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,:
ICSID Case No.:
UNCT/13/2:
Claimants,:
:
and:
:
REPUBLIC OF COSTA RICA,:
Respondent:

HEARING ON THE MERITS AND JURISDICTION

Friday, April 24, 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 9:30 a.m. before:

SIR DANIEL BETHLEHEM, QC, President of the Tribunal

MR. MARK KANTOR, Co-Arbitrator

DR. RAÚL E. VINUESA, Co-Arbitrator
Also Present:

**MS. GIULIANA CANÈ**  
Secretary to the Tribunal

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Interpreters:

**MS. JUDITH LETENDRE**  
**MS. STELLA COVRE**  
**MR. CHARLIE ROBERTS**

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**MR. BOB SPENCE**  
**MR. RONALD COPHER**  
**MR. BRETT BERKOWITZ**

On behalf of the Respondent:

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Procuraduría General de la República

**MR. STANIMIR A. ALEXANDROV**  
**MS. AVERY ARMACHAMBO**  
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### APPEARANCES: (Continued)

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## PROCEDURAL MATTERS | 1281

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**PROCEDINGS**

1  **PRESIDENT BETHLEHEM:** Ladies and gentlemen, welcome, then, to our fifth and last day of the Hearing. This morning is going to be given over to the Closing Submissions of the Claimants, including responses to questions from the Tribunal. This afternoon will be given over to the Closing Submissions to the Respondents.

2  **So, Mr. Cowper, over to you.**

3  **CLOSING STATEMENT BY COUNSEL FOR CLAIMANTS**

4  **MR. COWPER:** Thank you, Mr. President, Members of the Tribunal.

5  Let me say that, in our Opening, we indicated that it was an honor to address you with respect to this case, and the events of this week have not disappointed us. So in my Closing Submissions, I will fundamentally urge you to apply the rule of law to the dispute between the Parties. And in our submission, that application admits of no alternative but to grant the Claimants' claims in an appropriate amount on the condition that they transfer title upon payment of the amount awarded by the Tribunal as requested by the Respondent.

6  **President Bethlehem:** I note simply that a copy has been passed to the interpreters already.

7  **Mr. Cowper:** Now, just by way of introduction, let me say a few things purely by way of oral submission.

8  What have we learned this week? In my submission, in the most general of terms in relation to the dispute between the Parties, what we have learned is that the determination of the State of Costa Rica to take the Claimants' properties and to defer and avoid, if at all possible, paying the value which is assured to them under the Treaty and under customary international law continues to this day and more State action will take place if the claims are dismissed and the Claimants and their properties are returned to the domestic legal order of Costa Rica. I think that is a fair summary of the record before you, and I'll deal with some detail later.

9  In short, if the Claimants' claims are dismissed, they will be left to--and the phrase "tender mercies" occurs to me at this point, but they will be left to a domestic legal order in which the Government has determined that their rights as guaranteed by customary international law and the Treaty will not be honored and discharged.

10  By every measure, with respect to liability, the State's actions in this case are in breach of the Treaty guarantees and customary international law.

11  In my Opening, I said that there is not really a central debate about the existence of liability on that measure, that the central debate on the record should be about damages. And I maintain that, because once jurisdiction has been established, the multitude of breaches is obvious and overwhelming.

12  With respect to damages, I think a couple of things are of note.

13  Firstly, the Treaty guarantee is of--I'm going to take it the most general--restitution in relation to the value of the properties. The explicit
guarantee is Fair Market Value, and we're all aware of how long and developed the evolution is to clear understandings of Fair Market Value before the date of expropriation. But I start with the fundamental proposition that it is value and not cost that is an issue. I'm going to come back to this in a moment; and I accept that, in the absence of any probative evidence, a purchase price may be a proxy for value. And in relation to the questions which have been asked by the Tribunal during the course of the week, Ms. Cohen will address the damages claim as articulated in the Memorial and will also respond to the questions in as specific a way as we can about any alternative based upon using purchase price as a proxy of value and what that would mean.

To be clear, an award that was based on price as a loss is not consistent with the Treaty guarantee. Using price as a proxy for value and then using appropriate measures to increase that value to the Valuation Date and then adding to that a measure of interest from the Valuation Date to the date of the Award is at least, in principle, based upon value.

Now, we're going to say--and, of course, we stand by our primary claim--that the only valuation evidence you have before you is Mr. Hedden's Report, that you ought to give effect to that and use those values in your determination of Fair Market Value under the Treaty.

That is your safe harbor as a Tribunal. And you're assisted in this case because there is essentially no act of professional debate about value in respect of the appropriate appraisal standards to be followed. What you have is a debate between a Valuation Expert and a Damages Expert who essentially has marshaled an argument in favor of price.

Now, with respect to the period permitted to us this morning, I will be the principal person addressing you. I will address both the facts and liability. I will, in a summary way, address the jurisdiction and the answers to your questions.

I expect that Dr. Weiler will correct me and/or supplement my submissions with respect to jurisdiction--and I say both "correct" and "supplement"--and he'll be addressing some of the
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<td>09:41:48</td>
<td>1. put a fine point on it. You don't need to conclude that they were right, in my submission. And, indeed, it is not necessary to conclude anything on that question in order to support the expropriation claim. Because, to be explicit about it, the State has the right to expropriate the property, whether it lies inside the Park or outside the Park. That, if it is private land within the Park, as we know from the general evidence, it may there be for a very long time and the State has the right to expropriate it. But, equally, if it lay outside the Park and for public order or public purpose was needed to be expropriated, that is quite appropriate. From the Claimants' perspective, it is not necessary to establish that as a question of fact or law under Costa Rican Law, but it is certainly sufficient for our purposes to say that the facts abundantly show it was reasonable to conclude the properties they were purchasing were outside of the Park. Next slide, please.</td>
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<td>09:43:02</td>
<td>1. claims have factual differences between them that you will have to have regard to in respect of your separate claims for relief in this case. With respect to the Spence Claimants, let me say firstly that the evidence is clear that there was no knowledge of a controversy in 2003 on the Spence Claimants' parts, and that the purchase of the Ventanas Lots in 2003 occurred, and there's a reference to the Witness Statement there. And the third point is that, of course, there were no stamps on the registry documents, and I've given you the references there. And finally, with respect to the Spence--and we'll come back to the significance of this--you'll recall that, perhaps, the most dramatic evidence of the skyrocketing prices during the material period was the sale of Lot 35 for double the price in 2004. Now, could we turn.</td>
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<td>09:44:18</td>
<td>1. their Witness Statements. The Cophers had no knowledge of controversy surrounding Park boundaries in 2003, 2004. They purchased V39 and V40 in 2003, V38 in 2004, V46 and 47 in 2006. And the MINAE stamps on the registry documents indicated those properties are outside the Park. I'm going to come back to the issue of stamps later, but that's the evidence as it relates to those Claimants.</td>
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<td>09:45:34</td>
<td>1. With respect to Mr. Berkowitz, who also testified before you this week--and there is some subtlety here to the evidence, and I may take a few minutes on this slide to indicate what I, as counsel, see coming out of the documentary and live testimony this week. But let me just review the slide firstly. Firstly, I urge upon you a conclusion that he had a genuine belief that before completing the purchase of the B Lots--you may want to make a note of that, because he had an agreement to purchase them but he, on the Witness Statement and the evidence, clearly deferred completing that purchase until he had concluded that the Lots were outside the Park. And his understanding of the law--and this is a purely lay understanding--was that he could build on the land until the Government expropriated the land. It did not form part of the Park. And his understanding of the law--and this is a purely lay understanding--was that he could build on the land until the Government expropriated the land. Now, if I can pause here and ask you to make a mental or a physical note, you actually have ambiguity in the documents with respect to discussions about what's inside the Park, outside the Park, what</td>
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09:46:49 1 is "the Park." And I commend to you the Statement of 2 Mr. Ruíz, which is part of the Claimants' filing, 3 which sets out the background law.
4 Because it's clear, as I read the Witness 5 Statements, that when we talk about "the Decree," the 6 Decree does actually not create a Park. It creates a 7 proposed Park or decrees a proposed Park. That under 8 Costa Rican Law, the creation of the Park is actually 9 not perfected or consolidated until the private land 10 within the boundaries of the Park has been paid for 11 and expropriated.
12 And so there are, if you will, in the loose 13 sense, you can speak about lands that are within the 14 boundary of the Park that are not in the Park because 15 they haven't been purchased yet. But they are within 16 the boundaries of the Park and are clearly different 17 risks associated with private lands within the Park 18 and outside the Park.
19 My next point, though, is I'd commend to you 20 to recall that in general within the country, vast 21 stretches of park land are privately owned today. 22 This isn't a case where this Park is unusual--and I'll

09:48:04 1 give you the reference later when I turn up the slide, 2 but let me stay with the point for a moment.
3 The point is that, with respect to the Park 4 policy, it is commonplace to decree a Park or declare 5 a Park but not to actually create the Park under the 6 Park Law for a very long period of time. And people 7 enjoy their private rights, including construction, 8 development and otherwise, within the Park in the 9 meantime.
10 I think one of the Parks in the country has 11 90 percent private land, 40 percent, 60 percent.
12 Those are the portions of private land within the 13 boundaries of a Park.
14 And so it's not the case here that, if you 15 read the law, that the facts on the ground would marry 16 what the law appears to be, that you declare a Park, 17 you buy all the land in the Park, and then you have a 18 Park.
19 Rather, the policy supported by the facts on 20 the ground is you decree a park, you have boundaries 21 in the Park, and then you tolerate for indefinite 22 periods of time people to exercise their private

09:49:07 1 rights, including development rights, within the Park.
2 They are regulated, but they are clearly residences, 3 such as the residences Mr. Berkowitz contemplated 4 within the boundaries of the Park. Not only in this 5 Park, but in other Parks in the country.
6 And so the reason I dwell on this a bit is 7 because I was looking overnight with some care at the 8 evidence--and let me say this, and that is, I think it 9 should be concluded as a question of fact that the 10 Minister provided a positive reassurance to 11 Mr. Berkowitz that he could build his home on his 12 property. That's the first thing.
13 That--there is two ways to explain that, one 14 of them being that it was related to a statement that 15 the property lay outside the Park in the sense of 16 outside the boundaries of the Park.
17 Another way of understanding that would be 18 that it lay within the Park but that his policy was to 19 permit responsible low-density development within the 20 Park boundaries on private land.
21 The July Ayuda is completely consistent with 22 the reassurance that construction and development on

09:50:29 1 the part of Mr. Berkowitz could occur because the 2 State did not want to incur financial responsibility 3 for expropriation, and that it could occur within 4 private land, either within or outside the boundaries 5 of the Park. He clearly understood that he could 6 build and that his land was outside the boundaries of 7 the Park, but as counsel, it's open to you to find 8 that the representation was "you can build on your 9 property, you can do so responsibly. We don't want to 10 take your property," but that's not inconsistent with 11 it being within the boundaries of the Park, and that 12 would reconcile the letters by the Minister which were 13 put in evidence--which are roughly contemporaneous in 14 the spring, in which he positively averred in the 15 formal sense to the 75 meters being within the Park.
16 So, that's how I would deal with that narrow question 17 of fact.
18 Now, I think it is fair to say that there's 19 abundant evidence of confusion. So, one of the 20 singular features of this is the June 2004 IGN study, 21 in which it explicitly states that those properties 22 are not part of the Park. And I've given you the
reference there, and the IGN is the national cartographic service, which whatever, some 12 years later, is about to produce a map of a park. And so--and I'm going to come back to our debate about coordinates in a moment. I can't avoid that because my father was a cartographer.

But let me--in part, let me say that, for the present purposes, it's clear that there was a basis on which any reasonable person reviewing official documents could conclude that the properties are outside the Park. And so you are dealing with, from the Claimants' perspective, at its worst, a situation in which the State has, through its various organs, created a state of confusion. And I would say that confusion exists with respect to the '95 Law, it exists with respect to the '91 Law. It exists for all the reasons the Contraloría Report in 2010 says it is confusing and is not yet resolved. And I think--I reread the evidence last night, and my reading of the evidence is--just a small point of difference between myself and counsel for the Respondent.

As I read the evidence, the map referred to in answer to the Tribunal's comment is not the official map of the Park yet. It is a draft that has not yet been approved as an official map, and that's why, in the compliance chart, it is seen as being ongoing. It's a small point, but it is not an insignificant point in that, assume for the moment, we have an official map that is unpublished. That means that, as of the date of this hearing, we still don't have a published official map of the Park in any form, much less in a form that could allow us see what was necessary to define its parameters.

So, just completing, then, with respect to Mr. Berkowitz, I recall and ask you to recall that he purchased those Lots in 2003, and we accept that the evidence is he paid $1.5 million for those, Mr. Rodriguez--I've dealt with that.

And, of course, the second-to-final slide there is that he pursued in good faith the development of the Lot, the building of his home, and then the indirect measures commenced with the rejection of permitting and the suspension of any development of his parcel, which has continued to the current day.

Go to the next slide, please.

I'm just going to wrap up with the rest of the Claimants and move on to a different topic, but I'll remind you because the Gremillions didn't appear before you. We say that on the record they had no knowledge of controversy surrounding the Park in 2004, which is when they purchased it, and you'll recall that Mr. Kaczmarek--and I'm tempted to say "even Mr. Kaczmarek," but I say Mr. Kaczmarek agreed that Gremillion was unaware that Lot B7 would be within the Park boundaries.

Now, I don't want to spend an undue period of time on this. I think lawyers become curious about legal curiosities, and at the very least, this is sort of, from a foreign lawyer's point of view, a legal curiosity, but I do want to at least address--to be of assistance to you--what I see the record and establishing with respect to the creation of the Park.

