUEL A. ABDALA, CLAIMANTS' WITNESS, CALLED

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

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

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

B&B Reporters
001 202-544-1903

Page | 2120

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

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

PRESIDENT SIQUEIROS: Thank you.

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

DIRECT EXAMINATION

BY MR. BURN:

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

A. That's correct.

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

B&B Reporters
001 202-544-1903

Page | 2121

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

A. Yes, on the First Report.

Q. Thank you.

A. And yes on the Second Report.

Q. Thank you.

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

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

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

A. Thank you very much.

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

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

B&B Reporters
001 202-544-1903

Page | 2122

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2123

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21
22

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2124

1 2 3 4 5 6 7 8 9

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

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

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

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

B&B Reporters
001 202-544-1903

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2126

1 2 3 4 5 6 7 8 9

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

The second comment, which is new, that

Mr. Hart proposes, is that there is a financing ownership mismatch in the Claimants' investments and participations. Likewise, I don't pay attention, really, to that because my assessment to damages is for Claimants as a group. So, I have not allocated damages or value to each of the Claimants in particular.

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

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

B&B Reporters
001 202-544-1903

Page | 2127

1 2 3 4 5 6 7 8 9

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

flow.

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2128

1 2 3 4 5 6 7 8 9

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

that were to be offered in the different business segments, but I mark--I price those units at market

prices. And I also make assessments as to what would be according to the hospitality industry in Costa Rica. And that's where the likelihood of completion of sales, timing, and other parameters.

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2129

1 2 3 4 5 6 7 8 9

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2130

1 2 3 4 5 6 7 8 9

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

failure.

And proof of--the Tribunal may have to assess on its own what is--whether the 68 percent number that I offer is a number that you would like to see. But

the proof--the additional evidence that I have shown you is that all of the resorts that have been similar or comparable to Las Olas have been successful in the area. And Mr. Hart has not been able to point out to any one in particular that might have failed in that area.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2131

1 2 3 4 5 6 7 8 9

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2132

1 2 3 4 5 6 7 8 9

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

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

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

Slide Number 6. This is a map of the plan for Las Olas. And in red what you see is what Mr. Hart

has identified, in his research of the registry of Costa Rica, lots that have been sold, both prior and after May 2011. And they represent 16 percent of 37 hectares that he proposed.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2133

1 2 3 4 5 6 7 8 9

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

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

And, of course, all sales post May 2011, we can see that they have been conducted at a distressed

price. And we will see how we can take care of that adjustment.

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

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

B&B Reporters
001 202-544-1903

Page | 2134

1 2 3 4 5 6 7 8 9

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

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

But for the post-May 2011 sales, as per the registry, we see that there are 51 lots, two commercial sites, for an area of 43,961 square meters that no adjustment really is necessary because when

you see the prices at which these transactions were sold after the measures by Costa Rica, they are, on average, as you see a back-up slide, at around \$4 per square meter.

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

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

B&B Reporters
001 202-544-1903

Page | 2135

1 2 3 4 5 6 7 8 9

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

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

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

Now, in Slide Number 8 you have the results of

my adjustments to damages once you take into account this new information for the sales as per the registry. So, you can see that in total there's a 1.01 percent reduction on damages, and that includes also a commercial lot that was missing in the assessment.

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

B&B Reporters
001 202-544-1903

Page | 2136

1 2 3 4 5 6 7 8 9

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

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

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

And, finally, I have done two adjustments on timeshare revenues. One is related to Mr. Hart commented that there was a formula link that was incorrect in my model so that it was linked to units or intervals that were sold rather than--it was built

rather than sold. So, once you correct that, you have a small reduction on value.

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

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

B&B Reporters
001 202-544-1903

Page | 2137

1 2 3 4 5 6 7 8 9

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

recommendation as of May 2011.

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

Now, let me move to Section Number II now, which deals with business segments. And first you

see, in Slide Number 12, some information that I think is useful to the Tribunal. In the middle you see the bars here showing my methodology for damages. So, my DCF value discounted at 7.6 percent is worth \$81.9 million.

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

B&B Reporters
001 202-544-1903

Page | 2138

1 2 3 4 5 6 7 8 9

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

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

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

Now, Calderón's appraisal value, you see here as well that there is an adjustment. You see in the orange as of October 2009, Mr. Calderón has assessed \$52 million. And I have adjusted by the fact that the appraisal value had elements of assumptions of urbanization with a degree of total completion of the infrastructure works related to the land, such as road

access, water/sewage treatment, electricity, provisions, et cetera.

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

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

B&B Reporters
001 202-544-1903

Page | 2139

1 2 3 4 5 6 7 8 9

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

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

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

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

lot prices as of 2015.

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

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

B&B Reporters
001 202-544-1903

Page | 2140

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

The second adjustment is that I need to move from prices from 2015 to 2011. Because we don't have a real estate index of prices in Costa Rica, I used general inflation as an approximation. Mr. Hart also criticized that and says that because of the presence of the financial crisis, these adjustments may be different. But I know that the period that we're looking at between 2011 and 2015 is not directly

contaminated with that and--and that we don't have any other alternative really, and Mr. Hart has not proposed any better assessment.

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

B&B Reporters
001 202-544-1903

Page | 2141

1 2 3 4 5 6 7 8 9

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

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

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

And that is well established as well in the pricing policy of Los Sueños and any other developers,

which there will be increasing prices as they move along in the progress of urbanization and construction.

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

B&B Reporters
001 202-544-1903

Page | 2142

1 2 3 4 5 6 7 8 9

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

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

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

You cannot exclude the most expensive ones. I mean, if we exclude then the least expensive ones, then you will get to an average which is similar to the ones that I have obtained. So, there is no really

reason to make any adjustment there.

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

B&B Reporters
001 202-544-1903

Page | 2143

1 2 3 4 5 6 7 8 9

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

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

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

In Slide 17, I move to timeshares. And on timeshares, what you see in this table is the market information from RCI. RCI being the major exchange system for timeshare properties. And RCI has published, for Costa Rica in particular and Central America in general, average prices from all the

resorts that are affiliated. And in Costa Rica we have 40 resorts that are affiliated at the time that they have this price data.

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

B&B Reporters
001 202-544-1903

Page | 2144

1 2 3 4 5 6 7 8 9

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

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

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

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

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

And, finally, he makes some comparisons with

some data that he collected for some big category hotels. And I say that that comparison of what you can spend in a hotel versus the upfront payments of timeshares is not appropriate. Not only because the

B&B Reporters
001 202-544-1903

Page | 2145

1 2 3 4 5 6 7 8 9

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2146

1 2 3 4 5 6 7 8 9

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

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

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

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

Panama which is lower at \$176,000.

Of course, if you were to construct a hotel

B&B Reporters
001 202-544-1903

Page | 2147

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

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

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

And you see here that the most valuable is the blue area for the condominium lots at 41.3 million. And adding--the second most valuable is the concession area at 6 million. And adding all these pieces together, you would get to 52 million, as assessed by Calderón, in 2009, with the exception of the orange piece which are the easements lots which Mr. Calderón has assessed these a little bit later in 2013. And I

had translated it into 2009 values so as to have

B&B Reporters
001 202-544-1903

Page | 2148

1 2 3 4 5 6 7 8 9

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

comparable amounts.

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

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

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

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

Page | 2149

1 2 3 4 5 6 7 8 9

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

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

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

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

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

Page | 2150

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

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

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

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

1 2 3 4 5 6 7 8 9

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

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

Thank you very much.

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

PRESIDENT SIQUEIROS: Okay. Mr. Leathley.

MR. LEATHLEY: Thank you, Mr. President.

CROSS-EXAMINATION

BY MR. LEATHLEY:

Q. Good afternoon, Dr. Abdala.

A. Good afternoon.

Q. You have experience in investment arbitrations; right?

A. I do, yes.

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

A. It will. Of course, yes.

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

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

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

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

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

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

Q. Yes. And, so, information regarding the

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

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

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

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

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

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

Wouldn't you agree?

A. Could be.

Q. It could be.

And you're familiar with the investors'

B&B Reporters
001 202-544-1903

12
13
14
15
16
17
18
19
20
21
22

Witness Statements in this arbitration?

A. I've seen some, yes.

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

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

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

Were you aware of that?

A. Correct.

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

Were you aware of that testimony, sir?

A. Sure. Yes.

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

B&B Reporters
001 202-544-1903

Page | 2156

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

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

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

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

A. Yes.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2157

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

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

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

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

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

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

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

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

A. --what he has done before.

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

B&B Reporters
001 202-544-1903

Page | 2158

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

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

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

Q. Yes. Thank you, sir.

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2159

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

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

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

A. That's right.

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

A. That's right.

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2160

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

Mr. Aven and he did not contract any expert.
Are you aware of that as well, sir?

A. All right.

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

A. You mean consistent in what way?

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

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

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

A. Roughly.

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

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

A. I only learned about that through the transcripts.

B&B Reporters
001 202-544-1903

Page | 2161

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

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

A. All right.

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

Were you aware of that, sir?

A. Of course--yes.

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

Do you remember that, sir?

A. I do, yes.

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

A. Yes.

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

B&B Reporters
001 202-544-1903

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

project.

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

A. Sorry, which page number?

Q. 53.

A. Okay.

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

Do you see that, sir?

A. Which paragraph? I'm sorry.

Q. At the top left of Page 53.

A. Top left.

So you read the characteristics of the owners?

Q. That's right.

A. Uh-huh.

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

B&B Reporters
001 202-544-1903

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

that paragraph.

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

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

Q. Do you agree with that, sir?

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

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

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

Q. Yes. And previous experience as well.

A. Correct.

B&B Reporters
001 202-544-1903

Page | 2164

1 2 3 4 5 6 7 8 9

10

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2165

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

necessary permits to develop.

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

And that may take a significant amount of time--

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

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

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

A. I did, yes.

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

B&B Reporters
001 202-544-1903

Page | 2166

1 2 3 4 5 6 7 8 9

10

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

A. Yes.

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

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

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

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

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

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

Q. Thank you.

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

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

B&B Reporters
001 202-544-1903

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

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

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

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2169

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

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

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

Q. So sorry, sir--

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2170

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

A. No. That's not correct.

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

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

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

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

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

Q. Thank you.

The land was acquired in the early 2000s, and

B&B Reporters
001 202-544-1903

Page | 2171

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

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

That's what the evidence is.

A. Sorry. Could you repeat the last part?

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2172

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

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

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

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

A. Well--

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

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

Without--

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

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

B&B Reporters
001 202-544-1903

Page | 2173

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

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

Q. Thank you.

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

Are you aware of that testimony?

A. Yes.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2174

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

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

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

Q. Right.

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

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

A. Correct.

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

B&B Reporters
001 202-544-1903

Page | 2175

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

A. Okay. Yes.

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

Is that your understanding as well, sir?

A. Okay. Yes.

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

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

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

A. Correct.

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

B&B Reporters
001 202-544-1903

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

Costa Rica tourist industry and the competitors."

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

A. Yes.

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

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

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

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

A. Correct.

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

B&B Reporters
001 202-544-1903

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

by Mr. Damjanac; is that right?

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

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

But, yes, we see a short--

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2178

1 2 3 4 5 6 7 8 9

10

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

offerings were at that time.

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

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

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

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

Q. With no experience.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2179

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

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

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

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

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

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

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

Q. Interesting, then.

So your reference to consultants, advisors,

B&B Reporters
001 202-544-1903

Page | 2180

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

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

A. I just mention in response to your question.

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

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

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

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

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

A. Could be, yes. Of course.

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

B&B Reporters
001 202-544-1903

14
15
16
17
18
19
20
21
22

itself, in its performance; is that right?

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

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

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

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

Q. Yes.

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

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

B&B Reporters
001 202-544-1903

Page | 2182

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

Q. And then in January 2010, he became the marketing and sales director for the overall resort. Were you aware of that?

A. Okay. Yes.

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

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

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

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

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

This is in your Second Report.

A. Correct.

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

B&B Reporters
001 202-544-1903

Page | 2183

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

A. Which page number?

Q. Page 9.

Do you have that, sir?

A. Table 3.1; right?

Q. Yes, sir.

A. Yes.

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

A. Yes?

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

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

Do you see that?

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

B&B Reporters
001 202-544-1903

Page | 2184

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

any revenue for rentals because there was nothing there.

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2185

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

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

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2186

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

A. No.

Q. They're not?

A. The Norton Consulting is not a business plan.

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

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

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

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

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

Q. Yes.

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

B&B Reporters
001 202-544-1903

Page | 2187

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

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

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

Q. Thank you.

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

Q. Yes. Well, it was.

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

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

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

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

B&B Reporters
001 202-544-1903

Page | 2188

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

A. All of the sales? Sorry?

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

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

Q. Which ones are those, sir?

A. Well, let's take a look.

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

Q. Which lines are you referring to, sir?

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

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

B&B Reporters
001 202-544-1903

Page | 2189

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

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

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

A. Yes.

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

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

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

B&B Reporters
001 202-544-1903

Page | 2190

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

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

Q. And so, it's also correct to say, then, that none of the sales that were made were made with the knowledge of what was in Mr. Damjanac's plan, but for those three that you mentioned.

A. I'm not sure I understand the question. Let me read it again.

Q. Well, is it also--let me just rephrase my question.

Wouldn't you say it's true that none of the buyers in 2010 could have seen Mr. Damjanac's 2010 plan, perhaps but for the three that mentioned--you mentioned in Slide 27?

A. Correct.

Q. And so, they wouldn't have seen Mr. Damjanac's plan for a 114-room hotel.

A. For those who bought before the end of 2010, that's right.

Q. And so, they would have had--you have no evidence as to how those real buyers at Las Olas would

B&B Reporters
001 202-544-1903

Page | 2191

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

react to a building of a six-story, 114-room hotel down near the beach?

A. Well, we only know because we only have a relatively--five-month period or so, between that information became public and the suspension of the works in May 2011.

Q. And the beach was a critical attraction for the Las Olas Project; right?

A. The beach was an important attraction, yes.

Q. And once the land was purchased, Mr. Aven confirmed in the December Hearing that he relied totally on professionals. However, the only piece of legal advice that he received in writing was a memo that was disclosed during the document production stage; is that also your understanding, sir?

A. I don't recall if that is exactly the only thing, but--I don't know. I don't recall.

Q. Well, I'm referring to Day 3, Transcript 834, 11-14, where the comment was from Mr. Aven, "The only written legal advice I'm aware I received was this one piece of--this--this one legal advice that's appearing in this log."

B&B Reporters
001 202-544-1903

Page | 2192

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

That was the privileged log that was part of the production.

A. Well, I'm not going to dispute that. If that's--I'll take your representation that that's what was said.

Q. Very good. Thank you.

Now, Mr. Aven explained that "They'd just put documents in front of me and said verbally what they were for, and I signed them."

Do you also recall that from his testimony on the third day of the December Hearing?

A. Again, I don't recall, but I'll take your representation that that's what was said.

Q. And did you ask to see the legal advice the Claimants had received in advance of planning to develop the land?

A. No.

Q. Would it have been relevant to your considerations?

A. No, not really.

Q. So, it wouldn't have been relevant to their ability to build and develop the land along the terms

B&B Reporters
001 202-544-1903

Page | 2193

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

that you had assessed?

A. No. Because what I look is whether the land will eventually obtain the permits or not to be constructed, so that's what I would be focusing on, not on the intermediate process of what type of legal advice the developer may have sought or not.

Q. Dr. Abdala, can you name a leading luxury resort developer, either in Costa Rica or elsewhere, that would have run its business on the basis of one piece of written legal advice?

A. I'm not aware of the type of legal advice that others in Costa Rica may have gotten before to develop their resorts.

Q. Are you aware of resort developers in general and the nature of the legal advice they receive in order to develop resorts? Is that within your scope of your expertise?

A. Well, yes, in general. I mean Legal advice would be one of the elements that you need to assess in order to develop a resort.

Q. And would you say that would also be reflective of their ability to develop a resort as

B&B Reporters
001 202-544-1903

Page | 2194

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

well?

A. Well, not necessarily. I don't relate that with the ability, but it would be one element to bear into consideration.

Q. You said you looked through the costs and accounts of the Las Olas Project, but you didn't exhibit anything from their accounting documents, did you?

A. I did. I did exhibit what was--what I was given as the accounts. It was kind of a layer account that is part of one of my exhibits in the First Report.

Q. And this is an Excel chart with a listing of some of the costs; is that right?

A. Correct.

Q. Which had all been entered in on the same day, with the same date.

A. Well, I don't know when they were entered but it was on spreadsheet, yes.

Q. So, I think this is CLEX-022.

Did you see any other regular accounting documentation from Las Olas?

B&B Reporters
001 202-544-1903

Page | 2195

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

A. No. Only what I had included as exhibit in my reports.

Q. Did you see any U.S. tax returns?

A. No, I have not.

Q. Are you aware of whether any U.S. tax returns exist?

A. I don't know.

Q. Did you ask for them?

A. I asked for all the financial information, and everything that I was given was part of my exhibits to my report.

Q. Would you have expected to see U.S. tax returns as part of that information?

A. No, normally I never get U.S. tax returns. I mean, normally you get financial statements and balance sheets and accounts, but not--not tax returns really.

Q. But you don't get those either?

A. I didn't get those, right.

Q. I wonder if we can turn to Tab 4 of the binder in front of you. These are documents that were produced by the Claimants and which are cited in

B&B Reporters
001 202-544-1903

Page | 2196

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

Mr. Hart's Report.

MR. LEATHLEY: The footnote reference in his report, for the record, is AVE 14.9.

BY MR. LEATHLEY:

Q. Are you familiar with these documents behind this tab, sir?

A. No, not really.

Q. You haven't seen them before?

A. No. They are part of the record, but I have not seen them.

Q. If you go to Tab 5 as well, if you'd just turn through those. Also referenced in Mr. Hart's Report, are you familiar with these documents?

A. Let me see. This is 14.15?

Q. Correct, sir.

A. No. I know of the presence, but no, I have not reviewed them.

Q. These are some of the documents used to compile the Las Olas Project's investment expenses for 2002 to 2011, which went to form the document that you exhibited to your report, CLEX-022.

A. Right.

B&B Reporters
001 202-544-1903

Page | 2197

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

Q. Would that sound about right, sir?

A. Yes. It seems to be the invoices and--and documents that support those cost expenses.

Q. And so, these are the--these are the way that these documents were produced, the way they were organized.

A. Uh-huh.

Q. You can't testify, though, as to whether these were the documents that you had seen in your preparation of your two reports, though; right?

A. I have not seen these documents in preparation for my report, no.

Q. Okay. So, you took the expenses reports on trust that the content was correct?

A. That's right.

Q. And would it concur so with Mr. Aven's testimony in the December Hearing where he admitted that he put thousands of documents he had in a box and sent it to counsel for the Claimants?

Let me read Mr. Aven's testimony. He said, "I remember sending Mr. Burn a huge box of documents after I got that request"--he's referring to the

B&B Reporters
001 202-544-1903

Page | 2198

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

production request--"so there's thousands of documents in evidence in this case. And the documents I was able to find, I sent to Mr. Burn."

These are those documents, sir.

A. Okay.

Q. But they were not consolidated in any report in any way to make sense of them.

A. They were not consolidated, so you would have to reconstruct by dates and link them to the classification of the accounts layers that are in my exhibit in order to tally them.

Q. Uh-huh. And is this how you'd normally expect to see luxury resort developers manage their accounts?

A. You would normally expect to have them--financial statements. But this is the supporting evidence for some of the cost expenses. I think this is responding to what was asked on the Redfern to support that--those cost expenses that were on the record.

Q. Dr. Abdala, I'd like to ask you about your methodology you employ in reaching your many millions of dollars' compensation recommendation in your

B&B Reporters
001 202-544-1903

Page | 2199

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

report.

You employ a few mechanisms to reach the compensation amount, first of which is a discounted cash flow analysis; correct?

A. That's one of the elements, yes.

Q. And as the Tribunal will be well aware, the DCF analysis essentially projects a cash flow from a certain moment for a period of time; correct?

A. Yes.

Q. And that indication of that DCF analysis is premised on what one could say are two fundamental elements if you wish to establish damages assessment with any certainty.

The first is the successful launch of a business that must generate a cash flow in the first place that constitute a going concern; and second would be the successful positive operation of that business to continue to generate cash flow.

Would you agree with that?

A. No, I disagree. The DCF analysis is a tool that is used in valuation for--not just to value ongoing businesses, but also to value assets that are

B&B Reporters
001 202-544-1903

Page | 2200

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

at an earlier stage. And you can value assets that are not yet operational, all the time, and transactions are based on DCF recommendations for assets that are still completely preoperational. And that happens in many sectors.

In particular, it happens in real estate because in real estate development you know that you cannot be right away into an operational mode until you exhaust all the preoperational phase of construction permits, planning, developing, et cetera.

So, it takes a lot of time to get to the first stage in which you can establish sales. But that doesn't make the DCF analysis unsuitable for that when you can project what are the expected revenues and costs based on comparable market information and based on the industry parameters in general.

Q. And so, according to Exhibit 5, where Mr. Hart documented sales and reservations--and this is based on the documents provided by the Claimants--only 16 lots of the total project that encompassed the 352 lots were sold by December of 2010. Would that square with your understanding?

B&B Reporters
001 202-544-1903

Page | 2201

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

A. Well, the fact is that you have to understand what presales mean in a development that yet is not fully permitted, so--

Q. And I'm sorry to interrupt. I'm just focusing on the numbers for a moment, if I may. We'll come to the analysis in a moment. But 16 of 352 was the ratio of what had been sold.

