UNDER THE UNCITRAL ARBITRATION RULES AND SECTION B OF CHAPTER 10 OF THE DOMINICAN REPUBLIC - CENTRAL AMERICA - UNITED STATES FREE TRADE AGREEMENT

In the Matter of Arbitration:
Between:

SPENCE INTERNATIONAL
INVESTMENTS LLC, BOB F. SPENCE, JOSEPH M. HOLSTEN, BRENDA K. COPHER, RONALD E. COPHER, BRETT E. BERKOWITZ, TREVOR B. BERKOWITZ, AARON C. BERKOWITZ, and GLEN GREMILLION,

Claimants,

and

REPUBLIC OF COSTA RICA,

Respondent.

HEARING ON THE MERITS AND JURISDICTION

Monday, April 20, 2015

The World Bank
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 10:30 a.m. before:

SIR DANIEL BETHLEHEM, QC, President of the Tribunal

MR. MARK KANTOR, Co-Arbitrator

DR. RAÚL E. VINUESA, Co-Arbitrator

Volume 1
Also Present:

MS. GIULIANA CANÈ
Secretary to the Tribunal

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Interpreters:

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MS. STELLA COVRE
MR. CHARLIE ROBERTS

APPEARANCES: (Continued)

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Procuraduría General de la República

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MS. AVERY ARMACHAMBO
MS. MARÍA CAROLINA DURÁN
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On behalf of the United States of America:

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Chief, Investment Arbitration,
Office of International Claims
and Investment Disputes
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On behalf of the Republic of El Salvador:

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On behalf of the Claimants:

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Claimants and Claimants' Representative:

MR. ROBERT REDDY
MR. BOB SPENCE
MR. RONALD COPHER
MR. BRETT BERKOWITZ
PROCEDINGS

10:31:19 1 disclosure in accordance with Paragraph 23.6 of
2 Procedural Order Number 1. If that is incorrect,
3 please make sure that you draw that to the attention
4 of the Tribunal's Secretary, Giuliana Canè, as soon as
5 possible. We don't want to inadvertently stumble into
6 issues of protected information in the course of the
7 proceedings.
8   I also note--and after this I'll turn to the
9 introductions--that these proceedings are being
10 simultaneously translated, simultaneously interpreted.
11 So please do have regard to the interpreters and speak
12 at a pace that is--that they can manage. They will
13 draw our attention to anyone who is speaking too fast
14 or, for that matter, too slowly, just to ensure that
15 everything is being managed properly.
16   I think, with that, I would like to go
17 through the introductions and, first of all, to call
18 on my colleagues to introduce themselves. Mark
19 Kantor.
20   ARBITRATOR KANTOR:  Thank you. I'm Mark
21 Kantor from Washington, D.C. I do have an apology to
22 make. I will be chewing gum throughout the entirety
23 of these proceedings or using throat lozenges. I've
24 unfortunately developed a bit of a swallowing problem,
25 and the gum alleviates, mitigates, that problem. It
26 does not mean I'm being disrespectful to any of you.
27 It also does not mean I've reverted to being a
28 16-year-old.
29   PRESIDENT BETHLEHEM:  Raúl Vinuesa.
30   ARBITRATOR VINUESA:  Good morning, everyone.
31 I'm Raúl Vinuesa from Argentina.
32   PRESIDENT BETHLEHEM:  And our Tribunal
33 Secretary, Giuliana Canè.
34   MS. CANÈ:  Hello, I'm Giuliana Canè.
35   Two points on this. You have on Channel 1,
36 the English translation; and Channel 2 on this, the
37 Spanish one. Remember to bring to me or to the
38 interpreter any presentation or document you want to
39 have in the record so they can be facilitated and to
40 speak to the microphone and to switch off the
41 microphone when you're off. Thank you.
42   PRESIDENT BETHLEHEM:  Mr. Cowper, would you
43 like to introduce the Claimants?
44   MR. COWPER:  Yes, thank you. Mr. President,
Members of the Tribunal, my name is Jeff Cowper, and I'm counsel for the Claimants with other members of the team, who I'll introduce in a moment.

I did want to say that it's a particular honor to complete this proceeding in this year, which is the 50th anniversary of the ICSID Convention, and many of us gathered earlier in this year to honor that anniversary. It's a particular honor, though, to be able to complete an investor-State dispute this year.

My clients are present, either in person with their families or by webcast, and I wanted to thank you, Members of the Tribunal, for making that available to them.

I wanted, as well, simply to note that this overall exercise we're engaged in from the perspective of the Claimants is enhanced by its public transparency and the availability of members of the public to see the webcast, and so we thank you for that. And, in advance, the Claimants would like to thank you for your service. I believe in the earlier Convention someone commented on investor-States bringing the rule of law to the globalization phenomena and being a civilization-making exercise.

Mr. President, I've already indicated myself. To my immediate right is Tina Cicchetti, who is a partner in the firm of Fasken with me. To her immediate right is Dr. Todd Weiler, who is well-known in this field. And to his right is an associate of our office, Alexandra Mitretodis. To her right is Ms. Tracey Cohen, who is a partner in our office. At the end of the, if I may say, the battery of Claimants' counsel is Mr. Vianney Saborío. And let me use that moment to apologize for the rest of the week for my pronunciation of anything that looks or sounds Spanish. So, I hope that's a generic enough apology that I don't have to repeat it too often in the coming days.

Let me just say, while I'm doing the introductions, so the Members of the Tribunal know, you're going to be hearing from more counsel than me this week. And, in general, so you have in your minds, Ms. Cohen is going to be taking damages. You're going to be hearing largely from Dr. Weiler with respect to international law and investor-State technical issues, and you'll be hearing primarily from me with respect to the factual issues, and I will take the lead generally.

So, that is more of an extended introduction than you, perhaps, anticipated, but that's Claimants.

PRESIDENT BETHLEHEM: Are there any other members of your, as it were, attending representation that you would like to introduce?

MR. COWPER: I think I'll just generally note the attendance of the Claimants and their members of the family. I won't go down, given the number, to identify them for present purposes.

PRESIDENT BETHLEHEM: Thank you.

Mr. Alexandrov.

MR. ALEXANDROV: Mr. President, I'll introduce the members of the team including the Party representatives and the client, but we would like to put a name to the face. Could we ask our colleague to introduce everybody in the room, please?

MR. COWPER: People, are going to have to move out of their way.

The person immediately to the right of Vianney is Mr. Brett Berkowitz. To his right is Mr. Bob Reddy, and I believe behind him is Mr. Ron Copher, and behind him is Mr. Bob Spence, and to the right of Mr. Bob Spence is his wife Marsha. And finally, the final individual is Joshua Copher, the son of Ron Copher.

PRESIDENT BETHLEHEM: Thank you.

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PRESIDENT BETHLEHEM: Thank you.

MR. ALEXANDROV: Thank you, Mr. President.

I will introduce Respondent's side in the order in which they sit at the table for ease of reference. Jennifer Haworth McCandless of Sidley Austin, María Carolina Durán of Sidley Austin, I'm Stanimir Alexandrov of Sidley Austin, Courtney Hikawa...
10:39:09 1 of Sidley Austin.
2 And then we have the representatives of the Government of Costa Rica: Adriana González, Karina Saum, Andrea Zumbado, Georgina Chaves, Julio Jurado, Rotney Piedra. And then we have Andrew Preston, who is actually not present at the moment, but he was here a moment ago, from Navigant Consulting.
3 PRESIDENT BETHLEHEM: Thank you very much.
4 Let me invite the nondisputing parties, who are sitting so far at the back of the room that I require a telescope to see you, but just to introduce yourselves.
5 For El Salvador.
6 MR. PARADA: Luis Parada. Good morning, Mr. President, Members of the Tribunal. My name is Luis Parada, and with my colleague, Erin Argueta, we are representing El Salvador as a nondisputing party in this arbitration. Thank you.
7 PRESIDENT BETHLEHEM: Thank you very much.
8 For the United States as well.
9 MR. SHARPE: Good morning, Mr. President, Members of the Tribunal. I’m Jeremy Sharpe from the Office of the Legal Adviser at the Department of State. I’m here with my colleague, Nicole Thornton, also from the Legal Adviser's Office. It's a pleasure to be here. Thank you.
10 PRESIDENT BETHLEHEM: Thank you very much.
11 And I simply note for all of our attention in the room that we’ve got two written submissions from nondisputing parties from El Salvador and from the United States. El Salvador has already indicated that it wishes to make an oral submission, and the Tribunal has agreed that should come tomorrow morning.
12 To the United States, I would invite you by the close of play today to indicate to us whether you would also like to make an oral submission as you would be entitled to do so, and that would then follow tomorrow morning as well.
13 MR. SHARPE: Thank you very much.
14 PRESIDENT BETHLEHEM: Thank you.
15 A number of other housekeeping matters before we proceed to the substance. Publication of pleadings on the ICSID Web site, I think we've addressed--the Tribunal has addressed this to the Parties in correspondence. We were hoping that we would get a response from the Parties at the start of these proceedings, whether you have any objections or not.
16 I don't invite you to make any objections at this point, but, perhaps, you could signal that to the Tribunal's Secretary during the course of the break. The Tribunal would like to facilitate transparency insofar as the Parties do not have any objection.
17 We note that Costa Rica has already published the pleadings on the Government Web site, although not the annexes. At the moment, I think--Giuliana, you can tell me whether there is a link to the Costa Rican Web site on the ICSID --
18 MS. CANE: Not yet.
19 PRESIDENT BETHLEHEM: Not yet. So there is no indication of pleadings on the ICSID Web site, but, subject to the views of the Parties, we would like to do so. So, if you could inform the Tribunal Secretary in due course if you are content with that.
20 MR. COWPER: Well, I don't need time. That is satisfactory to the Claimants.
21 MR. ALEXANDROV: Mr. President, no objection on behalf Costa Rica either.
22 Did you have--sorry, Mr. Alexandrov.
23 PRESIDENT BETHLEHEM: Let me just be sure I understand, that relates to annexes, all the other submissions that the Parties have put in?
24 MR. COWPER: Yes.
25 PRESIDENT BETHLEHEM: Thank you. ICSID will turn to that as quickly as possible. Thank you very much.
26 Did you have--sorry, Mr. Alexandrov.
27 MR. ALEXANDROV: No. I was just going to confirm. And by the way, when you say "annexes," we refer to them as "exhibits." If that's what you mean, Mr. President, we have no objection to publishing the record of this proceeding.
28 PRESIDENT BETHLEHEM: Yes, I was being generic. I think there are some appendices, there are some annexes. There is quite a lot of documentation that we see on the wall over there and that we've all got in our systems, but if you are content for all of that to be put on the Web site--
29 MR. ALEXANDROV: No objection to publishing anything that's in the record.
PRESIDENT BETHLEHEM: Thank you very much, indeed. Let me, just for good housekeeping reasons, address the schedule of the hearing. Today, as we know from the Tribunal's correspondence with the Parties, we will have the Claimants' Opening this morning. We will then move to the Respondent's Opening this afternoon.

Mr. Cowper, I would invite you, when you stand up, just to give us an indication of whether you intend to reserve a period of time for Claimants' Reply on Jurisdiction at the end of the day, simply for good housekeeping purposes, but that we'd already anticipated.

Tomorrow, we will start with El Salvador as a nondisputing party with El Salvador's oral submissions. We await to hear from the United States whether it wishes the same facility.

I should say at this stage that the Tribunal anticipates that we will have questions to put to the Parties in the light of your Opening this morning and this afternoon. We propose to raise some of those questions, or the questions that occur to us of a general nature, after the nondisputing parties have made any oral submissions that they propose to do so tomorrow. And then to give you the opportunity, either or both, to give some immediate responses, if you'd like to give some immediate responses, or to save up those questions and to give responses as part of your Closing. But we thought it would be useful for you to have questions as early as possible.

We will then, after those questions, move to the Claimants' witnesses of fact. Subject to issues of timing, on Wednesday we will then move on to the Respondent's witnesses of fact. Thursday is given over to the Expert evidence of both the Claimants and Respondents, and then on Friday we will have closing submissions.

I imagine that there will be little issues of time management that we will have to address as we go along. We know both Parties have been given an equality of time, 12 hours apiece, to use as you think appropriate, subject to the guidance that we've given following consultation with you that we have a 1/2-hour period in Opening, a 2-hour period in response. Of course, any time that you use in response to questions from the Tribunal is our time rather than your time.

We propose to break about halfway through the morning sessions and the afternoon sessions. I would invite counsel for the Claimants and the Respondent to indicate when would be a convenient time during those submissions to take a break.

I'd like to remind you any procedural motions, applications, objections that you have that you can anticipate, please make them in a timely fashion. We'll give you an opportunity at the end of the day, if there is anything you anticipate that you'd like to raise notably in respect the proceedings the following day, it would be helpful to have those as early as possible.

Subject to anything that our Tribunal Secretary has to say, I think we will be getting transcripts at the end of the day. The Procedural Order addresses the time period within which you should be coming back with any corrections. I'd like to, just for good order, invite the Parties to meet with the Tribunal Secretary at the end of every day just to ensure that there are no lingering difficulties over time allocation.

Last point simply about questions from the Tribunal. I think we have concluded that we would like to be in a position to put to both sides immediately questions that seem to us to require clarification, immediate clarification, so we don't have any lingering uncertainty just in terms of our own understanding. But in terms of larger questions, we propose to save those up to the end of the two Opening submissions and then, as I suggested, to put those to you jointly, leaving you with the option of whether to reply then and there or to do so as part of your Closing.

I think that's everything in terms of the formalities, unless either side has anything they would like to raise with us.

MR. COWPER: I just said, I'd like to start...
my Opening, and nothing further by way of
housekeeping.

PRESIDENT BETHLEHEM: Thank you.

Mr. Alexandrov?

MR. ALEXANDROV: Mr. President, two points.

Dr. Weiler signaled to me that our Experts from
Navigant are now in the room, and I haven't introduced
them. So, I'd like to introduce Mr. Kaczmarek, Brent
Kaczmarek, and Mr. Andrew Preston, who are sitting at
the end of the table.

My second point is we have a pending
application; and because opposing counsel suggested
whether you wanted to address that application before.

PRESIDENT BETHLEHEM: Thank you,

Mr. Alexandrov. That is my omission. I intended to
address it. It was simply to say that we saw—we
noted your application of last night. We saw the
Claimants' response/objection to that application. We
will come back to you during the lunch break with our
decision.

Thank you. I think then, without more ado,

Mr. Cowper, we return to you to kick us off.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. COWPER: Thank you, Mr. President.

Just by way of time allocation and to let you
know how we have allocated our time, I will reserve
30 minutes for Reply on Jurisdiction alone that will
take place later in the day, and Dr. Weiler will
address the question of jurisdiction. And for the
purpose—as the Respondents bear the burden on both
jurisdiction and the time bar within the Treaty, he’ll
be addressing both in Reply.

I will also say in respect of questions, that
in general, of course, there are questions which beg
an immediate answer; and if I can give you an
immediate answer, I will. If I defer to later, it
will probably be as a consequence of knowing that my
team will want me to make sure that I got it entirely
right.

So, don't take from my deferral that we don't
have an answer or that I don't have an answer, but
just given the allocation of responsibilities within
the team I indicated earlier, we'll be fairly cautious
in permitting me to answer a question immediately.

So, thank you very much.

We have a PowerPoint; and pursuant to the
Procedural Order, I have a PowerPoint I'd like to use
for the purposes of our Opening. We have also
provided a PowerPoint with the pinpoint references to
the extent that they refer to the evidence or law
references. The visual PowerPoint doesn't have those,
so we'll file with the Secretary the references so the
Tribunal will have those and my friend will have a
copy of those.

And I should also say, you invited me to
stand, which is my normal posture in proceedings, but
it's not convenient here, and I won't go to the center
stage because my team wouldn't allow me to be that far
away from them, I think. So, I believe the Opening is
now being handed out. I'll wait a moment until I get
the green light to proceed.

(Comment off microphone.)

MR. COWPER: Thank you, Mr. President.
The first slide deals with, at the most
general level, the Claimants' case. And by way of
Opening, we submit to you that the facts, which are
already in the record and that you will hear by way of
evidence this week, will establish that the Respondent
has engaged in a consistent and ongoing refusal to
honor its promise to foreign investors that, if their
property is taken, the Fair Market Value of their
property will be paid without delay.

And I'll deal with this later, but in a case
like this, it is important to define what is at stake.
And let me say that we do not, of course, contest the
right of Costa Rica to expropriate the Claimants'
properties.

We do call upon the State of Costa Rica to
honor its promise as to how it will take properties
and how and when it will compensate for them, those
promises being embodied in the Treaty upon which the
Claimants rely and in customary international law.

The second point of general interest from a
counsel point of view is that, in our submission—and
we'll come back to this in our closing
submissions--this is not a case involving novel
questions of treaty law or novel questions of
international law. The Claimants' case calls upon the core guarantees of international law, and in our submission, you will not need to make any novel conclusions of law in order to find in favor of the Claimants.

The next point is a general question about the facts. And I'm going to deal with the facts in general, but I have tried to characterize them in a fair fashion in that the general state of the facts here is that the Claimants, as foreign owners of property in Costa Rica adjacent to this particular park, at the end of this sorry history, which I'll deal with in some detail later this morning, have eventually become the victims of an internal debate about whether to allow responsible development in a sensitive area.

And it's helpful for me to expand a little bit on that and to say another matter, which the Claimants do not contest, is the need for responsible development in environmentally sensitive areas. None of the Claimants ever anticipated, expected, or wanted irresponsible development. Each of them saw the proximity of the marine park as an asset to the value and enjoyment of their property, both for themselves, their families, and purchasers of the development that was in mind.

And so, effectively what happened--and you'll see this in greater detail--is that within Costa Rica there was a spirited debate, which has a great deal of detail about it, which is why we're taking five days, in part, this week. But that debate was, "Ought you to define the parameters of the Park to exclude the possibility of responsible development?"

The outcome of that has been concluded, but we say, in essence, that the overall history is that it was conducted with a view to delaying and avoiding the liability to compensate for the properties that were affected by the outcome of that debate.

In effect, that leads to my next general point, which is, from a practical point of view, the outcome for my clients was that their properties became valueless, but the outcome of the debate, we say, on a fair reading of the record, landed the Government of Costa Rica with an unwelcome obligation to compensate our clients. And like many Governments confronted with an unwelcome fiscal obligation, they have followed a variety of tactics and strategies to avoid, minimize, delay, and defer the obligation to compensate, and we say those are relevant, both under the Treaty and under international law.

And so where are we now? For the most part, there are a few properties which have been transferred, very few, but for most of the properties at issue, the Claimants stand in possession of "zombie" titles of property. And we've had a debate about how to characterize this, and this may not be part of the culture of any of the Members of the Tribunal, but in North America, most 16-year-olds are obsessed by zombies.

So, I'm speaking to Mr. Kantor, now, in this respect. And I think the analogy with zombies is appropriate. You know, a zombie is the half-dead, suffering individual who isn't dead yet, but, to all appearances, is useless. And that's exactly the titles that our clients still have. They are half dead. They haven't been killed because the property has not been transferred to the State. They haven't been compensated for, for the most part, and where they have been compensated for, they haven't been adequately compensated for. But they are still around, so they still have to deal with the taxing authorities, they still have to deal with the fact that they still own these properties.

So, we stand today in an entirely unsatisfactory stage and indeed--and I'm going to summarize my friend's position--but my friend's position, in general, appears to me, to be either that these claims are out of date or premature, that the titles we all have can't be the subject of a proceeding because you have to wait, and the titles which we don't have and which have effectively have been gone are out of time, either by reason of the Treaty period or limitation period we say neither is true, and that the proper resolution is to bring an end to their status of "zombie titles" to conclude this unfortunate history by an appropriate declaration of compensation, and, of course, as the Respondent has...
requested and properly requires, a transfer of the title to Costa Rica to resolve the final issue. At that point, the expropriation process will be complete.