And, of course, very quickly, it's, I think, forgotten by Mr. Jurado in his opinion, but the first Decree is not the '91 Decree. The first Decree is the wild refuge--wildlife refuge. So, before the sun rises on the Park idea, this has already been created as a wildlife refuge, and that is a degree, as Mr. Jurado acknowledged in cross-examination, a degree of protection of the "inalienable zone." The significance of that, if I can go back to the end, is simply from a lawyer's point of view, one of the bases of his reasoning was that Congress could not have intended the protection of the Park to go seaward because, otherwise, there would be no protection for the beach. That's both in his--effectively, his oral evidence, as well as his opinion, and that ignored the
With respect to the '91 Decree creating the Park, there's a curiosity here, and I say a "legal curiosity," and these are matters you don't have to resolve, but you'll recall that the '91 Decree only extends to the southern part of the territorial area we've been dealing with. And, yet, when we go to the end of the Constitutional Courts, we see that the Constitutional Courts are looking at the power of the '91 Decree to expropriate as a basis for finding that 75 meters should be expropriated by the relevant authorities without an explanation of how the '91 Decree, which is only on the southern half, conveyed any authority to expropriate the northern half because the northern half is only encompassed within anything by reason of the '95 Law. So, there's an enduring curiosity with respect to the '91 use. I did reread--and it's not necessary for you to find this--but in my reading, as best I can, as a foreign lawyer, it does not appear that the Court decisions adopted, as Mr. Jurado acknowledged, his reasoning about the '95 Law. They just ended up at the same conclusion.

And how is that relevant? Well, I think it's telling that the initial nonbinding Opinion and then the Legal Opinion of the Attorney General of the country ends up not being the means by which this land ends up being the subject matter of a mandatory order to expropriate. So, that's a third legal curiosity that is of some legal, historical significance.

With respect to the Opinion and dictamen, I don't have much to say about them, other than to say that clearly the dictamen in 2005 represented--and I acknowledge my friend's point that the dictamen in 2005 had a practical effect on the Government. And, of course, the Constitutional Court's Decisions equally had a practical effects, as well as legal effects.

For the purposes of our position in advancing the claims, let me say this, and that is: Our interpretation of the evidence as a whole is that it's clear that the Court, in its final expression, did not take on itself the responsibility and office of directing immediate expropriation, that the final expression of the Court and it's expressed in constitutional terms, is that, to the extent we've said that earlier, that's not our job, that's your job, which for our purposes means that the State's decisions, arising after the final expression by Constitutional Court, are the State's decisions within their sphere of authority.

So, it's the not the case that the State's decisions in this case to suspend and to continue to paralyze the Claimants' properties are connected to or in obedience of the Constitutional Court's decision. They had a choice, and they exercised and have continued to exercise and have renewed their exercise of choice since those decisions to continue to sterilize the Claimants' properties and to continue to make them unavailable for any practical purposes.

Next slide, please.

Next slide.

So, these are really small points in the grand scheme of things, but let me say this with respect to the turtle population, because there was a debate in the pleadings with respect to what the principal causes of the effects of turtle population are: I just simply say to you I think it's clear, upon reading Mr. Piedra's testimony and Mr. Rusenko's testimony, in the context of the record that--historically, in this area, the greatest cause of degradation was poaching, egg poaching, egg harvesting by people who--and I think one of the articles describes there being a commercial business of taking all the eggs and taking them to the city and selling them.

The fisheries in a post--the post-Park period clearly are the principal means by which adult turtles are being killed, and then climate change is a concern, as it affects the conditions in the ocean, and then, finally, development. The point being that, if you're looking at hierarchies of care here, it is, I think, clear on the record that the Claimants' proposed developments--it was not necessary to prevent them to preserve the turtles. Now, it's not necessary.
for you to find that, but I say that's a fair conclusion on the evidence.

You may want to make a mental note there that, in rereading the opinion of Mr. Jurado in--earlier in the period, the one that I just referred to, his official opinion, one of the comments I see is that he says that, if there's no protection of the beaches in support of the 75 meters, then there is no protection of the turtles. There is really no recognition in his opinion at all of the distinction between protecting the "beaches" where the turtles nest and protecting the upland area, and, of course, the discussions with Minister Rodriguez, the professional discussion and otherwise, hinges on the fact that the turtles do not nest above the "inalienable zone," and that the area above the "inalienable zone" is fundamentally requiring regulation as part of what you would want to regulate going far further back.

And so there's a legitimate Government question as to how far, if you need to go back at all, and how much further you need to go back, but from a technical point of view, it's clear that it would be an entirely responsible position to take that the upland property could be regulated consistent with the development of single homes and managed.

And I don't think we've given a--well, we've given a reference to Mr. Rusenko here. I just thought it was actually a fairly dramatic example of what's possible, that's he's managing successful turtle preservation, conservation project in Boca Raton, which, forget the first one-and two-story homes, Boca Raton is a highly developed, highly urbanized area. And we're not suggesting that was ever in the cards here, but the point is on the facts, what was driving the discussion around the 75 meters was not a nuanced or developed or considered assessment of the need to take the 75 meters.

And in a sense, in my Opening, I said to you on a fair reading of the record, that you could reach the conclusion that the taking of the 75 meters is essentially an unnecessary and, to some degree, unwanted imposition on the State. And I support that because, in my respectful submission, the most senior office of the State decided not to take the 75 meters and the net legal processes which resulted in it flew in the face of that unanimous intention of Congress.

And we're all lawyers here, and we can sort our way through to the various legal analyses which would see that happen, but from a purely factual point of view, what occurred in the final result was that legal interpretation of the law ended up operating to defeat the specific intentional desire of Congress to have the boundary of the Park extend seaward and not inland.

With respect to Mr. Piedra, he was a passionate, and as best I could read, both informed and careful advocate for the turtles. I think it's fair to conclude that he would like to have boundaries far more extensive than either 50 meters or 75 meters, and that he would like to have a control over areas beyond the Park.

With respect to the narrow question of his interview, it is difficult for me to reconcile his explanation for his statement with his statement. It is not necessary for you to conclude anything, but, with respect, it's fairly clear that it may have been Mr. Piedra was speaking of the Park in the same practical way that the Minister was, which is we don't have a park that includes 75 meters, because we haven't taken those lands, and so he is the administrator saying "what we have is 50 meters and 11 miles of territory." However, it goes far from saying and supporting his conclusion--and we answered this--which is his Witness Statement says everyone--everyone always knew it included 75 meters, and that's an assertion that can't be supported on the record.

So, this is just a reminder that the lobbying for protection went before the '91 Decree and included the Tamarindo wildlife refuge.

Next.

Sorry. Okay. That's good. And this is just a reminder of what the Tamarindo Refuge shows and the protection of the beach.

Go ahead.
With respect to the '91 Decree--and this is the point I was trying to make. And, again, this is--I'm, perhaps, drawn by my enthusiasm for cartography, perhaps wrongly to this point, as it's not a necessary point for the Claimants, but the point, in essence, is, the '91 Decree and the '95 Decree were not cartographic representations of an area. They had a northern point and a southern point. And on the whole of the evidence, I think you can conclude that any cartographer with that description would actually need to describe four points, neither of which were described in the '91 Law or the '95 Law, because the western points would be described by reference to high tide, and the eastern points would be described by reference to a line from high tide. Neither the northern point, the southern point in either law were so fixed. That's my point.

So, what they do actually provide is a northern extent, a southern extent, each of them change. The idea that somehow they dictated a boundary of the Park is not correct.

Next point.

With respect to the--I think we can go back a slide. I think I can skip that. Okay. I know I've said that. Let's keep going.

Now, the '95 Park Law, I think I've said all I need to say about that. I would say that, in the documentation and in the pleadings, to some extent, there is a--and to some extent, the history of the question. One of the issues was, if there isn't a 75-meter zone, why is there a reference to private property within the Park? Because if there isn't that terrestrial component, why are there references to taking private property? And the short answer is--on either reading--and Mr. Jurado agreed with this--there is lots of private property within the Park, even if the 75 meters does not form part of the boundaries. There's an entire area of Cerro el Morro and Isla Verde. And I don't know if you recall this, but Isla Verde not an island, it is essentially a large inland wetland area, it seems to be a wetland area. And, of course, Cerro el Morro is a large area in the northern part.

Next point.

This is just a reminder of the point that, under the Park Law, owners enjoy the full attributes of ownership until the expropriation process has commenced, and that is, as I said earlier, a general fact on the ground in the country as it relates to Parks, generally.

Next point.

I think you've got this, but this is just my reminder of how explicit and unanimous the decision to move the boundary of the Park offshore was.

Next slide.

And then--that's fine. Let's go to the next one.

And I will say this, and that is--sorry, if you go back a slide.

As I read the translation--and I apologize for not being able to read the original Spanish--that implicit in the motion was the principle that what was needed was a marine park and not a terrestrial park. And I say that as in respect to it meets the requirements of law of this type to protect Parks, especially it should have been "marine," and I see that as referring to Deputy Fournier's comment about the '91 dimensions; that they, in fact, shouldn't have been landward. They should have been marine so that he knew he was changing what had happened in '91, and that the justification for it was because what was needed was a marine park and beach, and he specifically talks about ordinary high tide there. So, that is unanimously agreed to by Congress. Obviously, their effort to accomplish that by way of amendment was ultimately unsuccessful.

Next slide.

I don't think we drew this to your attention in the opening, but the corroboration for the fact that it was not a casual conclusion is in his letter of January 5, 2007, in which he says there was no environmental justification whatsoever for going beyond the 50-meter strip.

Next slide.

And so I say, as a fact, you should have regard of the fact that Congress's decision was intentional and not a typographical error or a casual textual mistake.
So, I don't think--the final point on this would be--and this was supported by the Contraloría's Report in which the distinction between "territorial waters" and "internal waters" is another source of uncertainty in the description of the boundaries of the Park.

Next. And then I think we've done that.

So, let me just pause there and say I do want to say you can find, I think, that the boundaries--as a matter of fact, that the boundaries of the Park were not adequately defined in the 1991 Law or the 1995 Law, and, through omission, they have not up until--in any relevant sense, up until the present, been adequately defined. And the significance of that, of course, is, as the backdrop to investors investing in lands adjacent to the Park, the absence of State action to carry out what their laws require, which is a clear definition of the law because the whole point that the Contraloría's point is that the law wasn't--the precise boundaries are not really intended to be defined by the description in Section 1 of the '91 or '95 Law. Further work is required for that.

Further work was required in any event, and further work has now had to be carried out to carry that out. So, that failing ought not to be visited upon the Claimants.

Now, that is just a reminder--if you go back to the slide, please, thank you--and I think, as in many civil jurisdictions, Congress is the ultimate interpreter of the law. We often, in common law jurisdictions, don't think that because we're fond, more fond, perhaps, of the judicial functions, but it was totally legitimate to seek to have Congress clarify the matter, and there were efforts to do that, both to clarify it as going inland and to clarify it as going seaward, neither of which, as I understand the record, succeeded.

And until the Constitutional Court clarified the matter, it was clear that that was afoot, and from a practical point of view, the Congress ultimately was the appropriate body to clarify its intentions when it clearly had acted on a specific intention in 1995. That wasn't done, but--and then ultimately it was left to the Court, which happens in not a few cases around the world.

The final bill, of course, was an attempt to, again, go to Congress and say the net result of the Court's decisions is that your intentions have been frustrated, and you have not had a Congressional decision, an informed Congressional decision on the very question of whether the 75 meters ought to be protected in addition to the 50 meters, and just to remind you that the bill, which was on place and being debated after 2000--January 2009 was seeking not to remove protection from the turtles but to, rather, have a mixed refuge and to rectify the limits of the Park. And there's a typo there. It should say 'lapsed and archived in 2013.' I think that's a typo from the original slide.

Next slide, please.

So, I think I'll speed up here a little bit, but just to remind you, we didn't deal with this in the Opening specifically, but just to remind you that the Constitutional Court Decision, the first one in May, was this conflict between zoning regulations, and I remind you in the pleading, we brought your attention to the fact that another official source of confusion is that the municipality exercised and purported to exercise zoning authority over these lands, and so ultimately one of the consequences of the Constitutional Court Decisions was that those zoning provisions were found to be invalid or ineffective.

Next one.

And then, of course, you'll recall that there was a decision which, on any reading, appears to have ordered an immediate expropriation or a decision to encourage environmentally sensitive development.

And then continue.

And then we're actually missing the point which is the December 2008 one, but I'll just remind you that was on, I think, any fair reading, appeared to be an immediate order to expropriate. And then when we get to the spring of 2009, it is back to the administration to decide.

Next slide.

