

460. Although Mr. Aven repeatedly indicated that he was relying on his attorneys, this is not a valid justification because such reliance cannot be a substitute for diligence in a situation where he elects not to read, understand what is being submitted or even said, and fails to react with prudence when his attorney "... didn't want to take the time to explain it, you know, do the translation from Spanish to English and explain things.

I thought it was a defense to say you were relying on advice of counsel. But it appears it's not?

461. The immediate questions for the Tribunal include: (i) Were there wetlands and/or forests within the property at the time the D1 Application was filed by Claimants? (ii) Which determine whether a wetland and/or forest exist in Costa Rica? Did Claimants have an obligation to timely disclose the existence of wetlands and/or forests in their property?

This is referring to the Protti report. The report never said there were wetlands and it was not a required report for SETENA. I told George Burn and Louise Woods to get a statement from Protti in Costa Rica. They said they would be failed to do so.

463. After these questions are answered, the Tribunal will be in a position to then examine whether or not Claimants took actions to drain and/or refill the wetlands, damaging such ecosystem, and whether or not Respondent acted within its rights under DR-CAFTA, or whether there was a breach to its obligations thereunder or under principles of customary international law. All this becomes relevant not only in respect to the alleged illegality in securing the Environmental Viability but also in respect to the appropriateness of criminal charges brought against Messrs. Aven and Damjanac for presumably draining and filling wetlands. The same issue applies in respect of forests, and the alleged illegal felling of trees.

There is no evidence that I drain the wetlands. It was all lawyer testimony.

506. In light of the above analysis, the Tribunal concludes that there were wetlands in at least one location: that referred to was "Wetland # 1" in the easements 8 and 9. And this is sufficient in the determination for purposes of the analysis.

This is in an area that is outside the Las Olas Project site and consist of about 1 acre of land.

558. If Claimants had submitted in their D1 Application the information relating to the existence of potential wetlands as described in the so-called Protti Report, it is more likely than not that SETENA would have exercised its powers and verify the conditions on site prior to issuing the Environmental Viability and perhaps SETENA would have subject the Las Olas Project to some limitations in its development to protect the potential wetlands identified. In such instance, the real estate development would likely have proceeded to conclusion, albeit with some additional costs, but the Parties would not be involved in this case.

If we would have gotten a statement from Protti or SETENA that Would have shot down the entire false allegation. Of if George Burn would have asked me proper redirect questions when I brought up the Protti report he could have shut it down.

559. Since Claimants had the duty to advise SETENA at the time they filed their D1 Application of the existence of the “swamp-type flooded areas with poor draining” or potential wetlands, and Claimants failed to do so, they thus cannot now attempt to shield their omission on the alleged failure of SETENA to inspect the property to verify the existence of wetlands.

Again the failure of Vinson and Elkins to get a statement from Protti or SETENA

564. The record shows that the Las Olas Project - the investment carried out by Claimants was originally conceived as a single project, albeit composed of several stages and uses (such as the beach concession, the condominium site and the commercial zone). It was not until years later that the easement section was devised as a separate unit of development. Therefore, the Tribunal deems that the same should follow in respect of the permits and approvals. Permits should have been requested as if the project was one, without distinctions as to sections—whether easements or others.

This is wrong. Before I applied for the SETENA D1 project permit, I had subdivided that other parts of the property and they were owned by separate corporations. Burn failed to make that point at trial.

569. In respect of the first issue, the Tribunal finds that the easements were developed by Claimants as a separate project without any apparent reason beyond the avoidance of the EV for such area. It is evident from the information submitted in the arbitration that Claimants did not consider a development with an easements section until 2007, but even then, they nonetheless continued to view the Las Olas Project to be one single project. In his First Witness Statement, Mr. Aven described one project, comprised of five phases of development 523 (i) the Easements, (ii) the beach club, (iii) the Condo Section; (iv) the hotel across the beach in the Concession Site, and (v) the commercial/condo time shares. This was confirmed in various marketing efforts for the Las Olas Project.

Burn failed to make that point and failed to show that the property was subdivided legally according to Costa Rica law and the proper permits were issued accordingly.

572. When asked during the December Hearing on the business rationale of the fragmentation of the Easements Section, Mr. Aven indicated that it was his attorney, Juan Carlos Gavridge Pérez, who suggested that these be developed because the properties could be developed fairly quickly without need of going through an extensive permitting process “...and you don’t have to be concerned with the EV because it is along the main road”⁵³¹. Mr. Aven acknowledged this was his motivation, based upon legal advice from his attorney.

to be built in stages, as Claimants also acknowledged in the Memorial of Claims, cannot be then fragmented so as to avoid securing the environmental viability. But this is precisely what Claimants did.

