

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

- - - - - x
In the Matter of Arbitration :
Between: :
 :
DAVID AVEN, et al., :
 : UNCITRAL Case No.
Claimants, : UNCT/15/3
 :
and :
 :
THE REPUBLIC OF COSTA RICA, :
 :
Respondent. :
- - - - - x Volume 4

HEARING ON JURISDICTION AND MERITS

Thursday, December 8, 2016

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

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:07 a.m., before:

MR. EDUARDO SIQUEIROS T., President

MR. C. MARK BAKER, Co-Arbitrator

PROF. PEDRO NIKKEN, Co-Arbitrator

<p>Sheet 2</p> <p>1000</p> <p>Also Present:</p> <p>MR. FRANCISCO GROB D. Secretary to the Tribunal</p> <p>Court Reporters:</p> <p>MS. MICHELLE KIRKPATRICK MS. MARGIE DAUSTER Registered Diplomate Reporter (RDR) Registered Merit Reporter (RMR) Certified Realtime Reporters (CRR) B&B Reporters 529 14th Street, S.E. Washington, D.C. 20003 United States of America (202) 544-1903</p> <p>SRA. ELIZABETH LORETA CICORIA SRA. MARTA MARÍA RINALDI D.R. Esteno Colombres 566 Buenos Aires 1218ABE Argentina Republic of Argentina</p> <p>Interpreters:</p> <p>MS. JUDITH LETENDRE</p> <p>MS. KARIN RUCKHAUS</p> <p>MS. KELLEY REYNOLDS</p> <p>MS. STELLA COVRE</p>	<p>1002</p> <p>APPEARANCES (Continued):</p> <p>MR. HERMAN DUARTE IRAHETA Batalla Salto Luna San José Costa Rica</p> <p>MR. ESTEBAN DE LA CRUZ BENAVIDES Batalla Salto Luna San José, Costa Rica</p> <p>MR. JEROME HOYLE Vinson & Elkins RLLP International Lawyers 20 Fenchurch Street, London EC3M 3BY United Kingdom</p> <p>MS. CAROLINA ABREO-CARRILLO Vinson & Elkins LLP Attorneys at Law 1001 Fannin Street, Suite 2500 Houston, Texas 77002-6760 United States of America</p> <p>Attending on behalf of the Respondent:</p> <p>MR. JOSÉ CARLOS QUIRCE MS. ADRIANA GONZALEZ MS. KARIMA SAUMA MR. JULIAN AGUILAR MS. ARIANNA ARCE Ministry of Foreign Trade of Costa Rica (COMEX)</p> <p>MR. CHRISTIAN LEATHLEY MS. AMALBOUCHENAKI MS. FLORENCIA VILLAGGI (on the phone) Herbert Smith Freehills New York LLP 450 Lexington Avenue, 14th Floor New York, New York 10017 United States of America</p>
<p>1001</p> <p>APPEARANCES:</p> <p>Attending on behalf of the Claimants:</p> <p>MR. GEORGE BURN Vinson & Elkins RLLP International Lawyers 20 Fenchurch Street, London EC3M 3BY United Kingdom</p> <p>DR. TODD WEILER Barrister & Solicitor #19 - 2014 Valleyrun Blvd. London, Ontario N6G 5N8 Canada</p> <p>MRS. LOUISE WOODS Vinson & Elkins RLLP International Lawyers 20 Fenchurch Street, London EC3M 3BY United Kingdom</p> <p>MR. ROBERT LANDICHO Vinson & Elkins LLP Attorneys at Law 1001 Fannin Street, Suite 2500 Houston, Texas 77002-6760 United States of America</p> <p>MR. PETER D. DANYSH Vinson & Elkins LLP Attorneys at Law 1001 Fannin Street, Suite 2500 Houston, Texas 77002-6760 United States of America</p> <p>MR. RAÚL GUEVARA VILLALOBOS Batalla Salto Luna San José, Costa Rica</p> <p>MR. RÓGER GUEVARA VEGA Batalla Salto Luna San José, Costa Rica</p>	<p>1003</p> <p>APPEARANCES (Continued):</p> <p>On behalf of the non-disputing party United States of America:</p> <p>MR. PATRICK W. PEARSALL MS. NICOLE C. THORNTON Attorney-Advisers, Office of International Claims and Investment Disputes Office of the Legal Adviser U.S. Department of State Suite 203, South Building 2430 E Street, N.W. Washington, D.C. 20037-2800 United States of America</p>

<p>Sheet 3</p> <p>1004</p> <p>C O N T E N T S</p> <p>PAGE</p> <p>PRELIMINARY MATTERS: 1005</p> <p>WITNESSES:</p> <p>LUIS MARTÍNEZ ZÚÑIGA</p> <p>Direct Examination by Mr. Leathley 1013</p> <p>Cross-Examination by Mr. Burn 1015</p> <p>Redirect Examination by Mr. Leathley 1122</p> <p>Questions from the Tribunal 1127</p> <p>Recross-Examination by Mr. Burn 1195</p> <p>MÓNICA VARGAS</p> <p>Direct Examination by Mr. Leathley 1199</p> <p>Cross-Examination by Mr. Burn 1200</p> <p>Redirect Examination by Mr. Leathley 1258</p> <p>Questions from the Tribunal 1258</p> <p>LUIS ORTIZ</p> <p>Direct Presentation 1265</p>	<p>1006</p> <p>09:10:45 1 a document that's on the record or not on the record?</p> <p>2 MR. BURN: It's not on the record in the</p> <p>3 Arbitration. It was something that was used in some</p> <p>4 of the criminal proceedings, so--</p> <p>09:10:52 5 MR. LEATHLEY: Well, then I think we should</p> <p>6 see it first before we proceed with Mr. Luis's</p> <p>7 examination, because we may not want to accept it</p> <p>8 going onto the record, sir.</p> <p>9 MR. BURN: It's a legal exhibit, not a fact</p> <p>09:11:05 10 exhibit. It's a legal exhibit.</p> <p>11 MR. LEATHLEY: I dare say, sir. I think</p> <p>12 we're entitled to see a document that is being put to</p> <p>13 the witness cold. We've had three years since this</p> <p>14 Arbitration has started, sir.</p> <p>09:11:14 15 MR. BURN: If you consult the procedural</p> <p>16 orders, there's nothing mandating us with respect to</p> <p>17 legal exhibits. It's a matter of law.</p> <p>18 PRESIDENT SIQUEIROS: But it would be</p> <p>19 advisable, nonetheless, to have Respondent look at the</p> <p>09:11:30 20 document before, and if you would care to share with</p> <p>21 the Tribunal as well, just to confirm the nature of</p> <p>22 the document, before it is presented as a matter of</p>
<p>1005</p> <p>1 P R O C E E D I N G S</p> <p>2 PRESIDENT SIQUEIROS: Good morning. If the</p> <p>3 Court Reporters, Interpreters, and the Parties are</p> <p>4 ready to proceed, then we can proceed.</p> <p>09:09:47 5 This is the fourth day of hearing in the</p> <p>6 case brought by Mr. David R. Aven, et al., against the</p> <p>7 Republic of Costa Rica.</p> <p>8 Before we proceed with the examination of</p> <p>9 Mr. Luis Martínez Zúñiga, I would ask Claimants and</p> <p>09:10:11 10 Respondent whether there are any procedural issues</p> <p>11 they would like to discuss before?</p> <p>12 MR. BURN: No, save that just to mention</p> <p>13 that there is a legal exhibit that we'll be providing</p> <p>14 copies of very shortly--it's just literally being</p> <p>09:10:29 15 prepared right now--that will be relevant for Mr.</p> <p>16 Martínez' cross-examination.</p> <p>17 Beyond that, no, there are no points.</p> <p>18 PRESIDENT SIQUEIROS: Has this been</p> <p>19 delivered to Respondent?</p> <p>09:10:39 20 MR. BURN: No. It's only just come up.</p> <p>21 PRESIDENT SIQUEIROS: Okay.</p> <p>22 MR. LEATHLEY: So, could I clarify? Is this</p>	<p>1007</p> <p>09:11:46 1 record in the Arbitration.</p> <p>2 MR. BURN: Yes. As soon as I have the</p> <p>3 copies, we will hand it over. It's just being done</p> <p>4 now.</p> <p>09:11:51 5 PRESIDENT SIQUEIROS: Okay. Would you wish</p> <p>6 to delay examination of Mr. Martínez until this is</p> <p>7 distributed, or this will not be necessary as part of</p> <p>8 the examination?</p> <p>9 MR. BURN: For my part, I'm happy to</p> <p>09:12:02 10 proceed. But based on Mr. Leathley's comments just</p> <p>11 now, I anticipate that he may want to hold off and</p> <p>12 show it to the--to Mr. Martínez, but for my part, I'm</p> <p>13 happy to proceed.</p> <p>14 MR. LEATHLEY: Simply, sir, a legal</p> <p>09:12:13 15 exhibit--if you're talking about international law, of</p> <p>16 course, then that's not an issue. But Costa Rican</p> <p>17 law, as we've been explaining, is a question of fact.</p> <p>18 PRESIDENT SIQUEIROS: Indeed.</p> <p>19 MR. LEATHLEY: So, we would treat that as</p> <p>09:12:24 20 any document, letter, publication. We believe it</p> <p>21 would be prudent for us to see it in advance, and as</p> <p>22 you say, to verify. So, I would request that we have</p>

09:12:34 1 an opportunity to review that first.
 2 PRESIDENT SIQUEIROS: Would you care to
 3 describe what the document relates to, Mr. Burn?
 4 MR. BURN: Absolutely. These are the chief
 09:12:43 5 prosecutor's office's Guidelines for the Prosecutorial
 6 Investigation of Environmental Crimes issued in 2010.
 7 PRESIDENT SIQUEIROS: In Costa Rica?
 8 MR. BURN: In Costa Rica.
 9 MR. LEATHLEY: So, sir, this would be a
 09:12:58 10 document that we would have been able to show the
 11 witness in advance. If you can give me the time to
 12 present it to the witness--obviously, all the
 13 witnesses have access to the entire record.
 14 I would imagine if it is that innocuous,
 09:13:11 15 then Mr. Martínez perhaps may say he has no issue with
 16 it, but I think it's appropriate, at least from our
 17 perspective, that at least he have that. We're not
 18 too comfortable about being blindsided by documents.
 19 The purpose is to test the testimony rather than cold
 09:13:24 20 recollection on documents that he hasn't seen before.
 21 PRESIDENT SIQUEIROS: I think it would be
 22 fair, then, that if this could be shared when you have

09:13:38 1 copies available and be simply--it is a document of
 2 Costa Rican law. It is a document that we would be
 3 treating at this Arbitration as a document of fact
 4 rather than law for purposes of its nature; and
 09:13:59 5 therefore, if Respondent is comfortable with that, then
 6 let's proceed on that basis.
 7 Once we have copies shared with Respondent,
 8 he will simply show it to the witness.
 9 MR. BURN: That's absolutely fine. I'll
 09:14:17 10 actually send Mr. Leathley a soft copy immediately,
 11 and it's publicly available document, in any event.
 12 But I'll send that to you immediately, even before the
 13 hard copies arrive.
 14 PRESIDENT SIQUEIROS: Thank you.
 09:14:31 15 MR. BURN: I spoke too soon. They have
 16 arrived.
 17 I will invite my colleague to hand out the
 18 cross-examination bundle for Mr. Martínez, together
 19 with copies of--hard copies of this document and
 09:14:41 20 distribute it in the usual way; and if Mr. Leathley
 21 thinks he needs time to reflect on it with the
 22 witness, we're not going to oppose that.

09:14:49 1 MR. LEATHLEY: Yes, I think we can be very
 2 quick. So, we can do it now and then resume in
 3 hopefully, literally, minutes, if that.
 4 PRESIDENT SIQUEIROS: Yes, please proceed.
 09:14:59 5 Thank you, Mr. Leathley.
 6 MR. LEATHLEY: Thank you.
 7 (Pause.)
 8 (Brief recess.)
 9 PRESIDENT SIQUEIROS: Mr. Leathley, you have
 09:26:42 10 had a chance to review the document and discuss this
 11 with Mr. Martínez?
 12 MR. LEATHLEY: Thank you, sir. Yes, we
 13 have.
 14 We have no objection to it being admitted to
 09:26:51 15 the record. We would just ask at this point--we're
 16 halfway through the hearing--that if documents are
 17 going to be presented like this, that advance notice
 18 be given, that we do things properly, sir. It's a
 19 little bit of a waste of the Tribunal's time and
 09:27:10 20 everyone else's time to have to take time out to
 21 review documents like this, sir.
 22 PRESIDENT SIQUEIROS: We take note of your

09:27:14 1 comments. Thank you.
 2 So, if you would call in Mr. Luis Martínez
 3 Zúñiga.
 4 LUIS MARTÍNEZ ZÚÑIGA, RESPONDENT'S WITNESS, CALLED
 09:27:49 5 THE WITNESS: Good morning.
 6 PRESIDENT SIQUEIROS: Mr. Martínez, can you
 7 hear me? I'm going to speak Spanish for a few
 8 minutes. It is my understanding that you will be
 9 providing your testimony and you'll be examined in
 09:28:04 10 Spanish; is that correct?
 11 THE WITNESS: Yes, sir, it is correct.
 12 PRESIDENT SIQUEIROS: As the Costa Rica
 13 Republic attorneys must have explained to you, I'd
 14 like to myself explain the format for this
 09:28:20 15 examination.
 16 The representatives will be putting some
 17 introductory questions to you first so that you may
 18 confirm your testimony and your statements, and this,
 19 then, will be followed by a cross-examination by the
 09:28:41 20 Claimants; and then the representatives of the
 21 Republic of Costa Rica will have an opportunity to
 22 recross you, asking questions--sorry, redirect you

09:28:51 1 with regards to the questions posed by the attorney for
2 the Claimants. And at any point in time, the Tribunal
3 may put questions to you.

4 Your answers must be provided first to the
09:29:05 5 question. In other words, when you hear the question,
6 you must respond that question; and then if you wish
7 to further clarify, you may do so following that
8 answer.

9 If you do not fully understand a question,
09:29:17 10 you will have an opportunity to ask for clarification.

11 If the examination takes place in English,
12 please listen to the interpretation that you'll be
13 receiving through your headset, and then you may
14 respond.

09:29:39 15 There is a card on the table before you, on
16 the right-hand side, with a statement, and I would ask
17 you to kindly read it. That will explain how you will
18 be responding during this examination.

19 THE WITNESS: It states: I solemnly declare
09:29:58 20 upon my honor and conscience that I shall speak the
21 truth, the whole truth, and nothing but the truth.

22 PRESIDENT SIQUEIROS: Thank you very much.

09:30:06 1 MR. LEATHLEY: Thank you, Mr. President.

2 DIRECT EXAMINATION

3 BY MR. LEATHLEY:

4 Q. Good morning, Mr. Martínez. Could you
09:30:14 5 confirm that the statements--I don't know in which
6 part of the documents the Witness Statements are.
7 They are in that bundle before you.

8 Could you check your Witness Statements,
9 which are under Tabs 1 and 2? And please confirm that
09:30:38 10 these are your statements.

11 A. They're in English, sir.

12 Q. Under Tab 2?

13 A. Yes. Number 2 is in Spanish, and it is my
14 Number 2 Witness Statement.

09:31:13 15 Number 1 has my name, but it is in English.
16 I don't know if it is my Witness Statement.

17 Q. I think that the first one is your First
18 Witness Statement--that's under Tab 2--and your Second
19 Witness Statement is under Tab 4.

09:31:32 20 If I--I think that is correct.

21 A. Yes, correct. These are my Witness
22 Statements.

09:31:39 1 Q. Thank you.

2 And do you have any change to make to your
3 respective Statements?

4 A. Yes, in both Statements, I would like to add
09:31:50 5 something in Item 2, in both, in Number 1, and in
6 Number 2.

7 Literally, the change--actually, it would be
8 something to be added at the end of Number 2. So, it
9 would also read "Investigation by the prosecutor was
09:32:08 10 also made of a complaint due to forgery and use of
11 false statements and disobedience because of a
12 complaint by SETENA."

13 In Item 9--

14 PRESIDENT SIQUEIROS: That is what you would
09:32:36 15 like to include after Paragraph 2?

16 THE WITNESS: Correct.

17 PRESIDENT SIQUEIROS: Then there are other
18 changes that you would like to propose?

19 THE WITNESS: Yes. This correction is to
09:32:48 20 Item 2 of the First and Second Witness Statements. In
21 both, it is the same proposal.

22 Then in Paragraph 9 of the First Witness

09:33:01 1 Statement--in the first line, where it says
2 "Complaint," we should say "or criminous
3 notification."

4 And in Paragraph 12 of that same First
09:33:28 5 Statement, also in the first line, instead of saying
6 "appeals," it should say "remedy stage."

7 These are the suggestions I make.

8 MR. LEATHLEY: Sorry to--the screen on the
9 Spanish transcript's not appearing on my screen.
09:33:57 10 Apologies to interrupt.

11 PRESIDENT SIQUEIROS: Let's just take a
12 moment to verify that all of the technologies--

13 MR. LEATHLEY: So sorry about that.

14 (Pause.)

09:34:42 15 MR. LEATHLEY: Thank you. Sorry about that,
16 sir.

17 BY MR. LEATHLEY:

18 Q. Are there any further changes, Mr. Martínez?

19 A. No. Thank you.

09:35:02 20 MR. LEATHLEY: Thank you, sir.

21 MR. BURN: Thank you very much.

22 CROSS-EXAMINATION

09:35:07 1 BYMR. BURN:
 2 Q. Now, Mr. Martínez, you say that this story
 3 effectively began with the complaint lodged by Steve
 4 Bucelato on the 2nd of February, 2011; that's right,
 09:35:20 5 isn't it?
 6 A. Yes, correct. Microphone not on.
 7 Yes, the criminal file began with the
 8 complaint submitted by Mr. Bucelato on the date that
 9 you indicate.
 09:35:36 10 Q. Thank you. And Mr. Bucelato was not a
 11 biologist or a wetland specialist or any sort of
 12 technical expert, was he?
 13 A. Correct. Mr. Bucelato had--as far as I
 14 know, and as far as I can tell, he has no training in
 09:35:56 15 these specialties that you mention, sir.
 16 Q. And it's also your view that--and I'm
 17 quoting from Paragraph 16 of your Statement--that in
 18 criminal matters, the reasons or identity of the
 19 complainant are not relevant to the investigation.
 09:36:12 20 That remains your view, does it?
 21 A. Can you indicate in which of the two
 22 Statements--which of the two Statements you're talking

09:36:27 1 about?
 2 Q. If you go to Paragraph 16 of your First
 3 Statement, beginning right at the bottom of Page 4 in
 4 the English. I'm sorry, I don't know where it begins
 09:36:45 5 in the Spanish. But there's a sentence near the end
 6 which reads as follows: "In criminal matters, the
 7 reasons or identity of the complainant are not
 8 relevant to the investigation."
 9 So, this is the second-to-last sentence in
 09:37:06 10 Paragraph 16 of your First Statement, if you want to
 11 check that.
 12 A. Correct. I've already checked it, and in
 13 effect, that is an assertion that appears in my
 14 Witness Statement; and in effect, for criminal
 09:37:33 15 investigation, it is not relevant but is the reasons
 16 or the identity of the person who presents a complaint
 17 has no relevance.
 18 And if I may, I would like to say why I made
 19 that statement.
 09:37:47 20 In this case, environmental crimes are
 21 crimes of public action. The Public Ministry, once it
 22 receives the complaint or criminous notification, has

09:37:59 1 to carry out the investigation regardless of the
 2 personal characteristics of the person who makes the
 3 claim.
 4 And in this case, in addition to Mr.
 09:38:12 5 Bucelato's complaint in the file, there are two more
 6 complaints--or rather, three more complaints that had
 7 to be investigated; two made by an institution, which
 8 is ACOPAC, which you probably have heard about
 9 already. It is the area for the Central Pacific
 09:38:30 10 Conservation that belongs to SINAC from MINAE; and
 11 another one submitted by SETENA due to disobedience of
 12 authority, which was also investigated once there was
 13 an order given by SETENA in which they stated that Mr.
 14 David Aven had not complied with the rules.
 09:38:52 15 Q. Indeed. And we will come to the second
 16 complaint in a moment.
 17 But just before we leave Mr. Bucelato's
 18 complaint, your evidence, I think, would be--but
 19 please tell me if you think I'm wrong--that the fact
 09:39:09 20 that Mr. Bucelato lacks technical expertise is of no
 21 relevance; and the fact that this may have been some
 22 sort of personal vendetta being waged by Mr. Bucelato

09:39:22 1 would also not be relevant to your consideration of
 2 the complaint and whether criminal proceedings ought
 3 to follow; is that right?
 4 A. Well, not necessarily if it is a personal
 09:39:40 5 vendetta. That is, if it were a personal vendetta, it
 6 isn't necessarily relevant. The fact is that the
 7 facts submitted by Mr. Bucelato before the Public
 8 Ministry were investigated and were corroborated by
 9 the competent authorities and, to a great extent, on
 09:39:58 10 the basis of those facts, is that the accusation came.
 11 Q. Right. And we will go back and look at
 12 precisely how the other competent Ministries did
 13 indeed look at these matters, and when they rejected
 14 Mr. Bucelato's complaints and when that seemed to
 09:40:17 15 shift, but we'll come back to that.
 16 But nonetheless--I think I understand your
 17 evidence correctly--that you're not really interested
 18 in whether or not there's some sort of personal
 19 vendetta that may be being waged here between
 09:40:31 20 individuals or corporations; once you receive a
 21 complaint, you look at it without reference or without
 22 considering the possibility that underneath it all may

09:40:39 1 be some sort of personal vendetta.
 2 Just a "Yes" or "No," because you've
 3 obviously had the chance to discuss it, but just "Yes"
 4 or "No," do I understand--do I characterize your
 09:40:50 5 evidence on that correctly?
 6 A. No. It is not correct.
 7 Q. So, that would mean that if it were a
 8 personal vendetta, if you thought there were a
 9 personal vendetta underlying the complaint, that you
 09:41:08 10 might treat the complaint differently; is that right?
 11 A. Yes. If it is apparent that it is a
 12 question of personal vendetta, we would have to act
 13 much more cautiously in order to try to determine if
 14 those facts are true or not.
 09:41:28 15 Q. Okay. Thank you.
 16 Now, you do refer to a second complaint
 17 filed by Luis Picado Cubillo that was filed or was
 18 received by the Aguirre Prosecutor on the 8th of
 19 February 2011. And you refer to that at Paragraph 17
 09:41:49 20 of your First Statement.
 21 Do you recall that?
 22 A. Yes, correct.

09:42:07 1 Q. And Mr. Picado is--
 2 A. It is in Paragraph 17, correct.
 3 Q. Mr. Picado is an employee of SINAC; that's
 4 right, isn't it?
 09:42:18 5 A. Correct. He is in the Central Pacific--or
 6 at that time, in 2011--right now I don't know where he
 7 works, but at that time, he was in this conservation
 8 area, section.
 9 Q. Now, could you turn to Tab 60 in the files,
 09:42:44 10 which I think will be in the second volume.
 11 So, this is, for the record, R-66.
 12 If you look on the second page of that
 13 document, again, "Sexto," 6, could you just review the
 14 paragraph just below the first paragraph in that
 09:43:43 15 heading, which begins, "Adernás hacen."
 16 So, you see on the second page, there's--it
 17 says "Sexto" in the middle. Three or four paragraphs
 18 under that, or that reference "sexto," the third of
 19 those begins, "Adernás hacen"--could you just read
 09:44:13 20 that out, please?
 21 A. Yes. In the sixth paragraph of this ACOPAC
 22 document, ACOPAC-CP-015-11DN, it states, "In addition,

09:44:34 1 they emphasize that approximately two months ago, the
 2 Municipality of Parrita began to place pipes coming
 3 from the property in question that continues parallel
 4 to the main highway and then goes south, going in
 09:44:50 5 parallel to the sports arena of the place until it
 6 arrives at the mangrove that limits the property of
 7 Mr. Mario Venegas Hidalgo. In this site, we observed
 8 water running off through the sewage. The pipe is
 9 approximately 450 meters in, and according to the
 09:45:09 10 interviewees, it was done in order to dry the existing
 11 wetland."
 12 Q. Right. So, what you see here is that Mr.
 13 Picado's complaint is not only about matters relating
 14 to the developers at Las Olas, is it? It's also, as
 09:45:30 15 we can see here, about work that the Municipality is
 16 doing, the piping work that it is apparently doing
 17 with the intention of drying out wetlands.
 18 Do you see that?
 19 A. Yes. In effect, that is what this paragraph
 09:45:48 20 indicates. However, I can explain to you, sir, that
 21 during the investigation the Ministry of Public Works
 22 carried out, two visits were made to the Las Olas

09:46:02 1 Project and specifically to this site, where there is
 2 an alleged wetland.
 3 And during these two visits, they found
 4 operators, they found some machinery that had been
 09:46:15 5 working there on the site, and that were placing
 6 culverts and carrying out--or placing channels to take
 7 water out of the site. And the operators there told
 8 me personally that they were doing it under the order
 9 of Mr. Aven.
 09:46:38 10 Q. What else did you do to investigate the
 11 muni's own works here that are referenced in that
 12 document? Or was that it? Did you investigate the
 13 work that was referenced in this document from two
 14 months before, that the muni was doing; or did you
 09:46:56 15 just go and say, oh, well, it's only work that's being
 16 done by the developers, and just ignore the work that
 17 Mr. Picado is saying was being done by the
 18 Municipality?
 19 A. Yes. In effect, on this, we also held
 09:47:15 20 consultations, and the Municipality stated that the
 21 work that was being carried out was in a public road
 22 outside of the private project and that they could not

09:47:27 1 carry out any sewage work in private property.
 2 And we were told that that sewage work was
 3 being done outside of the project in order to channel
 4 rainwater from the public road sector to a site which
 09:47:43 5 is a place that is outside of the private property.
 6 Q. Now, could you turn to Tab 49 in the bundle.
 7 That's again in the same Volume Number 2.
 8 MR. LEATHLEY: I'm sorry to interrupt, Mr.
 9 Burn. There's just a translation issue we've picked
 09:48:11 10 up on, which may be material, particularly given the
 11 translation, for Mr. Burn.
 12 We understand--and I'm happy to be corrected
 13 if we're mistaken--that Mr. Martinez is
 14 referring--when he refers to "Ministeria Publico," it
 09:48:23 15 should be translated as Public Prosecutor's Office,
 16 and I understand it's being translated as "Ministry of
 17 Public Works."
 18 So, that could be quite important. I just
 19 wanted--I'm sorry for interrupting, Mr. Burn. It's
 09:48:35 20 just I want to catch that early on.
 21 PRESIDENT SIQUEIROS: That is indeed a good
 22 point, Mr. Leathley, and it should be indeed the

09:48:45 1 Prosecutor's Office, rather than the Ministry of
 2 Public Works. I did not identify that in the
 3 translation.
 4 MR. BURN: Thank you, sir. I'm grateful. BY
 09:49:00 5 MR. BURN:
 6 Q. Now, turning to Tab 49, and this is Exhibit
 7 C-296 in the proceedings, what you see here is a
 8 letter from the Municipality of Parrita to Inversiones
 9 Cotsco, and the document is dated the 10th of April,
 09:49:11 10 2008.
 11 You're familiar with this letter, aren't you,
 12 Mr. Martinez?
 13 A. No, sir. I don't remember having seen it.
 14 Q. Thank you.
 09:49:29 15 Looking at it now, you see in the first
 16 paragraph that it is indicated that there's a problem
 17 with flooding in the southwest corner of the property.
 18 You see that? First paragraph, first
 19 sentence.
 09:50:09 20 A. Yes, correct. It states that there's a
 21 problem in the south and in the west sector.
 22 Q. And then if you--if you'd go down to the

09:50:17 1 second paragraph, you see that the Municipality is
 2 looking to collaborate with respect to the building of
 3 a canal on the property.
 4 Do you see that?
 09:50:54 5 A. Correct. I do.
 6 Q. And you're saying that you didn't review
 7 this as part of your investigation; is that right?
 8 A. As far as I can remember, this document was
 9 not provided to the criminal investigation.
 09:51:14 10 Q. Are there any documents on the criminal file
 11 that relate to the works the Municipality did or
 12 sought to do in collaboration?
 13 A. Frankly, I don't remember if there's a
 14 document in the criminal file that speaks of that
 09:51:39 15 collaboration.
 16 Q. But also, we've seen Mr. Picado's complaint,
 17 which initiated part of your investigation, expressly
 18 refers to works of the Municipality.
 19 So, is it your evidence that you ignored
 09:51:54 20 that part of the complaint, works by--that Mr. Picado,
 21 the complainant, said were being done by the
 22 Municipality, and just focused your attention on the

09:52:06 1 other part of the complaint? Is that your evidence?
 2 A. No, sir. What I indicated was that we
 3 consulted the Municipality, and they stated that the
 4 works that they were carrying out were in a public
 09:52:23 5 road.
 6 This document, under these terms, is--as far
 7 as I can tell--a note sent by an official of the
 8 engineering department of the Parrita Municipality to
 9 the company. But I do not know if this proposal made
 09:52:43 10 here materialized.
 11 Q. Right. What I'm posing to you is if you'd
 12 done--if your unit had done its work properly, given
 13 Mr. Picado's complaint and the express terms of it,
 14 you would have investigated matters, and you would
 09:52:57 15 have found this 2008 letter, and you would have
 16 understood the role of the Municipality in respect to
 17 work relating to potential wetlands on the site; is
 18 that correct?
 19 A. No, sir. What I indicated is that
 09:53:21 20 consultations were made through the Municipality; and
 21 in addition, when we made the visits to the site, the
 22 workers there were private workers carrying out this

09:53:34 1 channeling and placing culverts there, and the
 2 interviews we made with them personally indicated that
 3 this work was being done under the instructions of Mr.
 4 Aven.

09:53:47 5 They never mention--that is, the employees
 6 that were there--that they worked for the
 7 Municipality, nor that they were there receiving
 8 orders from any official from the Municipality.

9 Q. Okay. Well, I think we'll leave it at that.

09:54:00 10 The documents do tend to speak for themselves. We can
 11 leave the Tribunal to make its own assessments of this
 12 particular point. I want to move on.

13 If you go to Paragraph 18 of your First
 14 Statement, you indicate that, "Therefore, given the
 09:54:17 15 repeated complaints regarding possible environmental
 16 damages, the Deputy Environmental Aguirre Prosecutor
 17 was supposed to investigate the case."

18 Now, I just want to--sorry. I'll wait for
 19 you to get to the relevant page.

09:54:30 20 You see that first reference, Paragraph 18?

21 A. Correct.

22 Q. So, I just want to understand your reference

09:54:38 1 here properly.

2 When you say "repeated complaints," what you
 3 mean is the Bucelato complaints that we've looked at
 4 and/or referred to, and the Picado complaint that
 09:54:49 5 we've looked at; is that right?

6 A. Correct. When we say here that there are
 7 repeated complaints that we're speaking about the one
 8 submitted by Mr. Bucelato at the time included a
 9 number of signatures of people from Esterillos Oeste,
 09:55:13 10 and the complaints by Mr. Picado, who had gone to the
 11 prosecutor's office in Aguirre and who was referring
 12 this to the Deputy Environmental Aguirre Prosecutor's
 13 Office, which is where I work.

14 Q. Okay. Now, at this point, I'd like you to
 09:55:31 15 take the loose document--so, these are the guidelines
 16 for the investigation--prosecutorial investigation of
 17 environmental crimes.

18 MR. BURN: For the record, these will be
 19 classified as Exhibit C-297. We'll hand up a cover
 09:55:50 20 sheet for everybody's use later on.

21 BY MR. BURN:

22 Q. Could you just--I just wanted you to read

09:55:58 1 onto the record some of the text of these guidelines.

2 If you look at the front page, the very
 3 first page, in smaller font underneath the title (in
 4 Spanish), you'll see some text, two paragraphs of
 09:56:19 5 text. Could you just read that out, please?

6 A. The one that is in small font, sir?

7 Q. Correct.

8 A. It states: "Under Articles 1, 13, 14, and
 9 25 of the Organic Law of the Public Prosecutor's
 09:56:40 10 Office, we let the prosecutors know about the
 11 following instructions by the general prosecutor,
 12 which must be complied with immediately so as to
 13 create and maintain a unity of action and
 14 interpretation of laws within the Public Prosecutor's
 09:56:56 15 Office.

16 "Under the Internal Control Law and Circular
 17 of GR Number 10, 2006, the deputy prosecutors have the
 18 responsibility to ensure that they be known and
 19 applied by the prosecutors that work in the
 09:57:13 20 prosecutor's office."

21 Q. And just turning over to Page 2, and there
 22 are two columns of text. In the first column, the

09:57:26 1 second-to-last paragraph, so, the paragraph that
 2 begins (in Spanish), could you just drop
 3 down--actually, why don't you read the whole of that
 4 paragraph out onto the record, please.

09:57:47 5 A. It states, "The updating of the policy of
 6 environmental criminal prosecution is an effort by the
 7 Deputy Environmental Prosecutor's office, together
 8 with the support of the Program of Environmental and
 9 Labor Excellence, the purpose of which is to
 09:58:04 10 strengthen the investigation, accusation, and
 11 prosecution of environmental crimes and improve the
 12 compliance of the commitments taken up in--under the
 13 Treaty of--Free Trade Treaty between Central America,
 14 the Dominican Republic, the United States, CAFTA-DR,
 09:58:15 15 by member countries."

16 (Overlapping speakers.)

17 PRESIDENT SIQUEIROS: Since they are
 18 interpreting into English, could you read a bit
 19 slower, please?

09:58:35 20 THE WITNESS: I don't know if you need me to
 21 read it again?

22 PRESIDENT SIQUEIROS: Yes. Sort of after

09:58:40 1 the middle of the paragraph.
 2 THE WITNESS: "The purpose of which is to
 3 strengthen the investigation, accusation, and
 4 prosecution of environmental crimes and improve the
 09:58:56 5 compliance of the commitments taken up under the Free
 6 Trade Agreement between Central America and the
 7 Dominican Republic with the United States, CAFTA-DR,
 8 by member countries."
 9 BYMR. BURN:
 09:59:16 10 Q. Thank you.
 11 And if you'd turn over to what is marked at
 12 the bottom as Page 26 in Section 3.3.
 13 The last paragraph in that section, if you
 14 could just read that out, please.
 09:59:41 15 A. It states, "From the ecological point of
 16 view, in order for"---should I read the title of 3.3?
 17 It says, "Lakes, nonartificial ponds, and other
 18 wetlands."
 19 The final--or the third paragraph which you
 09:59:58 20 asked me to read says, "From an ecological point of
 21 view, for it to be a wetland, it must comply with
 22 three basic requirements: A, soil permeability; B,

10:00:12 1 the presence of hydrophytic vegetation; and C, a slope
 2 below or equal to 5 percent.
 3 "Accordingly, in order to demonstrate an
 4 existence, it is not enough to have a soil study or
 10:00:31 5 the existence of the other two requirements by
 6 themselves. The three requirements must be there as a
 7 whole."
 8 Q. Thank you.
 9 And the last piece of text I'd like you to
 10:00:44 10 go to is just over the page, on Page 27. Would you
 11 read out the heading of 3.5 and the first sentence,
 12 please.
 13 A. In Page 27, Item 3.5, it says, "Evidentiary
 14 and Investigation Elements. The fundamental evidence
 10:01:19 15 is the visual inspection of the site, where the
 16 drainage works are carried out, preferably accompanied
 17 by a hydrogeologist or any specialist in wetlands."
 18 Should I read up to there or do you want me
 19 to read the whole paragraph?
 10:01:35 20 Q. No, just that sentence, please.
 21 So, these guidelines are--they apply to your
 22 work, that you have to work under these guidelines;

10:01:45 1 that's right, isn't it?
 2 A. Yes, that is correct. It's a part of the
 3 inputs that we use.
 4 In addition, the law, which is an instrument
 10:02:04 5 which prevails because these are under the laws and
 6 under the regulations.
 7 If the attorney would allow me, and the
 8 Tribunal as well, I'd like to indicate these
 9 guidelines were updated in 2010. This is
 10:02:26 10 administrative guidelines, and the prosecutor's office
 11 where I work--well, this was updated in 2010. There
 12 is a version from 2005, so, every five years, we try
 13 to update it to have uniform and objective criteria to
 14 use.
 10:02:49 15 But some things vary. If there's a legal
 16 reform, for example, that occurs, it must be included
 17 in these guidelines.
 18 Q. Thank you.
 19 At the time, so, 2011, these 2010 guidelines
 10:03:01 20 would have been in effect; correct?
 21 A. Yes. These guidelines are current
 22 heretofore because they have not been modified. But

10:03:21 1 what may have been amended may be the parameters to
 2 determine wetlands, because there are some parameters
 3 that came out after 2010, an executive decree from the
 4 Executive Branch which provides for new elements and
 10:03:39 5 parameters to determine and classify wetlands.
 6 Q. Right. But the very clear provisions of
 7 these guidelines, which you've read onto the record in
 8 the last paragraph of 3.3, nonetheless exist.
 9 So, you're aware, and were aware in 2011,
 10:04:04 10 weren't you, that it was mandatory for you, as a
 11 prosecutor, to ensure that you could prove the three
 12 specific elements that make up a wetland; that's
 13 correct, isn't it, Mr. Martinez?
 14 A. Correct. Yes. At that date, they were in
 10:04:36 15 force, and they're still in force; and yes, it was
 16 considered that we had to actually prove those three
 17 criteria, and so, a technical report was requested in
 18 that regard.
 19 Q. So, if any of those three--if just one of
 10:04:51 20 those three criteria could not be satisfied, there
 21 couldn't be an investigation, a prosecution, in
 22 respect to wetlands; that's right, isn't it?