Finally, by way of introduction, the Claimants, of course, are concerned that much of their experience with Costa Rica has been involved in the various Government agencies responsible for compensation using a variety of techniques to minimize and defer compensation. In this particular case, I brought to your attention from the beginning the unique quality of these properties because a great deal was at stake in the development of these properties, because they were unique, free title, beachfront properties on one of the most beautiful locations in the world. And that is what undergirds the claims and the quantum of the claims which have been claimed in these proceedings.

So, if we could go to the next slide—and I promise you that the next 222 slides won’t take me as long as the first slide. How did the Claimants come here? Well, let me summarize the situation for the Cophers, Mr. Holsten, and Bob Spence. And I won’t at this point ask you to make any notes because I’m going to draw a very general picture. But, in general, in 2003, Ron and Brenda Copher, who were then in their mid-50s, were making plans for their retirement and they had been frequent visitors to Costa Rica, and they decided to spend part of a year in Costa Rica. If I can pause there, they are precisely the type of people Costa Rica wants to attract. They are well-off, well-to-do, successful individuals who want to enjoy the amenities of Costa Rica and to make it their home for part of the year. That was their goal. They began to investigate properties to build their dream retirement home.

They purchased a home in Playa Conchal in which to live temporarily while they were doing that, and they fell in love with Playa Ventanas, which is the northern portion of the property at issue in this case, and which, of course, had, as you know, a secluded white beach, which at that point only had a few homes on it. Those Lots are accessible by a public road. It has an estuary on the opposite side, and they regarded all of that as desirable, including the fact that there was a park adjacent to it. And they were told, as you’ll see from the Witness Statement, that the Park went out to the sea. It was a marine park that went out to the sea. They also, by the way, when they were visiting the properties, were joined by their friend Bob Spence, who is another Claimant in these proceedings, and he had a similar goal in mind. And he ultimately, similarly, is a well-to-do individual who is very successful in business in the United States. He wanted to build a dream home, but he also saw the potential for an investment, a development, and a profit selling to similar people who had also been successful, would also see the potential for building dream homes, and would contribute to the general, frankly, huge success of Costa Rica in marketing itself as a safe, attractive, and enjoyable location for international people of means to come and spend part of their year.

So, we’ll get back later in that, but both the Cophers and Mr. Spence purchased properties in 2003 and following. And just to deal in general, they both proceeded to take steps to see what they could build. They hired—Mr. Copher hired an architect to draw up plans, to have an environmental impact statement prepared, and initially things went well until, of course, the very long delays—which we’ll deal with in detail later—commenced. Mr. Reddy is the representative for Spence, the corporate entity of Spence involved, and Mr. Reddy has supplied Witness Statements, but he was very involved in locating the investments which were made—which form part of the claims here for the corporate defendant. And as you’ll see from Mr. Reddy’s Witness Statements, he was aware of the ‘90–’91 Park Decree—that wasn’t a mystery—as well as the 1995 Park Law, which described the Park boundaries as being seaward from the main high tide. And some of the properties that were purchased were, of course, within the landward section of the high tide, which you’ll see, as you know from the pleadings, ended up becoming the point of dispute. Just to draw to your attention at this time,
this was a place of great potential, and the debate, in part, was, how should that potential be realized? I'm going to skip a little bit to deal with Mr. Berkowitz's story because I think that bears on that. He had a history with Costa Rica. Earlier in his life, he was a surfer. He had suffered an injury as a chiropractor, not allowing him to continue with his profession, and so he decided to spend most of his time in Costa Rica, and in order to earn a living, he decided to be involved in building and residential development. He had seen, as a very attractive purchase, the parcels, many which are in issue in this proceeding, because a large subdivision and development had been proposed on those parcels and had been controversial, and the opportunity that he saw, which is explained in his Witness Statement, was of a low-density, high-end, selling-to-wealthy-individuals development, which would make use of the attractiveness of the--of being adjacent to the Park, make use of the fact that it was not a high-density development that has occurred elsewhere in the country, and to take advantage of the huge rise in the value of land and in the economic tourist potential of the northern part of Costa Rica, which arose, in part, because of the development of the airport in the north, in Liberia. He had a dream for a dream home as well, and he had an architect draw plans, and those plans included the types of things, which we have filed as evidence, are appropriate for properties which are adjacent to a turtle nesting site. They include architectural features to reduce the lights onto the beach. They include a voluntary setbacks from the property, they include fascia to block the shedding of lights. And I'll just pause here, and the reason that we filed Mr. Rusenko's Witness Statement, in large part, was to indicate that the responsible development that is spoken of by the Claimants here is not a pipe dream, and it's not an effort to, by indirection, have development which harms the nesting sites of the turtles. Rather, it actually represents the best thinking of how human beings can coexist with nesting turtles. And as much as we're all concerned with the environment, we're also, of necessity, concerned with economy, as is Costa Rica, as were the Claimants. And their goal was to reconcile their economic dreams and aspirations, not only for the construction of highly valuable retirement homes for themselves, but also for resale of properties to others with similar dreams without contradicting the conservation goals of the marine park. Now, with respect to--I think I'll stop there in terms of the particulars, but, of course, Mr. Gremillion is another Claimant who purchased property and had a similar experience to Mr. Spence, the Cophers, Mr. Holsten, Mr. Berkowitz, and all of them experienced--and it's without question in these proceedings--a suspension of any right to develop and make use of their property as the years passed. So, that is intended to give you a little bit in a large international proceeding a perspective of the individuals involved and the fact that this case does not involve an international company. It doesn't involve an entity that is seeking to contradict the public policy of a state or to influence public policy in any way other than to try to reconcile the stated goals of conservation and the desire to have responsible development alongside. So, if we could then go back--so, this is to orient you. This, of course, is the Guanacaste Region, is in the northwest of country, and this is within Guanacaste, and you'll see Liberia, which is the location of the relatively new airport, which was a key feature to opening the north of the country to tourism. If you go to the Claimants' Lots slide, which is next one, this is really just to orient you north to south. Ventanas, of course, is in the north; Playa Grande is on the south part of that map, and you'll see the Lots at issue identified by letters and numbers alongside. If you go next to some pictures--no PowerPoint is complete without pictures. I have to say that I militated for audio at this point to have the sound of beach waves and birds play at this point. I was overruled. I--apparently, I was the only person
who thought that would be effective, but I was
overruled, but I'm still speaking. So, if you could
just imagine the waves and the birds as you look at
this slide, there is no question that this is one of
the most beautiful and accessible areas for tourism in
the world, and that Costa Rica is rightly proud of its
natural resources.

PRESIDENT BETHLEHEM: We note that the
Parties agreed that there should not be a site visit
on the part of the Tribunal.

MR. COWPER: Reluctantly.
The next slide is Playa Grande, similarly a
beautiful white beach, and from a legal perspective,
as is noted in the materials and is undisputed, the
properties at issue are unusual in that they represent
free-title land on a beach in Costa Rica. If we then
go next, I think I've commented on these features.
The next slide, which is just--you'll see
that dealing with money for a moment, foreign real
estate investment, you'll see that Santa Cruz, which
is the county in which we're dealing with was
fortunate to receive a substantial amount of foreign
real estate investment in 2004, 2007. And let me just
pause to say because during one of our preliminary
hearings I made this point, which is from the
Claimants' perspective, they are calling on the
promise of the state of Costa Rica to honor foreign
investment and to provide the minimum foreign
guarantees for foreign investment, which have been the
subject matter of international law for a very long
time and are the subject matter of the Treaty we rely
upon in these proceedings.

But that promise is actually simply arising
from the success of the offer of Costa Rica to open
itself to foreign investment, and that offer was acted
upon by the Claimants and by many, many other people
and has been responsible for a good deal of the
success that Costa Rica has enjoyed in the last number
of years, and it is simply that promises come with a
price, and that, if people are injured as a result of
acting on that price by your actions, then
compensation is necessarily required.

What we're engaged in here is that my
clients, being foreign investors, do not have to
content themselves with the domestic legal order, the
benefits and the disadvantages of that. We
fundamentally can rely upon the rule of law to have
their dispute decided according to the law before an
International Tribunal because of the existence of the
Treaty.

The next slide is tourism in Guanacaste. I
won't deal with that, but, of course, there has been a
dramatic and productive and important increase in
tourism. And I was reading last night the
administrative appraisals, which, of course, in our
view, understated the values. Consistently one thing
that they make note of is the entire shift of the
Costa Rican economy from an agriculture economy to a
services-based economy, which in significant part
resolves around the tourists and the people who would
have come and purchased these lands and in many other
parts of the country have done so. It's not the case
that the failure of these Claimants' desires have
frustrated development generally in Costa Rica, this
is a sad chapter in an otherwise very successful
voyage of foreign investment and development.

Next, if we could go to the leatherback
turtle: As you gather from our pleadings, our
fundamental position--this is actually not about the
turtles. My friends have said it is about the
turtles, so I didn't want to ignore the turtles in my
presentation, so here are two of them. The turtles,
occur, are massive, and they do require beaches to
nest. They don't climb trees, and they don't go into
vegetation to do. And that's the fundamental basis of
the ability to reconcile the need for nesting beaches
with the ability to develop alongside them. And we'll
deal with that. We've dealt with that in the
evidence.

And if we could go on, one of the tragedies
associated with the leatherback turtle, which, by the
way, is generally present in the Pacific, and,
actually, I'm from northwestern Canada, and we have
leatherback turtles off the coast of Vancouver Island
which have been seen. So, it's a general Pacific
population, and you'll see from this slide that, long
before the events that we're dealing with here, there
has been a catastrophic decrease in the turtle
population. It has not been, as a consequence, we say, of the development of the type of development that our clients had contemplated. If you go to the next slide, the causes of decline include egg harvesting. And by definition, these beaches are often found in areas of poverty. Emptying a turtle nest takes a very brief period of time, and you can harvest a hundred eggs for you and your family, and for poor people in poverty that is obviously an attractive source of protein and food. But it obviously can impair an entire world population of sea turtles and it has. Longline fishing has been a dramatic--has had a dramatic impact on all species of sea turtles because the longline fishing presents bait. The turtles take it, and you can characterize it as bycatch, but they are essentially killed as a consequence of the continuation of longline fishing. Some people, just to round out the thing, have cited global warming. I think that's unclear as to its role, and other people have referred to concern about development near nest sites, which is why the development has to be responsible. But there are--and you'll see from the Witness Statements--successful nesting sites adjacent to highly developed locations in the world.

You'll see this next slide just summarizes just how dramatic the decline in turtles has been, and this is just a note of how terrible poaching or egg harvesting can be, and then that will be the end of the turtle section of my Opening. And if we can then go to the facts around the Park, and so I will take it that Members of the Tribunal have read the pleadings generally, and, of course, you'll have time to read them more carefully. So, by way of Opening, I'm going to deal with it generally to try to introduce and sort of fasten in your mind some of the themes we rely upon here. In looking at the pleadings in preparation for today, it may be useful to think some of the details actually are not that critical in terms of resolving a case, as always. But if we start with the beginning, the Park was created by Decree in 1991, and when you say "creation"--and just to give you sort of a sense--parks are not actually fully created under Costa Rican law until the private property within the Park is expropriated and paid for. That's a consequence of the general Park Law, consequence of constitutional guarantee of property, and that's why you'll see in the materials, Government materials and otherwise, references to proposed park or consolidation process, because the consolidation process inherently involves reconciling private property interests with a National Park. And, of course, that means that the fiscal consequences of building a park--if I can use the word rather than creating a park--are ever present. In some of the Respondent's materials, it's suggested that fiscal problems here were not real. That seems to be a controversy between the Parties. For our part, there are multiple references that make it abundant, both in terms of Witness Statements, as well as documents, that the cost of fully creating a park and taking all of the property within the boundaries of the Park was ever present in the minds of public officials, and the resolution of that was either to avoid doing that by defining the Parks so as to not include property that would have to be compensated or otherwise seeking to avoid the consequences of the constitutional guarantee of property and the general requirements of the Park Law. The next thing is that the Decree in '91, just to anchor yourself, of course, deals with a southern part of the beaches we're talking about. So, it's Ventanas south. It doesn't deal with the northern part of the property--part of the beach. Now, so what you had was a Decree, not a law but a Decree, seeking to create a park in the southern part of the area, the Playa Grande area. Then, in 1995, you had a Park Law, and by way of the most broad thing, the--part of the reason we're here is because the 1995 Park Law created a marine park and not a terrestrial park. By reason of a long and somewhat complicated history, it ended up being both a marine and terrestrial park by reason of the final decision of the Supreme Court of Costa Rica. For reasons I'll get into here, in our view, that is clearly wrong, but every Supreme Court of every country is entitled to be wrong. That's what we
So the 1995 Park Law also expressly addressed the rights of private land within the Park and protected those, and it clearly contemplated that there would be development, despite the existence of the Park.

If I could then go down. And are we going to play the video? I see Mr. Piedra and trust he's going to be present later. This is a video--

(Video played.)

MR. COWPER: So, if we flip over to the English translation of those remarks, and you may want to make a flag here. This is a question of controversy. Mr. Piedra says his comments are taken out of context, but the comment we rely upon is "It is a marine park." When we talk about a marine park, we're referring to the more commonly known 50-meter public area, and this was in the context of an effort by many to expand the Park, to ensure that the Park would include a terrestrial area and not be restricted to a marine park, and we'll deal with that in detail, and we'll deal with that in detail in our Closing.

What you need to have in mind is that after the 1995 Park, there was a dissatisfaction by many with the absence of a terrestrial component to the Park, and we say that it's a rewriting of history to suggest that everybody knew that the Park proceeded inland.

Now, if you go to the next slide, I've already indicated this. I think we can just look. But here is just another slide on the Tamarindo Refuge, and we'll show you prior to '91, the protected area along the coast, which is narrow, and the estuary which is behind. So when I say the "estuary opposite," you have both the freshwater estuary and the ocean in the same area.

Then if we go to the '91 Decree, this just simply amplifies my description below. You'll see under Article 1, at the very beginning of the second paragraph in the left-hand kind "from a point located in the southern end of Playa Ventanas," at a distance of 125 meters as of the ordinary high tide. So, the Decree contemplated a terrestrial component.

And if you then go on, you'll see that it says--and I have a slide later on. Article 2 says (reading): Every residential development of any other type made in the zone shall approved by the Ministry of Natural Resources, Energy, and Mines. That's part of the respect for private property and development by private lands within the area. Now, this Article 2 refers to Playas Carbon and Ventanas and this 75-meter zone applicable to those properties. I have a later slide which deals with the land within the Decree.

You'll see equally in the next slide, Article 5, that the Declaration of the national park is fully valid once the State purchases the private properties existing within the delimitations, and that is a reflection of the general law and the constitutional right to the protection of property I referred to earlier.

We then skip to the 1995 Park Law, and this has the broader boundaries, which include both Playas Grande and Ventanas, and that's clear from Article 1.

And here is where the historical event arises. It's our case that the legislature specifically understood that it was being requested to preserve a terrestrial component to the Park which had been the subject of the Decree in 1991, and that it specifically rejected that request and that proposal.

And you'll see in the legislative debates in the next slide, the motion at the bottom was to amend Article 1 where it says (reading): After 125 meters from the ordinary high tide at 'into the water' or 'aguas adentro.' And there's no doubt that those phrases understood ordinarily meant that what was being created in 1995 was a marine park as described by Mr. Piedra and not a marine park with a terrestrial component. So, essentially you would have the 50-meter public zone, and you would have a 125-meter zone heading into the waters, and there was both reason and justification for that.

If you go to the next slide, you'll see that in the legislative debate, it says, in English (reading): It appears to me that it meets the requirement of a law of this type to protect parks, especially, it should have been marine because that is
what is customary in this case. It wasn't mentioned as being marine. When the Park is defined, it talks about 125 meters, an imaginary line, and that should extend into the water, exactly what I think this motion has clarified present unanimously approved. So, as a matter of pure history, we say there can be no doubt that there was a legislative decision as to the boundaries of the Park in 1995, and that decision was to exclude the terrestrial component that later arose through the complicated proceedings culminating in the judgment of the Costa Rican Supreme Court. And a later letter from Congressman Fournier speaks about this. If you go to the next slide, it says, "I recall at the time we discussed since it was a national marine park"--and I'm at the second body--"created to protect the leatherback sea turtles that use the beaches, it should be strengthened." It says, "Furthermore, as occurred with the Decree 1991, which created the Park, we were not presented with any environmental justification whatsoever for establishing an area of onshore protection, measured starting from the edge of the 50-meter strip, which includes the most important part of the protected ecosystem, i.e., where they lay eggs. In that considerable strip of 50 meters that runs along more than 5 kilometers of the coastline, a beach area and a tree farm form natural protective barriers. These elements ensure that sea turtles have a nesting area that is free from anthropogenic effects." Now, whether--and that is something, if I may say, something that everybody could debate about how big the Park should be. What we rely upon is the pure factual history, which is that was the legislative decision at the time. And so when we come to deal with the history of the Claimants, they had every reason, both legally and factually, to believe that their lands were capable and appropriate for the developments that they had in mind and that they would receive an appropriate governmental response to efforts to develop and sell those lands or to develop them and enjoy them as retirement homes. Now, another, if I will say, corroborative point was the explicit effort to expand the Park, and a number of people in the historical period said the '95 law is wrong. We should have actually a larger terrestrial component, the terrestrial and the large terrestrial component for the Park for both general conservation reasons, the reasons you create any park. You want to have a bigger park for preserving, not just for turtles, but for other reasons and making it attractive for turtles and et cetera--attractive to tourists, not "turtles." The beach makes the place attractive to turtles.

If you go to the next slide, you'll see that in relation to the proposal to expand the Park, there are comments about the inadequacy of the marine park created in 1995, and you'll see considering the law which created the Park, there was no reference concerning the terrestrial portion that limits the marine area of the Park and no mention of any special protection to the existent resources, making it important today to offer this project of law, which will enable the enlargement of the Park limits and the necessary protection to the terrestrial ecosystems.

And the next slide in our submission--and this has been cleaned up. We have it in Exhibit C-2F, I believe, but for the purposes of this, we've cleaned it up a little bit so you can see it clearly. But you'll see--and this is an attachment to a letter from the Minister to the legislature, that the area we're speaking of has a 50-meter dimension and no more. We can slip through, the evidence deals with the need to protect the interior waters and thus, the going seaward had, in fact, a justification. There was a concern about protecting the turtles as they approach the beach. And you'll see the next one is simply a description of how that Park Law would, in fact, have operated, and you'll see that the 50-meter zone on this particular area demonstrates the beaches available to the turtles and there is, in fact, a berm, a natural berm, behind the beach, which can be used to, if you will, govern responsible development. The next slide makes the same point in a different part where you'll see the berm rises and the turtles, of course, don't go into the forest to lay their eggs. They lay their eggs at the upper portions of the beaches.
internal relations of the Costa Rican Government makes the point that, as a matter of just pure historical fact, the municipality was purporting to zone the land that is now said to have always been part of the Park. The municipality didn’t agree with that. They granted building permits. They purported to exercise zoning and, indeed, the subsequent--one of the subsequent Constitutional Court Decisions dealt with that conflict and resolved it in favor of the Park. And that is ultimately--but at this time, my clients were not alone in thinking that development was possible, that you could obtain building permits from the local municipality, and you could carry out a responsible development or a number of responsible developments.

Now, the next slide deals in a very summary way, and I think we’ll have to go in more detail in Closing to this so that we carry our way through it. The title of this is a little bit misleading. There have been about a hundred Constitutional Court Decisions by our count or more, which actually refer to the Park. They are not all Park boundary decisions, so the title is a little bit broader than it should be. And there were a number of proposed bills to change the Park Law.

And these decisions, like the decisions often in many countries, don’t all go one direction. There’s a certain state of confusion created from reading these decisions, and I’ll just touch on it lightly at this point. In 2005, there’s a decision ordering MINAE and SETENA to consider establishing new guidelines for environmental assessments to be conducted as part of development.