Burn failed to make that point and failed to show that the property was subdivided legally according to Costa Rica law and the proper permits were issued accordingly. I didn't fragment the the property to avoid getting an EV permit. I fragmented the lots based on advise of my attorney that said you didn't need an EV permit if you were building on a main road since infrastructure was already there.

574. Taking advantage of certain benefits or relief granted by the law is not unlawful, but what may be is to structure an investment and carry out a development in such manner as the effect is to avoid having to request permits, procedures or consents that involve steps or disclosures which would trigger the need for scrutiny or subsequent studies, permits or conditions by simply applying the terms of law taken out of context. The full context must be considered in such instances.

This seems to be in contradiction to the Tribunal above statements and is really speculation on the part of the tribunal to know what was in the mind of the developer.

576. The second issue to address is whether Claimants had valid permits to work on easements 8 and 9, which are located in the southernmost portion of the Easements Section. It does not become necessary to examine permits for any other of the easements, as the allegation of the existence of wetlands in these two easements makes it sufficient for the Tribunal to determine whether actions undertaken in those two were or were not lawful.

The person who built the easements testified that he had acquired the permits to build them. Burns never drill down on that. Nor did he cross examine Monica Vargas on the project of 94 homes built right next to Las Olas that was built with no approvals of any kind, although I told Burn to do that during her cross. I had drone video taken of that project and told Burn to show it to the Tribunal, he failed to do that.

577. Claimants have stated that permits were received but were lost by the Municipality of Parrita. The Tribunal finds it hard to believe that permits presumably issued both in 2008 and 2009 were lost in the "Alma" storm, as alleged by Claimants. Especially since the storm occurred in May of 2008⁵³⁷. But also because it is hard to fathom that from all the various files corresponding to the Las Olas Project that are available to the Claimants and the Municipality, all documents are available and only the alleged construction permits have been lost. The coincidence is extreme. But assuming, for the sake of analysis, this was the case then it shows the lack of diligence by the owner and/or contractor in safeguarding documents that are critical for any development, and this would be revealing of the diligence with which the legal aspects of the development were being handled.

Mussio Madrigal stated that. They built those easements and testified they had gotten the permits for those easements. Burn never covered that during his cross of Mussio.

578. There is no evidence that work that was undertaken by Claimants in said easements 8 and 9 was validly authorized by construction permits issued by the Municipality, or approved plans for those easements from INVU, or the National Cadastre or the National Registry.

We had testimony by Mussio, who built the easements that he had gotten the permits, but they were lost during a flood in the town. How is that not evidence? Burn never covered that with Mussio.

579. From the foregoing analysis, the Tribunal concludes that the fragmentation made by Claimants did not have a business purpose in and for itself, and that by doing so Claimants evaded improperly the need to secure an EV precisely in the area where a wetland has been confirmed to have existed. Since the Las Olas Project was deemed to be a single development project, Easement Section should have been part of the D1 Application as well.

It did have a business purpose and I stated that during my testimony. Burn failed to cover that properly during his redirect of me so the Tribunal would clearly understand that.

580. There have been allegations and expert reports submitted by Respondent as to the existence of wetlands in other sites of the Las Olas Project, but also strong allegations to the contrary on the part of Claimants.

What does that even mean? This just goes to show you the abject failure on the part of VE attorneys to use the evidence to prove they were not just allegations, but we had strong evidence to prove there were no wetlands, VE attorneys failed to show that at the trial.

581. During his presentation during the December Hearing, Mr. Kevin Erwin confirmed that of the seven wetlands found in the Las Olas Project site, Wetland # 1 contained hydric soils and was an impacted wetland that had been drained and filled.

Again, Burn failed to show that this is exactly the area that INTA took their soil studies and determined there were not wetlands. VE attorney George Burn failed to use evidence we had to prove that to the tribunal.

582. There is clear evidence to the fact that the location of the wetland is precisely in the Easement Section – in easements 8 and 9, and works were undertaken precisely in that site. The evidence includes not only the reports prepared by SINAC, but also aerial photography and the KECE Report that performed the drills to confirm the existence of hydric soils in the areas where road work and other works were carried out.