Now, with respect to the Contraloría Report, at which I'll have much to say later in our...
10:19:18 1 submissions, this is a summary. First of all, it is
2 quite harshly critical of all of the boundaries in the
3 1995 Law, and I think that is justified. Secondly, it
4 is harshly critical of delays in the conduct of
5 expropriation, and that, again, is clearly justified.
6 The next point is a point of some
7 significance is that on the record, you should
8 conclude, in my submission, that what the Contraloría
9 Report recommended was a short suspension--that is, a
10 matter of months--pending a determination by the
11 responsible agency whether to seek annulment, and I'll
12 try to give you the specific pinpoint reference later.
13 But Mr. Jurado admitted that, and the concept
14 there--and I think I have a slide coming up with
15 it--but just the concept there was you have to decide
16 whether to take the next step, which is to actually
17 annul all the Claimants' properties, and it is general
18 and it's no question that the--if you look at the
19 text, there is actually explicit reference to the
20 source of the Claimants' properties, but it is also
21 more general than that.
22 But the point is, in respect of due order, is
23 10:20:35 1 that Contraloría said, "This is a significant step.
24 You have to decide whether you're going to do that and
25 report back to us in the spring." Spring five years
26 ago. Just the decision of whether to do it was the
27 spring of five years ago. That, on the pleadings, was
28 justified as the suspension which is still ongoing,
29 and what I say you ought to find as a finding of fact
30 is the Contraloría did not recommend an indefinite
31 suspension.
32 And I'm going to come back to what you ought
33 to conclude, but what you ought to conclude is that
34 the responsible agency and the Government of Costa
35 Rica as a whole intervened to use the Contraloría
36 Report as support for a more general indefinite
37 suspension, which is ongoing and which intervened in
38 the historical period as a fresh decision that is
39 within the Treaty period and within the limitation
40 period and is ongoing.
41 The reference I promised you is apparently
42 Transcript Day 3, Page 602 to 604, Mr. Jurado's
43 testimony. Now--I haven't finished yet with that
44 slide--I say that you ought to find as a fact that the
is supportive of our fundamental position, which is that the State has not discharged its obligation to proceed to expropriation. It is determined upon without delay.

With respect to the land registry drawings, I think that, with respect to relevant matters, I've dealt with them, but I've said, for example, that we have these stamps. There are either—there are no stamps or stamps saying outside the Park. With respect to the 1991 stamps, you have the evidence that those were reviewed. So, it's not the case that they were missed. Legal opinions were given with respect to the significance of stamps which refer to the 1991 Decree, and they were explained as not being inconsistent with the lands being outside the Park. And that's the kind of due diligence you would expect and that supports the reasonableness of the Claimants' conclusions.

With respect to the 1995 stamps, they appear to have been added after the, if you will, fresh determination by the Attorney General that that's what was required, and so those are not indicative of an official indication of the boundaries of the Park under the '95 law at the relevant time period.

Next stamp, please.

And that's a summary of what I've said, and Ms. Chaves in her testimony eventually came to admit as much.

Next stamp—slide.

Now, as part of the context of delay, of course, you will recall Ms. Chaves—or Dr. Chaves—I apologize—acknowledging that in—under her carriage, the State has been appealing and deferring finality and it has actually been seeking to change dates of dispossession and, as she acknowledged, dispossession under Costa Rican Law is not the final step of the expropriation process, and that is the transfer of title.

If you want to make a note, the ILC concept of expropriation is the same, which is that the actual act of expropriation is a transfer of title, and if I can flag for you—and I'll come back to it in a moment—that with respect to indirect expropriation,
purpose is taken when the title is transferred and paid for, and there's some variation as to whether payment happens or title happens, because some States transfer title and then undertake the obligation to pay. Other states pay first as a condition of title. In respect of indirect expropriations, where the State denies that it is seeking title, the State in an indirect expropriation is exercising State power which has the effect of taking the property but is not acknowledged to be a taking. But the end result of that is that the Measures which are tantamount to expropriation conclude with a legal conclusion—that there has, in effect, been a taking, and appropriate legal response under international law and in this Treaty is that the State has to discharge its obligations as if it had determined on an expropriation and its right to have the title is acknowledged as part of that.

Next step, please.

Okay. Now the--just because my friends are trying to help me as I go, so, I'll give you a reference to that, and I'll come back to if it's wrong. It is Footnote 17 on Judge Schwebel’s Opinion. It's the ILC Articles on State Responsibility, and I have a note here about RLA-5.

ARBITRATOR RANTOR: May I just clarify that's a reference to Crawford's commentary on the ILC Articles and not the ILC Articles themselves.

MR. COWPER: Yes. Thank you.

So, apart from my citation, though, I think I'm standing on the submission I made with respect to the concept of expropriation under international law and domestic law.

Next slide, please.

And this is where you're getting to, I think, an important point that you'll need to consider. And to some extent, this is freshly plowed ground, so I want to go a little bit slower. But in reviewing the record and the pleading there seem to be three categories of investment in relation to the totality of measures that you have before you. The first, of course, is you have Lots that are awaiting a valid Decree of Public Interest followed by a Decree of Expropriation. You can express those a different way,

but those—that's the first category. And the second ones are those which are in the judicial phase. And the third are those in which there has been—a final determination of compensation has been given and, whether or not it's actually reached this stage, the final transfer has not yet to occur. Next stage, please.

Sorry—and I would say all of those are properties that are directly or indirectly under a process of expropriation that has not been completed. With respect to the first Lots, I remind you that Costa Rica's position in this proceeding has been unequivocal; and that is it will complete the consolidation by expropriating all remaining private Lots, all of the Claimants' properties that have not yet been expropriated. And its basis for doing so in the pleading has been compliance with the Constitutional Court. And you have my submissions as to whether that is true or not. I say you ought to find as a fact that it's an independent decision by administrators rather than a mandatory order from the Constitutional Court, but it's a point of detail. To be obvious about it, it doesn't matter for purposes of our case whether it's one or the other. The further expropriations are imminent, as I've said earlier, because of the recommendation relating to annulment. And, in fact, as we've said, the Court lifted the immediacy requirement in its March 2009—"decision," not "letter," but I stand to be corrected. And then the--secondly, the three-month delay I've talked about and, at some point after May of 2010, a decision or decisions have been made to maintain the suspension on new and somewhat undisclosed grounds.

Next.

Now, with respect to continuing this category, the new delay measure—and it truly is new if you look at the historical record here—is within the Treaty period and was only known to the Claimants during course of this arbitration, and so no jurisdictional objection can apply. Now, if you're to find--and you need--you
feel you need to consider what the conclusion on the facts is, on a balance of probabilities, I think you can safely conclude that that measure is intended to be of indefinite duration save for the possibility that title to the properties could be annulled, which would then obviate the need for any compensation. And the third slide—no, sorry—go back a slide. Third bullet point. Sorry. And Costa Rica, in our submission, has admitted that its measure has had the intended effect of delaying commencement of the formal—or recommencement of the formal expropriation process. And there, in our submission, that measure is prima facie inconsistent with the obligations under 1(c) or 2(a) of Article 10.7. And I'll foreshadow an answer to one of Mr. President's—your questions, which is, we say, in principle, that with respect to the specifics here, there is a—and you used the word "free standing and independent" whether I do that or not—there is a separate Treaty obligation that is evidenced in both 10.7 and 10.7(2) in relation to delay. And the point in principle that I would make is that if an expropriation has been commenced with due order for a proper public purpose and Fair Market Value has not only been established but has been declared and that that is all in due order and appropriate, and then, for whatever reason, the State then engages in an undue delay—because it doesn't want to pay for one reason or another—then those acts of delay are in breach of that obligation under the Treaty. And they are separate breaches of those obligations, and it's knowledge of those breaches which is at issue with respect to the running of the time bars. So, that—I'll come back and I'm going to answer your questions later, but that is the short answer to, I think, your first question or part of your first question. The— with respect to 10(5), and I said in our Opening it's a secondary consideration, but I will say this, and that is I think the remarkable situation that Claimants have been left in for the last five years arising out of the Contraloría Report are the type of arbitrary state measure against an investor that are contemplated by—as being prohibited by the FET standard, separately from the expropriation concepts entirely. I think it's a fair conclusion to say that those facts justify a conclusion that there has been a breach of the FET standard, and if that's a relevant matter for you to consider you ought to be able to conclude that on those facts. And to foreshadow a little bit, the met conclusion of that is, you still at the end have the same appropriate measure of damage for that breach because ultimately what you need to do is to make the Claimants whole for that breach which requires an award giving them the value they ought to have been granted plus a measure for the time bar. And I've said that, in a sense—and you can say it a number of different ways—but under any—either theory of liability the deprivation is total and thus, the valuation and the damages ought to be—whether you call them compensation or damages—ought to be the same for both.

Now, moving to the second category—and these are the ones in the judicial phase—and I recall that the delay in this case, in respect to the judicial phase, is very lengthy by itself, and we commend to you the comparison with the conclusion of the four-year delay in the IO European case—and we say that the delays experienced by the Claimants in the judicial phase, this category, are inconsistent with 10.7, as I say, because the delay constitutes a self-standing and independently actionable breach of the promptness standard, the prohibition of being—the promise to compensate without delay, and the concurrent, if you will, or related denial of justice associated with arbitrary measures under 10.5. With respect to the—again, the theory of liability for each of those breaches concerns evidence of Costa Rica's conduct after the Treaty came into force. That is the Contraloría and the response to it.
objective test for knowledge of breach and I've already foreshadowed that. The appropriate question is at what point a reasonable investor would have been expected to conclude that the delays he or she had endured since the Treaty came into force should be regarded as a repudiation of Costa Rica's Treaty promises. And by that measure objectively, there can be no objection by reason of time bar. And then, with respect to 10.7, I don't think I need to read the next bullet point. You can read that.

Next slide, please.

So then moving to the third small handful of Lots for which a final determination has been rendered, they've all suffered from the same problem which is the compensation offered by Costa Rica has not been consistent with the Fair Market Value for each.

And with respect to the failure to provide investors with compensation values equal to Fair Market Value, that's inconsistent with the standard under the Treaty and the Fair Market Value standard guaranteed by 2(b), and the point there, of course, is that with respect to those measures, they are concerned with facts arising in respect to the breach that occur within the Treaty period.

And you will recall--and there are various forms of looking at this--but if we take an example which is contrary to the example I gave earlier and you have an example where the taking is for a bona fide, a legitimate public purpose, and that it purports to be pursuant to a process like this offering fair value, and that there is then a determination some years later of the actual amount under the standard but that on the evidence it is clearly that there's a breach and that Fair Market Value was not extended by the State, that's a breach that occurs at that time, and any consideration of a time bar has to relate to the fact that that can't be known until that time in that circumstance.

And it may be useful--and I'm sure I'll be corrected if it's not useful--to say that there are many different circumstances which will justify different conclusions as to when it's fair to start the time potentially. And so, a taking in which there's a round rejection of any obligation whatsoever, and a taking of the actual title, so that there's nothing further to be done from the State's perspective, may justify a different conclusion.

Those aren't the facts here. But you can imagine different scenarios.

And the ultimate submission I make to you is that the principles under the Treaty, the principles under the law, have to be married to the circumstances. In this case, I would urge you not to try to solve all of the timing issues with respect to all the potential cases that may arise out of both direct and indirect expropriation circumstances. Next slide.

And I think this slide essentially makes the point that I've just made.

So, I think, I'm going to suggest we have one coffee break. I think I've gone for an hour and a quarter, if we want to take the break now. And then I'll come back and we'll...
an independent consultant who we had not known existed
before yesterday or day before yesterday.
So, the other point is, of course, that, as I understand--and I read this a couple times, but I think it's a fair reading of Mr. Jurado's evidence--that this Independent Report of this third-party is not the end of the process but it's actually the beginning of the end of the process. I'm not sure which of the Churchill references are correct there.

But that what is intended is that, on the receipt of the Report, the Ministry will then consider whether to decide--or consider the decision about whether to annul. And, as he indicated, that that will be a start.

And in a sense, the last bullet point, it's difficult to reconcile that evidence in any practical sense with the Respondent's "lingering effects" idea that these are merely "lingering effects." The very present efforts being made by officials are continuing and ongoing breaches which have not come to an end. And if the Claimants' claims are dismissed, clearly there is much to come.

If I can say at this point--and I want to return and say something about the State and the State's Witnesses in this case, but as respectfully as I can. But let's just say that all analogies are imperfect and some are dangerous.

But my friend called upon the analogy of a train leaving the station in his Opening. And in my submission it is clear that, whatever is happening, the train did not leave the station long ago. Whatever analogy, if you stay with the train station analogy--we're probably in a subway, not a train, with trains coming and going and new ones coming and new ones to come.

Or, you could say we're--if we're in a conventional train station, that we have many platforms. Some trains have left. They left at different times during the historical period. Some have left very recently, and some are still in the station that are going to leave at some undefined point in the future.

What is very clear, in my respectful submission, is these are not the types of acts in which time bars are rightly concerned with clearing the decks. These are not ancient disputes. These are not dated disputes. They are essentially fresh and ongoing disputes between the Claimants and the State. And, perhaps, that leads me to my next point, which is--and I recognize that the existence of a right of action to hold a sovereign state responsible for the exercise of its sovereign powers is a heavy responsibility and a serious development in the rule of law. And my clients take that both seriously and are appreciative of it.

And let me say equally that I appreciate that agents of the Government--and it's not an uncommon observation--find it awkward and difficult and, to some extent, inconsistent with their normal experience to be held accountable in a venue like this for actions which they carry out as agents of the State, which are normally not accountable for except within the domestic legal regime and in any cases not accountable for at all.

Having said that, with respect to the lens, the legal lens that the Treaty requires you to apply, in my respectful submission, Ms. Chaves' speech to you, Mr. President, after your question to her, is a vivid and powerful evidence of the determination of the State to take these properties. And her frank hostility to the Claimants in respect of their claim to hold the State accountable in this case ought to, in my respectful submission, support that finding of fact on your behalf.

We don't often have, if you will, a living expression of that determination. We did in this case.

And I understand that and I'm, to some degree, sympathetic for it. But in the context of the legal lens in this case, that supports the Claimants' claims.