If you go to the next slide, you’ll see that there’s a resolution by SETENA to consider suspending environmental permits within 75 meters of the public zone. And just to be clear, the suspension of environmental assessments is suspending the rights of the owners to establish that their development is consistent with environmental protection. So, there’s an irony here in the case, in that the actual means of freezing the Claimants properties was to disallow them the power and the ability to prove that their development would not interfere with the nesting of the turtles and was completely consistent with the goals of the Park.

Of course, to be blunt about it, if the Park was to embrace and include their lands and to be taken and expropriated and compensated for for that purpose, then you could understand why the taking needed to proceed before they built their properties. But in plain terms, what the Claimants were owed under the Treaty obligations and under international law, and under the Costa Rican Domestic Law, was the honesty of the Administration saying "That's what we're going to do, and we're going to compensate it pursuant to the general law, the domestic law, and our international obligations."

The next decision is--there was a question of about the Court in that case refused to compel the administrative officials to consult with the cartographic service. IGN is the cartographic service of the Government, as I understand it.

And then we have the next important decision, which is in the Spring of 2008, the Supreme Court of Costa Rica took the position that the 1995 Law contained a typographical error and the boundaries were actually inland, and not seaward. And we’ll go into some greater detail of this in our Closing, but you may recall from our pleadings that there was an opinion generated within the Government that proposed that there was a typographical error.

We say that opinion and this decision is irreconcilable with the materials I’ve already put to you. It is irreconcilable with history. That doesn’t mean it isn’t a general law of Costa Rica. As I said before, Supreme Courts are entitled to be wrong. That's, in part, why we appoint them, but what it does show is a demonstration of the history is that should not be visited with our clients by the Respondent’s position that they ought to have known all along that this fell within the Park. It required not just foresight but divine foresight to have reached that conclusion.

So, I think I can skip to the next couple of decisions, but I would say this, and that is, there was--maybe I shouldn’t. If you go back to May--I’m mindful of the time--this is not unimportant, which is that there was a decision in the Spring of 2008 in
which the Court appeared to have actually ordered either the immediate expropriation or the development of guidelines. And then in the December of 2008, the Ministry was ordered to expropriate all private property within the Park immediately. You would have thought that was the end of matters. It was actually more in medias res I think would be the modern expression, more in the middle of matters. If you then go, you’ll see that in response to further requests, the Court in the Spring of 2009 actually said that it was up to the Administration to decide what to expropriate and when, and that their earlier Decree to do so immediately was not intended to introduce the Court into the Administration of the Government.

And the next slide, which is an extract from that, you’ll see that it says it is not their place to indicate when to expropriate nor how to go about it, as that is the responsibility of the Respondent and Administration. So the earlier judgment, which contemplated an immediate action, was mitigated by that reference. I think that slide’s reference to a resolution is wrong. I’ll double-check that, but I think that, I believe, is an extract of the judgment itself and the English translation for it.

The next important stage in the facts--and we’ll probably finish this and then take the morning break--is what then flowed from that, of course, as I said earlier as part of my Opening, was the unhappy, if you will, and unwanted obligation to pay for the very valuable lands which, by reason of this conclusion of typographical error, the State now had the responsibility to buy. It had that responsibility under its own law. It had that responsibility under international law. Of course, we have CAFTA coming into effect in which they promised to the citizens of the CAFTA Treaty that they will honor those obligations.

And what you have within the Administration is this Contraloría Report which effectively we now know has essentially been responsible for--or at least action based on it, has been responsible for the indefinite suspension. And I say "indefinite" in that we’re still in suspended mode today of the expropriation process.

On my reading last night, my understanding is that the position of the Respondent is that all the conditions of that Report have not yet been fulfilled. No time for the end of that process has been offered to the Tribunal. No--essentially all of the various procedures which under domestic law might offer some compensation to our client, for the most part, have essentially been suspended and have taken no further steps.

And if you look at the Appendix 2--at this point that might be a good thing--and if my notes to my own document are correct, what I draw your attention to essentially is if you look at the Ventanas Lots at the top, which essentially proceeded to the administrative assessment stage, and those are the ones going down--starting at the top and going down sort of to the white blanket at Ventanas. All of those have been essentially suspended since 2010, if I’m right. And then just while we’re on there, you’ll see that there have been essentially three titles transferred of all of the titles in issue throughout the history.

Now, there are a number of failed efforts to resolve these problems, both before and after the Costa Rican Supreme Court’s Decision, and the next slide summarizes some of those, and these are all genuine efforts. So, in 2002, there was an effort to expand and consolidate the Park which failed. I referred you earlier to the goal to actually expand the Park to make it clear and that, would, of course, make it clear, but that failed. In 2006, there was a bill, as I understand it, that advanced that would interpret "seaward" as "inland" before the Costa Rican Decision and that Bill failed. In January of 2008, there was a bill to interpret "seaward" as "seaward," and that Bill failed. In then finally in 2009, there was an effort to reconcile the development adjacent to the Park and to have a mixed refuge, and that lapsed and was essentially archived in 2013. And I think the slide says "achieved," and it wasn’t achieved in 2013. It was archived in 2013. There’s a procedure, as I understand it, within the Administration where if a
Bill has not been acted on within a certain period of time, it lapses and it's then archived. So that should read "archived."

And the next slide deals--as you'll recall, the Claimants' position in this proceeding, is that they had a reasonable and detrimental reliance on the assurances that these properties would be available for responsible development. This is actually--the slide needs to be corrected because it should read "minutes after meeting with Brett Berkowitz." It's not the "meetings" of his meeting. And just to--in dealing with the fact the Respondents have--we have a meeting with Mr. Berkowitz and the Minister, which is contested on the record.

PRESIDENT BETHLEHEM: May I just ask which slide we're on? The one I'm seeing on the screen seems to be different from the one that we have in the binder.

ARBITRATOR VINUESA: It's a continuation.

PRESIDENT BETHLEHEM: It's a continuation.

MR. COWPER: Your slide should say "Position on Development."

PRESIDENT BETHLEHEM: I'm just looking at the one that said, if you go back to the previous one, "The agenda of the meeting included the following."

That we don't have or it's been cut off in the packs it looks like.

MR. COWPER: The one on my screen says "Position on Development."

PRESIDENT BETHLEHEM: It looks as if it may just have printed incorrectly. You can have a look at that afterwards, but just to draw your attention to it, it's that slide.

MR. COWPER: You have the right slide and the one on the screen is the wrong slide. No, I think that's the right slide.

PRESIDENT BETHLEHEM: Yes, it is just rather different from what you have on the screen. No matter, we can come back. I don't want to delay you. We can come back.

MR. COWPER: Oh, I see. I'm sorry. Yes. Okay.

Yeah, I'll just keep plowing on, but the mistake I'm drawing your attention to is within the box. You should strike "minutes from meeting."

PRESIDENT BETHLEHEM: Yes.

MR. COWPER: That's not correct. But just from a counsel's point of view, what I'm drawing to your attention, Mr. President, is this: There is a controversy on the Witness Statements about the content of the meeting. There is no doubt there was a meeting. We don't have a statement from the Minister. We have a statement from Mr. Berkowitz, but from what I commend to you--and we'll return to this, of course, in Closing--is that his evidence that he was reassured of the position of the Government and that that was given to him before he had made his final payments to purchase this property is completely consistent with this document, which is made a few weeks later, and he says it was referred to, not explicitly in the sense that it wasn't available to him at the time, but the fact that there would be a statement of position rendered is consistent with it.

So, for the purposes of deciding as a matter of fact whether or not those statements were made, I say that this provides substantial corroboration of that fact. And you'll see, if you go--hopefully--do you have a slide which says "It is important to point out"?

PRESIDENT BETHLEHEM: Okay. It's rather different from the one that is on the screen because, at least in our packs--or in nine--it comes halfway down the page, but I think we've got the text in front of us.

MR. COWPER: Okay. So just for the purpose--we have, of course, the whole document in the record, but the points of this for the purposes of Opening, I wanted to point out to you that the Statement here is that the Ministry did not encourage the expansion of the Park, which was a proposal being advanced. That the Park would not be expanded to any area that was declared an area of tourism interest. And that in the private area, the Ministry wanted to promote a voluntary conservation regime instead of expropriations. I'm sorry, the Exhibit is C-53, if you want to make a note just so you have the right reference there.

And you'll see the next slide is "Any
development shall meet the criteria that shall be
defined as low density, proper use and management of
lighting, 'green curtain' use and implementation among
others." That's a summary of what I've been calling
"responsible development."

Now, I think I can move through a number of
slides quickly before the break. The next slide is
not really controversial. Of course, you need, in
order to get a building permit in this context, you
need a number of things, including an environmental
impact assessment. That's the critical matter that
was halted. And then there's a number of slides here
just to illustrate to you or show you dramatically
that, if you had gone to the land registry and seen
things, what would you have seen at the time? Well,
here is what was on the land registry drawings for
these Lots, and the English says, "In conformance with
Article 47. This office does not object to the plan
as it is outside the national park."

And the next slide with respect to these
Ventanas Lots says, "it is outside the national park."
The next slide, which is V59, is interesting because

It refers to the '91 Law. It says it's in the Park
according to the '91 Law. And you'll recall the
changes to the boundaries of the Park in the '95 Law.
And the next slide says that this is outside
the Park. The next slide says C-96 is outside the
Park, and then you'll see with respect to South Playa
Grande 1 and 2--and you may want to make a note that I
think it says 20 percent approximately is in the Park
according to the 1991 Decree. This is an example of a
reference to the Decree and part of SPG1 and SPG2
being within the Park.

With respect to the B Lots, you'll see it
says approximately 40 percent, as I read it, in the
Park according to the '91 Decree. That law says "'91
Law." It should say "Decree," just to be clear.

Now, Mr. President, I think that's--my note
is that I was to stop about now for coffee break on
time. I have a lot of slides to go, but the next 30
or 40 will take very little time. They are sort of by
way of a timeline demonstration. So I would suggest,
if we could, that we take the coffee break now.

PRESIDENT BETHLEHEM: Thank you. Let's do
Straightforward matter.

I think it's fair to say, certainly from me as a non-Spanish speaking lawyer from the wilds of the Pacific Northwest, that I'm more dangerous than reliable in reading the Decisions of the Costa Rican Court, but we have people on our team who can keep me correct.

The next slide, just quickly, when I was--we got a little bit off on the MINAE statement. I just wanted to pointed out to you--and I think it's--Alex, it's Slide 48 is what I was hoping for, I think. Yes, I'm sorry, just--it's the--if you go back a slide. If you just look at the slide, the reason I'm pointing out is I moved a little bit too quickly through it. I said earlier in my Opening that the documents are and have a number of references to the lack of financial resources, and this is just one of them. And I skipped over it. It says (reading): It does not encourage the expansion of the Park because there is a lack of financial resources to purchase lands.

And that's just a reference in this Opening Sheet to that. There are many other references in the pleadings, and we can marshal those in our final argument.

So, the next section of the slides is fairly lengthy, but I'm not going to take very long with it at all. It is essentially an attempt to draw a timeline for you in relation to the various Lots in issue. And, Alexandra, maybe you could do that.

So, this is the general timeline--if you can go to the next slide--and you'll see that those Lots were purchased in 2003. Next slide. And then other lots. Maybe Alexandra, I'll just--if you could just take a couple seconds per slide.

You'll see we're moving through, in respect of these, there's a Decree of public interest in October '07. We're advised in the course of these proceedings that the expropriation process has been suspended. And then the next slide. The current status is "title is unchanged."

Now, we've also given you Appendix 2, and...
And then Mr. Gremillion, who hasn’t received a lot of attention, but we can go through his slides here. He’s watching, I think, by webcast, he and his family. So, this is another zombie title. So, if we could then maybe go to the next slide now.

So, the point of that slide—and, of course, is the vast extent of time we’re dealing with from the beginning of the controversy to the current period. And as part of our claim, of course, we say that by no account and no definition of the term can this be an expropriation without delay. Delays have been typical rather than exceptional in the history of this dispute.

Now, the other feature to note was that, in terms of the history, the effort to rescue the situation and to reconcile responsible development with the Park was ongoing after the Supreme Court’s decision, and this next slide will show that one of the bills that I talked about earlier was reintroduced, and this would have made a mixed refuge, which was a different legal designation that would have permitted development, and you’ll see the note at the bottom, which one of the commentators says—Ballestero said she agrees with the law that would find a way to obtain the land from the private owners without having to use State money, and it’s quoted in the article to say (reading): We need to resolve the problem so the State doesn’t have to pay for the land. I believe there are more adequate mechanisms for us to be able to make this statement to have people inside the national park.

And then this a failed proposal, but if you go to the next slide, you see in dealing with this in 2010, the proposal would have reduced the Park and leave only 50 meters of beach for the leatherback turtles and allow for the construction on the beach. And then you’ll know that that was unsuccessful.

But, as an example of the conversation about responsible development, the next slide deals with a meeting between one of the Witnesses in this proceeding, Kirt Rusenko, and President Arias, and you’ll see that, as reflected in Mr. Rusenko’s, he met with President Arias, and he says, as you say here, that “a code with teeth would be needed to restrict light, building heights, and building density.”

So you couldn’t have, by this man’s view, 20-story buildings or 30-story buildings and the like, but you could have the kind of building that the Claimants contemplated (reading): If the 50-meter inalienable zone was respected, I thought the area could be developed with minimal impact to nesting sea turtles and their hatchlings. I also encouraged the President and his officials to engage in a national effort to keep records of sea turtle strandings, as well as a training program, so they could know what nesting activity exists before they allowed further development.

That is just an abstract.

So, I’d like to go next to a broad overview, by way of Opening only, of our complaints of about the expropriation process. And by way of a beginning, of course, I remind you that there is a sophisticated expropriation process within the country and within the domestic law. Our complaints primarily relate to how it was implemented, and there are challenges and complaints about some of the embedded means by which compensation is understated in the process, but primarily the implementation is the subject of most of our complaints.

If you go over to the respect for private property in the context of a park, I’ve given you the reference I promised you earlier in the 1995 Law, which says that (reading): The private lots of land included—will be susceptible to expropriation and will be considered part of the Park until they are acquired by the State by purchase, donation, or expropriation. In the meantime, the owners will enjoy the full exercise of the attributes of domain or ownership.

So the law of Costa Rica did not contemplate the suspension and freezing of property rights while the development of the Park was underway. If you then go to a summary, this is my summary by way of Opening of some of the characteristics of the historical record. In my submission, they can be summarized in five different ways of the State avoiding the taking, which has both been ongoing and is still ongoing, freezing property...
rights in the meantime, deferring obligations to
compensate, deferring payment of compensation, and
minimizing compensation. And I'll just give you some
each of those.

The next slide deals with the first. And the
most obvious point is today Respondent has only
directly taken 3 out of the 28 Claimants' Lots. And I
think that fact can't be more-- can be no persuasive
fact of the fact that the State has avoided the taking
in that fact. And that delay flies in the face of the
decision requiring expropriations to be conducted
immediately.

The next is freezing of property rights.
And, of course, you have a small, but telling example
in Mr. Berkowitz's home. He presented an
environmental impact assessment which demonstrated
that his home would not adversely impact the
environment and would be a responsible development.
As he testifies in his Witness Statement, the agency
receiving that purported to lose his application, and
then we find out later that there was a suspension on
the approval and review of environmental impact
assessments, and then later at some point a permanent
suspension, unknown to the Claimants, but effectuated
within the Government.

The next approach is that of freezing
property rights, and the fundamental one I mentioned
earlier is essentially preventing environmental
assessments, basically saying you can do any number of
environmental assessments which show that development
is fine. We don't care. We're not going to review
them. We're not going to proceed any further at this
point, but without actually expropriating and taking
the property and compensating for it.

And the next slide just points out that, in
the meantime, there are obligations. The owners are
required to pay taxes and required to maintain the
properties.

The next slide deals with deferring the
obligation to compensate, and the points to be made
there is for those Lots which are in the judicial
phase. It says a slow pace to judgment. I think you
might put "glacial" rather than "slow" there. For the
Lots which are in the administrative phase, as I

pointed out just a few minutes ago, there has been
essentially an indefinite suspension of the
expropriation process to avoid triggering the
obligation to deposit the administrative appraisal.
That's our inference; that essentially faced
with the fact that you have to deposit some money, the
Government officials froze the process before that
obligation came into being, and we say the inference
can be drawn that that's, indeed, the case because at
the time of the initial freeze, there was an
administrative appraisal, which had been actually
higher than previous appraisals. There was no report
recommending a suspension. The suspension happened,
and then the report came out very shortly afterwards.
So, we say that is telling evidence that, in this
context, the officials were seeking to defer the
obligation to compensate.

The next example is just as a concrete
example of delay for Lot A40. This is one--only one
of the Lots, but you have a Decree of public interest
in 2006, nine years ago. You have an administrative
appraisal in 2006, some months later, you have
judicial proceedings in 2007, and we'll deal in detail
in our closing with who's in control of which stage of
those proceedings. You have a judgment in 2010, the
payment is received in 2012 of principle. The payment
of interest is not received until 2015.

The next point, of course, is in respect of
the deferring of payment. The system is susceptible
to permitting delay and we've identified two examples
here between the determination of value and the actual
deposit of that amount, and we've seen that, and
between the deposit into the Court account and payment
to the owner.

Now, the final tool that I'm--by way of theme
identifying for you that we see in the evidence is a
variety of tactics to minimize the compensation. And
I won't get into all the detail here, but just a
couple of examples by way of highlighting. As you'll
see, some of the valuations based on conservation is
the highest and best use of the land. Of course, if
you can treat the land as already park land and unable
to be used for its highest and best use, you can then
dictate a minimal value to the land.
The other outstanding recommendation, one of the outstanding recommendations of the Contraloría Report was the direction to annul titles, that is to pursue the annulment of property titles which, of course, would, by necessity, then eliminate the obligation to pay compensation to the registered owner. So in summary, we think a fair reading of the history suggests that faced with an unwanted and undesirable obligation to compensate, the State has had recourse to every imaginatively available technique to either avoid the taking, defer the taking, defer compensation or otherwise, as I've said, minimize the financial consequences of their obligation to take the property and compensate for it.

The next slide goes into valuations and we can go fairly quickly through this, but these are illustratives of the differences in valuation. So if I can deal with Lot V30, you'll see by way of a bar graph, the dramatic difference between the administrative appraisal in this situation and the Claimants' independent valuation. For Lot V31, similar discrepancy. We don't have judgments in these cases. For Lot V32, again.

PRESIDENT BETHLEHEM: Can I just ask--sorry.

MR. COWPER: These are all expressed as--colones is the number at the top, and then we have U.S. dollars within the box, I believe, and price per meter. Lot V33 similarly, just by way of illustration. Lot V38, Lot V39, Lot V40, Lot V46, Lot V47, and then we have with Lot A40, a lot which has gone through more process, and you'll see interestingly enough there the administrative appraisal on the left, the FTI evaluation, you have the judgment and then you have the judgment on appeal. So, if you ignore the FTI appraisal, you'll see the dramatic difference in valuations even within the internal process.

If you go to SPG1, there's a similar dramatic difference between the value attributed by FTI, but also the value between the administrative appraisal and in this case, the judgment. In SPG2, you'll see a dramatic variation, both with respect to the internal valuations and with respect to the FTI evaluation. If you go to Lot B1, you'll see the dramatic difference between the administrative appraisal and the FTI evaluation. Lot B3, in that case there's a judgment applicable to that lot. Lot B5, Lot B6, and I think we can just flip--those are the only two lots left. B7, and then B8 you have another example where there's a dramatic discrepancy between the administrative appraisal, the judgment, the judgment on appeal, and the FTI evaluation.

So, of course in closing, we'll deal with each of the lots in detail, and we'll deal with the expert evidence on damages. I'm going to have a few comments on the damages issue by way of Opening, but that, of course, awaits the cross-examination of the Experts on their Reports later in the week.

I'm just checking my time.