10:05:11 1 A. That is correct.
 2 Q. And we saw at Paragraph 3.5 the instruction
 3 to prosecutors to ensure that any inspection of the
 4 relevant site should be done accompanied by a
 10:05:29 5 hydrologist or a qualified specialist, wetland
 6 specialist.
 7 Do you see that?
 8 A. Yes. It is suggested as an option that--as
 9 a priority, that there be the participation of a
 10:05:55 10 hydrogeologist or wetland specialist. So, you had the
 11 discretion to bring someone who is a specialist in
 12 that, although it's not a requirement that they be a
 13 hydrogeologist.
 14 Q. And it's a bit more than an option, isn't
 10:06:14 15 it? What it says is, "preferably accompanied by a
 16 hydrologist or a qualified wetlands specialist."
 17 So, it's not just an option in your
 18 handbook--
 19 (Overlapping interpreter channel with
 10:06:27 20 speaker.)
 21 BY MR. BURN:
 22 Q. --much discretion here. This is what you

10:06:30 1 should be doing unless there's a good reason not to;
 2 right?
 3 A. For me, it's a suggestion. This is the
 4 policy of the Circular, that the option could be a
 10:06:53 5 hydrogeologist or any specialist in wetlands.
 6 And in this case, the request for
 7 information to determine wetlands was made to the
 8 National Program for Wetlands of SINAC. That is the
 9 agency that is charged with determining whether on
 10:07:13 10 that site, there was a wetland or not.
 11 Q. Right. We'll come back to this; but
 12 obviously, one of the other agencies that you
 13 contacted was INTA, the soils specialists; right?
 14 A. Yes. Part of the information that was
 10:07:36 15 collected with regard to the investigation--well, led
 16 us to consult about the kinds of soils with INTA--and
 17 I'm sure you're familiar with this.
 18 Q. And you had to do that, as you've accepted
 19 Section 3.3 of these guidelines makes that very clear.
 10:07:55 20 Now, I'd like you just to--before we leave
 21 these guidelines, just to have a look at the last
 22 sentence in Section 3.5. If you'd just read that out,

10:08:06 1 I'd be grateful.
 2 Sorry, the last two sentences. So,
 3 beginning "Tambien puede" and so on. Just read those
 4 two sentences out.
 10:08:23 5 A. "3.5, Elements of Evidence and
 6 Investigation.
 7 "Information may also be requested from the
 8 IGN, the National Geographic Institute, whose
 9 techniques include photo interpretation, or also the
 10:09:09 10 Offices of the National Wetlands Program.
 11 Finally, if there is any doubt, the
 12 Inventory of Wetlands of Costa Rica should be
 13 consulted. This is published by the Worldwide Union
 14 for Nature--or Worldwide Union for Conservation of
 10:09:32 15 Nature.
 16 Q. Thank you.
 17 Now, I'd just like you to go back to your
 18 Witness Statement. In Paragraph 19, which is Page 6
 19 in the English, you say that once you received the
 10:09:51 20 criminal complaint from Mr. Picado, quote, "One of the
 21 first measures you took was to request seizure of
 22 SETENA's records to see what documentation was there

10:10:04 1 from SINAC-MINAE."
 2 Do you see that in your--in Paragraph 19 of
 3 your First Statement?
 4 A. Correct. In that point, it's indicated as
 10:10:57 5 part of the investigation that there was the seizure
 6 of SETENA's records that was ordered to see what
 7 documents were there from SINAC-MINAE.
 8 Q. Thank you.
 9 Was that the only reason you seized those
 10:11:15 10 records, to review those SINAC-MINAE documents?
 11 A. No. At that point, as I mentioned
 12 previously, we had the investigation for a forged
 13 document that supposedly was presented to SETENA in
 14 order to obtain the permits for Las Olas Projects.
 10:11:53 15 We wanted to have firsthand this information
 16 and--to see if there was a document like that one. In
 17 other words, a forged document, in order to analyze it
 18 and determine who was the person who had introduced it
 19 into the SETENA file, and determine or try to
 10:12:13 20 determine who had forged the specific document.
 21 Q. Thank you.
 22 Could you turn to Tab 62 in the bundle;

10:12:33 1 Volume 2 still. This is the Order for Seizure,
 2 Exhibit R-69.
 3 Do you see that, sir?
 4 A. Yes. It is a procedure order that was
 10:13:03 5 signed by me, and it was issued by the Office of the
 6 Agricultural and Environmental Prosecutor.
 7 Q. Right. And if you could look at--I think
 8 it's about 11 lines from the top of the text. So,
 9 underneath the heading. You see where it specifically
 10:13:23 10 references (in Spanish)? You see that?
 11 Do you see that reference?
 12 A. Yes. In that paragraph, there is this
 13 indication that the investigation has to do with Las
 14 Olas Horizontal Condominium Project.
 10:14:16 15 Q. Right. And we see, just a little bit
 16 further down in the same sentence, we see the
 17 administrative file number that corresponds with the
 18 Condominium Section of the Las Olas Project, and that
 19 file number we see just a few lines further down from
 10:14:33 20 the reference to the project, D1-1362-2007-SETENA.
 21 You see that?
 22 A. Yes. That's correct. There is a specific

10:14:51 1 reference to a SETENA file.
 2 Q. Right. And that's the only administrative
 3 file number for which you requested information for
 4 the criminal investigation in respect to Mr. Aven;
 10:15:04 5 right?
 6 A. At this point, I don't remember if some of
 7 the information that was seized included the seizure
 8 of a file of a project known as "La Canícula." This
 9 order does refer to that number--or that file number,
 10:15:41 10 but I seem to remember that we also--at some point, we
 11 looked at a file about La Canícula, which is a
 12 different file number from this one.
 13 Q. Did you request a file--from memory, did you
 14 request Administrative File Number 110-2005 relating
 10:16:13 15 to the Concession?
 16 A. I don't remember that specific number, sir.
 17 Q. Just to see if I can jog your memory, could
 18 you just turn to Tab 5 in Volume 1. This is SETENA
 19 Resolution Number 543-2006. And you'll see just--near
 10:17:04 20 the top of the first page, you'll see the number I
 21 have described to you, so, Number-110-2005-SETENA, and
 22 then (in Spanish).

10:17:21 1 Do you see that?
 2 A. Yes. On that page, I do see that file
 3 number associated with a SETENA resolution.
 4 Q. Does that refresh your memory as all? Do
 10:17:38 5 you remember requesting documents relating to this
 6 part of the project?
 7 A. As I already stated, I remember that the
 8 file on the La Canícula--we looked at it. However,
 9 this is an area located--it's an area which is in the
 10:18:09 10 Terrestrial Maritime area.
 11 When we went to the site, we found out that
 12 the events that were being investigated by the Office
 13 of the Prosecutor were on private property, which is
 14 not on the Maritime Zone. So, La Canícula was not
 10:18:32 15 really involved in what we were investigating by the
 16 Office of the Prosecutor.
 17 So, that file was returned some days after
 18 having looked at it.
 19 Q. Okay. Let's continue with that.
 10:18:49 20 Were you aware that the condominium portion
 21 of the project that--to which Mr. Bucelato referred in
 22 his complaint--and we've seen the file number already,

10:19:02 1 D1-1362-2007--are you aware that was previously
 2 entitled "Villa La Canícula" and had a separate file
 3 number?
 4 A. I'm sorry. I didn't understand the
 10:19:25 5 question.
 6 Q. Okay. I'll try to rephrase to make it
 7 clearer, but--do you recall that there was a different
 8 file number for a part of the project that was
 9 previously called "Villa La Canícula"--first of all,
 10:19:46 10 let's break it up.
 11 Do you remember that?
 12 A. The SETENA file that we ordered to be seized
 13 was called "Las Olas Residential Horizontal
 14 Condominium Project," which is what we looked at, and
 10:20:10 15 where we have a SETENA Resolution.
 16 This other one is about a project that I
 17 understand is on the Terrestrial Maritime Zone.
 18 Q. You may be confusing things a little here.
 19 Let me take you to a document that may clarify things
 10:20:29 20 for you.
 21 If you could go to Tab 50.
 22 So, this--if you just look at the front

10:20:51 1 page, this, again, is another SETENA Resolution Number
 2 2164-2004, and you can see in the description,
 3 Spanish) "Villas La Canícula." So, this is the
 4 Condominium Section. This is what formed the basis of
 10:21:07 5 Mr. Bucelato's complaints, the Condominium Section.
 6 My point to you is that this has a different
 7 number, different file number. 551-2002-SETENA.
 8 Did you review this material--or material
 9 from that file number--for the purposes of your
 10:21:27 10 investigation?
 11 A. No. We did not review this file because our
 12 interests were focused on the moment when the
 13 viability--or the Environmental Viability was granted.
 14 It had been granted within the file that's from 2007,
 10:21:54 15 as a reference.
 16 That was the file that we ordered be seized
 17 mainly because it had the Environmental Viability,
 18 which is a requirement imposed by Article 17 of Costa
 19 Rican law, and there were important elements there,
 10:22:16 20 such as the forged document that was in the complaint.
 21 That's why we focused on that file without looking for
 22 other files, such as this one, from 2002.

10:22:33 1 Q. Mr. Martínez, I don't wish to be rude, but
 2 that's not really a very satisfactory answer, is it?
 3 You, as a prosecutor, exercise serious powers that
 4 have serious implications for individual citizens and
 10:22:46 5 for corporate commercial entities. You have to use
 6 those powers appropriately and correctly, and that, in
 7 part, means investigating properly.
 8 It must be relevant to look at all of the
 9 files relating to a particular project around which
 10:23:05 10 there's been a complaint. That has to mean, doesn't
 11 it, that you had to look at the files relating to this
 12 file number as well as the file number that you did
 13 look at?
 14 There is simply no option, is there? In
 10:23:19 15 order to do a proper investigation, you have to look
 16 at everything that's relevant. Otherwise, your
 17 investigation is automatically dysfunctional; that's
 18 correct, isn't it?
 19 A. I cannot agree with that, sir, because the
 10:23:41 20 investigation specifically referred to a document that
 21 had been introduced in an administrative file, a
 22 specific administrative file. Indeed, it even made

10:23:54 1 reference in the complaint to the number of this
 2 specific file.
 3 And so, it's practically impossible that the
 4 agency that is conducting the investigation finds out
 10:24:12 5 about the existence of administrative files in other
 6 institutions or even within SETENA to be able to
 7 request all of them.
 8 And in any case, when the inquiry took place
 9 and thereafter, the Defendant and the Parties in the
 10:24:33 10 proceedings, the defense and the Defendant, can
 11 contribute any kind of evidence that they would like
 12 to for their defense.
 13 In this case, this file was not mentioned by
 14 the defense as an exhibit of evidence that they wanted
 10:24:47 15 the prosecutors to review, and the complaint
 16 specifically referred to a SETENA file, and that's the
 17 one that we seized.
 18 Q. All right. Well, I think we've spent enough
 19 time on this part. I think the Tribunal members will
 10:25:03 20 have it in mind that you are trying to refer to the
 21 forged document issue in order to answer questions
 22 relating to the investigation of alleged wetlands

10:25:12 1 offenses. They will have that in mind, I'm sure.
 2 In that same document--so, Tab 50, just go
 3 on to Page 3. And you'll see down at the bottom
 4 there, it says, "(in Spanish)," and again, "Villas de
 10:25:40 5 Canícula," and you see just--there's some information
 6 that's detailed there.
 7 And going over to Page 4, the Parrita
 8 District is referenced and the coordinates and so on.
 9 You see all of that. Yes?
 10:25:59 10 A. Yes, correct.
 11 Q. And just down from that, you see again "por
 12 lo tanto"; if you just want to read that one sentence
 13 onto the record.
 14 A. Yes, correct.
 10:26:24 15 Q. So, this is on Page 4 of the document at Tab
 16 50. Do you see--
 17 A. It states, "Thus, the Environmental
 18 Viability is granted to the same, and the
 19 environmental management stage is hereby initiated."
 10:26:53 20 Q. Right. And then in the sentence immediately
 21 below that, you see the express mention of Mr. David
 22 Aven. Do you see that?

10:27:13 1 Do you see it?
 2 A. Correct.
 3 Q. So, what we have here is the Environmental
 4 Viability being issued for Villas La Canícula;
 10:27:26 5 correct?
 6 A. Yes, correct. This makes a reference to
 7 this in the third paragraph.
 8 Q. Right. And, of course, you'll be very
 9 familiar with all of the relevant procedures. In
 10:27:47 10 order to obtain this Environmental Viability, the
 11 applicant had to go through a process. You're aware
 12 of that, yes?
 13 A. Yes. I understand that to request the
 14 Environmental Viability, the petitioner goes through a
 10:28:12 15 process, but that is not my area of work. I don't
 16 work for SETENA, and I don't know the detailed
 17 processes that are followed to grant or obtain an
 18 Environmental Viability permit.
 19 In general, I know what the Environmental
 10:28:28 20 Viability consists of, and in general what the
 21 developer must do to seek to obtain it. But specific
 22 details, I am not familiar with them.

10:28:43 1 Q. Right. Thank you.
 2 But you will be aware--as an Environmental
 3 Prosecutor, you will have enough familiarity with the
 4 process, wouldn't you, to know that as part of that
 10:28:55 5 application process, SINAC has to declare that the
 6 area in question is not a wildlife-protected area;
 7 correct?
 8 A. Yes, that is correct. As part of the
 9 process, the developers requested that he or she
 10:29:22 10 obtains information from SINAC that the area is not
 11 located in a protected-wildlife area.
 12 Q. Right. So, even without looking at any
 13 further paperwork beyond this document, you can say
 14 that David Aven, as applicant for Villa La Canícula,
 10:29:48 15 must have obtained that confirmation from SINAC;
 16 right?
 17 A. In principle, well, yes. It must have been
 18 confirmed that this was not located--the Project was
 19 not located in a Wildlife Protected Zone, as indicated
 10:30:15 20 in Article 32.
 21 Q. Thank you.
 22 Now, can you go back to Tab 5 in Volume 1.

10:30:45 1 Can you turn to page 4 of that document.
 2 So, this is, just as a reminder, SETENA
 3 Application 543-2006. Could you just
 4 review--Mr. Martínez, no need to read it out. Just
 10:31:07 5 review the text going all the way down that section
 6 until it reaches the underlined text. So, just have a
 7 quick read of that, please.
 8 Now, you would accept that this confirms
 9 that--
 10:32:04 10 COURT REPORTER: Interpreter, please switch
 11 the channel.
 12 MR. BURN: Sorry. I think the interpreters
 13 need to switch the channel. Start again.
 14 BY MR. BURN:
 10:32:13 15 Q. You accept, Mr. Martínez, that this confirms
 16 that--
 17 COURT REPORTER: Interpreter, please switch
 18 the channel.
 19 (Discussion off the record.)
 10:32:52 20 SECRETARY GROB: The mike is not working.
 21 (Pause.)
 22 PRESIDENT SIQUEIROS: Technology is ready?

10:33:21 1 Then we may proceed. Thank you.
 2 BY MR. BURN:
 3 Q. Apologies, Mr. Martínez. These things do
 4 happen. It's a fairly complicated situation with
 10:33:31 5 transcription and interpretation.
 6 But you would accept, looking back at the
 7 text to which I referred, that this confirms that an
 8 Environmental Viability permit has been issued for the
 9 Hotel Colinas del Mar. And we saw--we see--in this
 10:33:52 10 text, we see the confirmation of the relevant file
 11 number, 110-2005-SETENA. I'm correct on that? Yes?
 12 A. Correct. And that paragraph talks about the
 13 Environmental Viability for the hotel in File 110-2005
 14 in the Land-Maritime area.
 10:34:20 15 Q. Thank you.
 16 Can you just turn back to page 2 in that
 17 document. Can you just read out the text against the
 18 word "Primero."
 19 A. It says that "Mr. David Aven is entitled to
 10:34:53 20 request the environmental evaluation on behalf of La
 21 Canícula that he represents."
 22 Q. All right. And did you review this

10:35:07 1 documentation as part of your investigation into the
 2 complaints that were filed with your office?
 3 A. As I pointed out a moment ago, this project
 4 is in the Land-Maritime section of Los Esterillos
 10:35:28 5 Oeste. The facts that were investigated by the
 6 Prosecutor's Office in Costa Rica were that Mr. Aven
 7 was accused of some crimes, as well as another person
 8 named Damjanac, occurred in an area that is not a
 9 Land-Maritime area.
 10:35:45 10 That is a private property. That is not
 11 part of the development of this project. So, it is
 12 precisely for that reason that the file requested of
 13 SETENA was for the private property sector in order to
 14 look into some aspects having to do with the use of
 10:36:04 15 falsified documents and information about the request
 16 submitted by the developer.
 17 Q. Thank you.
 18 Just to be clear, the answer to my question
 19 "Did you review this documentation for the purposes of
 10:36:21 20 your investigation?" is no. That's correct, isn't it?
 21 A. No, sir. For the reasons that I pointed out
 22 to the Tribunal a moment ago.

10:36:36 1 Q. Thank you.
 2 Now, could you turn to Tab--I think it's 52.
 3 Yeah, Tab 52. So, this should be in Volume 2.
 4 MR. BURN: Apologies for asking you to move
 10:36:53 5 around, Arbitrators, but we always have lots of
 6 documents to look at.
 7 BY MR. BURN:
 8 Q. So, this is another SETENA Resolution,
 9 Number 375-2007.
 10:37:16 10 Now, you see on the first page under the
 11 heading "Resultando"--well, we see some text against
 12 the word "Primero." Could you just read out that
 13 paragraph quickly.
 14 A. It says that "Pursuant to Resolution Number
 10:37:44 15 2164-2004-SETENA, dated 23 November, 2004, notified on
 16 29 of that same month and year, it was agreed to
 17 approve the Environmental Viability for the Villas La
 18 Canicula project submitted by Mr. David Aven on behalf
 19 of the Cotsco Investment Enterprise, Cotsco C&T S.A.,
 10:38:10 20 indicating a one-year period in which works were to
 21 commence."
 22 Q. Right.

10:38:18 1 And the reference we see in that text to
 2 Resolution 2164-2004, we've already seen that
 3 document, haven't we? That was Exhibit R-9 which
 4 appears at Tab 50, the Environmental Viability in
 10:38:32 5 respect of Proyecto Villas La Canicula.
 6 Now, you will be, I assume, pretty familiar
 7 with this document. Do you know this document?
 8 A. No, sir. This document is part of the
 9 Land-Maritime Zone Project and therefore not part of
 10:39:20 10 what was investigated.
 11 Q. But you can see, can't you, that it
 12 indicates that as of the date of this document, 27
 13 February, 2007, the Environmental Viability permit for
 14 Villas La Canicula was extended. Do you see that?
 10:39:38 15 If you go to page 3, "Primero." You don't
 16 need to read it onto the text, but you can see it's
 17 been extended for an additional year. Do you see
 18 that?
 19 A. Correct. In this paragraph 1, it says that
 10:40:10 20 there is an additional year extension.
 21 Q. You didn't review this document either as a
 22 part of your investigation. That's what you're

10:40:19 1 saying, isn't it?
 2 A. Yes. I'd like to repeat that this project
 3 was located in the Land-Maritime sector. And the
 4 facts that were investigated, it belonged to a private
 10:40:40 5 property where a different project was going to be
 6 developed.
 7 Q. Are, now, could you turn to Volume 1, Tab 6.
 8 So, this is a letter from Gerardo Chavarria
 9 Amador dated the 2nd of April 2008 to the architect
 10:41:24 10 Edgardo Madigrál Mora. See that?
 11 A. Correct.
 12 Q. Can you just review the text? It's a very
 13 short letter. Can you just review quickly the text of
 14 the letter after "Esimado señor"?
 10:41:59 15 And would you agree with me that that
 16 contains confirmation that as of the 2nd of April,
 17 2008, the architect, Mr. Madigrál, had received
 18 SINAC's confirmation that the Condominium Section was
 19 not within the Wildlife Protected Area? Would you
 10:42:18 20 agree with that?
 21 MR. LEATHLEY: Sorry to interrupt. We just
 22 wanted to check for the record what exhibit number

10:42:23 1 this is, please.
 2 MR. BURN: It is Exhibit C-48.
 3 MR. LEATHLEY: Thank you.
 4 A. Correct. This letter from Mr. Gerardo
 10:42:38 5 Chavarria Amador, as head of the Aguirre Parrita
 6 Regional Office, informs Mr. Edgardo Madigral Mora
 7 that the Project--or, rather, the cadastral plan,
 8 P-1244761-2007, is not in a Wildlife Protected Area.
 9 In my opinion, this means that it's not in a
 10:43:05 10 Wildlife Protected Area as covered by Provision 32 of
 11 the Environmental Law.
 12 BY MR. BURN:
 13 Q. Right. Did you review this letter or
 14 anything relating to this letter as part of your
 10:43:19 15 investigation?
 16 A. That is correct. This letter was verified
 17 during the criminal investigation that was conducted.
 18 Q. So, you knew that there were already two
 19 confirmations on the record that the property was not
 10:43:43 20 within a Wildlife Protected Area? Yes?
 21 A. In this document specifically, my
 22 understanding is that it says that it is not in any

10:43:59 1 Wildlife Protected Area. But let me repeat.
 2 My understanding is that it's not in a WPA
 3 as provided by Article 32 of the Organic Law on the
 4 environment. The wetland that has been stated was on
 10:44:17 5 the site is not a wetland that belongs to a WPA. That
 6 is a different concept.
 7 And the forest that has been said was there
 8 is not part of a WPA either. They are on private
 9 property. And for them to belong to a WPA, they would
 10:44:37 10 have to be expropriated, whereas if they're on private
 11 property, there are other constraints that are
 12 provided in the Forestry Law and the Wildlife
 13 Protection Law. And that is why the decision was made
 14 to bring the accusation based on the regulations
 10:44:53 15 contained in those laws.
 16 Q. Right. So, your evidence, I think as I
 17 understand it, is that regardless of the fact that the
 18 relevant agency has confirmed and you knew at the time
 19 that it had confirmed not once but twice that the
 10:45:13 20 property was not within a WPA--regardless of that
 21 fact, you proceeded on the basis that there may have
 22 been protectable wetlands and forests; is that right?

10:45:38 1 A. It is correct. It's not the same concept,
 2 however. The Wildlife Protected Area is a concept
 3 where the decision has adopted an administrative
 4 decision to declare that a site is a national park, a
 10:45:58 5 national monument, a wetland that has to be managed as
 6 a WPA.
 7 On this property, what existed, according to
 8 the criminal investigation conducted, is a forest on
 9 private property and, furthermore, a wetland also on
 10:46:17 10 private property.
 11 The existence per se of these sites imply
 12 that they have to be afforded protection in accordance
 13 with the Constitutional Provision, Articles 50 and 80
 14 of the Political Constitution and, furthermore, in
 10:46:38 15 accordance with the regulation of Article 3 of the
 16 Forestry Law and Article 61 for the Forestry Law,
 17 Article 45 of the Organic Environmental Law, and
 18 Article 98 of the Wildlife Protection Law.
 19 We're not saying that there's invasion of
 10:46:57 20 WPA in the management, but they were affecting a site
 21 that was determined as a wetland and that there had
 22 been tree felling in a site that belongs to--that was

10:47:09 1 part of a forest.
 2 However, if you'd allow me to explain, in
 3 the Costa Rican legislation, tree felling without
 4 permit is punished. There is not--it is not
 10:47:23 5 aggravated because of it being located in a forest.
 6 That was indicated for purposes of an aggravating fact
 7 of the criminal reason.
 8 So, therefore, trees in a forest could
 9 have--or do have a more important ecological interest
 10:47:46 10 than trees that are not located in a forest.
 11 Q. I mean, I think we can safely say that your
 12 answer moves quite a long way from the question. Of
 13 course, you have the opportunity to clarify your
 14 answers. But, Mr. Martinez, this is going to work
 10:48:01 15 much better if you focus on the questions that you're
 16 being asked and answer those questions in order to
 17 assist the Tribunal.
 18 Now, just unpacking a little your speech.
 19 You would accept, wouldn't you, that the area covered
 10:48:23 20 by a WPA can extend over private property? Yes or no?
 21 A. Correct. If there has been a--
 22 PRESIDENT SIQUEIROS: Excuse me. Just to

10:48:42 1 make sure that what you're referring to and what is
2 being translated is the same thing.
3 You're referring to a WPA, and this is being
4 translated into a "área silvestre protegida." Is this
10:49:01 5 the same concept that you wish to refer to?
6 MR. BURN: Well, to avoid any confusion,
7 I'll use the--I'll not use the acronym. I'll use--
8 PRESIDENT SIQUEIROS: Because I think that
9 "área silvestre protegida" is probably a much broader
10:49:1310 concept than a Wetland Protected Area that you wish
11 to--
12 MR. BURN: No, no, no. This is a Wildlife
13 Protected Area.
14 PRESIDENT SIQUEIROS: Wildlife. Okay. MR.
10:49:1815 BURN: That is the legal terminology.
16 PRESIDENT SIQUEIROS: Perfect. Then the
17 translation is completely accurate.
18 MR. BURN: But I will, nonetheless, use the
19 filter--
10:49:2420 PRESIDENT SIQUEIROS: Correct.
21 MR. BURN: --just to avoid any difficulty.
22 BY MR. BURN:

10:49:28 1 Q. So, Mr. Martínez, you would accept that in
2 Costa Rican law a Wildlife Protected Area can extend
3 over private property? Yes?
4 A. Yes, that is correct. WPA--a state could
10:49:52 5 decide that they want to extend the geographic area.
6 A WPA, it must be understood, comes from Article 32 of
7 the Environmental Law. The state may make the
8 decision. And based on Article 37 of that very same
9 law, part of the W--that will be part of the WPA until
10:50:1310 the state receives them as a donation or expropriated
11 or paid for it.
12 Q. I'm sorry to interrupt. I don't like
13 interrupting witnesses.
14 But I did say this is--it was a simple
10:50:2615 question, a yes-or-no question. You'll have your
16 opportunities to explain yourself if you think it
17 necessary.
18 A. Okay.
19 Q. A Wildlife Protected Area will be such--will
10:50:4220 be classified as a Wildlife Protected Area, if,
21 amongst other things, it contains a wetland; correct?
22 A. I do not understand your question, sir.

10:50:57 1 Q. Let me try rephrasing.
2 There are various reasons for which an area
3 of land can be classified as a Wildlife Protected
4 Area; correct?
10:51:17 5 A. To declare that the site is a WPA is not the
6 ambit within which I work. I do not know which
7 criteria are used by MINAE to determine if an area is
8 to be declared a WPA.
9 Q. Right. But you, as an Environmental
10:51:3310 Prosecutor who takes people to court, seeks penal
11 measures to be taken against individuals, injunctions
12 property, injunctions actions, you will be aware that one
13 of the reasons that land may be classified as a
14 Wildlife Protected Area is because it contains a
10:52:0115 classified--a wetland within the terms that we've
16 discussed previously.
17 You're aware of that, aren't you?
18 A. Correct.
19 Q. So, when we see the relevant architects
10:52:1720 receiving a letter from the relevant agency confirming
21 that this is not a Wildlife Protected Area, we can say
22 and you as the investigator can say the architect and

10:52:34 1 their clients will have understood that, amongst other
2 things, this land does not, as far as the relevant
3 agency is concerned, contain a wetland; right?
4 A. I don't know what the architects who
10:52:54 5 received this letter could have understood from it,
6 sir.
7 What I just said a moment ago is that what I
8 would understand from it is that it is not part of a
9 WPA in accordance with Article 32 of the Organic
10:53:1010 Environmental Law.
11 Q. And just to go back to the speech you gave
12 earlier. Your evidence, as I understand it--but tell
13 me if I'm wrong--is that even if an agency like SINAC
14 or an agency like SETENA has looked at something and
10:53:3515 has confirmed it's not a Wildlife Protected Area, has
16 confirmed it doesn't contain a wetland, has not
17 identified a specific wetland--even if all of that is
18 correct, you in the Prosecutor's Office, can take your
19 own steps and classify something as being a wetland
10:53:5720 or, if we get into forestry, that it's got protectable
21 forest. You can do all of that separately. You don't
22 need to rely on the agencies.

10:54:07 1 Is that what you're saying?
 2 A. In the case of wetlands, when a criminal
 3 investigation is conducted, we resort to a specialized
 4 office within SINAC, and this is the National Wetlands
 10:54:25 5 Program, to try and determine whether or not there is
 6 a wetland on the site. Not as a protected--Wildlife
 7 Protected Area but as an ecosystem because this is
 8 protected by Article 98 of the Wildlife Protection
 9 law.
 10:54:43 10 We could also ask of SINAC that they
 11 indicate whether an area can be defined as a forest.
 12 That's what we have right now. We have a forensic
 13 department who conducts this kind of investigation.
 14 Q. Right. But you're not just looking at the
 10:55:01 15 technical questions. You're also looking at all of
 16 the constituent elements for an offense, including a
 17 person's state of mind.
 18 So, you will have to, won't you, look at
 19 what the--the potential accused person had in front of
 10:55:17 20 them at the time of the alleged offense; right?
 21 A. Correct. That is the knowledge that the
 22 person could have had concerning the area or the

10:55:42 1 knowledge the person could have had concerning the
 2 area where the facts could be--he could be accused of
 3 had been committed.
 4 Q. Right. And, so, regardless of what you
 10:55:54 5 think--whether you think it's acceptable to go back
 6 and reclassify land, regardless of what the competent
 7 agencies may have said, you know that from letters,
 8 like the 2nd of April 2008 letter, that the developers
 9 here considered that they were not doing anything
 10:56:15 10 within a Wildlife Protected Area, and, therefore, they
 11 were not doing anything with a protected wetland. You
 12 know that, don't you? There's no ambiguity there.
 13 A. No, I cannot agree with what you just
 14 stated, sir. Because in the SETENA file, there was
 10:56:39 15 also a letter from SINAC and MINAE indicating that on
 16 the Project, there were two potential wetlands. This
 17 is something that I looked into and I considered when
 18 looking at all the information that had been obtained
 19 by the prosecutor.
 10:56:59 20 With all of these elements a decision has to
 21 be made by prosecutors, just as the arbitrators would
 22 have to do it with all the information provided.

10:57:07 1 There are two criteria having to do with wetlands in
 2 the file.
 3 Therefore, the prosecutor, when bringing
 4 about the accusation or the final request--in this
 10:57:18 5 case an accusation--has to weigh whether the documents
 6 on file had been prepared, first, at the time in which
 7 the inspections were done, second, what they say, in
 8 order to determine if the person who committed the
 9 fact, if there is evidence about who did commit it,
 10:57:40 10 maybe made a mistake or perhaps the information in the
 11 documents is in accordance with the facts that had
 12 occurred.
 13 In this case, the documents on file allowed
 14 us to determine that the impact of that wetland
 10:57:58 15 ecosystem was being gradually--starting in 2008 had
 16 been encroached on. So, we needed to consider this.
 17 It was part of the analysis. And the documents issued
 18 by the different institutions needed to be looked at
 19 in context relating to the time of the visits to see
 10:58:17 20 if they were reliable compared to what the officials
 21 had observed.
 22 Q. 2008. You're saying the offense began in

10:58:31 1 2008; right?
 2 A. Yes. The investigation was able to
 3 determine that approximately beginning in 2009, things
 4 were being done impacting the ecosystem and that they
 10:58:50 5 increased in late 2010 and early 2011.
 6 Q. When in 2009?
 7 A. In the accusation, it says--it provides
 8 these dates as to the impact for 2009. They were
 9 verified. This information was verified through some
 10:59:14 10 reports that were done by an official of the Parrita
 11 Municipality that indicate that there was soil
 12 movements on the site and that later on it was
 13 confirmed had contained wetland.
 14 Q. So, the events in 2009 to which you refer
 10:59:40 15 are in the early parts of 2009. That's correct, isn't
 16 it?
 17 A. I don't recall the exact date, sir.
 18 Q. Maybe I can refresh your memory. It's
 19 Exhibit R-26.
 11:00:06 20 MR. BURN: I just need to find the bundle
 21 reference. Okay. It may not be in the bundle. Could
 22 somebody just provide a copy of R-26 to Mr. Martínez.

11:00:54 1 Thank you.
 2 PRESIDENT SIQUEIROS: While he reviews the
 3 document, Mr. Burn--Mr. Burn, while he reviews the
 4 document, how long would you estimate that your
 11:01:46 5 examination will continue? And if it's still going to
 6 go further, could you identify a moment when we would
 7 give a break to Court Reporters and Interpreters.
 8 MR. BURN: Actually, it would be--it has a
 9 little way to go, sir. But if I could just finish
 11:02:05 10 this point.
 11 PRESIDENT SIQUEIROS: Your call.
 12 MR. BURN: Yeah.
 13 PRESIDENT SIQUEIROS: Your call. Thank you.
 14 (Pause.)
 11:02:29 15 ARBITRATOR BAKER: Gentlemen, you may want
 16 to turn your mikes off when you're conferring.
 17 MR. BURN: I think it has to do with the
 18 interaction of headphones. It exaggerates it.
 19 BY MR. BURN:
 11:02:44 20 Q. So, in this document, you see this reference
 21 in the first paragraph under "Resultando" to the
 22 inspection on the 26th of April 2009. Do you see

11:02:57 1 that?
 2 A. Correct.
 3 Q. And you--if you'd just go down to the
 4 photographs--the photographs with which the Tribunal
 11:03:06 5 members would already be familiar, you'll see that the
 6 dates of these photographs on which you rely in
 7 respect to the prosecution--some of them are said to
 8 be 2007 and some are said to be March 2009. Do you
 9 see that?
 11:03:31 10 A. Correct. That's what the document says.
 11 Q. So, all of the offenses that you allege, all
 12 of the acts, the very latest that we can be looking at
 13 is March or April 2009; right?
 14 A. No, that's not true. I cannot agree with
 11:03:52 15 what you just said.
 16 Q. Can you explain?
 17 A. Yes. I understand that the latest date is
 18 March 2009. I had misunderstood you. But you are
 19 indicating that--and the closest date is the beginning
 11:04:20 20 of 2011.
 21 Q. Could you turn to Tab 33. Do you have that?
 22 A. Correct.

11:05:28 1 Q. So, this document is--I'm just going to the
 2 front page. This is the levying of charges against
 3 Mr. Aven and others issued by your office; correct?
 4 A. No. What I have here is a letter from 1st
 11:05:59 5 June, 2010.
 6 Q. So, this should be Tab 33 which, I think, is
 7 Exhibit C-142. Yeah, C-142. These are the criminal
 8 charges that were filed against Mr. Aven and
 9 Mr. Damjanac.
 11:06:35 10 A. Yes. Correct. This is the accusation
 11 brought against them.
 12 Q. And if you would just go to page 23 of that
 13 document. You see the first full sentence, "De la
 14 misma forma." Do you want to just read that sentence
 11:07:13 15 and the text--the underlined text immediately below
 16 it, please?
 17 A. "Prison sentence of 1 to 3 years will be
 18 punished for someone who without the prior
 19 authorization of the National System of Conservation
 11:07:40 20 areas drains, dries, fills, or eliminates lakes, not
 21 artificial ponds, and other wetlands declared or not
 22 as such."