The tribunal referred to easements 8 and 9, which is about 1 acre. VE attorneys failed to make the point that this was not in the approved SETENA EV approved area and ask why the

entire project was shut down if this is the only place the Tribunal found there were wetlands. Why was the whole project condemned if only 1 acre outside the approved EV approved area was a wetland?

583. The Parties agree that one of the elements that define a wetland is the existence of hydric soils. Regardless of whether there are such conditions in other areas within the property, it is an accredited fact to the Tribunal that these existed at the time the Las Olas Project was being developed and, more importantly, at the time works were carried out.

Facts and evidence prove otherwise. If the Tribunal didn't understand that, then it was due to the fact that Burn failed to drive that point home to the Tribunal.

585. The Tribunal determines that such wetland was indeed impacted by works undertaken by Claimants, and that the reaction taken by Respondent as a consequence was merited under the laws of Costa Rica, which are not inconsistent with international law. Further, that the actions taken by the Respondent are not arbitrary nor in breach of the obligations under DR-CAFTA.

Again, there was evidence that proved that was false. You notice in the entire report SETENA is referred to very little. I instructed George Burn and Louise Wood to show all the reports from 2006, 2007, 2008 2010 and 2011 that all said there were not wetland. The above statement shows that They never presented any evidence during the trial to prove that.

586. Forests were also impacted. This is clearly identified in the KECE Report aerial photographs that were attached to the Report comparing the forest canopy in 2005, 2010, 2011 and 2016.

I had three forest studies done in 2010 and 2011, all three showed there were no forest. Also MINAE reports didn't identify any forest and the SETENA studies never Identified any forest. So for the Tribunal to make that statement shows, Burn didn't present our evidence during the trial to prove that point to the tribunal.

589. Claimants have stated that the conduct of Prosecutor Martínez with regard to "... the criminal investigation, prosecution, and trial of Mr. Aven epitomizes arbitrary and discriminatory treatment in every respect"⁵⁴³. They add that Mr. Martínez's conduct in regard to Mr. Aven "... goes far beyond incompetence, and demonstrates such a level of disregard for the evidence, the law, and professional standards, that the only conclusion that can be drawn is that Mr. Martínez intentionally targeted Mr. Aven due to reasons that had nothing to do with actual criminal culpability"

590. They contend that once the investigation regarding the criminal charges was commenced, Mr. Aven was fully cooperative, and met with Mr. Martínez, the prosecutor, approximately three weeks after the SETENA April 2011 Injunction, whereby further works on the site under

the 2008 Environmental Viability Permit were prohibited. Mr. Martínez then instructed, as has been described above in Section VI, additional environmental reports from INTA (asking to take soil samples from the site of the alleged wetland at Las Olas in order to determine, in accordance with the legally applicable criteria, whether the soil was characteristic of a wetland), and from MINAE. Although the INTA report of May 5, 2011 indicated that there were no wetlands on the property, the report issued by MINAE (ACOPAC-CP-081-11), reached the opposite conclusion and determined that the Las Olas Project site did contain wetlands.

The fact that the tribunal fails to state that that the MINAE report of 2008, January, February and July of 2010 all stated there were not wetland, and the 2008, 2010 and 2011 SETENA report said there were not wetlands, indicated the failure of the VE attorneys George Burn and Louise Woods to point that out at trial. Further, the obvious question is why are conflicting reports construed against the Foreign developers.

591. According to Mr. Aven and Mr. Damjanac, Mr. Martínez then conducted a site visit on May 13, 2011 in search of the alleged wetlands referenced in the MINAE report, and during the site visit Mr. Martínez also accused them of unlawfully cutting down trees in violation of Costa Rican forestry laws. They have argued that two forestry experts later confirmed through expert reports and testimony offered at trial that the cutting of the type of trees identified was not prohibited under the laws of Costa Rica.

I talked about that site visit and that where Martinez directly told me and Jovan that he didn't believe the INTA report. I also told the story about categorically denying we ever cut trees without authorization or illegally. We walked the entire area where they said trees has been cut and there was nothing cut. So the fact that the Tribunal said that was again proof that the VE attorney failed to show evidence to prove that no trees were cut. We were never ever charged or fined for illegally cutting trees by any Costa Rica law enforcement agency.