So, I'm going to turn to a different topic, and I'm well within my two hours. I probably will finish a bit early, but I want to spend a few minutes on the legal side of this by way of Opening only. And I said some of this in the introduction to the whole case, but if we could go to the slide, Alex, and I did say in the introduction that in our view, this is calling upon the Respondent State to honor what we submit to you is a core promise that is made to foreign investors under customary international law and CAFTA. And I think it's useful to reflect on what that promise is. The promise is not that we will not take your land. It is that we will take your land in accordance with acceptable principles. We'll take it for the right purpose, and when we take, we will compensate you and we'll compensate you in accordance with Fair Market Value, and we'll do so without delay.

And in this case from, a legal question,! we don't have to worry about some of these cases deal with unusual types of property. We don't have to. This is back to dirt law. In Canada we would call it "dirt law." This is compensation for land that has been taken. So there is no question about that. Similarly, if you look at the entire pleadings, there is no practical question now that Costa Rica has determined to expropriate all or at least the most valuable portion of each of the Claimants' titles. And as I said in my introduction, we're not disputing the outcome of the political and legal debate within
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Costa Rica, however you interpret that. That is not
the purpose of this hearing.

But in our submission, what the history
reflects and demonstrates abundantly is that the
Respondent has renounced its obligations under
international law and CAFTA, and that renunciation is
ongoing to the present day. And indeed, at present,
the Respondent remains unwilling to inform even this
Tribunal when it will finish the recommendations it
says remained to be outstanding in 2015 arising from
the Contraloría Report in 2010.

Now, fundamentally, that’s what this case is
about. As you know and my friend will deal in Reply
with the timing issues which have been raised by the
Respondent, for that purpose and other purposes, I
would comment quickly on the FET claim which is both
additive and alternative in the present case, and that
is the Article 10.5 of the Treaty, and we have that
slide in front of you. And I’ll leave the detail and
the scholarship of this to Dr. Weiler, but
fundamentally, of course, the fair and equitable
treatment obligation has similar historical origins to

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the obligation to compensate for expropriation, and
there’s a broad consensus in my submission--this is
remaining, this wasn’t fixed. Okay. So this slide
says "fair and equitable treatment" but that’s
expropriation. I saw that typo last night but it
wasn’t caught. So if you make a note, the second
slide, it’s the first slide says "core promise," and
the second one is not FET, but is in relation to 10.7.
So that’s a typo with respect to the title and the
reference to 10.5. FET is 10.5. So that was a typo
we didn’t get in this version. I’m sorry for that.

So, I’ve covered the areas of reliance in
10.7. So, with respect--if you go to what’s in your
slide the second fair and equitable treatment slide,
but it’s really the only one we’ve put in as part of
the Opening, the CAFTA Parties have deemed FET to
include denials of justice, I note that--and that, of
course, applies to both executive and judicial
branches of the State. The legitimate expectations
doctrine, which we’ve directed, is relevant to the
application of FET analyses, in addition to
expropriation standards. They are additive in that

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sense. And abuse of right is another well-established
international law doctrine that can help in applying
the FET standard. And in this particular case, FET
claims arise with particular force because of the
arbitrary manner in which the Respondent has imposed
and maintained new delay measures, we say, without
even notifying the Claimants, that the Claimants
detrimentally relied on the explicit terms of Costa
Rican laws, the conduct and representations of Costa
Rican officials and, indeed, in one case, the
representations of the Environment Minister himself.

Thirdly, the arbitrary nature of the
expropriation regime, which I indicated earlier, has
inconsistent standards and offers an abuse of the
right of property owners to fair market compensation.
And, of course, we say that the inadequacy of that
regime amounts to de facto denial of justice under
the FET Standard.

So, the final comment is on damages. And in
our submission, you’ll be satisfied at the end of the
analysis that this case primarily concerns the
question of what is the appropriate amount of the

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Award, rather than whether there should be an award,
and I said that earlier in our prehearing submissions.
That, of course, is a point on which my friend
vigorously disagrees, but it remains my point.

So, in relation to the damages, we’ve
submitted a real property appraisal report which
values the subject Lots with an effective date of
value of May 27, 2008. And our appraisal report was
prepared by an accredited and licensed appraiser in
conformity with the Uniform Standards of Appraisal
Practice, and the Code of Professional Ethics and
Standards. And this is not getting into the detail of
lots or comparables or otherwise, but the point is
that the appraisal report, if you go to the next
slide, determines Fair Market Value in a manner
specified and in accordance with customary standards
in Article 10.7(2). And then it concludes that the
aggregate value of the takings is 36 1/2 million
dollars, or the equivalent in colones, and you’ll
recall that we’ve claimed the Award in colones plus
interest and costs.

But in relation to damages, let me just make
this observation by way of Opening. You do not have to select between appraisal reports in this case because there is only one appraisal report, and, of course, you'll want to be satisfied that appraisal report is properly and appropriately prepared, but the Respondent has not presented you with an appraisal report. Rather, they filed a report from a Valuation Expert, who is not an appraiser, and his fundamental report is, if I may put it this way, an appeal to you to apply a different measure of damages, being the purchase price of the Claimants for their Lots. And our fundamental answer to that is actually not a factual answer, it's a legal answer, which is that's not the standard which you're required by law to apply. That's not open to you to apply. It is not an appropriate standard in expropriation cases, it's not a proper standard in any evaluation in this context. And so I note that because it's an unusual thing in a case of this complexity to have only one appraisal report, and I, in my submission on behalf of the Claimants, that's a telling observation. It doesn't mean we abandon our attention at that point but you'll see that that is very much the approach we take to the conflict on the factual question of the damages to be drawn in this case. And, of course, we claim pre- and post-award interest and costs. I think we'll conclude my Opening at that point, Mr. President, Members of the Tribunal, and as I said, we reserve 30 minutes for our Reply, but I think we can adjourn now. We have on the schedule an hour and a half for the break. I suggest that we come back at the hour and a half, rather than at the allocated time which was 2:30, if you are both content with that. So if you break now, I'm looking at that clock which is just before 20 to, if we said 10 past 2, would that suit both sides?  

MR. COWPER: That's fine.  

MR. ALEXANDROV: Yes.  

PRESIDENT BETHLEHEM: Let's break, then, and we'll reconvene at 10 past 2:00. Thank you very much.  

(Whereupon, at 12:37 p.m., the Hearing was adjourned until 2:10 p.m., the same day.)
OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MR. ALEXANDROV: Mr. President, Members of the Tribunal, this is a case about individuals and real estate developers who purchased land in Costa Rica that was part of a national park, the Las Baulas National Park, created to protect the nesting habitat of the leatherback sea turtle, which is a critical endangered species.

Claimants purchased their land, knowing that it was located in the Park and, therefore, subject to being expropriated, but they hoped that either the Government would never get around to expropriating their property or that it would amend its laws to allow Claimants to develop their land.

But Claimants gamble did not pay off. Instead, the Government began the process of expropriating properties located inside the Park, including Claimants' properties, and offering Fair Market Value for the land inside the Park. Rather than allowing the Costa Rican Government's expropriation procedures to run their course, Claimants chose to seek millions from Costa Rica under the Dominican Republic-Central America-United States Free Trade Agreement, which I shall refer to as CAFTA.

To maximize their damages claims, Claimants seek to recover more in damages than they themselves were willing to pay when they purchased the land knowing that it was inside the Park. They now assert that they did not know that the land they purchased was in the Park and, therefore, they say, they're entitled to the value of their land as if it were outside of the Park.

The truth is the land Claimants purchased is part of the Park, and has been part of the Park as least since 1991. And Claimants were fully aware of that fact, and they are simply, therefore, not entitled to the windfall they now seek.

If you turn to Slide 1, these are the three topics we'll discuss in our Opening. First, as a factual matter, Claimants knew that their land was located within the boundaries of the Las Baulas Park, and that, as a result, their property was subject to being expropriated.

Second, I will show that Claimants' claims fall outside of the Tribunal's jurisdiction for two reasons: First, all of the alleged breaches about which Claimants complain occurred before CAFTA entered into force; and, second, Claimants first acquired knowledge of the alleged breaches and their harmful effects more than three years before Claimants submitted their Notice of Arbitration.

And finally, my college, Ms. Haworth McCandless, will outline the many problems with Claimants' assertions that Costa Rica has breached its CAFTA obligations and their request for damages.

Please turn to Slide 3. This slide provides a timeline of the key events in this dispute. Because the timing is important, I will explain in chronological order the events relevant to the dispute. Please note that all these events were before CAFTA entered into force and before the critical date for the statute of limitations.

Please also note that all the Declarations of Public Interest issued so far for Claimants' properties have been issued between 2005 and 2007. All Decrees of Expropriation issued so far with respect to Claimants' properties have been issued between 2006 and 2008, and all the Acts of Dispossession issued so far with respect to Claimants' properties have been issued in 2008. And you'll see that in the box at the bottom left-hand side of the slide. I'll come back to this, but now let me start with 1991.

The first date on the timeline is 1991, and that's the date when the Las Baulas National Park was created. It was created by Decree No. 20518, which is on the record as Exhibit C-1b. The 1991 Decree created as part of the Park a 75-meter strip buffer zone in addition to the 50 meters public zone that runs along the coast.

The 50 meters public zone was declared an inalienable zone in 1977, meaning that no private property--no private party could own or develop land in that 50-meter zone. The law that created that 50-meter public area is in the record as Exhibit R-001. The '91 Decree added a 75-meter zone...
to create a park of 125 meters.

The 1991 Decree provided in the Whereas section, in particular numbers 4 and 5 of that section, that, and I quote, "If tourist infrastructure were developed in those sites, serious disruptions shall be produced, and these would seriously affect the turtles. It is thus necessary to create a national park to perpetually protect the colony of leatherback turtles and other existing natural resources in the area."

In other words, the Park was created to prevent any urban development that would affect the leatherback sea turtles that nested in the Park.

We believe counsel for Claimants said this morning that the 1991 Decree included a terrestrial component, so what I just said seems to be common ground between the Parties.

Now, please turn to Slide Number 4. This is a map. The map on the slide is the Villareal and Matapalo map sheet that is referenced in Article 1 of the 1991 Decree to describe the boundaries of the Park. Article 1 of the Decree provides that, "From a point located in the southern end of Playa Ventanas, which is identified in the map in front of you with a green dot, the limited--I continue the quote, "the limit continues along an imaginary line parallel to the public zone in distance 75 meters, which means a total of 125 meters. 75 meters from it towards the southeast until the point of coordinates end 25500 and east 335050. And that is identified in the map in front of you with a purple dot down to the south."

So, as you can see on the map, the Park covered a strip of land of 125 meters. There no question that the coordinates I gave you, the purple dot inland clearly the 125-meter strip is inland because it runs towards the southeast.

I ask you to note-and I'll come back to this. I'll ask you to note that the 1995 Law, The Park Law, references the exact same map in the same southern coordinates as the 1991 Decree. But now back to the 1991 Decree for a moment.

In addition to the Park, the 1991 Decree created a protective zone in addition to the Park. This is stated in Article 2 of the Decree. According to Article 2 of the Decree, "Playas Carbon y Ventanas including a strip of land of 75 meters from the public zone is declared a protected zone."

The Decree states that "Every residential development of any other type made in this zone shall be approved by the Ministry of Natural Resources, Energy, and Mines."

What this means is that while Playa Ventanas was not at this point in time part of the Park, it was declared a protected zone and no development within that protected zone could occur without the express approval of the Ministry of Natural Resources, Energy, and Mines. It was-"it," Playa Ventanas--was subsequently included in the Park by virtue of the 1995 Park Law.

Article 4 of the 1991 Decree provides that "Resources to purchase lands for the Park are to be included in the budget," which means that the property inside the Park would be expropriated.

Please turn to Slide 5. The entire 125-meter strip of land that formed the Park and the protected zone was selected for a very particular reason: To protect the beaches where the leatherback sea turtles lay their eggs from urban invasion and development.

Mr. Rotney Piedra, manager of the Park since 1998, who will be testifying at this hearing, explained in his Witness Statements the abundant scientific evidence that shows that one of the biggest threats to the turtles in their reproduction is urban development in or near the nesting beaches. And thus, the 125-meter strip of land is intended to protect the nesting and surrounding areas from, among other things, adverse impact from development.

Now, 1995, the Costa Rican Congress passed a law that set out in greater detail the means to achieve the Park's environmental objectives.

Please turn to the next slide, which has an excerpt of Article 1 of the 1995 Park Law. Article 1 refers to the same map you already saw. And Article 1 of the Park Law provides the limits of the Park including the start and end point of the 125-meter strip of land. The north point now includes Playa Ventanas, which means now the protective zone of Playa Ventanas is now made part of the Park. Counsel
confirmed this this morning, so it also seems common
ground that Playa Ventanas was included in the Park by

Please note that the south point is the same
coordinates referenced in the 1991 Decree, the exact
same coordinates. And that point is inland. That is
the end point of the Park on the south. And so the
125-meter strip of land that runs along the coast of
Playa Ventanas and Playa Grande is now part of the
Park, and the Park includes a strip of land of
125 meters because the southernmost coordinate is the
same as the 1991 Law.

And I emphasize again the map, the 1991
Decree, and the 1995 Law referred to is the same.

Article 2 of the 1995 Law provides that the
property within the Park would be expropriated. The
1995 Park Law is Exhibit C-1e. And as Respondent has
explained in its written submission, the Costa Rican
Congress made an obvious mistake which describing the
borders of the Park.

As you can see from the slide, in describing
the area of the Park, the law stated that 125 meters
ran from the ordinary high tide offshore. Offshore,
this is Claimants' translation. We use the term
"seaward," I think it's common ground between the
Parties that it means towards the sea. The term in
Spanish is aguas adentro.

It is on this word of "offshore" or "seaward"
or "aguas adentro" that Claimants base their entire
case.

According to Claimants this means that the
Park is extended to the sea and not inland, and,
therefore, they say none of Claimants' properties was
inside the Park. But when you look at this word in
the context of the rest of the law and the map, there
no question that this was a mistake.

First, as I just showed you, the southern end
of coordinates provided in the law are on land. Thus,
the only way the area described in the law ends at
that specific southern coordinate is if the 125-meter
strip runs inland and not seawards. Again, as I
already said, the 1995 Park Law refers to the same map
which is referred to in the 1991 Decree.

Second, The Park Law would be determined
inconsistent if the term "seaward" were not a mistake.

Article 2 of the Park Law authorizes the expropriation
of private land within the Park, and I quote, "The
private lots of land included in the delimitation will
be susceptible of expropriation and will be considered
part of the National Marine Park Las Baulas." If the
Park were only at sea, there would be no land that
could be expropriated.

Third, the main purpose of the Park is to
protect the nesting habitat of the turtles. If the
Park had not included a portion of land along the
coast, the area where the turtles nest and the
surrounding area would be left unprotected. The
threat to the turtles is urban development. Urban
development occurs on land.

Fourth, as a matter of Costa Rican Law, the
Park Law could not have reduced the boundaries of the
Park created in 1991 unless there was a study that
supported such a reduction. In this case, there was
no such study; and we have provided the testimony of
Ms. Gloria Solano, who explains this point of Costa
Rican Law. And we submit to you that that testimony
is unrebutted.

And thus, looking at the text and the purpose
of the law, there is no doubt that the Park included a
125-meter strip that runs along the coastline inland,
not seawards. And that this was true was obvious to
anyone who looked carefully at the Park Law.

But there is much more. Contemporaneous
actions and documents show that it was well understood
at the time that the Park ran 125 meters inland. I’ll
go through some of those now, and for the rest I refer
to our written submissions.

Please turn to Slide Number 7. So first, as
is shown on this slide, on 7 May 2003, MINAE sent a
letter to the Municipality of Santa Cruz describing
the Park as including a 125-meter strip of land that
runs along the coast, "The Park and the protected zone
cover a strip that reaches inland 125 meters from the
high tide on the aforementioned beaches."

It also says that the 125-meter strip of land
is in addition to the Cerro el Morro and the
Isla Verde land areas covered by the Park. If MINAE,
the relevant Ministry of Costa Rica, understood that
02:29:34 1 the Park were seawards, it would have said so and it
2 would not have described the Park as inland. This is
3 on the record as Exhibit R-100.
4 I also want to refer to Exhibit C-53, which
5 was shown to you this morning, minutes of meetings of
6 Costa Rican Government officials. It was a slide, if
7 you recall, where the text on the screen was not quite
8 the text on the paper, but this doesn't matter. You
9 can look at the exhibit itself.
10 And what was not pointed out to you was the
11 text---it was partially read---saying MINAE does not
12 cover the expansion of this National Park. The
13 sentence continues, "up to 100 meters to the public
14 zone because there is the lack of financial resources
15 to purchase lands."
16 So the question was not whether the Park
17 extends 125 meters inland. The question discussed was
18 whether the inland area should be extended to
19 1,000 meters, and that's what MINAE at the time did
20 not support.
21 But if you also look further down the text,
22 there's a language that I will quote from Page 2 that

02:31:12 1 says, "In the private areas declared as a National
2 Park in 1991 and 1995, we would like to promote a
3 voluntary conservation regime instead of resorting to
4 the respective expropriations."
5 So what MINAE was discussing is whether,
6 instead of the respective expropriations, they could
7 find a way to impose a voluntary conservation regime.
8 That didn't happen. But what this shows is that MINAE
9 understood---and this is an internal Government
10 document—that the National Park, both in '91 and in
11 '95, provided for the expropriation of the private
12 property within the 125 strip of land.
13 Please turn to Slide 8. The expropriations
14 of private property inside the Park started in
15 November 2003. In a letter from the Minister of
16 Environment of Costa Rica, MINAE, to the National
17 Environmental Technical Secretariat, referred to as
18 SETENA, MINAE states that the issuance of the first
19 Declaration of Public Interest in November of 2003
20 marked the initiation of the expropriation proceedings
21 inside the Park.
22 Again, if MINAE had understood that the Park

02:32:58 1 boundaries ran 125 meters seaward, it would not have
2 needed to start any expropriation proceedings. This
3 document is Exhibit C-74.
4 Next, please turn to Slide 9. MINAE stamps
5 on the land registry drawings dated 2002 certify that
6 the properties located within the 125-meter strip of
7 land are inside the Park. This slide shows a stamp
8 that was issued for Lot B3. And this registry drawing
9 is on the record at Exhibit C-24a.
10 The MINAE stamp is dated 2002, before any
11 purchase was made by Claimants, and it specifically
12 states that the property is located inside the Park.
13 As you see, and I quote, "Based on the location that
14 appears in the land registry drawing, the described
15 property is located within the Las Baulas National
16 Park." The date of the stamp is September 9, 2002.
17 Claimants' counsel walked you through some of
18 those. I represent to you---because it's in the record
19 and in our submissions now---that the same stamp from
20 2002 also appears in the registry drawings for the
21 other B Lots: B1, B5, B6, B7, and B8.
22 Claimants started purchasing their properties

02:34:47 1 in late 2003. Notwithstanding evidence like the land
2 registry drawing I just showed you and that you see on
3 the screen demonstrating that the property is inside
4 of the Park, Claimants deny that this is true. They
5 deny that the land registry drawings show Claimants'
6 property was inside of the Park. We'll get to that in
7 a moment.
8 But now please turn to the next slide,
9 Slide 10. It shows that the land registry drawing for
10 Lot B3 dated this time 2005. The MINAE stamp also is
11 dated 2005. This registry drawing clearly shows that
12 Lot B3 was inside the Park in 2005 as well. So, you
13 have evidence the registry drawings of 2002 and 2005.
14 and they show that this piece of property was part of
15 the Park in 2002 and in 2005.
16 The Claimant in the registry of properties is
17 Mr. Berkowitz, and he alleges that he disregarded the
18 2002 stamp, which dates before the purchase, because
19 it only mentioned the 1991 Decree. And he then argues
20 that only in 2005 do MINAE stamps started referring to
21 the 1995 Law. This argument was repeated this morning
22 by counsel for Claimants saying that, Well, you should
disregard the 2002 stamp saying the property is inside the Park because it only refers to the '91 Decree and not to the '95 Law.