A. Well, that is an incorrect number. I mean, as we have seen, there is 26 lots; so it's not 16.

But what I was going to say is that it is obviously expected that before you get fully permits to construct, you would not be selling a huge amount of lots in the marketplace until the development starts going on. So, this should be seen as presales, as with any other real estate development.

Q. So, the 16 or 26 representing about 5 or 6 percent of the total number of lots, and only one house from among those lots had actually been built on the resort. Is that also your understanding, only one property had been built?

A. Well, I understand that there's only 26 lots that were sold before May 2011.

B&B Reporters
001 202-544-1903

Page | 2202

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

Q. And so, no construction--to state the obvious--on any of the unsold lots either; is that also your understanding?

A. Correct.

Q. And no hotel had been built.

A. No.

Q. And no other aspects of the resort had been developed, apart from maybe some of the roads that were being cut.

A. Well, the--I made--in my report, I inform as to what is the stage of development. This includes not only roads, but also other infrastructure works, including pluvial system, including cordons, including some of the preparations for water, et cetera.

Q. So, the resort wasn't open for business, there were no completed roads, there's no flowing water, there's no electricity, there's no people, there's no resort; and, yet, your opinion is that this is a going concern; is that right?

A. No. No. You're mistaken. I mean, I always characterized this as a preoperational asset, so it's not--as of May 2011, it's not an ongoing concern

B&B Reporters
001 202-544-1903

Page | 2203

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

because it's not fully yet developed. It's at a preoperational stage.

What the discounted cash flow method analysis is, recognized that if it continues, it will become a fully developed resort. And so, you attach certain probability that that happens. If it doesn't continue, as it states, as is, then it has to be sold with a state of partial urbanization and with the value of the land as appraised by Mr. Calderón at that stage.

Q. So, is to buy a car tire a preoperational stage of building and running a car?

A. No, no, no. You cannot compare with--with that.

Q. Well, sir, we have one house on undeveloped land; and from that, you're extrapolating a going concern worth tens of millions of dollars. Your preoperational phase seems to be, "If you state it, it will become." And I'd like to understand how you can say that without engaging in profound speculation.

A. Okay. It's very simple. Preoperational stage means that you are still on the phase of developing.

B&B Reporters
001 202-544-1903

Page | 2204

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

You're still investing. You have not finished investing before you can start selling and producing most of the revenues. And assets get transacted at those stages all the time, not just in real estate, but in any other businesses--in mining, in crude oil.

I mean, you are at exploration stage, and then you move on to the next stage. And so, you have transactions at preoperational stage all the time, and real estate development is one of them.

Q. And in that case, sir--

A. So, the value that you add to the land is the permitting, the zoning, the infrastructure works, and the offerings that you plan to do in the future.

So, there is no speculative element. The only risk is of completion and, in time, completion of what comes next.

Q. So, sir, is it your testimony--

A. That's what you need to assess that risk.

Q. Is it your testimony, then, that there is no speculation whatsoever in your analysis?

A. Correct. There's no speculation as to what you can sell these lots--or you can sell those houses

B&B Reporters
001 202-544-1903

Page | 2205

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20

21

22

for because the market is telling you what the prices are.

The only risk is not--risk is not the same as speculation. The risk is that you cannot complete it in time as planned; and for that, you adjust in my model by two ways. One, you adjust by the risk of doing business with a discount rate. But second, you adjust with the probability of success or probability of failure. So you have two--two ways of reducing the expected value.

Q. Why, if--if you have a business, would you say, at a preoperational phase, is capable of being assessed as a business, why on earth do you need a probabilistic factor for a DCF calculation?

A. Well, you do need the probabilistic factor because that's one of the ways to assess the risk of not full completion. And all the possibilities--

Q. But you said there's no speculation, sir. You said there's no risk with the--the market is telling you what the prices are. From your assessment, it seems to be that all you do is plug in time, and time will tell you to project your cash flow to a certain

B&B Reporters
001 202-544-1903

Page | 2206

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

level.

A. No. You're confusing speculation with risk. I mean, all assets have a value. They can be transacted at any time, regardless of whether you are completed or not completed in your stage of development. It's just a matter of putting a transaction price.

And the valuation expert is able to put that measuring risk, either through the discount rate or, as I've done in my analysis, via the expected value, taking into account the probabilities that things go sour, and then you cannot complete the development. And so, you account for that risk.

Q. If your analysis of the market, sir, was based on the December 2010 business plan, why did you feel a need to supplement their business plan?

A. I didn't supplement the business plan. I used the design of the 2010 business plan, but I did not use the developer's view on pricing at that time. I'd rather go to the marketplace and see what lots are being sold for, what houses are being sold for, what condos are being sold for, what rental weeks can be

B&B Reporters
001 202-544-1903

Page | 2207

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

sold for in the RCI in Costa Rica. So, I used market information to price the offerings.

Q. Uh-huh. Thank you.

MR. LEATHLEY: Thank you. We have no further questions.

PRESIDENT SIQUEIROS: Will your redirect be extensive? I'm thinking simply of a break--taking a break right now, especially for interpreters and transcribers.

MR. BURN: I would estimate we'd be needing 10 to 15 minutes, that sort of thing. Happy to take a break now or proceed.

PRESIDENT SIQUEIROS: I think that if--would you be willing to go for the 15 minutes; is that okay? Or would you prefer to take a break now?

Okay. Let's continue, then. Thank you.

REDIRECT EXAMINATION

BY MR. BURN:

Q. Okay. Dr. Abdala, you'll recall, in fact, a good deal of the cross-examination concentrated on issues relating to the characteristics of the Claimants and those associated with them as being

B&B Reporters
001 202-544-1903

Page | 2208

1 2 3 4 5 6 7 8 9

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

significant for valuing the project. You recall the--there were various questions relating to how one approaches valuation, given their characteristics and experience.

A. Correct.

Q. Why would you say--well, how significant is it, in your opinion, the characteristics of the specific sellers for the purposes of the exercise you've undertaken in assessing a fair market value?

A. Well, what I look at the features of the sellers when assessing fair market value is exactly, first of all, what the sellers' expectations are. These are normally translated into the contemporaneous business plans at the time. And you need to match that with the expectations of the willing buyer. And so, for that, you look into market information as to what--how much someone would pay for, for this particular asset.

And you'd need to value a price that you know that the willing seller would be really willing to sell. So the willing seller may have a reservation price, and you also need to understand that the

B&B Reporters
001 202-544-1903

Page | 2209

1 2 3 4 5 6 7 8 9

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

22

willing buyer will have a price that may be different from the--what that reservation price may be.

And that's the part that I look at on the willing seller. I mean, I look at their expectations as to what they think their asset is worth for, and that's normally reflected in their business plan projections. That's the main feature.

Q. And when you were taken to the Brian Headd Article, which is Exhibit CLEX-002, which is at Tab 1 in the cross-examination bundle--and specifically at Page 53 of that article--what do these factors that Mr. Headd, Dr. Headd--I'm not sure of his correct description--what do these factors in the first column in Page 53, to which you were taken, tell you for understanding the seller's position for the purposes of assessing fair market value of an asset?

A. Well, first, let's understand that Mr. Headd here is talking about the survival rates; right? He's not trying to assess, say, fair market value transaction prices.

So, he's looking at--at that and the relationship between the characteristics of the owner

B&B Reporters
001 202-544-1903

Page | 2210

1 2 3 4 5 6 7 8 9

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

of the asset in their decision to, say, continue or close the business. And those are traits that he found some of them not being correlated and some of them to have some correlation with survival rates. And that's all we need to take from his findings here.

Q. And for the purposes of the fair market value assessment, the sale by a hypothetical seller of an asset to a hypothetical buyer with no interfering extraneous factors, the factors Mr. Headd refers to, to which party in that hypothetical transaction are those factors most relevant?

A. Well, I think Mr. Headd here is talking about the willing--the seller. I mean, it would be about the seller. But, again, in a transaction, you don't really pay too much attention to the identity of the seller or the buyer unless you're trying to assess value in use, because it could be that for a particular investor, the asset has more value because it has synergies with other assets that they may have; therefore, you will know that the reservation price of that seller would be higher than a normal buyer.

But unless you have that synergies, what you

B&B Reporters
001 202-544-1903

Page | 2211

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

really care about is what the market would pay for

this asset. And that comes from kind of a neutral assessment as to who really holds the asset at that time because you know that someone else can take over and extract the value of that asset. And that's what the market would pay for it. Regardless of whether a company, say, is mismanaged or whether it's beautifully managed, it doesn't matter. What--the value of the asset is what someone would pay for it.

If I want to buy a company and I see that those who run the company are doing a very poor job, I would still be competing with others that have the same perception as I do, that this company's more valuable if it were in the hands of someone who's managing that company differently or better, optimize, and that the market price is, then, independent of the identity of the actual owner of the asset.

Q. Thank you.

You were also asked about the quality of the 2010 business plan.

A. Uh-huh.

Q. And various questions were put to you. You

B&B Reporters
001 202-544-1903

Page | 2212

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

were invited to comment on Mr. Damjanac's ability to draft the business plan, and so on.

Now, setting to one side whether or not you're in a position to answer those types of questions, how--in a situation where you are looking outside of the objective factors and looking at the subjective capabilities of hypothetical sellers--so, setting your other points to one side for a moment--how would you expect owners and would-be sellers who lack skills and experience that are necessary to perform certain exercises in relation to an asset, how would you expect them to respond to that absence of ability?

A. Let me see if I understand the question. Hold on a second.

Q. The last word in that--

A. It's a long question. I'm not sure what you're referring to. When you say, "How would you expect them to respond to that absence of ability," by "them" you mean who?

Q. The Claimants in this--in this scenario.

A. The Claimants? So, how Claimants would expect--hold on.

B&B Reporters
001 202-544-1903

Page | 2213

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Maybe I should have another go at formulating the question in a clearer fashion.

If owners don't have a particular skill--

A. Right.

Q. --what are they going to do?

A. Well, I see--I see your question now.

Then--I mean, if you are the owner and if you think your manager is eventually putting forward a plan that may not conform to what is optimal or what the market think can be done, then you will fire that manager, right, and you will hire someone else in order to get a different view or a more professional view or a different undertaking.

That's--I mean, that's what the owner would do; it's like a board of directors will replace their management if they think they are not capable of doing something.

Q. And in terms of--again, certain assertions were put to you in relation to the drafting of the 2010 business plan, and you responded along the lines of you understood that Mr. Damjanac had taken advice in respect of the drafting of that business plan. You

B&B Reporters
001 202-544-1903

Page | 2214

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

recall that?

A. Okay. Yes.

Q. Did you read, for the purposes of your analysis, Mr. Damjanac's Witness Statement, his first

Witness Statement?

A. I did, but a long time ago, so I may not recall.

Q. Do you recall--do you recall Mr. Damjanac describing in that Witness Statement what he did with respect to the preparation and finalization of that business plan? Just in general terms; I'm not examining asking for specifics.

A. Right.

No, I don't recall. Sorry.

Q. Okay.

MR. BURN: I have no further questions, sir.

PRESIDENT SIQUEIROS: Tribunal, any questions?

QUESTION FROM THE TRIBUNAL

ARBITRATOR BAKER: Dr. Abdala, would you please tell me a little bit about the search for comparable real estate sales and the process that you went through that? I know you've explained it in your

B&B Reporters
001 202-544-1903

Page | 2215

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

report, but it seems like there is a rather limited amount of data for comparative purposes.

THE WITNESS: Right. The way I approached this was twofold: First, I didn't try to identify any

particular resort that--where to obtain prices, but I just went to the database of this website called REMAX that would have all of the listings of prices that were offered in the Puntarenas Province. And I did this research in October, November 2015.

And I looked at both houses, lots, and condominiums because we had prices on these three dimensions. And I also looked at information on rental prices for houses, which was another parameter. So, I extracted all the information that was relevant to the region and the characteristics of the properties that would conform to resorts on similar type of offerings with beachfront or with the type of amenities that it would be so we would have a universe of observations from which then use an average listing price, which I then convert into a selling price.

That's one part of the analysis. The other part of the analysis is I look at the more targeted

B&B Reporters
001 202-544-1903

Page | 2216

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

resorts that were more comparable or similar to Las Olas. And then I searched for listing prices or selling prices for those particular resorts, such as Místico and Málaga, for which those two I will say, Will you contact them directly and get their listing

prices or information that was specific to the market prices that I was looking for.

ARBITRATOR BAKER: Next question: Walk me through, briefly, how you determined the weighted average cost of capital in your Slide 25.

THE WITNESS: Right. Well, the WACC, or weighted average cost of capital, has two components, cost of equity and cost of debt. For the cost of equity, I follow the standard methodology of the capital asset pricing model, which is to add the--there's three different components.

One is the risk-free rate, which I use a ten-year U.S. Treasury bond as an indication of a risk-free rate; and then I add the industry risk, measured by the so-called "parameter beta" of the real estate industry; and the market risk premium, which I use from the standard sources.

B&B Reporters
001 202-544-1903

Page | 2217

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

And then I add a country risk premium for Costa Rica by looking at the spread between a bond--sovereign bond issuing dollars in Costa Rica against the risk-free rate. That is the sum of the cost of equity, which, if I'm not mistaken, as of 2011 was around 11 or 12 percent.

And then you add the cost of debt. For the cost of debt, I used the so-called "synthetic approach," which is to, again, go from the bottom, the risk-free rate plus the industry risk for the profile of borrowers in that industry, and the country risk premium as well for Costa Rica.

So I get to the cost of that, and then the average between the typical leverage that you see in the industry with so-called "the optimal leverage ratio" I used in order to weight cost effect with the end cost effect.

ARBITRATOR BAKER: So, that is an imputed attribution of the capital structure. Because, here, as Mr. Hart as pointed out repeatedly, it was an equity investment by the investors rather than an actual leveraged investment.

B&B Reporters
001 202-544-1903

Page | 2218

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

So, you used what is typical for these types of developments; is that essentially what you're saying?

THE WITNESS: That's right. And the difference is--again, it has to do with the concept of fair market value because what the recommendations are is that you don't necessarily look at the actual

leverage ratio because some companies may be--or projects, developments may be more leveraged than others.

And what you tend to see is that the willing buyer will eventually use the capital structure that is common in the industry. That's why you look at the industry leverage rather than the project-specific leverage. So that's the recommended practice. And that's what I have used, regardless of the fact that the project was intended as an equity--100 percent equity financing.

Now, I also said in my report that if you were to, say, value this at a discount rate that was 100 percent equity, what the recommendation is is to look at the so-called "unlevered cost of equity,"

B&B Reporters
001 202-544-1903

Page | 2219

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

which takes into account in one of the parameters of assessing industry risk the fact that you're going to be fully financed on equity.

And I think I computed that as well in a footnote, so you're--compared to the WACC, the unlevered cost effect would be slightly higher; I think at 8-point-something, 8.5 or so, which is an alternative view in which you value the asset,

assuming that not only the owner is already developing the project with 100 percent equity, but also willing buyer would kind of respect the same structure and would not inject that, and, therefore, the cost of equity becomes the relevant discount rate.

ARBITRATOR BAKER: And I've tried to follow the discussion between you and Mr. Hart over what is the appropriate risk-free rate between the 10- or the 20-year bond.

THE WITNESS: Right.

ARBITRATOR BAKER: Has there been a move in valuation analysis to seek something other than a U.S. Treasury as a risk-free rate? We've seen some pretty wild market conditions over the last ten years. I

B&B Reporters
001 202-544-1903

Page | 2220

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

mean, we've gone through an area where we actually have seen, depending on which sovereign was involved, negative interest rates.

THE WITNESS: Right.

ARBITRATOR BAKER: What does that do to the concept of a risk-free rate?

THE WITNESS: Right. I agree. It's interesting times because what you see is that central banks of many of the western countries and also Japan

has been actively trying to pursue monetary policies, that it reviews the interest rate at levels that we have not seen before for such a sustained, long period of time.

So, the practice is that we're still using that as a reflection as risk-free because there is a correlation with the returns that you can obtain in the marketplace, also at the corporate level.

So, in general, in times when the interest rates are so low, as they are right now, the expected returns are also relatively low, or at least lower than what they used to be. Because now lending is cheaper; therefore, the expectations of returns of a

B&B Reporters
001 202-544-1903

Page | 2221

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

company are, on average, lower.

So, I mean, the practice is that people still use a U.S. bond and--although in different regions, you can think about using other sovereign bonds as a reference. In Europe, for example, if you value an asset in Europe, sometimes you look at the German bonds, which is even lower than the U.S.

But some valuator could also look at the yields of the bonds in a hard currency but issued by the sovereign of the country where the asset is

located. The thing is that if you do that, that yield may be higher than the U.S. bond, but it includes also a component of country risk already implicit in that particular yield of--of that bond. So, that can be done as well.

But, in general, I have not seen much of a disagreement among experts on keeping using the U.S. bond rate as a reference for the risk rate.

ARBITRATOR BAKER: And what was the--

THE WITNESS: Despite the abnormal low rates--not abnormal, but sustained low rates that we see in the marketplace.

B&B Reporters
001 202-544-1903

Page | 2222

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

ARBITRATOR BAKER: Yeah. I mean, it calls into real question--I mean, we have to have some measure, obviously, to do this analysis. But given the way there has been a pretty substantial intervention and manipulation of interest rates in concerted action around the world, it does call into question whether or not that's still the best rate.

THE WITNESS: Well, one thing that you can think of, then, adjustments that may come naturally with this is that the risk rate could still be very low, and that reflects market reality because that

impacts the interest rates that banks charge against each other, it impacts the interest rates that banks charge to corporations.

But you may think that--say if the expected return of the corporations is so much higher than the 1 or 2 percent that we see in these rates, that would be--at some point be captured by the expected market premium that you add to the risk-free rate in the competition of the cost of equity.

And there's been some academic discussion, which is interesting, which may imply departing from

B&B Reporters
001 202-544-1903

Page | 2223

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

the traditional way of computing market risk premium, which is by looking at the--either the geometrical or arithmetical average of long periods of time of history, which takes time for those measures to capture what is the expected market premium that a company may obtain from now on.

I mean, the theory would be that eventually, if the interest rates now are so low, maybe that the market risk premium may be a little bit higher forward-looking. But it's not really being captured in the traditional way that you're computing the market risk premium if you're only focusing on

historical premiums.

ARBITRATOR BAKER: Last question: On the country risk, at what date did you determine to use for the country risk, and what number did you use?

THE WITNESS: Okay. If I can just--to give the precise answer, let me go to my report, the First Report.

And the number--let's see. Trying to get to the appendix of the WACC section.

Okay. The number is 189 bases points or 1.89

B&B Reporters
001 202-544-1903

Page | 2224

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

percent. And the way it's been computed is--

MR. BURN: You may want to refer to Page 92.

THE WITNESS: I'm sorry?

MR. BURN: Page 92.

THE WITNESS: Page 92. You're looking at my First Report or my Second Report?

MR. BURN: First.

THE WITNESS: I'm not--well--

MR. BURN: Apologies.

THE WITNESS: I'm looking at the one in Spanish. That's why maybe this is a different Page number.

But the way I do this is by looking at the

spread between the average yield of Costa Rican bonds for the 12-month period before the date of valuation, so it would be in the 12-month period before the before 12th of May, 2011. So it's the spread between the Costa Rican bond of ten-year duration issued in dollars against the U.S-dollar bond issued by the U.S.

ARBITRATOR BAKER: Okay. Thank you very much.

ARBITRATOR NIKKEN: I'm going to ask you in Spanish, your native language. Perhaps I'm

B&B Reporters
001 202-544-1903

Page | 2225

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

simplifying, but perhaps this can help in general. In paragraph 2 of your statement, you assume that the Claimants prevail in their principal claim.

I'd like to see, what is the scope of this assumption? Because as you have seen, and simplifying a lot, there have been many points in debate at this Tribunal, and some of those, it could be said, have to do with the substance of the lots in question. In other words, are there wetlands on this real estate? And then others that are a procedural due process contradiction between Costa Rican agencies.

When you say "prevail," you mean prevail in all points--well, have you actually thought about whether the Claimants are right with regard to some

points, procedural points, but perhaps they're wrong about the fact that there are wetlands on the property?

THE WITNESS: My valuation exercise assumes that the Claimants prevail with regard to all points, with regard to the economic valuation, the permits that Claimants had they had in order to construct environmental permits and construction permits, which

B&B Reporters
001 202-544-1903

Page | 2226

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

meant that they could launch this to the market, they could continue with development, they could construct. It was understood that these had been obtained and so there is no further thought about whether there is doing to be a delay in issuance or whether the permits had to be modified. This has not been considered in my valuation.

PRESIDENT SIQUEIROS: I have questions. And I am grateful for the patience of court transcribers and interpreters.

You analyzed the value of the damages for the hotel investment. And you make that value, and you make a comparison with respect to other properties located in Costa Rica and outside of Costa Rica, and you determined that it's a value 181,000 per room, as

I understand correctly the tables on page 18 of your summary in the presentation today.

Have you taken into account whether the hotel was going to be built on the concession where it is my understanding that there will not be a true ownership of the land in that area?

THE WITNESS: I have--

B&B Reporters
001 202-544-1903

Page | 2227

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

PRESIDENT SIQUEIROS: Because it is precisely a concession.