592. Claimants have argued that despite the fact that under Costa Rican law criminal liability requires proof of intent to commit a crime, and that Mr. Martinez's criminal investigation revealed overwhelming evidence that Mr. Aven and Mr. Damjanac did not intend to commit crimes – but rather that they had been diligent in seeking an Environmental Viability from SETENA and construction permits from the Municipality of Parrita and in enlisting the support of qualified experts such as their Environmental Regent to ensure that they were in compliance with Costa Rican law — Mr. Martínez not only failed to abandon his investigation and decline to file criminal charges, but formally filed criminal

That statement is true. How can you file criminal charges against me for violating wetlands, when a top wetland agency that you asked to test the site for wetlands tells you there are no wetlands?

596. The criminal complaint failed to provide credible evidence in the opinion of Claimants, who also alleged that they timely submitted the INTA May 2011 report 553 concluding there were no wetlands, and a report from Mr. Minor Arce Solano, the Costa Rican forestry consultant, who conducted multiple site visits before concluding in a September 2010 report that the Las Olas property did not contain a forest⁵⁵⁴; and that findings from such report were consistent with a December 2011 report issued by INGEOFOR, a Costa Rican environmental consulting company which – after reviewing the findings of MINAE mentioned above disagreed and also determined that the Las Olas Project site did not contain a forest, but largely consisted of a cattle pasture.

That's exactly right.

598. The record shows that the criminal court scheduled a preliminary hearing in Mr. Aven and Mr. Damjanac's case on June 19, 2012, at which time the judge had the opportunity to determine whether the prosecutor had enough evidence to take a case to trial; if not, the judge might dismiss certain charges or the prosecutor might choose not to pursue certain charges. Mr. Aven has alleged he presented the relevant environmental permits and reports, including the INTA May 2011 report and the INGEOFOR report, while the government attorneys presented no additional evidence. In Claimants' view, despite the "overwhelming evidence" presented in support of Mr. Aven's case, the judge determined that three of the charges should proceed to trial.

That's exactly right and goes along with the legal opinion recommendations to show evidence that would prove bias by the Criminal prosecutor and the Judge. That evidence was there, I showed it to Burns and Woods and told them to use it, but they again failed to follow my instructions.

617. As described previously, when the new trial was set for December 2013, and counsel to Mr. Aven advised that his client would not be attending the hearing because Mr. Aven had left the country of fear for his life, a trial hearing was re-scheduled for January 13, 2014. The Court then issued the INTERPOL Red Notice since Mr. Aven did not appear to face trial.

I presented evidence that I was had surgery in a hospital during that time that prevented me from traveling. Again, not used by VE during the trial.

620. The Tribunal has examined the allegations and the record of the criminal case, and believes that the Prosecutor (Mr. Martínez) had sufficient elements under the laws of Costa Rica to file charges against Messrs. Aven and Damjanac. These were initially based on the SINAC January 2011 report containing its conclusions and recommendations after its multiple visits to the Las Olas Project site in December 2010, which were later confirmed by SINAC. The Prosecutor then commenced his own investigation and gathered evidence through interviews with SINAC and Municipality officials, personal visits to the site, including interviews with workmen carrying out construction work and Mr. Aven, neighbors' complaints, and reports

issued by different agencies to determine the existence of wetlands, and the damages to the ecosystem in the Las Olas Project.

Burn and VE never used the evidence that there were numerous reports from 2008 to 2011 that stated there were not wetlands, but it was not presented at the trial. But the above statement is in conflict with par 622.

622. Whether or not the conduct of Mr. Aven could be considered as a “continued crime” or not, and whether the evidence gathered by Mr. Martinez was sufficient to proceed into trial, is not for this Tribunal to determine. This is an issue that would need to be decided by the criminal judge taking knowledge of the case in Costa Rica. At the time, the criminal judge had access to arguments and evidence from both the prosecution and the defense to weigh whether there were elements, including intent to commit the crime, i.e., refilling the wetland. And based on that evidence and arguments, he determined that the matter should proceed to trial.

Burn failed to follow recommendation of the legal opinion attorneys to produce evidence to show bias of the Prosecutor and the Judge. There was no evidence to show the I did anything to refill the wetlands.

623. This means that the fact that the Prosecutor filed charges based on what he believed to be supported by local regulations and sufficient factual elements did not, per se, immediately affect Messrs. Aven and Damjanac. Both were provided the opportunity to be represented by counsel of their choice and were subject to the laws and procedures available in Costa Rica.

What kind of statement is this. You file criminal charges not on a belief system, but on evidence that there was intent to commit a crime. Again VE failed to use all the reports, permits and studies to show there was not intent to commit a crime. How could there be, every document I saw from 2008 to 2011 said there were no wetlands on the project site. WE had all the legal permits that were issued by the Government.