Mr. President and Members of the Tribunal,

whether or not the stamp in 2002 refers to the '95 Law or the '91 Decree is entirely irrelevant. The fact is that before Claimants purchased their property, and in this particular case of the B Lots, around the time Mr. Berkowitz was purchasing the property before, in 2002 and after in 2005, the land registry drawings told him the property was inside the Park. Both the 2000 and the 2005 registry drawings show that the property is inside the Park.

Please turn to Slide 11. Claimants Copher and Spence argue that the land registry drawings for their properties even certified that their properties were located outside of the Park. What they failed to explain, however, is why the stamps provided that the properties are outside the Park.

So, let's take, for example, the land drawing for Lot V38, which is on the record as Exhibit C-7a. You have that on the screen, and as you can see, the stamp is dated 1993. Lot V38, as all of the Copher and Spence Lots, is located in Playa Ventanas. As I just discussed, Playa Ventanas only became part of the Park in 1995, and so any stamp predating 1995, predating the 1995 Park Law, would provide that Playa Ventanas and the lots in Playa Ventanas are outside of the Park. But let's look at what happens after 1995.

Please turn to Slide 12. In contrast, land registry drawings for Playa Ventanas registered after 1995 do indicate that the property is located inside the Park. Claimants have not submitted the post-'95 registry drawings for the same lots, but they have submitted post-'95 registry drawings for another lot located in Playa Ventanas.

So, we look, for example, to Lot V59 owned by Spence International Investments, which is in Playa Ventanas. And you see on the slide the land registry drawing for this lot, Exhibit C-12a. The stamp on this land registry is dated September '96, after the Park Law. And if you look at the stamp from MINAE on the back of the page, it states that, "On the base of the location that appears on this map, the property described is located inside the Las Baulas National Park."

A similar stamp is on the land registry drawings for Lots V61a, V61b, and V61c, all dated 2006. And so the argument that the properties in Playa Ventanas are outside the Park because the registry drawings say so is simply wrong. After Playa Ventanas was incorporated into the Park in 1995, the registry drawings bear a stamp showing that those properties are inside the Park.

According to Costa Rican Law, landowners are responsible for updating the land registry drawings. This includes requesting MINAE to certify whether the property is inside a national park. Had Claimants updated the land registry drawings at the time of their purchases, MINAE would have certified that the properties were inside of the Park. Instead, some of the Claimants prefer-- at least for the purposes of this arbitration-- to rely on drawings that had been registered as many as 10 years before they purchased their land.

We find it hard to believe that they didn't obtain such registry drawings at the time of purchase and we wonder why they weren't submitted if they were saying that the properties were outside of the Park. And so, in spite of the fact that the registry drawings of 2002, before the purchases in 2005, show that their properties are inside of the Park, Claimants insist, they allege that they could not have known that the property was located in the Park because the 1995 Park Law provided that the Park extended seawards. And as I already explained, that reference in the law was a mistake. And indeed, in 2003, MINAE requested from the Procuraduría an interpretation of the 1995 Park Law. In particular, MINAE inquired about the meaning of the "seaward" language in Article 1. MINAE's request is on the next slide...
02:42:55 1 record as Exhibit R-93.
2 Please turn to Slide 13. This is an excerpt from Procuraduría's response in February of 2004. The
3 Procuraduría clarified that the only logical interpretation of the boundaries of the Park was that
4 Congress had mistakenly included the "seaward" reference, and that the 125-meter strip referenced in
5 the law ran inland. Exhibit C-1t.

9 Claimants make much of the point that the First Opinion of the Procuraduría was not binding on
10 MINAE for technical reasons. Nevertheless, this First Opinion was significant. Claimants try to argue that
11 because the Opinion was not binding, it did not have any effect, and that is not true; it did have effect.
12 It informed interested Parties of what was, according to the Procuraduría, the proper interpretation of the
13 law. The Opinion was made public through the Costa Rican system of legal information on the Web site.
14 And so if Claimants had any doubts regarding the boundaries of the Park, they could have consulted this
15 opinion to clarify the matter. The 2004 Procuraduría opinion was not binding on MINAE for a technical reason. MINAE addressed the question to the Procuraduría but did not attach a study supporting the question, which was required under Costa Rican law. In 2005, MINAE corrected this technical defect and requested a new opinion from the Procuraduría, this time supporting the question with a study. The Procuraduría issued a new opinion on December 23, 2005, which was legally binding this time. This is Exhibit C-1g, and this opinion essentially reproduced the 2004 opinion and logically confirmed it. The very last sentence of the 2005 opinion concludes that the Park, "runs on land at a distance of 125 meters from the normal high tide."

22 If you'll allow me to draw your attention again to the timeline we showed you earlier, which is now on Slide 14. This timeline shows all the events through 2008, and I will discuss some of them in a moment, but the point here is that, if Claimants had any doubt whatsoever, if they knew nothing of any of these developments that you see on the timeline, if they had not obtained recent registry drawings at the time of the purchase, if they did not pay any attention to the Procuraduría opinions, then they would have certainly found out they were being expropriated when MINAE initiated expropriation procedures for some of Claimants' own properties in December of 2005, when it issued a declaration of public interest, for example, for all the B Lots. In December of 2005, they had no idea of anything else that was going on, they would have found out.

22 Further, as early as 2005, the constitutional division of the Supreme Court declared that: One, the Park includes 125-meter strip of land; two, private property had to be expropriated; and, three, the State should adopt any relevant actions to protect the environmentally fragile area of the Park.

22 In deciding cases on the constitutionality of the laws and regulations that impacted the Park, the Supreme Court, in two different proceedings, reached the same interpretation of the 1995 Park Law as the Procuraduría. One decision was rendered in 2005; another in 2008. They are Exhibit C-1v and C-1h respectively.

22 Finally, in August 2005, SETENA issued Resolution Number 2238, 2005, Exhibit C-1f, temporarily suspending the issues of all environmental permits located inside the Park. This suspension was a result of the Supreme Court's decision and subsequent orders by MINAE.

22 In 2008, the Supreme Court issued Decision 2008-18529, in which it ordered SETENA to permanently suspend all environmental and building permits within the Park area, Exhibit C-1j. This Supreme Court decision resulted from a case brought by neighbors of the Park, who insisted that SETENA's issuance of environmental permits inside of the Park was contrary to the State's constitutional obligation to protect the environment. And the Supreme Court so decided.

22 In compliance with this decision, the State suspended all environmental permits inside the Park and adopted several other measures to further protect the area of the Park. They are listed in Exhibit R-035 and Exhibit C-z1. And I want to emphasize the significance of the December 2008 Decision of the Supreme Court. It ordered SETENA to
permanently suspend all environmental and public permits within the Park in December of 2008.

In sum, there is no basis for Claimants to argue that the 125-meter strip runs seawards rather than inland. Any uncertainty regarding the Park's boundaries that may have been caused by the mistake in the use of the word "seawards" in the 1995 law was definitively resolved as early as February of 2004 by the Legal Opinion of the Procuraduría, which was subsequently endorsed by the Supreme Court. And drawings in the record as early as 2002, before Claimants purchased their properties, indicate with a stamp by MINAE that the properties were inside of the Park.

And so what happened here was that Claimants made a risky investment. They knew that the land they were purchasing was inside of the Park and was subject to being expropriated. They thought perhaps it might not be or they would sell it before it was expropriated. We don't know. What we know is that they took a calculated risk and lost. But Costa Rica should not have to pay for Claimants' ill-fated gamble. The Government maintained the Park's boundaries and began to expropriate properties therein. And Claimants should not be allowed now to blame Costa Rica because they underestimated Costa Rica's commitment to environmental conservation.

Let me now turn to questions of jurisdiction. As I mentioned, everything about which Claimants complain in these proceedings is time-barred for two independent reasons: First, CAFTA entered into force on January 1, 2009, and the alleged breaches about which Claimants complain took place before that date. And, second, CAFTA Article 10.18 provides that, "No claim may be submitted to arbitration if more than three years have elapsed from the date in which the claim first acquired or should have first acquired knowledge of the breach alleged and knowledge that the Claimant or enterprise has incurred loss of damage."

Claimants filed their Notice of Arbitration on June 10, 2013, and, therefore, the key date for statute of limitations purposes is June 10, 2010. They knew or should have known about the breaches they allege before June of 2010.

So, let me discuss those two grounds or lack of jurisdiction, in turn. I will start with the argument that Claimants' claims are time-barred under CAFTA because the alleged breaches occurred before CAFTA entered into force. The jurisdiction of this Tribunal covered alleged breaches that occurred after CAFTA entered into force; that is, after January 1, 2009. Article 28 of the Vienna Convention of the Law of Treaties establishes that, unless a different intention appears from the Treaty unless otherwise established, a treaty's provisions do not bind a party in relation to any act or fact that took place before the date of the entering into force of the Treaty with respect to that party.

In addition, Article 10.13(3) of CAFTA provides, quote/unquote, for greater certainty that "This chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entering into force of this agreement."

In short, CAFTA does not apply retroactively. If a Claimant in CAFTA is based on measures that occurred before January 1, 2009, such measures cannot breach any provisions of CAFTA because there was no obligation at the time under CAFTA, and the claim, therefore, must fail.

In this case, the Measures about which Claimants complain occurred before January 1, 2009. Therefore, Costa Rica is not in breach of its CAFTA obligations, cannot be found liable for any damages that may have resulted from those measures, and this Tribunal lacks jurisdiction to hear Claimants' claims regarding such measures.

First, with respect to nine of Claimants' properties—and those are Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7, and B8. With respect to those nine properties, Claimants assert direct expropriation. With respect to timing, they point in their Memorial on the Merits to the Act of Dispossession as the moment when direct expropriation occurred. According to Claimants, at that point in time, "The State takes possession of the land therefore"—"thereby satisfying the customary requirement of a direct 'taking.'"
This is Claimants' Memorial on the Merits at Paragraph 207. Well, the Acts of Dispossession for those nine properties were issued on March 12, 13, and 14, 2008, and on December 9, 2008. All those dates are before CAFTA entered into force.

Second, with respect to the remaining 17 properties, Claimants assert indirect expropriation. Claimants allege that they lost the use and enjoyment of those properties as a result of the State's confirmation of the boundaries of the Park and the State's restriction on development within the Park. In particular, Claimants allege that, "It is manifest that the only measure that could crystallize the creeping expropriation started in 2004 would be a final decision by MINAE to permanently terminate the permitting process and to revoke all existing permits. This event took place in 2010, after the CAPTA had come into force."

This is from their Reply on the Merits at Paragraph 294. But as a matter of fact, Claimants are incorrect. This event took place in 2008, not 2010, and that's before CAFTA entered into force.

So, the indirect expropriation, the creeping expropriation that occurred crystallized in December of 2008, and this is also before CAFTA entered into force.

Now, in their Memorial, Claimants complain that Respondent has breached its obligations under CAFTA by not paying Claimants prompt and adequate compensation and otherwise treating them unfairly and equitably by the following allegedly arbitrary Government actions: One, the violations of the property by independent appraisers; two, the judicial decisions from the valuation of the property; and, three, the partial expropriation of the properties with respect to the portions of the properties that lie within the boundaries of the Park; and, four, the temporary suspension of the expropriation process for properties not yet at the judicial stage in the proceedings.

As a matter of fact, most of these acts occurred before CAFTA entered into force, but to the extent that they did not, they represent the lingering effects of completed acts; that is, the acts of the alleged direct and indirect expropriation. Those are the lingering effects of the direct and indirect expropriation, which on their own case, was completed before CAFTA entered into force. None of these acts, which I refer as to the lingering effects, is a breach in and of itself of CAFTA's obligations. The foundation of Claimants' complaints is the alleged expropriation of their properties, which was complete before CAFTA entered into force. Delayed payment, allegedly inadequate payment, allegedly stole judicial procedures, these are purported harms stemming from a completed act of expropriation.

The Tribunal in Mondev, for example, agreed with this reasoning in its analysis of claims strikingly similar to this case. There, the Tribunal found that it did not have jurisdiction over Mondev's expropriation claim because the Claim concerned alleged breaches that took place before NAFTA entered into force. The Tribunal held that, if there were an expropriation of Mondev's rights in the investment, it was completed at the time that the alleged expropriation had definitive effect pre-NAFTA. Mondev may have experienced harm that continued into the time NAFTA entered into force, but the Tribunal held that the mere fact that an act may have continue to cause harm does not make that act of a continuing nature.

Members of the Tribunal, let us look carefully at what Claimants are actually arguing. They say that both the direct and the indirect expropriation happened, crystallized, and completed before CAFTA entered into force. They say, however, that, when CAFTA entered into force in on January 1, 2009, CAFTA imposed on Costa Rica the obligation to pay prompt and adequate compensation for those expropriations that happened before.

Counsel repeated this morning the obligation
that was breached was an obligation of expropriation in a manner consistent with CAFTA, but that obligation did not exist when the expropriations took place. When the expropriations took place, Costa Rica had no obligation to expropriate in the manner consistent with CAFTA because CAFTA did not apply retroactively. So, Claimants essentially argue that, with the entering into force of CAFTA, the CAFTA Parties became obligated to pay compensation for expropriations that occurred at an earlier point in time.

Well, to put you a blunt example, according to Claimants' theory, if a Canadian investor owned a shoe factory, owned a shoe factory in Costa Rica, and that factory expropriated 20, 30, or 50 years ago without compensation, for example, on January 1, 2009, an obligation under CAFTA to pay compensation kicks in. This cannot be.

Before CAFTA entered into force, Costa Rica did not have under CAFTA an obligation to provide compensation for expropriation. In other words, prior to its entering into force, CAFTA could not have and did not have--and did not prohibit uncompensated expropriation, at the time the alleged expropriation occurred--expropriation occurred, Costa Rica had no CAPTA obligation to Claimants to pay prompt and adequate compensation, or any compensation, for that matter. And an obligation cannot arise under CAFTA to pay compensation with respect to an earlier expropriation, an expropriation that occurred when payment of compensation under CAFTA was not required. To the same extent that Claimants' expropriation claims are time-barred, by the entering into force of CAFTA, so, too, are Claimants' allegations regarding whether such expropriations were conducted in accordance with CAFTA's standard of fair and equitable treatment. At the time Claimants' property was expropriated, Costa Rica had no CAFTA obligation to carry out the expropriations in a fair and equitable manner, whatever that standard means, and we'll come back to that standard.

In essence, Claimants' other claims, other than the claims for direct and indirect expropriation--it is the claims for nonpayment of prompt and adequate compensation, denial of fair and equitable treatment, denial of justice, et cetera--are nothing but the lingering effects of the alleged expropriation. That expropriation took place before NAFTA entered into force, and Claimants now seek to portray the lingering effects of those expropriations as new breaches that took place after January 1, 2009.

As I just discussed, similar arguments were addressed in and dismissed by the Tribunal in Mondev, and that analysis was endorsed by the recent Clayton Award. In Clayton, Canada, similar to Costa Rica here, argued that the continuing effects of a measure do not transform it into a continuing measure. The Clayton Tribunal held, in light with the reasoning set out by Judge Schwebel, in his Expert Opinions submitted in this case, and in line with the reasoning with the Tribunal in Mondev, that, although an act may have lingering effects that are felt after the completion of that act, those lingering effects do not transform a completed measure into a measure of continuing nature.

In the words of the Clayton Tribunal--and I quote from Paragraph 268--the Tribunal's position that an act can be complete even if it has continuing ongoing effects is in line with the Tribunal in Mondev and further consistent with Article 14.1 of the International Commission's Article on the responsibility of States for Internationally Wrongful Acts, according to which the breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

And the Clayton Tribunal said further in Paragraph 268, the Investors refer in their submissions to the ongoing effects of imposing blasting conditions, the ongoing effects of requiring a comprehensive study of the investment in the ongoing impact of the referral of the project to the JPR 380 issued specific to that case. And the Tribunal concludes, those ongoing impacts, however, do not establish that there were ongoing acts, and this conclusion of the Tribunal is quite relevant here.

In sum, this Tribunal has no jurisdiction because the alleged expropriations took place before
CAFTA entered into force, and Claimants complain simply of the lingering effect of those expropriations, some of which may have continued after January 1, 2009, but whether or not the lingering effects continue after CAFTA entered into force, this Tribunal has no jurisdiction.

Allow me now to move to the second independent ground for lack of jurisdiction, which is that Claimants' claims are time-barred because Claimants did not file their Notice of Arbitration within the three-year statute of limitations provided under CAFTA. Article 10.18 of CAFTA provides that an arbitral claim must be filed within "three years from the date in which Claimant first acquired or should have first acquired knowledge of the breach alleged under Article 10.16(1), and knowledge that the Claimant has incurred loss or damage."

Claimants filed their Notice of Arbitration on June 10, 2013, and, therefore, the critical date regarding CAFTA statute of limitations is June 10, 2010, three years prior to the filing of the notice. It is absolutely clear from the record in this case that the Claimants first knew about the facts that they--about the acts that they allege breach Costa Rica's statutory obligations and the harms resulting from those acts well before June 10, 2010.

Claimants themselves have provided evidence that they first knew of the alleged breaches and that they incurred loss or damage as a result of those alleged breaches more than three years before they brought their claims to arbitration. In fact, Claimants admit over and over again in their written submissions that they first knew about the alleged breaches--in particular, expropriation and the related harms--well outside of the CAFTA's statute of limitations. And I invite you to take a look at some of Claimants' submissions regarding when they first acquired knowledge of the alleged breaches and the resulting loss.

Please turn to Slide 16. This is a list of quotes from Claimants' Notice of Arbitration and their Memorial. These are some of the dates Claimants themselves identify in the Notice of Arbitration of the Memorial on the Merits.
And, finally, on this slide, May 27, 2008, is the date used by their Damages Expert as the date on which he determines the value of the property because of the requirement that the value of property is determined on the eve of expropriation. There is more. I invite you to turn to Slide 17. It continues. "By 2009, they say, Respondent, through various agencies, Ministries, and Courts, had passed a series of Resolutions and made a number of decisions without taking title to land resulted in total deprivation of the Claimants' rights to own and enjoy the property."

By 2009, they say, there was a total deprivation of their rights to own and enjoy the property. They must convince you now that they didn't know about that, total deprivation of the rights to own and enjoy the property. They cannot. This is their case.

Next, second bullet, "Claimants lost their investments five or more years ago." This is in their Memorial filed in April 2014. So, they claim they lost their investments before April 2009.

Next, the Respondent has maintained measures tantamount expropriation of most of Claimants' investment which began with the Decision of the Constitutional Court rendered on 23 May 2008, and crystallized, crystallized with an order of the Minister of MINAE on 19 March 2010 in which he ordered his staff to terminate all pending environmental viability permit applications and never accept another. So the Measures tantamount expropriation crystallized on 19 March 2010, again before the critical date.

Next, the order issued in 19 March 2010, they say, finally abolished any opportunity for the Claimants to freely exercise their property rights. On their own case, the exercise of their property rights was finally abolished in March 2010. They have a very, very heavy burden to persuade you they didn't know about that in March 2010.

And, finally, finally in terms of our examples, the answer they say to the question of when the composite impact of Respondent's measure substantially deprive the Claimants of their use and enjoyment of their property rights and interest in their investment was on or about 19 March 2010. The composite impact substantially deprived them of their property on or about 19 March 2010. All this, all this on their own case was before June 10, 2010, the critical date for the statute of limitation purposes.

If you turn to Slide 18, this is Claimants own summary of their case. Their own summary of the measures or acts which they allege are a breach of CAFTA. I'm not going to read them all, but you will see that those acts begin in 1995 and end in March of 2010. All before the critical date of June 2010.

This is their case. And to avoid their statute of limitation problem, they have to persuade you that they had no knowledge whatsoever about any of these measures until after June 2010. They cannot do that. There is ample evidence in the record that they acquired such a knowledge. And even if there weren't such an evidence, those are public measures and Claimants could have and should have known about them at the time they were adopted.