THE WITNESS: Right. It is a concession. Yes, you're right. The way I interpret the ownership rights is in function of the shareholder agreement that I understand was also in place which basically asked for the minority shareholder to finance all the construction of the hotel and any other development that was planned for that area, and in exchange they would get 100 percent of the profits related to that. So--

PRESIDENT SIQUEIROS: But that relates to the profits of the company of La Canicula, which was going to be the company that holds the concession.

THE WITNESS: Right. But I understand that the--I mean, we have--I think we have a back-up slide

that would be helpful which is at the very end of my presentation. But my understanding is that this is an agreement between Mrs. Murillo--

PRESIDENT SIQUEIROS: Indeed. Indeed it is.

THE WITNESS: --and the U.S. investors.

PRESIDENT SIQUEIROS: But that relates--and

B&B Reporters
001 202-544-1903

Page | 2228

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

you have a copy of that in, I believe, the final page of your presentation on page 33.

But this relates to the profits that are being earned in the company holding the concession. My question is, if you're going to value a hotel room, you would normally have to take into account--especially if you're comparing to other properties outside--whether these properties are outside of--this is different than this Las Olas Project--owned the land or whether they do not own the land.

THE WITNESS: Right.

PRESIDENT SIQUEIROS: In Las Olas the concession rights are a concession of the land, but there's no ownership of the land. So the only thing that would be owned would be the construction. Am I correct?

THE WITNESS: Well--

PRESIDENT SIQUEIROS: Because if this is so, then it would not own the grounds, the gardens which most likely the other properties that you're comparing which--when they take into account a per-room value

B&B Reporters
001 202-544-1903

Page | 2229

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

would have to necessarily take into account also the--the other elements, not only the construction, but also the grounds, the gardens that make up that development.

THE WITNESS: Well, I think that your question is right, and there is a distinction to be made, say, if the land is owned by the same company or developer that is trying to sell a hotel or whether the--the land is sitting on a Concession rights.

From an economic point of view, both can be valued, and they can have similar prices to the extent that, A, the Concession terms are sufficiently long enough so as to net present value of the revenues, less cost of a hotel are sufficiently long in order to be kind of equivalent to owning the land; or--and B, to the extent that you expect that the Concession rights would be renewed at the end, say, you have a 10-year or a 15-year Concession term, and so you would

factor in the expectations of renewal of that
Concession and whether you have to pay any fee
for--for being the--the Concessionaire, whether it's a
one-time fee or whether it's an annual payment that

B&B Reporters
001 202-544-1903

Page | 2230

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

you have to pay to the owner of the land or the--the
Concession--the party that grants the Concession.

So that's what we would do. In my particular
valuation--I mean, the Concession rights are I think
for 20 years, with expectation of renewal. And I
understand that there's no payment or at least no
significant payment for obtaining such Concession
rights.

If I knew of such payment, I would have
incorporated as a cost in the--

PRESIDENT SIQUEIROS: The annual fees?
Because--there are annual fees?

THE WITNESS: I think the annual fees I've
seen, but they are very, very small, so they're not
really making a difference on--on valuation.

But that's a type of distinction that you
would make between a, say, Concessionaire as opposed
to ownership of the land.

PRESIDENT SIQUEIROS: Okay. And the following

question--I notice also that you provide a--an estimated value on the--per lots of \$170 per square meter.

B&B Reporters
001 202-544-1903

Page | 2231

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

But when I look at the list of properties that were sold before May 2011 and even thereafter, I see that the prices per meter are--you know, except for some sales that were made in 2008, the prices are substantially--very substantially lower than your estimated value of the properties as of May 2011.

Could you explain that, or--there might be something that I'm not understanding well here.

THE WITNESS: No. Your observation is correct, but let's distinguish the two periods: Pre-May and post-May. I mean, all of the values that you see post-May are--are really very low, but they are implicit that you cannot construct or you cannot develop because there's already an order.

So you should be disregarding those for market price purposes, and--but if you look at the prices pre-May 2011, it's true that on average, the per square meter is around 143, which is lower than the 186 that I find as of May 2011.

And that my understanding is that this is

normal for presales, that you would be discounting in order to get attraction to the--to the sales. So, you

B&B Reporters
001 202-544-1903

Page | 2232

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

would be selling to those who are there to buy very early on, even before the permits are in place, so that they can have the--some of the benefits of the uprise in prices in value once you're completing the permitting process and once you start deploying the construction of the infrastructure.

So, one of the uncertainties that those who buy very early on have is the timing as to when the project will really look like a resort development so that they can start constructing their houses or moving in with their condos.

And that is the--kind of the risk that you see in lower prices. I mean, in order for them to be attractive for early sales, you have to sell at relatively lower prices.

In addition, you see here that--of course, you have the financial crisis in the middle as well. So, you see some impact on relatively higher prices before the financial crisis and after as being another element to take into account.

PRESIDENT SIQUEIROS: There are those that I

see, indeed, even as of January 2011 are almost
B&B Reporters
001 202-544-1903

Page | 2233

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

one-half--50 percent of the value that you estimate.

So you would still include that very substantial--you would attribute this very substantial amount of difference to the elements that you have described on the need that the developers would identify to undercut the prices before the project is fully operational?

THE WITNESS: Yes. And that's my understanding. And the reason I say so is also because I look at the prices that other resorts are offering. And say for the same size or very similar size or even a smaller size--you have El Místico offering lots for \$120,000 rather than \$60,000.

So it's not credible to think that a developer in Las Olas would be completely off the market going forward. So you--you have to adjust to market prices of similar quality or similar offerings sooner or later. So the way I interpret those lower prices in 2010 and 2011 is on that direction of trying to make it very attractive so as to get some sales going on at the predevelopment stage.

PRESIDENT SIQUEIROS: Thank you. Thank you

Page | 2234

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

very much. I have no further questions.

None from parties? Okay. Thank you very much, Mr. Abdala.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: You are released.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: Thank you.

So it's roughly 5 minutes to 2:00. Are the parties in agreement if we return at 3:00?

MR. LEATHLEY: Yes.

PRESIDENT SIQUEIROS: Okay. Thank you very much.

(Whereupon, at 1:53 p.m., the Hearing was adjourned until 3:10 p.m. the same day.)

B&B Reporters
001 202-544-1903

Page | 2235

1 2 3 4 5 6 7 8 9

10 11 12 13 14

AFTERNOON SESSION

PRESIDENT SIQUEIROS: Mr. Burn.

MR. BURN: Yes, sir. There are a couple of administrative matters, I just wanted to turn to, before we hand it over to Mr. Hart.

And, first of all, Dr. Abdala forgot to mention this, but with respect to the valuation model that you would have seen exhibited as CLEX-82 to his second report, which is an Excel spreadsheet--a live Excel spreadsheet, he does have versions of that updated to reflect the modifications that he referenced in his--his presentation.

And those are available for the Respondent and for the members of the Tribunal in--on a USB stick if those are required. I'm happy to distribute those at the end of proceedings today. They highlighted--the modifications that he referenced are highlighted on the spreadsheets, so it's pretty clear where the further modifications have been made.

PRESIDENT SIQUEIROS: Okay. I think it would be useful to have those to reflect the changes that were done to his model. Yes, I think that would be

B&B Reporters
001 202-544-1903

Page | 2236

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

desired.

MR. BURN: Indeed. We'll distribute those at the end of the day.

The other thing is I just wanted to check where we were on timing.

PRESIDENT SIQUEIROS: Francisco, if you may, please.

SECRETARY GROB: Sure. The Claimants have used 74 minutes and the Respondents have used 142 minutes, and you have three hours each.

MR. BURN: Thank you.

PRESIDENT SIQUEIROS: Anything from the other side, Mr. Leathley?

MR. LEATHLEY: No, sir. Thank you.

I'm tempted to plant the seed in the mind of the Tribunal of the generosity from Costa Rica to Claimants at the last minutes of the--of the hearing in December, but I don't know if the Christmas jollity extends into February.

MR. BURN: I mean, that's up to you. Fine. The 15 minutes we had additional in December, that absolutely ought to be provided, if they need it, to

B&B Reporters
001 202-544-1903

Page | 2237

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

the Respondent. So, yeah, there will be no objection on our side to an extra 15 minutes, but no more than

that.

PRESIDENT SIQUEIROS: As I mentioned, the civility and the courtesy that each party afforded the other in December I'm sure would be reciprocated anytime.

TIMOTHY HART, RESPONDENT'S WITNESS, CALLED

PRESIDENT SIQUEIROS: Dr. Hart, good afternoon. I believe this is not the first time that you are before a Tribunal such as this, so you likely know what the procedure will follow.

After a few confirming questions on the part of counsel to Costa Rica, you will be permitted to go through a summary of your report, to be followed then by cross-examination on the part of Claimants.

Should counsel to the Respondent of Costa Rica decide to make any redirect questions in respect to that examination, they will do so. The Tribunal may at any time ask any questions from you, although we will normally, but not be required to do so, wait until the parties have ended their exchange.

B&B Reporters
001 202-544-1903

Page | 2238

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Please proceed to answer the questions. You will be afforded the opportunity to make clarifications afterwards.

Also, as you have witnessed me ask Mr. Abdala, please, between the question and the answer, allow just a second or two to go by so that primarily interpreters can make any--you know, allow them time to do their job. I don't expect that there will be any Spanish examination right now. But, still, it's best to allow them a few seconds just between answer and question.

And, finally, I would ask you to read the statement that's in the card right in front of you.

THE WITNESS: I, Timothy Hart, solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT SIQUEIROS: Thank you very much.

MR. LEATHLEY: Thank you, Mr. President.

DIRECT EXAMINATION

BY MR. LEATHLEY:

Q. Good afternoon, Mr. Hart. Just to confirm in the binder in front of you, if you could check the two

B&B Reporters
001 202-544-1903

Page | 2239

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

expert reports which have been submitted. If you can just verify those are yours, please.

A. They are.

Q. And do you have any changes you wish to make?

A. I have one small change in my second report, and it's been distributed as an errata sheet with the presentation. It's on page 12, paragraph 32, where we strike where it says "we're down," and we replaced "did not increase at the same rate." And we changed the minus 15 in the table to a positive 15 percent. That's all.

Q. Thank you.

MR. LEATHLEY: Mr. Hart will be making a short presentation at this stage.

So, please, Mr. Hart.

DIRECT PRESENTATION

THE WITNESS: Thank you.

Good afternoon. Briefly, my qualifications are here for the review of the Tribunal. But I am president and founder of Credibility International which I founded in 2010. I've got 32 years assessing damages. By background, I'm an accountant as well as

B&B Reporters
001 202-544-1903

Page | 2240

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

a certified fraud examiner.

If you would turn to the summary of opinions. From a financial standpoint, the Claimants' interactions caused Las Olas to be a failure to date. They bought the property with no plan and minimal due

diligence. The Project has a history of numerous business plans with widely varying specifications. The management did not have the proper experience to add value to Las Olas in those business plans.

I identified several red flags related to this project which undermine its financial viability. Dr. Abdala ignored the lack of due diligence and experience as well as the red flags in his valuation. And Dr. Abdala's hybrid, probabilistic approach damage methodology is incorrect. I've never seen it before. And it's just as inapplicable in this case in particular.

Even if his entirely flawed approach were accepted, his underlying calculations in his DCF have multiple flaws and, again, do not reflect the market or any sort of measure of fair market value.

The cost approach, the least speculative

B&B Reporters
001 202-544-1903

Page | 2241

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

method to calculate the value of raw land in this case, because it does take into account the actual transaction of that land, albeit nine years before, but it is the actual property.

The Claimants have not put forth a claim under the cost approach. They gave us an unorganized group

of documents that look like shoebox accounting, which precludes me from putting forth a reasonable or a reliable cost claim. And Claimants' expert testified he saw one accounting document from a project that lasted for nine and a quarter years. It's really quite unheard of.

Given the documentation provided, my best estimate of damages under the cost method is 2.72 million. But, again, there's a good chance that this will significantly overstate the value. Given the circumstances of the original investment, the multiple changes in the plan, Claimants' background and lack of experience, and the lack of the proper accounting system, again, makes it hard to figure out what costs actually added value to this project during that period of time.

B&B Reporters
001 202-544-1903

Page | 2242

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

The reason the claim has no relationship with the investment. The investment was 1.647 million in the property. We oddly have nothing but--from the Claimants' Witness Statement of what was actually invested in the project, alleging to be in total 7.66 million, although we've seen balance sheets that suggest only a total of 2.2 million was put--or

2.4 million was put into the project as of September 30th, 2007.

But the claim itself at \$69.1 million for this 9 1/2-year--or 9 1/4-year project plus 28.3 million of interest. That's \$97.4 million, which is 12 times the alleged investment, which, again, I think the investment is overstated. 60 times the cost of the land. The Claimants don't own 22 percent of the land they're expecting to get paid for.

Let's talk about observations on Las Olas. The assets Claimants owned in May 2011 is what we need focus on. They had raw land purchased with limited due diligence. Again, for \$1.647 million. That they appeared to equate to the value of an 800-square-meter plot of land in Florida. They had no specific plans

B&B Reporters
001 202-544-1903

Page | 2243

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

for it. And it sounded--they thought they could hold it for a few years and maybe make a decent return on investment if they flipped the property.

They don't own the lots on the property. So, that's what they have, raw land, but less of it than they paid for back in 2002.

They got a poor business plan. This valuation by Dr. Abdala is built on a very poor plan.

Mr. Damjanac quickly prepared--his own words--in his plans to give a general overview of profitability can be later refined is what his plan said. He lacked proper experience and any success in real estate in Costa Rica.

You know, this plan is not put together by an experienced professional who can point to success in Costa Rica in resort development. And it's supported by rendition drawings and admittedly still needing permits as of December 2011.

All four iterations of the business plan were failures. There's no evidence of any offers or interest of investors to buy all of Las Olas. Again, if this is worth \$100 million, as Dr. Abdala says,

B&B Reporters
001 202-544-1903

Page | 2244

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

somebody would have come along at some point and tried to buy this. We've just got no evidence of that.

The evidence of lack of demand with low lot sales and subscriptions over a nine-plus-year period. They tried to sell the property, virtually nobody was interested, and they were sold for a much lower value than Dr. Abdala testified to.

Las Olas is not beachfront property. The property has 150 meters of beachfront that you walk

through a property they don't own onto a concession area. I mean, they have 750 meters of highway. So, this is not really prime beachfront property.

The rendering of the Beach Club included in the December '10 Plan certainly looks misleading as the buildings can't possibly be built that close to the water. Again, it shows the preliminary nature of the drawings they had as of the date of the alleged taking--I'm sorry--of the problems.

In December 2010, Claimants admit Las Olas was at low value, speculative, raw land in a dead market. That's their own admissions. The December 12, 2010, David Aven letter to investors says, "Since that time

B&B Reporters
001 202-544-1903

Page | 2245

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

after the economic crisis, we have sold an additional 16 lots and taken deposits on a few more."

So, in about one year's time, they've have closed \$875,000 in sales and taken deposits on 387 in sales and should close in the next few months.

I've seen some agreements for these alleged sales but limited evidence of cash received. I saw instructions to wire money through Switzerland for no apparent reason. But we can't seem to get any real accounting for what the real sales were.

Mr. Damjanac's Witness Statement evidences that not one of the seven deposits became a sale as of May 2011 because his number of sales agree exactly with Mr. Aven's back in December 2011. So, all these deposits fell through also.

And it is very difficult to sell a raw land product which is not improved, to Mr. Aven. This was a most difficult year to sell real estate down here. Mostly all of their deals are dead in the water. He said there's little market for their improved raw land and the market was dead. That's his own words. So, the value should be based on raw land in a dead

B&B Reporters
001 202-544-1903

Page | 2246

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

market.

He also said in the same letter, "The more the land is developed, the more it's worth." This land is virtually undeveloped at that point in time.

The low value, raw land required further speculative construction to add unproven value to Las Olas.

Again, in the same letter he talked about this house being built by Mr. Tory Mills of being of critical importance. How the house going up will increase interest rapidly, you know, high sales

velocity. They want to see construction progress, he said. People jump into the deal. He said that Tory assured him that the minute the house sells, he will probably buy a couple more lots.

That doesn't sound very certain. He will buy another lot when Tory's house sells, another person.

So, again, they're hoping this one single 1,300-square-foot home was going to change the entire trajectory of this project. If they truly believed that, as real developers, they would have been building houses and homes to sell. They clearly

B&B Reporters
001 202-544-1903

Page | 2247

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

didn't have the financial resources to be developing as real developers would.

The multiple failed business plans for Las Olas. Let's start back--February 6, 2002, they bought the land. They then hired professionals in Norton and EDSA to do a plan in 2004.

2007, they came up with a more definitive plan with resort development marketing international on it.

We go to 2012--2010 and Mr. Aven prepared his own project overview and proposed business model. It appears to be superseded by Mr. Damjanac's business plan for Las Olas Beach Community. And that is the

plan that Dr. Abdala relied upon for all of the--the unit sales, in essence, the footprint of the Project is what came from Mr. Damjanac's plan.

That's 9 1/4 years. We've got four different plans. None of them which worked. As you know, to be successful in business means you have sales. You have no sales; you have no business. And they tried to sell this on two occasions, and the sales were very, very thin, showing very little market interest in Las Olas.

B&B Reporters
001 202-544-1903

Page | 2248

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Let's look at the evolution of the plan.

Look at the number of condo units in 2004 from Norton Consulting and EDSA, 345 units. We go to Mr. Damjanac's plan. And between the single-family homes, the condo units, the timeshares, and the number of hotel rooms, we have 708 units. That's 105 percent more than the professionals at Norton and EDSA recommended developing the property.

And look at the--how timeshare also becomes a huge portion of the business model as we go over time. There is none of it in the Norton Consulting/EDSA plan, and eventually it's the lion's share and a huge, huge driver of Mr. Damjanac's plan. Mr. Aven had a

little bit of it in there also.

But it also focused on hotel sales.

Mr. Damjanac expected an \$18 million sale in Year 2 on a hotel for 114 rooms that they had a single drawing, just a rendering of it. And it's planned to be built not on the concession area. It's on the parcel across the street, the 14,000 square-meter area that is not owned by the Claimants.

So, it's not where the hotel condos were--I'm

B&B Reporters
001 202-544-1903

Page | 2249

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

sorry--the hotel timeshare, 66 units at the beach. It was the next parcel back is where they planned. But they expected to sell an \$18 million hotel in Year 2 when all they had was a rendering. And the first time it ever appeared in a plan was in Mr. Damjanac's December 2010 Plan.

Technical difficulty. We're back. All right. Sorry about that.

Now, if we look at the planned undeveloped land plummets. 2004 Plan had 43 percent of the land undeveloped, so lots of green space and bigger areas for people to enjoy. Mr. Damjanac's plan is the maximizer plan that fits as many people as you can on the plot of land, leaving 7.1 percent unoccupied.

So, therein is the magic of the unit sales is you put a bunch more--assume a bunch more people fit in the same space and multiply it by alleged market prices and you get a much higher value.

So, the total units, again, increase substantially. And if you add the hotel to that, the comparison would be 345 to 708 for a 105 percent increase.

B&B Reporters
001 202-544-1903

Page | 2250

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

The Claimants do not own all the lots on the Las Olas property. Again, I heard Dr. Abdala's testimony this morning which didn't seem to comport with the facts. In the red you can see that's the property not owned by the Claimants, and it's inside the area they're planning to develop. And it's a much larger number of lots than Dr. Abdala says he subtracted. We don't know if they're selling lots on the side, what happened. But they did not own those lots as of the date of the May 2011.

The green area is where they planned to build the hotel. I don't think there's a dispute about them not owning that land. And then there's a dispute about the ownership out of the concession, what can be done with the Beach Club and the hotel condos down

there. And the blue signifies what's been sold subsequent to the filing of the--of the case.

So, again, just on--on square meters, it's 22 percent overstated in terms of what the--you know, the land they have to sell from, you know, 2011 forward.

The Claimants did not mitigate the risk of

B&B Reporters
001 202-544-1903

Page | 2251

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

investing in the hotel leisure industry.

Down on the left side of this chart shows the risk category being occupancy, product, and investment provider, developer, management company.

And then the Claimants' lack of experience and action where they failed to mitigate. And I'll walk through each point.

Under occupancy, the key to the success of the investment in achieving returns. Well, the Claimants failed in nine-plus years to make meaningful sales, so it's highly doubtful that occupancy is going to be successful.

Demand dictates whether the property can hit its occupancy targets. Well, they demonstrated low demand. And by their own admission, it was a dead market at the valuation time.

Their product investment provider. Clear responsibility of inability to provide ongoing investment. There's no trace of actual funds with these investors in terms of having the bankroll to build the common amenities, build the hotel, to build the other--the condos and things. So, you know, they

B&B Reporters
001 202-544-1903

Page | 2252

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

didn't appear to have the financial wherewithal at that point in time to really push the development forward.

The previous success of the investment property is critical. Had no success at Las Olas. In 9 1/4 years of ownership to show no success--or anywhere else.

And for the developer, a track record of meeting build targets and standards. Well, they never developed a resort, and they lack any real progress over nine years at Las Olas.

The management company is essential to the success of the investment. In charge of the day-to-day running of the property, room rates, and occupancy. They have no management experience running a resort.

The track record and performance of the other

properties managed by the company. They have no other properties managed.

So, they fail on every single element of the scorecard as to whether Claimants actually mitigated the risks in the hotel leisure industry.