11:07:56 1 Q. Read the sentence above that as well, just
 2 so we're clear.
 3 A. "Likewise, the above-mentioned Law 7317 and
 4 its Number 98 establishes."
 11:08:17 5 Q. Right. And then if you just drop down a bit
 6 underneath the underlined text. And you can see in
 7 very small font in brackets some text. Can you just
 8 read that out, please.
 9 A. It says, "Thus, amended by Article 1 of Law
 11:08:40 10 8689 of December 4, 2008."
 11 Q. 2008. So, the law was amended--the law
 12 under which you charged Mr. Aven and Mr. Damjanac was
 13 amended in December 2008. It's not a retrospective
 14 law, is it? So, acts that came before December 2008
 11:09:08 15 can't be relevant, can they?
 16 A. That is--or, rather, retroactivity that
 17 cannot be applied is with regard to this specific
 18 standard. This standard was amended on that date, and
 19 it amended a few verbs, including some verbs that are
 11:09:44 20 part of the action that is being punished.
 21 And as far as I recall, the criminal
 22 definition only envisaged two of the four actions that

11:10:02 1 are now envisaged here. Now it says "drained, dry,
2 fill, or eliminate," where before there were some
3 actions or only two of these four actions were
4 envisaged.

11:10:14 5 The amendment includes other definition
6 verbs within this punishment construction. So, what
7 could not be applied retroactively are these other
8 actions that had been included in December 2008.

9 Q. Well, that's not quite right, is it? But we
11:10:37 10 will come back to that in a sec.

11 The law that you refer to here, Law 8689,
12 4th December, 2008, that came into effect in
13 June 2009, didn't it?

14 A. I don't recall, sir. The reference made
11:11:03 15 here is only to the date of when the law was enacted,
16 December 4, 2008.

17 Q. But if it did only come into effect in
18 June 2009, then any matters predating June 2009 would
19 be irrelevant under that law. You would have to use
11:11:27 20 the preexisting law; correct?

21 A. You would have to apply the drafting of the
22 preexisting law for actions prior to its entry and

11:13:12 1 happened--that citizens--individuals could not be
2 charged for that felony offense. They would have to
3 be charged under whatever was available under the
4 prior legislation. You'd accept that proposition;
11:13:28 5 correct?

6 A. In this case, the crime is within the same
7 Number 98. The difference--which I don't have here to
8 make the comparison, but that can be seen if we look
9 for the text that was amended--has to do with a
11:13:54 10 penalty, not--that is a penalty in this case and
11 entails a range of 1 to 3 years. We have to look at
12 the previous text to see if this penalty was changed,
13 what kind of penalty applied. And in any case, the
14 behavior is always a crime but simply with a different
11:14:13 15 penalty.

16 In Costa Rican legal procedure, it includes
17 penalties or criminal standards that include a penalty
18 of prison or a penalty of fine, but there's still a
19 crime.

11:14:29 20 Q. Okay. I don't think you've answered the
21 question, but I think the point is there. I think the
22 members of the Tribunal will understand.

11:11:40 1 effect.

2 Q. And that prior law--it's not just a change
3 of a few verbs in June 2009. Under that prior law,
4 the matters to which had been referred in these
11:11:53 5 charges would have--would not have been a felony
6 offense, would they? They would have been a
7 misdemeanor attracting a fine; right?

8 A. Well, we would have to review the text and
9 its--that is the text prior to the one of December 4,
11:12:17 10 2008--to see what was being punished or, in other
11 words, what was the penalty that would be applied.
12 Then the text that appears here applies a penalty of
13 prison.

14 There's some regulations within
11:12:32 15 environmental legislation that include fines, but this
16 text here punishes with a prison sentence. It is a
17 crime where punishment by prison applies. There are
18 other crimes that are punished by a fine. But this
19 text here does not allow me to see if there was a
11:12:55 20 change also in the penalty or--if there was or not.

21 Q. But you would accept that if the felony
22 offense only came into effect in June 2009--if that

11:14:38 1 MR. BURN: I'm happy to take a break at this
2 stage, sir.

3 PRESIDENT SIQUEIROS: Okay. We will take a
4 10-minute break.

11:14:48 5 Mr. Martinez, we will take a break now. It
6 will be a 10-minute break. And during this 10-minute
7 period, please do not speak to the representatives of
8 the Republic of Costa Rica. Of course, you can get
9 up, you can go to the bathroom, you can take some
11:15:08 10 water, get some water, get some coffee, but please do
11 not communicate with the legal representatives of the
12 Republic.

13 Thank you.

14 THE WITNESS: Yes, sir.

11:15:16 15 (Brief recess.)

16 PRESIDENT SIQUEIROS: If the Parties,
17 Interpreters, and Court Reporters are ready to
18 proceed, then we may proceed.

19 MR. BURN: Thank you, sir.

11:15:34 20 PRESIDENT SIQUEIROS: Mr. Martínez, shall we
21 continue?

22 BY MR. BURN:

11:34:11 1 Q. Mr. Martínez, could you have a look at the
 2 document at Tab 56 in Volume 2? This is Exhibit R-20.
 3 You refer to this report in your statement, don't you?
 4 Now, if you could just go over to page 2,
 11:34:47 5 right at the bottom there, "Conclusiones." And, so,
 6 there's the first conclusion in this report from
 7 SINAC.
 8 You would agree that what the two SINAC
 9 inspectors who attended the site are reporting here is
 11:35:14 10 that they think there is--there are possible wetlands?
 11 You agree with that?
 12 INTERPRETER: Please use your microphone.
 13 A. Correct. I agree with that statement, sir.
 14 BY MR. BURN:
 11:35:42 15 Q. And you're aware from this three-page report
 16 that the inspection was done over the course of half a
 17 day? Yes?
 18 I mean, you know this document well, don't
 19 you? Because this is one of the most important
 11:36:09 20 documents in the case against Mr. Aven and
 21 Mr. Damjanac. Yes?
 22 A. I would need to review it because I don't

11:36:26 1 know it by memory. I would have to review it to
 2 ascertain that they were there only half a day.
 3 Q. They didn't take any soil studies for the
 4 purposes of this report, did they?
 11:37:06 5 A. There's no indication they did any soil
 6 studies, but they request information. They request
 7 that SINAC Department of Wetlands takes the pertinent
 8 action to determine the wetlands.
 9 Q. Right. And, so, there's no formal
 11:37:28 10 identification or conclusion that there are wetlands
 11 on-site, no delimitation of wetlands on site that's
 12 recorded by way of this document, is there?
 13 A. Correct. They indicate that there are two
 14 potential wetlands and that the Department of Wetlands
 11:37:59 15 go forward in order to determine whether this is such.
 16 Q. Right. And just in respect of the time
 17 taken for the site visit, we can see--actually, just
 18 in the text above the "Conclusiones" heading, you can
 19 see that the site visit finished at 1:30 p.m. So, it
 11:38:20 20 would be a fair summary to say they were there for no
 21 more than half a day; right?
 22 A. I don't know when they arrived. But,

11:38:39 1 indeed, it does say that they left the site at 1:30.
 2 Q. Thank you.
 3 Now, this report--this three-page report
 4 indicating the possibility of wetlands but seeking
 11:38:51 5 more information was, of course, superseded, wasn't
 6 it, by the SINAC report that appears at Exhibit C-72,
 7 Tab 13 in your files?
 8 If you would just go to page 6 of that
 9 document. It actually says "page 3" at the top, but
 11:39:43 10 it's the sixth page in the document. If you do go
 11 down to the last paragraph, you will see that there is
 12 the conclusion that there were no wetlands on the
 13 property. Do you see that?
 14 The conclusion is on that paragraph--the
 11:40:31 15 bottom of the sixth page of that document, there is
 16 recorded the conclusion that there are no wetlands.
 17 Do you see that?
 18 A. Correct. That is what this paragraph
 19 states.
 11:40:51 20 Q. So, on the 16th of July, 2010, you see SINAC
 21 saying there are no wetlands. And if we just go back
 22 to the previous document--apologies for jumping around

11:41:09 1 again--R-20 at Tab 56. You should still have it open,
 2 I think. This is the reminder--just to remind you,
 3 this is the preliminary indication that there may be
 4 wetlands. It needs investigation.
 11:41:32 5 And could you just look at the last
 6 paragraph on the first page of the document. It's not
 7 completely clear, but I think you'll be able to make
 8 out the text. Just read it onto the record from
 9 Exhibit R-20, that last paragraph on the first page of
 11:41:49 10 the document. Do you see it? It refers to possible
 11 wetlands. Just read that out.
 12 A. I'm sorry. I didn't hear the last thing
 13 that you said, please.
 14 Q. All I want you to do is just read onto the
 11:42:18 15 record this last paragraph on page 1 of the--of R-20.
 16 This is the SINAC report of 1 October, 2008. And just
 17 read out the text there at the bottom.
 18 A. I don't know if your copy is more legible
 19 than mine, but this is illegible. I don't want to
 11:42:54 20 read words that don't exist.
 21 THE WITNESS: I don't know if the Tribunal
 22 would like to see this, but I really can't read this

11:43:02 1 based on the illegible text.
 2 MR. BURN: Well, as I said--
 3 PRESIDENT SIQUEIROS: Please verify that you
 4 both are looking at the paragraph that he should be
 11:43:10 5 reading because there might be an error.
 6 MR. BURN: I think he's looking at the right
 7 page. And as I indicated, it's not perfect. It's the
 8 Respondent's exhibit. It's not perfect, I don't
 9 think, in anyone's copy, this portion of the text.
 11:43:27 10 I put it to Mr. Martínez that although--you
 11 know, maybe six words or seven words in the paragraph
 12 are not clear. I would accept that.
 13 BY MR. BURN:
 14 Q. Actually, you can read through most of the
 11:43:36 15 text there, and it would not be particularly difficult
 16 for you to do so. So, I invite you again to read the
 17 paragraph on to the record.
 18 PRESIDENT SIQUEIROS: If you can please read
 19 it. And if there's any doubt about the text, well,
 11:43:59 20 then you can state that.
 21 A. Based on what I can read, there is a word
 22 and a number I can't see. "Potential wetlands, which

11:44:13 1 according to"--and then I can't read the word. Then I
 2 can't read the other word. Then it says "Muss"--I
 3 can't read it. Then it says "conden high"--then I
 4 can't read it--"water due to obstruction of culverts."
 11:44:39 5 BY MR. BURN:
 6 Q. I'll just interrupt you. I've given you a
 7 couple of chances to read through text which is a lot
 8 clearer than what you might suggest. But we'll leave
 9 it there. The text is there. I think the members of
 11:44:51 10 the Tribunal can read it later on.
 11 Now, if we could turn now to Binder Tab 17.
 12 This is Exhibit C-283. This is SETENA Resolution
 13 2086-2010. And you see down at the bottom of the
 14 page--of the first page, again, "Sexto," there's a
 11:45:27 15 reference to the complaint filed by Mr. Steve
 16 Bucelato.
 17 And you can see--if you go to the very last
 18 page of the document, "Primero"--I think it's the
 19 penultimate page rather than the last page, but
 11:45:51 20 anyway. Underneath the--so in the section headed
 21 "Portanto La Comisión Plenaria Resuelve." And then
 22 you can see against "Primero" that the complaint is

11:46:05 1 rejected.
 2 Do you see that?
 3 A. Correct. That is what it says under
 4 "First."
 11:46:19 5 Q. Right. And you must have reviewed this
 6 document as part of your investigation; right?
 7 A. Correct. I did review this document during
 8 the criminal investigation that I conducted.
 9 Q. And you knew that this--the complaint that's
 11:46:47 10 been dealt with here wasn't the first time
 11 Mr. Bucelato had filed a criminal complaint in
 12 relation to alleged wetlands on the Las Olas site.
 13 You knew that, didn't you?
 14 A. Yes, I knew about this complaint that had
 11:47:11 15 been presented to the Ombudsman's Office that was then
 16 sent to SETENA. I don't know the kind of processing
 17 that took place there because I don't work in these
 18 institutions. That's not under my ambit.
 19 Q. Right. But you're aware of it. Presumably,
 11:47:32 20 you also would have known of the fact that Mr. Aven
 21 had filed a defamation suit against Mr. Bucelato in
 22 relation to similar issues. You knew about that at

11:47:43 1 the time?
 2 A. Yes. During the inquiry, which is the first
 3 moment when the defendant is called upon by the
 4 prosecutor, there was a mention that Mr. David Aven
 11:48:04 5 had actually presented a complaint against
 6 Mr. Bucelato for defamation.
 7 Q. Right.
 8 So, you knew perfectly well that there was a
 9 contentious relationship, a contentious situation
 11:48:23 10 between Mr. Aven and Mr. Bucelato, between the
 11 developers of the site and Mr. Bucelato. You knew
 12 about that, didn't you?
 13 A. Mr. Aven mentioned this complaint that he
 14 had filed. I didn't know if it had been resolved, and
 11:48:53 15 so I didn't know if the--Mr. Bucelato's complaint
 16 about him had actually been taken on by the courts. I
 17 don't know what kind of proceedings Mr. Aven had
 18 actually filed against Mr. Bucelato.
 19 Q. Right.
 11:49:12 20 But thinking back to your answers early on
 21 today in which you confirmed that it would be a
 22 relevant consideration if there was some sort of

11:49:20 1 vendetta underlying or motivating a complaint. You
2 would accept, wouldn't you, that the context of a
3 complaint is relevant to your assessment of what to do
4 with that complaint; right?

11:49:47 5 A. Indeed, it is a consideration that must be
6 borne in mind. In this specific case, Mr. Bucelato's
7 complaint was--it was possible to confirm this through
8 other evidence. If the only evidence that existed
9 with regard to the author or perpetrator of these
11:50:1810 actions--if that was just Mr. Bucelato, then this
11 conflict between Mr. Aven and Mr. Bucelato would have
12 been evaluated by me to see whether--whether what he
13 was saying was true or not.

14 But in this specific case, independent
11:50:3815 evidence was obtained with regard to the events that
16 were occurring and, also, related to Mr. Aven's
17 involvement in those events.

18 So, the complaint presented by Mr. Bucelato,
19 what it did was generate notification of a crime in
11:51:0020 the Office of the Public Prosecutors that we then
21 investigated and that we were able to confirm with
22 independent sources that were not Mr. Bucelato.

11:51:11 1 Q. Can you turn to Tab 19 in the files. That
2 should be in Volume 1. This is Exhibit C-101. It's a
3 SINAC report dated 3 January 2011.

4 Do you know this document, Mr. Martínez?

11:51:39 5 A. Correct. I do know it. This is the
6 document that Mr. Picardo presented. It was a report
7 he sent.

8 Q. Right. Thank you.

9 Can you just go to page 3 of the report.
11:52:0310 You see there at the very first conclusion there is
11 that--there is a statement that there are bodies of
12 water on sites that are apparently classified as
13 wetlands. Do you see that?

14 A. Correct.

11:52:2315 Q. So, you--as a prosecutor or as a lawyer of
16 any support, you would understand that that is not
17 going to be a conclusive position. You need to do
18 much more in order to establish, as one of the various
19 elements of the offenses in question, that there was a
11:52:4120 wetland; right?

21 Right?

22 A. Correct.

11:53:06 1 Q. Okay. So, just to recap, there are--in
2 terms of what you've had from SINAC by this point.
3 You've had two SINAC reports that confirm there are no
4 wetlands on the site, and there are two SINAC reports
11:53:23 5 which refer to a possibility of wetlands or apparently
6 there being wetlands on the site.

7 There's nothing else from SINAC, is there,
8 making a conclusive statement "There are wetlands on
9 the site" at this point, are there? There's nothing
11:53:4210 else on the record, is there?

11 A. That's not correct. There is a report from
12 the National Wetland Programs that was requested by
13 our office that does confirm the existence of wetlands
14 on the site.

11:54:0515 Q. But you would--looking at this report, you
16 would accept that there's an obvious inconsistency, a
17 clash, between what SINAC is saying here and what it
18 was saying in its report on 16 July 2010 to which
19 we've already gone in which they rejected the idea of
11:54:2520 there being wetlands on the site? You understood
21 there was an obvious contradiction there, right?

22 A. Yes. If we look at these reports

11:54:46 1 separately, we could consider that there is
2 inconsistencies between them. But the work of the
3 prosecutor means that you have to weigh all the
4 information available and look at when the information
11:55:05 5 was issued, interview the people who drew up the
6 reports and based on that analysis and that weighing
7 that is done by the Office of the Public Prosecutor.

8 When you draw conclusions about the
9 investigation, a decision must be made to apply some
11:55:3210 principles that are used in criminal procedure, for
11 example, of maybe probable cause. To draw up an
12 accusation, there must be a degree of probability that
13 a crime has been committed and a degree of probability
14 with regard to who is the perpetrator of that crime.

11:55:5515 The Office of the Public Prosecutor lays out an
16 accusatory thesis. And then in the intermediate
17 stage, then, there is an independent judge,
18 independent from our office, that decides on that.

19 And then there is a trial judge that makes a decision
11:56:1420 as to whether the evidence provided by the
21 prosecutor--well, if the defendant should be punished
22 based on the evidence presented.

11:56:29 1 And, so, several aspects were weighed at
2 that time, and we leaned to use the reports that
3 indicated there is the probability that these wetlands
4 existed. But then the report from the National
11:56:49 5 Wetland Program is conclusive in that there were
6 wetlands and that they had been drained.
7 Q. Thank you.
8 Now, just before we leave this document, if
9 you could just turn to page 4 of the document. This
11:57:04 10 is in the "Recommendation" section. And you see--at
11 the top there against the Number 2, do you see the
12 recommendation that you solicit analysis of soils from
13 the relevant agency, INTA? Do you see that?
14 A. Correct.
11:57:34 15 Q. Soil quality being one of the mandatory
16 features to establish before any conclusion on the
17 existence of a wetland can be drawn; right?
18 A. Correct. That is right.
19 Q. Now, can you just go back to your statement,
11:58:07 20 Paragraph 20. You refer to the 1 October 2008--
21 ARBITRATOR BAKER: Excuse me, Counsel.
22 Which statement.

11:58:20 1 MR. BURN: Yes. Apologies, sir. The first
2 statement.
3 ARBITRATOR BAKER: Thank you.
4 BY MR. BURN:
11:58:30 5 Q. So, you see there that you make reference to
6 the SINAC report of the 1st of October, 2008. That's
7 the report that we've looked at which mentions the
8 possibility of a wetland on the project site.
9 So, what you're saying in Paragraph 20 of
11:58:54 10 your statement--apologies.
11 Do you see Paragraph 20 of your statement?
12 A. Please, one moment. I'm sorry. I'm looking
13 at the English version, sir.
14 Q. Maybe we should start over. I'll do it in
11:59:15 15 Spanish, and you do it in English.
16 So, you have Paragraph 20. You make
17 reference, as I say, to the SINAC report of 1 October,
18 2008. Do you see that?
19 So, as you say in the last paragraph, "This
11:59:43 20 in itself was sufficient motive to continue the
21 investigation in order to guarantee the application of
22 legislation on environmental protection"; right?

11:59:57 1 So, what you're saying is that a three-page
2 report mentioning the possibility of wetlands was
3 enough to proceed?
4 A. Yes. With this report and other reports
12:00:20 5 that also confirm the existence thereof that when we
6 made that conclusion, we considered that at this point
7 we could go forward with the criminal investigation
8 for that--
9 Q. Right.
12:00:37 10 A. --fact or for others as well.
11 Q. But--apologies for overspeaking.
12 You, obviously, still need to do more in
13 order to get to a point where you could be satisfied
14 you would have a chance of achieving a conviction;
12:00:53 15 right?
16 One short report indicating a possibility is
17 not going to be enough for that, is it?
18 A. Yes, that's correct. But, as I said
19 earlier, more information was obtained that confirmed
12:01:21 20 the existence of a wetland on the site. There was a
21 report from the Wetland National Program that referred
22 categorically and not as possible. They indicated

12:01:34 1 that there was a wetland on the site in the
2 consideration.
3 Q. Now, there wasn't, though, any executive
4 decree creating and delimiting any wetlands on the Las
12:01:54 5 Olas site, was there? And, in fact, there hasn't been
6 to this date, has there?
7 A. It is correct. There is no executive decree
8 declaring it to be a WPA for one of the operations as
9 established in Article 32 of the law. No, there is no
12:02:16 10 such decree.
11 Q. And until September 2009, the law stated
12 that there had to be an executive decree delimiting a
13 wetlands; right?
14 A. There was an indication in the Wildlife
12:02:49 15 Protection Law saying that they had to be created.
16 However, for criminal purposes, there was a
17 resolution of the constitutional realm that said that
18 the word "creation" was in constitution. That being a
19 word that was used in the Wildlife Law. And the
12:03:13 20 protection of wetlands, they said, had to be by their
21 mere existence.
22 Q. So, you agree with me that that happened in

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12:03:21 1 September 2009. So, up until that point, you did need
2 to have an executive decree; correct?

3 A. I don't recall the date, sir, on which that
4 regulation was amended. I cannot recall it, not by
12:03:41 5 memory.

6 Q. Okay. Just moving on to a slightly
7 different topic. I wanted to check whether you were
8 aware of the work of the local auditor in the
9 Municipality of Parrita. This is Mr. Jorge Antonio
12:04:00 10 Briceño Vega. Does that name sound familiar?

11 A. No, sir. I know of no one by that name, nor
12 have I seen any documents related to anyone bearing
13 that name.

14 Q. So, you don't remember seeing any documents
12:04:19 15 relating to analyses of municipality action undertaken
16 by Mr. Briceño as part of your investigation? You
17 don't remember seeing any of that?

18 A. None at all. Nothing. I don't recall
19 having seen any information relating to analysis by a
12:04:43 20 municipal auditor relating to the project. It's not
21 the--my ambit to look at agreements or information
22 provided by municipal officials.

1093

12:04:57 1 Q. Okay. But if you, as an investigating
2 prosecutor, discovered that the complainant had taken
3 the same complaints through a different route through
4 the Municipality and subsequently the Municipality had
12:05:16 5 taken steps, but subsequent to that the auditor had
6 found that the Municipality's actions were illegal,
7 would you consider that to be relevant for dealing
8 with the criminal issues that had been put on your
9 desk?

12:05:42 10 A. We would be basing this on an assumption
11 that I would have known about that document. And,
12 actually, I never--we never saw that document in the
13 criminal file. It wasn't provided by the defense
14 throughout the investigation. So, I would be
12:05:59 15 speculating to a certain extent, even as to its
16 content, because I never saw it.

17 Q. Okay. That's absolutely right.

18 I'm asking you to deal with the hypothetical
19 that you had--I accept that you had not seen this
12:06:14 20 material. This material was not given to you, was not
21 provided to you. So, all we can do is put it in terms
22 of hypotheticals.

1094

12:06:22 1 If you had seen material that had bearing on
2 the same facts as were before you in a criminal
3 complaint and that material showed an auditor saying
4 that the related actions of a municipality were
12:06:43 5 illegal, that would have been relevant to your
6 analysis of the criminal complaint, wouldn't it? It
7 must have been.

8 THE WITNESS: I'd like to ask the members of
9 the Tribunal if it is necessary that I answer
12:07:14 10 questions that focus on A hypothetical case.

11 PRESIDENT SIQUEIROS: I'm going to speak in
12 English, and it will be translated for you.

13 You are a witness of fact. You have
14 been--your statement has been submitted by Respondent
12:08:00 15 as a witness of fact, and the examination is based on
16 your testimony. There may be instances in which a
17 question may be posed to you hypothetically, but with
18 respect exclusively to your witness statement.

19 If that statement would--if that
12:08:27 20 question--I'm sorry--would entail a different set of
21 facts, then that would be beyond the scope of the
22 examination.

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12:08:37 1 MR. BURN: Okay. I would say, sir--I
2 probably went press this. But I think the point here
3 is that all of Mr. Martínez's evidence goes to the
4 scope of the investigation and the way in which the
12:08:50 5 Prosecutor's Office conducted itself.

6 In that context--and I appreciate that's a
7 very wide framing of the context--it is relevant to
8 understand what he--how he would have conducted
9 himself or the office would have conducted itself had
12:09:05 10 it had this material.

11 So, I appreciate that there is no reference
12 to auditors, to Mr. Briceño, and so on, in his two
13 statements. But, nonetheless, we would say there is
14 some relevance given the overall aegis of the
12:09:21 15 evidence.

16 MR. LEATHLEY: Mr. President, if I can just
17 offer only an observation. And we're confirming this
18 at the moment, but I think we haven't shown
19 Mr. Martínez anything to do with Mr. Briceño for
12:09:32 20 precisely the reason that is now being raised.

21 We have not conflated Mr. Martínez's role
22 with that of other institutions, and, so, I just

12:09:42 1 wanted that to be borne in mind in this regard. We
 2 are, of course, in possession of all of the
 3 information in this arbitration.
 4 PRESIDENT SIQUEIROS: Yes.
 12:09:54 5 (Tribunal conferred.)
 6 PRESIDENT SIQUEIROS: The Tribunal believes
 7 that we should restrict to the facts that were
 8 available to Mr. Martínez at the time and that
 9 questions that could be speculative with respect to
 12:14:30 10 facts that could have been available back then but
 11 were not should not be addressed, nor should he be
 12 required to respond.
 13 MR. BURN: Thank you, sir.
 14 PRESIDENT SIQUEIROS: Thank you.
 12:14:44 15 BY MR. BURN:
 16 Q. And moving on, Mr. Martínez, there's the
 17 question of the forged document, to which you've
 18 already referred.
 19 Now, I'd like you to turn to Tab 39 in the
 12:15:04 20 materials before you, which is still in Volume 1.
 21 So, you'll see on the first page of the
 22 document, there's the date, 27 March 2008.

12:15:26 1 Do you see that?
 2 A. Correct.
 3 Q. Now, can you just flick on in the copy of
 4 that document? If you go to the very last page, and
 12:15:49 5 then go back one page. So, it's on the second-last
 6 page. That's it on the right-hand side there, just a
 7 handwritten note and a stamp.
 8 Do you see that?
 9 So, you can see every page of this document
 12:16:02 10 has the same stamp on it, which, one assumes, was made
 11 at the time of receipt at the relevant office.
 12 Can you just read out that handwritten note?
 13 A. Yes, sir. Surely, sir.
 14 What it says in handwriting here, it says,
 12:16:28 15 "Submitted by Mr. --"
 16 Q. Steven?
 17 A. --"Steven"---actually, it reads more like
 18 SETENA--"Allen Bucelato on 28 March 2008 in the file
 19 department. SETENA has four photos and--several
 12:16:53 20 photographs."
 21 This stamp on the left-hand side with a
 22 signature is not from SETENA; it is from the Quepos

12:17:02 1 (in Spanish) Legal Court of the Judiciary of that
 2 area. They are the ones who are certifying the copy.
 3 So, it is a judicial stamp; it's not a
 4 SETENA stamp.
 12:17:15 5 Q. Thank you for that.
 6 But you can see that the day after the date
 7 of this document, there's a record of Mr. Bucelato
 8 putting it on file.
 9 Do you see that?
 12:17:36 10 A. Yes. The note is dated 28 May, and the
 11 other document--and the document itself is 27 May.
 12 Q. So, 27 March, and the date of the document,
 13 28 March. Yeah?
 14 A. Yes, correct. I did make a mistake.
 12:17:59 15 Q. Fine.
 16 And now, this document overall was terribly
 17 important for your analysis, wasn't it, for the work
 18 you did for considering criminal charges and so on.
 19 A. That's correct. This document was--I
 12:18:24 20 analyzed it. And in light of a section of what had
 21 been in Mr. Bucelato's complaint to the Office of the
 22 Prosecutor saying that this was a falsified document.

12:18:45 1 And it's based on that complaint, and having seen that
 2 it existed in the SETENA file, I personally and
 3 directly interviewed the individuals whose names
 4 appear signing here, which are Mr. Quesada Avendaño,
 12:19:09 5 Vargas, and Brenes.
 6 I interviewed them directly. I brought--I
 7 had Mr. Gabriel Quesada Avendaño and Mr. Ronald Vargas
 8 Brenes come to my office, and I asked them if the
 9 signatures here and if the document of which we had a
 12:19:26 10 copy here, if they had--if the document had been drawn
 11 up by them and signed by them. They both denied this
 12 fact. They both denied that this was their signature,
 13 and they denied that they drew up this document.
 14 Subsequently, I interviewed the person who
 12:19:42 15 received documents at SETENA. It's a single person
 16 who receives documents for file. And she told me that
 17 there was no way to determine who had actually
 18 submitted the document to that institution.
 19 At the time, this note on the last page was
 12:20:10 20 not--we never saw it on file. At the time of the
 21 investigation, we never saw this. And it's kind of
 22 curious that that page is not numbered. You will see

12:20:22 1 that in the other pages in the document, in the upper
2 right-hand side, there is a number that begins with
3 three zeroes, and then it runs from 258--or rather, I
4 should say from 251 to 258.

12:20:39 5 SETENA numbers the pages in the reverse
6 order than what we do at the judiciary.

7 So, this handwritten note, what I can note
8 is that it doesn't have that stamped number, and this
9 is something that I noticed at the time.

12:20:58 10 Q. Absolutely correct. But perhaps I can help
11 you with that.

12 Would it surprise you to know that this note
13 was found on the reverse side of the relevant page in
14 the original file? And therefore, that--therefore, it
15 does not have one of these stamped numbers to which
16 you refer?

17 Does that surprise you? Does that change
18 your view of whether there's anything odd about that
19 fact of that note?

12:21:49 20 A. Yes. What I must tell you, sir, is that
21 SETENA, in this case, for this document, you can see
22 that both of the sides endorse, so, they're both

12:22:04 1 stamped with a number.

2 I am surprised to see that this page does
3 not have a number. It looks strange to me. I'm
4 surprised by it.

12:22:12 5 But actually, when the investigation was
6 conducted, neither I nor the attorneys who defended
7 Mr. Aven at various steps, they never referenced or
8 made mention of the existence of this note, and said
9 SETENA was available to the defense and to the accused
10 at all times from when evidence was gathered.

11 And it was available to him at the time of
12 the formal investigation. It's a point in which the
13 person who has been accused or who has been
14 investigated, they are presented with the evidence
15 brought against them.

16 So, I'm surprised that it's only now that
17 this note appears. And rather than surprised, let me
18 say that at the time of the investigation, neither I
19 personally, nor any of the individuals who were
20 working on the file, referred to it.

21 In any event, I should also add that the
22 investigation having to do with the use of a falsified

12:23:22 1 document and the existence, and something that SETENA
2 denounced, my decision was to file it in the case of
3 David Aven.

4 Q. Right. But you seized the SETENA files,
12:23:37 5 right, at the beginning of the process. We saw that;
6 right? So, you seized the original files; correct?

7 A. That is correct. We saw a Resolution
8 ordering that seizure.

9 Q. So, if copies were taken and distributed and
12:24:01 10 used in the proceedings of the actual document itself,
11 which is everything other than that page with the
12 handwritten note, the copying wouldn't have been done
13 of the reverse side of the paper, would it?

14 So, it's possible that everybody just missed
12:24:25 15 the fact there was a handwritten note recording the
16 receipt onto the file of the document; right? It's
17 possible that that was just missed.

18 A. That's a possibility. However, what is--the
19 fact is that the copies of the files in the Office of
12:24:52 20 the Prosecutor, the copies of the main file and of the
21 evidence gathered by the Office of the Prosecutor is
22 not generated by them or by that office. Each of the

12:25:06 1 parties come, and the Costa Rican attorneys who are
2 here can say--each of the parties come, they request
3 the documents and they look over it individually.

4 If they decide to copy it, they decide which
12:25:19 5 pages they want to copy. But this is a decision by
6 the defense or by the accused. Anybody makes their
7 own personal decision as to what copies they want to
8 make of a document that is part of a criminal
9 investigation.

12:25:35 10 We do not give them the copy.

11 Q. Right. But you're the prosecutors; you're
12 the ones who are investigating; you're the ones who
13 are considering whether or not to bring criminal
14 charges against individuals for an offense, in this
15 case, of dishonesty, which is, therefore, a serious
16 matter.

17 When you're looking at something like an
18 allegation of a forged document, you're not just going
19 to have a quick look at it, have a chat with the
12:26:03 20 alleged signatories who say they know nothing about
21 it, and that would be the end.

22 You must have considered subjecting this

12:26:10 1 document to forensic analysis in its original form. You
 2 must have done that, mustn't you?
 3 A. No, it was not done, and for several
 4 reasons, sir.
 12:26:26 5 The document on the SETENA's file is also a
 6 copy. It is not an original document. The forensic
 7 analysis would have been relevant, had the individuals
 8 whose signatures are there would have pointed out
 9 that, indeed, this was their signature. Then maybe it
 10 would have been necessary to determine that it wasn't
 11 authentic. Then we would have to--would have had to
 12 conduct a forensic study.
 13 But at the beginning of the investigation, it
 14 was clear for several reasons that the document
 15 itself was a forgery. This was confirmed by the
 16 people whose names appear, and the office that is
 17 mentioned here, Esterillos Oeste, doesn't exist.
 18 So, all of these elements are things that I
 19 looked into.
 12:27:21 20 (Overlapping interpreter channel with
 21 speaker.)
 22 BY MR. BURN:

12:27:22 1 Q. --enough to satisfy yourself that this was
 2 not an authentic document. But in terms of
 3 understanding who was responsible for the supposed act
 4 of forgery, it doesn't begin to approach an
 12:27:33 5 appropriate analysis, does it?
 6 And you can see now the note that you
 7 missed, that the person who put this on the file the
 8 day after it is dated is Mr. Bucelato. You can see
 9 that.
 12:27:48 10 So, your inquiries for the forgery you
 11 identified have to begin with Mr. Bucelato, don't
 12 they? That's the only competent, reasonable way for
 13 you to execute your duties; right?
 14 A. No, that is not correct. In my opinion,
 12:28:14 15 Mr. Bucelato had no interest in using a falsified
 16 document. This falsified--a falsified document,
 17 according to Costa Rican legislation, is to obtain a
 18 benefit.
 19 In this case, the document would only be
 12:28:32 20 beneficial to the Las Olas Project, because what is
 21 stated here is in favor of that project. So, one
 22 could not think that Mr. Bucelato would have submitted

12:28:44 1 this document in order to favor the Las Olas Project.
 2 Therefore, the investigation, well, had no reason to
 3 focus on this individual.
 4 As--in fact, when Mr. Bucelato
 12:28:59 5 submitted--filed the criminal case, then he presented
 6 this document that then became part of the criminal
 7 file. The fact that he submitted it for the criminal
 8 file, to think that he was committing a crime and
 9 using falsified documents, in my humble opinion, is
 10 not correct.
 12:29:19 11 Q. Do you not begin to see the
 12 possibility--frankly, I have no idea whether this is
 13 the correct version of events or not. But it's your
 14 job to investigate the possibilities.
 12:29:30 15 Do you not begin to see the possibility that
 16 the person who is recorded on State files as having
 17 deposited a document you subsequently discover to be a
 18 forgery might have done it in order to line up an
 19 attack of precisely this sort later on?
 12:29:47 20 Do you not see that as a possibility?
 21 A. Yes, possibly that was the intention. I do
 22 not dismiss this as a possibility, sir.

12:30:13 1 Q. Thank you.
 2 And just go back to your Witness Statement.
 3 I want to have a quick look at Paragraph 21 of your
 4 First Witness Statement.
 12:30:28 5 You indicate there that you discussed
 6 studies and technical reports that you needed as part
 7 of your investigation, and you did various things.
 8 You say that--you asked SINAC-ACOPAC, the Labor Office
 9 of SINAC, to determine whether there was a forest on
 10 the project site. You say that you went to the
 12:30:57 11 National Wetlands Program within SINAC-MINAE to ask
 12 them to send the technical criteria on whether there
 13 were wetlands on the property, and you asked them to
 14 take soil samples of the project site.
 12:31:20 15 All of that's correct?
 16 A. Yes, it's correct.
 17 Q. And you say that the reference to INTA was
 18 related to the Soil Use Handling and Conservation Act,
 19 Number 7779.
 12:31:41 20 We see that's at the end of that paragraph?
 21 A. Yes, that's correct.
 22 Q. Perhaps if you could turn to Tab 22 in

12:31:55 1 Volume 1. This is Exhibit C-116. While you're
2 finding it, I'll just confirm that this is 18th March
3 2011 SINAC Inspection Report.
4 Now, this is the report submitted by Jorge
12:32:22 5 Gamboa Elizondo from the National Wetlands Project.
6 I'd like you to go a little way into the
7 document--I think the number that's stamped at the top
8 there is 000039. Might be 38, but I think it's 39.
9 Now, you see that there's a conclusion that
12:32:58 10 there was a palustrine wetland being affected by the
11 construction of a drainage and sewage canal.
12 Now, that's not consistent with the report
13 from SINAC of 16th July 2010 to which we referred, the
14 one made by Mr. Bogantes and Mr. Manfredi, the
12:33:28 15 Document C-72. There's an inconsistency there, you'd
16 accept.
17 I think you've already accepted that there
18 are multiple SINAC reports saying there are no
19 wetlands. There's one that says there's a possibility
12:33:40 20 of wetlands. There's one that refers to apparently
21 having wetlands. And now we have a list that I think
22 you were referring to earlier, something from the

12:33:49 1 National Wetlands Program saying that there are
2 palustrine wetlands being affected by the construction
3 of the drainage and sewage canal.
4 A. Yes. These reports seen--as I was telling
12:34:18 5 you a moment ago--looked at then--just from a simple
6 point of view, they seem, in effect, to be
7 contradicting one another. But during the criminal
8 investigation, the prosecutor must--prosecutor must
9 weigh the evidence to see the likelihood of a crime
12:34:39 10 being committed.
11 And it is then when you decide when is
12 the--or when you evaluate when was the date or the
13 site when they were issued, the people who issued
14 them, their jurisdiction, and then you make a decision
12:34:55 15 at that point--or at this point, we made a decision
16 that made us have to look at environmental principles.
17 And it was then, at that point, that we
18 considered that there was the probability that a
19 wetland drainage crime had been committed and the
12:35:13 20 possibility that that wetland did exist, in effect, and
21 that it was being impacted when this work was being
22 carried out.