Mr. President, Members of the Tribunal, we really could stop here because on their own case, they say is a breach of the Fair and Equitable Treatment Standard, more than three years before they filed their Notice of Arbitration. They claim that Respondent has treated them unfairly and inequitably in violation of CAFTA Article 10.5 by conspiring to deny Claimants' payment and by delaying the expropriation process that started many years ago.

But these are the same harms that they claim as a result of the violation of the expropriation provision, and as I just discussed, all those measures occurred well before June 2010.
And so the claims regarding fair and equitable treatment are also time-barred. So let me briefly discuss then what is it that they say in their attempt to seek to avoid the statute of limitations provision. Well, they have several arguments, and I’ll discuss them briefly.

First, they say the alleged breaches are continuing or composite in nature and thus, continue into the statute of limitations period. Claimants assert, for example, that the failure to pay sufficient compensation or adequate compensation is a continuous breach. That’s Paragraph 71 of their Rejoinder on Jurisdiction. That assertion, Mr. President, Members of the Tribunal, does nothing to cure the lack of jurisdiction over those claims. The question is not whether the breaches are continuing or composite in nature, it may continue beyond the critical date. The question is, when Claimants first knew or should have known of the alleged breach and harm.

Allow me to use a very simple example to illustrate how untenable Claimants’ argument is. Let’s assume that Claimants were subjected to discriminatory treatment, make a discriminatory taxation, that started 20 years ago and continues to this day. Their claims would have been time-barred because they first acquired knowledge or should have acquired knowledge of that alleged discriminatory conduct and harm 20 years ago. The fact that this may be a continuous breach does nothing to remove the operation of the statute of limitations. Under NAFTA statute of limitation, it is enough that Claimants knew about the alleged breach and harm more than three years before they filed for arbitration, and that results in a failure for this Tribunal to accept jurisdiction.

This issue has been addressed by NAFTA tribunals and resolved in favor of Costa Rica’s position. According to the Grand River Tribunal, allowing investors to evade limitation periods by basing their claims on the most recent transgression--is the word used by the Grand River Tribunal--the most recent regression in a series of similar and related actions by Respondent State would render the statute of limitations ineffective. This is the Decision on Jurisdiction at Paragraph 81. And in the words of the Grand River Tribunal, "a series of similar and related actions by a Respondent State" is at issue, an investor cannot evade the statute of limitations period by basing its claim on "the most recent transgression in that series." Paragraph 81 on the Decision on Jurisdiction.

To allow an investor to do so would, in the view of the Grand River Tribunal, "render the limitation provision ineffective." Again, Paragraph 81. That argument was also addressed by the Clayton Tribunal. Claimants in that case allege that certain acts and omissions of the Canadian Government with respect to their investments were discriminatory, arbitrary and unfair, and Canada, much like Costa Rica in this case, argued that investors’ claims were time-barred because of the alleged breaches occurred, and Claimants knew about the harm they suffered as a result of those breaches, more than three years before Claimant filed their Notice of Arbitration. The Claimants in Clayton disagreed asserting that the actions which constituted the alleged breaches were continuing in nature and had continued into the time period within NAFTA’s three-year statute of limitations. The Clayton Tribunal ruled in favor of Canada.

So the first argument that this was a continuous act that may have started well before the statute of limitations was continued to the statute of limitations is untenable.

The second argument, Claimants assert that they could not have known of the extent of the harm until the continuing measures had ended. And so in this case, they say, they allegedly could not have known the extent of the harm until they received some compensation and could quantify the exact amount of the damages suffered because they didn’t know what they would receive because so they didn’t know what the delta would be between what they received and what they think they were entitled to.

Several problems with that argument. Acquiring specific detail and precise knowledge of the
quantum of damages is not required. It is sufficient that a Claimant knows or should have known that he or she has suffered harm as a result of the alleged breach. Knowing the extent of the loss or quantifying the exact amount of damages is not an event that triggers the statute of limitations period. And explicitly. I'm referring to Mondev, Grand River, and Clayton. As a Tribunal in Clayton stated in Paragraph 275, "the Tribunal agrees with the reasoning of its predecessors on this point. The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage. It might be that some qualification can be read into the plain language such as a requirement that the laws be material. To require a reasonably specific knowledge of the amount of loss would however involve reading into Article 1116(2) a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time limit issue. It would have to be determined in each case, not only whether there's actual constructive knowledge of loss or damages, but whether the Investor has knowledge that is sufficiently actual or concrete. The Grand River Tribunal reached the same conclusion. According to that Tribunal--and I quote from Paragraph 77 of the Decision on Jurisdiction--"Damages for injury may be incurred even though the amount or extent may not become known until some future time." And the same Tribunal, one paragraph later, Paragraph 78, said, "In this respect, the Tribunal's views parallel those of the NAFTA Tribunal in Mondev. The Claimant there also faced difficulties arising from the time limitations of Article 1116(20), 1117(2). The Claimants sought to surmount these with the argument that it could have certain knowledge that it had incurred injury from the events prior to the limitations period only after it knew the outcome of subsequent litigation that stood to quantify the extent of loss was known. The Tribunal did not agree finding that a Claimant may know that it has suffered loss or damage, even if the extent of quantification of the loss or damage is still unclear."
have shifted their case dramatically, in an attempt to show that their claims are based on events after June 2010. Claimants' case as set forth in their Notice of Arbitration and their Memorial on the Merits, as we just demonstrated, clearly shows their knowledge of the alleged harms caused by the State, and that knowledge goes back well before June 2010. What I showed you on the slides is in stark contrast to statements that they make, now, in their Rejoinder on Jurisdiction, where, in essence, they try to add new measures to their case in an attempt to show that something happened after June 2010.

Please turn to Slide 19. This slide compares statements made in a Notice of Arbitration, the Memorial and the merits with statements made in the Rejoinder on Jurisdiction. I'm not going to go through the statements on the left-hand side of the slide. We talked about them already, but let us see what they now say in their Rejoinder on Jurisdiction. They allege that other measures that have occurred later in time constitute the basis of their claim. Let's see what they say. They say, in May 2010, there was a new legislation, but it failed to reach the floor for a vote before a new administration and a new Congress were installed. And it is then when this new legislation failed that they started considering their CAFTA options within six months.

Well, first, May 2010 is still before the critical June 2010 date. But, second, this is not a measure. The fact that there was a bill that was proposed and that it didn't reach the plenary, was not adopted and didn't reach a vote is not a measure they can complain of. So this says nothing about their argument that they should avoid the statute of limitations.

Next they say again in May 2010, Laura Chinchilla was elected into the Office of the President and distanced herself from the Bill. Again, May 2010, one point. Second point, the fact that there was a new President who didn't support the Bill is not an Act, a measure they can complain of. So it does nothing to help them in terms of their statute of limitations problem.

Next, Claimants submit that the Respondent's position, the proposed part, only solidified in June 2010, following the installation of President Chinchilla and her administration. We don't know what "solidified" means, but they don't talk here about the measure.

And the last bullet point that you see on the slide is similar. After President Chinchilla took office, they say, Costa Rica took a hard line assuring Claimants that their loss will be expropriated. Well, the line that their loss would be expropriated, as we demonstrated, had been taken many, many years prior to that point when President Chinchilla took office.

None of this talks about a measure adopted after June 2010. But, of course, it is not surprising that Claimants claim in their Rejoinder on Jurisdiction that they based their claims, now, on new allegations compared to their Notice of Arbitration and the Memorial. They do need to point to something that would anchor their claims to the time after CAFTA came into force and within three years of the statute of limitations. Interestingly, only when Claimants were faced with the possibility that their claims could be time-barred did they assert that the actual date when the Acts about which they complain crystallized later than what they initially said was the March 2010 date. This attempt, of course, as I just showed is not effective. And moreover, those newly invented allegations have no merit whatsoever.

Again, whether Respondent's position with respect to the Park hardened or softened in May-June 20 is irrelevant. The relevant measures were adopted well before that. Whether Claimants hoped that the new bill would be adopted that would amend or repeal the expropriation statute does not change the fact that there was a measure on the books that allegedly expropriated their investments.

And even if Claimants decided to wait with the CAFTA claim to see if they can resolve their dispute otherwise by lobbying the Government or by seeking the adoption of a new law, that has absolutely no effect on the statute of limitations. It was a strategy, if that was a strategy. It was a strategy they pursued at their own risk.

Interesting in Paragraph 310 of their Reply,
they say--that is the Reply on the Merits and the Counter-Memorial on Jurisdiction, they say "that they shouldn't be denied relief on the basis of three months' worth of extra patience." They said, we just had to wait three more months to see if this would be resolved. We should not now be bumped out because of the statute of limitations. Even if there was any merit to this assertion that it was only three months they had to wait and be patient because the issue was just about to be resolved, and we don't see any merit to this claim, but even if that were the case, my only answer is a story that I can tell you about the client who was visiting from New York and who texted me to say I was only five minutes late, and the train had departed Penn Station. It doesn't matter whether it's three months, three weeks, or three days. They were out. They are out because the statute of limitations kicks in this June of 2010. And whether they should not--whether it's unfair because of three months or three years or three days is irrelevant. This is not a sliding slope. It's a fixed date.

And, finally, Claimants go as far as to allege that the Government of Costa Rica has breached its CAFTA obligations through new delay measures that it discovered as a result of reading about them in Costa Rica's Reply on Jurisdiction and Rejoinder on the Merits. Claimants allege that the Ministry of the Environment suspension of the administrative phases of the expropriation in order to implement the recommendations of the Procuraduría is a new breaching measure because it denies Claimants justice.

Well, if Claimants didn't know about this measure at the time they filed a Notice of Arbitration, they say they didn't--they cannot raise a new claim, now, in this arbitration. They would need to submit a new Notice of Arbitration, a new proceeding about a new measure they complain of. They cannot simply tack on every Government action. They cannot simply tack on every Government action that has taken place since CAFTA entered into force and within the three year statute of limitations so that they claim their claims are not time-barred. And again, I refer back to the Grand River Tribunal's conclusion: Allowing investors to evade statute of limitation period by basing their claims on the most recent transgression in a series of similar unrelated actions by a Respondent State would render the statute of limitations ineffective. So no matter how Claimants may try to recast their claims, they're outside this Tribunal's jurisdiction.

The fundamental breach about which Claimants complain is the expropriation of their properties. The acts that allegedly affected that expropriation can have effects that continue beyond the time when the acts themselves were completed, but that does not mean that those effects are separate breaches or that the acts themselves are continuing or composite in nature. Even if Claimants try to recast them in an attempt to squeeze them into a Tribunal's jurisdiction.

Mr. President, Members of the Tribunal, I will take one more minute before I ask for a break, and ask my colleague, Jennifer Haworth McCandless to continue with merits and damages, but I need this minute because I must address Claimants' accusations of improper conduct by Respondent in this proceeding.

In Paragraph 8 and elsewhere in the Rejoinder on Jurisdiction, Claimants assert that introducing the Expert Report by Judge Schwebel is "nothing short of improper." They base this accusation on two grounds. First, they say "an expert opinion on international law is unnecessary in a dispute that is governed exclusively by CAFTA and applicable international law." This argument is as nonsensical as it sounds. They say an opinion on international law is unnecessary where a dispute is governed by international law. We disagree.

Second, they say "any Expert Legal Opinion that purports to provide a Tribunal with the answer to the decision its members have been appointed to make is unnecessary and inappropriate." Well, this is what Expert Opinions do, they seek to address and provide an answer to a question or questions that are before the Tribunal to decide. There is nothing inappropriate in presenting an Expert Opinion on international law providing answers by the Expert to questions that are before this Tribunal. And we have read that Claimants have leveled such a serious
accusation and we are compelled to place on the record
that objection.

With that, Mr. President, perhaps we should take a break.

PRESIDENT BETHLEHEM: Thank you very much. I think that is an appropriate moment to take a break.

Thank you very much.

(Brief recess.)

PRESIDENT BETHLEHEM: It is over to you to pick up.

MS. McCANDLESS: Thank you, Mr. President. Mr. President, Members of the Tribunal, if you disagree with us on our Objections to Jurisdiction, then you'll want to look at the expropriation process. Costa Rica's position is that it acted in good faith at all times to regulate the use of land in the Park, to protect the nesting habitat of the leatherback sea turtles while respecting landowners' rights.

Each of Claimants' claims is without merit. Costa Rica's actions are fully consistent with its obligations under CAFTA. In the interest of time, I will keep my discussion of the legal issues limited. The Tribunal may refer to Paragraphs 175-229 of Respondent's Rejoinder on the Merits for a more detailed discussion of Costa Rica's Legal Arguments.

Claimants allege that Respondent has breached Article 10.7 of CAFTA. Article 10.7 of CAFTA provides that "No Party may expropriate or nationalize a covered investment, either directly or indirectly, through measures equivalent to expropriation or nationalization, except," quote, "for a public purpose in a nondiscriminatory matter on payment of prompt, adequate, and effective compensation and in accordance with due process of law" and in the Minimum Standard of Treatment.

Each of these elements has been met in this case. Respondent's efforts to expropriate the 57-meter portion of Claimants' properties that are within the Park's boundaries are and have been fully lawful and under international law and under municipal law.
The State may take possession of the property two months after the initial deposit of the administrative appraisal has been made. With the State taking possession of the land, the property owner then loses possession but not title to the property. The property owner does not lose title to the property until after the Court has issued a final decision and the Fair Market Value on the property has been made.

Costa Rica’s expropriation procedure gives the owner several safeguards. First, the Court must determine the Fair Market Value of the property based on evidence submitted by both Parties, the owner of the property and the Procuraduría, who represents the State in these transactions.

Second, the amount awarded cannot be lower than the administrative amount that’s been appraised. And third, the Judge’s decision may be appealed by either Party. So, thus, the owner has not one, but two, opportunities to appeal the value of the Award as compensation for the expropriation.

And Costa Rica has followed this procedure with respect to all of Claimants’ properties that have been subject to expropriation and that are at this stage.

With respect to all of Claimants’ properties that have been subject to expropriation and that are at this stage.

Please turn to Slide 22. Claimants’ properties are in three different stages in the expropriation procedure. The first category is properties where no Declaration of Public Interest has been issued. Eight properties fall into this category. They are Lots A39, SPG3, C71, C96, V59, V61a, V61b, and V61c.

PRESIDENT BETHLEHEM: May I just ask you— you said no Declaration of Public Interest, and your slide says Declaration of Public Interest. Is that a typo or have I just misheard?

MS. McCANDLESS: Sorry. It is a typo. It was a typo in the slide. I apologize. Thank you for that.

PRESIDENT BETHLEHEM: It should be no —

MS. McCandless: It should be no Declaration of Public Interest. Thank you for catching that.

The second category of properties is where a Declaration of Public Interest has been issued, but where there is no Decree of Expropriation. These are the properties where expropriation procedures were suspended at the administrative stage but before the properties were transferred to the judicial stage. And nine properties fall into that category, and they are listed there: Lots V30, V31, 32, 33, 38, 39, 40, 46 and 47.

The third category of properties is where the Decree of Expropriation has been issued and, thus, the properties are in the judicial stage. And nine properties fall into this category. They are A40, SPG1, SPG2, B1, B3, B5, B7, and B8.

So, I will discuss the status of properties in Categories 1 and 2 first and then I will discuss the status of properties in the third category.

As we’ve explained in our written submissions, the expropriation of properties in the first and second categories, that is, properties that have not yet reached the judicial stage, are currently suspended until SINAC completes the implementation of recommendations from the Contraloría which was issued in 2010. The Contraloría is Costa Rican Government’s inspection and oversight agency. Its recommendations are binding on the entity being supervised.

In 2010, the Contraloría recommended that SINAC and other Government agencies take several actions to improve the expropriation procedures of properties inside the Park. To date, SINAC has completed nine of the 13 recommendations and is working to complete the remaining recommendations as soon as possible.

When this process is finished, Costa Rica will continue with the expropriation procedures and pay property owners compensation awarded by the Costa Rican courts. For those properties that are in the administrative stage, Claimants will have the opportunity to request an updated administrative appraisal or to continue directly into the judicial stage of expropriation procedure.

Properties in this category or these two categories have not yet been expropriated, directly or indirectly. First, the suspension of the expropriation procedures do not themselves constitute a taking. According to Costa Rican Law, Claimants may
04:05:47 still enjoy use or dispose of their property as they please. Thus, the properties are practically in the same position that they would have been—where they were when they bought the land, they are inside the Park with the possibility that they will be expropriated.

Contrary to Claimants’ allegations, Costa Rica never redrew the boundaries of the Park. Instead, the Claimants bought properties hoping that Costa Rica would redraw the boundaries of the Park or change its protective status, but it did not. Claimants also allege that the definite suspension of all environmental permits by SETENA accounts for indirect expropriation under Annex 10-C of CAFTA. If a Tribunal were to decide that it has jurisdiction to hear that claim, even though the suspension was adopted before CAFTA came into force, this measure was taken to safeguard environmentally fragile area of the Park. As such, it is not an indirect expropriation as provided under Annex 10-C of CAFTA.

Specifically, Article 4(b) of Annex 10-C provides that, “Except in rare circumstances, nondiscriminatory regulatory actions by a party that are designed and applied to protect the legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” Thus, the suspension of the environmental permits does not constitute an indirect expropriation.

Please turn to Slide 23. Let us now consider the properties—the status of the properties in the third category. These are the properties that are at the judicial stage.

To date, a final judicial decision on compensation has been issued for six of the nine lots, Lots A4, SPG2, B3, B5, B6, and B8. Claimants allege that these properties have been directly expropriated. However, Claimants have presented different arguments regarding exactly when that expropriation occurred. In their Memorial on the Merits, Claimants argued that expropriation occurred at the moment the State took possession of the property, and this occurs when an Act of Dispossession is issued. If this were true, then all their claims would be outside of the Tribunal’s jurisdiction, because the State took possession of these properties in 2008.

In their Rejoinder On Jurisdiction, which is their latest submission, Claimants changed their argument to argue that expropriation occurs when the State takes title of the property. That was at Claimants’ Rejoinder On Jurisdiction at Paras 4 and 153.

But, even if you were to accept this argument—which they reiterated today in their Opening—their claim is not ripe with respect to six of the nine properties that are in the judicial stage because there has been no title that has passed for those properties.

In any case, with respect to the three properties—A40, B3, and B8—for which there has been title that has passed, Respondent’s actions have been fully consistent with its obligations under Article 10.7 of CAFTA. As I discussed a short while ago, Article 10.7(1) provides that no Party may expropriate or nationalize a covered investment directly or indirectly through measures equivalent to expropriation, except for a public purpose in a nondiscriminatory manner on a payment of prompt, adequate, and effective compensation, and in accordance with due process of law. Each of these elements has been met in this case.

First, Las Baulas National Park was created for a valid public purpose. As Mr. Alexandrov discussed in detail earlier today, the creation of the Park and, in particular, the inclusion of the 125-meter strip of land along the coast, was necessary to protect the fragile nesting area of one of the most endangered species in the world, the leatherback sea turtle. This is supported by scientific evidence, international organizations, and the Costa Rican authorities.