Secondly, this case is fundamentally about unconscionable delays. And we know as lawyers, all systems can, from time to time, fall into either practices, habits, or otherwise in individual cases circumstances where unconscionable delays occur. That is not the question. The question is what...
1 accountability exists for that.
2 The Treaty essentially says that, if you as a
3 State have engaged in unconscionable delays in the
4 exercise of your State powers in respect of foreign
5 investors, you can be held to account in the practical
6 sense that you can be compelled to compensate the
7 investors in the terms in which you've undertaken to
8 compensate them formally.
9 And it's, of course, a heavy burden on anyone
10 to bring a matter to this Tribunal, to an
11 international Tribunal, but that opportunity is one
12 fundamentally of driving a just conclusion in
13 accordance with the law in this context of the
14 domestic law as well. It simply provides a means by
15 which the State can be held accountable for the
16 fundamental obligation of timeliness.
17 At the end of the day, all the Claimants are
18 seeking is what they ought to have received within the
19 domestic legal order and that they've been frustrated
20 from obtaining and which they ask for you to obtain.
21 I say to you that Mr. Jurado's evidence is
22 supportive of a conclusion that the State in this
3 record has had a consistent indifference at least
4 to its obligations of timeliness, to process the
5 expropriations without delay, and to act promptly.
6 The new evidence is corroborative of the fact that the
7 historical delays are a product of State action and
8 not a product of happenstance. They're a product of a
9 series of decisions and not a single decision.
10 They are not a product of a lingering air of
11 delay. They're a product of a series of decisions to
12 delay the Claimants' receipt of the property value and
13 the compensation that they're accorded and entitled
14 to.
15 And so, in some senses, it's unusual to have
16 as vivid a display of determination to pursue delay as
17 you have in the Contraloria Report and the Ministry's
18 Response to it and Mr. Jurado's evidence of where we
19 stand today. And I say that that evidence
20 overwhelmingly supports a conclusion that what you
21 have here is a full support for the necessity and the
22 justice of enforcing the State's solemn promise to act
23 without delay.
24 Now, my--I think that covers the next two
25 slides.
11:14:59  careful to, in a sense, not transfer terms that are,
perhaps, applicable but not fully appropriate to the
circumstances of a delay claim.

And let me put it this way: You can use a
term like "crystallization" in a way that predisposes
that it's an instantaneous event. And my submission
in respect of an indirect expropriation, the ongoing
nature of the obligations of the State mean that the
point at which you can claim an indirect
expropriation, I would submit, can more properly be
spoken of as the point at which the indirect--the
conditions for a complaint of indirect expropriation
have arisen. So, it isn't that they crystallize at a point
in time. That time will be relevant for valuation
purposes, it will be relevant for all sorts of
purposes, but it isn't a frozen moment.

We said in our Opening that there isn't a
frozen moment other than the actual transfer of title
moment. But in my submission what happens in respect
of an indirect expropriation is that the complainant
has to decide when the facts are sufficient to support
the conclusion that the Measures taken separately or
together are tantamount to expropriation. That's what
happens at that point.

And so that's the point at which an action
for expropriation, if you will, or a complaint about a
breach of the obligation of expropriation can be
taken. It isn't a point in time.

PRESIDENT BETHLEHEM: Before you move on to
the third question, may I just ask a clarification?
And please don't take this as an indication that in my
mind anything necessarily turns on this, but just to
clarify the point.

At various points in your submissions this
morning--and I think Dr. Weiler in his observations on
Monday--you've made the point or the suggestion or the
contention that there is a potential delay breach
under Article 10.7(1) and then separately under
10.7(2).

I'd just like to be clear whether you are
alleging or you are submitting that Article 10.7(2),
"compensation shall," is a separate provision which
can be--which is amenable to breach or whether it is
simply an articulation of the standard set out in
10.7(1)(c)?

MR. COWPER: I have all sorts of people
helping me here, but I actually think I knew the
answer anyway, but I'm glad I'm being held
accountable.

So the short answer, and I think I'll be
formal about it, is we do rest on and leave with you
our submission in the Memorial and to be explicit
about it that, properly construed, Paragraph 2 is a
separate obligation and is not simply a definition of
the obligation under Paragraph 1.

Having said that--and I do commend to you the
reasoning in that and that there is a reason and a
purpose and a--in our submission, under the Vienna
Convention and otherwise, a logic to not rendering
that provision inutile and to actually giving it a
separate life, if necessary.

Having said that, as you probably have
observed, it's not necessary for our submissions for
you to conclude that because, in our fundamental
submission, it's a necessary part of the obligations
under the first paragraph that the obligation to
compensate in terms of its timeliness and its value
are separate obligations.

So it's not necessary, but we do make the
submission that on this particular Treaty, there is a
separate provision, and that supports the
separateness, if you will, of the obligation.

PRESIDENT BETHLEHEM: Thank you.

MR. COWPER: So, I think I'm at the third
question. And the answer to that is on the terms of
the Treaty, it's the Claimants' knowledge of the
breach arising from CAFTA that's spoken of, so it is
contingent on the existence of a right under CAFTA.

Put another way, the Claimants acknowledge
the alleged breach is contingent on the existence of a
right under CAFTA.

Now, let me say this. And that is, we
acknowledge that the right spoken of is the right in
investor-State treaties where in a sense the right
vests in the State and the means of enforcing that
right has been opened to the investor. So, we're
mindful of that, but that doesn't change the answer to
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11:20:48 1 that question in respect to the interpretation of the
2 Treaty.
3 PRESIDENT BETHLEHEM: I think, Mr. Cowper,
4 the sense behind the question was trying to identify
5 whether the entry to force of the CAFTA on the 1st of
6 January 2009 for these purposes, to use the word that
7 you've already identified we should be cautious of,
8 was, "crystallizes" the breach.
9 So, in other words, let's take the
10 hypothetical. And I think counsel for the Respondent
11 in his submissions speculated about an expropriation
12 that may have happened 30 years ago. If an
13 expropriation happened in the 1970s and then all of a
14 sudden the CAFTA enters into force on the 1st of
15 January 2009, the only possible breach of the CAFTA
16 that could have arisen would be on the 1st of
17 January 2009.
18 So, I'm looking at the language here of
19 Article 10.18(1), "No claim may be submitted to
20 arbitration under this Section if more than
21 three years have elapsed from the date on which the
22 Claimant first acquired or should have first acquired
knowledge of the breach.'
23 And the issue of 'knowledge of the breach,' I
24 think, is, at least in my mind, intended to try to
25 elicit from you some clarification of whether
26 knowledge of the breach is the factual circumstances
27 relating to the breach or the cause of action
28 associated with the CAFTA entering into force.
29 MR. COWPER: Yes. And we say it's the
30 latter, not the former.
31 Now, to be clear, we have not claimed that
32 CAFTA permits us to claim for the delay associated
33 with the pre-Treaty period, so we'd acknowledge that.
34 I think the--let me try to say a couple things.
35 In response to my friend's example, if an
36 expropriation has been completed and it is completed
37 before the Treaty period, then that's fine. I think
38 you have to define "completed," and you obviously have
39 to define "completed.'
40 And if it's a completed expropriation and the
41 title has been transferred, then that is a completed
42 expropriation. There may be all sorts of problems
43 with it, but it is, you know, factually completed.
44
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2 that period from 27th of May 2008 to the 1st of
3 January 2009, when CAFTA entered into force, falls
4 within the scope of your pre-Treaty period, as worth
5 exclusion? Or is that simply a sort of a valuation
6 methodology, if you like, if one can distinguish
7 between the two?
8 MR. COWPER: So, there are two separate
9 questions, of course, the appropriate method of
10 compensation and the question of determination of
11 delay. And, perhaps, take my friend's example and
12 twist it a little bit and say that you don't have a
13 completed expropriation. What you have is an
14 expropriation which has been running as an "open sore"
15 for an extended period of time. It hasn't been
16 resolved by title or otherwise.
17 The Treaty comes into force. And the State,
18 discharging its obligation, immediately pays the Fair
19 Market Value on the commencement of the Treaty period.
20 There is a compelling force to say at that point the
21 State is not in violation of its obligations under the
22 Treaty.
In respect of the present circumstance—and, as I say, I’ll stand to be corrected—but the valuation date we’ve taken is related to the predicate fact of when would you properly date the assessment of compensation for the property? We also say in respect of interest—and I’m sure I’m right on this, but having not gotten much sleep last night, let me just... So your question caused me to wonder whether I was getting it right, but I am getting it right. That we have not claimed interest until the commencement of the Treaty period. So, there’s the question of how do you determine the value? And then that’s the other question of a valuation date, which depends upon predicate facts and likewise. And in respect of an indirect expropriation, it’s, we say, appropriate to say—well, in these facts appropriate to use that valuation date for those purposes.

In respect of the assessment of the State’s discharge of its obligations, in a sense—and I don’t want to be misleading by grabbing a phrase—but the State has a fresh undertaking on the commencement of the Treaty, and it can discharge those fresh undertakings. We acknowledge that. And so it would be—it would be quite reasonable to expect a State to say, We’re going to review ongoing controversies and ongoing disputes to resolve them because we’ve now undertaken to make those promises not just as a matter of domestic legal requirements but also assurances to foreign investors who have made investments in the Host State, and they now have that right to do that.

So in terms of determining whether there has been undue delay, we say that the predicate facts of what delays occurred before, the State is not accountable for; but in determining whether the delay is undue, those are predicate facts which are relevant to that determination.

President Bethlehem: But you have just said that you’re not claiming interest in respect to the period before the 1st of January.

Mr. Cowper: That’s correct.

President Bethlehem: But you are in terms of your Award has different components to it. If the State is accountable purely and simply for the payment of an Award which is responsive to its obligation under the Treaty, those components will include of necessity, whether it’s a breach of the expropriation provision or a breach of the delay provision or the breach of the valuation provision—of necessity, you have to determine what, if you will, that principal amount should have been. Because the delay clearly arises in the Treaty period; and in the period within the Treaty, it’s actionable. You have jurisdiction over it. The Award would be incomplete. I mean, let me posit two examples.

So, for example, if you were to say, Oh, well, the interest attributable is only X dollars, so you get $10,000, you don’t get the principal. Then, of course, that would be an incomplete Award because it’s of necessity that what’s been delayed is the payment of the Fair Market Value. In determining the Fair Market Value, in principle you must determine the Fair Market Value by reference to the taking, and that event may occur before the Treaty because you’re determining as a matter of fact what the appropriate valuation is. The Treaty doesn’t require you to value it during the
Treaty period. And let me give you a perfect example of this, I think, as a case example.

Assume that 10 years earlier that the State had determined that it owed $10 million to the Claimants in respect of their properties pursuant to an expropriation which was not complete. But they had determined the value, they had undertaken to pay, but they had not paid. And then 10 years later, the Treaty comes into force and then five years later payment has not yet been received.

In my submission, the Award would be: You have breached your undertaking to pay without delay, you've not acted promptly, whether you regard the five years as the only period or you regard the entire 15-year period. And the Award of necessity would be the amount of the Fair Market Value that's 15 years in the past on that scenario.

So, in this case, the fact that it's a couple of years before is indifferent to the analysis.

PRESIDENT BETHLEHEM: Thank you.

MR. COWPER: I'm not indifferent to the analysis, but the fact is indifferent to the analysis.

So the fifth question that you asked is the date on which knowledge of the alleged breach could first have been acquired. If that is 1st of January 2009, what impact does it have on the operation of the three-year limitation period in this case?

Now, of course our point is, of course, with respect to the handful of cases in which a final determination is rendered after 10th of January 2010 -- so I remind you, there are values determined clearly within the three-year period. So, in our analysis, it's impossible to have known that those would be in breach of the Fair Market Value standard any earlier than that. And I'm not dealing with the scenario where the State has completely rejected any Fair Market Value analysis. That's a different case, right?

Because in our case the State assumed a Fair Market Value analysis based on the evidence. It, in our submission, simply didn't discharge it. But you can't know of that failure to discharge on those facts until then.

A different scenario, it could be in a circumstance where the State has clearly told the Claimant it's not going receive Fair Market Value, that a different analysis might apply. But in a present analysis, that's the answer to that question.

With respect to the other Lots, the ones which haven't been paid, then the two objections, of course, remain distinct and come back to the self-standing nature of the obligations under the Treaty. And in my respectful submission, that occurred within the three-year period.

And so it's not focused on when the conduct could be construed as a measure but on when the investor first knew or should have known that the breach had occurred. And so those fall within that three-year period, and I put emphasis in that context on the more recent events and steps taken by the State.

PRESIDENT BETHLEHEM: Thank you.

MR. COWPER: Okay. The next--I'd like to proceed, if I can, to answer Arbitrator Kantor's questions and answers. And I may have foreshadowed some of this in my submission, so I won't--I'll try not to intentionally repeat them, although that is not necessarily a guarantee of performance on my part.

But with respect to the first one, I think you have now, as opposed to when you handed up, a pretty full understanding of what was done by the Contraloría and by SINAC and MINAE and when. But let me just summarize for the purposes of giving you the formal answer, which is I've already said to you that, in our submission, what the Contraloría did was to advocate a brief submission for the purpose of deciding whether or not to suspend.

What the agency has done is to have decided to suspend indefinitely. And it seems pretty clear that there's a series of decisions on that point that occur afterwards; but whether it's a series or otherwise, that is the agency decision and that's what we know.

We know for sure that SINAC suspended the proceedings, and I'll just give you a couple references to that. Loasiggia Witness Statement 2 Paragraph 4, and Mr. Jurado's transcript on Day 1 is 602-603, Lines 21 to 22.
11:35:36 1 Sorry, you were about to ask me a question, I think.

ARBITRATOR KANTOR: The word "when" is a very important part of that question.

MR. COWPER: Yes. Okay.

ARBITRATOR KANTOR: If you can give me Claimants' perspective on when those events occurred.

MR. COWPER: So, the decision to suspend, based upon their reception the Contraloría Report, can occur no earlier than May of 2010, and our submission on a balance of probabilities occurred then and some point thereafter.

ARBITRATOR KANTOR: Why do you say "May" when the Report was February?