B&B Reporters
001 202-544-1903

Page | 2253

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Now, the particular risk factors at Las Olas. Again, they entered this with minimal, if any, due diligence and buying the property more on a lark. Evolving business plans with varying specification and longtime intervals between each version shows they weren't making progress.

They presented no evidence that a market exists for this project. In fact, their own contemporaneous evidence shows the market was very poor, no demand. Investors, developers, and management are comprised of generally the same group of individuals who lack experience in the local market, experience in the industry, proven track records, and international experience.

Claimants' backgrounds exhibit numerous red flags that would have concerned legitimate, diligent investors. Because this is a real estate investment. So, whoever you're going in with, you necessarily get

tied together in their financing and their background.

Mr. Janney's background had red flags. He filed for personal bankruptcy in December 2015, primarily driven by real estate failures. Engaging in

B&B Reporters
001 202-544-1903

Page | 2254

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

conduct of questionable professional integrity. He failed to mention his involvement in Las Olas in his Federal bankruptcy filing. He has accusations against him on a personal level and accusations of defrauding donors of the World Hope organization. And we also saw hotel receipts for, you know, hotel stays for World Hope in Nairobi in the accounting documents in this case.

Now, the Aven family background and red flags. David Aven has no experience in resort development or management. He never invested outside of the United States prior to Las Olas, and he added no strategic value in the points I've got listed.

Samuel Aven, somehow the largest stakeholder with the \$700,000 claimed investment, granted a 44 percent stake, yet there's no witness statement or testimony. He's got no known real estate experience and a passive investor with no strategic value.

Carolyn and Eric Park, they invested on the

advice of David Aven. No known relevant experience or knowledge. And, again, passive investors.

Mr. Shiolenno, no financial investment.

B&B Reporters
001 202-544-1903

Page | 2255

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Instead, he was given lots by David Aven in exchange for marketing work which produced zero results. He also filed for personal bankruptcy.

And Mr. Raguso is the one person who looked like he had experience for the role he was slotted to do, which would have been helping construct the hotel and other common buildings; however, it never progressed to that level of services, yet he still has equity in the project even though he never worked on it.

Let's turn to damages and Dr. Abdala's flawed methodology. He applied a hybrid methodology based on the income approach, a probabilistic DCF, and market approach. Preexisting appraisal and comparables is what he's done. A probabilistic DCF is not appropriate. It was never a going-concern project.

The estimated cash flows for the new project in the pre-operational phase cannot be reasonably certain. You heard this morning Dr. Abdala took Mr. Damjanac's plan, used the units from that plan and

he went--he ignored what was happening in Las Olas and allegedly applied his market values to that plan.

B&B Reporters
001 202-544-1903

Page | 2256

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

That's not reasonably certain. There's--the plan they were trying to sell at Las Olas was not selling. There's no figures upon which to base critical inputs such as sales volume, unit sales prices, construction costs, and operational costs.

They just don't exist. Dr. Abdala applied a speculative probability of success of 68 percent versus 32 percent based on U.S. data of the real estate segment. Not a Greenfield resort that had been languishing for over 9 years.

So, he's basically telling you it's twice as likely to succeed by this alleged success. They didn't succeed in 9 1/4 years. But these things you're going to see going forward.

He presented two valuation dates. It sounded like this morning he abandoned the other ones and talked only about 2011. He intertwines own assumptions of the Claimants' 2010 quickly prepared, general, unsupported and untested business plan.

He estimated cash flows are unreliable and not reasonably certain. They contain numerous unsupported

assumptions. And, again, he applied U.S. data to a
B&B Reporters
001 202-544-1903

Page | 2257

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Costa Rican project for his supposed success ratio.

The discount rate does not properly account
for the risks faced by Las Olas.

Valuation date I'll skip. It looks like he's
gone back to the May 2011 date. But if we look
at--now, these next two pages are pretty important to
look at.

Under the lots, we look and see, under
Dr. Abdala's world, that you have total revenue from
the lots of \$37 million, up 15 million from
Mr. Damjanac's own plans. So, Mr. Damjanac was
assuming they would be selling 60,000 per lot on a
go-forward basis, very close to the 55 that they were
already selling, on the lots closest to the beach.
That's what they sold historically were the lots
closest down to the beach for, on average, 55,000.
Mr. Damjanac assumed 60-. But he's inflated the
revenue substantially on the lots, getting a net
profit of \$28.5 million on the lots alone.

Then on the houses he's come down a little bit
from Mr. Damjanac in terms of what he thinks that
portion of the profit would be. But on a net basis

Page | 2258

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

between the house and the lots, he's--he's much greater. It looks like Damjanac was looking at 30 million. He's looking at \$47 1/2 million.

Now, when we look at the condos, it's quite interesting. He said this morning that it's normal that a condo would cost the same as a house. Condos normally cost less than the house. His own model shows that the--that the condo price is within \$2,000 on the low end and almost identical on the high end. It just doesn't make sense. So, he ends up driving almost a \$23 million profit on selling these condos. Again, a higher profit than Mr. Damjanac had projected.

Look at the timeshares. I think he recognized how crazy Mr. Damjanac's estimate of timeshares were where he thought he could get \$139 million of profit off timeshares. Dr. Abdala reduced it, but he's still saying on \$40 million of revenue, they're going to make \$33.7 million of profit.

It just doesn't make sense. They didn't sell a single timeshare historically at this property, and you heard this morning for the first time that he had

Page | 2259

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

assumed that they had joined an international group sharing timeshares. That was not in his evidence before today.

We get next the hotel. Dr. Abdala increased the sales price from Mr. Damjanac from 18 million to 20.6, a hotel that they have a rendering of that was first in the business plan in December 2010. They assume it was going to sell in Year 2 for \$20.6 million and a profit of 9 million.

I mean--and this is the ultimate in a speculative claim. Each element of it, you go down it--if this was anywhere near worth \$103 million of undiscounted cash flow, somebody somewhere would have come along and tried to buy this, and we'd have some evidence that there would have been some interested investors that would have done exactly that.

We look at the historical versus projected sales. Here's the real world, what really happened at Las Olas. Dr. Abdala's numbers show it's 12 lots. I'm going to go with Mr. Aven and Mr. Damjanac's testimony of saying 16 lots sold to a grand total of 12 different individuals, because some people bought

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

more than one.

Okay. They then assumed right away, the next year, they'd sell 42 lots, even though the evidence that they showed you said that three lots sold in January and nothing thereafter. But they're going to have a huge jump up in lots, up to 63 the very next year.

But then we add on top of that the house sales, they're now assuming--even though they were building no houses--Tory Mills is the only guy building a house there, but we've got to assume that someone is going to be building houses on top of these lots and half of them are getting built by a developer.

Then you go to condo sales. They're going to sell 8 of those right away in 2011. But then the magic comes in with the timeshare sales. All of a sudden there's going to be 330 weeklong sales of timeshares right away in that first year.

So, you can see reality on the left and the magic of the spreadsheet on the right.

Historical versus projected revenue, it's even

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

worse. You got, by all accounts, less than a million dollars of sales, less than 900,000 in 2010. But just the lots by themselves, we see them multiplied to more than 5 million in the very next year. We get a lot of revenue from building houses. The condo revenues would come right in. We then get timeshare revenues for \$15 million of revenue in the very next year.

So, we go more than 15 times what was going on in the real world in 2010. And then the very next year, 49.9 million. Add 2011 and 2012 together, it says they're expecting \$65 million of revenue in the first two years.

The discount rate. Again, I've got--the criticisms have been there. I won't spend time today going through them since I don't think it even applies. DCF is the wrong method, so, we don't have a place for discount rate in this case.

Dr. Abdala's value of Las Olas as a failed project. He refers to the value of the property as partially developed land with environmental and construction permits in place, a portion of the lots already sold to third parties and certain

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

infrastructure and urbanization works completed and others in progress.

Based on an appraisal prepared in 2009. And Dr. Abdala implemented adjustments for inflation, currency devaluation and partial urbanization. He ignored the change in the real estate market between 2009 and 2011.

But the other thing I would say with this approach is necessarily the plan by the appraiser is taking into account the plan they had. If they're going to measure the urbanization of this property, it's under the plan the Claimants had when the appraiser came in.

Again, it's a very summary report, and you don't see the work of the appraiser, but it's clearly following the blueprint of whatever Claimants were planning at the time.

Applied unsupported 32 percent probability of failure. It's just the inverse of his unsupported 68 percent based on the U.S. data.

His value of the land in the current state. This is where he takes his deduction. I don't think

B&B Reporters
001 202-544-1903

11
12
13
14
15
16
17
18
19
20
21
22

it's really--he presents three comparables but doesn't identify them, so, we can't even, you know, find out if they're right.

Does not adjust between real estate market in 2015 when he followed them back to May '11. He applied an arbitrary discount of 7.81 percent to the difference between listing prices in Key West, Florida, versus sales prices. That has nothing to do with what's going on in Costa Rica.

The basis of the claim in May 2011. This is something you'll have never seen before. The value of the Las Olas as a going concern at his discounted 103 million down to 86, times a 68 percent probability of success, and the value of Las Olas as a failed project, 35.2 million times 32 percent equals 69.6 million but-for expected value.

If this were a real damages method or a real valuation method, you would see it in court cases around the world. Every preoperational business would go to court saying, "I've been in a breach of contract. I've been harmed." And I'd say, "The probability of success in my industry is this much,

B&B Reporters
001 202-544-1903

12
13
14
15
16
17
18
19
20
21
22

and let me do a DCF."

But that's not the way it's done. You wouldn't do this for a client asking you to help value something before you go buy it. This is just not a method that's used.

Equals--you know, minus half a million dollars for the value of the land without the permits equals 69.1 million in damages plus 28.3 million of interest gives you 97.4 million of claim.

So, again, it's a methodology you've not seen before because it's not used out there. You'd have seen it in U.S. courts, UK courts. You'd have seen it in arbitration. But people try to show you get over the line to have an actual operational business to apply a DCF, and that does not apply here.

Here's the summary of Dr. Abdala's various claims. He went through them this morning. I won't belabor them.

Let's look at reasonableness check of the timeshare cost compared to local hotels. If we look and take the prices to rent a hotel for a week, which would be the comparable of saying I own a timeshare

B&B Reporters
001 202-544-1903

Page | 2265

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

that I share with 49 other people, you take 35 years of the timeshare, it would be less costly than renting at a hotel. Or 80 years until the timeshare is less expensive than the next most expensive.

That would just tell you that everything about their timeshare model makes no sense if it takes a lifetime to have the most expensive one be less expensive than the timeshare.

The invested cost approach. This is the least speculative valuation methodology. They're admittedly raw land and never a going concern. And it's the way businesses actually account for these properties in fair value statements. It's the way it's done.

The only prudent value-added expenses should be considered under the cost approach. And they've put forth--you know, they put forth no claim under the cost approach. They've said it's not appropriate, but they gave us the poorly organized box of documents.

As I said earlier, I think there's a significant chance that this will overstate the value because the drop in prices is the financial crisis, the lack of due diligence in the original investment,

B&B Reporters
001 202-544-1903

Page | 2266

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

multiple changes in the plans, the Claimants' backgrounds and lack of experience and track records in real estate, which is implicit in the plan that Dr. Abdala used to value, as well as the lack of the proper accounting system.

You know, people out there couldn't get comfortable with his project about what its financials were given they don't have contemporaneous accounting or financial statements.

So, in the invested cost method, I've taken account the original purchase price plus those expenses I've identified as being related. Given the invested amount of 3.5 million less the 22 percent for the property not owned brings a \$2.72 million invested cost approach.

The interest. I think asking for WACC is not appropriate. The prevailing rate from the study that we did at Credibility in 2014 is more the ten-year U.S. Treasury rate or the six-month LIBOR plus 2 is the, you know, most prevalent rates use by tribunals up through 2014. And that concludes my prepared remarks.

B&B Reporters
001 202-544-1903

Page | 2267

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

MR. LEATHLEY: Nothing further. Thank you.

PRESIDENT SIQUEIROS: Mr. Burn.

MR. BURN: Thank you, sir.

CROSS-EXAMINATION

BY MR. BURN:

Q. Now, Mr. Hart, we're very grateful for what are two very colorful reports that you've provided in these proceedings. I'm going to take some time to take you to various of your criticisms and your assertions in order to test them against the evidence and the testimony of Dr. Abdala.

Now, first of all, if one looks at your CV, and we can obviously go to the updated CV in your second report if we need to, you describe yourself--if you could confirm this--as a forensic accountant, and you say that you've testified in matters primarily relating to accounting, to damages, finance, fraud and valuation and the like. Does that sound fair?

A. Yes.

Q. So, one thing you're not is an economist; is that right?

A. That's correct.

B&B Reporters
001 202-544-1903

Page | 2268

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

Q. So, you don't have the training of an economist; is that right?

A. I have some economics training, but I'm not a--I'm not a degreed accountant--economist.

Q. Thank you.

And you're also not a real estate development expert, are you?

A. I have dealt with a lot of real estate development particularly.

Q. Sorry. If you could just focus on the question as I put it to you. You're not a real estate development expert, are you?

A. I'm going to explain to the Tribunal what my expertise is with real estate development.

Q. Well, that you could start by answering the question, and then if you need to extend, you can extend.

A. It's not for me to decide if I'm an expert in something or not. I have dealt with multiple real estate portfolios and multiple real estate projects over my 30-year career and many in the context of very large insurance companies that own substantial real

B&B Reporters
001 202-544-1903

13
14
15
16
17
18
19
20
21
22

estate portfolios that I've been involved in valuing and helping work out.

Q. You're not an expert in resort development, are you?

A. No.

Q. So, you cannot give any evidence to the Tribunal as to what it takes to develop a resort development or a real estate development because those are matters outside your expertise; right?

A. No. Again, I was involved in two very, very large, what turned out to be successful resorts that were troubled real estate projects that I was directly hands-on involved in.

And I've, again, been involved in multiple cases and troubled situations that have involved real estate. So, that--that's my experience.

Q. Right. And I, as a jobbing lawyer, have been involved in numerous cases relating to real estate development as well. Doesn't make me an expert in what it takes to make a real estate development a success, does it?

I'm not talking about the valuation issues.

B&B Reporters
001 202-544-1903

Page | 2270

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

One would expect that you would have some degree of expertise in relation to valuation issues on real estate development projects.

I'm talking about what it takes to make these projects a success. And you do not have and cannot offer that expertise, can you?

A. As I said, I've been involved in multiple real estate projects, including large resorts, that I have been intimately involved in, workouts and other situations. So, that's for the Tribunal to decide what the expertise is.

Q. But you cannot, for example, speak to the practical issues of making a successful development, the planning, the permitting, the marketing, the construction, and so on. You can't speak from an expert's point of view on any issue like that, can you?

A. I was involved in virtually every one of those aspects, except for the permitting, with two very large, you know, multi-hundred million dollar resorts that my client was on the hook for.

Q. Now, if we were to turn to the list of

B&B Reporters
001 202-544-1903

13
14
15
16
17
18
19
20
21
22

cases--and I would invite you now to turn to Tab 3 in the folder, where you'll find a copy of your second report.

If you turn to the CV, which I think you will find is at about--it's at tab--oh, sorry it's just the CV you've got in Tab 3.

So, if you look in Tab 3 there, you'll see your up-to-date CV. Is there anything that you need to add to this CV, just so we're fully up-to-date? You see the Poland case at the top there?

A. There are a number of cases since Poland that I've issued testimony in.

Q. Are there any investor state cases to add?

A. In that time frame I do not recall that there are new investor state in that window since September--since September 2016. There may have been. I just don't recall which reports went out in that time frame.

Q. But if we look at this list, and just starting chronologically in that first section at the bottom--so, this is on page 2 of 7 as it's marked. Sorry. Actually go to page 3 of 7.

B&B Reporters
001 202-544-1903

Page | 2272

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

So, what we see here is your experience as it develops over time. And what we see right at the bottom there is the first investor state case in which you were involved where you sat as arbitrator in relation to a case relating to Guyana.

A. Mm-hum.

Q. And then you have a couple of instructions on the part--on the side of--to Claimants, one in the Slovak/CSOB case, and then in the GAMI Investments and Mexico case. So, we see those two. And those--those cases began at the end of the '90s; correct?

A. Yes.

Q. And then if we work our way up that list and over to--over the page to page 2 of 7, we see the remainder of your investor state experience blended in with various commercial cases.

Now, I've done a bit of arithmetic. I would invite you to accept my arithmetic. But we can go through it more methodically if you wish. I reckon that there are--after the--the GAMI Investments case, there are 19 references to investor state cases. Does that sound right to you?

B&B Reporters
001 202-544-1903

Page | 2273

1 2 3 4 5 6 7 8 9

10

11
12
13
14
15
16
17
18
19
20
21
22

A. That's in the neighborhood.

Q. Right. And every one of those remaining 19 is on the side of the Respondent. Does that sound right to you?

A. It does.

Q. So, it's fair to say--and this CV reflects what you show on your website; right?

A. As most recently updated. I mean, every expert report I send has an updated CV. I don't update the website as religiously as I do what gets attached to my reports.

Q. I think you do yourself down. I checked your website and it does have this information on it.

A. Well, it may have this one, but it does not have--I know it's not been updated in the last few months.

Q. So, if we were looking at your international work, especially bearing in mind how frequent the investor state instructions from Respondent states become in--as this list develops, it's fair to say, isn't it, that you are a respondents' expert? Yes?

A. No, that's just who has called and who has

B&B Reporters
001 202-544-1903

10
11
12
13
14
15
16
17
18
19
20
21
22

engaged me. So, it's--I'm not a respondents' expert. I've done historically U.S. and some UK cases. I've done ICC cases, and I've done--

Q. There are commercial cases. I'm not talking about commercial cases.

A. Oh. If you're talking just in the--yes, the large number in investor state is on the respondent's side, but I'm not a respondents' expert.

Q. Right. But it's certainly fair to say that over the last 15 or 16 years, virtually your entire investor state practice, in fact your entire investor state practice and a good proportion of your international practice, has been involved in appearing as the damages expert on behalf of states. You would accept that?

A. In that portion of my practice, yes.

Q. Now, turning to questions of methodology now. If we could just turn to methodology. You would accept, wouldn't you, that the primary objective of the damages assessment exercise in this case is to identify the fair market value of the Las Olas Project; right?

B&B Reporters
001 202-544-1903

11
12
13
14
15
16
17
18
19
20
21
22

A. Yes.

Q. And you would accept that the standard definition of fair market value is the price at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller. Does that sound right to you?

A. With all of the requisite or all of the relevant knowledge on both sides.

Q. Right. And that's been widely endorsed in the international case law and in the practice handbooks and so on. So, I don't think that there will be much disagreement between us on that.

So, the benchmark for the quantum exercise here is the price at which a willing buyer and a willing seller would agree on the sale of the Las Olas Project outright; correct?

A. Yes.

Q. But your reports don't mention that this is the relevant benchmark, the transaction between a hypothetical willing buyer and a hypothetical willing seller, do they?

A. They don't need to. I know the standard.

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Q. It's not a question of whether you know the standard. It's a question of the benchmark for the exercise you're undertaking for the benefit of the Tribunal.

Now, you would agree that it's important to keep that objective in mind all the way through the process; right?

A. Yes.

Q. But there's no dispute, is there, that the transaction being valued is a sale of the whole Las Olas Project? You've already accepted that, right?

A. Well, the whole, less what they don't own.

Q. Right. We'll leave that particular issue to one side. But it's a sale of the Project. Whatever they own, it is the--a way of identifying fair market value is to understand in these hypothetical terms what it would sell for at a particular point in time; right?

A. Yes.

Q. So, I'm sorry to belabor the point, but it is important that we get this absolutely fixed. The underlying premise of the valuation is that a

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

hypothetical willing buyer comes in and buys the whole project in May 2011; right?

A. Yes.

Q. And that means that the hypothetical buyer would then continue the Project development itself; right?

A. Yes.

Q. So, that obviously means that the sellers of the Project at that point in time fall out of the equation because they've sold their entire interest in the Project; right?

A. In a complete sale, yes.

Q. Which, in turn means, from the point of view of a valuing expert such as yourself, that we're looking for the objective parameters that feed into the valuation; right?

A. I guess I didn't understand that question.

Q. So, let me rephrase just to make it a little clearer perhaps. So, for the purposes of valuation, having accepted the objective and the importance of hypothetical willing buyer, hypothetical willing seller, in order to do that, in order to put meat on

Page | 2278

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

the bone, what we need to do is find the objective data, objectively verifiable data that goes with that; correct?

A. Yes.

Q. Now, in your report, and in particular in your second report, you invest a lot of time and effort making comments about the subjective characteristics, capabilities, qualities and so on of the Claimants in this case and those associated with them. Do you accept that?

A. I do.

Q. But you've just accepted that they would fall out of the equation. That's the whole point of this exercise. They would no longer be relevant, they would no longer have anything to do with the Project in the hypothetical transaction. You've already accepted that; right?

A. However, in this case--

Q. Yes or no?

A. No, it's not a yes-or-no question.

However, in this case what's being valued is
the business plan put together by those very same

B&B Reporters
001 202-544-1903

Page | 2279

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

people. So, it is--it's their work product that
Dr. Abdala just said he put different prices on. It's
exactly their layout, it's exactly their number of
units that they thought they could sell.

So, it has their footprint on it, as well as
the history of that particular land of people knowing
that for nine-plus years that they owned it and sold
nothing carries forward in the value of that land.
It's been for sale lots for at least--

Q. Okay. Thank you. Thank you.

A. --for at least five years.

Q. Thank you for that. It was a yes-or-no
question. You chose to not engage with the question.
That's your prerogative, but it certainly gives me
reason to cut you off.