12:35:21 1 Q. If you could just go back to the third page
2 of that report, you'll see halfway down the page is a
3 section, "Cuarto."
4 Would you agree with me that this paragraph
12:35:46 5 indicates that the Municipality has been carrying out
6 piping work in the southern portion of the property?
7 Do you see that?
8 And you see the reference to that work,
9 according to interviews, being intended to dry out
12:36:04 10 alleged wetlands. Do you see that?
11 A. Yes, I do. This paragraph is a
12 transcription of the ACOPAC of 3-1-2003 letter to
13 which we made reference, and we discussed this matter
14 a moment ago.
12:36:23 15 The people from the Wetlands Program is
16 referring to the previous letter of ACOPAC where they
17 had made this reference.
18 Q. What did you do to investigate the
19 Municipality's work and its impact on the site?
12:36:46 20 A. I don't have to explain it once again, but I
21 had already answered this question, because regarding
22 this letter, we had already previously spoken with

12:36:56 1 you, the attorney. You had asked about the
2 investigation we had made--
3 PRESIDENT SIQUEIROS: Please reply to the
4 question that Mr. Burn has asked.
12:37:12 5 THE WITNESS: Yes.
6 In effect, because of that indication, we
7 asked the Municipality if they had carried out any
8 kind of work within the property. They answered that
9 the work had been carried out outside of the property
12:37:28 10 to channel rainwater going towards that place which,
11 if I remember correctly, is called (in Spanish.)
12 BY MR. BURN:
13 Q. Now, another one of the inquiries you
14 commissioned was with INTA. If you turn to Tab 25 in
12:37:57 15 Volume 1, this is Exhibit C-124.
16 Before that--I just neglected to ask this
17 when we were touching on the Municipality. Did your
18 office make a written request to the Municipality for
19 copies of its documents?
12:38:39 20 A. Of which documents? Which documents do you
21 refer to, sir?
22 Q. The documents relating to the Las Olas site

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12:38:46 1 and the Municipality's dealings with the developers
2 over time. Did you make any sort of written request
3 of that sort?

4 A. I think that we did make a request to find
12:39:04 5 out if there were construction permits granted by the
6 Municipality.

7 Q. And specifically about the piping work we've
8 seen reference to, did you make any requests for
9 documents relating to that piping work?

12:39:25 10 A. I seem to recall that we did ask that they
11 indicate if, in effect, they had carried out any kind
12 of pipe-laying.

13 Q. I'm sure we've seen the records come into
14 the Arbitration, but we can pick up later about that.

12:39:47 15 Turning back to Exhibit C-124, the INTA
16 report, you went to them because you knew, didn't you,
17 that you wanted to establish whether or not there was
18 a wetland; one of the mandatory elements was that
19 there was the requisite quality of soil in the areas
12:40:02 20 on the site; that's right?

21 A. Correct.

22 Q. And then you can see, on Page 8 of that

1114

12:41:52 1 to my own experience. Those are the ones that usually
2 are defined as part of a wetland.

3 So, in this case, the conclusion that INTA
4 is referring to is that they might not be typical of a
12:42:05 5 wetland, but they do have to bear in mind the
6 historical moment when the inspection is done by INTA.
7 And that is at that point--well, I took the gentleman
8 from INTA to that site personally. And at that
9 specific point, the site had been filled
12:42:22 10 substantially.

11 So, all of these elements were weighed at
12 the time when the decision was made.

13 Q. So, in effect, what you're saying is you
14 knew better than the experts about soil quality, and
12:42:37 15 you could just ignore their report; right?

16 A. No, I'm not saying that. What I'm saying is
17 that in the National Wetlands Program report,
18 reference is made to the existence of soils that can
19 classify the site as a wetland.

12:42:59 20 Q. Right. But--I think you can see the
21 specialists, INTA, the agency dealing with soils
22 classification across the country, have said quite

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12:40:13 1 report, INTA recording its conclusions after it's
2 undertaken its analysis.

3 And you can see, Paragraph 5, in
4 "Conclusions," that they conclude that there is--they
12:40:39 5 do not see any evidence of soil that is typical of
6 wetland areas.

7 Do you see that?

8 A. Correct. I do.

9 Q. So, that ought to terminate your entire
12:40:56 10 investigation in relation to wetlands matters, no?
11 That's the end.

12 A. No, sir. This document was one more
13 document that the Prosecutor's Office had to analyze
14 as part of the investigation. And they took these
12:41:22 15 opportunities in which I spoke about when the
16 document--I indicated that the context in which it is
17 issued has to be analyzed, the conclusion that is
18 being issued.

19 And in this case, the Wetlands National
12:41:38 20 Program, when it issues its report, states that there
21 are hydric soils, which are the ones that are normally
22 required, according to the regulations and according

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12:43:09 1 clearly to you, there's no evidence--no evidence of
2 soil of the right quality existing on site.

3 And you took--you made a call to ignore that
4 finding and pursue Mr. Aven and Mr. Damjanac,
12:43:25 5 regardless of the fact that one of the mandatory
6 elements of the offense was the evidence that you had
7 commissioned showed it was not there.

8 That was your judgment, wasn't it?

9 A. Yes. As I mentioned before, when weighing
12:43:46 10 the evidence--that is, when the Public Prosecutor's
11 Office weighed the evidence, we took into account the
12 investigation of the National Wetlands Program, which
13 was completely credible to us at that point.

14 And based on that, we made the decision
12:44:01 15 to--to present charges, because we were sure that it
16 was very--that it showed probability. And with that,
17 we were able to continue progressing, and that's when
18 we brought this to trial.

19 This was assessed by an independent--that
12:44:18 20 are not part of the Prosecutor's Office. Their role
21 is independent within the Judiciary Branch, and so,
22 this weighing of the analysis was carried out.

12:44:33 1 Q. Just thinking about the criminal trial
 2 itself, you'll recall--because you were there; you
 3 were one of the protagonists--that at the end of the
 4 trial, there was an adjournment, and then the judge
 12:44:52 5 had a medical issue with respect to some surgery on
 6 his hand, and he was not able to return on the
 7 scheduled date.
 8 Now, you'll recall Mr. Aven's counsel,
 9 Mr. Morera, asked you to agree to find another judge
 12:45:1110 to take over the case. You rejected that request,
 11 didn't you?
 12 A. In effect, I rejected that request because
 13 within Costa Rican legislation, there is a regulation
 14 that states that if it is more than ten business days
 12:45:3315 that the trial adjourns, then the previous material
 16 has to be annulled. So, within Costa Rican law, we
 17 cannot replace a judge who has been present throughout
 18 all the cross-examination, who has been able to
 19 intervene, to participate, to listen to the
 12:45:5220 Parties--or to hear the Parties directly, to replace
 21 him when all of this has, happened so that only with
 22 the videos, the second judge makes a decision. He can

12:46:05 1 hear what the Parties say. But if he has any
 2 questions, he cannot ask for clarification.
 3 So, according to our procedural law, these
 4 regulations are clear. They govern the criminal
 12:46:16 5 process in the whole process through debate,
 6 examination, cross-examination, et cetera.
 7 So, the request by Mr. Morera was
 8 simply--completely crazy, and I'm sorry to say that.
 9 Q. But you also rejected the waiving of the
 12:46:3010 ten-day rule. That's a rule that's there to protect
 11 defendants from criminal proceedings continuing on
 12 ad infinitum. You rejected that request as well,
 13 didn't you?
 14 A. Yes, correct. I rejected the request made
 12:46:4915 by Mr. Morera also to continue after the ten days
 16 because, obviously, that rule is one which, in my
 17 opinion, is not aimed at only protecting defendants
 18 but also to protect all the parties in the procedure.
 19 The rules established within the Costa Rican
 12:47:1220 criminal code, from that point of view, the point of
 21 view of these principles, have not been aimed at
 22 protecting only the defendant; all the parties of the

12:47:20 1 procedure have to be able to benefit from that
 2 possibility.
 3 Now, it was not an arbitrary decision. At
 4 that point, I analyzed case law, appeals, courts in my
 12:47:31 5 country, case law which stated that even when appeal
 6 courts observe that this ten-day rule has been
 7 violated, even when there's been agreement by the
 8 parties, they order the annulment of the procedure
 9 because there's been a violation of the Principle of
 12:47:4810 Contradiction or the Principle of the Presence of the
 11 Judge in the discussions.
 12 Q. Mr. Martínez, that is absolutely fanciful,
 13 isn't it? Your idea that the State in a criminal
 14 matter needs to be protected from some sort of
 12:48:0815 prejudice in relation to a continuation is, frankly,
 16 ludicrous.
 17 You have no--nothing to protect yourself
 18 from except the difficulties of what would otherwise
 19 be a failed trial. You just wanted to use this rule
 12:48:2420 in order to capsize the first trial in which you had
 21 failed to prove your case and have another go and keep
 22 everything going against Mr. Aven.

12:48:33 1 That's the fair way of understanding your
 2 decision to reject the request to waive the ten-day
 3 rule; correct?
 4 A. No, sir. I cannot agree with your
 12:48:51 5 assertion, because the prosecutor's not the only
 6 procedural party that is there. During the
 7 discussions, there are many more parties to the
 8 procedure. There's the victim, for instance, and
 9 other types of crime. And even in this type of crime
 12:49:0810 where the victim is represented by the
 11 Attorney General's Office of the Republic.
 12 In addition, the trial we had done up to
 13 then, at least the way I or our office had seen it, is
 14 that we had managed to show the facts that we were
 12:49:2415 attributing to the Defendants. In that procedural
 16 stage, I, more than anyone, was interested in having
 17 this procedure conclude. I had two open trials. I
 18 was going from one place to the other.
 19 So, the criminal procedure that was being
 12:49:3920 carried out in Quepos comes to an end. However, the
 21 problem is that there were no--there was no guarantee
 22 that, given this waive that Mr. Morera has been

12:49:54 1 requesting if there was a sentence against him, we
2 didn't want him to then say that that ten-day rule had
3 been violated.
4 I did not--I opposed this negotiation in
12:50:05 5 order to have an opportunity, because in any new
6 opportunity that might have arisen during that
7 procedure, we would have had to go with the same
8 evidence that we'd already submitted.
9 The Public Prosecutor's Office in my country
12:50:2210 cannot submit additional evidence once the charge is
11 brought. Once the charge was brought, then the Public
12 Prosecutor's Office cannot show more evidence--or
13 cannot accept more evidence for better settlement.
14 So, that rule of better settlement is
12:50:4215 normally reserved for the defense. And the attorneys
16 present here from Costa Rica know that.
17 Q. All right. Well, I'm grateful for your
18 confirmation that the State would not, in fact, have
19 been prejudiced; that it would be confined to the
12:50:5620 evidence already heard.
21 One last question to you. I think it's one
22 last question; does depend on your answer, I guess.

12:51:02 1 But--one last question to you, Mr. Martínez: If
2 Mr. Aven had been charged with a misdemeanor offense
3 for which a fine would have been the maximum penalty,
4 you couldn't have sought this extradition by way of an
12:51:21 5 INTERPOL Red Notice, could you?
6 A. Correct. In order to proceed with this Red
7 Notice, the crime that is being investigated needs to
8 be punishable by prison.
9 MR. BURN: Thank you. I have no further
12:51:3910 questions.
11 PRESIDENT SIQUEIROS: Before determining
12 whether we're going to take a break for lunch at this
13 time, do you expect to do some redirect, Mr. Leathley?
14 MR. LEATHLEY: Thank you, sir. Yes, I do.
12:51:5215 I can be finished before 1 o'clock. So--in fact,
16 maybe even quicker than that. Five minutes.
17 PRESIDENT SIQUEIROS: If the Court Reporters
18 and Interpreters are available for these additional
19 five, ten minutes?
12:52:0620 And there will be some questions on the part
21 of the Tribunal as well, so, we will have to take that
22 into account. Are the Court Reporters and

12:52:13 1 Interpreters available?
2 MR. LEATHLEY: If you wish so, we can break
3 now. And given we have a--of course, in my ignorance
4 I have forgotten, of course, the number of questions
12:52:26 5 that will come from the Tribunal. So, we're very
6 happy to wait until after the break.
7 PRESIDENT SIQUEIROS: You're fine? Okay.
8 So, I think if the Court Reporters and
9 Interpreters are fine, then the Tribunal is fine with
12:52:4610 that as well, of course. We have more stamina because
11 we haven't been probably working as hard as they have.
12 So, please proceed, then.
13 MR. LEATHLEY: Thank you, sir.
14 REDIRECT EXAMINATION
12:53:0315 BY MR. LEATHLEY:
16 Q. And, Mr. Martínez, I just want to add a
17 couple of questions as far as--on behalf of
18 Costa Rica.
19 Regarding Mr. Burn's question on the crime
12:53:1620 charged in the criminal case, I would like to make
21 reference to the document which is in Tab 33, which is
22 there in your bundle.

12:53:37 1 A. The prosecutor's charge?
2 Q. Yes. Can you see this document? Did you
3 find it? Do you have it there before you?
4 A. Yes, I do.
12:53:47 5 Q. Could you go to the last page? What is the
6 date of this document?
7 A. October 21, 2011.
8 Q. Could you go to Paragraph 5, fifth
9 paragraph? I think it's on Page 4.
12:54:0810 A. Yes.
11 Q. And could you please read that Paragraph 5.
12 Let us begin at the middle of the paragraph, or rather
13 the first half of the paragraph. Could you read it
14 aloud?
12:54:2715 A. It says, "Without specifying a precise date,
16 but since April 2009, the accused, David Richard Aven,
17 on the basis of the residential condominium and the
18 owners of the lots that had been on the property, Plot
19 6-142646, indicated that the gradual filling of the
12:54:5020 wetland that is in the west of the Project since these
21 actions increased in--between November 2010 and
22 February 2011."

12:55:01 1 Q. Whilst you've been reading, I've been
2 corrected by my colleague that this is also translated
3 behind Tab 34 of your folder into English. And the
4 purpose of my question was to read it onto the record.
12:55:19 5 But--so, you don't have to read it all,
6 because the document is already in the record in
7 English, so that you can stop there.
8 But my question is--and could you read
9 Paragraph 6 and 7, please?
12:55:41 10 A. Aloud?
11 Q. No, just to yourself.
12 A. Yes, sir.
13 Q. Having read these paragraphs, can you say
14 when, in which years, these events that were the basis
12:56:27 15 of the charge happened?
16 A. From April 2009--or rather, only from--on
17 the basis of this last paragraph?
18 Q. No, sorry. Paragraphs 5, 6, and 7, the
19 dates there.
12:56:44 20 A. Well, with regard to Paragraph 5, they state
21 here that it began in April 2009, but that this
22 increased--that is, these filling tasks increased

12:56:58 1 between November 2010 and February 2011.
2 And with regard to the facts attributed to
3 Mr. Damjanac, those facts related with the illegal
4 logging of trees, that is between November and
12:57:15 5 December 2010, other events in October 2011, and a
6 specific one on September 9, 2011.
7 Q. Thank you very much.
8 Mr. Martínez, in the Costa Rican criminal
9 procedure, the prosecutor's opinion links the judge?
12:57:36 10 A. No. What the Prosecutor's Office--what it
11 does is pose a legal hypothesis. Then the judge can
12 qualify that if the events that have been charged are
13 under another standard.
14 So, the legal qualification then by the
12:57:54 15 Prosecutor's Office is one that is done--if I
16 may--it's of a temporary nature. And then it's the
17 judge who makes a decision regarding the legal issues.
18 We have something that says that what are
19 charged are facts and not legal qualifications.
12:58:13 20 Q. Thank you.
21 Mr. Martínez, do you know--and don't worry
22 if you don't remember--if Mr. Aven was represented by

12:58:21 1 an attorney at that point during the criminal process?
2 A. He was represented by attorneys from the
3 moment in which we began the inquiry. That is,
4 throughout the whole criminal procedure, he has been
12:58:35 5 represented by an attorney at law.
6 Q. I only have one more question. Could you go
7 to Tab 25.
8 A. Yes, sir.
9 Q. That is the letter by INTA.
12:58:53 10 A. I'm sorry. I don't have the reference for
11 the record.
12 MR. BURN: C-124.
13 MR. LEATHLEY: Thank you.
14 BY MR. LEATHLEY:
12:59:17 15 Q. Do you remember this document from Mr.
16 Burn's questions?
17 A. Yes, I do.
18 Q. And if I take you to Paragraph 5 on the page
19 that has the Number 8.
12:59:36 20 A. Yes.
21 Q. You were being asked questions about INTA's
22 conclusions, and you've made reference to another soil

12:59:48 1 test that you took into account.
2 Could you expand on what you were talking
3 about?
4 A. Yes. The reference to the type of soil is
12:59:59 5 in the report prepared by the National Wetlands
6 Program, where they state that they're hydric or
7 water-type soils.
8 MR. LEATHLEY: I don't have any other
9 questions.
01:00:14 10 PRESIDENT SIQUEIROS: Okay. Pedro?
11 QUESTIONS FROM THE TRIBUNAL
12 ARBITRATOR NIKKEN: Mr. Martínez--and I
13 understood, but please confirm this for me, if, with
14 regard to the investigation that you led up,
01:00:49 15 conceptually speaking, did you consider that the
16 conception of wetlands does not necessarily correspond
17 to a WPA? Is--do you understand that--or should I
18 understand that there can be wetlands that are not
19 within a wildlife-protected area?
01:01:15 20 THE WITNESS: That is correct.
21 ARBITRATOR NIKKEN: There's another thing.
22 It's really a comment, not a question. And I wonder

01:01:25 1 if it's in the record.
 2 The note from 25 March, 2008, sent by fax
 3 from Architect Madrigal to Gerardo Chavarria, which
 4 then indicated that the project was not within a WPA.
 01:01:49 5 And this is for the Parties. The sentence,
 6 "The property is not within any wildlife-protected
 7 area," is in a response--well, that Mr. Chavarria
 8 asked the Architect Madrigal. But the note sent by
 9 Architect Madrigal to Mr. Chavarria, well, that could
 01:02:29 10 help us see within what context wildlife-protected
 11 area was used.
 12 I'd like to know if that's in the record.
 13 MR. BURN: We think--we think the answer is
 14 no, but we can double-check that. We think that is
 01:02:54 15 not in the record.
 16 ARBITRATOR NIKKEN: Okay.
 17 MR. LEATHLEY: I would like to confirm it,
 18 sir, if I may?
 19 PRESIDENT SIQUEIROS: Just for the record,
 01:03:05 20 the document to which Arbitrator Nikken is referring
 21 to is C-48, which is in Tab Number 6 of this
 22 cross-examination bundle.

01:03:41 1 Any further questions, Mr. Nikken? No?
 2 Mr. Baker?
 3 ARBITRATOR BAKER: Thank you, Chairman.
 4 Mr. Martínez, how long have you been a
 01:03:53 5 prosecutor?
 6 THE WITNESS: I began as a prosecutor in
 7 February 2008. Well, eight years, practically.
 8 Nine--in a few months, it'll be nine.
 9 ARBITRATOR BAKER: And what were you doing
 01:04:22 10 before you became a prosecutor?
 11 THE WITNESS: Very well. I'm an attorney
 12 since August 2001. I've been a lawyer for 15 years.
 13 Initially, I worked some two years in a
 14 firm, litigating. Therefore, I began to work in the
 01:04:53 15 Ministry of Finance, in 2003, as a public servant. I
 16 was there for almost a year.
 17 Then I worked in another ministry, which was
 18 the Ministry of Justice, in the Office of Social
 19 Adaptation, which is an agency devoted to supervising
 01:05:15 20 those people who have been convicted.
 21 And since 2005, until I went to work for the
 22 Prosecutor's Office, I worked at the

01:05:27 1 Attorney General's Office.
 2 Just to clarify, there are two agencies.
 3 One is the Office of the Public Prosecutors, which is
 4 under the Judicial Branch. And then the
 01:05:39 5 Attorney General's Office, which is like the Attorney
 6 of the State.
 7 From 2005 to 2008, I worked in the criminal
 8 section with regard to environmental claims. I was an
 9 assistant to the coordinator of the criminal
 01:06:02 10 department of the State--or excuse me, the
 11 Attorney General's Office.
 12 ARBITRATOR BAKER: So, if I understand your
 13 answer correctly, prior to 2005, you had not been
 14 involved in the environmental legal practice; is that
 01:06:19 15 correct?
 16 THE WITNESS: That is correct.
 17 ARBITRATOR BAKER: And when you went to work
 18 for the Attorney General in the criminal division and
 19 began to deal with environmental matters, what is the
 01:06:37 20 difference, briefly, between what the
 21 Attorney General's Office does and the Public
 22 Prosecutor's Office?

01:06:54 1 THE WITNESS: Yes. Well, let me begin with
 2 the Prosecutor's Office.
 3 The Prosecutor's Office carries out criminal
 4 investigations in a direct fashion. When there is a
 01:07:08 5 complaint, then the Prosecutor's Office takes all
 6 steps to investigate whether a crime has been
 7 committed, who committed it, when, where; and finally,
 8 it makes a decision on whether it will file an
 9 Accusation or to shelve the file or to dismiss it.
 01:07:33 10 And then it will go forward throughout the
 11 proceedings, all phases, the arguments phase, and then
 12 thereafter, appeals or criminal sentencing. And the
 13 Attorney General's Office, with regard to
 14 environmental matters, has the representation of the
 01:07:56 15 victim. And so, that is the victim, as such.
 16 And as the victim, in criminal matters,
 17 well, they must file the criminal complaint, which is
 18 a subsidiary Accusation or parallel to the one
 19 presented by the Prosecutor's Office and also it is
 01:08:21 20 incumbent upon them to also file the civil action for
 21 reparation which could be linked to any criminal
 22 conviction.

01:08:30 1 So, the civil and the penal action that goes
2 forward; once the Prosecutor's Office has finished and
3 has an Accusation, then, thereafter, the
4 Attorney General's Office--well, may intervene as a
01:08:49 5 party. And so, they will also accompany the
6 Prosecutor's Office throughout the phases that I just
7 laid out for you.
8 ARBITRATOR BAKER: So, one of the key
9 differences that I understand from your answer between
01:09:02 10 the two is that in the Public Prosecutor's Office, the
11 attorney--or the public prosecutor acts as his own
12 investigating agent, which he does not in the
13 Attorney General's Office; is that correct?
14 THE WITNESS: The Attorney General's Office
01:09:30 15 can carry out investigations, but it's not normal for
16 it to conduct investigations.
17 The Public Prosecutor's Office does using
18 technical agencies in order to figure out who's
19 responsible for the crime, an institution that is
01:09:50 20 called the Bureau of Judicial Investigation. They
21 have experts, investigators from different
22 disciplines.

01:09:58 1 ARBITRATOR BAKER: So, before becoming a
2 public prosecutor, while you were still at the
3 Attorney General's Office, did you conduct any such
4 investigations yourself?
01:10:14 5 THE WITNESS: No. When I was at the
6 Attorney General's Office, I did not conduct any kind
7 of investigation. What we did is--to some extent, we
8 verified that the steps taken by the Prosecutor's
9 Office were correct when we wanted to file civil
01:10:35 10 action or a criminal complaint, to make sure that the
11 procedures followed--would allow for success.
12 So, we would review the Prosecutor's Office
13 for steps, without any control over them, just to be
14 certain that what the Attorney General's Office was
01:11:00 15 accusing in, for example, this civil action, would be
16 successful in the criminal proceedings.
17 ARBITRATOR BAKER: That's very helpful to
18 me.
19 So, in other words if I have it correct, the
01:11:42 20 Attorney General's Office, you would review the public
21 prosecutor's completed investigation and the Criminal
22 Complaint, but you would not participate in the

01:11:27 1 investigation on the front end or the public
2 prosecutor's decision on what charges to bring.
3 Do I have that right?
4 THE WITNESS: That is correct.
01:11:46 5 ARBITRATOR BAKER: So, when you became a
6 member of the Public Prosecutor's Office--and before I
7 go there, actually, how does that happen? Do you
8 apply? Are you appointed by the Judicial Branch? Is
9 it appointed by the Political Branch? How does one
01:12:00 10 become a public prosecutor in Costa Rica?
11 THE WITNESS: Very well. The Prosecutor's
12 Office is under the Judicial Branch. It is under the
13 Judicial Branch.
14 To be a prosecutor at that time, and to
01:12:25 15 date, there are exams, very rigorous exams, given by
16 the Prosecutor's Office, where you must show your
17 knowledge of criminal law, special laws, and also
18 criminal procedure.
19 Thereafter, if you pass the exam stage, then
01:12:53 20 you can have access to a post. Then you must go
21 through some training, which lasts about a year--well,
22 I think at that time, it was about six months. I

01:13:03 1 think it's now a year.
2 During that period, you receive training
3 from prosecutors who have a great deal of knowledge,
4 and you receive training from these people in
01:13:20 5 procedural matters, investigative matters,
6 criminalistics, forensic matters, criminal matters.
7 And so, once you receive this training, you
8 are then eligible to be given a post throughout the
9 nation. And that appointment depends on the grade
01:13:40 10 that you got on your exams and the grades that you got
11 during the training during--well, the six months,
12 there are different exams that are given. And so,
13 this depends on the grades.
14 When someone is appointed, well, you go from
01:14:02 15 the person who gets the best grade, and then you go
16 down, and then when there are no posts left, well,
17 that's it.
18 ARBITRATOR BAKER: And so, is one entitled,
19 then, as a civil servant in the Public Prosecutor's
01:14:13 20 Office, to have that position for the rest of your
21 career unless you decide to change?
22 In other words, is the term of appointment,

01:14:23 1 once you are given one, forever, like it is for judges
2 in many countries? Or do you have to be reappointed
3 on a consecutive basis?

4 THE WITNESS: No. In my country, there are
01:14:50 5 two concepts. You could be there with tenure or
6 without tenure. So, I went in in 2008 without tenure,
7 and then I got a tenured post in December 2013. And
8 nontenured and tenured positions have nothing to do
9 with being a lifelong judge or prosecutor.

01:15:18 10 We must always be subject to a disciplinary
11 regime that governs any public servant in the country.
12 If you commit any kind of action which might cause you
13 to be dismissed, well, you could be dismissed if
14 you're a judge or prosecutor, if it's proven that you
01:15:43 15 have committed wrongdoing.

16 ARBITRATOR BAKER: So, let me now turn to
17 when this case began.

18 How many investigations into environmental
19 crimes had you done before you began to investigate
01:16:00 20 Mr. Aven?

21 THE WITNESS: Very well. I can't give you an
22 exact number of how many investigations I had

01:17:55 1 ARBITRATOR BAKER: So, sticking with the
2 number of investigations--and I would include both the
3 period where you were at the Provincial Office as well
4 as when you moved to San Jose--what percentage of
01:18:09 5 those cases actually led to the filing of any form of
6 criminal charge? Approximately.

7 THE WITNESS: It's very difficult to give
8 you an exact number. At that time, if you counted
9 them--well, it's not data that I would think was
01:18:53 10 relevant for answering a question eight years later.

11 Well, my experience indicates to me
12 throughout this time that more or less 50 percent of
13 these environmental proceedings end up with a formal
14 Accusation. Even the ones in my office, I could say
01:19:13 15 that practically half of them end up with a formal
16 Accusation.

17 The other 50 percent probably will end up
18 with a request for dismissal or--which is the way,
19 usually, to shelve cases in my country.

01:19:36 20 We also have something called (in Spanish),
21 which is something also like dismissal.

22 ARBITRATOR BAKER: So, of the 50 percent

01:16:17 1 conducted. But what I must tell you--and to give you
2 some context, in the places where I have been carrying
3 out environmental crimes investigations, in 2009 and
4 2010, I was conducting environmental investigations in
01:16:37 5 a province which is called Guanacaste in Costa Rica.
6 The Environmental Prosecutor's office had an office
7 there where all kinds of environmental crimes are
8 investigated.

9 The current practice is to--well, in that
01:17:00 10 office, they get about 200 files a year. So, I would
11 have less than that, but between 2009 and 2010, I may
12 have handled--being modest, 300 cases. And then as of
13 2011, where I went into the Environmental Prosecutor's
14 office, it's a special Prosecutor's Office that has
01:17:24 15 its headquarters in San Jose, and it only looks at
16 cases from different jurisdictions throughout the
17 country, but more complex cases.

18 In the Provincial Offices in Guanacaste,
19 there are complex matters, cases, but there are less
01:17:44 20 complicated cases and not necessarily dealing with the
21 very specialized laws that are about the environment
22 in Costa Rica.

01:19:44 1 that lead to the filing of some complaint, what
2 percentages of those are felony cases and what
3 percentage are misdemeanor cases, in your experience?

4 THE WITNESS: In Costa Rica, we don't have
01:20:13 5 this kind of classification between felonies and
6 misdemeanors. Well, maybe we call them infractions.

7 All crimes that we deal with either have
8 penalties of prison or penalties of fines, but they're
9 all crimes.

01:20:39 10 But my investigation--

11 ARBITRATOR BAKER: Let's stick with that
12 very helpful suggestion, because I want to put it in
13 the right context.

14 How many of those 50 percent of those cases
01:20:50 15 that led to a charge were cases resolvable by fines
16 and how many were resolvable with the possibility of a
17 prison term?

18 THE WITNESS: I don't have data to give you
19 a percentage, sir.

01:21:29 20 What I can tell you, the kinds of crimes
21 that lead to a fine in our laws--well, there are 110
22 environmental crimes. Of those 110, 90 of those are

01:21:48 1 penalized with prison, and the rest with fines.
 2 Most crimes that can be sanctioned with
 3 fines have to do with the fishing law, and the others
 4 have to do with forest law--no, excuse me, not in the
 01:22:06 5 forest law.
 6 There are--it's--I'm just talking
 7 about--well, for fines, it's--it's just fishing and a
 8 few others. But most of them, actually, have
 9 sanctions which include prison.
 01:22:24 10 ARBITRATOR BAKER: Let me see if I can get
 11 at the information this way: In your personal
 12 experience as a member of the Public Prosecutor's
 13 Offices, how many cases did you bring where the
 14 punishment was for a prison sentence and the matters
 01:22:46 15 involved allegations of wetlands?
 16 Other than the Aven case.
 17 THE WITNESS: Well, when I was in the
 18 province, I remember a case that had to do with a
 19 place called Nosara in the Province of Guanacaste,
 01:23:27 20 where there was the accusation of filling a wetland,
 21 where there was a gas station. I remember that in
 22 Nosara, there was another one because a house was

01:23:41 1 built within a wetland.
 2 In 2010, at the--well, at the beginning of
 3 2011, I personally accused the owner of a business
 4 called "Pedregal" in Costa Rica. We had a one-year
 01:24:03 5 trial, and this person was convicted. For seven
 6 environmental crimes, actually.
 7 I'm still working on a case known--well, for
 8 constructing a highway. It's on the border between
 9 Costa Rica and Nicaragua. We call it "The (in
 01:24:33 10 Spanish) Costa Rica." Well, the attorneys from my
 11 country have certainly heard of this, and has to do
 12 with the issue of wetlands.
 13 And just trying to remember--well, four or
 14 five cases that I can tell you off the top of my head.
 01:24:52 15 But perhaps it's probably more because these are
 16 crimes that are quite frequent in my country.
 17 ARBITRATOR BAKER: Again, sticking just with
 18 your personal experience in these types of matters
 19 which have the possibility of penal sentence, you told
 01:25:08 20 me about one conviction which involved seven
 21 environmental crimes. You mentioned two, perhaps
 22 three other cases, plus an ongoing one.

01:25:18 1 Of the other ones that you could remember
 2 and mention, were they resolved by judgment or by
 3 settlement between the parties, or a plea bargain, as
 4 we would say here?
 01:25:43 5 THE WITNESS: Well, in environmental crimes,
 6 most--a large percentage--a very high percentage of
 7 the criminal proceedings have to do with environmental
 8 matters, are resolved with alternative measures. I
 9 don't have exact data, but my experience indicates to
 01:26:00 10 me that very few proceedings get to trial, because
 11 usually the parties negotiate. Usually they
 12 negotiate.
 13 In Costa Rica, there are three kinds of
 14 figures that allow for negotiation with regard to
 01:26:20 15 these kinds of crimes: Conciliation, the suspension,
 16 and the other, reparation--full reparation of damages.
 17 90 to 95 percent of the criminal proceedings
 18 in which I have presented Accusations, the Parties,
 19 the Defendant and his or her attorney, and the victim,
 01:26:47 20 in other words, the Attorney General's Office, we
 21 reach an agreement in this document that the Claimant
 22 presented, there are some specific provisions which

01:27:02 1 oblige us to weigh three aspects with regard to those
 2 negotiations, and we use them when we reach an
 3 agreement.
 4 We consult with this when we are undertaking
 01:27:19 5 negotiations, and we seek that the negotiations are in
 6 keeping with these guidelines or our policy on that.
 7 ARBITRATOR BAKER: I'm going to switch
 8 subjects for a minute, Mr. Martínez.
 9 Do you have a piece of paper and a pen or
 01:27:35 10 something to write with in front of you? It may help
 11 you for what we're about to do.
 12 I want to try an exercise, if we could, with
 13 the Chairman's indulgence, to help me make sense of
 14 what is a very complicated fact pattern.
 01:27:58 15 So, what I hope to come out with, just to
 16 tell you where I'm going, is essentially a chart which
 17 will have three columns in it. And in the first
 18 column, I'd like you to list for me the expert
 19 agencies or investigative bodies or municipal bodies
 01:28:23 20 that you, as an experienced Environmental Prosecutor,
 21 believe should be consulted in a case where there is
 22 an allegation involving destruction of wetlands.

01:28:41 1 A top-to-bottom list, if you will, in the
 2 first column of the chart of all of the expert
 3 agencies or expertise that you could call upon in your
 4 role as a prosecutor to help you make a determination
 01:28:55 5 as to whether or not a violation of environmental
 6 wetlands statutes has taken place.
 7 Does that make sense for Column 1?
 8 THE WITNESS: Correct.
 9 ARBITRATOR BAKER: Okay. So, take a minute,
 01:29:19 10 and just give me your list. A new matter comes to you
 11 in your file and involves an allegation of wetlands,
 12 who are you going to pick up the phone and call?
 13 Which agencies?
 14 PRESIDENT SIQUEIROS: Just for reference of
 01:30:14 15 Court Reporters and Interpreters, once Mr. Baker
 16 addresses the composition of this chart, we're going to
 17 take a break, because his examination may take
 18 approximately 20 to 30 minutes more.
 19 ARBITRATOR BAKER: And Chairman, I'm
 01:30:32 20 perfectly happy--because most of the substantial work
 21 that I've asked the witness to do is going to be in
 22 Column 1. So, as a practical matter, since he's going

01:30:43 1 to be sequestered anyway, we can give him homework
 2 over lunch, and he can continue to work while he's
 3 eating his luscious sandwich that I'm sure will be
 4 provided for him, and then we can return to a finished
 01:30:58 5 chart on Column 1.
 6 Sorry about that, Mr. Martínez.
 7 Want to do that? Yeah.
 8 So, as long as you're clear, because if you
 9 can get for me--and this will give you a chance to
 01:31:13 10 think about it, too--the most complete list of the
 11 technical experts' expertise that you would have
 12 available to you to consult with about a case
 13 involving wetlands. And we'll start from there when
 14 we come back after lunch.
 01:31:31 15 PRESIDENT SIQUEIROS: Just to make sure: Mr.
 16 Martínez, did you understand correctly what Mr. Baker
 17 has asked of you?
 18 THE WITNESS: Yes, I understand. It's quite
 19 clear. He wants a list of--
 01:31:51 20 PRESIDENT SIQUEIROS: Of all these
 21 specialized entities that you would consult if it were
 22 a wetlands-related case.