MR. COWPER: Because the decision that at issue is not the Report's decision but the agency's response to the decision.

ARBITRATOR KANTOR: And where in the record do you direct me for "May"?

MR. COWPER: Sorry. For?

ARBITRATOR KANTOR: "May," as the--

MR. COWPER: Oh, okay. I can do that.

11:36:41 1 It's--well, the actual expression, Mr. Jurado uses is--there's two deadlines, and it's, I think, 4(1)(b) and 4(1)(c) in the chronology of compliance, and I can actually take you to those. But let me--it's Section 2.1.1. I think you know the sections that I'm talking about. It is 4.1(b) and (c), and one is a reference to April and one is a reference to May. But let me be clear that that's the Report, that that's not the decision. And, in fact, it's simply an advisory to the agency, and what we know is the agency took that, and we know that there was a suspension before the Report was delivered, and we know there's a suspension or suspensions afterwards, that continue continuity of suspensions, and we also know, for the purposes of jurisdiction, that the Claimants didn't know of those suspensions. So, in terms of knowledge, it occurred during the course of the proceedings and clearly falls within the three-year period.

(Pause.)

ARBITRATOR KANTOR: For hypothetical purposes, assuming those suspensions might be legally significant acts, to what would you direct me in the record to understand when Claimants "should" have first acquired knowledge as distinct from when they "actually" acquired knowledge?

MR. COWPER: Okay. I'll take that under advisement, but I don't, at the moment, know of any clear evidence in the record that they had the means of obtaining knowledge of that decision. They know that no steps are being taken, but they don't have the means of acquiring that, the knowledge that there has been a fresh decision by the agency to suspend activities or to suspend expropriatory proceedings after the Contraloría Report has been expressed. And the difference on the evidence, if you understand between the Claimant and Respondent--and this is on my reading of the record, that the Respondent's submission to you, which was the Contraloría Report, was the decision which suspended the proceedings. I say that's not so on the record, and that was conceded, I say, not to be so in cross-examination by Mr. Jurado.

And the one point of detail--so that--you'll get the transcript--the one point of detail, prior to the hearing, there was some suggestion that there was, if you will, an act of suspension prior to the receipt of the Report and in anticipation of the Report. It doesn't matter for our purposes, but I'm not sure that is actually supported on the history here. But what is clearly the case is that the agency decided to suspend independently of the recommendations of the Report, and that's why I say it occurred sometime after the deadline of, if you will, referral, because that has to have occurred after that point, it may have occurred before and after that point, but it has to, in its operative sense, occurred afterwards. And for our purposes, there is no means by which that could have been known earlier than the three-year period under the Treaty. That's my submission.

ARBITRATOR KANTOR: Does that submission relate only to the matters in administrative proceeding or also to the matters in judicial proceeding?

MR. COWPER: I've given you the submissions earlier in the slide with respect to the right
11:40:54 1 analysis on the judicial proceedings, so I largely
2 rest on those. I think, on the whole of the evidence,
3 the evidence of the agency is that they did not
4 purport to suspend those matters that are within the
5 judicial proceedings. I think it is a fair conclusion
6 from Ms. Chaves’s evidence and the evidence we put in
7 the record that there were efforts to delay the
8 judicial proceedings by the actions of other
9 Government actors. They are restricted in terms of
10 they don't have the same direct chain effect, but we
11 do say that you can conclude in fairness that the
12 State sought to delay the judicial proceedings as and
13 when it could as well.
14 (Pause.)
15 MR. COWPER: I may come back to that when I
16 have some supplemental, but...
17 By the way, before I forget,
18 Arbitrator Kantor, you've demonstrated a passion for
19 detail here. There is another typo that you ought to
20 be aware of, that you pointed out a typo, but in the
21 compliance report--and my friends can say whether they
22 agree with this or not--but in the English and, I

11:42:41 1 believe, also the Spanish transcription, 4.1(c), that
2 recommendation actually should read Sector 4, which is
3 a sector within which our--some of our Complainants
4 rest, rather than Section 6. Now, we have the general
5 admission that included all the Complainants'
6 properties, but that's the typo.
7 ARBITRATOR KANTOR: Just to be clear, you're
8 identifying a typo in the comparison chart or the
9 chart of--
10 MR. COWPER: Yes, the comparison chart.
11 ARBITRATOR KANTOR: --completed actions?
12 Thank you.
13 MR. COWPER: Yeah. Thank you.
14 (Comments off microphone.)
15 MR. COWPER: The other--the other point that
16 Mr. --Dr. Weiler referred me to, which is the--in
17 relation to the Contraloria Report, there's a
18 reference to a '2.2.1,' but it's actually '2.1.1,' so
19 when you go--and I think you can sort that out
20 yourself, but those are two navigation problems
21 between the two documents which we identify.
22 Could I go to Question 2?

11:43:55 1 With respect to the Question 2, Mr. Kantor,
2 the question was, if the matters resulted in a
3 continuation or establishment of a suspension, is
4 there evidence that the expected duration--and I think
5 I've already spoken of this, but just formally in
6 answer to your question, I understand the current
7 situation to be that the suspension is contingent or
8 related to the consideration of annulment on
9 Mr. Jurado's evidence, and that the current situation
10 is that there's a third party who is conducting an
11 analysis of that, that has not yet been received.
12 In respect of the critical question, which is
13 the duration, by connecting those two, Mr. Jurado said
14 he could not assure the Tribunal of when that Report
15 would be received. And then that would not, as I said
16 earlier, not be the end of the process, even if it
17 would be the beginning of that process. And so that's
18 the evidence you have about the--about, if you will,
19 the expected duration.
20 With respect to Question 3, the impact of the
21 matter, because those measures did not commence until
22 after the Treaty period, you have jurisdiction ratione
temporis to consider the claims, and because the
2 Claimants' knowledge of them arose clearly, we say,
3 within the three-year period, and the capacity to know
4 them arose, at the earliest, within the three-year
5 period, there is no time bar under the Treaty
6 applicable to those matters.
7 With respect to the fourth question, whether
8 there's a differential impact between the directional
9 direct expropriation claims and the indirect
10 expropriation claims, the claims for indirect
11 expropriation, just to be clear, logically apply to
12 every lot, which has not yet passed from the Claimants
13 to the host State by--based on our definition of
14 "expropriation." And so even those Lots that have
15 been subject to measures of direct expropriation have
16 also been subject to indirect expropriation. So, that
17 population may contain Lots you hadn't thought of as
18 indirect--subject matters of indirect expropriation.
19 So, in our submission, the only exceptions are those
20 Lots in which title has already been passed to Costa
21 Rica, which are clearly within the three-year period.
22 Now, with respect to the new measures, I've
already acknowledged to you that the suspension on its
terms on the evidence as a whole essentially applies
to the Lots that are not in the judicial process.

Now, the fifth question is the
distinguishment between--or how do you distinguish
between so-called "Measures" and so-called "lingering
effects" and what evidence is relevant to determine
the category into which this matter should be placed.

Now, we rest our primary answer to this, that
we actually don't agree with the "lingering effects"
theory, if you will, as it applies to the facts of
this case. There may be--and there are lots of cases
where you can imagine a completed wrong that has
"lingering effects." We say that's not the applicable
analysis here for the reasons we've already fully
briefed and pleaded and referred to in the Opening.

If you, of course, disagree with that and you
say, "Well, how would you distinguish between the
'lingering effects,' assuming that you're wrong about
'lingering effects,'" there's a certain effort of
imagination that I have to undergo to do that, but let
me try to be of assistance. And I think that's why

In essence, I think, I would commend to you
this analysis, which is, has the State taken measures,
in the general sense, which either renew its
determination or express its determination in
different ways than simply omitting to act? In other
words, if there are, if you will, positive decisions
to either not act, which is effectively an omission,
but by reason of State responsibility, it's a State
action to decide not to act in the evidence, or if
you have, if you will, evidence of positive decisions
to prolong in this context, the delay, then those are
matters which are not "lingering effects." And maybe
I can give you a couple of examples which might be of
assistance.

If a State had, under its domestic legal
order, all that we would hope for, and in a given case
had done the right and proper thing of noticing an
expropriation and moving to expropriate, and it had,
under its domestic legal order, an obligation to
competent for Fair Market Value, and some later period
in time, it acted so as to deprive the property owner
of that Fair Market Value, that, in my submission,
would not be a lingering effect of the original
expropriation, but would be a, if you will, a measure
and not a lingering effect.

On the facts of this case--and I'll just
state the obvious--we commend to you that the history
of delay here is not a history of, if you will, a
lingering odor of something that is happening in which
you could characterize the history, as my friend did,
of the train leaving years ago and no other activity
on the rails.

To the contrary, we say, in this case, you
have abundant evidence of a series of decisions by the
State to either, if you will, bring about a new delay
or to prolong an existing delay or to potentially
engineer an unforeseen possibility of another delay.
And in the--in those circumstances--I'm just trying to
be helpful to you because I think, to some degree,
we're in sort of unplowed territory here. That's the
best means I can provide in principle to distinguish
between what I understand to be the proposition of
lingering effects and new measures.

you asked me the question, so let me do my best.

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in the general sense, which either renew its
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best means I can provide in principle to distinguish
between what I understand to be the proposition of
lingering effects and new measures.

ARBITRATOR KANTOR: Well, not my proposition,
of course. I'm merely quoting back language that--
MR. COWPER: I understand.
ARBITRATOR KANTOR: --we have heard from
counsel on both sides.
MR. COWPER: Yes. I wasn't suggesting the
contrary. Sorry.
ARBITRATOR KANTOR: In your response, one of
the phrases you just used--and here again I'm quoting
back what counsel just provided--you used the phrase
"acted so as to delay."

Without suggesting that this time period is
the legally operative time period, we are all well
aware of the three-year period that would commence in
June 2010 because in June 2013 the Notice of
Arbitration is filed. Can you identify for me
Claimants' position for conduct of the State that
falls within the phrase "acted so as to delay" from
and after the time period that commences three years
prior to the filing of notice of the arbitration?
MR. COWPER: Well, I think the fundamental
answer to that are under my submissions arising out of
the agency's response to the Contraloría Report. And
I'll come back maybe at the end and give you the
colored version of that, but that's the fundamental
answer to that question.

My point in the concept for you, Mr. Kantor,
is that, in relation to a concern over undue delay,
there are delays of different characters, if you will,
if you're going to adopt this analysis, and since
we're dealing with State responsibility for State
action, an action to prolong a delay is as much an
action as an action to start a delay in my submission.
And so, the ongoing nature of the suspensions, the
ongoing nature and consideration of the agency, in my
view, extends to the current time, and for that
reason, that's my submission in relation to it.

ARBITRATOR KANTOR: Just to be clear--
MR. COWPER: Yeah.

ARBITRATOR KANTOR: --is it Claimant's
position that, once a delay commences or a suspension
commences, every day thereafter is as--is conduct to
continue that suspension, which is independently
capable of being considered for purposes of the
three-year period?
MR. COWPER: I'll give you an answer, and
then I'll tell you if I have to nuance it later, but I
think that you're combining two submissions there in
the question. With respect to the first point, it's
our general submission that a delay represents an
ongoing breach after the reasonable period of time has
lapsed, and that's a proper application of the facts
and the law to this case, whether or not the State
decides to do anything. Okay? That's our primary
submission.

If you find, contrary to that, that that's
wrong on these facts and that--and that in order for
the Claimants to succeed, they have to attach
themselves to new decisions, the next point I make is,
those decisions don't have to be different in
character. They don't have to be relying on a
different law or a different basis.

All that you have to establish is that the
State has actively sought to delay in order to avoid,
if you will, the definition of "lingering effects."
And in our submission, the State's actions after and
1097 1 lacking transparency in that we don't know what it's based on, other than a determination and a decision to continue that suspension.
4 So, I don't--so, I could, perhaps, say this just to give you sort of the anatomy of potential cases, is you can imagine a situation where, under the domestic law, there's a timeline for each of these matters, and under the normal course, you would have a determination of value, a taking in the sense of an announcement of a future taking, a determination of value and a payment date. And you can then imagine a scenario, which is not uncommon, that the person responsible for that process the eve before the payment is due decides to defer the payment. That's a State decision. That's a State measure which results in a delay.
17 When you come back in hindsight, you may be years later looking at it, and you sit there and say, "Well, is that a delay associated with the first measure?" No, it isn't. There's a--if you're distinguishing lingering effects and other measures, that's a new measure. So, in the evidence you have here, we know that the agents of the Government, in the respectful sense, the officers of the Government, made a fresh decision arising out the Contraloría Report. We've talked about what you conclude the basis of that decision was, but that was clearly a fresh decision, and it's not clear to all of us, and it's a fresh decision that was unknown to the Claimants.