Second, Costa Rica has not acted in a discriminatory manner while expropriating Claimants’ property. Claimants have not submitted any evidence to support this statement. In fact, Costa Rica has a detailed plan concerning expropriations and will expropriate all property located inside the Park.
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04:10:31 1 without consideration as to whether the land owner is
2 foreign or not. And those plans are at Exhibits R-009
3 and R-010.
4
5 Third, Costa Rica has provided or is in the
6 process of providing prompt, adequate, and effective
7 compensation. Costa Rica has also paid compensation
8 without delay equivalent to the Fair Market Value of
9 the expropriated investment before the expropriation
10 took place and has not reflected any change in value
11 occurring because of the intended expropriation had
12 become known earlier.
13
14 This is, perhaps, the point in where there is
15 the most contention between the Parties. But as Costa
16 Rica has explained in its written submissions, and as
17 Claimant now argues, under Costa Rican law, an
18 expropriation has ripened when title passes to the
19 State. This occurs after the final judgment of the
20 Fair Market Value for the property as rendered and
21 executed, and around that time, payment of the amount
22 awarded by the Court is made available to the
23 landowner. It happens at the same time almost.
24
25 Claimants themselves admit that prompt payment occurs

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04:12:49 1 allegation on FTI's Expert Report, however, FTI's
2 reports are overstated, and as I will discuss in
3 greater detail a little bit later.
4
5 In addition, Claimants are asking this
6 Tribunal to act as an appeal court. Claimants are
7 asking you to second-guess the decisions made by the
8 domestic courts.
9
10 Finally, ample due process has been provided.
11 Claimants have had opportunity to present their
12 arguments and to defend their interest throughout the
13 entire expropriation procedure. As I discussed, there
14 are several steps along the way in which the Claimants
15 and which the property owners are able to appeal
16 decision or ask for a different decision. Thus, there
17 is no merit to Claimants' allegations concerning
18 expropriation.
19
20 If you turn to Slide 24, in their first two
21 written submissions, Claimants limited their
22 allegations to claims of Costa Rica contravening
23 Claimants' legitimate expectations and acting in an
24 arbitrary matter, but in their Rejoinder on
25 Jurisdiction, Claimants have a new claim with respect

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04:13:53 1 to denial of justice. Each of these claims is without
2 merit. With respect to legitimate expectations,
3 Article 10.5 of CAFTA provides for the Minimum
4 Standard of Treatment under customary international
5 law. As Respondent has explained in its written
6 submissions, the Minimum Standard of Treatment under
7 customary international law sets a very high standard
8 or a very high threshold. In other words, the
9 Measures need to be sufficiently egregious or shocking
10 to fall below that accepted international standard.
11
12 This interpretation has been supported by the
13 Tribunal in the Glamis Gold versus United States Case, 
14 when interpreting a similar standard of treatment
15 under NAFTA. Respondent also argued that other
16 Tribunals, such as those at Merrill & Ring versus
17 Canada, International Thunderbird Gaming Corporation
18 versus Mexico, and ADF versus the United States, in
19 those cases they have also interpreted the Minimum
20 Standard of Treatment. And they've interpreted it to
21 exclude the protection of investors' legitimate
22 expectations unless there has been an action by the
23 Government inducing the Investor to invest.
And in this case, Costa Rica has never induced or invited or prompted Claimants to buy their properties; thus, Claimants' legitimate expectations are not protected under CAFTA. However, even if the Tribunal were to find that Claimants alleged legitimate expectations were protected, Claimants could not have legitimately expected that their land was outside the Park or that it would not be expropriated.

Please turn to Slide 25. This is the timeline slide that you have seen before, earlier today, and a brief review of the chronology of events prior to Claimants' investment shows why Claimants' legitimate expectations claims are baseless. In light of the Claimants' knowledge before they purchased their properties, there is simply no basis for Claimants to assert that they had a legitimate expectation that their properties would not fall within the Park boundaries of all the properties they purchased or that the State would not expropriate Claimants' land. They were, in fact, entitled to do so under the 1995 Park Law.

The truth is that Claimants were hoping that none would occur, that none of this would occur, that none of their properties would be taken, and in their Opening they were mentioning the legislations—legislative acts that were being considered, but in the end, those legislative acts that would have changed the rules or the law with respect to where the Park boundaries were, never were passed. So, Claimants hoped that that law would change. They hoped that it would be such that they would not—that their land would not be in land that would be expropriated. They took a chance, but they lost that chance. The law stayed the same. The Claimants' alleged expectations to the contrary are just simply not legitimate.

Members of the Tribunal, this takes us to Claimants' claims of arbitrariness. Claimants complain about variations in property valuation. However, there is nothing arbitrary about such valuations. The Parties agree that the applicable standard to determine whether a State's conduct is arbitrary is the one set forth in ELSI Case. In ELSI, the ICJ held that an arbitrary act "is not so much something opposed to a rule of law as something opposed to the rule of law. It is a willful disregard of due process of law, an act which shocks or at least surprises a sense of judicial propriety." That's at Paragraph 128 of the ELSI Award.

As the facts show, the Costa Rican courts have followed the provisions of the expropriation law to determine the valuation of the properties. Judges decide the valuation depending upon the evidence presented to them and the arguments presented the Parties, and when the judges make it a consideration, they have at least two—they can have in front of them at least two valuations that are put forward by them, one by one party and one by the other party. And so they have a lot of evidence that is put before them, and they consider all of that evidence when they are making their decision.

The fact that judges come out—or the decisions, the valuations come out differently is not a surprise. It depends upon the elements and the facts that are before the judge when they're making that decision. So, there is nothing inherently arbitrary about this process. And it's intended to give rights to both Parties in trying to determine what the final value should be for the property.

Finally, Claimants allege that, in the course of this arbitration, that they learned of a new measure adopted by Costa Rica that constituted a breach of CAFTA's provision. This so-called new measure is the temporary suspension of expropriation procedures adopted by SINAC in order to implement the Contraloría's recommendations that I discussed a little bit earlier.

These recommendations are aimed at improving the expropriation procedures related to Las Baulas National Park and guaranteeing landowners' property rights. In their Rejoinder on jurisdiction, Claimants allege, for the first time in these proceedings, that the suspension was adopted to further delay payment of compensation to Claimants and that the delay in payment constitutes a constructive denial of justice.

Members of the Tribunal, this claim is
04:19:24 1 untimely. First, Claimants cannot raise a claim in
2 the middle of an arbitration proceeding if they did
3 not include it in their Notice of Arbitration, nor may
4 they raise an argument on the merits of this new
5 claim, in particular on a Rejoinder on Jurisdiction.
6 So, not only is it at the very end of the proceeding,
7 but it’s even in a time in which they are not supposed
8 to be discussing issues on merits. This is a
9 Rejoinder on Jurisdiction. This issue is a merits
10 claim. Respondent has not been given time to--or an
11 opportunity to properly respond to the Claim; thus,
12 the claim should be excluded from this arbitration.
13 Second, it is not a new measure. With
14 respect to the alleged delay of payment of indirect
15 expropriation, this corresponds to the lingering
16 effects of the Measure that was adopted by CAFTA
17 before CAFTA came into force. Therefore, before 2009,
18 Costa Rica had no international obligation to pay
19 promptly, as Mr. Alexandrov had explained earlier.
20 Let me now turn to the--briefly to the issue
21 of damages in Claimants’ damages claims. Respondent
22 maintains that it has acted in accordance with its
23 obligations at all times; thus, the Tribunal
24 should not award any damages beyond those that
25 Claimants have already received or will receive
26 through the expropriation procedures in Costa Rica.
27 At this point, Claimants have already received or will
28 receive, once requested, by them, the value of
29 colones--1,706,180,610 colones, and that’s for the
30 nine properties that are at the judicial stage of
31 expropriation. And Claimants will receive Fair Market
32 Value for each of the remaining 17 properties that the
33 Government will expropriate.
34 However, if a Tribunal were to determine that
35 Costa Rica has breached obligations under CAFTA and
36 award Claimants compensation accordingly, it goes
37 without saying that any amounts Claimants have
38 received in the domestic legal proceedings must be
39 offset against any Award.
40 In addition, if the Tribunal were to award
41 damages based on the value of property, Claimants must
42 be required to surrender that property to the State
43 without further court proceedings.
44 In the Reply, Claimants agreed to both of
45 these requests, that is Claimants agreed that any
46 amount that has been paid to them should be offset
47 by--against any final amount Awarded and by the
48 Tribunal, and that they will surrender title to the
49 property to the State if the Tribunal were to award
50 damages in the value of their property. So in this
51 point, the Parties agree.
52 Claimants seek a total amount of damages of
53 $59,484,100, which is comprised of $36,000,543 of
54 value in their allegedly expropriated properties and
55 $22,941,100 in interest. These values, as I will
56 discuss momentarily, are grossly overstated. But I
57 wanted to mention one thing at this moment. Counsel
58 for Claimants had said in the Opening Statement that
59 this is the only appraisal report that’s on the
60 record, and this is not true. First, there are many
61 appraisal reports that have been made with respect to
62 these properties. There are the administrative
63 appraisals, the judicial appraisals, and there are two
64 judicial appraisals for each of the processes, they
65 are the judicial proceedings and then the final
66 judicial decision. In addition, Respondents’ Damages
67 Expert has in his Second Report at Paragraph 130
68 identified a value for the properties if the Tribunal
69 were to agree or accept the prices that have been put
70 on the record as the prices that have been paid for
71 the properties, and that amount is $4,529,490. So
72 there is an alternative amount that is before you.
73 Claimants’ principle complaint is one of
74 wrongful expropriation. According to CAFTA,
75 compensation for a breach of the expropriation
76 provision is equal to the Fair Market Value of the
77 expropriated investment. This is at Article 10.72(b)
78 of CAFTA, which is Exhibit C-3A. The date of the
79 valuations to occur "immediately before the
80 expropriation took place." But rather than valuing
81 the Fair Market Value of the expropriated investment
82 immediately before the expropriation took place,
83 Claimants seek to base the value of their properties
84 on a but-for scenario that ignores the fact that their
85 properties are located in a national park.
86 But, in fact, as discussed earlier, Claimants
87 knew or should have known when they purchased their
88 land that they were purchasing property within the
1 Park, and, therefore, their land was subjected to restrictions and eventual expropriation that would negatively affect the value of their investment. Thus, if the Tribunal were to value Claimants' investment, Respondent respectfully requests that the Tribunal take into consideration the fact that Claimants' properties are currently located in the Park and were located in the Park on the date the Claimants purchased them.

2 Each of Claimants purchased their properties at a significant discount because the properties are located in the Park. Therefore, awarding Claimants anything more than they originally purchased for them would give Claimants an improper windfall. The most Claimants should receive if the Tribunal should find that they should receive anything at all since they will eventually receive fair compensation through the expropriation process, is price—is the price that Claimants paid for them, paid for the properties. In fact, no damage should be awarded at all because Claimants will receive fair and adequate compensation for the properties that Costa Rica

expropriates. Claimants will actually receive more than Fair Market and adequate compensation through Costa Rica's expropriation process. To it, some of Claimants' properties that have been complete, have gone through the--have been completed in the judicial stage of expropriation are receiving a surprising amount more than what they paid for them. For example, Spence Company, which will receive 697,625,000 colones for the portion of Lot SPG2 that is being expropriated. That, portion of SPG2 cost Spence Company 85,014,297 colones, thus, Spence Co. received 721 percent more from the Government of Costa Rica for that property than Spence Co. originally paid for it. In the case of Lot B8 as another example, based on the evidence that's currently on the record, Mr. Berkowitz will receive 326,078,368 colones for the portion of the property that is being expropriated. That is a whopping 171,398 percent more than the 190,136 colones it cost him to purchase that property based on evidence on the record. Claimants' damages claims are overstated and

undeserved for other reasons as well. In this respect, Respondents' damages Expert Mr. Kaczmarek has identified a number of fundamental flaws in Claimants' and their real estate appraisers, FTI's approach to the valuation of Claimant's properties. First, FTI ignores the reality of the real estate market in Guanacaste at the time that the alleged breach occurred, and that is May 2008, and the reason why I select that date is because that's the date the valuation has been made by Mr. Hedden. As Mr. Kaczmarek explains in his Report, the Costa Rican market underwent a boom in the early 2000s, and a bust in 2008. FTI ignores this fact completely. Second, with respect to the properties that are partially expropriated, FTI argues that Claimants should receive damages for both portion that was expropriated and the portion that is not expropriated. This is their severance and damages claim. But FTI's claim on severance damages does not make any sense. They are attributing beachfront value to the entire lot subject to partial expropriation. FTI claims that the portion of the property that was closest to the beach was expropriated, and, therefore, the remaining parcel has lost its beachfront value. So not only should the expropriated portion be valued at beachfront property, but the remaining portion that is no longer--is also no longer considered beachfront property. This is true even though it is now, after the expropriation, the property closest to the beach. And the truth is as for beach--the truth is as for beachfront value or so-called beachfront value, there never really was any beachfront view or access to lose. This is because of environmental regulations that prohibit the removal of vegetation that borders and covers access to the beach.

Finally, FTI employs comparable sale approach in its property valuations. It analyzes similar properties and sales of similar properties to Claimants' properties in order to determine the value of Claimants properties. Yet none of these transactions are properties it uses are comparable or appropriate, and for these reasons FTI's analysis is unreliable. Mr. Kaczmarek will discuss this--more flaws in detail in his Expert testimony later this
In sum, Claimants' damages claims are grossly overstated and unreliable. Claimants are reaching for every cent that they think they can squeeze out of this arbitration, and, in so doing, they have raised serious doubts about the credibility of their damages claims. For the foregoing reasons, and for those stated in Mr. Kaczmarek's two Expert Opinions, Claimants are simply not entitled to the damages they seek.

Thank you. That is the end of our Opening Statement.

Dr. Weiler.

Thank you very much. Thank you. I'm sure we'll come back to that at the end of the session.

We'll take a short break.

Thank you. So, we'll say a quarter to or 4:45.

(Brief recess.)

Okay. I think we can make a start. Before I pass the microphone over to Dr. Weiler, let me just draw everyone's attention. I think it's not going to be so relevant for the submissions that we're about to hear and probably only now next for the closing submissions on Friday, but I've just had a plea from the interpreters that, if you have a written script from which you are reading, please ensure that you pass a copy to the interpreters beforehand. Written scripts tend to be much denser. They struggle to keep up. Just a request that if there is a written script, particularly on Friday, that you pass that to the interpreters beforehand.

Dr. Weiler, in the Tribunal's letter to the Parties which followed the prehearing organizational meeting, at Paragraph 7, we noted that of the 2 1/2 hours allocated to the Claimants for their Opening Submissions, this may include a max of 30 minutes of Reply submissions strictly confined to the issue of jurisdiction. I understand that's what you're going to be addressing now.

It is what we are going to be addressing but I am going to be taking some of the time that was originally allocated to Jeffrey to--in his submissions, I'm going to allocate probably--probably about 15 of his minutes over, which I understand from the Secretary still leaves us with lots of time.
will recall from the prehearing organizational meeting, there was quite a lot of discussion about this, and I think it was quite clearly -- I think the Agreement of the Parties, which then the Tribunal reflected in Paragraph 7, that this should be 30 minutes and it should be focused on issues of jurisdiction.

So unless the Respondent is minded to allow a degree of flexibility, I think that we're going to stick to what's in here.

MR. WEILER: My concern is I speak very quickly, and I'm going to try very hard to speak slowly, but that might--

PRESIDENT BETHLEHEM: Well, I'm not going to encourage you to speak more quickly because then we will have a difficulty.

As I've said, the Tribunal is inclined, as we indicated in the correspondence, to allow a degree of flexibility, but I do remind you of what was the agreement of the Parties as reflected by the Tribunal.

MR. WEILER: Okay.

REPLY ON JURISDICTION BY COUNSEL FOR CLAIMANTS

MR. WEILER: With that, I'll begin.

There's a couple of points I wanted to mention, though. First, I'm just going to describe documents that are being sent to you. These are not new documents. These are documents that appeared in your USB drives; but unfortunately only the first page of them, of the four or five of them, came to you in hard copy. So this is just the entire bundle of them.

So, these are from our previous submission, I believe. This was February? This is the Rejoinder, yeah. So nothing new.

PRESIDENT BETHLEHEM: Some uncertainty on the part of the Tribunal Secretary about these documents. (Pause.)

MR. WEILER: I think you're being handed our PowerPoint slides in paper version as well.

PRESIDENT BETHLEHEM: Perhaps you can just explain. We've got two sets, one with a paper clip at the top, which looks as if it's to be inserted somewhere. Is that is not--

(Comment off microphone.)
as soon as we heard about it. So that would be my initial point and then let's move on right to our slides here.

Mr. Alexandrov: Mr. President, I object. I think Dr. Weiler is testifying as a Witness about what he did or didn't do in another case. If the point is to made here without testimony of a witness of fact, then we should be directed to the materials in the case.

Mr. Weiler: Read the Decision. The Decision actually describes the process, so we don't need my word for it.

President Bethlehem: I think we understand the point, and we've heard what you've had to say.

Mr. Weiler: Okay. So, here there's two objections, both ratione temporis. The one is about Treaty nonretroactivity, and the other is about a three-year time bar. The nonretroactivity objection revolves around how one would constitute expropriation, what constitutes a measure, what constitutes continuing or composite breaches, whereas a time-bar obligation is interested in similar questions but primarily in respect of what constitutes a breach in this case.

It is also important to note that there are different perspectives that one takes with respect to these objections. They aren't identical. From the nonretroactivity perspective, you're really looking at the timing of the measures as alleged breaches, whereas the time-bar objection has one looking at the timing of the Claimants' knowledge of the alleged breaches. So, there are differences, but the bottom line is that the breach is the most important element.

So, here in these first three slides, I've just set out the language of the CAFTA. And I'll just skip to the second slide here, which shows us Articles 10--I'm sorry, 10.16. So we see that the investment dispute is triggered when someone believes they have a Claim, and the Claim is based on when someone thinks there has been a breach of something, and then we'll click further.

And we go further then on, of course, to the most important provision in this regard and that's 10.18. Under 10.18, we see that the question is "Should have first acquired knowledge of what?" Well, of the alleged breach.

We would submit in this case--and we will explain within this presentation why we're really not concerned in this case about the second branch of that test about the knowledge of loss or damage.

So, when one wants to articulate what the breaches are, we've done it on a few occasions. Of course, we did it with these documents that we submitted with a Rejoinder, and we did it in the Rejoinder. And, I'm essentially, once again, putting them before you here.

So there are seven breaches. I styled them as five breaches in our Memorial. They--whether you call them seven or five, you'll see, as we continue, is immaterial. But those are the breaches right there. And what I'd like to do is go through each breach and try to explain why these objections are not sustained based on the actual breaches we have alleged rather than the breaches our friends would have liked us to have alleged. There is the other five. I'll give you--the other three. I'll give you a second to read them.

So, with respect to the first one, so the Respondent says that it doesn't matter whether it's direct or indirect expropriation, it always constitutes some single act in time and, therefore, that it's merely a subsequent effect if you didn't pay enough or you didn't pay promptly.

And I think our position is that if the Respondent's argument is true, host States would always avoid liability. They have two ways of doing it. Either they could commit to a creeping expropriation but just never formalize it by transferring title, or they could declare an expropriation and just never pay. After three years, on their theory, they would be set. They wouldn't have to worry about it. Basically it would be a contest. You'd have to make sure that, if the Claimant didn't get in in that period, they are out of luck.

So, we don't think that's the proper approach and neither did the Tribunal in IO European Group versus Venezuela. This is an award which was cited by
our friends from the United States in their submission, which we receive on Friday, and we had a quick look at it. It's in Spanish, so the quotation you're about to see on the second page is an informal translation with our friends from Google rather than anything official, and so I would recommend to you reading the Spanish version.

But in a nutshell, we have a case in Venezuela where there was an Expropriation Decree and compensation—one would have expected the determination of compensation would have been made through their process which seemed to fit the international standards. And after four years, there was no determination. And the Tribunal in that case thought that that violated the "without delay" provisions of that particular Treaty, which, of course, are very similar to ours.

So, and the quotation there is that the Tribunal concludes that the Bolivarian Republic has not offered a plausible explanation justifying the delay of more than four years in fixing at least the fair value owed in compliance with the LECUPS, which implies that it cannot be considered to satisfy the requirement of Article 6(c).

And our friends also, I should mention, do cite this older case, which I think from what I can see is very useful and I thank them for that as well. It's another case which involves expropriation and then a delay in terms of the compensation being announced.

The correct approach, we submit, is that the date of the breach is the date upon which an investor knew, or ought to have known, that an expropriation occurred without payment of prompt, adequate, and effective compensation,* and with regard to the promptness, it must be done without delay. So, all elements of that statement are necessary. None of them are superfluous.