01:31:59 1 THE WITNESS: Yes, I understood.
 2 PRESIDENT SIQUEIROS: What we're going to do
 3 now is have a lunch break. During this time, in any
 4 event, you're sequestered. So, you cannot consult or
 01:32:12 5 talk with any of the members of the team on the side
 6 of Costa Rica.
 7 So, we'll have our lunch break, and when we
 8 come back, we will continue with Mr. Baker's Witness
 9 Statements.
 01:32:32 10 And obviously, meanwhile, you will be given
 11 something to eat.
 12 THE WITNESS: Well, thank you.
 13 MR. BURN: Just so avoid any difficulty--
 14 PRESIDENT SIQUEIROS: Please.
 01:32:42 15 MR. BURN: --this creates the slightly
 16 unusual request made from the Tribunal for Mr.
 17 Martínez. There is no difficulty in asking. I just
 18 don't want to--for us all to get into any difficulties
 19 with regard to sequestration.
 01:32:57 20 I assumed that Mr. Martínez should
 21 understand that he's not going to be looking things up
 22 on a phone either. It's not that we--I understand

01:33:06 1 where Mr. Baker's inquiry goes, but I wouldn't want
 2 there to be any difficulty. So, I don't want the
 3 witness to misunderstand and to think that he's also
 4 meant to research the thing over the break.
 01:33:19 5 It's not because I want him to be right or
 6 wrong in the answer; it's just that it could create
 7 some difficulty with other matters that Mr. Baker may
 8 go to in his subsequent questions--or anyone.
 9 So, I think just the terms of the
 01:33:32 10 sequestration just need to be clear for the purposes
 11 of this exercise.
 12 PRESIDENT SIQUEIROS: Just to be perfectly
 13 clear, but he will not be restricted to consulting the
 14 cross-bundle that you have presented in front of him.
 01:33:45 15 MR. BURN: Yeah. Absolutely fine.
 16 PRESIDENT SIQUEIROS: Okay. Do you have any
 17 objection to that, Mr. Leathley?
 18 MR. LEATHLEY: No, sir.
 19 PRESIDENT SIQUEIROS: Okay. Then simply for
 01:33:57 20 purposes of clarity, what has just been requested by
 21 the Claimants' counsel is that in this period, you may
 22 consult the documents, your statements, and all the

01:34:13 1 documents that are on file, the documents you've
2 received in the three binders.
3 However, you may not use your phone, nor may
4 you consult the Internet or any similar type of thing.
01:34:27 5 THE WITNESS: Yes. That is understood, sir,
6 and I promise to not do what I'm not supposed to.
7 PRESIDENT SIQUEIROS: When we break--it's 25
8 minutes to 2 o'clock; and we return at, shall we say,
9 at 20 minutes to 3:00?
01:34:46 10 MR. BURN: Could we--I'm just mindful of the
11 marching of time. Would it be possible to make it
12 quarter past 2:00 or half past 2:00? Just worried
13 about losing time.
14 If you think it's better to--
01:35:03 15 PRESIDENT SIQUEIROS: I can eat a fast
16 sandwich. I'm concerned also with the rest of--the
17 Reporters, which is not only lunch; it's also a true
18 break.
19 Thank you.
01:35:16 20 (Whereupon, at 1:35 p.m., the Hearing was
21 adjourned until 2:40 p.m.)
22

02:33:36 1 AFTERNOON SESSION
2 PRESIDENT SIQUEIROS: Are we ready to
3 proceed? Okay.
4 Are we ready to proceed, Mr. Martínez?
02:44:57 5 THE WITNESS: Yes.
6 PRESIDENT SIQUEIROS: Please proceed.
7 ARBITRATOR BAKER: Mr. Martínez, I hope you
8 had a good lunch and some time left over after helping
9 me out here. How many names did you come up with,
02:45:06 10 first of all, in our first column for our chart?
11 THE WITNESS: I have six institutions and
12 one that is important, but it's not an institution.
13 One other entry.
14 ARBITRATOR BAKER: Okay. Would you start
02:45:32 15 with the first one and tell me which one it is.
16 THE WITNESS: The first institution from
17 which one could seek information about wetlands is the
18 Forest Department--Science Department of the Office.
19 There's a section there that's called Forensic Biology
02:46:00 20 where currently studies are conducted, reports
21 prepared to determine wetlands on a site.
22 ARBITRATOR BAKER: And this is the Forensic

02:46:12 1 Biology Department in your office or a university? I
2 wasn't clear.
3 THE WITNESS: It belongs to the judicial
4 branch but not directly the Office of the Prosecutor.
02:46:30 5 So, it's the judiciary, but not with the prosecutor,
6 and they collaborate with us in some criminal cases.
7 And it's initials of--it's the OIJ.
8 ARBITRATOR BAKER: OIJ, okay.
9 And the second one?
02:46:52 10 THE WITNESS: The National Wetlands Program.
11 We have mentioned that a few times today.
12 ARBITRATOR BAKER: And the third one?
13 THE WITNESS: One could also resort to the
14 National Geographic Institute to obtain information on
02:47:14 15 the existence of a wetland in any given area.
16 ARBITRATOR BAKER: And the fourth?
17 THE WITNESS: The fourth is an institution
18 known as the UICN. UICN in English. They have a
19 National Registry of Classified Wetlands; in other
02:47:43 20 words, areas that have already been categorized or
21 classified as wetlands.
22 ARBITRATOR BAKER: And the fifth?

02:47:57 1 THE WITNESS: One could also resort to INTA
2 to obtain some information to locate a wetland on a
3 site. INTA is another acronym that I believe you
4 already have heard about.
02:48:12 5 ARBITRATOR BAKER: And the sixth one?
6 THE WITNESS: The sixth is a place or an
7 institution that is part of the OIJ. There are
8 certain research areas where they can find witnesses
9 to determine the conditions of the site.
02:48:35 10 Earlier I spoke about the Forensic Biology
11 Department. This other department is one more of
12 criminal investigation. And they could help locate
13 witnesses closer to or neighbors of the area that one
14 wishes to classify; and, thus, with these witnesses
02:49:01 15 and their statements, one may learn about the
16 conditions as assessed by neighbors through their
17 observations of the site that is under investigation.
18 And I mention this because as a principle in
19 cases which is the probational freedom situation--this
02:49:24 20 means that we don't have given evidence to prove
21 everything. So, this is a system where it's free
22 evidence that allows us to show things by any means

02:49:42 1 possible provided the means is legal.
 2 ARBITRATOR BAKER: Okay. So, as I
 3 understand it, the first five are all institutes or
 4 organizations that have scientists and expertise in
 02:49:57 5 wetlands among their members, and the sixth one is an
 6 investigative agency that helps collect fact witnesses
 7 but does not necessarily have experts in the field; is
 8 that right?
 9 THE WITNESS: Yes, that is right, sir.
 02:50:18 10 ARBITRATOR BAKER: Okay. And you mentioned
 11 one other that was not an agency or an institution.
 12 What is that?
 13 THE WITNESS: Always as part of the duty to
 14 investigate the site it is our policy in Costa Rica,
 02:50:39 15 when looking into environmental matters, for the
 16 Prosecutor to go to the site and observe the
 17 conditions that exist there. So, the site inspections
 18 for the investigation of criminal acts is necessary.
 19 So, it's not so much an institution,
 02:51:01 20 actually, but it is an activity or a duty that we
 21 should add to these other institutions from which one
 22 could seek information. And that will help determine

02:51:15 1 whether or not there is a wetland.
 2 ARBITRATOR BAKER: Okay. Staying with that
 3 for just a minute. How many visits to the site did
 4 you personally make?
 02:51:31 5 THE WITNESS: In this case, two.
 6 ARBITRATOR BAKER: And did you take anyone
 7 from your office or any of these other agencies with
 8 you on either one of those visits?
 9 THE WITNESS: Yes, indeed. On the visits to
 02:51:45 10 the site, I recall that at least on one of them I was
 11 accompanied by the person who was at the time my boss,
 12 Luis Diego Hernandez Araya.
 13 This prosecutor works for the Office of the
 14 Prosecutor. He's been working since 1998, and he was
 02:52:10 15 the head of the Office. I was also accompanied by
 16 Mr. Jorge Gamboa from the National Wetlands Program.
 17 He was with me on both visits.
 18 In addition, there was an INTA official, I
 19 think, on one of the two visits, and I think there was
 02:52:41 20 officials from the criminal investigation branch--from
 21 the criminal system. They weren't perhaps technical,
 22 but we asked them to come with us to help us locate

02:52:54 1 and interview witnesses.
 2 ARBITRATOR BAKER: Okay. So, let me stick
 3 with the nontechnical participants first. So, your
 4 boss, who sounds like a very experienced prosecutor,
 02:53:08 5 does he have technical, scientific, or environmental
 6 training, or is he just an experienced prosecutor?
 7 THE WITNESS: He is a prosecutor with a lot
 8 of experience. He's an attorney. He doesn't have any
 9 preparations or specific skills in any other
 02:53:31 10 discipline, as far as I know at least.
 11 ARBITRATOR BAKER: And is it usual for you
 12 to be accompanied by the head of your office to an
 13 initial site visit? Is that a routine thing?
 14 THE WITNESS: No, it's on a case-by-case
 02:53:52 15 basis, really.
 16 Sometimes, given the distance of where the
 17 site is located or perhaps if something else has to be
 18 done, there have been occasions in which he
 19 accompanied me and other times and for other cases I
 02:54:09 20 accompanied him.
 21 It's not a rule. Nor was there any special
 22 reason for him to accompany me. It was just something

02:54:21 1 that happened on that occasion. It was just
 2 coincidental really.
 3 ARBITRATOR BAKER: Do you remember if you
 4 asked him or if he invited himself along on the trip?
 02:54:43 5 THE WITNESS: No, I do not recall.
 6 ARBITRATOR BAKER: Just for comparison, how
 7 many times would you say you were accompanied on an
 8 investigation in a year by the head of your office?
 9 How many site visits?
 02:55:07 10 THE WITNESS: That year I think we went to
 11 two sites together for inspection purposes. This one
 12 in which he came with me he was accompanying me; in
 13 other words, I was the one leading that case. And
 14 that very same year, I recall I accompanied him to
 02:55:23 15 visit a project known as the Marcarena Tourist
 16 Project.
 17 As far as I recall, Mr. Manuel Ventura
 18 perhaps referred to this when he provided his witness
 19 statement, and I also mention it.
 02:55:42 20 And at that time I accompanied my boss. And
 21 that case is--presently I am managing it.
 22 ARBITRATOR BAKER: Do you remember if it was

02:55:52 1 the first or second trip to the site that you made
 2 that your boss came with you?
 3 THE WITNESS: Let me try and recall. I
 4 don't know really yet if it was the first or second.
 02:56:16 5 Let me think about it.
 6 No, unfortunately, I could not tell you. It
 7 would be speculation. I'm sure that he was with me on
 8 one of those visits, but I don't recall which one.
 9 What I would like to add, however, is that
 02:56:38 10 one took place in March and the other May. Two months
 11 away--two months between each of the two visits.
 12 ARBITRATOR BAKER: Okay. So, let me take
 13 you back, then, to the criminal investigative
 14 individuals from the OIJ that were there. Are those
 02:57:00 15 the folks that interviewed the equipment operators for
 16 you, or did you do that yourself?
 17 THE WITNESS: No. At that time when the
 18 operatives were there, the investigators were with us.
 19 Luis Diego and myself--Luis Diego Hernandez and
 02:57:30 20 myself, we asked investigators to please tell the
 21 operatives to cease with their activities, that they
 22 come to a given sector.

02:57:42 1 Because that was an open site. So,
 2 actually, there was no possibility of having desks, et
 3 cetera. So, we asked them to move towards a given
 4 sector. There we identified them, and Luis Diego
 02:57:59 5 Hernandez and myself interviewed them to try and
 6 determine who had given them the instructions for the
 7 work that they were carrying out.
 8 ARBITRATOR BAKER: So, for my way of,
 9 perhaps, phrasing it in a simple fashion, that's the
 02:58:17 10 who, what, where questions, not the technical
 11 questions; right?
 12 THE WITNESS: The questions we put to the
 13 operatives?
 14 ARBITRATOR BAKER: Yes, sir.
 02:58:34 15 THE WITNESS: Yes, that's correct. We asked
 16 them about all those other aspects as to space, time,
 17 and manner, plus who was responsible.
 18 ARBITRATOR BAKER: Okay. So, let me take
 19 you back, then, to the beginning of your institutional
 02:58:50 20 list.
 21 During this investigation into the wetlands,
 22 did you consult with the Forest Department or the

02:58:59 1 Forensic Biology Group for any part of your
 2 investigation?
 3 THE WITNESS: No, sir. This department was
 4 not consulted because at that date it didn't meet the
 02:59:22 5 aspect or we weren't considering wetlands. This
 6 department classifies wetlands--they started
 7 recognizing or classifying wetlands only in 2014.
 8 Before that they didn't do it.
 9 ARBITRATOR BAKER: Okay. So, it's an agency
 02:59:37 10 that's available to consult now but was not at the
 11 time?
 12 THE WITNESS: At the time, no.
 13 ARBITRATOR BAKER: Okay.
 14 THE WITNESS: They didn't have experts who
 02:59:51 15 could determine that an area was a wetland.
 16 ARBITRATOR BAKER: Let me ask you the same
 17 question with the second agency on your list, the
 18 National Wetlands Program. At any time during your
 19 investigation of this wetlands case did you consult
 03:00:05 20 with the National Wetlands Program as part of your
 21 investigation?
 22 THE WITNESS: Correct. I did. They issued

03:00:13 1 a report. Mr. Jorge Gamboa went with us to the
 2 inspections, and he issued a report in which he
 3 indicated that in that site there was a palustrine
 4 wetland that was being affected by drainage and
 03:00:27 5 filling.
 6 ARBITRATOR BAKER: And what technical
 7 apparatus did Mr. Gamboa bring with him at the site
 8 investigation to collect samples of the soils to make
 9 those decisions?
 03:00:45 10 THE WITNESS: At that time when he did the
 11 inspection, Mr. Diógenes Cubero from INTA went along.
 12 And during that specific visit, the first visit we
 13 did, no samples were taken.
 14 But after that Mr. Diógenes went to the site
 03:01:03 15 with Mr. Gamboa, and he did the sampling in the
 16 presence of Mr. Gamboa. So, Mr. Jorge was present
 17 when the samples were taken for the decision that INTA
 18 took.
 19 ARBITRATOR BAKER: And what was it that was
 03:01:20 20 seen at the first site investigation where no sampling
 21 was done that led you to decide to make the second
 22 visit? What was--what were the technical experts

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03:01:33 1 saying that caused them to want to go back and do a
2 second visit?
3 THE WITNESS: I remember that at that
4 time--at least Mr. Gamboa in his opinion--because it
03:01:52 5 is a technical opinion--that somebody with training in
6 the law, such as I am, could only simply listen to
7 him. But Mr. Gamboa said that on that site there was
8 vegetation or, rather, characteristic vegetation --
9 vegetation characteristic of wetland systems. And he
03:02:18 10 described--he gave some names that for him were
11 typical of wetland ecosystems.
12 Also, Mr. Gamboa made reference to the water
13 conditions in the area on that site that were being
14 eliminated through a kind of channel that was being
03:02:37 15 built or that was already mostly built on that site.
16 And then, as I mentioned, on the basis of Mr.
17 Gamboa's experience, the reference made to the
18 subject of soils.
19 ARBITRATOR BAKER: So, after the sampling
03:03:00 20 was done and you started to collect other documents as
21 part of your investigation, did you transfer or make
22 available to Mr. Gamboa or the folks at INTA any of

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03:03:13 1 the documentary evidence that you had collected as
2 part of your investigation as to permits or plans for
3 the building of the drainage areas, just as one
4 example? I don't limit it to that. That's just one
03:03:29 5 that's been talked about a lot here this morning.
6 And I'm just trying to find out if
7 Mr. Gamboa or colleagues at INTA had had that
8 information available to them as well at the time they
9 prepared the report and recommendation.
03:03:51 10 THE WITNESS: The criminal investigation in
11 Costa Rica has certain limitations. Access to
12 criminal records is limited only to the procedural
13 parties: the defendant and his defense counsel, the
14 victim, people bringing charges, these are--or
03:04:11 15 bringing suits, if these are individuals bringing
16 suits. And in this case, the request made to them did
17 not come with the transfer of any documents from the
18 file.
19 I do understand that Mr. Gamboa, as part of
03:04:29 20 his attributions, did carry out some kind of
21 investigation inside MINAE to be able to collect
22 reports from some other offices regarding the

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03:04:39 1 conditions on-site.
2 But the Prosecutor's Office was not--did not
3 have the obligation or right to give this file because
4 of the limitations that are in one of the articles of
03:04:57 5 the criminal code.
6 As a matter of fact, if the Prosecutor in
7 the Public Prosecution Office gives access to people
8 who are not a party, he or she will have to be
9 disciplined for having violated this right that the
03:05:10 10 parties have that only they have access.
11 ARBITRATOR BAKER: Thank you for that
12 helpful explanation.
13 So, what was it that gave Mr. Gamboa the
14 right, then, to go out and collect records from other
03:05:25 15 agencies as part of his process?
16 THE WITNESS: I could give you my opinion on
17 what I think he took into account.
18 I would imagine that he wanted to get the
19 background information--historical background on the
03:05:49 20 conditions of the site. That is part of his work,
21 which for me is something timely and appropriate.
22 But, frankly, I cannot tell you if that was the

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03:05:57 1 specific reason why he decided to get these documents
2 from other offices of MINAE.
3 Maybe it had to do with some kind of
4 institutional coordination or some kind of assurance
03:06:15 5 regarding the results.
6 But in any case, that is my opinion. I
7 never spoke to Mr. Gamboa on those terms to find out
8 why he had decided to look for information from other
9 departments.
03:06:32 10 ARBITRATOR BAKER: Do we know which specific
11 departments he may have consulted to know if it was a
12 complete and thorough examination of what might have
13 been available everywhere, or do we--where would we
14 find that to see what he looked at?
03:06:55 15 THE WITNESS: In the report that Mr. Gamboa
16 gave us as a result of the visits, probably the
17 geographic reference that he had at his disposal is
18 there. That report is from 2011--March 2011, if I
19 remember correctly. And maybe you could get relevant
03:07:13 20 information, then, on what--there, rather, on what
21 Mr. Gamboa reviewed to reach his conclusion.
22 ARBITRATOR BAKER: Okay. So, let's go to

03:07:22 1 the third entity, the National Geographic Institute.
2 Did you consult with them as part of your
3 investigation as to whether or not there was a wetland
4 on-site or not?

03:07:36 5 THE WITNESS: No, sir. At that point, we
6 did not consult the National Geographic Institute.
7 Basically because we already had a report from the
8 National Wetlands Program that confirmed the existence
9 of a wetland.

03:07:50 10 In addition, we had some witnesses who
11 indicated what were the conditions of the site before.
12 This list that I gave you is a list that you can
13 consult without having to go to each one of the
14 institutions. Because a moment ago I was saying that
03:08:09 15 in my country, there's a principle of evidentiary
16 freedom. So, one doesn't have to ask each one of
17 these places. But to a certain extent, they can give
18 information as long as there's any questions about the
19 existence of a wetland on a certain site.

03:08:32 20 ARBITRATOR BAKER: Yes. I'm going to come
21 on to that in a minute. But let's just work our way
22 through the rest of the list so the record is clear.

03:08:39 1 Because just so you'll know, when my
2 colleagues and I are seized with having to decide this
3 case, one of the things that's most important for us
4 is being able to make sense of this huge volume of
03:08:51 5 material that's surrounding us and getting taller day
6 by day.

7 So, that's why I'm asking you these
8 questions. Because I'll have it in one place, and I
9 can go back to this part of the record to help me work
03:09:04 10 my way through the documents. So, I very much
11 appreciate your assistance.

12 So, the other agency was UICNN? Was that
13 right? Did you consult with them as any part of your
14 investigation into whether there were wetlands at the
03:09:19 15 site?

16 THE WITNESS: No, sir, we did not consult
17 the IUCN. And, basically, we did not consult IUCN
18 because this was not a wetland that had been
19 classified before as such.

03:09:34 20 The National Inventory of Wetlands is a list
21 of wetlands that were already classified before. So,
22 it is a catalog of wetlands that have already been

03:09:46 1 studied and identified. And in this case, from our
2 investigation, we could deduce easily that it was not
3 a wetland that had already been part of an
4 inventory--of a prior inventory. So, we would have to
03:10:04 5 consult someone with a reply that we already knew they
6 were going to say no.

7 So, I put it in the list because there's
8 certain impact--there have been cases where there is
9 an impact regarding wetlands that are in the
03:10:17 10 inventory.

11 A moment ago, I had talked about the case of
12 the owner of Pedregal, where a wetland impact--that
13 is, a wetland had been impacted, a wetland that was
14 already part of the inventory of wetlands that I
03:10:35 15 mentioned. It's called Laguna Madigral. You can look
16 for it if you so wish.

17 ARBITRATOR BAKER: And just so my record
18 would be complete, same question with regard to INTA.
19 You told me that one of their individuals was present
03:10:47 20 during one of the site visits. But just so I'll have
21 it here in front of me, same question about consulting
22 with them before the--during your investigation.

03:11:01 1 THE WITNESS: Yes. In effect, there was
2 consultation to INTA, and there's a report issued by
3 Mr. Diogenes Cubero within the criminal file.

4 ARBITRATOR BAKER: Okay. So, now I want to
03:11:12 5 turn to the point that you were making just before we
6 finished the list about who was consulted. Because
7 it's my understanding that nothing had been classified
8 as a wetland previously by any governmental agency on
9 this particular piece of property. Do I have that
03:11:30 10 right? Prior to your investigation.

11 THE WITNESS: Before my investigation--well,
12 then we were able to observe that there were some
13 reports that had been issued by some officials from
14 MINAE, SINAC. But reports not for classification
03:11:51 15 purposes; simply reports related to visits to the
16 site.

17 Those reports--when I made these
18 requests--mainly to the National Wetlands Program and
19 to INTA, were not in the file. And they were provided
03:12:07 20 by the defendant when we did the inquiry in May 2011.
21 May 6th, 2011, if I remember correctly.

22 ARBITRATOR BAKER: But my point--my basic

03:12:22 1 point, I think, is clear. And that is, prior to your
 2 investigation starting, you were never able to
 3 determine if anybody had actually officially
 4 classified any piece of this property as having a
 03:12:37 5 wetland. Isn't that the case?
 6 THE WITNESS: Yes. Correct. Before
 7 beginning my investigation, there was no notification
 8 within the file that a prior classification had been
 9 made.
 03:12:54 10 ARBITRATOR BAKER: Okay. So, now I need
 11 your help on the way in which you made your decisions
 12 to exercise your discretion as a prosecutor.
 13 Help me understand, sir, the thought
 14 processes about receiving one report that classifies
 03:13:16 15 an area as potentially meeting the definition of
 16 wetlands and then other information that came to light
 17 during the investigation showing that other agencies
 18 and other reports were prepared saying that there were
 19 no wetlands.
 03:13:34 20 How did you make a decision resolving that
 21 inconsistent information? Did you have--consult with
 22 experts about that, or did you make the decision

03:13:46 1 yourself or in consultation with your boss? How did
 2 that come about?
 3 THE WITNESS: Yes, I understand.
 4 In this case, when the final analysis is
 03:14:02 5 made to make a decision, that is to issue the
 6 requirement. Because when the analysis is made--when
 7 the final analysis is made when we're ready--because
 8 the investigation, at some point we have to conclude
 9 it. We cannot have a criminal cause open for years.
 03:14:19 10 So, when the Prosecutor or I considered that
 11 there was enough evidence to make a decision, I had to
 12 sort of weigh and analyze each one of the reports and
 13 make a decision. That decision was made basically
 14 bearing in mind what had been written in the reports
 03:14:41 15 and what we were able to consult regarding the
 16 signatories of this--of these reports on the
 17 conditions of the site that they had observed when the
 18 report had been issued.
 19 So, we took into account the report and what
 03:14:56 20 the person who had issued the report said, and then
 21 with that information, when the evidence for trial is
 22 offered, the Prosecutor's Office--that is, I offered

03:15:12 1 the report, and the person who had prepared it.
 2 So, the analysis implied observing the
 3 document, interviewing the person who had prepared it
 4 to find out about the conditions he or she had
 03:15:26 5 observed at the point when they had done the visit
 6 before preparing the report and also consider the
 7 chronology of the impact that had been documented by a
 8 number of institutions.
 9 Because it said there that it had begun in
 03:15:43 10 2009--in April 2009, as we just saw now, and that it
 11 continued for a certain given period of time.
 12 So, we needed to have an overall vision of
 13 the chronology of the impact, the reports that were in
 14 the file when these reports had been prepared and
 03:16:04 15 visits prior to the preparation of the reports; and we
 16 also had to take into account--or we took into account
 17 a more in-depth study that was being carried out by
 18 someone from an institution, which is the National
 19 Wetlands Program, that they have large and
 03:16:24 20 long-lasting experience in that area.
 21 So, with all of that information, we had to
 22 make a decision. We had to decide if we were going to

03:16:38 1 bring charges or if we were going to ask that the file
 2 be filed. To a certain extent, we had two positions,
 3 but the decision has to be made. And in this case, we
 4 weighed, among other things, the precautionary
 03:16:56 5 principle that is under our constitution and legal
 6 system of environmental protection.
 7 In this case, we felt that the final report
 8 of the National Wetlands Program was more
 9 comprehensive and the explanation that had been given
 03:17:12 10 by the person who had prepared it was more reasonable
 11 than the explanations or the reports that had been
 12 generated in--other times where they said there was no
 13 wetlands because they had been carried out through
 14 visits at times when already there had been an impact.
 03:17:28 15 So, with all of these elements, we had to
 16 make a decision. And with all due respect, I know you
 17 will have to make a decision too now that there are
 18 two positions, and with the information we're
 19 providing, you will obviously have to make a decision.
 03:17:44 20 So, we also had to decide between these two positions.
 21 And my line of thought was--or the decision
 22 I made was on the basis of that analysis, of the

03:17:51 1 reports, the people who had prepared the reports, and
 2 the chronology when these reports had been prepared,
 3 all in light of the impact on the site that already
 4 had been documented.

03:18:03 5 ARBITRATOR BAKER: Thank you for that.
 6 Help me with this. Because at different
 7 times during your answer you spoke in the first person
 8 singular, "I," and sometimes you said "we."
 9 So, I'm trying to get a handle on who
 03:18:17 10 actually made the decision. Was it you? Did you
 11 consult with others and the responsibility was always
 12 yours but you took opinions from others in your
 13 office? Help me with that.

14 THE WITNESS: Maybe it's just simply a
 03:18:37 15 question of language when expressing myself. The
 16 decisions on the files that the Prosecutor has
 17 normally are made by the person who is in charge of
 18 the case. In this specific case, the decision was
 19 mine.

03:18:53 20 However, it was a decision that came after
 21 this analysis and after interviewing these people and
 22 this for purposes of the decision. It was not a

03:19:11 1 decision related to the positive or negative opinion
 2 of my bosses. At that time it was simply a decision
 3 that I took.

4 Now, in this case there's only one event
 03:19:20 5 where I did ask for their opinion, and it had to do
 6 with the rule of Article 336, the ten-day rule. We
 7 discussed this in our office.

8 As for the rest, as for the other items, it
 9 was something in which I took the decision.

03:19:44 10 ARBITRATOR BAKER: Thank you for that. Now,
 11 help me understand the next phase of this.

12 Once you decided, in weighing these
 13 conflicting reports, to go forward, as I understand
 14 the next step in the procedure, there is what I would
 03:19:55 15 think of as a preliminary hearing or there is a review
 16 by a judicial member to determine whether there's good
 17 cause to go forward or not. Is that correct?

18 THE WITNESS: Correct. That is correct.
 19 When the prosecutor brings a charge, this file is then
 03:20:22 20 transferred to a criminal court with territorial
 21 jurisdiction relating--for the site on which these
 22 charges are based.

03:20:34 1 And as I said a moment ago, the prosecutor's
 2 office where I work has files for the whole country.
 3 In this case when the charge was brought, there's an
 4 indication of where the events happened. And then
 03:20:47 5 depending on the administrative distribution of the
 6 country, this would come--go to the Criminal Court of
 7 Aguirre in Parrita. Today it's called Quepos in
 8 Parrita.

9 This judge at this intermediary stage,
 03:21:01 10 that's what he's called, because there's
 11 investigator--investigative stage. So, there's a
 12 judge for the preliminary stage for certain events,
 13 such as the requests for preventing imprisonment,
 14 injunctions, et cetera.

03:21:13 15 And once the charge is brought, then you go
 16 to the intermediate stage. And then you have hearing,
 17 which is called a preliminary hearing. At that
 18 preliminary hearing, there is a litigation--well,
 19 first of all, you have the possibility of finding
 03:21:27 20 alternate measures. You open space for negotiating or
 21 for settlement for crimes where settlements apply on
 22 the basis of certain preestablished rules according to

03:21:40 1 our criminal code. And then depending if there is a
 2 criminal history for the defendant, if it is
 3 considered a misdemeanor or felony.

4 But in any case, a space opens there to
 03:21:55 5 settle. And if no settlement is made because there's
 6 no agreement between the parties or because the
 7 defendant is not interested in it, then you have the
 8 preliminary hearing.

9 That is simply a litigation where the public
 03:22:07 10 prosecutor's office and the attorney general's office
 11 explain their charges and their accusations. They
 12 explain to the judge what is the evidence they have
 13 for the acts they are speaking about. They explain to
 14 the judge what is the legal definition.

03:22:21 15 And then the defense has the ability to give
 16 the judge the information they have on their theory of
 17 the case, what are the negative--what is the negative
 18 evidence, and then the judge of this intermediary
 19 stage makes a decision and decides if it is likely
 03:22:41 20 that this affair could go up to a higher level.

21 And then we would go to the subsequent
 22 stage. I don't know if you are interested in my

03:22:52 1 explaining it or not.
 2 ARBITRATOR BAKER: In a minute. But I want
 3 to make sure I have the intermediate stage correct.
 4 So, as I understand what you've just said,
 03:23:04 5 in the intermediate phase, the accused has the right
 6 to be present with counsel and has the right to see
 7 the items in the prosecutor's file and to listen to
 8 the prosecutor and the attorney general, if they're
 9 also making an appearance, describe the case and why
 03:23:25 10 the public prosecutor and/or the attorney general
 11 believe that they can meet the elements of the causes
 12 of action that are set forth in the petition or
 13 whatever you call the criminal complaint. Is that
 14 right?
 03:23:42 15 THE WITNESS: Yes. You have understood
 16 perfectly well. That is the way it works.
 17 ARBITRATOR BAKER: Okay. And so, once that
 18 decision is made, is--does that intermediate judge
 19 render any form of a written decision or a
 03:23:55 20 recommendation, or does he just simply say "go on" or
 21 "don't go on"?
 22 THE WITNESS: Well, both possibilities are

03:24:07 1 there. Costa Rica for a few years already has been
 2 promoting what we're doing here.
 3 So, there are offices where hearings are
 4 verbal and are recorded, the way we're doing it here
 03:24:28 5 where it's verbal. And so, all discussions there are
 6 recorded by audio; whereas, in the intermediate stage,
 7 normally it is--yes, normally it's only recorded by
 8 audio, not video.
 9 So, all discussions, all arguments are oral.
 03:24:42 10 And the judge's resolution--if it is a resolution on a
 11 relatively simple case, he normally gives the decision
 12 verbally, and then a kind of minutes are drafted
 13 where--where they indicate the place and the parties
 14 simply with a few lines.
 03:25:02 15 Because everything that was discussed there
 16 and was resolved there is backed up by audio
 17 recording. And this is in order to have something in
 18 the files and not only the audio records.
 19 Now, when the case is more complex, judges
 03:25:22 20 defer the resolution. They don't give it right away.
 21 They only notify them--to the parties later. And in
 22 that case, the resolution, if I remember--or in this

03:25:33 1 case, if I remember correctly, this decision of the
 2 intermediate stage was given in writing where they
 3 decided to open this up to a trial.
 4 This is if I remember correctly. But you
 03:25:44 5 could--you may be--you could possibly review the file.
 6 ARBITRATOR BAKER: So, the intermediate
 7 judge, does he actually go through the same process
 8 that you yourself went through? In other words, does
 9 he listen to and read reports that came to different
 03:26:01 10 conclusions on whether or not there were wetlands on
 11 this property before deciding to make his decision?
 12 I'm trying to get a feel for this. Is this a
 13 procedure that lasts an hour? Is this a procedure
 14 that lasts two days? I really just don't know.
 03:26:19 15 So, can you help me with that?
 16 THE WITNESS: Yes. In the hearings--in the
 17 preliminary hearing--this is what they're called,
 18 preliminary hearings--at present we have the
 19 principal--the verbal principal, the oral principle
 03:26:38 20 where the judges require that the parties make oral
 21 substantive statements. So, each one of the people
 22 who take the floor has to explain to the judge what is

03:26:48 1 the evidence, what are the considerations they've
 2 taken into account in order to reach a conclusion.
 3 So, in the case of the prosecutor's office,
 4 if it's there, it's because the charge was fraud, and
 03:27:00 5 it is asking that this be brought to trial. And in
 6 the case of the defense, they also have the
 7 opportunity to submit to the judge substantive
 8 information where they normally reviewed. Well,
 9 normally there's a difference of opinion. Obviously,
 03:27:15 10 a prosecutor wants to bring this to trial when there's
 11 a charge, and the defendant wants to file to dismiss
 12 this.
 13 So, that is the time when the defense
 14 attorney must submit all his arguments to contradict
 03:27:32 15 what the Prosecutor's Office is saying so that the
 16 judge, if he has any doubts, can refer to the
 17 documents and do the review and exam. It is an
 18 obligation of the parties to give the judge
 19 substantive information in the preliminary hearing so
 03:27:47 20 that once that information is provided, the judge can
 21 make the decision.
 22 ARBITRATOR BAKER: Help me with this. In

03:27:58 1 the examination from Mr. Burne earlier today, he asked
2 you a series of questions that were designed to show
3 that intent to commit a crime was an essential element
4 of the offense for which Mr. Aven was charged.

03:28:17 5 Do you agree with that proposition that
6 intent is a fundamental requirement that the
7 prosecution must show in order to convict someone of
8 an environmental crime requiring imprisonment? Do I
9 have that correct or incorrect?

03:28:42 10 THE WITNESS: Most of the crimes under Costa
11 Rica's criminal code are crimes that can be committed
12 only as intentional crimes. In the environmental
13 area, there's only one crime that can be committed in
14 that way. And that is because there's already a

03:29:02 15 written provision whereby and expressly it states that
16 it can be done intentionally. It's called intentional
17 forest fires. Those that are not considered or set
18 expressed--expressly--we understand that it is
19 only--in other words, in other cases it is not
03:29:27 20 considered that it is done intentionally.

21 ARBITRATOR BAKER: Okay.

22 INTERPRETER: If I--if the interpreter

03:29:33 1 understood correctly.

2 ARBITRATOR BAKER: Okay. So, I want to make
3 sure that between your answer and the interpretation
4 and my unfamiliarity with the subject that I've got
03:29:43 5 this right. So, I want to go back through it one more
6 time.

7 Do I understand your testimony to be that of
8 the 110 environmental criminal statutes that you told
9 me about before lunch, that only one of those requires
03:29:59 10 the prosecution to prove intent in order to justify a
11 penal sentence? Is that--do I have that right? And
12 that's intentionally setting a forest fire?

13 COURT REPORTER: Interpreter--

14 THE WITNESS: No. It's quite the contrary,
03:30:27 15 actually.

16 ARBITRATOR BAKER: I think we had a little
17 interpretation--so I deliberately asked you in this
18 question the other way, provocatively. So, why don't
19 we just start over and we'll go from there, number 2.

03:30:41 20 Please continue. You were about to tell me
21 how my question had it backwards.

22 THE WITNESS: Yes. Environmental

03:30:53 1 legislation only has one crime where someone can be
2 culpable. And the other 110--if it's not 110, it's
3 close. Let's say it's 110.