1099 1 of delay, so it would be useful to hear from you whether you think that what we are concerned with is a single dispute that has an antecedent period and a more recent period, or whether they are separate disputes; and if you think that it's a--if you characterize it as a single dispute, it would be useful to have your views in a rather focused fashion on the language of Article 10.1.3.
9 For greater certainty, this chapter does not bind any Party in relation to any act or fact before the date of entry into the force of this agreement. And the question that follows from that is: To what extent are we then taken into sort of a terrain of artificiality, where we are looking to pre-1st of January 2009 acts or facts, but, you know, in order to inform a post-1st of January 2009, as it were, a determination, but in circumstances in which this may preclude us from doing so?
19 MR. COWPER: I may want to return to this the end of the hour. I'm just trying to answer your question about whether it's useful or not.
22 PRESIDENT BETHLEHEM: Let me just sort of elaborate a small point. I mean, there is--not in the context of these kinds of disputes, at least insofar as I'm aware, but there is case law out there which suggests that there may be a measure of artificiality in trying to pass up a composite dispute into different composite parts because it doesn't allow a Tribunal or a court to actually get to grips with the whole of the dispute. So, that's the point that I'm trying to grapple with.
10 MR. COWPER: Well, I think the answer I would give you--and I don't know whether I'm using your language or my own language, but it is that the dispute that the Claimants bring you here is that they have not received the discharge of the promise under the Treaty within the Treaty period, and in order to determine whether that dispute is proven, you have to decide whether the incidence of that dispute have been made out. That may require you to have regard to precedent facts, but it most definitely does not, in principle, require you to retroactively apply the Treaty. And maybe I'll give the perfect--I think what is a very clear example is--and maybe we'll give two
If you assume for the moment that there has been an announcement of a taking, a public purpose, a Fair Market Value, and then an unconscionable delay within the Treaty period for payment of that Fair Market Value, that dispute is one over which you have jurisdiction. You must assess whether or not the delay has breached the provisions of the Treaty during the Treaty period; and I say, you know, in terms of artificiality, it would be entirely artificial to disregard the delay before the Treaty period in determining whether it is conscionable or not. But it isn’t governing, and in the facts of this case, we say the delays are sufficient, even if you disregarded the previous delays, and in–in connection with that, then you’re honoring the Treaty period, you’re honoring the State’s undertaking, and you’re acting on matters which are at the heart of your jurisdiction. You’re not reaching back in any material way.

In order to discharge and to make an award in that circumstance, it requires you to determine what value it should have been otherwise—otherwise you can’t restore the Party to the and provide restitution for breach of the obligation because wrapped into the delay is what they failed to receive.

MR. COWPER: I can’t restore the Party to the—and provide restitution for breach of the obligation because that circumstance, it requires you to determine what
can’t be the Party to the—those restitution for breach of the obligation because that circumstance, it requires you to determine what

ARBITRATOR KANTOR: Thank you for your patience. Please proceed now.

MR. COWPER: I can—just for the sake of completeness, and I know Ms. Cohen is champing at the bit to take the podium from me, I can answer 6, 7, and 8 pretty quickly, I think, and I think you probably know what the answers are.

We say that the—essentially—what we've been speaking of falls within the bounds of our Statement of Claim, and you'll have regard to 67 as an example of it. We say that the—essentially—what we've been speaking of falls within the bounds of our Statement of Claim, and you'll have regard to 67 as an example of it.

You've mentioned that the response to the Contraloría Report had to have occurred no earlier than May 2010, but May, of course, predates June. Can you identify which specific decisions or acts your client relies upon that arose from and after June 10, 2010?
amendment—we say we don't require an amendment—we say you ought to, in the circumstances, grant that amendment. I think I'll do—do you want to do—Dr. Weiler promises to do Chapter 17 in under 30 seconds.

PRESIDENT BETHLEHEM: The clock is ticking.

MR. WEILER: You asked about the—Chapter 17. The important thing to note is that Article 10.2(1) provides, "In the event of any inconsistency between this chapter and other chapter, the other chapter shall prevail to the extent of the inconsistency.' " (Comments off microphone.)

MR. WEILER: We don't have an inconsistency. So, really, Chapter 17 is not going to apply directly, though, I would think, say, that you might want to look at Chapter 17 within the context of the Vienna Convention, Article 31(3) context arm because there are some interesting provisions there which don't—which would suggest that, again, that there are some procedural problems with regard to the delays in this case. I would direct your attention to Article 17.6, Opportunity For Public Participation, and I would also direct your attention to Article 17.9, Environmental Cooperation.

MS. COHEN: I'll give the podium to Ms. Cohen now.

PRESIDENT BETHLEHEM: Thank you. And I'll just mention that she's—presumably you're going to swap seats or she—

MR. COWPER: I'll give the podium to Ms. Cohen.

PRESIDENT BETHLEHEM: Okay. MS. COHEN: Some of the submissions that I was going to make I think have been covered, so I will try and stay as close to the 12:30 mark as I'm able to.

With respect to damages, first—the next slide—just an overview of the Report and the different methodologies that have been applied here. In my submission, the only appraisal of the subject Lots before the Tribunal is the appraisal that was provided by Mr. Hedden, and in my submission, he's a qualified appraiser who has followed the appropriate methodologies in coming up with the proper values for the subject Lots that are before you.

Just turning to the next slide, I think the Tribunal is, by now, very familiar with the fact that the Fair Market Value is the appropriate measure for compensation. The comparables that were used to determine the Fair Market Values in my submission are reasonable. While they were not comparables that are as, perhaps, easily available in other markets, the comparables that were chosen do reflect, in my submission, what are appropriate values when adjusted in accordance with the methodology that was applied by Mr. Hedden.

For the V Lots, the comparables used—and I have listed the three comparables—were all located within 75-meter zone, beyond the 50-meter "inalienable zone," and the sales prices for those Lots would reflect any lawful and nonexpropriatory measures or actions of the Republic. So, I think that covers the question that was being addressed yesterday.

The next slide, the sales prices for the Lots are consistent with what would be expected upon a considered and supported market analysis in my submission. And I've set out the references in Mr. Hedden's Report where he analyzes the market in—the real estate market in Costa Rica and why it is not in my submission correlative to the U.S. market. In my submission, the extreme boom in the real estate market in Costa Rica was not comparable to many other...
Markets. It was substantial increases in value over the period of time from 2003 right through to 2007, and those extreme increases in value are reflected in the purchase prices that you see both in the comparables and in the values that we are submitting as being the appropriate values for compensation.

Turning to the next slide, I say that this is particularly so when we look at the subject Lots, which are, in this case, Lots that were in the prime area. They were unique in the sense not only that they were beachfront lots, but also in that they were fee-simple Lots, which is unusual in the area. I refer in these slides to the market timing, and I have given references in the slides, and I will leave that with the Tribunal. But there are a number of references in the record which clearly indicate in my submission that the market did not peak and then decline in 2006, but, rather, it continued to increase in value right through 2007, and it was only in 2008 where it tapered off, and we see no further significant increases in value, but it held its value for a period of time, and, at the earliest, I say, the decline in value happened in the fall of 2008. I've included a graph that shows the market timing. I don't intend to spend any time on that. Turning next to the Reports of Mr. Kaczmarek, in my submission, it is clear from the scope of work, when one reads Mr. Kaczmarek's First Report, that he was not asked, nor did he do an appraisal or any formal methodology applied in valuing the properties that are in issue in this proceeding. Mr. Kaczmarek was not--is not qualified to do so. He's not a certified or licensed appraiser, and he did not prepare his Report in conformity with any of the applicable appraisal standards. Turning to the next slide, in my submission, Mr. Kaczmarek was a partial Witness, whose presentation, in my respectful submission, sounded more like Closing Submissions of legal counsel. He engaged in a fact-finding mission, he reviewed Witness statements, and came to his own conclusions on facts and legal analysis in respect of the very Constitutional Court Decisions and Park Law, which are at issue in this proceeding.

I've given a number of examples in his Report in my submission, which I say are evidence, in my submission. His presentation and his answers to questions in this proceeding were also evident of that. I say many of his conclusions go to the ultimate issues which are within the purview of the Tribunal. Turning to the next slide I say, again, still referring to Mr. Kaczmarek's reports, that he did not identify the source of many of the statements contained in his Report, and there is no evidence that he did any independent verification beyond reviewing some Articles that he's attached to his Report. I say the Articles that he has attached do not support the conclusions that he reaches, and in any event, they are not sufficient for this Tribunal to draw conclusions about the market timing in Costa Rica and, in particular, the areas at Playa Grande and Playa Ventanas. He acknowledged that his findings of fact, if they are not concurred in by the Tribunal, may influence the outcome his opinions.

Turning to a couple of specific examples of credibility, and I apologize for the number of words on this particular slide, but in my submission, Mr. Kaczmarek was guided with a view to an objective, which was to compensate the Claimants for the lowest possible amount, using the facts to try and manipulate that outcome, in my submission. And two examples that I have included in my presentation, in my submissions to you this afternoon, are, firstly, his conclusions or his opinions with respect to his appraisal, the administrative appraisals that were rendered with respect to these subject Lots, it was clear in his cross-examination yesterday that, although in his Reports he states that, in his opinion, the administrative appraisals were reasonable, he did nothing to actually verify either the methodology that were used by the appraisers who came to those administrative appraisals. He did no analysis of the comparables that they used to see if they were at all relevant to the subject Lots. He did no analysis of evaluation valuation dates that were chosen by those appraisers, nor did he do anything else to verify
whether those reports have any bearing on the Fair Market Value of the subject Lots. And in my submission, it's clear on the face of the administrative appraisals, on the amounts that they used, that they are at all not reflective of Fair Market Value. And that is further confirmed by the fact that, in the judicial process, a number of the administrative appraisals were substantially increased as a result of the judicial process, and I say even those judicial appraisals did not result in a Fair Market Value for the Claimants' properties.

I say his own--the second example that I give is with respect to his conclusions with respect to Fair Market Value. In his own Report--and you'll recall yesterday the cross-examination of his belief with respect to the B Lots and whether they could possibly have actually had a purchase price of $1,200 per Lot. And in my submission, based on the information that he had at hand, including the document that he relied upon from the registry, which showed that there were mortgages on the one B1 Lot that were in access of $400,000, he could not in exercising any professional judgment have possibly concluded that the actual purchase price was $1,200. And I will come back to that point, because it's relevant to the basis upon which the Tribunal decides to award compensation.

Turning to the next slide, I refer, again, to the submission that I was just making, so, passing over that slide onto the next slide.

So, with respect to the amount of compensation--and I haven't included the amount in the slides--the amount is found in Mr. Hedden's presentation and the amount claimed is US$36,608,000--that is the amount that takes into account the severance damages as well, and I should say, so that I don't forget to when I come later into the slides, that the preference of the Claimants would actually be that the State take the entirety of those Lots and not leave any remnant or remainder at all. And if one were to award compensation on that basis, the amount of compensation would be the amount that's indicated in Mr. Hedden's Report as the before-taking value for those properties.
your first Memorial?

MS. COHEN: Yes, it is. And it's in the
Footnote 251.

PRESIDENT BETHLEHEM: I don't have a
Footnote 251 on that page.

ARBITRATOR KANTOR: It's on Page 96.

PRESIDENT BETHLEHEM: Ninety six. Is it the
footnote beginning Sedco against National Iranian Oil
Company.

MS. COHEN: That's correct. I apologize.

For some reason mine is Page 95.

And in my submission, there is a distinction
between the date upon which--the valuation date that's
chosen and the date for calculation of interest, and
that is because of the statutory requirement that the
date of value is the date immediately affected by the
expropriation, so that it doesn't take into account
the expropriatory measures or regulatory-unlawful
regulatory conduct in thereby diminishing the
restitution that is given to the Claimants, whereas
the compensation of interest is tied to the date of
breach.

So, the breach occurs. That doesn't mean one
doesn't look back in time to assess when to measure
the appropriate compensation. But in terms of the
interest and international law relating to the
requirement to pay interest, it is calculated from the
date of the actual breach, which in this case, would
be the date of the delay, which is after the CAPTA was
in effect.

So, I may come back to that when I get to
interest, but I'm trying to be economical with my
time. Still on the Slide 62, any Award based upon a
return of the purchase price would have to ensure that
the genesis for the analysis or the proxy for the
analysis being the purchase price is actually
reflective of the Fair Market Value at that time, and
there are certainly some issues with respect to that
in the record because there is debate about what the
appropriate purchase price was at the time.

I have handed up a chart that has been
prepared, demonstrative evidence that has--that
summarizes the evidence and performs an analysis, an
alternative measure of damages. And in our
adjourn now to provide those to the Respondents so that they’re on notice, I think that will save time in going through all of these 26 Lots.

MS. COHEN: I would be happy to do so.

So, but, just to take you through the chart itself, what it indicates is the property cost and the date of acquisition, the monthly return that is applied over the period, and I submit to you that those monthly returns for 2003, 2004, 2005 are conservative, if anything, and I will take you through a number of examples of why that is in a moment.

For 2006, 2007, and 2008, the monthly return percentages are those that were determined by Mr. Hedden to be appropriate for the market at that--at those points in time. And then that amount is calculated on the basis of the amount or the square footage of property that was taken to come up with a per-square-meter compensation amount for those subject Lots.

The--and just to explain that, with respect to the Lots that are at the second portion of the page, the lower portion, the B Lots and the SPG Lots, with respect to those Lots, because the Lots were aggregated, they are larger Lots, it was difficult to perform this analysis on a price--on a purchase price basis. And so for the entirety of the square footage, the Unglaube--the amount that was awarded in Unglaube is used as the per-square-meter value as of January 2006, and then the returns are applied thereafter.

MR. ALEXANDROV: Mr. President, just to register a quick objection; in the closing statement what we have been provided with is an entirely new damages calculation. We move that this be stricken from the record.

MS. COHEN: Yes, I will do so.

And just turning to the next slide, I think I have covered most of the comments that I wanted to make on this slide. I do refer to--and as I said in my submission the amounts are conservative--the transaction with respect to Lot V61 in my submission is indicative of the conservativeness of the amount, and there were substantial values that were obviously being experienced in that market at the time.

Turning to the next slide, with respect to severance damages, I don't intend to say much about that other than that the hand-up that I did give you does not take into account severance damages, and so severance damages would have to be added on top of that or, as I indicated earlier, alternatively, if the entirety of the properties is taken, the square footage would have to be increased to reflect the entire square footage of those properties.

Turning to the next slide, with respect to Article 10.7 of the CAFTA, I have already submitted to you that in my submission the intention is to ensure full restitution and that is why the basis of the compensation is Fair Market Value.