And again, counsel on your side can certainly
follow up on these matters later.

The business plan, the 2010 business plan, is,
indeed, a relevant source of information for
Dr. Abdala's valuation, but I put it to you that it is
absolutely not the case and has never been the case

that the valuation of damages in this case put forward
B&B Reporters
001 202-544-1903

Page | 2280

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

by Dr. Abdala is a valuation of the business plan, as you say. It is nothing of the sort.

A. He tested--

Q. He got certain information from the business plan, explains what it is, and then takes objective, verifiable data from the market. Would you accept that?

A. No. You must not have been listening to his testimony this morning. He said he took the units from their plan and he took what he believed to be market prices and applied them to it. So, he implicitly has used their business plan as the base of his valuation.

And he further went on to say that the willing buyer/willing seller is influenced by what the willing seller thinks the property is worth at that time.

And just as Mr. Damjanac testified to, he worked on a transaction in Costa Rica in 2006 where he said he had a willing buyer, but his employer was not willing to sell at the price that he bought. So, it's absolutely influenced by the value that the seller thinks they have, whether it's grounded in the real

Page | 2281

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

world or not.

Q. Now, at various points in your two reports, you use some very colorful--some very disrespectful language in relation to Dr. Abdala's analysis.

You speak of him hiding things, sneaking things in, misleading, being deceptive, and so on multiple times. There are dozens of examples of you making all sorts of colorful accusations against your opposite number.

Now, I'll put it to you that it's nothing of the sort. He just approaches the valuation exercise in a particular way and does not consider the type of information that you point to as being relevant. You'd accept that, wouldn't you?

A. You can put it to me, but I don't accept it, no.

Q. Do you think you went over the top with some of your accusations against Mr. Abdala?

A. Not in the least. I've seen his work multiple times, and this is--

Q. So, you think he's been lying to this Tribunal?

Page | 2282

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. I don't think he's been straightforward with this Tribunal about what the value of this property is. Not even in the least.

Q. You think he's been sneaking things in, hiding things, misrepresenting things? That's your honest evidence?

A. Those sound like your words.

Q. No, they're--I can take you to your words if you really want me to.

A. Sure.

Q. Perhaps we could turn in your second report to paragraph 60 where you use a phrase as follows: "This letter tells me the true state of Las Olas as a troubled raw land deal in a poor local real estate market, not an asset in the hospitality industry with no speculative elements as grossly mischaracterized by Dr. Abdala."

Do you see that?

A. Yes.

Q. Paragraph 107: You say, "Las Olas and high-growth companies are in no way comparable, and as such, Dr. Abdala's attempt to mislead the Tribunal

Page | 2283

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

should be disregarded."

Do you see that?

A. I do, and I believe that's an appropriate statement.

Q. If you turn to paragraph 150, we see the phrase, "Dr. Abdala sneaks in a miscalculation to increase revenues." Do you see that?

I could go on. But I put it to you, my characterization was perfectly fair that you have, on multiple occasions in your reports, used abusive language in relation to your opposing experts.

And I put it to you that that is inappropriate, unnecessary, and that all--the difference between you and Dr. Abdala is simply a difference of approach.

A. That may be your opinion, but it's not correct. Someone who takes a model like you got from Mr. Damjanac and then turns it into a \$100 million free cash flow project is misleading the Tribunal as to what the value of this property is. He's been misleading across the board.

Q. Well, I'll put it to you that the very same
B&B Reporters
001 202-544-1903

Page | 2284

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

accusations could easily be made about your analysis.

A. Is that a question?

Q. I don't think it is.

Now, you seem a little confused given what you already said in oral testimony this afternoon and what appears in your reports and what appears in your opening presentation, because you have already accepted that the basis of Dr. Abdala's valuation is a sale, a clean sale between a hypothetical buyer and a hypothetical seller. You've already accepted that. And you had to accept that because that's the correct way of understanding the assessment of fair market value.

But you have also referred, in your opening presentation today, and in your reports, to it not being a sale but being an investment, that we're not talking about a hypothetical buyer of the project, we're talking about somebody who comes in and invests.

You said in your opening presentation they would be tied together and that that is what makes it relevant to understand the qualities, the merits and demerits of the Claimants in this case.

Page | 2285

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

I'll put it to you, given the obvious contradiction between those two positions, that whether somebody is a hypothetical investor or not is utterly irrelevant, isn't it?

A. That was an awful long speech. But, no, an investor is a different word for a buyer.

Q. No, it isn't.

A. It is in the world of finance. Someone who comes in and invests and buys a company is an investor.

Q. Mr. Hart, Mr. Hart, you have already accepted that this would be a clean sale, that it would be a simple sale of everything, the whole Las Olas Project. You made the point, "Yeah, but it wouldn't include the 22 percent," and I said, "We'll come back to that."

It wouldn't include the 22 percent, but it would--you then accepted that it would be a clean sale of the entire project. Whatever they owned would be sold.

So, whether somebody is investing or not is not relevant. It's about a hypothetical buyer and a hypothetical seller.

Page | 2286

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Now, do you want to clarify things in order that we can try and deal with the contradiction between your different statements?

A. There is no contradiction. You can invest in 100 percent of something, or you can invest in part of it. I mean, an investor and a buyer are the same.

You can buy shares, you know, some portion of them. You can buy assets. But you're an investor in either category. It ends up on your balance sheet once you have made the purchase in whole or in part. There's no contradiction.

Q. I suggest to you you're plainly confused as to the difference between, in this context, what a buyer is and what an investor is.

A. I am not confused.

Q. Now, in terms of Dr. Abdala's methodology, we've already established, and you've accepted, that the aim of the damages assessment exercise is to find the fair market value of the Las Olas Project as at May 2011.

Now, you say, Dr. Abdala has used the wrong methodology to reach--to identify that fair market

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

value; right?

A. Yes.

Q. And you characterize Dr. Abdala's approach as being a DCF valuation of the Project. Yes?

A. Yes.

Q. And just so we're clear--I think probably most people in the room have dealt with DCF analyses any number of times. But just so we're absolutely clear, in the simplest lawyer-friendly terms possible, a DCF is a technique that values a business, an asset, using--by arriving at a present value of estimated future cash flows; correct?

A. That's fair.

Q. So, the starting point is to profile those expected--the expected revenues and costs. Yes?

A. Yes.

Q. And then to build a model of the expected future income of the project; right?

A. Based on reasonable inputs, yes.

Q. Right. And one then makes adjustments for the time value of the money and for the risks that arise from making a forward-looking valuation. Does that

Page | 2288

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

sound right to you?

A. Generally.

Q. So, the aim of a DCF is to work out the future income-generating capacity of a project and give it a value for that future income as at a particular date; right?

A. Starting from a business that has a track record, yes.

Q. Well, we'll come back to that.

DCF is obviously a commonly used example of an income approach to valuation; correct?

A. It is.

Q. The other primary approach is being market approaches or asset approaches; right?

A. Yes.

Q. And as you've already observed, you say that Dr. Abdala conducted DCF valuations of the Project.

Now, that's not quite right, is it? Because what Dr. Abdala does is do a DCF calculation that is one element that goes into his overall assessment of fair market value of the project. That's correct,

isn't it?

B&B Reporters
001 202-544-1903

Page | 2289

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. In his hybrid approach as I explained to the Tribunal, yes.

Q. Because his overall valuation of the project does take account of a DCF calculation, but then combines it with an asset valuation, and then weights the two according to an overall--in order to arrive at an overall valuation; right?

A. No. It takes each separately, multiplies them, then combines them.

Q. Right.

So, DCF is just one input into the overall valuation; right?

A. It's the driver, the big number.

Q. It's one element in the overall valuation; right?

A. It's the biggest one, yes.

Q. Thank you.

Now, Dr. Abdala's methodology is supported by academic writing, specifically that of Professor Damodaran; correct?

A. So he says, but it's warned not to use the broad brush, which he's used here, in terms of the

Page | 2290

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

application of the--of the approach. So--

Q. Right. Well, we'll come back to the reference to "broad brush" and your reading of the Damodaran analysis momentarily.

Now, perhaps you could just have to hand Paragraph 56 of Dr. Abdala's First Report, which is at Tab 5 of the file in front of you, and also have in mind--

A. Which paragraph?

Q. That's Paragraph 56 at Tab 5 and also Tab 6; you'll see a copy of the article written by Professor Damodaran. And specifically, I'd refer you to Page 42.

So, you can see, at Paragraph 56 of Dr. Abdala's First Report, he describes the approach: "Damodaran's approach, which I adopt for this matter, is essentially an expected value calculation in which the expected transaction value of the business is the average value between an outcome that assumes success and an outcome that assumes lack of success weighted by the probability of success."

And he describes it with a mathematical

Page | 2291

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

formula below that.

So--and he goes on in Paragraph 57 to say, "In other words, to value Las Olas as a preoperational business, I assess two values, the value assuming Las Olas ultimately evolves as a successful business, generating positive cash flows as a going concern, which are discounted to the valuation date at a rate reflecting industry risk, and the value assuming that Las Olas does not become a viable commercial operation."

Now, that's consistent, isn't it, with Professor Damodaran's article. Yes?

A. That's consistent with that part, yes.

Q. And you don't provide any alternative evidence as to financial writings that provide the Tribunal with anything different or that questions the Damodaran approach or anything like that. You haven't put forward anything of that type, have you?

A. No. Just criticize the application of his--of this one single paper.

Q. Right.

So--exactly. Your position is the DCF element

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

can't be undertaken because the inputs are too uncertain; right?

A. All of them, yes.

Q. But you would accept, as a hypothesis, that if the inputs are sufficiently certain, the DCF element can be used to arrive at a good valuation of an income-producing project which is being operated successfully.

You'd accept that, yes?

A. It's a big "if". Yes, if--you know, if you have reasonably certain inputs, DCF is the--you know, is an appropriate tool. But that's a--that's what you do all the testing for, to see whether you can use DCF or whether, very similar, you can use lost profits. You know, in a damages context, you've got to test to see how reasonable the inputs are to use that method.

Q. So it's just essentially a question of the inputs; make sure the inputs are solid, and you will get a decent valuation out of the process.

A. Well, it's typically the--it's more complicated than that because you typically have to be able to test history, the ability of that particular

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

business, and the steadiness of their--or first--in the first instance, their capability to make sales, because you don't value anything if you--if you show that it can't make a sale.

And then you want to be able to understand what kind of profit margins you would actually earn out of each segment of the business based on history; so that your history is going to inform your reasonable certainty in terms of whether or not the underlying plan and business model, whether you're building a factory or you're doing resort development.

Q. Right. And--but if the project isn't fully operational, there is a risk, isn't there, that the project might not succeed at all. So--

A. If--

Q. --in that circumstance, a willing buyer is going to take that into account in its valuation of something it might be willing to buy; right?

A. No. The--the rational, willing buyer is going to understand it's preoperational; and just as Mr. Aven himself said, that the lack of development--I mean, it's so undeveloped, it's worth less. So they

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

say this is a project that's not operational, and they wouldn't value it using DCF because every single input into it is a variable.

Q. Right. But Professor Damodaran chose--and you don't challenge it because you don't offer any alternative academic writings--a way of understanding that, rooting it in solid data and valuing preoperational projects, doesn't he?

A. Well, it's--it's got two defects with that statement: One, the preoperational based in solid data; and then, the lack of application of his theory in the real world.

Having been involved in the valuation of multiple companies in the real world, you know, portfolios in the real world, private equity deals in the real world, it's just not--this is not a methodology that's used in the real world. I've never seen it.

Q. Right. You've never seen it. I think that's--that's the relevant element to take away from that.

A. And I have never--I've never seen writings

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

about it by anyone else.

Q. Right. But as you say, you're not an economist, so you're probably not as aware of the more sophisticated economic techniques that are available; right?

A. He's a professor of finance, and I've been practicing as an accountant for 32 years and dealing--doing finance deals, leverage deals in the real world. If someone walked in and tried to sell you on this methodology, they would not get the business, in my opinion.

Q. Right. I'm not sure what your expertise is for that particular statement, but leave that to one side.

And you accepted already that if all of the--the inputs are solid, then it is possible to arrive at a valuation. I put it to you that all that Dr. Abdala has done is to take an asset and to look at what all of the relevant inputs are to go out and find market data on what those inputs would be and to derive a very solid valuation from that analysis.

Would you accept that?

B&B Reporters
001 202-544-1903

11
12
13
14
15
16
17
18
19
20
21
22

A. No. He started and, with blinders on, ignored the sheer lack of sales of the real property. And then, in turn, the chairman was exactly right in terms of the value of the property sold in 2010 was at \$93 per square meter and not at the 143 that he testified to.

So, he's put the blinders on to the only real evidence we have of success/failure in the fact that their own business plan, the one that he is valuing, said their plan to sell these at 40--at 50 to 70 percent lower than market because they had a downscale product. And that's what he valued was that business plan, without taking into account that there was--the plan itself was downmarket. So, he's taken upmarket prices and tried to apply it to Las Olas prices.

Q. Right.

A. We know the real land there was not selling.

Q. Now, if we--if you want--have you got a copy of Dr. Abdala's presentation to hand--

A. I don't.

Q. --or do you want one to be provided very quickly?

B&B Reporters
001 202-544-1903

Page | 2297

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

Because you've just referred to an exchange between President Siqueiros and Dr. Abdala towards the end of Dr. Abdala's testimony, but you've provided an incomplete summary of what Dr. Abdala said.

If you turn to page--just one second.

So, if you could--when you eventually get it--apologies--can you turn to Page 27. This was a chart in the backup slides that Dr. Abdala referred to when answering President Siqueiros.

A. The ones he didn't show on the screen--or didn't show on the screen?

Q. These are the backup slides that did not show onscreen but he referred to when discussing this with Mr. Siqueiros.

So--and Mr. Siqueiros' question was, when one looks at the penultimate column, the price per square meter and looks in the 2011 period, one sees the values of land at that stage that are substantially lower than the \$170-odd per square meter that Dr. Abdala had derived from various sources.

And what Dr. Abdala said was, "Yes, that's right. At that point in time, there was indeed a low

B&B Reporters
001 202-544-1903

Page | 2298

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

price. But if one looks up the chart to the period up until the financial--the global financial crash, one sees much, much higher prices, going up to \$264 per square meter."

You see that?

A. I do. That's exactly how he answered the question.

Q. And then if one just flips back a couple of pages to Slide 24, you see--in green in the middle, you see Dr. Abdala shows his \$170 per square meter; and then over on the right, he's compared it with prices that have been enjoyed in the real world by projects in the area.

Now, El Místico, the one on the far right of that list, that project only began construction after May 2011. So that's a real-world project that began construction after the measures taken against Las Olas, they're completed, and that it's sold at almost \$200 per square meter in the real world.

Bearing all of that in mind, I suggest to you that when Dr. Abdala uses a price of \$170 per square meter, it is clear that it is a very reasonable,

B&B Reporters
001 202-544-1903

Page | 2299

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

pretty conservative estimate.

Do you accept that?

A. I don't. The comparable value, as been established here, is what did the lot next door sell for? I mean, is someone really going to move in and say, great, I paid--I paid three times--or, you know--what the guy next door paid for my lot?

That's not the way the--I mean, real estate is very localized in terms of values in neighborhoods. So, the fact that Las Olas was selling the--the plots closest to the beach for \$93 on average per square meter in 2010 is much more telling than what was sold somewhere else with an actual real development with actual, probably real financing, and a real chance of survival.

Q. Now, you've already referred to this in cross-examination today; but in your Second Report, you say that "Dr. Abdala chose to ignore the caveats presented by Professor Damodaran, and Professor Damodaran cautions that using sector data averages from a study as the probability of survival for an individual firm or project is, quote, 'painting with a

B&B Reporters
001 202-544-1903

Page | 2300

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

broad brush' and generalizing findings from a specific time frame to the firm or project in question."

Do you recall saying that in your Second Report?

A. I do.

Q. And you say that because of that caveat, that Dr. Abdala is wrong to, quote, "insist that this methodology is consistent with financial literature."

You say that; right?

A. Yes.

Q. But that caveat doesn't say what you say it says, does it? Doesn't have anything to do with the overall use of the methodology that Damodaran suggests as being appropriate, does it?

A. I think it does.

Q. Okay. Perhaps you could turn to a copy of the article. You'll find it at Tab 6 in the file before you.

A. Which Page?

Q. Page 42, I think.

So, if we look at the bottom of the first paragraph on Page 42 of the article--sorry. It's at

B&B Reporters
001 202-544-1903

Page | 2301

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

the--the first paragraph--the paragraph itself was started over the page. But the sentence I want to read to you--or the couple of sentences start, "For a software firm that"--

A. Which paragraph are you in? I'm just--

Q. So this is on Page 42. If you go back to Page 41, you'll see that in the heading, "Survival," you'll see the subheading, "1, Sector Averages." And then he continues down, and just right at the end of that Subparagraph 1, he says, "We are painting with a broad brush in this case and generalizing findings from a very specific time period, 1998 to 2005, to all firms."

You see that?

A. I do.

Q. So that's what Professor Damodaran was talking about. He was talking about the broad brush in the context of--go back to the previous page--survival; right?

So, what he's saying is, when--when discussing the possible ways of assessing the probability of failure, that one needs to be careful. So, his caveat

B&B Reporters
001 202-544-1903

Page | 2302

1 2 3 4 5 6 7 8 9

10
11
12
13
14

15
16
17
18
19
20
21
22

is, when looking at issues of survival, there is a danger of using a broad brush.

So, I put it to you that what Professor Damodaran is saying is not that generally there is a danger of using a broad brush, but there is a danger in relation to the assumed survival of a company.

A. Well, that's exactly what we're talking about here. The 68 percent chance of survival is what he's put forward, and that's the broad brush he's painting with. He's saying from U.S. data with the real estate sector, 68 percent chance of survival, then applied to this particular point in time, to this Greenfield resort development in Costa Rica; that is the ultimate broad brush.

Q. Right. Okay. Well, I'm pleased we're actually of one mind on this. It's one element of the Damodaran--I'm sorry.

Need some water?

A. Yeah, please.

(Pause.)

Q. So it's--you would accept it's just one element of the Damodaran thesis that's--to which the

B&B Reporters
001 202-544-1903

Page | 2303

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

description "using a broad brush" relates. It's not the entire description, the entire thesis that he puts forward.

A. It's an element, but an awful critical element. When you're trying to talk about the survival of an individual firm, I would say the survival of that individual firm is much more dependent upon the business model as put together for that firm. The prospects of that firm, the history of that firm, the capital of that firm in looking at the real estate survival rate in the United States and applying it is the ultimate broad brush.

Q. Right. But--we've already gone to this, but the business plan of the company that owns the asset that's being bought is neither here nor there, is it? The business plan falls away because the hypothetical buyer comes in and does what it wants to do with the project.

A. In your hypothetical, that could happen; that's not what's happened in this case. Dr. Abdala valued their exact business plan. He took the exact density, the exact number of units, and went and took

B&B Reporters
001 202-544-1903

Page | 2304

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

prices that he applied to their business plan.

If a--if he'd come in and said, no, I assume this is a bad business plan, it doesn't work, and I'm going to do something else, that's different. But he has taken exactly their business plan, which was what he valued, and changed the prices.

Q. Now, in relation to the use of the DCF component in his valuation--I'll put it to you that Dr. Abdala mitigates the uncertainty that's inherent in any forward-looking valuation technique; but by accounting for that risk in the way he describes, that there is a percentage to it. He doesn't say that this project is bound to succeed; he says, looking at the data in the market, it has got a 68 percent chance of succeeding.

So, he's already taken the possibility of failure into account; you'd accept that?

A. He's applied a U.S. figure of the entire real estate industry, which is not Greenfield resort development in Costa Rica that had been languishing for over nine years. So that's--he put in a factor, but it's a complete guess; it doesn't--does not apply.

B&B Reporters
001 202-544-1903

Page | 2305

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

Q. Right. But it's certainly corroborated by real-world experiences of neighboring projects, all of which have completed, all of which have sold, and are successes.

So, the real world only corroborates precisely the analysis that Dr. Abdala puts forward.

A. That's not correct. He's, again, applied a success factor from the U.S. to this particular project. And who's to know how many tracts of land have been bought over time and someone had a dream to develop it into a resort and that dream failed? There's lots of big tracts of land for sale that people have bought and thought about that and failed. So, that logic doesn't follow.

Q. You'd accept, wouldn't you, that Dr. Abdala has gone out and researched unit sale prices, construction costs, operational costs, and so on, and has fed those into his report; yes?

A. He has--he has, in each of those areas, done some analysis. But what we have here is trying to take averages from 2015 of sales, applied--we've found individual properties that sold in that period of time

B&B Reporters
001 202-544-1903

Page | 2306

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

and assuming that 352 lots of land at Las Olas would sell at that price.

Because you found a transaction at that price does not bring you back to think that this densely populated plan that he valued is going to sell at those prices. You need to do a full comparable analysis to see how each of those prices compared with being offered in his business plan at Las Olas.

Q. Now, I suggest to you that what Dr. Abdala really did was to go to the 2010 business plan, identify--and also the Master Site Plan, and identified the basic description of the site, the most contemporaneous description of what was going to happen, in order to work out what--how this was going to develop.

He didn't adopt any other data from the business plan; right?