4 Well, 109. Well, you could only file
03:31:18 5 charges if there has been criminal intent. And then
6 there's one which is culpable setting of forest
7 fire--in other words, you were negligent and you set a
8 fire, but that is a crime. So, it's just--to lay it
9 out for you in very simple terms.

03:31:41 10 ARBITRATOR BAKER: So, for the specifics of
11 my understanding in this case, the prosecution at its
12 trial was going to have to prove that Mr. Aven
13 intentionally destroyed a wetland, is that correct, in
14 order to support a conviction?

03:32:07 15 THE WITNESS: That is correct, at least for
16 eventual intentionality, which is a kind of criminal
17 intent.

18 ARBITRATOR BAKER: Let me switch gears.
19 I'll come back to this in a minute, but let me switch
03:32:28 20 gears.

21 On the--you were asked some questions about
22 the INTERPOL Red Flag Notice. Was that a decision

03:32:34 1 that you made to report Mr. Aven to INTERPOL by
2 yourself, or was that a decision where you consulted
3 with others in your department?

4 THE WITNESS: Absolutely not. That does not
03:32:58 5 depend on the prosecutor, this decision.

6 And in this specific case, it was not--it
7 didn't depend on me. When we began the trial and
8 Mr. Damjanac and Mr. Aven were called upon to come, we
9 were told that they would not appear and that he had
03:33:20 10 come to the United States.

11 At that point the only decision that the
12 prosecutor could make was to request that the judge of
13 the court enforce a provision in the criminal code,
14 which is called default. And that's when someone does
03:33:45 15 not--or cannot be located at their domicile, and so we
16 asked that the defendant be declared in default for
17 having gone to another country and evading justice.

18 So, as a result of that request to declare
19 him in default, then the international arrest warrant
03:34:11 20 was issued so that the person who is a fugitive from
21 the country can be captured for purposes of
22 extradition. And that's the only thing that

03:34:22 1 specifically--which depended on me.
 2 Now, based thereon, there was a resolution
 3 that was issued by an independent judge, a female
 4 judge in this case, which--in which she actually
 03:34:40 5 decided to declare him in default and then issue this
 6 international arrest warrant. And then there is a
 7 whole administrative paperwork trail that went on to
 8 inform INTERPOL authorities about the need to have
 9 this person detained at some point.
 03:35:04 10 But the office where I work does not
 11 intervene in this. Now my participation in this
 12 regard with regard to the arrest warrant was to
 13 request that the judge do this. She made a decision.
 14 And we have an office called "ohwatee" (phonetic), and
 03:35:22 15 this specialized office in these kinds of matters
 16 begins to do translations into English. They
 17 communicate with the corresponding authorities. And
 18 thereafter, INTERPOL decides the kind of alert that
 19 would be issued against the person.
 03:35:45 20 So, I understand this is an INTERPOL
 21 decision which has its headquarters in Costa Rica--a
 22 police organization with headquarters in Costa Rica.

03:35:57 1 ARBITRATOR BAKER: Thank you very much for
 2 that. That's helpful. I've had more than several
 3 occasions to deal with INTERPOL in my career for
 4 clients, so I wanted to make sure that I understood
 03:36:10 5 how the system worked in Costa Rica.
 6 So, my understanding is that when you filed
 7 your motion for default, it was assigned to a
 8 different judge than the original trial judge; right?
 9 THE WITNESS: Yes. That resolution was
 03:36:36 10 issued by a judge that actually heard the case against
 11 Mr. Damjanac. In Quepos there's only one trial judge,
 12 and she decided on that. And then she issued a
 13 judgment in the case against Mr. Damjanac, which was
 14 then appealed by the prosecutor's office and is still
 03:37:02 15 pending trial.
 16 ARBITRATOR BAKER: And then do I understand
 17 the next phase of this is that once the judge grants
 18 the motion for default, the papers are then sent as a
 19 matter of course by the judge to someone in the
 03:37:18 20 ministry of justice or at the attorney general's
 21 office for further processing?
 22 What's the next stage of the--I know it's

03:37:26 1 not your office. But I'm just trying to figure out
 2 how many independent layers happened in making this
 3 decision.
 4 THE WITNESS: No, sir. I don't have
 03:37:47 5 specific knowledge about what the offices are that
 6 actually intervene.
 7 I understand that the only thing they do
 8 when the initial resolution has been issued, they look
 9 at the conditions of the resolution, they do
 03:38:01 10 translations, and they give them to the pertinent
 11 offices. But that's not within my ambit, so I really
 12 don't know in detail what the procedure would be.
 13 ARBITRATOR BAKER: In all the environmental
 14 cases that you had told me about before the lunch
 03:38:18 15 break, have you ever had another one where INTERPOL
 16 became involved?
 17 THE WITNESS: No. There have been no others
 18 in which I have been involved in which we had to ask
 19 for an international arrest warrant because he left
 03:38:45 20 the country.
 21 ARBITRATOR BAKER: You've had an awful lot
 22 of time to think about this, as has everybody that's

03:39:01 1 been involved in these proceedings. Is there
 2 anything, as you sit here with the benefit of
 3 hindsight today, that you would have done differently
 4 in the investigation for the first trial against
 03:39:15 5 Mr. Aven? Or would you have done it exactly the same
 6 if you had to do it all over again.
 7 THE WITNESS: No, not at all. I am
 8 convinced that what was done in these proceedings was
 9 in strict compliance with Costa Rican law; that there
 03:39:50 10 was no arbitrary actions on my part with regard to
 11 defendant; his guarantees and rights were respected;
 12 and that he was entitled to a lawyer and exercised
 13 that right at every time.
 14 I do not--I'm not--I--my conscience is
 03:40:11 15 clear. I'm at peace with that, and I do regret a
 16 thing.
 17 ARBITRATOR BAKER: Thank you for your
 18 testimony, Mr. Martínez. I appreciate.
 19 Thank you, Chairman.
 03:40:23 20 PRESIDENT SIQUEIROS: Thank you, Mr. Baker.
 21 I have a question, Mr. Martínez, which I'm
 22 going to express in Spanish.

03:40:39 1 Mr. Martínez, you've been asked the
2 application of the rule, which I think is known as
3 Rule 336. It has to do with these ten business days
4 with respect to which if the proceedings have not been
03:41:17 5 completed, well, then a retrial must be requested.
6 Well, I've read your Witness Statement, the
7 First and the Second, the statement by Mr. Morera, the
8 arguments of the parties. And it's difficult for me
9 to understand that despite an agreement by the
03:41:46 10 parties, this cannot be presented to the judge.
11 In your statement, the decision to ask for a
12 retrial was due to the fact that the courts in Costa
13 Rica have decided that even if the parties reach an
14 agreement, the judgment can be nullified. And you
03:42:33 15 confirmed that to Mr. Burn.
16 But the Claimants have also set forth that
17 there are--there's case law that shows the contrary.
18 That the agreement between the parties must be
19 respected.
03:42:50 20 So, this is where there's a bit of
21 difficulty or a conflict between the positions of the
22 parties.

03:42:58 1 Could you explain to the members of the
2 Tribunal, how does this work? And what elements were
3 taken into consideration at that time? And if the
4 arguments of the claimant--well in this case, the
03:43:18 5 defense of Mr. Aven and Mr. Damjanac, the defense
6 counsel, were expressed at that time and what was--how
7 did your decision come about to request that retrial?
8 THE WITNESS: Article 336 of the Criminal
9 Procedural Code--
03:43:44 10 PRESIDENT SIQUEIROS: Can you please go
11 closer to the microphone.
12 THE WITNESS: This provision, what it
13 includes is called the principle of having a judge
14 present all phases of the trial. So, the court has
03:44:05 15 the information that was provided by witnesses, the
16 evidence that's been gathered throughout the trial or
17 the proceedings. And, of course, they have this right
18 here in their memory and then can make a decision.
19 And so, this is a principle, from my point
03:44:27 20 of view, and it's following a line of case law that I
21 researched. This is a principle that cannot be
22 decided on by the parties.

03:44:42 1 PRESIDENT SIQUEIROS: Just to clarify,
2 because even though we speak the same language, words
3 don't always mean the same thing. Are you saying that
4 the parties cannot waive this principle?
03:44:56 5 THE WITNESS: Correct. This right, as
6 stated in some case law, which is valid in our legal
7 system--and we're talking about appeals court--some
8 have said that this is an irrevocable right, that
9 the--their--they cannot have an agreement that flies
03:45:21 10 in the face of the provision.
11 So, I studied this legal point. And now one
12 of the parties--well, one of the judges, I believe,
13 asked me if there was a decision made after consulting
14 with my boss.
03:45:40 15 This was the only decision I made after
16 consulting my boss or bosses. I told them that there
17 was a proposal to continue with arguments, I don't
18 know, on the 12th or 14th day when the judge who had
19 fallen ill came back to his bench. And we discussed
03:46:03 20 it, and we looked at the different grounds and case
21 law.
22 And we saw that it was a situation in which

03:46:16 1 we could not accept the negotiation--not a negotiation
2 of that kind, because it was going to create an
3 absolute defect that any of the parties could actually
4 nullify the trial later.
03:46:33 5 And so, continue to invest public resources
6 in a trial which probably later would be nullified.
7 And we were afraid that, considering the evidence that
8 had been collected and had come out during arguments,
9 we--we thought that probably the prosecutor's office
03:47:03 10 would prevail in the trial. So, we didn't want there
11 to be the possibility--or there would be a very high
12 possibility that the party proposing the agreement
13 when the judgment was issued and if it was based on
14 our arguments. We didn't want the opposing party to
03:47:25 15 be able to go to the appeals court and then actually
16 invalidate the trial.
17 So, we decided we couldn't have this
18 continue on and wait for the judge, that--and that,
19 legally speaking, we could not substitute that judge
03:47:44 20 with another judge, which I believe was proposed also
21 by defense. So, we could not do this.
22 PRESIDENT SIQUEIROS: My point is that the

03:47:59 1 representatives of the Claimant have mentioned that
 2 there are precedents--in other words, case law--that is
 3 quite the contrary. That it is possible to have the
 4 parties waive this right.

03:48:19 5 THE WITNESS: Yes, there is another line of
 6 case law that does allow for the parties to reach an
 7 agreement of this kind. But this is a legal debate,
 8 and a decision had to be made.

9 And the most recent case law indicated that
 03:48:39 10 the nullification of a trial and based on this kind of
 11 negotiation--well, we have very limited resources.
 12 And especially the Office of Prosecutors where I work,
 13 we didn't want to spend resources on a trial that
 14 could be nullified later based on this and not even
 03:49:08 15 based on the merits. And so, we believe that based on
 16 this, this trial could be nullified.

17 PRESIDENT SIQUEIROS: And so, when you refer
 18 to the rule, you're talking about the latest case law?
 19 What rule are you referring to with this?

03:49:26 20 THE WITNESS: No. 336, that a trial cannot
 21 be suspended for more than ten days.

22 PRESIDENT SIQUEIROS: But you mentioned that

03:49:36 1 there was later or more recent case law.

2 THE WITNESS: Yes. The most recent case law
 3 indicates that the defect that comes about when you
 4 decide to break this Rule 336 by negotiating and
 03:49:53 5 coming to an agreement, at least what we researched at
 6 that time, indicates that the arguments can be
 7 invalidated on the own motion of an appeals court. In
 8 other words, the parties don't even have to intervene
 9 for this nullification, rather that the appeals court
 03:50:15 10 could do this of their own motion if this rule was
 11 broken.

12 PRESIDENT SIQUEIROS: But when you refer to
 13 the most recent case law, this was after the facts
 14 that were involved in this case occurred?

03:50:33 15 THE WITNESS: When I say "the most recent,"
 16 I mean at that time.

17 PRESIDENT SIQUEIROS: Do you remember if
 18 that case law analyzed or took into account the other
 19 case law that indicated that this agreement was all
 03:50:52 20 right?

21 THE WITNESS: No. These were judgments of
 22 appeals courts, different appeals courts. For some

03:51:03 1 years now, there is a court of cassation--a criminal
 2 court of cassation. And among other things, they must
 3 make decisions when there's contradictory case law.

4 But as far as I know, there has been no
 03:51:18 5 cases before the Third Chamber of Cassation to decide
 6 on which of these lines of jurisprudence need to be
 7 followed.

8 And so, what we have now are decisions from
 9 different appeals courts. But these appeals courts
 03:51:37 10 are lower courts as compared to this court of
 11 cassation that decides on definitive case law.

12 PRESIDENT SIQUEIROS: So, just for my own
 13 benefit, after the decision was made, if you can say,
 14 what has the predominant line of case law been with
 03:52:07 15 regard to this? Is the right to waive this
 16 recognized, or is the line maintained that
 17 nullification must occur of its own motion of the
 18 Court?

19 THE WITNESS: Well, there is a decision from
 03:52:28 20 2013. And in that decision, this follows the line
 21 that the waiving of the ten days leads to invalidation
 22 that could come down of the own motion of an appeals

03:52:46 1 court.

2 PRESIDENT SIQUEIROS: I have no further
 3 questions. Mr. Nikken? Mr. Baker?

4 Do the parties have any desire to make any
 03:52:57 5 examination of the witness in light of the questions
 6 of the Tribunal?

7 MR. BURN: I have one question arising out
 8 of one of Mr. Baker's questions.

9 PRESIDENT SIQUEIROS: Please go ahead,
 03:53:07 10 Mr. Burn.

11 RE-CROSS-EXAMINATION

12 BY MR. BURN:

13 Q. Mr. Martínez, this relates to the
 14 international arrest warrant and INTERPOL. Did you
 03:53:18 15 make the request for an international arrest warrant
 16 to be issued in this case?

17 A. Yes. When the motion was made for default
 18 against Mr. Aven in the trial that was to start in
 19 2014 as a--well, together with this, we also asked or
 03:53:49 20 requested that this international arrest warrant be
 21 issued; and indeed it was granted by the judge.

22 MR. BURN: Thank you.

03:54:00 1 MR. LEATHLEY: Nothing from us, sir. Only
2 just to note there were a couple of moments where you,
3 Mr. President, and the witness spoke very close to
4 each other, and the English transcript didn't quite
03:54:10 5 catch it. So we'll, obviously, police that when the
6 time comes on the translation.
7 Sorry. That wasn't meant to come across as
8 directions to the Chair.
9 PRESIDENT SIQUEIROS: I just hope you don't
03:54:20 10 request that we repeat our questions and answers.
11 I apologize to the Court Reporters and
12 Translators and Interpreters for that.
13 So, if there are no further questions from
14 Mr. Martínez Zúñiga, then, Mr. Martínez, you are
03:54:41 15 released as a witness.
16 Mr. Martínez Zúñiga, you are released as a
17 witness. Thank you very much.
18 Naturally, and as Dr. Nikken mentions, if
19 you would like, you could remain here. You couldn't
03:55:12 20 be here before. If you would like, of course, you can
21 remain here.
22 THE WITNESS: Thank you very much.

03:55:31 1 PRESIDENT SIQUEIROS: So, we have now the
2 first expert witness on--or we refer to as expert
3 witness of local law--no. I'm sorry.
4 It's Ms. Mónica Vargas.
03:55:51 5 MR. BURN: Thank you.
6 PRESIDENT SIQUEIROS: Right.
7 MR. BURN: Were you worried for a second?
8 Brain faint.
9 PRESIDENT SIQUEIROS: It's just that the
03:55:58 10 timing of this schedule does seem now a little bit--
11 ARBITRATOR BAKER: Optimistic?
12 PRESIDENT SIQUEIROS: Optimistic, yes,
13 indeed.
14 Yes, Ms. Mónica Vargas.
03:56:29 15 Yes. Let's take five minutes, a very, very
16 short break, for everyone to get papers in place and
17 allow anyone who wants to make a stop for coffee or
18 otherwise do so.
19 (Brief recess.)
04:06:34 20 PRESIDENT SIQUEIROS: Okay. Then we're
21 ready to proceed, and we will continue with the
22 Hearing and proceed with the examination of Ms. Mónica

04:06:46 1 Vargas.
2 MÓNICA VARGAS, RESPONDENT'S WITNESS, CALLED
3 PRESIDENT SIQUEIROS: Ms. Vargas, you will
4 be providing testimony in Spanish; is that correct?
04:07:05 5 THE WITNESS: Yes, sir.
6 PRESIDENT SIQUEIROS: I'd like to give you
7 some instructions. You probably have already been
8 advised by legal counsel for the Republic of Costa
9 Rica.
04:07:18 10 Nonetheless, in this case, there will be
11 some brief questions about your testimony, and then
12 the interrogation itself will be carried out by legal
13 counsel for--sorry, the first questions will be by
14 legal counsel of the--you will be examined by the
04:07:45 15 Respondent, and then you might, perhaps, get a second
16 round of questions from the legal counsel for the
17 Claimants.
18 Please reply to any question, and then
19 afterwards you can clarify. If there is any question
04:08:07 20 you have not understood, please feel free to seek
21 clarification before providing your answer.
22 For purposes of record, although you perhaps

04:08:17 1 were able to understand the question in English, or if
2 you think you clearly understood the question in
3 English, please wait till the Interpreters have had a
4 chance to translate it, because since there is
04:08:33 5 transcription carried out in the two languages, it is
6 very difficult for the Court Reporters to complete
7 their work if--and for the Interpreter to also catch
8 both languages unless each person has finished
9 speaking.
04:08:51 10 You will find a card on the right on your
11 table. There is a statement there which we ask you to
12 kindly read aloud for the record.
13 THE WITNESS: I solemnly declare upon my
14 honor and conscience that I will say that--that I
04:09:12 15 shall speak the truth, the whole truth, and nothing
16 but the truth.
17 MR. LEATHLEY: Good afternoon.
18 Thank you, Mr. President.
19 DIRECT EXAMINATION
04:09:20 20 BY MR. LEATHLEY:
21 Q. Good afternoon, Ms. Vargas. I wanted to
22 know if you had before you a copy of both of your

04:09:22 1 Statements. I believe you'll find them in Tabs 1 and
2 2.
3 Could you please confirm that these are
4 indeed your Statements?
04:09:55 5 A. Yes, indeed.
6 Q. Perhaps you'd like to make any correction,
7 or do you have any changes you'd like to make?
8 A. Yes. There is a correction I'd like to make
9 to Paragraph 11 of my first--of the first document.
04:10:14 10 Paragraph 11, talking about the date of the
11 complaint as 26 April 2009, but I'd like to correct
12 that. It's 27 April. This is, perhaps, a mistake of
13 the time that the date was indicated, because there
14 was an inspection on the Monday. So, I just wanted to
04:10:33 15 correct that. It should read "27 April."
16 Q. Are there any additional corrections?
17 A. No, that's all. Thank you very much.
18 Q. Very well. Thank you.
19 MR. LEATHLEY: I have no further questions.
04:10:49 20 MR. BURN: Thank you.
21 CROSS-EXAMINATION
22 BY MR. BURN:

04:10:51 1 Q. Ms. Vargas, good afternoon.
2 In fact, you have gone to a point in your
3 First Statement that I needed to pick up with you in
4 any event, because I think even with your correction,
04:11:01 5 that there remains what I think is an oversight on
6 your part in terms of the--what you set out in
7 Paragraph 11 and Paragraph 13. So, I just want to
8 check this with you to see if there is, indeed, an
9 oversight.
04:11:18 10 So, what you say in Paragraph 11 in the
11 amended text is: "In relation to this complaint dated
12 April 27, 2009, I performed an inspection in the
13 reported area."
14 And then if we drop down to Paragraph 13, we
04:11:34 15 can see that you say, "After the first visits to the
16 Las Olas Project area, I issued a report which gave an
17 account," and so on and so on. And that continues
18 over to the next page.
19 Now, the report to which you refer in
04:11:55 20 Paragraph 13 is behind Tab 5, I think. But I'd like
21 you to have a look at that and tell me if I'm right or
22 wrong.

04:12:14 1 A. That's correct.
2 Q. We see the date of 26 April 2009, in the top
3 left-hand corner.
4 So, that's what you refer to, and this is
04:12:27 5 the first reference in your Statement to any sort of
6 site visit and report; correct?
7 A. Correct.
8 Q. If you'd go back in the file by two tabs, to
9 Tab 3, you'll see here a document from various people,
04:13:02 10 it was signed at the bottom there, a series of
11 signatures on the bottom of the second page of the
12 document. So, it's not your document; this is from
13 some neighbors of the project.
14 But if you go to the first substantive
04:13:20 15 paragraph of the document, you can see, can't you,
16 that in the second sentence, there's a reference to
17 you having led a group of six or seven people
18 representing the Municipality. See that--that refers
19 to a site visit.
04:13:38 20 You see that? Yes?
21 A. Please, I'd like a moment to read it?
22 Q. Sure.

04:13:48 1 While you're doing that, just--if you'd also
2 read the line a little bit further down that starts,
3 "Todo el trabajo."
4 A. Uh-huh. What line is that?
04:14:26 5 Q. So, if you look--so, you read the first
6 sentence in the middle of the paragraph, the line that
7 starts "Todo el trabajo"? Do you see it a couple of
8 paragraphs down? Just have a quick read of that.
9 You have it?
04:14:56 10 A. Uh-huh.
11 Q. Ms. Vargas, just so, you know how the
12 process works, instead of responding "Uh-huh," it's
13 necessary to say "Yes" or "No" for the transcript.
14 So, just--just to assist.
04:15:09 15 Now, do you agree with the document, that
16 you, in fact, first visited the site in March of 2009;
17 or do you maintain what appears in Paragraphs 11 and
18 13 of your Statement, that you made your first site
19 visit in late April 2009?
04:15:35 20 A. As Government, local Government, we,
21 together with MINAE, when they sometimes have to have
22 an inspection, they ask us to accompany them. In this

04:15:46 1 case, that is what happened.
 2 Nonetheless, the environmental management
 3 department conducts its investigation in April, which
 4 is the date indicated.

04:16:00 5 So, perhaps the first time was just
 6 accompanying the group with MINAE.

7 Q. So, the distinction that you draw is between
 8 a more formal visit in April and you accompanying a
 9 delegation of others in March; is that right?

04:16:17 10 A. Yes, precisely.

11 Q. I think that explains the contradiction in
 12 the records, but I'm grateful for that.

13 Now, you inspected the property from the site
 14 boundary; that's correct, isn't it?

04:16:35 15 A. That's correct.

16 May I expand a little bit about the boundary
 17 here?

18 Q. Let's see where we go with the questions,
 19 and if you still have something to say, I'm sure that
 04:16:47 20 there will be a good opportunity. But if we could
 21 just follow the questions for a little bit, and so,
 22 you may find that you cover everything you need to.

04:16:57 1 You were able, weren't you, during those
 2 observations from the site boundary, from the road
 3 running alongside the site, to make the observations
 4 you needed to make; yes?

04:17:12 5 A. That's correct.

6 Q. And indeed, in your report at Tab 6, there
 7 are photographs--sorry, Tab 5, there are photographs.
 8 Which of these photographs did you take from the site
 9 boundary?

04:17:55 10 A. As the report indicates, these photographs
 11 were provided to us by the community. This is a
 12 report on an observation, and that's what it says
 13 here. What we were conducting was an observation, and
 14 the community are the ones who provided the
 04:18:16 15 photographs.

16 Now, when it comes to Figures 3, 4, and 5, I
 17 was on site.

18 Q. Thank you.

19 And in your Report, you ask the relevant
 04:18:35 20 authorities to conduct their own site inspections in
 21 order that they could determine whether or not there
 22 was a wetland on site; is that right?

04:18:47 1 A. Correct. The document was sent to SINAC.

2 Q. Because it wasn't your job to determine the
 3 question of whether or not a wetland existed; correct?
 4 A. Correct.

04:19:05 5 Q. Would I be correct in understanding that the
 6 26 April report was copied to the Mayor of Parrita?

7 A. Correct.

8 Q. And indeed, if we see right at the bottom of
 9 Page 3 of that report, relatively small text, the
 04:19:29 10 report is copied to Gerardo Acuña Calderón and Ovidio
 11 Céspedes Duran.

12 A. Correct.

13 Q. And you attach the photographic logbook to
 14 your report showing the alleged location of the
 04:19:52 15 wetland, and you say that this is--"As documentary
 16 proof of the enumerated facts, a photograph logbook is
 17 attached"--"is provided." Sorry.

18 Now, if we look at those photographs--

19 A. May I say something with regards to what you
 04:20:22 20 just said?

21 Q. Please do. Yeah.

22 PRESIDENT SIQUEIROS: I'll just say for the

04:20:31 1 record and then it'll be translated to you.

2 Only if there is a question that you answer
 3 and there is an immediate clarification, you may
 4 proceed to do so. Otherwise, as Mr. Burn has
 04:20:43 5 indicated, his line of questioning may bring out the
 6 further responses that he wants to make.

7 So, I think I think to defer to the line of
 8 questioning of Mr. Burn, you should wait to see
 9 whether his line of questioning would allow you to
 04:21:03 10 make the clarification.

11 BY MR. BURN:

12 Q. So, Ms. Vargas, just looking at those
 13 photographs at Page 3 of the Report under Tab 5, you
 14 indicated already that those were taken by a neighbor
 04:21:27 15 in 2007.

16 That's your understanding, isn't it?

17 A. Correct.

18 Q. Which neighbor?

19 A. That was Mr. Bucelato.

04:21:41 20 Q. And which month in 2007?

21 A. That's not indicated. When he provided the
 22 photographs, he just said that they were from 2007.

04:21:53 1 Q. So, you don't even know if they were from
2 2007.
3 A. That's what that person from the community
4 told us.
04:22:07 5 Q. And you don't know--you have no indication
6 as to where these--what these photographs are of. You
7 don't know which precise location these photographs
8 were taken from, do you?
9 A. What Mr. Bucelato said is that it comes from
04:22:33 10 the Las Olas property and that the photographs were
11 taken in 2007.
12 Q. Mr. Bucelato said.
13 And the third and fourth photographs there,
14 they are alleged to have been taken in 2009. Were
04:22:53 15 they taken by you?
16 A. They were taken by the community, but in my
17 presence.
18 Q. Right. And so, you can say categorically
19 that these are photographs taken from the Las Olas
04:23:09 20 site.
21 A. Yes, sir.
22 Q. And were those taken during the 26 April

04:23:16 1 2009 site visit, not the March visit?
2 A. In the April visit.
3 Q. And then if we look down at the fifth
4 photograph, you'll see the legend over on the
04:23:41 5 right-hand side, Figure 5, describes the photos having
6 been taken in March--on the 17th of March, 2009.
7 A. Figure 5 says that it's a photograph taken
8 on 17 March 2009, that's correct.
9 Q. Did you take that photographs?
04:24:07 10 A. Figure 5 was a photograph taken by the
11 community, as were the others.
12 Q. Right, but you have already confirmed that
13 you made this site visit in March, not a formal site
14 visit; you accompanied a delegation in March.
04:24:23 15 My question to you is: Did you see the
16 photograph being taken during that time; or were you
17 just handed a photograph and told, "This one was taken
18 on the 17th of March, 2009?" Which one was it?
19 A. I don't clearly recall this one in
04:24:54 20 particular. However, the inspections conducted were
21 only at those times.
22 If I wrote next to the photograph "17

04:25:11 1 March," because that is what we were specifying, it
2 was taken on 17 March.
3 Q. Okay. But you can't say from direct
4 knowledge, can you, that this photograph was taken on
04:25:24 5 17 March 2009?
6 A. This was in 2009.
7 When inspections are done--I was very clear
8 about the photograph, specifically this one. That
9 means that yes, it was taken on 17 March.
04:25:44 10 Q. But was it taken in your presence, or
11 because somebody gave it to you and said, "This was
12 taken on 17 March 2009?"
13 A. When inspections were carried out at Las
14 Olas, there are a number of photographs relating to
04:26:04 15 the project. So, we don't always use all of the
16 photographs to include them in the photographic log.
17 We only select some.
18 And this one, we only selected what it says
19 here, one from the 17 March. And it's specifically
04:26:24 20 the one that's here. Just as in the above, it
21 specifically indicates it's from 2007.
22 Q. Ms. Vargas, you gave perfectly good answers

04:26:34 1 with regard to the first four photographs. You
2 explained that you relied on Mr. Bucelato to
3 understand what the first two photographs meant, and
4 you explained that you were in the presence of the
04:26:41 5 people taking the photographs in respect to Figures 3
6 and 4.
7 With this one, I've asked you the question
8 twice already, and you've just not answered it. I'll
9 put it one more time. And just answer the question.
04:26:53 10 Listen to me--to my question, and answer it, please.
11 Was that fifth photograph taken in your
12 presence, or were you relying on somebody else telling
13 you that it was taken on the 17th of March, 2009?
14 A. In March, as we pointed out, an inspection
04:27:19 15 had been conducted jointly with MINAE. This
16 photograph very likely came from that date, with that
17 inspection.
18 As I said, lots of photographs are taken,
19 but we only select a few to include in--with the
04:27:34 20 report.
21 Q. Right. But the relevant words there are
22 "very likely," which means that you believe and

04:27:42 1 trusted that, but you can't know from your direct
2 knowledge. Equally, you can't know--you can only
3 think that it's very likely that this is a photograph
4 of the Las Olas site; correct?

04:27:54 5 A. Correct.
6 Q. Thank you.
7 Now, you made site visits sometime later,
8 and the dates in Paragraph 14 of your statement are 20
9 January 2010 and 21 May 2010.

04:28:1210 Now, again, you will have made those site
11 visits from the site boundary; correct?
12 So, you see there, subsequently on January
13 20, 2010, and May 21, 2010, you revisited the site.
14 A. Yes, correct.

04:28:4315 Q. You didn't take any photographs on this
16 occasion, did you?
17 A. Yeah, but if it's not in the reports, and
18 there's a photography log, then the photographs were
19 not taken.

04:29:2720 Q. Thank you.
21 And there's nothing in the documents what you
22 describe as "new claims" that there were works

04:29:34 1 being carried out on the site? There's no
2 documentation recording those new claims or new
3 complaints, is there?
4 A. By 20--21 May, an inspection was done
04:29:53 5 together with MINAE.
6 Q. You say here that you made those further
7 site visits in January and May 2010 following new
8 claims that there were works being carried out on the
9 site.

04:30:0810 My point to you is, you don't refer to any
11 documentation, there are no footnotes to documentation
12 received from neighbors, from anybody; so, there isn't
13 any documentation recording those specific complaints,
14 is there?

04:30:2515 A. Correct.
16 Q. So, you must have had conversations with the
17 people in question.
18 A. Correct.
19 Q. When did you have those conversations?

04:30:4220 A. It must have been at that time, in January
21 and May, precisely. The Department of Environmental
22 Management receives calls, and we also act accordingly

04:30:55 1 when we receive a complaint by phone.
2 Q. But you haven't produced any--or you--any
3 copies of notes of those conversations or e-mails
4 recording those conversations; there's no record
04:31:10 5 before us of those conversations, is there?
6 A. Correct.
7 Q. And we see in Paragraph 14 that you issue
8 various reports, one was sent to the construction
9 department, to the Municipality; another was sent to
04:31:2910 what you describe as the competent authorities to
11 conduct the respective inspection in order to
12 determine whether certain environmental laws were
13 being infringed; and then one to the patent department
14 for the Municipality regarding the existence of
04:31:4815 permits.
16 So, you set all of that out, and those
17 reports, we can see from your introductory words, were
18 issued on the 31st of May, 2010. But there's
19 nothing--nothing issued following your January site
04:32:1020 visit, was there?
21 A. Correct.
22 I didn't quite understand. What do you

04:32:26 1 mean, "nothing issued" regarding--
2 Q. So, we can see that at the end of May 2010,
3 after--ten days after the second site visit to which
4 you refer in Paragraph 14, you issue three reports to
04:32:41 5 relevant agencies. That's all understood.
6 But you also refer to having undertaken an
7 inspection on the 20th of January, 2010. My point to
8 you is: You did not do anything similar, you didn't
9 issue any reports to agencies such as those listed at
04:32:5810 A, B, and C; and based on your answer that no, you did
11 not, I ask why you did not.
12 A. In this case, the inspection was done
13 together with SINAC. So, SINAC is the one that
14 prepares that report.

04:33:1915 Q. Did you receive a copy of that report?
16 A. No, I did not receive a copy.
17 Q. If you'd turn to Volume 2 in the papers in
18 front of you to Tab 107.
19 This is the report referred to at your
04:33:4320 Paragraph 14(b)?
21 A. Correct.
22 Q. Correct?

04:33:56 1 A. Yes, correct. I've got it.
 2 Q. Now, if we go to the back of that document,
 3 we see some very bleached copies of five photographs.
 4 Those are the same photographs as are
 04:34:15 5 attached to the 26 April 2009 report; correct?
 6 A. Yes, correct.
 7 Q. So, the same photographs, despite the fact
 8 that you have recorded having undertaken two further
 9 site inspections in January in 2010. But did you not
 04:34:44 10 think that some new, some additional, some updated
 11 documentary proof of environmental infractions was
 12 going to be needed?
 13 A. I don't have a--or at that point, I did not
 14 have a camera in my department. There was one camera
 04:35:09 15 for three departments. So, there were limitations
 16 regarding the equipment in our department.
 17 Q. Okay. But regardless of the reason, there
 18 were no photographs that were taken.
 19 And if we look at the front of this report,
 04:35:28 20 you say that the observed area is characterized by
 21 land with soil that can be completely or partially
 22 flooded.

04:35:45 1 A. Is this in the conclusions or--where it says
 2 "Resultando" or where--
 3 Q. If you could just--you see in the first
 4 bullet point, Number 1, under "Resultando," you say,
 04:36:09 5 "The observed area is characterized by land with soil
 6 that can be completely or partially flooded." See
 7 that?
 8 Oh, sorry; I'm looking at the wrong part.
 9 It's not "Resultando," it's "Considerando De los
 04:36:33 10 Hechos." First bullet point.
 11 Do you see that?
 12 A. Uh-huh.
 13 Q. Sorry. "Yes" or "No"?
 14 A. Correct. Yes. Sorry.
 04:36:42 15 Q. That was your observation, wasn't it?
 16 A. Yes, correct.
 17 Q. And you must be talking about an area shown
 18 in one of the photographs that's attached to the
 19 report; correct?
 04:37:01 20 A. Correct, yes, to one of the areas that
 21 appears in the photograph.
 22 Q. The first two photographs, I would have

04:37:08 1 thought; is that right?
 2 A. No. In this case, we're not making
 3 reference to the photographs of 2007. What we're
 4 indicating is that in the area observed, this is land
 04:37:22 5 with partial or total floods. We're not making
 6 reference to the photographs of 2007, but just to
 7 observations.
 8 Q. Right.
 9 Now, if I take you back, just for the
 04:37:32 10 clearer versions of those photographs, if you just go
 11 back--keep that document open; but if you just go back
 12 to Tab 5, just for the clearer versions. We've
 13 already confirmed these are the same photographs.
 14 You say that your observation about the
 04:37:52 15 flooding of land doesn't relate to Figures 1 and 2.
 16 Which of Figures 3, 4, and 5 does it relate to?
 17 A. In this case, these are observations that
 18 were made through time. So, the idea of adding the
 19 photographs is to sort of be aware of the site. We
 04:38:27 20 are saying--talking about that the observed site is
 21 characterized by this kind of soil, but it doesn't
 22 refer to any kind of photograph.

04:38:33 1 Q. Right. So, if we're to understand the
 2 observations that are recorded in your 31st May 2010
 3 report, we should ignore what's in the photos. That's
 4 something else; is that right?
 04:38:54 5 A. It is the photography log.
 6 Q. But it's not a photography log for the
 7 observation that I've taken you to that the observed
 8 area is characterized by land with soil that can be
 9 completely or partially flooded.
 04:39:05 10 You don't have a photograph to prove that
 11 point or confirm that point in any way; correct?
 12 A. Precisely, because no mention is made of a
 13 photography. When a mention is made of the
 14 photograph, we indicate parenthetically, "Go to
 04:39:23 15 Figure X or Figure Y."
 16 Q. Other than your statement that the observed
 17 area is characterized by land with soil that can be
 18 completely or partially flooded, there's nothing else
 19 in these documents that we've been examining to bear
 04:39:43 20 that point out, is there? There's nothing to prove
 21 that there is often flooding in these areas, is there?
 22 A. Correct, which is why we asked for

04:39:56 1 cooperation from SINAC.
 2 Q. Okay. Just going back to your May 2010
 3 report, the second observation, "Secundo," just near
 4 the bottom of the page--you see that? You say that
 04:40:20 5 "During the rainy season, the land becomes a lake, and
 6 typical wetlands can be observed there."
 7 Do you see that?
 8 A. Correct.
 9 Q. That's not your observation, is it?
 04:40:38 10 A. Correct. It indicates that according what
 11 the neighbors of the area say.
 12 Q. Right. And when you included the reference
 13 to the neighbors' assertion, did you have in mind that
 14 the term "wetlands" has a very specific and technical
 04:40:57 15 meaning?
 16 A. This is an observation made by the neighbors
 17 of the community, which is why we ask for SINAC's
 18 assistance.
 19 Q. Right. But based on what they told you, you
 04:41:23 20 would still understand that there was specific
 21 scientific criteria that needed to be satisfied before
 22 a wetland could actually be established; right?