With respect to the next slide, the Respondent suggests that to pay Fair Market Value would result in the Claimants receiving a windfall. And in my submission I would submit to you that in doing otherwise would result in a potential encouragement to States to take unlawful and expropriatory measures and to delay the payment of compensation so as to drive down the price or Fair Market Values of the properties and then have to pay lesser compensation.

It is the very, in my submission, unlawful and expropriatory measures that have created the possibility for speculation in the marketplace, and the Respondent should not be rewarded for having taken those measures by awarding them compensation on the
basis--by awarding compensation to the Claimants based on the prices that they paid rather than the Fair Market Value at the time of the taking.

I also would refer you to the Second Memorial, the Reply Memorial on the Merits, and I direct your attention to Paragraphs 259 through 263--sorry, through 265. I will not take you through them now, but I think they also address the case law with respect to these issues which is of assistance to the Tribunal.

Turning to the next slide, I've addressed already the Valuation Date. I don't intend to say any more about that.

Turning to the Unglaube decision, the language of the Treaty in issue in the Unglaube case is not the same, and I've noted in Paragraph 301 of the Unglaube decision, which I believe has been given to you electronically, in that case they quote from the Treaty provisions. It is a different basis. It is a different measure of compensation, I think in a material way, and it differs. So, I do note that.

But with respect to the conclusions of the

Experts on compensation, I note that they varied widely. The Tribunal comments that the Claimants sought compensation at a valuation date of July 2006, which they characterized as the peak of demand in the market.

The Respondent's Expert, who is Mr. Kaczmarek, advocated for a valuation date of 2003/2004, just turning to the next slide.

The Tribunal agreed to a significant degree with the Claimants' Expert but concluded that, rather than awarding compensation on the peak, they would award compensation on the period six months prior to what was determined to be the peak and so compensation was awarded as of January 2006.

And I note here, based on the math--and this isn't in the slide, so I note it for your reference--at Paragraph 299 of the Unglaube decision, it refers to the values that were contained in the Expert Reports. And the appraisal dated the July 2006 values for the 75-meter strip at $5,190,000 per square meter, or--sorry, per meter--or $5692 per square meter--the value awarded was 3,100,000 as of January 2006. And so I note that for that six-month period, the difference in value was a 67 percent increase in value for the period, for that six-month period between January 2006 and July 2006, for the Unglaube property, which in my submission, is very comparable to the subject Lots in this proceeding given that it is on the same strip of beachfront, and that would be an 11 percent per month increase which is substantially less than the values that are being either included Mr. Hedden's Report or in the chart I've handed up to you.

PRESIDENT BETHLEHEM: Just to be clear, your references to Paragraph 299 of the Unglaube Award is to the position as set out by the Claimants there, and then following is the position of the Respondents. So, we'll find it in the Award. I'm just not sure that that reference is a correct reference, looking at it now.

MS. COHEN: I'll double-check that as well over the lunch break.

Turning to the next slide--skipping over to the next slide on--sorry, damages, staying on this slide for a moment--I think I've covered most of what I intended to say at this slide but for one thing, which is that in this case there is also a claim for damages based on Article 10.5. Given the circumstances of this case, the amount of compensation being sought is the same. There is no difference in the intention is to put the Party in the same position that they would have been in as if the wrongful conduct had not occurred and in this case we say the measure of damages is the same, irrespective of which basis of--upon which basis it is awarded.

But turning to the next tab on interest, in my submission the interest that could have been earned if compensation had been paid and invested favorably is the appropriate measure of interest. And just referring to the Memorial on the Merits, Paragraph 322, the principle of full reparation requires that the Claimants be awarded interest at a rate that fully compensates for the delay. And in Footnote 268, it's noted that pursuant to Article 38(2), interest runs from the date when the
principal sum should have been paid until the date the obligation to pay is fulfilled. And so I refer to—I refer the Tribunal to both of those portions of the Memorial, and also commend you to the Reply on the Merits at paragraph—sorry, I just want to double-check because I think it's Page 71, but I'll just refer you to the paragraph reference so I am sure that's the correct paragraph. Paragraphs 259 through to 265.

In my submission, compound interest in this case is appropriate as it reflects a commercially reasonable rate, and I noted in the cross-examination yesterday that there are many circumstances in which compound interest is awarded in circumstances where commercial interest is applied as it has been sought in this case, but the interest that is being sought is a commercially reasonable rate of interest.

So, subject to any questions that the Tribunal may have, I don't—Mr. Cowper is going to address cost, but those are the only submissions I was going to make on damages.

PRESIDENT BETHLEHEM: There are one or two questions from the Tribunal.

ARBITRATOR KANTOR: Ms. Cohen, thank you.

Very quickly, as you know, the Parties are in dispute over whether or not Claimants knew or had reason to know, prior to purchasing their properties, of a risk of expropriation, or, as alternatively stated, that the property was "in the Park" or there was confusion as to whether the property was "in the Park."

If hypothetically the Tribunal were to conclude that the Claimants did have reason to know of a risk of expropriation before purchasing the property, in your view is that a decision that is relevant to the computation of expropriation compensation under CAFTA?

MS. COHEN: In my submission it is not relevant to that question.

ARBITRATOR KANTOR: If it were relevant, do you have a view as to how one would go about taking account of it?

MS. COHEN: Well, I think that the way that Mr. Hedden has performed his valuation report, it takes into account—it uses comparables that were within the Park, and so to the extent that the risk of expropriation was present, it would already be "baked in," to use a sort of inartful slang. It would be "baked in" to the prices that were seen with respect to those comparables.

ARBITRATOR KANTOR: Same question, but with respect to any potential hypothetical finding by the Tribunal that Costa Rica's conduct was a breach of the Minimum Standard of Treatment, including fair and equitable treatment. Would a finding by the Tribunal the Claimants knew or had reason to know the property was subject to a risk of expropriation have an impact on calculation of compensation in those circumstances?

MS. COHEN: In my submission it would not because, again, the concept requires that the Claimants be put in the position they would have been in had the wrongful conduct not occurred.

ARBITRATOR KANTOR: Last question: I note that the chart you've handed up and are later going to annotate further covers up through the period of 2008. There are some who advocate that in thinking about compensation for the breach of a Minimum Standard of Treatment, including fair and equitable treatment, that the proper date for determining damages in that scenario would be the Award date, not the date of a hypothetical expropriation.

Would you care to comment on how that might relate to an alternative methodology?

MS. COHEN: In my submission, what the case law--arbitration law suggests is that it is the Claimants' choice as to whether or not the date applied should be the date of expropriation or the date of the Award and that it is typically the higher date, the higher value that would be awarded.

In this case there is not much, if any, evidence about what the current value of the market would be absent the expropriatory--I mean, it's--the conduct makes it very difficult, in my submission, the conduct of the State makes it very difficult to now determine what the fair values would be at a present valuation date. But there is some evidence in the record that the market--the real estate market--generally in Costa Rica has returned to the value that it would have had in the 2006-2007 period,
but the evidence is pretty scant.

ARBITRATOR KANTOR: In speaking of an option on the part of Claimants and case law relating to that for a later date, are you referring to the Awards that have drawn distinctions between lawful and unlawful expropriations?

MS. COHEN: I am, yes.

ARBITRATOR KANTOR: Is such an option in your knowledge also found in Awards dealing with a breach of the Fair and Equitable Treatment standard or the Minimum Standard Treatment including fair and equitable treatment?

MS. COHEN: Not to my knowledge, no.

ARBITRATOR KANTOR: Thank you. No additional questions.

PRESIDENT BETHLEHEM: Mr. Vinuesa.

ARBITRATOR VINUESA: Thank you very much, Mr. President.

Ms. Cohen, I have a very general question just to try to understand the dimension of your work on damages.

And it's if you consider that the only appropriate applicable standards to be applied for real estate prices in Costa Rica to determine Fair Market Value conformity with international law should be assumed to be United States of America standards, or United States of America standards as defined by American professional institutions?

It seems to me you're relying on a way of thinking that defines your standards, that are the only standards you apply as American standards, even if you call it international standards, you do refer to American organizations, professional organizations, defining those standards.

MS. COHEN: In Mr. Hedden's Report, he refers to both--or in his analysis he refers to both the American standards and also the International Valuation Standards, and he has applied both with respect to the rendering of his opinions. But he is an American expert, and so he has applied the standards that are applicable to him in rendering the Report.

ARBITRATOR VINUESA: Right. And I assume that when he's talking about international standards, refers to the international standards that are applicable for these American institutions?

MS. COHEN: I don't think with respect to the matters that are an issue in this proceeding that there was any distinction between the International Valuation Standards and the USPAP.

ARBITRATOR VINUESA: Okay. I will check that. Thank you.

PRESIDENT BETHLEHEM: Mr. Cowper, you want some concluding remarks?

MR. COWPER: Yes. Yes. Thank you.

And one point that I may offer in response to Mr. Kantor's comments of detail, which I've--Ms. Cohen can strike me if I'm off--but is on the evidence here to the extent that the Claimants purchased on the conclusion that there wasn't a risk associated with expropriation or in the Park, that fact renders a more close proxy for Fair Market Value, just to state that obviously.

We stand on the fact that the Treaty expressly guarantees that people whose property will be taken will not be visited by a diminution in value associated with the expropriation becoming known earlier.

Finally, let me say that with respect to--and I'm only going to be a minute or two--just, I said I would come back to you with respect to the "ought to" standard, and I don't know that I said that precisely. So, I probably covered it in one of my several answers to you, but the point I sought to make or I would make is that if the Claimants ought to have known that the Contraloria Report in February of 2010 and then they're held to have ought to have known of the deadline for the decision under the--by the Ministry, that is distinct from holding that they ought to have known of the decision that was made sometime later.

And so, with respect to the proper operation of the three-year period, my point was May is not a magic date. It's the date on which they "ought to have known" that some other measure has intervened, and that date clearly has to be within the three-year period. We say it's actually through the pleadings, but even if it's not through the pleadings, it has to
have occurred after June of 2010. That's my "ought to have known" answer to you.

Finally, with respect to costs, and I'll be very brief on that, the Claimants do ask for costs in
the normal course and ordinary measure of costs of attorneys' fees. I do want to say that, with respect,
my friend characterized his claim for costs as attendant upon the frivolous nature of the Claimants' claims in this case.

In my submission, you ought not to—even if you conclude that these claims are defeated for any of the reasons set out by the Respondent, they are clearly not frivolous in any measure, and you ought to consider, in exercising your discretion, if the matter is dismissed for any of the reasons offered by the Respondent declining to award the Respondent costs, even if there's an unfavorable outcome for the Claimants in view of the general circumstances of State action in this case.

And those are the submissions for the Claimants. Thank you for your patience, and the enjoyable morning.

PRESIDENT BETHLEHEM: Thank you very much, Mr. Cowper.

Mr. Alexandrov, we're in your hands now. We were due to break from 12:30 through to 2:00. If you feel you need the extra half an hour or so, we will recommence at 2:30. Otherwise, I think we'd be quite content to recommence at 2:00.

MR. ALEXANDROV: Mr. President, we are content to recommence at 2:00. I want to ask for two clarifications. One is, if we have to go a little bit beyond the time allocated to us, I hope that we'll be granted the same courtesy as Claimants' counsel.

PRESIDENT BETHLEHEM: You can take it that you'll be granted the same courtesy. I think Claimants were delayed because of the questions from the Tribunal and we will certainly grant you the same courtesy.

MR. ALEXANDROV: We hope that there will be questions to us as well.

And my second question is, we ask that you repeat your—restate or repeat your instructions that we be provided with those references as soon as possible.

MR. COWPER: That's not necessary.

MR. ALEXANDROV: So that we can look at them and be ready at 2:00 to address the issue that I raised in the context of my objections.

PRESIDENT BETHLEHEM: I think it's in the record. I see Ms. Cohen scribbling away. Claimants will provide you with a copy of those references as soon as possible.

MS. COHEN: I will switch copies with you in about two minutes.

MR. ALEXANDROV: In that case, we are content to start at 2:00.

PRESIDENT BETHLEHEM: Thank you very much. Then we will adjourn until 2:00. Thank you very much.

(whereupon, at 12:55 p.m., the hearing was adjourned until 2:00 p.m., the same day.)

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AFTERNOON SESSION

PRESIDENT BETHLEHEM: I think Mr. Cowper wanted to make a quick correction for the record.

MR. COWPER: Thank you.

Members of our team were talking and I have to correct a correction because I said to you earlier that we thought there had been a typo, and I believe on the record I said that the typo was in 4.1. And I misdirected you on two scores. I ought to have referred to 4.2 of the Contraloría Report, Paragraphs (b) and (c), not Paragraph 4.1. And my friends have pointed out that in that paragraph it is not a typo because it refers in 4.1(c), to Zone 4.

And just to be clear, the reporting date in respect of Mr. Berkowitz's properties fall within Zone 4. And the reporting date on that, which may be of some significance, not to my theory but to some of the questions, is 30th July 2010.

PRESIDENT BETHLEHEM: Thank you very much for that correction.