A. He adopted the number of units that were planned to be sold by Mr. Damjanac, and inherently, he was buying into the density that was going to be, you know, a 93 percent build on this property; and he also bought into the fact that Mr. Damjanac put a 114-room

B&B Reporters
001 202-544-1903

Page | 2307

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20
21
22

hotel into the plan, planned to be built on land they didn't own.

Q. And you say he--Mr. Damjanac inserted it; but actually, the 2008 Master Site Plan prepared by--the architect--the architects Madrigal and Mussio, provides the density of development. So, by the time Mr. Damjanac arrived, it was already well-settled, wasn't it, how dense the projected development was going to be on-site?

A. He's the first one who quantified it all the way out. They may have put the Master Site Plan in, but it's the first attempt to quantify it into a business plan that I'm aware of. I think that Mr. Aven's attempt was kind of partial, and then Mr. Damjanac maximized every one of those lots in terms of his valuation.

Q. All right. Well--would it surprise you if I put it to you that the Málaga development, which had a smaller land area, had over 400 homes on it?

A. It depends upon how it's designed, and I don't know how much green space they had. If they were, in fact, stacking up condos, you've got more green space

B&B Reporters
001 202-544-1903

Page | 2308

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20

21

22

in there. So, I don't know what their remaining space was after the plan.

Q. But the layouts and usage of the site, given the 2008 Master Site Plan as adopted and used over the course of the next few years, meant that the usage of the site wasn't an uncertain element; right? You can see from the 2008 Site Plan how the site was going to be developed; right?

A. Well, because there's a--a plan of how they planned to develop it doesn't make it at all certain. I mean, there's been an awful lot of failed real estate developments in the history of, you know, the world.

So, the fact that that site plan exists in 2008 tells you that that's the basis of what--any appraisal that happened thereafter and also is the underlying basis of the failed sales in 2010.

Q. But the Tribunal's already seen evidence in the December Hearing showing that--a very significant amount of work had already been done--cutting the roads, shaping the land, terracing in certain areas, building drains, and so on.

B&B Reporters
001 202-544-1903

Page | 2309

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

So, far from this being speculative, the site was already very much taking shape by the time May 2011 came around. You're aware that they had done a lot of that infrastructure work already?

A. I'm aware they've done some of that infrastructure work. I'm aware that Dr. Abdala seemed to have extracted from the only accounting document produced that he saw in this case and tried to do a rough calculation of how much of that had been done, which is, again, not the proper approach.

So, there was work that had gone on, but you're missing my point, which is--

Q. No--

A. No. You are missing my point of the development plan itself. Because someone says that you could have room for 708 different units to be sold does not mean it's nonspeculative. It means that somebody plotted it out on the land; it doesn't mean that somebody wants to buy those lots or buy the units put on those lots.

Q. Mr. Hart--Mr. Hart, the question I put to you was that the fact that a good deal of infrastructure

B&B Reporters
001 202-544-1903

21

22

work had already been done on-site, consistent with the plans that had been in place for some years, shows that there is much less uncertainty as to what this site was going to be than you would represent to the Tribunal; do you accept that?

A. Not at all. Again, the number of times you'll see abandoned early-stage roads or sewer or electric poles and then abandoned, completely, developments, that happens all of the time. And I wouldn't say, from all the pictures and the other things that I've seen, that they were at all far advanced.

What I would say is that what was completely lacking was any investment in the actual common amenities, the beach club, the thing that actually draws somebody to coming by. The fact that you're cutting in dirt roads and putting in some sewers is not--is not telling.

Q. Okay. Can you turn to Tab 10 in the file in front of you.

Now, this is a copy of--

PRESIDENT SIQUEIROS: Mr. Burn?

MR. BURN: Yeah.

B&B Reporters
001 202-544-1903

Page | 2311

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

PRESIDENT SIQUEIROS: When would be an appropriate time to take a small break? I don't want to interrupt your--

MR. BURN: No, no--

PRESIDENT SIQUEIROS: But just whenever you think. If you were thinking of continuing for some time, perhaps now would be a good time. If it's a short time, then, you know, we could continue till then.

MR. BURN: No, let's--let's--if you--

PRESIDENT SIQUEIROS: If you want to conclude a question or so, please go ahead. But--

MR. BURN: Okay. I'll be just two minutes, I think, and--

PRESIDENT SIQUEIROS: That's fine.

MR. BURN: --with one question, and then perhaps we'll take a break.

PRESIDENT SIQUEIROS: That's fine.

MR. BURN: Thank you.

BY MR. BURN:

Q. Mr. Hart, this is a copy of CLEX-82; it's the first page of the valuation model that Dr. Abdala

B&B Reporters
001 202-544-1903

provided.

Now, if you'd just run down the list on the left-hand side, you can see precisely what Dr. Abdala has done. On the first--first item, "Lot Pricing," if you see the lots and you see the pricing, you'd accept, wouldn't you, that that--his figures for that are drawn from market data, aren't they?

A. Yes, the market pricing is. That's where he's--

Q. That's all I'm asking.

A. Yeah.

Q. And then the development costs, you see he's referred to an Engineer Manuel Calvo as being the source of data there. So, he's explained a source of data.

A. Yes.

Q. And then for house rental prices, you see his house--the rental price assumption, a little way down? It's market data again, isn't it? And so on, we could run down all of these items, and we can see that Dr. Abdala has explained that this is all market data.

So, given that his financial assumptions are

B&B Reporters
001 202-544-1903

Page | 2313

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21

22

all stated of being researched, he's explained where he's got the market data from, the fairest characterization is that this isn't based on his--his valuation isn't based on the Claimant's projections at all; his valuation is based on market data; right?

A. That's not fair at all. No. It's--it's based on their plan, and he's then tried to change the value that we know Las Olas properties were selling for to be something else by this approach. And there's multiple assumptions in here, including the assumption that 90 percent of the homes would be built by Las Olas when they hadn't built a single home or shown that they had a capability or a building company.

So, I--it's full of baseless assumptions, and it is directly strapped on top of the 2010 Las Olas business plan.

Q. Well, Mr. Hart, I was going to leave it there. But, I mean, once again--I'm not sure whether it's deliberate on your part or it's just confusion on your part.

But, again, you are conflating what the Claimants and their people would have done with the

B&B Reporters
001 202-544-1903

Page | 2314

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

project had they continued uninterrupted by the Republic of Costa Rica with what a hypothetical willing buyer of the project would have done, bearing in mind market conditions.

Now--

A. And--

Q. What--when you say it's full of baseless assumptions and is directly on top of the 2010 Las Olas business plan, I put it to you that that is absolutely irrelevant for the purposes of this valuation, other than for understanding the basic components of the development.

A. No, that's false. Dr. Abdala's valuation--he had said it this morning. He used their units, and then he went and found what he thought to be market prices to apply it to.

So, it is directly intertwined with what Claimants are--you know, had available to sell is what he tried to value.

MR. BURN: Thank you, sir.

That concludes this part of my questioning, so I'm happy to break now.

B&B Reporters
001 202-544-1903

Page | 2315

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

PRESIDENT SIQUEIROS: Why don't we take a

break for ten minutes? Is that fine? Thank you.

(Brief recess.)

PRESIDENT SIQUEIROS: Thank you for the break.
Please continue, Mr. Burn.

MR. BURN: Thank you.

BY MR. BURN:

Q. Mr. Hart, I want to turn to your preferred valuation methodology for this case, the costs approach.

Now, you say that this is derived from the asset approach and say that it's commonly used for real estate valuations; right?

A. Yes.

Q. But you haven't provided any evidence to support that proposition, have you?

We can turn to your report, if you want.

A. No. I am recalling that there is the document of--regarding the appraisal of one of the properties in this case where they do, in fact, say that the approved--the preferred method in real estate, when you can't use a DCF, is real estate--I want to say

B&B Reporters
001 202-544-1903

Page | 2316

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

it's the HVC, but I don't recall it particularly.

Q. Yeah. I think you're probably talking about the HVA--HVS Report, which we'll come back to, and we'll see that it doesn't quite say what you'd like it to say.

Now, you quote the--at Paragraph 217 of your Second Report, the Litigation Services Handbook definition of the cost approach. And we can turn to that if you want or I can just give you the words, but what you say is--or what the Litigation Services Handbook says, and you quote it, "It's a general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset."

Do you accept that quote?

A. I do.

Q. So, the Litigation Services Handbook looks at the replacement cost of an asset; right?

A. In that definition, yes.

Q. So--but your approach is to look at the amount that has been spent in terms of costs on an asset rather than the replacement cost; right?

B&B Reporters
001 202-544-1903

Page | 2317

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. No. I mean, in this instance, we have--starts

with a transaction of the real property that we're trying to value here, which is Las Olas, plus the costs we can identify to develop it.

Q. Right. But it's fair to say that the Litigation Services Handbook does not accord with the approach that you take, does it? It talks of a replacement cost; right?

A. No. I mean, the cost approach--I mean, what they're saying there is the cost approach most oftentimes will replicate what the replacement cost is unless there's been a major change in the cost of, say, building a factory or some other type of asset.

Q. But I'll put it to you that the reality is that the costs spent are rarely an indicator of substitution value; would you accept that?

A. No. As was testified here today, you know, that you have the--you know, the purchase of the land in the first instance, and then whatever costs were incurred to get the permits or to do any improvement to the land would give you a good idea of what the fair value when you--when you bought the property,

B&B Reporters
001 202-544-1903

Page | 2318

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

plus the improvements, absent any other method to determine the value.

Q. Now, Dr. Abdala pointed to what Shannon Pratt said, and the quote from Paragraph 109 of Dr. Abdala's Second Report is, "In fact, accounting book value is not a business valuation method at all. The values presented on the cost-based balance sheet are usually not representative of a current economic value for business valuation purposes."

Now, you didn't provide any evidence to contradict that proposition, did you?

A. No, other than the use of fair value accounting, and the way that does work and it is, you know, fair value, that an asset is held on your balance sheet at the cost you've acquired it until it's moved into operation, it's in construction across the--across the spectrum; and then once you put it into operation, you are subjected to basically impairment testing using DCF once it's been put into--so, it is the--the fair value way to account for an asset when it's preoperational.

Q. Right. But let's test this in terms of some

B&B Reporters
001 202-544-1903

Page | 2319

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

real-world basics. And if I buy a house in, say--I don't know, the year 2005, and I pay \$1 million for that house, and in the intervening period, the next 11

or 12 years, I spend, let's say, \$100,000 on that house.

If we followed your methodology, when I was looking to understand the value in 2016/17 of my house, I wouldn't go out to the market and check what the market told me about the values of houses in my area. I would look at my expenditure, and I would say, oh, "Well, my house is worth \$1.1 million now, because that's what I spent."

Doesn't sound very realistic, does it?

A. No, and in the hypothetical you just posed, if you're able to go out to the marketplace and say, "I've got comparable properties," which you do all the time in real estate appraisal, you'd be able to say I've normalized the number of bedrooms for the size of the lot, for the size of the building itself, and say--you can then do a comparable analysis that's truly comparable, and that's what you would do. That's not possible here with the data available on

B&B Reporters
001 202-544-1903

Page | 2320

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Las Olas.

Q. Well, no. What Dr. Abdala demonstrates very well is that it is indeed possible, because there are all sorts of sources of market-verifiable objective

data that can be used to understand the value of this asset in 2011.

A. That's absolutely false. I mean, again, it fails with the--the sales premise. The fact that this has been on the market for as long as it had, and they had sold so few lots, are showing there's something fundamentally unattractive about what they were trying to sell at Las Olas, and he valued that very same plan.

So, no, he's taken market data from a different place and a different resort--different resorts or properties, and tried to apply it to Las Olas's exact business plan. That's not demonstrated at all.

Q. No, I think you misunderstand, actually, Mr. Hart. And that's the criticism you make in respect to the income part of the equation.

His source of data in respect to the real

B&B Reporters
001 202-544-1903

Page | 2321

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

estate value part of the equation is an actual appraisal made by Mr. Calderón that is on the record and that he has updated in a proper and transparent fashion.

And so, what we can see is the Calderón

appraisal provides a very solid real estate assessment of the value of that land. You'd accept that?

A. No. I would accept that there's a report that he provides his summary findings, and implicit in that report would be reliance upon the 2008 site plan that we were just talking about. So, he went and said, "Let's assume we can sell all of these lots if you develop it," because he's talking about the urbanization under that existing plan.

So, you know, it's, to me, not a valid approach because, again, it's been tested in the market that Las Olas was not selling lots. It fails because if he's talking about a \$35 million valuation, or 54-, that would presume these lots would sell, and the market in 2011 was dead.

Q. Again--

A. Wasn't selling.

B&B Reporters
001 202-544-1903

Page | 2322

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Again, you're confusing things here.

But perhaps we can look at the Calderón Report now. You'll have to forgive me, Mr. Hart and the Tribunal; I had not anticipated going to this in Cross-Examination, but there is a further exhibit to put in front of the witness which was not in the

Cross-Examination bundle. Copies are just being distributed now with flags to the relevant page because it doesn't have page numbers. So I apologize for that.

So, this is Exhibit--I think it's CLEX-70. The page that is flagged--there are actually two reports in the same document. The first one doesn't relate to--right.

If we go to the second one of those--and I would take you to the green tab that is there, perhaps the 32nd page out of 53. I'm not asking everybody to read through the whole thing.

We can see 12th of November 2009. We see Mr. Calderón introducing his Report, and he talks of his methodology.

Now, the portion I would refer you to,

B&B Reporters
001 202-544-1903

Page | 2323

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Mr. Hart, is the fourth paragraph down on that page, on page 32, 32nd page after 53, which reads as follows:

"With respect to the methodology used in our estimates, we talked about comparables--apologies for the English--but we talked about comparables within the Zone and with comparables that present the same

type of characteristics, which is--by which we made a study of the present market of the Zone of Esterillos and compared present projects of the Zone, like Coast Reserve, Costa Esterillos, and Pacific, et cetera."

So, bearing that in mind, you would presumably not maintain your characterization, Mr. Hart, that Mr. Calderón was following the Claimant's business plan. You can see that he says expressly that he's looking at the broad state of affairs in the market.

Do you accept that?

A. He--he does, in fact, say he's looked at the comparables, but then he applies it to the property as designed by Claimants.

Q. Right. His appraisal is based on the value of comparable land, isn't it?

B&B Reporters
001 202-544-1903

Page | 2324

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

A. That's what he says, but the--he does apply it to the site plan at Las Olas.

Q. But it's not tied to a particular business plan, is it?

A. Well, it's tied to the site plan, and the site plan underlies the business plan.

Q. Right, but they're not the same thing. You may think this is pedantic, but it's important that we

don't mislead the Tribunal by suggesting, as you did in your opening presentation, that Mr. Calderón's appraisal of the land was tied into the business plan. That's what you said.

A. It's tied into the--the site plan which underlies the business plan. That's where Mr. Damjanac takes it from.

Q. Now, you don't need to keep that document open. I don't have too many more questions for you.

But your approach would have the Tribunal believe that the Claimants, having taken the project through permitting and start of construction and even some sales having begun, and with this prospect of significant income generation on the horizon, and

B&B Reporters
001 202-544-1903

Page | 2325

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

there are successful projects in the area, that they would have agreed to sell the project for the costs they had incurred up to that point.

That's what you're saying to the Tribunal, isn't it?

A. No. I'm saying something different. I'm saying the evidence shows that they were having no success selling, that the plan that they first put together didn't work; the second one was not working;

and I've seen many times in the real world, people be happy to get their money back and get out. So, it would not be unusual for someone to say, "That's what I've put into it, I get paid that, and I walk away."

But all the indications of them trying to operate and develop this project was, they weren't developing it; they were having no success selling. It was a tiny amount of sales. They showed no ability to construct anything on the land except for a few roads and sewers.

So, that's the state of the project, not someone having put together a business plan that doesn't have a basis in the real world.

B&B Reporters
001 202-544-1903

Page | 2326

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Q. Well, I put it to you that your approach commercially is utterly lacking in credibility.

Now, historic cost isn't a market valuation at all, is it?

A. It is where you fall back to if you can't do a reasonably certain approach to provide damages or prepare a value. So, that's where you go to.

And we're in a situation here where there's no way you can take this business that had failed and try to cast it as a profitable business into the future.

And that's why you revert to cost method, as Investment Treaty Tribunals do all the time, when you can't prove reasonable certainty and you can't use market or DCF methods.

Q. Now, bear in mind what you said at the outset of your Cross-Examination. You agreed with me that the object of this exercise is to identify the fair market value of this asset in May 2011.

What you've just said is that, well, what I'm suggesting is not a market valuation, but it's the best that could possibly be hoped for because of the subjective conditions of the project, as you perceive

B&B Reporters
001 202-544-1903

Page | 2327

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

them.

A. It's the best proxy for fair market value, and it's been widely accepted by Investment Treaty Tribunals when you've got a nonoperating business that has been harmed in some way.

Q. Now, you referred to the HVS valuation report for a Panamanian hotel. You refer to this at Paragraph 225 of your Second Report. And you say that that report provides support for your use of the cost approach; right?

A. Yes.

Q. I'd like you to turn to Tab 13 in the file in front of you. This is a copy of CLEX-69, which is the HVS Report to which you refer.

I believe the relevant part of the text in that very long Report is on page 129. So, in the conclusion section, the very last words of that conclusion section--because if you turn over, you can see that a new section begins--you see that in this Report relating to a completely different project, HVS indicated, "This estimate has been rounded to \$22.6 million. Due to the hotel's proposed status,

B&B Reporters
001 202-544-1903

Page | 2328

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

this value estimate is considered applicable to our appraisal analysis."

Do you see that?

A. I do.

Q. Just move on--flick over to Page 131. And you see on the left-hand side, there are, in bold subheadings, there is one that is marked "Value Conclusion."

Now, what we see here is interesting, because what the authors of the Report say is, "Careful

consideration has been given to the strengths and weaknesses of the three approaches to value discussed above. In recognition of the purpose of this appraisal, we have given primary weight to the value indicated by the income capitalization approach."

Do you see that?

A. I do.

Q. So, actually, what HVS is saying is that the--what is to be preferred is an income approach, not a cost approach; right?

A. Well, that's--in this--when they've looked at the various strengths and weaknesses in this case,

B&B Reporters
001 202-544-1903

Page | 2329

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

where they're saying they felt they could do an income approach that was reliable and valid, they preferred it.

Q. Right.

A. But when they can't, that's why they're presenting the cost approach. But in this instance and in our case, you can't do an income approach that's valid given we have a failed project and a failed history.

Q. Right. But what I'm putting to you is that you are being very selective in the way you are referring to this report, because you have looked at the--the portion of text just above, which says "Cost approach," and it says this methodology is applicable to this property. What you omitted to point out to the Tribunal is that immediately below, the authors of this report say, "But the better method is the income-based approach."

You did not say the authors found that both could apply and that therefore, both being available, the income approach is to be preferred; you simply said the cost approach is endorsed by the HVS Report.

B&B Reporters
001 202-544-1903

Page | 2330

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

I put it to you, that is being selective, at best.

A. That may be your contention; I don't think so.

Q. But what we see with Dr. Abdala is that his approach performs both an income and an asset valuation and provides a mechanism for weighting them.

You accept that, yes?

A. He's not done a cost approach, no.

Q. He's done an asset approach and an income-based approach, and has weighted the two accordingly and has explained precisely how he's done

that and on what basis.

You accept that, don't you?

A. I don't know.

Q. You don't accept that that's what he's done?

A. No. I mean, his appraisal is a--I mean, as you showed, trying to apply comparables, so they're both market approaches.

Q. Just one second.

(Pause.)

MR. BURN: No further questions. Thank you.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: Mr. Leathley?

B&B Reporters
001 202-544-1903

Page | 2331

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

MR. LEATHLEY: We have no questions either.
Thank you, sir.

PRESIDENT SIQUEIROS: Mark?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BAKER: In your survey of the investment jurisprudence awards that you were talking about earlier--

THE WITNESS: Yes.

ARBITRATOR BAKER: --could you give us an indication as to the number of cases that have used the cost approach?

THE WITNESS: Well, the--there were far fewer cases that used DCF when we did the study than we had suspected.

I don't have the exact percentage, but lots of the cases reverted back to the invested cost as well as lost expenses, you know, improper taxes--you know. This was just a study of the ICSID public awards to date at that time.

But the income approach was not in the--the majority. And a lot of them did revert. I mean, I can get that number out of the study, but, you know,

B&B Reporters
001 202-544-1903

Page | 2332

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

there is the summary in the back of the study that shows it.

ARBITRATOR BAKER: And so, from your perspective, the key point is to determine whether or not a particular project or a particular investment has a track record suitable for application of a DCF or a modified DCF approach; and if it doesn't, then your position is that the cost approach must be used.

THE WITNESS: Yeah, and it's completely consistent with what you do in a typical commercial case, where you say, is there historic history that you can look at, that you can rely upon, to reasonably

project the future for, you know, a DCF approach, or can you find a truly comparable transaction to value something.

Absent that, courts fall back to saying, No, you really can't use lost profits and we'll award you your lost, you know, historic costs.

ARBITRATOR BAKER: So, in terms of using sales data in Costa Rica for similar projects, would it be a valid approach to take a look at what other master-planned developments of a similar size had done

B&B Reporters
001 202-544-1903

Page | 2333

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

from the standpoint of determining what would have been a comparable value, as opposed to using the cost-based approach?

THE WITNESS: Again, key in your question there is--you used "similar" twice. So, to say how can we apply and say are these other properties similar in the right dimensions to be able to say I can then come up with a cost.