04:41:37 1 A. Precisely. That is why we asked for SINAC's
 2 assistance.
 3 Q. Okay. Going back to the reports at the
 4 third observation there, you see that it states that
 04:41:54 5 soil compacting and the cutting and burning of trees
 6 at different times of year and exclusively at weekends
 7 was observed on the site. See that?
 8 A. Correct.
 9 Q. And did you observe that on the site?
 04:42:14 10 A. Correct.
 11 Q. You observed that on the site?
 12 A. Right.
 13 Q. Can you show me where in your Witness
 14 Statement you say that?
 04:42:29 15 A. Reference is made to Document 095.
 16 Q. If you go to your Witness Statement, there's
 17 no mention there of you making any observation of soil
 18 compacting and cutting and burning of trees, is there?
 19 A. Correct. That is why an indication is made
 04:43:10 20 to the report, a reference is made to the report.
 21 Q. Right. Just to be clear, are you trying to
 22 say now that you, yourself, saw evidence of cutting of

04:43:23 1 trees, of burning on-site, and so on? Is that your
 2 evidence?
 3 A. Correct.
 4 Q. When did you observe that?
 04:43:39 5 A. A number of inspections were done on-site,
 6 and that's what we observed.
 7 Q. Where is that documented?
 8 A. In the reports. That's where we place it in
 9 order to be able to request help from SINAC, and that
 04:43:58 10 SINAC then indicate--indicate the situation.
 11 Q. If you look at the third sentence of the
 12 Paragraph 14 of your Witness Statement, what you
 13 actually say is that "According to what the neighbors
 14 told me, this practice took place during the weekends,
 04:44:34 15 given that public officials we cannot say exactly when
 16 the practice was occurred."
 17 So, at least in part, you were relying on
 18 what you were told; right?
 19 A. Correct. I also received phone calls during
 04:44:50 20 the weekend from the community.
 21 Q. Now, can you turn to Tab 109.
 22 You will see a letter--this is document C-69

04:45:11 1 on the record.
 2 You'll see a request sent to the TAA to
 3 inspect the site; right?
 4 A. Correct. A request for investigation is
 04:45:26 5 made.
 6 Q. And you say in this letter that the
 7 Municipality can't--refused to give permits requested
 8 in the future because you have no valid official
 9 document to make the case for the protection of a
 04:45:39 10 wetland area; is that fair?
 11 A. Correct.
 12 Q. Now, presumably, that would also apply to
 13 the cancellation of existing construction permits; is
 14 that right?
 04:46:07 15 A. I don't quite understand your question.
 16 Q. So, there would need to be, you say, in
 17 respect to the idea of new construction permits to be
 18 issued, that there would need to be valid--a valid
 19 basis on which to refuse a grant. Okay? So, you've
 04:46:24 20 confirmed that.
 21 My proposition to you is that there must
 22 also be a valid basis for existing permits to be

04:46:33 1 withdrawn. One follows from the other, doesn't it?
 2 A. Of course, yes.
 3 Q. Right. And this--this request to the TAA,
 4 we can see, is dated the 15th of June 2010. So, in
 04:46:51 5 terms of the timeline, this is about 14 or 15 months
 6 since the original complaint; right?
 7 A. Correct.
 8 Q. And you were doing everything you could to
 9 resolve the situation; right?
 04:47:07 10 A. Correct.
 11 Q. But you couldn't recommend refusal of
 12 construction permits because it wouldn't be proper
 13 without grounds, without an official possibility, at
 14 least, suggesting the possibility of wetlands; right?
 04:47:28 15 A. Correct.
 16 Q. Because as of June 2010, all you had was a
 17 couple of complaints from a few neighbors and some
 18 photographs that they'd provided. That's all you had
 19 by this point; correct?
 04:47:47 20 A. I don't quite remember if there were at that
 21 point any other institutions involved in this, but
 22 that's right; if there was no document that indicated

04:47:59 1 that the permits could not be refused, then the
 2 proceeding of it would continue.
 3 Q. And--of course. I mean, the point you're
 4 making here is that you can't just take a neighbor's
 04:48:13 5 complaint and do anything with that in terms of
 6 refusing permits and so on. There's going to be
 7 something much more that's needed, no matter how many
 8 times those neighbors might complain; right?
 9 A. Correct. It is important to do an
 04:48:32 10 investigation.
 11 Q. Thank you.
 12 Now, can we just go to Paragraph 27 of your
 13 First Statement?
 14 A. Yes, right.
 04:48:49 15 Q. This section of your Statement refers to a
 16 meeting of the 7th of March 2011. And you describe a
 17 meeting with Mr. Bucelato, a couple of his associates,
 18 Mr. Carmiol and Mr. Jiménez, as well as two employees,
 19 Mr. Nelson Masis Campos and Mr. Marvin Mora
 04:49:12 20 Chinchilla, yes?
 21 Do you see that's in the text of
 22 Paragraph 27; correct?

04:49:29 1 A. Yes, correct, I see it.
 2 Q. And Bucelato, Jiménez, and Carmiol were
 3 asking for the suspension of existing construction
 4 permits. Right?
 04:49:43 5 A. I don't know exactly what Mr. Bucelato was
 6 asking.
 7 Here, they mention--we mention that meeting;
 8 but if you see the environmental department was not
 9 present. He gave the document to Mr. Marvin Mora and
 04:50:03 10 Nelson Masis from the Municipality.
 11 Q. Right. But as you say, Bucelato, Jiménez,
 12 and Carmiol appeared at the offices of the Muni,
 13 appended documentation and requested, pursuant to such
 14 documentation, the suspension of the permits granted
 04:50:21 15 to the Las Olas Project.
 16 A. Correct.
 17 Q. And at this point in time, Mr. Mora was head
 18 of the Maritime Terrestrial Zone department; correct?
 19 A. Correct.
 04:50:37 20 Q. Thank you.
 21 Mr. Masis was president of the Municipal
 22 Council; right?

04:50:45 1 A. Correct.
 2 Q. But I think as you more or less confirmed
 3 just a moment ago, you weren't at this meeting, were
 4 you?
 04:50:52 5 A. Yes, that is the case, correct.
 6 Q. And indeed, nobody who attended this meeting
 7 has been put forward as a witness in these
 8 proceedings.
 9 Now, if we just go over to Paragraph 28 of
 04:51:09 10 your statement, we see that the next day, you say, you
 11 confirm, that the Municipal Council agreed to ask the
 12 mayor to send instructions to the Department of Urban
 13 and Social Development--I think it's INVU--in order to
 14 suspend the permits granted until the complaints were
 04:51:32 15 clarified; right?
 16 A. Correct.
 17 Q. My colleague is correct; it's not in
 18 the--but you set out the text proper in your
 19 Statement.
 04:51:55 20 Now, the complaints that you refer to here
 21 must be the complaints that are mentioned in the
 22 previous paragraph.

04:52:09 1 So, the complaints of Bucelato, Jiménez, and
2 Carmiol; correct?

3 A. In this case, as I indicated, I was not at
4 that meeting. But what was provided at that meeting,
04:52:30 5 it was ACOPAC-CP-03-11, as is indicated here.

6 Q. Right. But I'm just trying to get what
7 you're saying in your Statement. So, this is what
8 you're saying.

9 And in Paragraph 28, you refer to the need
04:52:48 10 to suspend permits until--that have been granted until
11 the complaints are clarified. In English, those are
12 the precise words. And, I'm assuming, in Spanish it's
13 something very close to it.

14 My point is a very small one. When you talk
04:53:03 15 about "the complaints" in Paragraph 28, you must be
16 referring to the content of the discussion that you've
17 also referred to in Paragraph 27 that happened the
18 previous day involving members of the Muni and
19 involving Bucelato, Jiménez, and Carmiol. That's what
04:53:24 20 you meant when you referred to "the complaints";
21 right?

22 A. Yes, that is right.

04:53:30 1 Q. Thank you.

2 Now, if you could just turn to Tab 27 in the
3 folder in front of you. This is the Muni's Decision
4 and it's document R-75. And we can see that the
04:54:01 5 reference number for the Decision is given--I'm
6 looking for it now, actually. Yes, I think there's
7 some text missing, actually.

8 If you look just a little bit down just
9 underlined, it says, "C-03-2362-2011." I think it
04:54:29 10 probably in the original said "AC." But in any event,
11 you can see that there's a reference number there;
12 right?

13 A. No. I didn't quite understand what
14 reference number you're speaking of.

04:54:45 15 Q. Just look where I'm pointing on the page.
16 So, just there.

17 A. I see. C-03-2362-2011.

18 Q. And I think in the copying, something's just
19 been clipped and one of the letters is missing, but I
04:55:04 20 don't think anything happens on that.

21 But underneath that, we have the text of the
22 Decision saying that all existing permits should be

04:55:10 1 suspended and no further permits are granted to the
2 Las Olas Project; correct?

3 A. That's what it indicates.

4 Q. So, what we see is as of the 8th of March
04:55:26 5 2011, the decision has been taken to stop, to paralyze
6 all work on the project; correct?

7 A. Yes, that is what the agreement of the
8 Municipal Council indicated.

9 Q. And you would presumably characterize that
04:55:46 10 measure as being a precautionary measure, a measure to
11 prevent further environmental damage; is that correct?

12 A. Yes. Very probably, because I was
13 not--however, I was not at that meeting; I'm not a
14 member of the Municipal Council. I understand, and by
04:56:06 15 looking at this, that the Decision was taken on the
16 basis of the principle of not violating environment.

17 Q. Right. But these issues had already been
18 addressed, hadn't they, by SETENA; you're aware of
19 that?

04:56:22 20 A. In this case, as I indicated, I do not make
21 the decision. I am not a member of the Municipal
22 Council, nor was I a party to the meeting, nor to the

04:56:34 1 situation that was happening here.

2 Q. Absolutely. And I would not dream of
3 suggesting that you had taken any decision. It's
4 unfortunate that the Respondent has not put forward
04:56:47 5 various officials who were more actively involved,
6 more closely involved, in the decision-making process.
7 I'm, therefore, stuck with putting these points to
8 you.

9 I understand your involvement is limited;
04:57:00 10 but you do refer to matters that lead into this in
11 your Witness Statement. So, I need to put these
12 points to you. You can make known the limits of your
13 knowledge, and that's completely fair.

14 What I want to say to you is the complaints
04:57:17 15 to which you refer from Paragraph 28 and which leads,
16 as we see, to this Stop Order on the 8th of March
17 2011, the day after the meeting between the Muni and
18 Bucelato and co, that complaint had already been
19 addressed by SETENA. And I can take you to a document
04:57:42 20 to show you the fact.

21 And if you want to turn to it, it's Tab 116.
22 But this is a resolution from the previous year.

04:57:53 1 Resolution 2086-2010, and they set out there--the
2 Tribunal is very familiar with this document. They
3 have seen it several times already.
4 But it clearly shows that SETENA, the
04:58:09 5 department that issues Environmental Viability
6 permits, has considered the complaints of Bucelato and
7 cowetlands and so on, and has decided, no, Bucelato,
8 you're completely wrong, that's the end of your
9 complaint. And yet, we see based on a single meeting
04:58:29 10 on the 7th of March 2011, the Muni issuing a Stop
11 Order.
12 Now, I assume you can't comment on the
13 SETENA Decision because you're not at SETENA; it's not
14 within your competence.
04:58:48 15 Does it seem strange to you that the matter
16 has been dealt with once in 2010 by one agency and is
17 brought back from the grave the following year by the
18 same people, to the Muni; and based on one meeting, it
19 results in a Stop Order?
04:59:08 20 Does that seem strange to you?
21 A. I really don't know if the Municipal Council
22 was aware of SETENA's Resolution, and they make

04:59:20 1 reference to the SINAC's document, where
2 accommodations are requested, and they base themselves
3 on the principle of (in Spanish) that is, violation of
4 nature, and that's what they say in that decision.
04:59:52 5 Q. Now, back in July--well, sorry.
6 Back in September 2010, you had--sorry.
7 Now I'm losing my train. Just let me start
8 again.
9 On the 16th of July 2010, SINAC had issued a
05:00:12 10 report confirming there were no wetlands. Are you
11 aware of that fact?
12 A. Which report are you referring to on the
13 16th of July?
14 Q. If you turn to Tab 113, you'll see a copy of
05:00:33 15 the report. And then if you look at Tab 114, you'll
16 see your letter of 29 August 2010 in which you
17 recommended to the mayor and to the TAA that once the
18 EV had been delivered, construction permits should be
19 granted; right?
05:01:07 20 A. Correct.
21 Q. So the one you're looking at, 114, is the
22 letter to the TAA--for the record, I'm not sure we

05:01:17 1 need to go there, there's another letter from you the
2 same date addressed to the Muni, and that's at Tab 18
3 in the file. And as I say, that's pretty much the
4 same--it's a letter saying more or less the same
05:01:35 5 thing.
6 And so, my question to you is, you were
7 saying at the end of August 2010, that--to the TAA and
8 to the Muni, go ahead and issue the construction
9 permits. So, what had changed by March 2011 to
05:01:53 10 justify a view--your view, that there could be
11 wetlands on the site? What had changed?
12 A. After the request for the investigation by
13 SINAC 27 August, we received documentation from the
14 biologist Manfredi, where he says there is no wetland.
05:02:36 15 So, the Department of Environmental Management noted
16 that, and we indicate that to the TAA and to the mayor
17 that there--this is the situation.
18 Now, you sent me back to--or now are
19 indicating 2011, just to be able to follow the
05:03:02 20 timeline. What date did you indicate?
21 Q. March 2011, because we see the--you refer to
22 the 7 March meeting, you refer to the 8 March Stop

05:03:14 1 Order. I've taken you to the documents relating to
2 that. So, something's changed between the end of
3 August, when you say should go ahead and issue permits
4 once the EV is in place; a few months later, you're
05:03:29 5 saying stop, we need to--we need to look, because
6 there's evidence of wetlands.
7 What's changed?
8 A. Can we refer to the SINAC document, which
9 was used?
05:04:03 10 If you could find it for me, I would
11 appreciate it.
12 Q. Okay. It's very close to the documents
13 you've already looked at. So, if you just go to the
14 Tab 117, I think you'll find what you intended.
05:04:44 15 And for the--well, at least for Mr. Baker,
16 there's an English version just behind Tab 118.
17 Is this the document you had in mind?
18 A. Correct.
19 Q. But if you'll just go back to the Muni's
05:05:25 20 Decision--so, if you just turn back to Tab 27, if you
21 remember this document, 8th of March 2011, what we see
22 in the text of the Decision is the reference to

05:06:44 1 the--is that the Muni, speaker of the need to clarify
 2 what's claimed produced by the said gentleman.
 3 Do you see that, in the middle of the
 4 operative paragraph?
 05:07:21 5 A. Yes, correct.
 6 Q. And it's obviously the same gentleman, given
 7 the chronology, that has to be Bucelato, Jiménez, and
 8 Carmiol; correct?
 9 A. It said those--or "said gentlemen."
 05:07:49 10 Q. Right. And the gentlemen are named in the
 11 paragraph above. You can see there's a reference to
 12 Masis meeting with Señor Steve Bucelato, Alfonso
 13 Jiménez, and Señor Franklin Carmiol.
 14 So, we know who is being referred to in the
 05:08:11 15 paragraph below. And as you say in Paragraph 27 of
 16 your statement, and the documents are going--that are
 17 being referenced here are the--well, it's the SINAC
 18 Report of January the 3rd, 2011. So, if we just go to
 19 Paragraph 27 of your Report, just to make sure I've
 05:08:45 20 summarized things fairly.
 21 So, you see, you say "Steve Bucelato,
 22 Alfonso Jiménez, and Franklin Carmiol delivered at

05:09:00 1 that time a Report from the ACOPAC, a local Offices a
 2 SINAC, of January 3rd, 2011."
 3 So, the documents that need to be clarified,
 4 that's the document we're talking about, isn't it?
 05:09:23 5 A. Yes, that is indicated there, ACOPAC.
 6 Yes, there is a reference here to
 7 ACOPAC 063.
 8 Q. Okay. And just going back to the Muni's
 9 Decision, so, Tab 27 still.
 05:09:56 10 So, you see in that paragraph that has the
 11 heading "Asunto Number 14"--you see that?
 12 A. Correct.
 13 Q. And you can see that the Muni's Decision is
 14 part of Agenda Item 14, and it was taken on the basis
 05:10:15 15 of correspondence that was received with reference
 16 DZMT-025-2011.
 17 Do you see that?
 18 MR. LEATHLEY: Sorry to interrupt, Mr. Burn.
 19 The original is slightly different. It ends in
 05:10:33 20 026-2011. I don't know if that's material--
 21 MR. BURN: Did I misread? I apologize if I
 22 did. Thank you.

05:10:38 1 BY MR. BURN:
 2 Q. So, you see that reference there? And we
 3 can find that documentation. If you just go back a
 4 couple of tabs to Tab 25, you'll see here a letter
 05:11:00 5 dated the 7th of March 2011 has the reference at the
 6 top from the Muni. This is a letter from Mr. Mora.
 7 This is a two-paragraph letter addressed by Mr. Mora
 8 to the Municipal Council from Mr. Mora, who at that
 9 time, as you confirmed, was head of the Maritime Zone
 05:11:34 10 Department.
 11 Now, if you read quickly the two paragraphs
 12 of text there, you'll see that the letter simply
 13 describes the fact that a meeting took place the
 14 previous day with Bucelato, Jiménez, and Carmiol,
 05:11:51 15 which they presented some documentation and requested
 16 that the project permits be suspended.
 17 The letter does not describe anything about
 18 those documents, what those documents contained, does
 19 it?
 05:12:08 20 A. Correct.
 21 Q. So, the Muni was not apprised of the
 22 contents. They were not told what those documents

05:12:18 1 actually contained, were they?
 2 A. It's not indicated here in this letter from
 3 Mr. Marvin Mora.
 4 Q. And there's nothing here to suggest that
 05:12:38 5 this was being copied at the same time to the
 6 Environmental Department, is there? You can see it's
 7 copied to the archives, to the files. There's nothing
 8 else to indicate that it was copied to the
 9 Environmental Department, is there?
 05:13:01 10 A. Correct.
 11 Q. Did you see a copy of this letter at the
 12 time?
 13 A. This letter, on 7 March 2011? As I said, I
 14 was not at that meeting, nor was I at the Municipal
 05:13:25 15 Council meeting when the Decision was made.
 16 Q. Right. But even though you had an ongoing
 17 investigation into the site that was an open
 18 investigation at this point in time, this letter was
 19 not copied to you or to your department, was it?
 05:13:48 20 A. That is correct.
 21 Q. Okay. And slightly different topic. You
 22 should have loose--it's not in the files--a copy of a

05:14:03 1 Witness Statement made by a Mr. Jorge Antonio Briceño
 2 Vega. Just keep that available. There are going to
 3 be some other documents to look at.
 4 In Volume 2, could you turn to Tab 132.
 05:14:33 5 Now, do you know who Mr. Briceño is?
 6 A. Yes.
 7 Q. What position did he hold in 2012?
 8 A. He was the internal auditor of the
 9 municipality.
 05:14:57 10 Q. Right. And at Tab 132, we see his letter of
 11 the 16th October 2012 to the President of the TAA.
 12 Do you see that?
 13 A. Yes, correct. Excuse me.
 14 Q. Have you seen that letter before?
 05:15:21 15 A. No.
 16 Q. Thank you.
 17 Nonetheless, I'd like to take you to some of
 18 its contents and put a few questions to you; not much.
 19 If you'd look at Paragraph C, he notes that
 05:15:38 20 the Muni is an active party in a claim filed by Mónica
 21 Vargas Quesada. That's a claim that you filed at the
 22 TAA.

05:15:50 1 Do you see that?
 2 A. Correct.
 3 Q. Have you read Mr. Briceño's Witness
 4 Statements in these proceedings?
 05:16:10 5 A. Correct, yes.
 6 Q. So, you're aware that he was concerned by
 7 the complaint you had filed at the TAA because he was
 8 of the view that in filing that claim you were acting
 9 in your own name and not that of the Muni. You're
 05:16:23 10 aware of his concerns in that regard?
 11 A. I found out during these proceedings about
 12 the situation with the auditor.
 13 Q. Right. And you now know--didn't know at the
 14 time, but you now know that his concern was that the
 05:16:50 15 Muni could be exposed to liabilities, both civil and
 16 criminal, if third parties' rights had been affected
 17 by the claim you were pursuing; you understand that,
 18 yes?
 19 A. Well, in our department, we were just
 05:17:16 20 carrying out an investigation. We did not recommend a
 21 complaint to the auditor. First, we do an
 22 investigation to take in that, and then--excuse me, we

05:17:30 1 do make a recommendation.
 2 Q. Can you turn to Tab 134.
 3 So, this is a letter from Mr. Briceño to the
 4 Muni, to Mr. Freddy Garro Arias at the Alcalde Muni,
 05:17:58 5 and it's dated the 29th of October 2012. And he says
 6 that he inquired at the TAA; and according to the
 7 document in the file, Mrs. Vargas was notified at 9:20
 8 on September the 10th, 2010, on Fax Number 2779-9965;
 9 however, when asked, she said that she had not
 05:18:32 10 received that notice.
 11 Do you see that?
 12 A. May you--may I read it, please? I'd like to
 13 read it.
 14 Q. Yes, that's absolutely fine. If you just go
 05:18:49 15 to the second page of the document, top paragraph.
 16 A. Please allow me to read it.
 17 Q. Yes, you see that.
 18 And you're aware of this because you--as you
 19 said, you read Mr. Briceño's Witness Statement, and he
 05:20:53 20 deals with this at Paragraph 30 of his statement.
 21 So, Mr. Briceño wants to know why you
 22 haven't responded to the TAA's request.

05:21:15 1 PRESIDENT SIQUEIROS: Could you please
 2 respond to Mr. Burn's question first.
 3 If you know, well, based on the report of
 4 Mr. Briceño--well, his declaration about the
 05:21:29 5 situation.
 6 THE WITNESS: I know the situation because
 7 of the arbitration. The auditor never asked me for
 8 information or documentation.
 9 PRESIDENT SIQUEIROS: But the question is,
 05:21:42 10 did you know about this information?
 11 THE WITNESS: Yes.
 12 ARBITRATOR NIKKEN: When you say "I know the
 13 situation"--until this arbitration? Did you know
 14 about it before this proceeding or because of this
 05:22:03 15 proceeding?
 16 THE WITNESS: This auditing investigation.
 17 It's now I'm finding out about it.
 18 ARBITRATOR NIKKEN: Because you're using
 19 this word in Spanish "hasta," which can mean "now" or
 05:22:19 20 can mean "until."
 21 BY MR. BURN
 22 Q. So, what we see is that Mr. Briceño wanted

05:22:29 1 to know why you had not dealt with the TAA's request
 2 that you have the Municipality confirm its standing
 3 for the purposes of the claim that you had initiated.
 4 You agree that that's what he's saying, at
 05:22:44 5 least in part, in this letter? Yes?
 6 A. Well, this 2779-9965 is not the facts of my
 7 office. It didn't arrive and it's directed to the
 8 Municipal Council. So, I don't have a response to
 9 that question.
 05:23:1210 Q. But you told Mr. Briceño that you had not
 11 received the facts, didn't you?
 12 A. 2779-9965 he says is here. But as I said,
 13 I'm finding out about this situation about the
 14 Auditing Office. I didn't know that the Auditing
 05:23:3715 Office was doing an investigation with regard to this
 16 Project.
 17 Q. But you didn't ever procure the Certificate
 18 of Good Standing or any sort of express statement from
 19 the Muni with respect to the claim that you initiated,
 05:23:5320 did you? That never happened, did it?
 21 A. I don't understand the question.
 22 Q. It's probably my fault.

05:24:09 1 Would you say, regardless of what was
 2 discussed at the time and what was not, that
 3 Mr. Briceño is saying that there is an action of the
 4 TAA that has been brought by Mónica Vargas? It is a
 05:24:23 5 concern and a worry for the position--the legal
 6 position of the Muni that that has been filed in
 7 Ms. Vargas's own name. To rectify the situation, a
 8 Certificate of Good Standing in the Muni's name needs
 9 to be filed.
 05:24:4010 Now, you've accepted all of those points.
 11 Not that--all of those descriptions of Mr. Briceño's
 12 position, as set out in--in this correspondence. The
 13 final point to you on this--on this issue is just to
 14 confirm that you and the Muni never did secure a
 05:25:0315 Certificate of Good Standing in the Muni's name with
 16 respect to the action you initiated at the TAA.
 17 Do you agree that that is correct?
 18 A. First of all, in all my reports, we talk
 19 about requests for information, not for complaints.
 05:25:3320 First, there's the investigation, and then the
 21 document is sent with--all the evidence is sent to the
 22 Mayor for corresponding action.

05:25:43 1 And this documentation--I'm just finding out
 2 about this now. I don't know the situation. Well, we
 3 have the Municipal Council and the Mayor. I don't
 4 know why or if they sent that notification, and they
 05:26:03 5 didn't ask me because they know what's going on. I
 6 sent the copies to the Mayor and a summary of
 7 documents.
 8 Q. Maybe you're confused. But you have already
 9 said that before this hearing you read Mr. Briceño's
 05:26:2310 statement. I've shown you that he deals with this in
 11 his Witness Statement.
 12 So, even if you did not look at the
 13 documents to which he referred in his statement, you
 14 already knew from the statement itself that you say
 05:26:3715 you read that he was making these points.
 16 So, it is not correct, is it, to say that
 17 this is the first time you've become aware of it? You
 18 knew before today, at least since this--this Witness
 19 Statement was given to you, that he had concerns about
 05:26:5220 the way in which the TAA claim was being pursued. You
 21 knew that already, didn't you?
 22 A. Let me explain, then.

05:27:09 1 When I read the clarification of
 2 Mr. Briceño, that's when I realized that this
 3 situation exists. That's the issue, right. When I
 4 read his statement, that's when I realized the request
 05:27:25 5 that had been made to the Municipality and the Mayor.
 6 Q. Right. Now, you were aware on the 13th of
 7 April, 2011--
 8 MR. BURN: I think the channel needs to be
 9 switched.
 05:27:4410 BY MR. BURN:
 11 Q. You're aware that on the 13th of April,
 12 2011, SETENA received a resolution suspending the
 13 Environmental Viability Permit for the site. You're
 14 aware of that? Yes?
 05:28:0115 A. Can you refer to the document, please?
 16 Q. Just one second. We don't have it in these
 17 papers, I don't think.
 18 But just take it from me. You're aware that
 19 the EV was suspended in 2011 by SETENA? It was just a
 05:28:3120 few weeks after the Muni decision that we've looked
 21 at. You must have been aware that SETENA then
 22 suspended the EV. You're aware of that fact? Yes?

05:28:48 1 A. I can't tell you the exact date because I
2 don't have them up here in my head. But if I saw the
3 document and the date, I could say, "Well, yes, that's
4 correct."
05:29:07 5 MR. BURN: Can the witness be given a copy
6 of R-87, please.
7 BY MR. BURN:
8 Q. So, do you remember this document now?
9 A. This is the document from the Municipal
05:29:54 10 Council conveying it. It says that there is a
11 precautionary measure.
12 INTERPRETER: And the rest she mumbled.
13 BY MR. BURN:
14 Q. And then if you go to Tab 37 in the files in
05:30:17 15 front of you. You see a letter from you dated the 5th
16 of May, 2011.
17 A. Correct.
18 Q. And you refer to enforcement of the SETENA
19 Resolution until SETENA indicates to the contrary. Do
05:30:48 20 you see that?
21 A. Correct.
22 Q. So, we can safely say that you were aware of

05:31:10 1 the SETENA Resolution of the 13th of April, 2011, at
2 the time because you refer to it there.
3 Now, you're aware also, presumably, that the
4 suspension by SETENA was lifted on the 15th of
05:31:24 5 November, 2011?
6 A. The notification took place at the Office of
7 the Mayor. That's where all notifications are sent.
8 So, right now I don't have 839 to see the exact date.
9 However, when a notification is made, it is filed with
05:31:47 10 the Mayor's Office, then it's sent to the Council that
11 then conveys it. But perhaps by then, they may have
12 had it. It may have reached the Office of the Mayor
13 earlier.
14 Q. Right. But we can see from your
05:32:01 15 correspondence that you are asking for the SETENA
16 Resolution stopping work or lifting--suspending the EV
17 to be given effect immediately.
18 Did you or anyone in your department do
19 anything to enforce the SETENA Resolution in
05:32:18 20 November 2011, as far as you remember?
21 A. The SETENA Resolution of 2011?
22 Q. Yes. The Suspension Order, we can see you

05:32:38 1 asked for it to be enforced. You've confirmed that.
2 Did you do the same or did somebody in your
3 department do the same with the November decision of
4 SETENA reinstating the Environmental Viability Permit?
05:32:58 5 A. Could you tell me where I can see that
6 November 1, please.
7 Q. We'll find it for you. I'm not sure. If
8 you can just go to Tab 127. I'm not sure it's going
9 to help you because my question goes to what you
05:33:19 10 recall. So, this is Resolution Number 2850-2011. And
11 this is the SETENA Resolution reinstating the EV.
12 I repeat my question. Do you recall either
13 you personally doing anything to ask for this to be
14 enforced or anybody in your department?
05:34:03 15 A. In this case, on 5 May--Freddy Garro joined
16 the Municipality on 1 May, and he asked me to send him
17 a summary of the Project. That is the reason why we
18 send the recommendation that is contained here in the
19 last paragraph.
05:34:19 20 Then it reaches the Office of the Mayor and
21 then Urban Development that issues construction
22 permits. They are the ones who are supposed to

05:34:29 1 execute it.
2 Q. That's fine. It's not an answer to my
3 question. It's the third time I've asked this
4 question.
05:34:40 5 Do you recall either yourself personally or
6 somebody in your department taking any steps to
7 enforce the November SETENA Resolution?
8 A. I do not recall precisely about this
9 Resolution.
05:35:10 10 However, it had been clarified in the
11 previous point that I had--that we had asked for the
12 Environmental Viability to be enforced.
13 Q. Now, can you just finally turn to Tab 136.
14 You will find there a copy of a letter from
05:35:33 15 Mr. Briceño dated the 5th of November, 2012.
16 Can you just go over to the second page of
17 that letter.
18 A. Correct.
19 Q. Can you see the paragraph that begins
05:36:18 20 "El"--well, the 29th of April 2011. Can you just read
21 that out loud, that paragraph?
22 A. Yes.

05:36:28 1 "On 29 April 2011, the Cotsco Investment
2 Company"--sorry--"Cotsco C&T, S.A., represented by
3 Richard Aven, presented revocation resource for the
4 appeal having to do with the nullification of
05:36:46 5 Resolution 839-2011. By Resolution 2850-2011 of
6 15 November 2011, SETENA declares that the
7 request"--or it doesn't say so--"that leaves without
8 any effect the precautionary measures imposed by the
9 Resolution that was annulled."

05:37:09 10 Q. Thank you.
11 Can you just drop down another couple of
12 paragraphs and just read out the paragraph beginning
13 "Analizando."
14 A. Correct. Yes.

05:37:25 15 "Analyzing the above, please note that the
16 agreement made on March 2011, it is requested from the
17 Mayor to issue precautionary measures to halt the
18 continuation of the works on such project. When they
19 learned about Resolution 839-2011-SETENA, it is sent
05:37:44 20 to the Urban Development Department. However, when
21 they learned about Resolution 2850-2011-SETENA, that
22 nullifies the previous resolution. It is sent to the

05:37:53 1 same department, but they do not tell the department or
2 Mayor to suspend the precautionary measures that were
3 requested on March 2011, nor those issued in
4 Resolution 839-2011 from April 13, 2011, which the
05:38:10 5 Council learned about on May 2nd of that same year."
6 Q. Okay. And if we just continue down to the
7 next paragraph, we can see Mr. Briceño refers to
8 correspondence between SINAC and Mr. Bucelato.
9 Can you just go to where it says, "Sin
05:38:35 10 embargo ell no." Just read the remainder of that
11 sentence out from where it says "however" onwards.
12 A. In the next paragraph?
13 Q. Just right near the end, three lines from
14 the bottom of that paragraph, beginning "cabe
05:39:02 15 indicar." If you just go down near the bottom of that
16 paragraph. It says, "Sin embargo ell no."
17 Do you have it? Just read out the remainder
18 of that sentence.
19 A. "However, this is no reason for the Project
05:39:20 20 to halt by the Municipality not eliminating the
21 precautionary measures requested to the Mayor's
22 Offices, even when they did not have the required

05:39:29 1 legal basis."
2 Q. So, in total, what we see from Mr. Briceño's
3 letter is that he's--he's worried that a decision has
4 been taken in relation to the Project based on the
05:39:49 5 complaints of three neighbors of the Project whose
6 complaints have already been dismissed by SETENA.
7 And he's concerned that there's no legal or
8 administrative basis for the Council's decision.
9 That's correct, isn't it? That's his concern at this
05:40:07 10 point?
11 A. Correct.
12 Q. And it wasn't your decision. You were
13 working in the Environmental Department. But he was
14 concerned that the Muni had taken steps which exposed
05:40:26 15 it to legal claims from people like developers for
16 damages that they might suffer by way of illegal acts.
17 That's a fair summary of his--his concerns,
18 isn't it?
19 A. I cannot make exact reference to this or
05:40:50 20 what it's talking to. First, because Mr. Briceño and
21 Mr. Jorge never spoke to me. It was sent to the
22 Municipal Council. It is my understanding that, yes,

05:41:02 1 there was a suspension by the TAA also.
2 Now, what the Council did with regards to
3 this information is something that I am unable to tell
4 you.
05:41:18 5 Q. Right.
6 A. I just want that to be clear.
7 Q. That is very clear. And I repeat what I
8 said, that it's unfortunate that you're the only
9 person I can put these questions to. I would,
05:41:30 10 frankly, much rather be able to put the questions to
11 the people who actually took the decisions. But there
12 you have it.
13 Now, just to finish, you'll see at the
14 conclusion of this letter Mr. Briceño sets out three
05:41:45 15 recommendations. Do you see that's on the last page
16 of the letter? And he essentially says the
17 7 March 2011 decision should be nullified. So, that's
18 the decision to suspend the construction permits.
19 Do you see that? And his point was that was
05:42:08 20 a decision taken without legal basis. Do you see
21 that?
22 A. That's what Mr. Jorge's letter says.

05:42:23 1 Q. And then his second recommendation was that
2 the 15 November 2011 SETENA Resolution needed to be
3 given effect. Do you see that?
4 A. That's what it says.

05:42:56 5 Q. And would you agree with me that the Muni
6 has done neither of those first two things to date?
7 A. There are documents that the Environmental
8 Management Office--that these documents were not
9 transferred to us, so I don't know what the answer to
05:43:1810 that is.
11 And even more with regard to the information
12 mentioned by Mr. Jorge Briceño.
13 Q. As far as for completeness' sake--as far as
14 the third recommendation is concerned, you can see he
05:43:3315 says there should be set up an interdisciplinary
16 commission.
17 Now, would you agree with me that a
18 commission--such a commission was eventually set up?
19 Will you agree with that?
05:43:5020 A. Correct.
21 Q. And would you agree that it has not taken
22 any substantive steps, any significant steps, to

05:43:59 1 resolve this situation at Las Olas? Is that correct
2 based on your understanding?
3 A. I am not part of this interdisciplinary
4 group. Nonetheless, with regards to the injunction,
05:44:19 5 that paralyzes the actions at the Municipality.
6 Q. Right. And I think it's my last question.
7 You can--you can see in Paragraph 3 there that he
8 indicates that on the interdisciplinary commission,
9 there should be included representatives of the
05:44:3310 Project--of the Condominium Project.
11 The commission that was set up did not
12 include any representatives of the Condominium
13 Project, did it?
14 A. As I said, I'm not part of the group;
05:44:5215 therefore, I don't even know who joined that
16 interdisciplinary group.
17 MR. BURN: Thank you, Ms. Vargas. I have no
18 further questions. I'm grateful for your patience.
19 PRESIDENT SIQUEIROS: Mr. Leathley.
05:45:0920 MR. LEATHLEY: Thank you, sir. Can I just
21 take 10 seconds to confirm one point, please.
22 Thank you.