With regard to direct expropriation, the way that this would apply is fairly straightforward. Even if we were to accept, though, in our case that the Respondent was correct and that the direct expropriation was actually triggered and completed by a particular event—in this case, I believe they would have to assume that breach has occurred until actually all of the breaches which form—sorry, all of the Measures which form the breach have actually occurred. And in this regard, we'd also just like to remind the Tribunal, as we did in our Memorial, that there is a difference between the Parties' arguments with respect to the appropriate date for valuation versus the appropriate date for breach.

Professor Mendelson had a rationale in which he was responding to Judge Schwebel's Opinion, and we adopt it for our own. We think it's quite useful. He points out that if the Claimants still retain title in all of their Lots, in the case of indirect expropriation, until there actually is an official transfer of title, well, if that's the case, then it is actually logically impossible for that breach to solidify until after title has been transferred. And so in that—if one applies that logic, the result would be that indirect expropriations never toll based on a three-year rule because they would be continuing until such time as compensation was actually paid. So, that's why, in our submissions, we talk...
05:03:14 1 to about the totality of the measures which constitute
2 interference which rises to a substantial level as
3 being an appropriate point at which one could bring a
4 claim. But because title is permanently
5 nontransferred, as a result, during this whole period,
6 after there has been that level of substantive
7 interference, during that whole period until they
8 actually transfer title, you have a live breach, and, 9 therefore, you can't have a problem with a time
10 limitation. It is an ongoing breach. And we
11 definitely support that.
12
13 How much time by the way?
14 (Comment off microphone.)
15
16 So, in this case, we have a few examples
17 here. We have a SETENA adopting these temporary
18 annual moratoriums on accepting environmental permit
19 applications, and it's a little murky as to exactly
20 the basis upon which they did it. From the best that
21 we can grasp from the record, essentially, they
22 referred to the one-year suspensive effect rule in the
23 expropriation statute and just reapplied it annually.
24 Alternatively, they did it once and then sua
25 sponte actually maintained the suspensions annually on
26 the basis of some expected or pending court decision.
27
28 So, it's not exactly clear how they did it.
29 But what's clear is that it was only ever temporary,
30 and it didn't actually become permanent until after
31 the Constitutional Court had had its say in multiple
32 times. And as we've described in our Memorials, in
33 the case of the Constitutional Court, we have, in May,
34 it's saying to the Government that it has a choice.
35 Either it expropriates or it provides compensation.
36 It's got to do one or the other, and it's got to move.
37 And then in December of that same year, just a
38 few days actually, just a few weeks the CAPTA comes
39 into force for Americans, the Court now says, "No, you
40 have to do it immediately."
41
42 And so that concerns obviously--I think
43 rightly so--that concerns both MINAE and SETENA
44 officials, which is why in January and February of the
45 following year, just about a month and a month and a
46 half later, they write to the Court and say, "We think
47 your decisions are contradictory. We need some
48 guidance here. Which one is it?"
49
50 05:06:02 1 And the Court, amusingly enough, said, "No,
51 we actually think it makes perfect sense, and you
52 should know constitutionally that you have the
53 discretion to decide when and how to expropriate.
54 That's not our job. We just tell you, you have to do
55 it."
56
57 So, the Court's explanation essentially
58 modified its December decision to take the immediate
59 out of "you must expropriate." So interestingly
60 enough, it's another year before the Minister actually
61 gets around to doing that. It is not until March 19,
62 2010, that the Minister actually exercises that
63 discretion and makes those suspensions permanent,
64 which, of course, is an element which is necessary in
65 finding an expropriation. There has to be an element
66 of permanence. It can't be ephemeral, it must be
67 permanent. So we now have a very nice peg along the
68 road towards expropriation with the Minister's
69 decision.
70
71 So, when one, though, is trying to ascertain
72 whether there has been an indirect expropriation, we
73 now know that we have a suspension which effectively
74 eviscerated the Claimants' rights in property, and we
75 now know that it became permanent as of March 10, but
76 what we don't know, if we put ourselves in the
77 Claimants' shoes at that time, is whether the
78 Government is actually going to own up, follow this
79 decision, and actually either change the law, as the
80 environment minister was attempting to do, at the same
81 time it was issuing this order. He and the President
82 were both actually working hand in hand with the
83 Claimants to change the law so that they actually
84 would be able to. And I should say, change the law,
85 as interpreted by the Court rather than change the law
86 as it was written.
87
88 So, from the Claimants' perspectives, if you
89 put yourself in their shoes, they have court decisions
90 going this way and that. And then have--they don't
91 know, of course, about these letters that have been
92 made by the two ministries asking the Court to clarify
93 itself, and they don't know about the Court's
94 clarification. All they know is that, in the middle
95 of working with the President's office and the
96 Minister's office, the Minister's office issues this
05:08:41 1 final binding suspension of all consideration of
2 application for environmental permits.
3  
4 So, from a Claimants' perspective, what are
5 they to do? They've got the very same Ministry doing
6 one thing and another, which seemed completely at
7 odds. I think probably they were really just covering
8 both of their bases because a new administration was
9 about to come in. And they know that there's a good
10 chance that because the President is in support of the
11 Measure that would allow them to continue and
12 sustainably develop their land, why would one think at
13 that point in time--or, perhaps, I should say, why
14 would a reasonable claimant in those circumstances be
15 held to assume that it was at that very point that
16 they actually had to make their decision, that their
17 claim tolled from that day?
18  
19 It would seem to us that it would make a lot
20 more sense that we would want to put ourselves in the
21 shoes of the Claimant, not in the shoes of a lawyer
22 looking at it years later, and say, well, probably as
23 of that date, whether it be March or whether it be
24 May, or whether it be June, they were probably quite
25 hopeful that this was all going to get sorted out.
26  
27 And, of course, they have promises, all sorts
28 of promises from the others--from the Costa Rica
29 saying, "Don't worry. At the end of the day, our
30 statute says you're going to get paid. You're going
31 to have compensation. It's going to be full,
32 adequate, and effective.'
33  
34 Well, how were they to know at that date? On
35 the other hand, go about a year forward, after the
36 Chinchilla Administration has been in, there's no new
37 bills. Everything looks pretty firm. I would say
38 that about a year after that, let's say, sometime in
39 March of the following year, it looks pretty desperate
40 for them. It looks like nothing is going to change.
41 The Government is going to be in force for another
42 couple of years. That is probably a good time to
43 suggest that that is when a reasonable Claimant would
44 have actually expected--been expected to make a claim.
45  
46 So, I'm going to skip forward now, just a
47 couple slides, and for the sake of the record, I've
48 been talking about these slides without clicking them
49 forward. I'll move to 2 and 3, the second and third.

05:11:00 1 And this is a point which I wanted to just stress as
2 quickly as I could with respect to something that my
3 friend said. He mentioned the idea that a Claimant is
4 not allowed to say "I need to wait until I know
5 exactly how much my damages are," and he cites, quite
6 properly, Bilcon and a few other Tribunals for that
7 position.
8  
9 That's all fine and dandy, but that's not the
10 problem we have here. The problem we have here is
11 whether or not the breach should be known or should be
12 constructively known because it's the breach that's
13 relevant. It's about compensation. There's an actual
14 formula in the treaty and a formula on customary law
15 that says what one must do to satisfy this
16 compensation standard.
17  
18 The only way one can know whether or not that
19 obligation has been fulfilled is if an offer has been
20 made. If a determination has been made and the number
21 is X and from one's--from the reasonable investor's
22 position, it should have been X plus 2, well, then,
23 that would be the moment at which one would expect
24 them or construe them to have knowledge. But until

05:12:18 1 they've actually told you what the compensation is,
2 you can't know the breach. This has nothing to do
3 with the loss of damages are, it's got to do with
4 whether there's been a breach. So, this is the kind
5 of provision that does not lend itself to the analysis
6 that my friend would like to have it to apply to.
7  
8 Now, with respect to the fourth breach, we
9 don't have a clear methodology from the Respondent on
10 this, and this is basically the question of how many
11 breaches we actually have here. We know that, in the
12 text of the Treaty in the annex, that it specified
13 that Article 10.17(1) constitutes customary
14 international law. It doesn't say "1 and 2." It just
15 says "1". So based on the language of the Treaty, it
16 appears that the other provision, Section 2, or
17 Paragraph 2 of the same Article, must mean something.
18 It has to have some sort of meaning, and interestingly
19 enough, if you look at that provision, it actually
20 specifies what "prompt" means. It means without
21 delay.
22  
23 Okay. Well, we have more information than we
24 did before. It means that you have to satisfy a
promptness standard and you have to satisfy a without delay standard, and that appears to be what the Tribunal in that recent Venezuelan case did. It asked itself what was the test for "without delay."

At least we know from them that four years is too long, and in our case we’ve got lots more than four years. In that regard, I should also mention, just because it has come up a few times, to be clear, in our case, we don’t ask you to toll the delay meter, if you will, if you think of the tax analogy. You don’t start the delay meter until the CAFTA comes into force because before that time, we just know there has been a delay. You can certainly take notice of the fact that there had been a delay because that’s what’s continuing. But you actually only start the meter running at the point where the obligation is actually in force for the Respondent.

And that—to be clear, that’s the meter for the retroactivity objection. The meter for the three-year time rule objection is a little bit—about a year further. That one is June 10, 2010. So I would leave it to the Tribunal to decide whether it prefers the first or the second ultimately. You might want to apply—there’s an argument to be made that it actually should just be—that the delay counts from the day the obligation was in force.

I think actually, I take it, back. I wouldn’t leave it to you. I would actually say it’s got to be that day, and the reason why is, the time limitation question isn’t about whether—when the breach occurred. It’s about when knowledge of the breach or constructive knowledge of the breach would have happened. So, you count the timing of delay from 2009, which means today, in the cases that we have going forward right now, we’re into seven years. So we’re way past the four years of this Tribunal.

And, again, I’ve sped before—I’ve sped past my slides again. Let’s move to Number 5 here. So, the indefinite delay: This is the Contraloría Report, and this—these are the new measures, and with respect to the new measures, it’s important to note—this is an interesting test because we don’t know exactly when they came into force, and we don’t have all the documents one would have expected to be attached to

We get the idea that it was sometime in 2008, roughly around the same time as fairly big administrative valuations came in on four Lots. Coincidentally, it’s right around that same time that they decide that, in anticipation of the auditors doing the work, that they should really suspend everything. So, you can keep in mind the Contraloría actually never really did ask for that suspension, at least it is not on the record. So, in anticipation of the Contraloría wanting to potentially suspend, they claim that they suspended.

Was that in 2008 or was that in 2009? I don’t know. Luckily, it doesn’t matter because we know that, in 2010, they tell us, after the Contraloría had finished the Report, even though it never did ask for suspension even then, they decided to keep suspending because they wanted to "implement" all of the Contraloría’s Report recommendations.

Interestingly, one of those recommendations was to use other legal processes to try to invalidate title for everybody who still has land to be expropriated. That hasn’t happened in our case, but it’s just interesting that that is one of the recommendations. We don’t know if that is one of the—exactly how one actually "implements" that or if that is what is holding them up. But for some reason, they can’t tell us at what point they’re going to start going again.

But we do know that, from 2010, which is after the CAFTA came in, they made a decision, which clearly constitutes a measure under the CAFTA, that they were going to not do anything about half of the cases that are involved with our clients. All the ones where there has either only been an Expropriation Decree or the ones even earlier back in the process that have only had a Public Interest notice.

So, that whole group of cases, there seemed to be in this permanent state of stasis, I guess, zombified, and we don’t know when they’re going to end. But that’s what we mean by "delay," and that delay we would submit is so arbitrary that it is not just a breach of Article 17(2)(b). It is also a
breach of the Minimum Standard of Treatment because it's simply not fair and equitable to come up with a suspension without giving any notice to the people who are going to be affected by it and to not even mention it to them until they sue you and then you mention it to them in the course of your pleadings. The basis for it, we just don't have enough information from the Respondent to be able to tell us if it's actually rational. It really doesn't appear. It appears that, based on the evidence we have, that the reason they really did it, was because they didn't want to pay those four administrative appraisals, which were about $400 a square foot, which was a lot more than the previous ones. It's not even half of what they should be paying, but it's substantially more than what they thought they were going to get and what they got from the other appraisers.

So, moving on to 6. This one we don't need to go into too much detail. You've seen this in all of our submissions. We basically say that fair and equitable treatment is violated when due process is not provided, and we also say that evidence of fair and equitable treatment being not provided can be manifest in the arbitrariness of the results of a process. So, for example, the crazy high and low numbers that were coming in, and seem to still be coming in, that arbitrariness is a hallmark of a lack of fair and equitable treatment in a process. We also say that that process itself, because they are providing a process that, in fact, is completely inferior, even though, just like the Soviet Constitution looks great on paper, that also is a failure to provide access to a process as required under the customary international law expropriation standard, which says you must give access to a process that give us prompt, adequate, and effective compensation.

The same is true with our detriment to reliance obligations—I'm sorry, allegations. Again, to be clear, we're actually not making an allegation that detrimental reliance is a delict in and of itself. It isn't. It is simply a doctrine, much like the abuse of rights doctrine that can be used to demonstrate in the analysis that a Tribunal undertakes, whether or not something is fair and equitable. It may be in some cases that detrimental reliance is not relevant to a fair and equitable analysis. Sometimes it is. We submit that in this case, it is. Just like in the Bilcon Case and we would certainly commend to you the Bilcon analysis with respect to this area of FET because in that case they did actually believe that or find that legitimate expectations included the general category of expectations. So, this general category would include the laws as they found them, the regulatory environment and the regime that they found. Obviously they don't get any kind of guarantee that it's always going to stay the same, but by the same token, they do have some expectation that if the law says X, that they're not going to get Y. So just like in Bilcon, we submit that that evidence in this case is useful for you to find an FET breach. It's particularly useful in the case of Brett Berkowitz and the Berkowitz Claimants because, as the record definitely demonstrates, he went to the Minister before he—he went all in on his investment and asked, "am I going to be able to do this?" And when he did that, that was at the time when the Minister was—the Minister kept changing his mind, or maybe he was just of two minds at the same time, but this is at the time where we know on the record we have him saying, we're going to sustainable development. We're going to get this so that you guys are going to be able and do a sustainable construction of your homes.

So, it only makes sense, given the documentary record that we have that that meeting actually did take place as it was recalled by Mr. Berkowitz and if that did, indeed, happen, that is a quintessential example of something that you can rely on, that you can take to the bank. It comes from the Environment Minister.

So, if the Environment Minister has promised you that you are going to be able to go ahead isn't worth anything, then I don't know what is. So I would say that that's a great example of why his detrimental reliance demonstrates a breach of the FET standard.
And with that, I have reached my 30, probably 31 minutes right now and I'm finished. PRESIDENT BETHLEHEM: I was just going to say that if you'd hit the buffers, we'd give you an extra minute or two if you wanted flexibility, but if you'd finished--

MR. WEILER: No. I hesitate because I know my friend is worried about too many slides that weren't spoken to, but I feel--I would feel comfortable that I've actually addressed all of them, even though I didn't hit the button often enough. So thank you very much.

PRESIDENT BETHLEHEM: Thank you all very much. I take it that that's the end of the formal submissions of the Parties for today's session. There are a number of housekeeping issues that I'd like to address with you all before we bring today's session to a close.

Really, all of this is in prospect for tomorrow. I indicated at the start of today's session that we would begin tomorrow's proceedings with the oral submissions of El Salvador as a non-disputing State. I'd like to ask the counsel for El Salvador, you indicated to us previously that you would like 20 minutes. Would you like to just affirm or revise that time period simply for our planning purposes, please.

MR. PARADA: Thank you, Mr. President, Members of the Tribunal. I would like to affirm that I will not take more than 20 minutes tomorrow on El Salvador's oral submission.

PRESIDENT BETHLEHEM: Thank you very much. As I'll remind you, we'll start tomorrow at 9:30, and I think we will start with El Salvador's oral submission. United States, would you like to just--you reserved your position on whether you want to make an oral submission as you're entitled to do under the DR-CAFTA.

MR. SHARPE: Thank you, Mr. President, and Members of the Tribunal. The United States does not intend to make an oral submission tomorrow. We thank you for having accepted the written submission, and we would just respectfully reserve any rights under the Treaty. Thank you.

PRESIDENT BETHLEHEM: Okay. Thank you. Thank you very much for that.

So, we have a starting 20 minutes with El Salvador. I indicated also in Opening this morning that I anticipated that the Tribunal would have a number of questions arising out of today's session, and I think I can say, without conferring in detail with my colleagues that we are likely to have questions that we would like to put to you. What we propose to do is to put those questions to you tomorrow after El Salvador has made its oral submission. Invite you, if you would like to, to spend a little bit of time actually addressing such questions as you may want to there, either in whole or partially, and if you would like to reserve the opportunity to either address them completely or return to them at the time of your Reply submissions on Friday, that will be fine as well. But I think this is really for purposes of giving you as much advanced notice of some of the issues that are concerning us in the light of today.

I remind you that if you do have any applications, motions, objections in prospect of the Witness testimony that is going to be begin tomorrow, this is the opportunity if you've got them already in mind, to raise these with us in a timely fashion. I'd like not to be in a position where we're bumping up against objections which you've been sitting on for some period of time. But only make them as the Witness is called.

So, if you have in mind any objections at this stage or applications or motions, now is the time to raise them. Of course, if they only occur to you tomorrow, you can raise them tomorrow, but let me just pause for a moment and ask you whether there are any pending motions, applications, objections.

MR. COWPER: I'm not sitting on any objections at present, Mr. President.

PRESIDENT BETHLEHEM: Thank you. That's helpful to know.
We've got--Sorry. You're right in saying that we should get Mr. Alexandrov's shaking of his head negatively on the record.

MR. ALEXANDROV: We're not sitting on any objections at the moment. Thank you.

PRESIDENT BETHLEHEM: Thank you very much for that.

After the questions and any answers tomorrow morning, we'll be moving to the Claimants' fact witnesses, and I think we have them--if I'm correct--in the order of Mr. Reddy, Mr. Berkowitz, and then Dr. Rusenko. Is that correct?

MR. COWPER: Yes, that's correct, Mr. President.

PRESIDENT BETHLEHEM: Thank you.

We've set this out in correspondence to the Parties previously. I would just like to remind you that, although we--we, the Tribunal, will proceed with a degree of flexibility in terms of timing, so this is not going to, as it were, bind you in an inflexible way, but we would like to endeavor, if at all possible, to ensure that Witnesses do not unnecessarily straddle the lunch break or the break at the end of the day. I appreciate that this is going to depend on the cross-examination and any reexamination that might follow, but I just urge you to take that in mind, keep that in mind.

One last point, I think, to draw to your attention, and the members of the Tribunal have discussed this previously in the light of the reservation of rights to object on the part of both Parties. As we move into the Witness testimony tomorrow and in the coming days, we will, of course, entertain whatever objections you may feel that you want to make, but just to put down a marker at this stage, our inclination is to allow a degree of flexibility. We don't propose to run this like a U.S. courtroom or a common-law courtroom. But needless to say, if there are objections, we will consider those as made.

So, I think that's it from me. I remind you that we're starting again tomorrow at 9:30, but let me just ask the Parties whether there is anything of a housekeeping nature that you'd like to raise before we close?

MR. COWPER: Just one brief matter. The sequestered Witness, Dr. Rusenko, we haven't met to prepare his brief chief, and we intend to do that this evening. We will respect your ruling, of course, and not inform him of anything that has happened in today's hearing by way of Openings or otherwise, but we will, of course, develop his evidence in chief this evening, and respect that limitation. I just bring that to your attention because practice on that does vary from jurisdiction to jurisdiction.

PRESIDENT BETHLEHEM: Thank you very much. The Tribunal has reflected on this previously, and I think we've come to the conclusion that we are not in a position to police the sequestration. It's the reason why I admonished you, the Claimants, right at the start of this to ensure that Dr. Rusenko was aware of the requirements of his sequestration, and as counsel before the Tribunal, we will assume that you will proceed accordingly.

Mr. Alexandrov, any issues that you would like to raise before we close?
CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

[Signature]

DAWN K. LARSON