But there is something seemingly defective at Las Olas. In May 2001, they say the market is dead. "Nothing's selling anywhere around," is the exact words used by Mr. Aven.

So, that's the market at the time. And that's

the date we're valuing. So, that's the critical feature, as opposed to Dr. Abdala takes data from 2015 with--and then backcasts it by just the simple rate of inflation.

ARBITRATOR BAKER: So, having looked at all of this data, in your view, what was this jinx? What was this thing, whatever it is, that made Las Olas hard to sell?

THE WITNESS: They didn't know what they were
B&B Reporters
001 202-544-1903

Page | 2334

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

doing. You've got people who are inexperienced and brought this--you know, just bought the land without a plan, and brought it to market in 2007, after years of holding it, and they sold three lots or four lots, whatever it was. And then the financial crisis came along; they don't have any capital.

So, they didn't do anything that a real developer would do, which would be truly cut the roads, build the beach club to attract people. And so, there you were with this property that they tried to sell lots, and they just weren't getting buyers.

And their business plan that they put together was for much more cut-down, you know, less luxurious properties, and that's what was, in fact, valued here.

So, you know, is there really a market for things that are 50 to 70 percent less than--less expensive in the market that are not luxury, that are very concentrated with 7 percent green space? And the market seemed to say no, with nobody buying in 2010--or early 2011.

ARBITRATOR BAKER: Did you study or look at comparable sales in the 2011 period at other

B&B Reporters
001 202-544-1903

Page | 2335

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

developments as part of your exercise? I know it's not the subject of your report, but did you look at that data?

THE WITNESS: We looked to find them. But just as Claimants said themselves, the market was dead. They're basically saying there were no lots being sold, let alone anything that would be a comparable transaction.

ARBITRATOR BAKER: And so, in your view, that's why the most current sales data was used, because the market had recovered and, therefore, there was data that was available?

THE WITNESS: Well, again, I mean, taking data from across the--you know, the entire province and trying to apply it back to Las Olas as configured is,

again, a broad-brush method. It's not saying, "Okay, I've now found--and I'm going to tell you, Tribunal, that this is a comparable property. And this is what the condo sold for. It's nearby. It has all these features that we can show you are the same."

It's saying, "Here's just, you know, houses, condos, lots in the entire province that sold." And

B&B Reporters
001 202-544-1903

Page | 2336

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

each one of those data points is really, you know, a sale of one. Or trying then to apply that to a--350 lots. You know, 90 percent of those, you know, being houses they're going to put in, a whole bunch of condos.

So, it's the application that's problematic.

ARBITRATOR BAKER: Well, help me with this last question, then. So, under the academic writings that Dr. Abdala cited to us, there is a factor that is taken for the success or failure of a venture. And you're familiar with that; you've talked about that in your report.

So, isn't one way of looking at this that if you used a DCF method and you applied that failure perspective, what you're really saying is that you disagree with him on the 68 percent/32 percent split,

and that you would have it--have those numbers at a 90/10 or maybe 100 to 0? I don't know.

But, in other words, you get to your outcome, but you could also use the DCF method to get there because your point is, as I understand it, that there is something wrong with this property that did not

B&B Reporters
001 202-544-1903

Page | 2337

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

lead to successful sales.

THE WITNESS: Yeah, it's--well, A) the 68 percent is just literally picked out of the air to try to apply to this property. You know, more relevant is that two of the key people involved here--the main person bankrupted himself through a number of real estate transactions. He is the main real estate person in this transaction.

So, they really don't have the experience of the way this was put together and the way this was developed. And, so, I wouldn't--and, so--but the underlying DCF--I mean, the first thing that you check with business is: Do you have sales? You know, can you show that there's demand for this?

In 2011, they say themselves there was no demand. So, if you've got no demand, there's no basis to say that I'm going to run a DCF. Because if you

don't have sales, the rest of it is just nonsense. It's going to drive a loss. You'll get a negative number.

ARBITRATOR BAKER: Thank you, Chairman.

PRESIDENT SIQUEIROS: I have no questions,

B&B Reporters
001 202-544-1903

Page | 2338

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Dr. Hart. Thank you.

THE WITNESS: Thank you.

PRESIDENT SIQUEIROS: And you are released.

So, before we go to any Closing Statements, could you advise us, Francisco, how we're doing with the allocation of time? And based on that, the parties may wish to consult with each other.

SECRETARY GROB: Sure. The Claimants have used 152 minutes. So, that means that they have 28 minutes left. And the Respondent has used 174 minutes, meaning that they have 6 minutes left.

MR. BURN: Just to confirm, I'm perfectly happy with an additional 15 minutes on the other side because that was afforded to us last time.

SECRETARY GROB: In which case they would have 21 minutes left.

MR. LEATHLEY: Thank you very much.

PRESIDENT SIQUEIROS: So, are you ready to

proceed now? Okay. Are the transcribers and interpreters also ready? If we are, then let's go on.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

MR. BURN: Members of the Tribunal, you have

B&B Reporters
001 202-544-1903

Page | 2339

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

heard today from Mr. Briceño, the municipal auditor of Parrita, and you've heard from Dr. Abdala, and from Mr. Hart, the quantum experts engaged by the Parties in these proceedings.

In these short Closing submissions, I'll take you to some of the key points arising from both Mr. Briceño's evidence and from the quantum evidence.

Mr. Briceño I will turn to first. You've now heard from him in person. He was the municipal auditor of Parrita at the time of the Respondent's unlawful actions in relation to the Claimants' investment.

The examination he has undergone today reveals Mr. Briceño to be a careful and knowledgeable official who took his professional role as auditor and the responsibilities of his public office very seriously. And it's obvious that he simply has not nor has ever had a horse in this race.

The Respondent argues that Mr. Briceño's

findings have no bearing on Costa Rica's liability under the DR-CAFTA treaty because he is allegedly just a low-ranking employee whose recommendations are not

B&B Reporters
001 202-544-1903

Page | 2340

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

binding and have no bearing on the rights of third parties. I'll put three points to you in response to that.

Article 39 of the Internal Control Act, which governs people sitting as municipal auditors, establishes administrative liabilities for Municipality employees if they unjustifiably decide against implementing an auditor's recommendations.

So, his recommendations were, in effect, binding as a matter of Costa Rican law.

Second point. The Respondent's noncompliance with Article 39 of the Internal Control Act has not been raised as a DR-CAFTA breach, so the Respondent's criticism misses the point in any event.

Thirdly, Mr. Briceño's statement was presented to the Tribunal because it provides that rarest and most precious of things, the evidence of an objective and professionally knowledgeable observer of contemporaneous events.

He is and was quintessentially independent and

objective. You heard him confirm when challenged that he had not met the Claimants, he did not know the

B&B Reporters
001 202-544-1903

Page | 2341

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Claimants. He was aware of Mr. Damjanac, somebody who lived in the same community as him, but no more than that. And he describes to you having seen him in an office during a site visit with other Municipality employees.

This is somebody who had no connection to the Claimants whatsoever. And indeed, the very lateness of his being tendered as a witness in these proceedings only confirms that. The Claimants, and therefore we as the Claimants' lawyers, had no idea of Mr. Briceño before trolling through the document production provided by Costa Rica. They knew of his existence. They knew he had relevant information. We didn't.

Perhaps the most important aspect of Mr. Briceño's testimony is that it reminds us of an undeniable weakness in the Respondent's case. I'm talking about the gaping hole in the evidentiary record. There are no witnesses from the ministry that was actually responsible for issuing Environmental Viability permits: SETENA.

SETENA is an agency whose officials served the
B&B Reporters
001 202-544-1903

Page | 2342

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Investors professionally and in good faith and from which, certainly, no solicitations for bribes were made. SETENA is the agency whose officials were all inexplicably absent from these proceedings. It's a point I've made before, but it's a point I will continue to make to you: That relevant witnesses have been kept from you, and that speaks volumes in terms of liabilities in these proceedings.

Lest we forget, SETENA is also home to the officials who counsel for Costa Rica now claimed were duped, even defrauded by the Investors. Indeed, that's the very crux of the Respondent's defense. It paints a picture of deceitful foreigners defrauding SETENA officials whose greedy plans for the utter despoliation of a pristine wetland were foiled by the heroic efforts of a small band of officials: Mr. Martínez, Mr. Bogantes, Hazel Díaz, and Mónica Vargas.

Of course, Mr. Bogantes was the official who sought to take advantage of the opportunities that existed in the tangled web of rules and regulations and extorted bribe--in an attempt to extort bribes.

Page | 2343

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

And Mónica Vargas, whose work Mr. Briceño had to analyze--well, we all enjoyed the extreme good fortune of having found Mr. Briceño, a retired municipal auditor, whose unimpeachable evidence was that Ms. Vargas and the Municipality acted illegally and in gross violation of the procedural rights of the Investors.

There were important details in Mr. Briceño's evidence that ought not to be lost in the haze of cross-examination. Let's just quickly touch on a few of them.

Mr. Briceño's high standing as an employee of the Municipality of Parrita and his excellent working relationship with his colleagues was in evidence before you. His exceptional performance record was in evidence before you. The huge number of municipal employees who wrote in support of him when he resigned in 2012 is in evidence before you. And the fact that the Mayor and Municipal Council were prepared to recognize their own shortcomings and to even give assurances as to their future conduct in an effort to persuade him to stay. You'll recall his evidence on

Page | 2344

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

these points.

But the dysfunction and inertia that Mr. Briceño uncovered at the Municipality was what was--is what precipitated his first attempted resignation in 2012. He did leave for good in 2013 because the situation had not improved.

One of the cases of maladministration that vexed Mr. Briceño, as the Municipality's auditor, was the Las Olas file. It wasn't the only thing, but it was one of them. And it was in 2011 that Mr. Briceño, an independent auditor with oversight of the Municipality, concluded that the Municipality's decision to shut down the project on the basis of a meeting with and a couple of communications from Mr. Bucelato was unlawful.

This was the contemporaneous finding of an independent government-appointed auditor that the Respondent violated its own laws by closing down Las Olas on the basis of little more than supposition and without regard to the Claimants' due process rights.

It's not the post facto evidence of--of the official whose conduct he rightly impugned or of a

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

senior official, such as the country's sitting Attorney General provided exclusively for the purposes of defeating a CAFTA claim.

For the avoidance of doubt, Mr. Briceño's contemporaneous review of the Las Olas case concluded unequivocally that the Municipality had acted unlawfully.

First, in suspending Las Olas's construction permits and then in failing to give effect to SETENA's resolution reinstating the Environmental Viability for the Project. And that was on the 6th of November, 2011.

Mr. Briceño also made three recommendations to the Mayor and to the Council at the time, none of which had been implemented by the time of his final resignation. Even today, only one of those recommendations has received partial implementation.

He ordered the Municipality to reverse its suspension of the Las Olas permits which Mr. Briceño considered to have been undertaken without any basis in law. He ordered the Municipality to respect SETENA's resolution reconfirming the Environmental

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Viability for the Project as it was legally bound to do, and he ordered the establishment of an interdisciplinary commission which he said should include members of the--developers as members to expeditiously resolve any contentious issues.

It's only that last one that has been given any effect, but it was a commission without the developers.

We might just pause for a moment to consider a question. Query whether Mr. Briceño hasn't just overwhelmingly demonstrated that he possesses a significant amount of relevant firsthand evidence that bears directly on the case. So, why didn't the Respondent offer as witnesses the SETENA officials it alleges to have been originally duped by the Investors?

Where is Sonya Phillips, the SETENA official who issued the binding declaration reaffirming the original findings of viability on 11 November 2011? Not just after all of Bucelato's allegations had been aired, but even though Mr. Martínez's witch hunt was in full stride.

B&B Reporters
001 202-544-1903

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Similarly, instead of asking Mr. Briceño about various nonbinding SINAC reports, the Respondent might have asked him about Resolution 2850-2011 from SETENA. Rather than assisting this Tribunal by making available witnesses under its control who possess the best evidence for a resolution of this case, the Respondent has opted for unjustly impugning Mr. Briceño's honor and professionalism.

The Respondent claimed that Mr. Briceño overstepped his bounds to become a de facto co-administrator, but the evidence just doesn't bear this out, even if it were relevant.

The Respondent has challenged Mr. Briceño's objectivity and independence, but its attempts to paint him as a political partisan obviously fell flat.

The Respondent stepped more lightly today in respect of Mr. Briceño's resignation attempt probably because they saw the folly in challenging the principal decisions of a manifestly honorable professional.

The Respondent's unfortunate attempt to attack Mr. Briceño's pension entitlement also fizzled out

B&B Reporters
001 202-544-1903

11
12
13
14
15
16
17
18
19
20
21
22

during cross-examination.

So, in summary, none of the Respondent's allegations concerning Mr. Briceño withstand the slightest scrutiny. The Tribunal should recognize them as just another attempt to revamp the historical narrative recasting itself as the innocent victim of the Investors' so-called trail of illegalities.

In much the same way that the Respondent failed to impugn Mr. Briceño's character and credibility, we submit that the same is true of the efforts the Respondent has undertaken to blacken the names of Mr. Aven and other investors, especially given that it failed to produce any witnesses from SETENA who could have spoken to this alleged fraud perpetrated on them.

It's, therefore, my final submission in relation to Mr. Briceño that the Tribunal ought to draw an adverse inference against the Respondent for its failure to produce witnesses from SETENA.

We submit that if Sonya Phillips, the SETENA official responsible for issuing the 21 November 2011 declaration, had been made available to the Tribunal

B&B Reporters
001 202-544-1903

Page | 2349

1 2 3 4 5 6 7 8 9

10
11

12
13
14
15
16
17
18
19
20
21
22

by the Respondent, her evidence would have clinched the fact that work on the Las Olas Project should have been back underway by the end of 2011.

Turning to damages. You've heard today evidence from two very contrasting experts. We don't have time to discuss all of the issues raised in oral evidence or in the expert reports, but I will look briefly at some of the key points that arise from the evidence put forward by the experts.

The contrasting approaches of Dr. Abdala and Mr. Hart are clear from the expert reports they have filed in these proceedings. But today's live testimony emphasized what should already have been evident from the written reports. Dr. Abdala has presented logical, defensible, and measured evidence rooted in financial literature and scholarship and objectively verifiable market data.

By contrast, Mr. Hart, for the most part eschews scholarship, relying instead on saying he thinks Dr. Abdala's approach is wrong without ever providing a cogent reason why or supporting that opinion with authority from the financial literature.

B&B Reporters
001 202-544-1903

Page | 2350

1 2 3 4 5 6 7 8 9

10
11
12

13
14
15
16
17
18
19
20
21
22

Many Claimants claim damages based on their own plans and projections. But if these Claimants had done that in this case, they would be claiming, as a minimum, \$150 million.

The Claimants will never get what they were expecting to get from this Project. They've been denied that.

What they are claiming now is the market value at the time of the Measures, having been denied the possibility of completing their Project and enjoying the benefits of that.

They have formulated that market value through the work of Dr. Abdala in a conservative manner to ensure it is rooted in the market. This is what Dr. Abdala does. He puts together a careful valuation model. He roots it in market data and financial authority, and he finds a fair market value for the Project.

The noise generated by Mr. Hart lacks credibility and has been put forward in a self-serving manner and with no attempt to assist the Tribunal in arriving at a fair market value.

B&B Reporters
001 202-544-1903

Page | 2351

1 2 3 4 5 6 7 8 9

10
11
12
13

14
15
16
17
18
19
20
21
22

Mr. Hart's expert report provides an extremely Respondent-friendly analysis, which he combines with numerous ad hominem attacks on witnesses and throwing dirt to distract attention from the real issues.

The fundamental aim of the quantum exercise in this case is to arrive at a fair market value for the Las Olas Project immediately before the Measures complained of, namely May 2011.

It's not disputed, nor could it be, that the fair market value is measured by the price a willing buyer and a willing seller would agree for the sale of that project.

The concept is not controversial, but it is critical to the quantum exercise. It's the question the Tribunal will need to determine. What price would a willing buyer and a willing seller have agreed?

Mr. Hart's approach is to assess the absolute lowest price a willing buyer might think about offering to purchase the Project, the amount of money that the Claimants have sunk into the Project.

In a very distressed situation, that might be something a seller would consider. But then that

B&B Reporters
001 202-544-1903

15
16
17
18
19
20
21
22

wouldn't be a willing seller. That would be a seller under compunction, under compulsion to sell.

There is no conceivable scenario in which a willing seller would agree to sell the Project for that amount of money.

The approach Mr. Hart advocates ignores the market value of the physical land and the permits that the Claimants had obtained. His approach assumes the value of the land is the same in 2011 as it was in 2002 when the Claimants purchased it.

Clearly, at an absolute minimum, a willing seller would only agree to sell if it received the market value of the physical land at the time of the sale.

That's assessed by a land appraisal. Dr. Abdala's approach uses a third-party land appraisal as part of his analysis.

The approach Mr. Hart advocates clearly--sorry--also ignores the income-earning potential of the Project. It's not credible to suggest that a willing seller would sell an income-producing project without any consideration of

B&B Reporters
001 202-544-1903

Page | 2353

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15

16
17
18
19
20
21
22

the potential value in the sale price. The seller would simply say no to the sale and continue to develop itself.

So, straightaway, it's clear that Mr. Hart's approach does not accord with the aim of the quantum exercise. He's not trying to find the market value of the Project. Quite transparently, he is trying to find the lowest possible number. It's not a valuation of the Project, it's a valuation of what he thinks the Claimants spent.

Mr. Hart can only put this approach forward in the first place by committing two sleights of hand. First, he doesn't establish, anywhere in his reports, the fundamental parameters of the exercise he's undertaking. He doesn't spell out that his job is to assist the Tribunal in determining the fair market value of the Project. And he doesn't spell out that this is achieved by finding the price at which a willing buyer and a willing seller would transact. This enables him to slide past this crucial step in the analysis.

And, secondly, he describes three valuation

B&B Reporters
001 202-544-1903

Page | 2354

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

17
18
19
20
21
22

approaches, income, market, and asset approaches. And he says he will adopt the asset approach. But--and here is where the sleight of hand comes in. He doesn't actually perform an asset valuation of the Project.

Ignoring the very definitions he cites, himself, from the financial literature, he says that his cost approach is a variation on the asset approach.

Quite simply, his approach is not an asset valuation at all. It does not seek to value the assets of the Las Olas Project. It merely values the funds the Claimants have spent, which is not the same thing at all, when only he has to look at the fiscal land itself to realize that. And, of course, the physical land is only one asset of the Las Olas Project.

It's obvious to anyone who has ever bought a property that the market value of that property bears no relation to the value paid for it. The value might go up, it might go down, or it might stay the same. But it requires an appraisal at the time of sale to

B&B Reporters
001 202-544-1903

Page | 2355

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17

18
19
20
21
22

know the market value at that point in time. Mr. Hart does not do that.

By contrast to Mr. Hart, Dr. Abdala's approach throughout is conservative, thoughtful, responsive to valid criticism and above all, seeks to find an objectively sustainable market value. He makes adjustments when they're needed to increase certainty and conservatism, to ensure he's not presenting a price at which a willing buyer would refuse to transact.

He presents a damages analysis, which is much reduced from the Claimants' projections of what was achievable with the Las Olas Project, and, therefore, much reduced from what a willing seller in May 2011 would have used as the value of the Project.

But crucially, it is a value which both a willing buyer and a willing seller would have agreed because it takes account of both the potential of the Project and the risks inherent in pursuing it to completion.

You heard Dr. Abdala explain clearly the difference between risk and speculation. All

B&B Reporters
001 202-544-1903

Page | 2356

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18

19
20
21
22

transactions involve an assessment of risk and a pricing of risk. That does not make all transactions speculative.

This approach intuitively describes the process a willing seller and a willing buyer would go through when assessing the value at which they would be prepared to transact. It's logical and rooted in the real world, but it's also supported by the financial literature and scholarship.

Dr. Abdala describes all of this in detail, and Mr. Hart cannot point to any scholarship that casts any doubt on the theoretical basis for Dr. Abdala's approach.

Mr. Hart tries to deflect attention from the fundamental/philosophical problems with his analysis by spending a great deal of time, in his Second Report and in today's evidence, in arguing that the Claimants didn't have the requisite experience or expertise to develop the Project successfully.

It's notable that Mr. Hart's lengthy and highly prejudicial assessments of the Claimants appeared only in his Second Report, despite the fact

B&B Reporters
001 202-544-1903

Page | 2357

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19

20

21

22

that virtually all of the material on which he based his criticisms was available to him when he was preparing his First Report.

Mr. Hart clearly didn't consider it important enough to the quantum exercise to consider it in his First Report. The cynical conclusion is that it was a deliberate decision to hold this back until a Rejoinder stage when the individuals concerned would have no opportunity to respond to the allegations in witness statements.

Be that as it may, the whole exercise is misconceived because the Claimants' merits and demerits as developers are simply not relevant to the quantum exercise before you.

You heard Dr. Abdala explain that in an analysis of the fair market value of this Project, it's assumed that a new buyer comes in and takes over the Project. The Claimants would not, in the but-for scenario, have any involvement in the Project going forward. And, so, their capacity to complete the Project plays no part in the valuation.

When one strips out the ad hominem attacks on

B&B Reporters
001 202-544-1903

Page | 2358

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

Dr. Abdala and the Claimants, the bluster around methodology, which is not backed up by authority and the relevant issues, Mr. Hart's principal objection to Dr. Abdala's methodology is he thinks the inputs to the DCF calculation are too uncertain.