05:45:38 1 (Pause.)
2 PRESIDENT SIQUEIROS: Mr. Leathley.
3 MR. LEATHLEY: Thank you very much, sir.
4 REDIRECT EXAMINATION

05:46:49 5 BY MR. LEATHLEY:
6 Q. Ms. Vargas, just one question. I'd ask you
7 to please look--Mr. Burns asked some questions about
8 what one can see from the border from the public--from
9 the road.
05:47:0510 For the benefit of the members of the
11 Tribunal who haven't visited the site, could you say
12 what is visible from the roadway?
13 A. The land is totally open. There are no
14 walls, no fences. And in the inspection, where one is
05:47:2515 located, it might be as far as the table over there.
16 And that's where--and the trees--and where the trees
17 were burnt is roughly where you are. And if you just
18 step into it one step, it's the Las Olas Project.
19 It's open space, and there's complete visibility all
05:47:4720 around on the Project. There's very good visibility.
21 MR. LEATHLEY: Thank you very much. I have
22 no other questions.

05:47:55 1 PRESIDENT SIQUEIROS: Mr. Nikken, do you
2 have any questions?
3 QUESTIONS FROM THE TRIBUNAL
4 ARBITRATOR NIKKEN: You said that it's only
05:48:07 5 now that you're hearing about this complaint from the
6 auditor against you advising you about your
7 responsibility for the damage to the environmental
8 heritage that can be caused by the Las Olas Project.
9 You're only hearing about it now?
05:48:3410 THE WITNESS: Yes. When I saw the document
11 from Mr. Briceño, it's only then that I heard about
12 it.
13 ARBITRATOR NIKKEN: And how concerned are
14 you about all of this?
05:48:4415 THE WITNESS: Well, truly, what I felt is
16 that my department was really making an investigation.
17 We never filed a claim. To file a claim, first, you
18 have to perform an investigation so as to have grounds
19 to take something to the Mayor. And the Mayor will
05:48:5820 then make a decision based on the recommendation
21 provided by the Environmental Management Office, with
22 all the documentation and information, to decide

05:49:06 1 whether yes or not to file a complaint.
 2 We're not going to have the Mayor waste his
 3 time by simply giving a document. So, first, the full
 4 investigation is carried out, following which the
 05:49:19 5 complaint is filed.
 6 ARBITRATOR NIKKEN: And as far as you know,
 7 is it common or frequent for the auditor to point out
 8 that there could be a possible damage caused to third
 9 parties by the actions by an official? Do you know of
 05:49:41 10 any other instance in which a controller has done
 11 something similar?
 12 THE WITNESS: No, I know of no case.
 13 ARBITRATOR NIKKEN: Thank you.
 14 PRESIDENT SIQUEIROS: Mr. Baker.
 05:49:51 15 ARBITRATOR BAKER: No.
 16 PRESIDENT SIQUEIROS: I have no further
 17 questions either.
 18 Thank you, Ms. Vargas. You are released as
 19 a witness.
 05:50:04 20 Ms. Vargas, your participation as a witness
 21 has now concluded. If you wish, you may remain in the
 22 room.

05:50:13 1 THE WITNESS: Thank you.
 2 PRESIDENT SIQUEIROS: So, it is 10 minutes
 3 of 6:00. We may continue if the Court Reporters and
 4 Interpreters are willing to do so and the Parties are
 05:50:26 5 as well.
 6 I do have to advise you that Francisco Grob
 7 has alerted us to the fact that the bank will be
 8 closing down tonight at 7:00. There will be no
 9 further services, nor streaming services, for that
 05:50:42 10 matter.
 11 So, we would have to end the hearing before
 12 7:00 p.m. if the Parties and the Court Reporters and
 13 Interpreters would wish to continue.
 14 MR. BURN: For the Claimants' part, we think
 05:50:59 15 it would be sensible to continue for the maximum time.
 16 MR. LEATHLEY: Thank you, sir. Yes, we
 17 agree.
 18 PRESIDENT SIQUEIROS: Okay. So, do you find
 19 it advisable to take a short break? I think that the
 05:51:12 20 Court Reporters and Interpreters would like to
 21 take--or deserve a short break.
 22 MR. BURN: We'll have Mr. Ortiz ready in

05:51:22 1 five minutes' time.
 2 PRESIDENT SIQUEIROS: Thank you.
 3 (Brief recess.)
 4 PRESIDENT SIQUEIROS: Are we ready to
 06:06:42 5 proceed?
 6 MR. BURN: Yes.
 7 LUIS ORTIZ, CLAIMANTS WITNESS, CALLED,
 8 PRESIDENT SIQUEIROS: Okay. If the Court
 9 Reporters and Interpreters and Parties are ready to
 06:06:47 10 proceed, then we shall proceed with the examination of
 11 Mr. Luis Ortiz, who has submitted an expert report on
 12 Costa Rican public law.
 13 Mr. Ortiz, will you be subject to the
 14 examination in English?
 06:07:08 15 THE WITNESS: Yes, sir.
 16 PRESIDENT SIQUEIROS: Okay. So, I would
 17 wish to confirm certain rules with respect to the way
 18 the examination is going to be conducted.
 19 There will be a direct examination, which
 06:07:28 20 will be brief, to be submitted--which will be carried
 21 out--I'm sorry--by counsel to the Claimants. This
 22 will be followed by a cross-examination on the part of

06:07:38 1 the representatives for the Republic of Costa Rica
 2 and, thereafter, a redirect questioning by
 3 representatives of the Claimants in respect to issues
 4 that have arisen during cross-examination.
 06:07:57 5 MR. BURN: Sir.
 6 PRESIDENT SIQUEIROS: The Tribunal--I'm
 7 sorry.
 8 MR. BURN: Sorry to interrupt, but just to
 9 clarify a couple of points. You'll remember that
 06:08:06 10 Mr. Ortiz is going to give his presentation in lieu of
 11 direct examination, as such, in Spanish, and then he
 12 will be examined in English.
 13 PRESIDENT SIQUEIROS: Indeed, yes. And I
 14 have that in mind. But I am simply addressing at this
 06:08:21 15 point what the process will follow--what will follow
 16 after his direct presentation, which you have
 17 indicated.
 18 The Tribunal may during that time or even
 19 during the presentation in Spanish may address
 06:08:40 20 questions to you with respect to your presentation or
 21 answers being given during examination.
 22 THE WITNESS: No problem.

06:08:53 1 PRESIDENT SIQUEIROS: And there is a
2 statement also on the desk, which we would ask you to
3 read in respect to your statements to be made.
4 THE WITNESS: Okay. "I solemnly declare
06:09:15 5 upon my honor and conscience that my statement will be
6 in accordance with my sincere belief."
7 PRESIDENT SIQUEIROS: Thank you very much.
8 So, please feel free to proceed with your
9 presentation.
06:09:47 10 (Discussion off the record.)
11 PRESIDENT SIQUEIROS: There is a button
12 there in front of you at the microphone. The
13 microphone has to come on.
14 THE WITNESS: But I'm using this microphone.
06:10:05 15 PRESIDENT SIQUEIROS: Okay. Great. Now, if
16 you need it and if you are thinking of getting up to
17 show something on this paper that is behind you, that
18 is something that we will have to check to make sure
19 that your microphone is working.
06:10:24 20 THE WITNESS: If not, maybe I could--
21 SECRETARY GROB: Yes. Maybe your microphone
22 is not on, your tie mic.

06:10:38 1 INTERPRETER: No, the Interpreter cannot
2 hear.
3 (Pause.)
4 DIRECT PRESENTATION
06:14:01 5 THE WITNESS: Very well. Once again, good
6 afternoon, members of the Tribunal and counsel for the
7 Republic of Costa Rica. Today I'd like to give you a
8 brief presentation on the most important topics of
9 this case, especially from the point of view of
06:14:17 10 administrative and public law, which is my specialty.
11 My presentation is divided into seven
12 sections. The first is the theory of the case of the
13 Costa Rican country. One is the organizational chart
14 of the public entities and institutions that are
06:14:40 15 involved. The second are--the third are the
16 administrative precautionary measures or injunctions.
17 The fourth is how administrative acts can be
18 extinguished. Five, application of the principles of
19 legitimate contrast--good-faith intangibility or
06:15:00 20 estoppel. Six, easements. And, seven, a couple of
21 topics having to do with the Concession.
22 Let me begin by reminding the Tribunal and

06:15:11 1 the parties that the theory of Costa Rica is based on
2 a very specific point, and that is that all permits
3 are--have a flaw because of the illegal actions of the
4 Claimants. This is the theory of the Costa Rican
06:15:30 5 State. It's a starting point for all the allegations.
6 Hence, my participation is in this
7 arbitration as an expert in public administrative law.
8 Because environmental law is not first environmental
9 law and then administrative law; but, on the other
06:15:46 10 hand, it is really administrative law qualified by
11 environmental law.
12 What this means is that the processes to be
13 followed are those provided by the Costa Rican public
14 law based on the clear reading of Article 364, the
06:16:06 15 General Law of Public Administration, that I would
16 like to read to you very quickly.
17 It provides that this is a public law, and
18 it waives all those opposed to it. If there is any
19 doubt, its rules and principles prevail over those of
06:16:24 20 any other provision of equal or lesser rank.
21 Furthermore, it is the criteria for
22 interpretation of all the administrative legal system

06:16:36 1 of the country.
2 Costa Rica, as any other state, does not
3 admit that the end justifies the means. And just as
4 our Constitutional Tribunal has provided, if the
06:16:55 5 procedures set forth in the legal system are not
6 applied, then, quite simply, any action by the State
7 or Public Administration will become illegitimate,
8 regardless of the end sort.
9 So, with this introduction, let me now move
06:17:18 10 to a very important topic, given the theory of the
11 case in this matter. And that is that the public
12 entities and organs participated in the dispute.
13 We have already analyzed quite a lot with
14 the witness testimony, in particular by the
06:17:35 15 prosecutor, but there are a few points that I would
16 like to clarify. Although I'm not very good at
17 drawing, I did think this is perhaps the best way.
18 First, the Costa Rican Public Administration
19 comprises what we call the State. This is the legal
06:18:03 20 entity divided in the legislative branch, executive
21 branch, judicial branch, the Supreme Electorate or
22 Elections Tribunal, and the Auditor General of the

06:18:29 1 Republic. These are the five constitutional organs of
2 the constitutional state. This is a legal entity.
3 And based on the executive power, all the Ministries
4 then are derived. Many of them have offices and
06:18:45 5 organs that we will be seeing momentarily.

6 But in addition to the state, administration
7 has other public entities. Their characteristic is
8 that they have their own legal standing, complete
9 legal standing. And here we have municipalities of
06:19:09 10 which there are 81, the autonomous institutions and
11 other public entities that have a specific
12 classification.

13 What we are interested in here, we have the
14 three branches of government: legislative, executive,
06:19:41 15 judicial. The ombudsman, which is the Defensoría
16 de los Habitantes, which reports to the legislative
17 branch.

18 And what we're interested in here are, in
19 particular, three ministries. First, the Ministry of
06:20:09 20 Agriculture and Livestock, which has under it, but
21 with maximum deconcentration, an entity known as INTA,
22 the National Institute for Agricultural Innovation and

06:22:24 1 there's yet another entity. This is the municipality.
2 They have governing autonomy and administrative
3 autonomy. Therefore, the central government has
4 no--is not involved with what they do. It is not
06:22:44 5 hierarchically determined as a member of the central
6 government, but it's a state--it belongs to the state
7 government and is a state authority.

8 What very preliminary conclusions can we
9 draw from this organizational chart that I have drawn
06:23:04 10 so briefly? That there is a great scattering.
11 Although the Costa Rican government appears to be a
12 single one, nonetheless, there is a scattering, a
13 fractioning maybe. There are competing competencies
14 that coordination is required. In other words, that
06:23:30 15 in Costa Rica, nobody is the boss.

16 The second issue I'd like to address are the
17 injunctions. We know that in this case, there were
18 injunctions, ante causam, which means that these are
19 issued prior to there either being an administrative
06:23:53 20 procedure put in place or a judicial one.

21 We know that they were issued by SETENA, by
22 SINAC, by the TAA, and even by the judicial. Can

06:20:29 1 Transformation.

2 Then we have MINAE, under which we have the
3 TAA, SETENA, and SINAC. All share the same legal
4 position. They are what are called maximally
06:21:07 5 deconcentrated organs. This means that the minister
6 cannot give them any orders or take over their
7 competencies. They are independent, regardless of the
8 fact that they do belong to this entity, and they
9 don't have legal standing. They're not entities.

06:21:23 10 They are an organ. But, nonetheless, they are
11 independent of the chain of command of the top of that
12 body, which is the minister.

13 And, lastly, the Justice and Peace Ministry,
14 under which we have the National Property Registry.
06:21:44 15 And under this, we have the National Geographic
16 Institute.

17 Likewise, SINAC also has another sub-body, a
18 regulatory entity. It's not deconcentrated. It is
19 not independent of the SINAC. It reports to it. And
06:22:08 20 this is the National Wetlands Program.

21 So, in this case, this is what we call--talk
22 about being the government as a legal entity, but

06:24:08 1 public administrations issue such injunctions? Yes,
2 absolutely, they can. Given the general principle,
3 all public administrations or agencies do have the
4 authority to issue injunctions via the administrative
06:24:23 5 channels, and they can do it prior to an
6 administrative system or a judicial one. These are
7 the ante causam injunctions; or, otherwise, they can
8 also do it as part of an administrative process.

9 Now, what's the difference between
06:24:39 10 injunctions issued by all other public administrations
11 and the public administrations with environmental
12 competencies?

13 Well, basically, there is one difference and
14 only one difference. And that is that the
06:24:54 15 injunctions, in order to be decreed, need to meet
16 three requirements. One, the periculum in mora, which
17 is the danger of delay, in which the requesting party,
18 or in this case the administration imposing them, must
19 prove that if that injunction is not issued, then
06:25:16 20 there is going to be irreversible damage. Not
21 irreparable but irreversible. Because given the
22 normal time of an administrative process or a judicial

06:25:28 1 process, should there be a decision in favor, there's
 2 not much further one can do.
 3 In environmental matters, as you well know,
 4 whether it's the estuary of a river--well, once the
 06:25:42 5 river is already moving forward, there's no--nothing
 6 further that can be done. You can't go back then.
 7 The (in Spanish), which is the smoke of the
 8 well-being. And then the--and, third, the weight of
 9 interest. These are the three requirements that any
 06:25:59 10 injunction has to be met, whether it be administrative
 11 or judicial.
 12 As I was saying, what's the difference when
 13 it comes to the environment?
 14 Well, environmentally, what applies is the
 06:26:12 15 precautionary principle, or in dubio pro natura, whose
 16 potential damage is irreversible. That's the example
 17 I mentioned earlier, but there are many, many more
 18 that one could cite. Environmentally, damage will
 19 always be irreversible; therefore, one of those three
 06:26:32 20 elements when it comes to the environment is
 21 practically always met.
 22 However, this does not mean that the

06:26:38 1 precautionary principle or in dubio pro natura can be
 2 used to justify any kind of injunction.
 3 And when it comes to the environment, the
 4 burden of proof is reversed, while it is presumed that
 06:26:53 5 there are--if there are no studies showing the safety
 6 of the activity, the same can cause irreversible
 7 damage.
 8 What is true is that if there are studies,
 9 such as, for instance, an Environmental Impact Study
 06:27:08 10 where one applies a different principle, the
 11 preventive principle, which applies when the risk may
 12 be limited, when the risk is known. And the
 13 precautionary measure applies when there are no
 14 environmental impact studies or when there are no
 06:27:25 15 reports that have been able to delimit the risk.
 16 That's why there's uncertainty.
 17 It's only in these latter cases where it is
 18 possible to apply the precautionary measure and the in
 19 dubio pro natura.
 06:27:40 20 The fundamental characteristic--there are
 21 many characteristics. But the fundamental--the key
 22 characteristic of these injunctions are the

06:27:50 1 instruments used. And this is a very important
 2 element in this case because precautionary measures
 3 are not an end per se, but they exist always in
 4 function of a leading process.
 06:28:01 5 In other words, we cannot have an autonomous
 6 injunction that is independent and sovereign. They
 7 are always--as my professor explained to me, they are
 8 like a satellite of the lead process, but they always
 9 belong to a lead process. They cannot exist on their
 06:28:19 10 own. Thus, an execution and once issued, they must
 11 meet certain requirements that arise from the very
 12 logic of what we're explaining.
 13 If the injunction is ante causam, then
 14 before approval of our contentious, litigious code in
 06:28:43 15 2008, it was required that once issued, given their
 16 provisional nature, an administrative or judicial
 17 process needed to be initiated in what our
 18 Constitutional Court said, a reasonable term.
 19 What is that reasonable term as set forth?
 06:29:05 20 Two months, using the General Law of Public
 21 Administration. Following approval of the
 22 contentious, litigious procedural code, the term was

06:29:16 1 extended to 15 days. That is the same that one can
 2 see in that code when an injunction is ante causam in
 3 the judicial process, so that the party may then file
 4 its claim.
 06:29:33 5 But then there's yet another requirement.
 6 And that is that neither the administrative or
 7 judicial process may be eternal when there is an
 8 injunction that suspends the exercise of rights.
 9 Because as a fundamental right--and this is the right
 06:29:52 10 to rapid, speedy justice, that does not allow a
 11 process to continue for too much of an extensive time
 12 for two reasons. Because the injunctions would then
 13 not meet the condition of being provisional but, even
 14 more important, because the injunction that must be
 06:30:15 15 provisional, temporary, would then become punishment
 16 without due process or a sanction without due process.
 17 In other words, we would be affecting the
 18 rights of private individuals or those administered
 19 without having a sentence but simply an injunction
 06:30:34 20 that rapidly looks at (in Spanish), whether the party
 21 may or may not be right in the lead process.
 22 In this particular case, there is an

06:30:47 1 injunction that is still pending from the TAA which has
 2 four points for five years after having been issued.
 3 And an administrative process, a formal one
 4 has not been initiated. There is a criminal
 06:31:01 5 injunction that is still pending with the aggravating
 6 point that they can--are not competent to nullify
 7 administrative acts like construction permits.
 8 So, this is not--this is not instrumental and
 9 this cannot be because this could never be any
 06:31:24 10 nullification of the permits that the Costa Rican
 11 State has granted to the investors.
 12 And the third issue I wanted to touch on has
 13 to do with extinction of administrative acts, and I
 14 will be brief and succinct. There are four ways to do
 06:31:46 15 so.
 16 If there is absolute evident and
 17 manifest--if that is--the nullification is such, that
 18 is the only way that the administration can nullify
 19 something in administrative process before due process
 06:32:02 20 where there is a proceeding where people are provided
 21 rights.
 22

06:32:13 1 And subject to an opinion that is issued by
 2 the Attorney General's Office or the controller's
 3 office, that there is an evident and absolute
 4 nullification. And this is not just any kind of
 06:32:29 5 nullification. If it is not evident and manifest, if
 6 it's an absolute nullity or a relative, then
 7 necessarily, the Public Administration must file for a
 8 proceeding, a judicial proceeding after having stated
 9 that this act is harmful. And if the judicial
 06:32:56 10 proceedings have not issued an injunction, then the
 11 administrative injunction would not be pending.
 12 So, this could mean that administrative
 13 acts--excuse me--will still be valid until there is a
 14 judgment that is final.
 06:33:19 15 The third way is revocation and here we
 16 don't talk about nullification, rather, a divergence
 17 or discrepancy before the advisability of the act with
 18 regard to the public. And since we're not talking
 19 about nullification, then the State must compensate
 06:33:42 20 the person if they revoke the administrative act.
 21 And so, they must ask the controller's
 22 office, which is like a Tribunal for accounts. And

06:33:56 1 then for the cancellation where we're not talking
 2 about nullification, rather, about compliance where a
 3 right that can be lost if there is due process
 4 granted. And you can imagine Costa Rica, this could
 06:34:18 5 be a month or two months or a year even because it is
 6 a small administrative proceeding or trial. These are
 7 the four ways administrative acts can be extinguished.
 8 So, how does it apply in this case? The
 9 principles of good faith and also legitimate
 06:34:40 10 expectations--these principles are not a creation that
 11 comes from foreign countries. Rather, these are based
 12 on the legal framework in Article 34 of the
 13 constitution, which sets forth the fundamental right
 14 to the fact that administrative acts and laws cannot
 06:35:08 15 be retroactive, and 73 of the administration--public
 16 Administration law which regulates what I just
 17 explained.
 18 Now, given a nullification, the
 19 administration can only annul in an administrative
 06:35:26 20 level if it's evident and manifest. And if not, it
 21 must be sent to the administrative court which can
 22 annul administrative acts according to the

06:35:37 1 constitution so that impartially and objectively it
 2 can nullify the administrative act. And, of course--
 3 ARBITRATOR BAKER: Excuse me. Who has the
 4 duty to send it to the administrative proceeding that
 06:35:50 5 you're just talking about? Who bears that burden?
 6 THE WITNESS: Okay. It depends on which
 7 body or agency issued the act. Here we have a
 8 parallelism of forms while acts must be issued and
 9 then revoked in the same way.
 06:36:13 10 So, SETENA could issue something, revoke it
 11 at an administrative level. But if harm has been
 12 declared, then SETENA can send it to the Attorney
 13 General's Office so that the Attorney General's Office
 14 can then present its case with regard to harm done.
 06:36:31 15 What are the legal effects of not following
 16 legal procedures to extinguish administrative acts?
 17 Well, as in this case where injunctions have
 18 been issued which are ad infinitum and acts that were
 19 favorable for the investors have been suspended, and
 06:37:06 20 also acts that provided rights to them, and so also
 21 legal certainty was violated.
 22 Also, that nonretroactivity, also the

06:37:17 1 intangibility of acts that we mentioned that the
2 administration cannot leave its acts without effect
3 because they must be legitimate. And if they have not
4 been annulled by the proceedings established by law,
06:37:36 5 that act is valid and must be applied.
6 Due process, of course. Because having an
7 injunction without a main proceeding, which could
8 annul it through a judgment, that's the same as
9 punishing someone without providing due process.

06:38:02 10 The case of environmental impact studies and
11 construction permits, well, I want to refer to
12 something. And, of course, this is a very Byzantine
13 debate, and I have included this in my written report.
14 But I do want to refer to it. It's clear that the
06:38:25 15 environmental impact studies create rights.
16 And for the Constitutional Court, whose case
17 law and precedence are binding, erga omnes, for all,
18 even them, in order to annul the studies, the
19 proceeding I just outlined must be followed.

06:38:58 20 PRESIDENT SIQUEIROS: When you're referring
21 to environmental impact studies, do you mean
22 environmental impact assessments?

06:39:04 1 THE WITNESS: Yes. That has been set forth
2 by the Constitutional Court, and also the office of
3 the Attorney General has been doing this in many of
4 their opinions in keeping with the office of the
06:39:20 5 Attorney General.
6 And so, we may agree whether the--these
7 impact studies are final and preparatory acts or
8 whether they generate rights. But our greatest
9 interpreter of the Constitution, our highest court, has
06:39:39 10 said yes. So, I won't dwell on that.
11 And if they aren't acts that generate
12 rights, if we, hypothetically, said that, well,
13 administration issues it and then disregards it the
14 next day, well, it means that we have seven
06:40:04 15 construction permits. And there's no debate about
16 that, not even theoretically. These are final and
17 definitive acts that generate rights. And to be
18 annulled, this proceeding must be followed.
19 Furthermore, this debate is innocuous
06:40:22 20 because doctrine establishes so that to respect an
21 individual's right, as a guarantee to the individual,
22 the acts, whether their internal, external, or being

06:40:36 1 processed or final, they are favorable. They must be
2 favorable to the individual and they generate rights.
3 And in this particular case, reports were
4 issued from the National System for Conservation
06:40:57 5 Areas, not just one, several, in which it was set
6 forth that there were no wetlands. And what are the
7 effects of these reports? These are external reports.
8 They are not final acts.
9 They are opinions that are used internally
06:41:14 10 in the administration to make final decisions. And
11 so, we could wonder whether they do have effects,
12 vis-à-vis on individuals, if the investors could have
13 legitimate expectations based on these reports.
14 Again, the general Public Administration law
06:41:36 15 gives a response to this in three articles.
16 Article 136(c) states, "Well, there will be
17 a succinct mention of the grounds of why this is not
18 following case law and precedence.
19 And so, it's not so true that internal acts
06:42:08 20 are worthless. Rather, that they are mandatory. In
21 other words, if they are not going to follow what the
22 provisions usually are, they have to explain why.

06:42:22 1 And 199.3 also sets forth that if the
2 administration does not follow advisory opinions, this
3 will be illegal. And so, if SINAC's reports are not
4 followed and it is said there is no wetland, then the
06:42:53 5 State must respond because there is then dolo, or
6 intentionality.
7 What's even clearer is Article 122 that
8 talks about the value of internal acts within the
9 administration and provides that internal acts are not
06:43:11 10 valid if they are prejudicial to an individual.
11 However, that's not the case if they're beneficial.
12 So, reports and opinions issued by SINAC,
13 there they are not final acts. So, they cannot
14 generate rights against an individual, but they can
06:43:29 15 generate rights that benefit the individuals.
16 And so, then in this case, yes, they can be
17 considered final. And there are reports from INTA
18 that stated the same. There are environmental impact
19 studies from SETENA.
06:43:48 20 Furthermore, SETENA creates legitimate
21 expectations for the investors because in Article 83,
22 84 of the environmental law establishes the obligation

06:44:01 1 and not just as a power to carry out inspections
2 before issuing agreements. And Article 13(d) of
3 Decree 338815, which reorganized SETENA--SETENA must do
4 mandatory in situ inspections.

06:44:25 5 So, for an investor or for another
6 individual that goes to SETENA to have an
7 Environmental Impact Study, where SETENA should have
8 done an inspection and looked at a map where it
9 locates the Project and they must make comparisons
06:44:49 10 where perhaps there might be wetlands where everyone
11 might have known if it's true that there were wetlands
12 there, if that was known, then SETENA, when they were
13 looking at a map--well, they didn't realize there were
14 wetlands if it was so evident, if it was so obvious?

06:45:14 15 And it didn't seem so obvious because SETENA
16 didn't raise any red flag because they didn't consider
17 that they existed.

18 And, of course, this created legitimate
19 expectations for the individuals. Also, the
06:45:27 20 Municipality carried out inspections where it said
21 that there was nothing untoward going on, and it
22 issued the construction permits based on environmental

06:45:36 1 viabilities, which it considers necessary.

2 And, also, it gives authority for the
3 easements. If the easements had needed an
4 Environmental Impact Study, then these would have been
06:45:52 5 required. Then it issues also land-use permits based
6 on its regulatory plan.

7 Please repeat the last thing you said. The
8 Municipalities issued the certificates for land use
9 based on their regulatory plan that establishes the
06:46:16 10 zones, which are commercial, where you can construct,
11 where you have protected areas. The Municipality
12 issued these land-use permits and also it carried out
13 inspections.

14 So, clearly, all of these acts or--the work
06:46:38 15 the administration doesn't even have to issue formal
16 administrative acts but we can also talk about
17 administrative conduct, which include acts,
18 resolutions, provisions, simple implicit acts or
19 expressions of will of the administration which
06:46:57 20 creates a legitimate expectation among the individual
21 that they're doing everything well and that the
22 administration is also doing everything well because

06:47:07 1 the administration is the one that must know what the
2 requirements are and when certain steps or paperwork
3 must be processed.

4 Now, I'd like to close with two additional
06:47:22 5 issues, and that is the issue, first, of the
6 easements, just to clarify.

7 The easements are regulated in the civil
8 code. It is simply the division of a lot where one of
9 the lots has an encumbrance for the other lots. In
06:47:42 10 other words, it is an easement for access.

11 Now, with regard to the urban plans, they
12 are also regulated. This is allowed for housing, with
13 smaller lots, or also for agricultural purposes, where
14 the lots are much larger.

06:48:02 15 Now, the easement is not free--it's not that
16 you don't have to process any paperwork. The
17 easements had to be presented to the National
18 Institute for Housing and Urban Planning, for their
19 authorization, for the authorization of the
06:48:20 20 Municipality. If the Municipality had thought those
21 easements required an Environmental Impact Study, they
22 would not have granted those permits. Furthermore,

06:48:34 1 and they are then registered in the National Property
2 Registry.

3 Now, from an environmental point of view,
4 the truth is, SETENA, during the period in which
06:48:48 5 authorizations were requested for the easements, and
6 the easements were made, had issued at least three
7 resolutions, given the characteristics of some
8 activities, it considered that the Environmental
9 Impact Study was not necessary.

06:49:04 10 Now, in this case, it is clear that the mere
11 division of the lots in smaller lots did not require
12 Environmental Impact Studies because no activity was
13 being initiated. What is more, the developer didn't
14 know what purpose those lots might serve.

06:49:27 15 So, if those lots later were going to be
16 used for an activity that required an Environmental
17 Impact Study, then it would be logical that before
18 that project, the developer would go and then do these
19 studies or assessments, if necessary. And the last
06:49:46 20 study I wanted--or issue I wanted to refer to has to
21 do with the Concession in the Terrestrial Maritime
22 area.

06:49:55 1 This is a patrimonial good, and it is
2 referred to by the Costa Rican State and the Guarantee
3 in Trust, and they said that because it's a trust, 51
4 percent must be owned by Costa Ricans. But the
06:50:20 5 extinction of a trust, due to being out of time, does
6 not mean that ownership is passed on to others or
7 ceded to others.

8 Now, with regard to ceding participation to
9 others when it's been in trust, no. If we could even
06:50:48 10 accept the fact that the trust had expired, that the
11 stock or the interest went back to Mr. Aven, these are
12 two different legal moments.

13 So that there is this transfer of stock, two
14 legal acts must take place: First of all, they must
06:51:11 15 be endorsed nominally; and secondly, there is the
16 registering of the transfer of ownership in the books.

17 MR. LEATHLEY: Excuse me, Mr. President, but
18 I wanted to raise it now, because it's not included in
19 his Report. So, we're in your hands as to whether it
06:51:34 20 should then be part of his presentation, because he's
21 not actually presenting his content of his Report.

22 PRESIDENT SIQUEIROS: If you're going to

06:53:06 1 Peruvian Government must take his nationality away,
2 strip him of it, so that they could also take his TV
3 stations from him.

4 So, in the Costa Rican case, there is a
06:53:19 5 precedent from the Constitutional Court, which I
6 repeat, must be followed. It's called the Taca case,
7 where the law prohibited that the certificates of
8 aeronautical use were in the hands of foreigners, or
9 that corporations--well, their owners, could not have
06:53:41 10 51 percent be owned by foreigners.

11 And this was declared unconstitutional
12 because Taca, which then became Avianca, which was
13 Salvadorian, and it bought out the Costa Rican airline
14 known as Luchtze.

06:54:03 15 Now, just some final reflections, and I just
16 wanted to state for the Tribunal, in my professional
17 practice, I deal with many of these cases. This is
18 not something isolated. It is repeated, and I say
19 that sadly as a citizen of Costa Rica, and we've seen
06:54:29 20 the same thing in many projects.

21 I've had to deal with these kinds of
22 pressures and problems with the public administration

06:51:42 1 rule it out, because we may have, as a Tribunal,
2 questions precisely on this point, as this point has
3 been raised during the Hearing.

4 So, this may--we'll allow it to continue.

06:52:00 5 THE WITNESS: Just one more minute about
6 this point, and I thank the Tribunal for allowing me.

7 Even if we admitted that there was the
8 transfer of ownership and that sometime 51 percent was
9 in the hands of a foreigner, the truth is that this is
06:52:17 10 a case which has been already decided upon on the
11 Inter-American Court of Human Rights and the
12 Constitutional Court. In the Ivcher Bronstein against
13 Peru case in the Inter-American Court, that with
14 regard to human rights--well, with regard to the only
06:52:37 15 human rights where there can be discrimination between
16 citizens and foreigners has to do with political
17 rights, and this case--well, there was an Israeli
18 citizen who became Peruvian in order to be able to
19 have the majority participation in a TV station in the
06:52:55 20 times of Fujimori.

21 This was the TV station that showed the
22 video of Montesinos and his corruption. And so, the

06:54:37 1 in Costa Rica, in the project Los Sueños, which is an
2 emblematic project in Costa Rica such that--
3 (Overlapping interpreter channel with
4 speaker.)

06:54:47 5 THE WITNESS: So, it's for a reason, and
6 those of us who are in the profession suffer from
7 this, and investors suffer from this, both national
8 and international investors.

9 It's because the environmental law in Costa
06:55:03 10 Rica allows for procedural abuse, unfortunately, as a
11 measure of extortion, and there are associations and
12 individuals and people in Costa Rica who are
13 professionally devoted to this.

14 And I want this to be clear to the Tribunal,
06:55:19 15 and I say that from my perspective as an expert, and I
16 suffer from this as an attorney, a litigation
17 attorney, and an attorney that is exercising his
18 profession.

19 PRESIDENT SIQUEIROS: I'm sorry that,
06:55:35 20 unfortunately, we need to end. The building is
21 closing.

22 Thank you for your presentation. I would

<p>Sheet 75</p> <p>1292</p> <p>06:55:42 1 ask the Parties, if they have no objection, that we 2 continue with examination tomorrow morning. 3 MR. BURN: Certainly none, sir. And I'm 4 sure I'm speaking for Mr. Leathley as well. 06:55:55 5 Sir, I think whether we do this immediately 6 now or have an offline conversation, I think from 7 outside, again, I anticipate there is some shared 8 concerns on the other side as well. 9 I know there are some concerns about the 06:56:11 10 available time for completing everything by the end of 11 Monday, given where we stand. 12 It's a very good thing that we have an 13 engaged and activist Tribunal. But to be honest, 14 there have been probably more questions coming from 06:56:32 15 the Tribunal than--than had been budgeted. 16 I think on our side--I can't speak to Mr. 17 Leathley--we've taken a little longer to date with our 18 work than we had budgeted, and there is a concern that 19 we may be having overall scheduling difficulties in 06:56:50 20 terms of getting everything done in time for the end 21 of Monday. 22 As I say, I'm perfectly happy to have this</p>	<p>1294</p> <p>06:58:36 1 Reporters and the Interpreters have afforded for this 2 evening, and then we look forward to reinitiating 3 tomorrow at 9 o'clock. 4 MR. BURN: Sir, and just as a point of 06:58:49 5 procedure, not that, frankly, we have any particular 6 intention of spending lots of time with Mr. Ortiz this 7 evening, but we assume, as I think is usual, that 8 sequestration rules do not apply to expert witnesses. 9 But just to avoid any doubt, we'd be grateful of 06:59:07 10 confirmation of that. 11 PRESIDENT SIQUEIROS: I confirm that, it 12 doesn't, unless my co-arbiters have a different point 13 of view, and we can discuss that. 14 So, no, it doesn't. 06:59:25 15 MR. BURN: Thank you, sir. 16 (Whereupon, at 6:59 p.m., the Hearing was 17 adjourned until 9:00 a.m. the following day.) 18 19 20 21 22</p>
<p>1293</p> <p>06:56:56 1 conversation offline, but I think that we do need to 2 have some sort of consideration of where we stand in 3 terms of timings and what needs to be achieved 4 tomorrow and what needs to be achieved on Monday. 06:57:09 5 PRESIDENT SIQUEIROS: Fine. Why don't we 6 have that conversation, but Mr. Grob may, after we 7 conclude today, or perhaps tomorrow morning, if we 8 have to leave, may advise the parties on what the 9 timing is in their respective interventions in light 06:57:30 10 of the time allocated in procedural calendar--I'm 11 sorry, the Procedural Order Number 5. 12 SECRETARY GROB: Yes. Well, the Claimants 13 have used 13 hours and 19 minutes. So, they have 4 14 hours and 41 minutes left. 06:57:52 15 And Costa Rica has used 9 hours and 26 16 minutes, which means that they have left 8 hours and 17 34 minutes. 18 (Comments off microphone.) 19 SECRETARY GROB: The Tribunal's time is not 06:58:18 20 here. 21 PRESIDENT SIQUEIROS: We appreciate--we do 22 appreciate the time--the extra time that the Court</p>	<p>1295</p> <p>CERTIFICATE OF REPORTER</p> <p>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.</p> <p>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.</p> <p>MICHELLE KIRKPATRICK</p>

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 DAUSTER