Never mind the fact that the methodology already accounts for the risk of failure of the Project, which seems to be the focus of Mr. Hart's criticisms, this objection doesn't withstand any scrutiny.

Dr. Abdala presents a careful and objectively verifiable DCF calculation. In order to establish the physical layout of the Project, how many properties, of what type, and the proposed income streams that will be pursued, he refers to the 2010 Business Plan, a business plan completed only five months or so before the date of valuation.

As regards the layout of the Project site, the 2010 business plan is based on the 2008 master site plan. So, these plans had already been around for over two years before the date of valuation, and they are the basis on which the construction permits were

B&B Reporters
001 202-544-1903

Page | 2359

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

issued.

Moreover, by May 2011, the Claimants had started construction of the roads, the infrastructure, the services necessary to deliver the layout of the 2008 master site plan.

These basic inputs to the DCF calculation are, therefore, very much certain. Construction had started. Of course, it would have been possible to alter the plan slightly mid construction, but it's unlikely that this would have happened absent a reason not anticipated in May 2011.

But when it comes to the financial drivers of the DCF calculation, Dr. Abdala does not rely on the Claimants' business plan.

Rather, he ensures certainty by relying on independent third-party data or market data. There's no uncertainty here at all. Dr. Abdala's data is objectively verifiable and is market driven. That accords with the approach a hypothetical buyer would take.

Mr. Hart has no difficulty engaging with these inputs because they derive from objective and

B&B Reporters
001 202-544-1903

available data, and apart from some minor adjustments, he does not propose anything by way of alternatives. This underlines the confidence and certainty which the Tribunal--with which the Tribunal can approach the DCF valuation.

The final element of the--once one factors in the appraisal value, which you've heard me already, the final element in the valuation methodology is the probability of success.

This is, again, something on which the Tribunal can be confident of certainty. Not only is Dr. Abdala's 68 percent probability derived from verifiable and reliable data, which is relevant to the Las Olas Project, but, again, Mr. Hart provides no meaningful challenge to it or alternative opinion.

Moreover, in terms of probability of success, the Tribunal only need look at the neighboring Rock Construction Malaga Project, less than 10 kilometers away from Las Olas. In the period from 2012 to 2016 the Malaga Project had virtually completed construction of a development of over 400 properties and had sold out of its Classico house model.

B&B Reporters
001 202-544-1903

Page | 2361

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

You can see for yourselves the development of

the Malaga Project. Mr. Hart's Exhibit CRED-63 is a printout of the page from the Las Olas website, which contains a number of aerial photographs of both the Las Olas Project site and the Rock Construction Project site. And I encourage the Tribunal to go to that website. And the address is at the bottom of Mr. Hart's Exhibit Number 63.

Amongst the videos, there are--you'll find footage of the Malaga Project, footage of the current state of the Las Olas Project site and a drive-thru video of the Las Olas Project from the time the construction was in progress.

There's a series of aerial photographs charting the development of the Malaga Project from a bare, undeveloped site in 2012 to the virtually completed development in 2016.

Had Costa Rica not shut down the Las Olas Project, Las Olas would have been over a year ahead of the Malaga Project in terms of development and was offering much bigger plots than the Malaga Project.

Success of the Malaga Project in the period

B&B Reporters
001 202-544-1903

Page | 2362

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

since Las Olas shut down demonstrates that ascribing a 68 percent probability of success to Las Olas was

certainly a very conservative proposition.

Now, I'm going to conclude there because I think I'm out of time. But I will want to address, in post-hearing briefs, the questions of moral damages and consequential damages, which there's been minimal reference to today, but, nonetheless, come into the damages analysis.

All I would say by way of conclusion is that Costa Rica's approach to the evidence we've heard today has followed the approach it took in December and in its written submissions. The approach is to make unjustified and unsupported personal attacks on witnesses and experts put forward by the Claimants.

We've seen it today with a public servant of the Respondent itself against whom they have seen fit to throw all sorts of unjustified allegations and insults.

We've also seen this, unfortunately, in the written and oral evidence of Mr. Hart, who makes, quite frankly, unprofessional accusations against

B&B Reporters
001 202-544-1903

Page | 2363

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Mr. Abdala in arguing that he has misled the Tribunal, when that could not be further from the truth.

The Claimants are confident the Tribunal will

see these tactics as the transparent and undignified distraction that they are since they have permeated the Respondent's entire presentation of its case in these proceedings.

The Tribunal ought to ignore these attacks and instead focus on the clear, independent, and careful evidence we've heard today from Mr. Briceño and from Dr. Abdala, who have both sought to do nothing more than assist the Tribunal to the best of their ability.

Thank you.

PRESIDENT SIQUEIROS: Thank you, Mr. Burn.

Mr. Leathley?

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. LEATHLEY: Thank you very much.

Thank you, Mr. President.

And members of the Tribunal, we do not believe that Mr. Briceño's testimony today has served any particular purpose.

Mr. Briceño was proffered as some smoking gun

B&B Reporters
001 202-544-1903

Page | 2364

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

at the 11th hour, rushed into these proceedings, and necessitating a late exchange of witness testimony, and we see nothing of persuasion in this arbitration from his testimony.

First, Mr. Briceño's testimony points to recommendations he made and which he said were ignored. The evidence shows this is untrue. From our submission, we made clear that steps were taken to address the recommendations, and there was a rationalized conclusion reached, which turned on the ongoing nature of the criminal proceedings.

As a result, the complaints raised by the Claimants disappear with this evidence. Steps were taken, and a conclusion was reached. It is not the conclusion the Claimants want, but it was reasoned, and it was based on Costa Rican law.

Second, Mr. Briceño, his recommendations far exceeded what he was authorized to do.

Third, Mr. Briceño's credibility is significantly flawed. And we do not say this to attack his personality. We do so because he showed a lack of diligence and care. He claimed a pension when

B&B Reporters
001 202-544-1903

Page | 2365

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

he should not have; and in our Post-Hearing brief, we will deal with Mr. Briceño's errors in his analysis of Costa Rican constitutional law.

He engaged in political activity when he should not have. Mr. Briceño had accepted the

nomination; otherwise, his name would not have appeared in the official papers. And he engaged in political activity on behalf a party that opposed the mayor's party, being the mayor he has admonished in this arbitration.

We've also shown Mr. Briceño's lack of independence and objectivity during his performance as Internal Auditor. Mr. Briceño admitted that even though it was available to him, he failed to review the files pertaining to the investigation carried out by SINAC, while at the same time admitting that SINAC is the competent body to determine the existence of wetlands in Costa Rica.

A macro review, as he described it, macro review of the files in actual fact means that Mr. Briceño ignored critical evidence that would have given him the legal and administrative basis to

B&B Reporters
001 202-544-1903

Page | 2366

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

support the Municipality's decision.

Fourth, we have unanswered questions as to why a document talking to the Claimants' view of the project and seemingly directing the auditor to undertake certain action was found and verified independently by officials to be on the Auditor's

file.

Let me look at the recommendations that Mr. Briceño referred to. Mr. Briceño made four recommendations: The first, the intervention of a Municipality in the TAA investigation. Mr. Briceño was concerned about potential liabilities for the Municipality if it decided to intervene as a complainant in the investigation proceedings initiated by the TAA.

First, the intervention or not of a Municipality in the TAA investigation had no relevant legal consequences for the Municipality. Under Article 111 of the Environmental Organic Law--this is Exhibit C-184--the TAA can conduct investigations ex officio; that is, without the need of a formal complaint.

B&B Reporters
001 202-544-1903

Page | 2367

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Second, the intervention or not of the Municipality in the TAA investigation currently does not represent any liability for the Municipality. In case the TAA finds no liability on the part of Claimants, the Municipality would not be liable.

Under Article 6 of the Environmental Organic Law, municipalities have a duty to undertake actions

to protect the environment.

Third, if Claimants still thought that the municipality's actions were unlawful, they had plenty of legal routes available to challenge those acts before Costa Rica's administrative courts and seek any compensation for any damages arising out of the Municipality's conduct. And much like we saw as we concluded in the December Hearing, Claimants simply have not pursued them.

The second recommendation, the unlawfulness of the suspension of construction permits issued by the Municipal Council.

Mr. Briceño has admitted that he did not give any importance to SINAC's findings on the existence of wetlands on the site and the potential impact by

B&B Reporters
001 202-544-1903

Page | 2368

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

Claimants' construction works on the site.

He also admitted that he was not present during the Municipal Council's deliberations, so does not have any knowledge of what was discussed and what were the grounds on which the Municipal Council based its decision to suspend the construction permits granted to the Las Olas Project.

What we know is that the Municipal Council was

aware of the SINAC Report, whereas he seemingly was not.

Mr. Briceño acknowledged the importance of the precautionary principle on the issuance of injunctions against activities that may cause harm to the environment.

In light of the findings of SINAC and the neighbors' concerns, the Municipality was obliged to suspend any activity that could cause damage to protected ecosystems under Costa Rican law.

We urge the Tribunal to marginalize Mr. Briceño's view of the system when compared to Dr. Jurado's testimony on the functioning of the state apparatus when it comes to environmental protection

B&B Reporters
001 202-544-1903

Page | 2369

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

enforcement.

If the Municipality decided to suspend the construction permits, it was because a greater interest was at stake: The protection of the environment against unlawful works by the Claimants.

It is not a coincidence that every agency involved in the investigation into the Las Olas Project issued injunctions when they became aware of the risk of environmental damage: SETENA, SINAC, the

TAA, criminal courts, and the Municipal Council.

This is how Costa Rica's legal system operates, and Claimants' oath to abide by it since the first day they decided to invest in the country.

Mr. Briceño's neither a lawyer, nor even well informed; hence, his mistaken conclusions.

Today, Mr. Briceño has come up with a new criticism of the Municipal Court's decision of March the 7th, 2011, that we have not heard before.

Mr. Briceño said today that according to Article 44 and 45 of the Municipal Code, a proper procedure was not followed by the Municipal Council, and that because the Municipal Council is not part of the

B&B Reporters
001 202-544-1903

Page | 2370

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

active administration, they could not take this decision.

We want to reiterate that neither in his Witness Statement nor in the recommendations that he made to the Municipality, Mr. Briceño ever raised this procedural flaw. However, neither is this true under Costa Rican law, and we will show in our Post-Hearing briefs by reference to opinions of the Attorney General's office, and we will show, apart from not being a lawyer, that he is anything but

careful.

The third recommendation, the confirmation of an inter-institutional group.

Mr. Briceño advised the Municipal Council how to undertake this task, rather than being just a mere recommendation. Mr. Briceño's opinion overrides an internal order to the prohibition not to coadministrate. This is a task exclusively assigned by Article 34(a) of the Internal Control Act to the Municipal Council. Mr. Briceño, therefore, exceeded his authority when he tried to tell the administration how to act.

B&B Reporters
001 202-544-1903

Page | 2371

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

The fourth point, the reversal of the injunction after SETENA lifted its injunction against the Las Olas Project for the forgery of a public document.

Mr. Briceño recommended the Municipal Council reverse its injunction, given that SETENA had found that there was--that there were insufficient elements to find Mr. Aven responsible for the forgery of a SINAC official letter which cleared the developer's project before SETENA.

The Municipality, in fact, embraced

Mr. Briceño's recommendation and reversed its injunction against the Las Olas Project. The Municipal Council's decision is Exhibit R-129.

However, what the Claimants forget to mention is that by that time, three key things had happened: First, the SINAC injunction had been confirmed by SINAC and the contentious Administrative Tribunals. This can be found in Exhibit C-114 and R-193.

Second, the TAA injunction was in force, as can be found in Exhibit C-121.

And third, and very importantly, the judicial

B&B Reporters
001 202-544-1903

Page | 2372

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

injunction issued by the criminal courts of Parrita was in place. This is Exhibit C-146. And this is key.

Now, the Tribunal, of course, should ask itself, what is the relevance of Mr. Briceño's testimony? What is the relevance on Costa Rica's international responsibility under the DR-CAFTA?

I'm confused by Mr. Burn's comment that it seemingly doesn't have a bearing under the DR-CAFTA, but maybe I misheard him.

The answer is, there is no bearing on Costa Rica's liability. And that is quite apart from the

profound flaws that I've already identified in the Claimants' offering of Mr. Briceño's testimony.

Mr. Briceño issued mere recommendations to the Municipal Council and nothing more. His letters to the Municipal Council do not amount to final determinations or administrative acts capable of declaring any rights of third parties.

Mr. Briceño has admitted today that he had the opportunity to raise any of his concerns with the Contraloría, but he chose not to do so. Absent a

B&B Reporters
001 202-544-1903

Page | 2373

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

final determination from the Contraloría, the Municipality, or a judicial body, who could have backed up Mr. Briceño's concerns if they shared them, no right has accrued in favor of the Claimants.

The fact that some of Mr. Briceño's recommendations are favorable to Claimants' case does not automatically imply that those are decisive or that they are conclusively established or that they conclusively establish a wrong under Costa Rican law. In the same way, Mr. Briceño's recommendations cannot be the basis for a finding of international wrong.

I'd like to make a number of points in this regard: First, whether the Municipality did or did

not participate as a proper plaintiff in the TAA's investigation cannot be deemed a breach of an international obligation. The TAA investigation against the Las Olas Project would continue regardless of the Municipality's intervention.

Whether the suspension of the construction permits was undertaken with the proper legal basis is a question for a local court rather than an International Tribunal. Claimants had at the time,

B&B Reporters
001 202-544-1903

Page | 2374

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

and still have, administrative and judicial recourses available to challenge any injunction against them.

Third point, whether an interdisciplinary commission formed within the Municipality addressed one or all of the nonbinding recommendations of an Internal Auditor falls outside the sphere of international law.

And finally, even if the Municipality was delayed in reversing its injunction after knowing of SETENA's lifting of its injunction, other injunctions issued by SINAC, the TAA, and the criminal courts were in force and had exactly the same effects over the Claimants' construction permits.

Nothing would have changed if the Municipality

had rushed to reverse its injunction, because other agencies had already suspended the project until a final determination on liability was issued. That determination is contingent on Mr. Aven's return to Costa Rica to face his ongoing criminal proceedings.

It's appropriate for me at this point to address a point that Mr. Burn has made and emphasized significantly in his closing. He asked this Tribunal

B&B Reporters
001 202-544-1903

Page | 2375

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

to draw an adverse inference for the lack of witnesses.

And we've--we would refer you to our opening remarks, where we addressed this point very clearly. The documents speak for themselves. The Claimants had, and still have, an opportunity to test the alleged violations of Costa Rica law, and they have ignored comprehensively those chances.

This is not the forum for a he-said/she said dispute that the Claimants have chosen to pass up under Costa Rican law.

And finally, members of the Tribunal, I want to deal very briefly with the testimony you've heard today in relation to damages. I want to make a couple of closing remarks in relation to Dr. Abdala's

testimony. Of course, we will supplement in our Post-Hearing brief.

Inasmuch as of a finding of liability against Costa Rica would be a ground-breaking decision under international law, never seen before, so too would the use of Dr. Abdala's methodology. It is untested and it is unreliable.

B&B Reporters
001 202-544-1903

Page | 2376

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

First, to employ DCF in the absence of a track record immediately places you in the realm of a Tribunal that is speculating. International law is very clear that that is not your job, and to ask that of you is to grossly distort how international law assesses damages.

Second, to employ a probabilistic outcome factor on top of a DCF calculation is tantamount to admitting that DCF on its own does not function, which it does not.

But as much as the probabilistic factor is a fig leaf on an embarrassed DCF calculation, it is also flawed. Dr. Abdala testified that experience may be an important and relevant factor to determining the probability of success. The evidence is clear. The Claimants didn't know what they were doing, and the

evidence showed they didn't know how to sell.

Therefore, this means one of two things:
First, either it means that the project was never
going to take off, in large part due to their
inexperience and lack of skill in the resort
development business; second, and the alternative--and

B&B Reporters
001 202-544-1903

Page | 2377

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

this is Dr. Abdala's view of the world, where he tries
to ignore the lack of expertise--the lack of sales
that we know occurred proves that the business simply
wasn't going to take off at the time we've analyzed
it.

In short, there is no evidence that Dr. Abdala
could find a willing buyer for his fair market value
tests, because Claimants struggled so much to find a
willing buyer. The market was dead, as Mr. Aven
testifies.

Finally, Dr. Abdala builds his damages model
on their business plan, which is the--which, as the
cornerstone of Dr. Abdala's damages assessment, is
fundamentally flawed.

Precisely because of the Claimants' lack of
experience, the Tribunal should be very nervous of
going anywhere near a methodology that relies on their

plan. If a scrappy and unproven business plan is a sufficient foundation to establish a multimillion-dollar claim for damages in a market that barely moved in their favor and in relation to a project for which there was no outside interest shown,

B&B Reporters
001 202-544-1903

Page | 2378

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

then we can rapidly retire from the law and mock up a rough business plan in the hope of elevating a nonstarting or failing business into a financial gold mine just because we can state in theory, but not proven in practice, that there must surely be a willing buyer somewhere.

Finally, Members of the Tribunal, we're putting on the slide--on the screen slides taken from Mr. Hart's presentation today.

Dr. Abdala's analysis takes fact and converts it to fiction. His assessment is far from conservative, as Mr. Burn presented. It is radical, finding a cash flow that has never existed and for which there is no evidence of it ever coming into existence. These diagrams illustrate this perfectly.

Mr. Hart's approach is the market approach, and the support for this is the deafening silence when it comes to showing Dr. Abdala's methodology being

relied on by anyone else. Dr. Abdala cites U.S. data. Members of the Tribunal, we are Costa Rica. In 2011, to quote Mr. Aven, the market was dead.

Thank you very much for your time. No further

B&B Reporters
001 202-544-1903

Page | 2379

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

submissions.

PRESIDENT SIQUEIROS: Thank you very much, Mr. Leathley.

So, just to confirm, you had requested a two-week extension to produce the post-Hearing briefs. The two weeks--let me just try to get Procedural Order Number 5--were supposed to be delivered on Friday, February 24th, but you are making reference to a two-week extension.

Does this mean that it would be Friday, March 10th?

MR. BURN: Sir, that's our understanding, yes.

MR. LEATHLEY: Yes, sir. Yes. That's right.

PRESIDENT SIQUEIROS: Okay. The Tribunal might wish to request from the Parties to place specific interest on certain topics on your briefs.

Would you be amenable to allow the Tribunal to deliver these points by early next week?

MR. BURN: If it's only next week, absolutely.

That's fine for us, yeah.

MR. LEATHLEY: Yes. We'd be happy to address any issues the Tribunal wishes.

B&B Reporters
001 202-544-1903

Page | 2380

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

PRESIDENT SIQUEIROS: Okay. Because the Tribunal might--it's not certain that it will do so, but--and we will advise you, of course--if it does or if it does not wish to raise these issues with you. But if we do, we'd be proposing to submit these to you by early next week.

MR. BURN: Thank you, sir.

MR. LEATHLEY: Thank you.

MR. BURN: I just want to take the opportunity to, of course, thank the Members of the Tribunal for the--their attention before and during the two Hearings we've had and, of course, to thank everybody else who's contributed to these proceedings, and certainly Mr. Grob and to the transcribers and translators, even to my opponents and their experts and witnesses.

Thank you very much, sir.

PRESIDENT SIQUEIROS: Thank you.

MR. LEATHLEY: Thank you very much.

That allows me to say I echo Mr. Burn's

remarks. However, one small housekeeping point.
There was a reference I think I made to a translation,
B&B Reporters
001 202-544-1903

Page | 2381

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16
17
18
19
20
21
22

a revised translation. We would, whilst we have the Tribunal here, like to hand a copy to the Tribunal.

I don't know if the Claimants have had an opportunity to review it. If not, we'll hopefully circulate it, if there is objection from the Claimants, by e-mail.

MR. BURN: Yeah. Could we do that by e-mail? I mean, we've had a brief look at it, but not sufficiently.

That does remind me, though, we do have the USB drives with the updated model. My colleague is going to distribute those now.

PRESIDENT SIQUEIROS: Okay. I would also like to thank the Parties, as I did at the closing of the Hearing in December. Sometimes the statements made and the arguments and the passion that is brought out in these hearings would almost lead a Party who is not experienced in these types of hearings or one who is alien to the Hearing itself to think that they become personal in nature; but certainly, they are not, and I commend both counsel for the professionalism in which

they have conducted themselves, not only today, but

B&B Reporters
001 202-544-1903

Page | 2382

1 2 3 4 5 6 7 8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

also during the December Hearing.

Thank you for your patience, at times, with the other Party. Thank you for allowing the other Party additional time when that time was necessary for the other Party to conclude the argument. And from my end, it's been--the case is certainly not over, but up until now, it's been truly a satisfaction to hear both arguments, both written and oral, from the Parties thus far.

MR. LEATHLEY: Thank you very much.

PRESIDENT SIQUEIROS: Thank you.

And thank everyone involved: Francisco, the court transcribers, and the interpreters, and everyone else involved. We appreciate your support.

(Whereupon, at 6:28 p.m., the Hearing was concluded.)

B&B Reporters
001 202-544-1903

Page | 2383

1 2 3 4 5 6 7 8 9

10
11
12
13
14
15
16

CERTIFICATE OF REPORTER

I, Michelle Kirkpatrick, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

Michelle Kirkpatrick

Page | 2384

B&B Reporters
001 202-544-1903

CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARGIE R. DAUSTER

Page | 2385

B&B Reporters
001 202-544-1903