There was an objection made before the break to the table put in by counsel for the Claimants.
02:01:44 1 Just to say the Tribunal has reflected on this, and 
2 we've concluded that the table should be admitted. It 
3 is responsive to issues that were raised by the 
4 Tribunal in questioning. So the table is admitted. 
5 Mr. Alexandrov, over to you. 
6 MR. ALEXANDROV: Thank you very much, 
7 Mr. President. 
8 Mr. President, we'll distributing binders 
9 that we'll be using during the Closing Statement. 
10 Those binders contain the slides, and there are a 
11 couple documents in the pocket. 
12 PRESIDENT BETHLEHEM: Has a copy been 
13 provided to the interpreters? 
14 MR. ALEXANDROV: A while ago. 
15 PRESIDENT BETHLEHEM: A while ago. Thank you 
16 very much. 
17 CLOSING STATEMENT BY COUNSEL FOR RESPONDENT 
18 MR. ALEXANDROV: Mr. President,Members of 
19 the Tribunal, good afternoon. We are ending this 
20 hearing where we started, which is Costa Rica should 
21 not be here. 
22 In our Opening Statement, we said that
02:03:19 1 Claimants have used this arbitration to make Costa 
2 Rica pay on a gamble they made, a gamble that did not 
3 pay off. Claimants took a risk and they lost. 
4 Claimants knew that they had purchased 
5 property inside the Park which was subject to 
6 expropriation, and this hearing has only reinforced 
7 that statement. 
8 It has become clear, not only that Claimants' 
9 claims are frivolous, but also that the testimony of 
10 Claimants' own Witnesses actually supports 
11 Respondent's arguments. And in this Closing, we'll be 
12 focusing primarily on their own words and on what they 
13 tried, but failed, to prove. 
14 And what I'll be doing is I'll be addressing 
15 different topics, not necessarily in a consistent 
16 narrative, and I'll be addressing a little bit in 
17 that—in my Closing the Tribunal's questions. But 
18 once I get into the Closing and lay out some of the 
19 facts, I'll address specifically the Tribunal's 
20 questions. 
21 Before we get into the details, Respondent 
22 notes that Claimants' initial claims—
02:04:39 1 PRESIDENT BETHLEHEM: Mr. Alexandrov, may I 
2 just stop you for a moment. I've just had a note from 
3 the interpreters saying that, if you've got a script 
4 that you're reading from, it would be very helpful for 
5 the interpreters to have that. This is one of the 
6 struggles that they've had. When counsel read from a 
7 script, it's much more difficult to translate at the 
8 speed. So if there is a script that you could let 
9 them have, that would be of help. 
10 MR. ALEXANDROV: Unfortunately, as you will 
11 discover, it's not much of a script. 
12 PRESIDENT BETHLEHEM: That will reassure the 
13 interpreters. 
14 MR. ALEXANDROV: So before we get into the 
15 details, we want to note that Claimants' initial 
16 claims as set forth in their Memorial were based on an 
17 imaginary conspiracy theory, at the minimum, involving 
18 a former Vice Minister of the Environment, Mr. Mario 
19 Boza, a member of Procuraduría, Mr. Julio Jurado, and 
20 a former Ministry of the Environment, Mr. Carlos 
21 Manuel Rodríguez. All of whom, according to 
22 Claimants, banded together to create a National Park
02:05:57 1 to protect the leatherback sea turtle and to 
2 expropriate the private property that was within the 
3 boundaries of that Park. 
4 Claimants have yet to submit a single piece 
5 of evidence to support those conspiracy theories. 
6 They have never been able to prove that any of these 
7 persons were not acting in good faith. They have 
8 never been able to prove that any of these individuals 
9 did anything but carry out their responsibilities as 
10 independent professionals and civil servants. 
11 And in fact, it seems that they have dropped 
12 their allegations of conspiracy because not a single 
13 word on that matter was heard in the course of the 
14 hearing. 
15 Nevertheless, those outlandish allegations 
16 remain in the record in Claimants' written submissions 
17 which are public, and therefore they need to be 
18 addressed. And I need say a few words about that. 
19 Claimants have alleged that Costa Rican 
20 Government officials for selfish reasons and in 
21 pursuit of a dubious political agenda have conspired 
22 to deprive Claimants of their property. In their
Memorial, they allege that the Costa Rican Government has intentionally created National Parks without having the necessary funds to consolidate the boundaries of the Parks. And the creation of the Las Baulas Park was allegedly the result of such flawed policy.

Claimants allege that Mr. Mario Boza, the former Vice Minister of the Environment, was the mastermind in this "acquire now/pay later" play book. This is the Memorial on the Merits, Paragraph 86.

They allege that the creation of the Las Baulas National Park 'was not the official policy of the Government of Costa Rica; rather, it was the agenda of the men who had devoted the last two decades of growing a network of National Parks and who by 1991 had reached the senior levels of the Government staff.' This is Memorial on the Merits, Paragraph 59.

So this sounds like the penetration of the Mafia into the levels of the Government, the environment Mafia that wants to create more environmental Parks in Costa Rica.

Further, according to Claimants, Mr. Boza's agenda failed. When the Costa Rican Congress approved the '95 Park--the '95 Park Law, pardon me--because the Park extended seawards.

And so according to Claimants, Mr. Boza, who was defeated at that time, created a scheme to expand the borders of the Park to include a 125-meter zone that runs along the coast. And they say the only reason Mr. Boza would adopt such a scheme was because he was "not blind to the potential opportunities for international recognition and fundraising that may be seen as the defender of the largest turtles in the world." Memorial on the Merits at Paragraph 87.

And this scheme, according to Claimants, involved lobbying the Costa Rican Congress to pass new legislation to expand the boundaries of the Park and working in the back room with other Government officials and other individuals to start the expropriation of the 125-meter strip area of the Park. And that you will find in Paragraphs 142-143.

In their Memorial, in those paragraphs, Claimants allege that Mr. Mario Boza pulled Mr. Jurado further, according to Claimants' Memorial, Mr. Boza's agenda failed. When the Costa Rican Congress approved the '95 Park--the '95 Park Law, pardon me--because the Park extended seawards.

And so according to Claimants, Mr. Boza, who was defeated at that time, created a scheme to expand the borders of the Park to include a 125-meter zone that runs along the coast. And they say the only reason Mr. Boza would adopt such a scheme was because he was "not blind to the potential opportunities for international recognition and fundraising that may be seen as the defender of the largest turtles in the world." Memorial on the Merits at Paragraph 87.

And this scheme, according to Claimants, involved lobbying the Costa Rican Congress to pass new legislation to expand the boundaries of the Park and working in the back room with other Government officials and other individuals to start the expropriation of the 125-meter strip area of the Park. And that you will find in Paragraphs 142-143.

In their Memorial, in those paragraphs, Claimants allege that Mr. Mario Boza pulled Mr. Jurado into the conspiracy to change the '95 Park Law and to expand the Park. Then they further allege that Mr. Boza and Mr. Jurado pulled a third person into the big conspiracy, Minister Carlos Rodriguez. And you have that slide on the screen.

At some point, "It appears as though the two men decided to rope in a third accomplice: None other the Minister of Environment and Energy, Carlos Manuel Rodriguez Echandi."

Further, according to Claimants, Mr. Boza, Mr. Jurado, and Mr. Rodriguez decided that, "Mr. Jurado would use his authority as Attorney General to issue a binding interpretation that would effectively read the 'aguas adentro' language out of the '95 Park Law simply by labeling it as a typographical error." You'll see that quote on Slide Number 2 which is from Paragraph 145 of Claimants' Memorial on the Merits.

So, this was some back room deal among three individuals where Mr. Jurado would use his authority to single-handedly amend the law to pursue a dubious political agenda.

Further, according to Claimants, Mr. Jurado played a cure-all because he was in charge of launching, "the next stage in the plan to expand the Park." That is, to order SETENA in 2005 to refuse any new applications for environmental assessments.

That's Paragraph 147 of the Memorial.

Of course, they got the facts wrong in all situations, including here, because SETENA suspended the issuance of environmental permits inside of the Park by Order of the Supreme Court of Costa Rica, not by Minister Rodriguez. And the SETENA 2005 suspension of the permits is in the record as Exhibit C-1(f).

Now, let me pause for a second and say that Minister Carlos Manuel Rodriguez, who together with Mr. Jurado was allegedly leading this conspiracy to single-handedly extend the National Park in breach of Costa Rican Law, is the same Minister who allegedly promised Mr. Berkowitz that his property--Mr. Berkowitz's property--was outside of the Park and wouldn't be expropriated.

So according to Mr. Berkowitz's testimony here at the hearing, he trusted the Minister. The
Minister was almost his trusted friend, and the Minister was very much in favor of protecting the landowners. Well, I submit that Mr. Berkowitz's own testimony at the hearing defeats the allegations advanced by Claimants' written submissions of this grand conspiracy. As I stated, those allegations of grand conspiracy were not voiced at the hearing and did not come out through any Witness testimony. So those very serious allegations including against Mr. Jurado, a Witness in this case, were advanced with written submissions but not discussed at the hearing. Let me talk a little bit about Mr. Jurado. Claimants describe Mr. Jurado's opinions—and they called them Mr. Jurado's opinions—as being, "highly dubious." Claimants' Reply at Paragraph 103. Not only that, but Claimants' Costa Rican Law Expert even suggested that Mr. Jurado had abused his power and should be criminally liable for issuing the opinion on the interpretation of the Park. And you see the quote from their Expert on Costa Rican Law, Mr. Ruíz, on the screen, Slide 3. That is from his Expert Report, Pages 13 and 14. He has committed, he says of Mr. Jurado, an abuse of power to be sanctioned under the penal code of Costa Rica with imprisonment for up to 10 years for this kind of case, "corrupción agravada," aggravated corruption. And yet the conclusion of the Legal Expert is that the Government has apparently condoned Jurado's actions. Based on these allegations, Claimants accuse the Respondent of intentionally hiding Mr. Jurado's testimony from this arbitration. There is a whole section in Claimants' Reply titled, "Where Mr. Jurado's Statement?" The allegation was that, if Mr. Jurado did not present a Witness Statement, the Tribunal should draw adverse inferences from that fact. This is the Reply, Paragraphs 198-206. But Mr. Jurado did testify. Respondents submitted Mr. Jurado's testimony. He was subject to rigorous cross-examination at the hearing. He explained what analysis be performed to reach the conclusions set forth in the Procuraduría Opinion. He explained that he consulted entities and Experts on matters on which he was not an Expert, such as geography and geographical coordinates. He further explained that his opinion was not, in fact, his opinion. It was not a personal opinion, a personal creation, but a formal document of the Institution, the Procuraduría, approved by the Head of the Procuraduría. And he also testified that the conclusions reached in the Opinion have been supported by the Supreme Court of Costa Rica. So Claimants had their wish. Mr. Jurado did appear to testify. In his testimony, if there was any doubt whatsoever, his testimony put to rest Claimants' conspiracy theories. During Mr. Jurado's cross-examination, Counsel did not even attempt to probe the accusations of conspiracy. This just emphasizes the outlandish nature of the conspiracy theories advanced by Claimants in their written submissions. So the answer to Claimants' question of "Where is Mr. Jurado" is Mr. Jurado is here. He testified, he was cross-examined, and he was not even asked about those conspiracy theories. Of course, Mr. President and Members of the Tribunal, those conspiracy theories are unsustainable and they should be completely disregarded. Those are very serious allegations against Government officials in a sovereign government. They cannot be taken lightly. Claimants did not present any—and I emphasize "any"—evidence to support those theories. There is not a shred of evidence to support those theories. They were not even maintained at the hearing, but they were not withdrawn; and we expected that they would be withdrawn, but they weren't. It is unfortunate that Claimants have chosen to advance such theories against Costa Rica contained in a public document and, therefore, we believe we have an obligation to address those theories, even though the allegations don't seem to be maintained. That Claimants would even advance those theories in their written submissions speaks volumes about Claimants' credibility and good intention. And
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I will come back at the end of our Closing Argument to the issue of costs, but we ask you to keep in mind the dozens of pages of Claimants' written submissions filled with conspiracy theories and accusations against Costa Rica.

What I’d like to do now is talk a little bit about some of the facts of the case, particularly in terms of Claimants' knowledge. And to avoid repetition, the points that I will make will be based exclusively on the testimony of Claimants' Witnesses at the hearing.

You will recall that in our Opening Statement we showed you a timeline where we showed the key events in this dispute. And we mentioned that all of the key events occurred before CAFTA entered into force and before the critical date for the statute of limitations and Claimants had knowledge of those events. And we submit to you that the testimony we heard at the hearing only made it clearer that Claimants knew of those events at the latest in 2008.

To begin with, was the property inside of the 75-meter strip? There should be no doubt any more that Claimants bought property inside of the Park, inside of the 75-meter strip, fully aware of the property's location within the boundaries of the Park and fully aware that the property would be expropriated.

Claimants' Witnesses who testified at the hearing had no choice but to admit to that fact. The evidence on the record, Members of the Tribunal, is abundant on the matter, and we will only highlight just some of the admissions made by Claimants' Witnesses. But, of course, you will read in due course the transcript of the testimony of Mr. Reddy and Mr. Berkowitz.

When we examined Mr. Reddy and Mr. Berkowitz, we went through the exercise of showing them land registry drawings for their Lots. And you will, of course, recall that they had a stamp from MINAE certifying that the property was inside the Park. Both Mr. Reddy and Mr. Berkowitz came up with several excuses as to why they had disregarded those stamps. First, they both allege that they had been advised by their local lawyers that the stamps had no value because they only referenced the 1991 Decree and not the '95 Law.

Second, they both alleged, without any basis that, okay, they knew about MINAE's interpretation that their property was within the boundaries of the Park, but MINAE was simply incorrect. For example, Mr. Berkowitz alleged that—and you'll see that on your next slide, Number 5:

*Question: And when you saw the stamp later in 2005, you still had no doubt whatsoever that your property was outside of the Park?

*Answer: The stamp in my mind shows that MINAE was of the opinion that it was in the Park.

This was not my opinion.*

You have the reference to the transcript on the slide.

Well, whether MINAE's opinion was correct or incorrect for the purposes of the point I'm making is irrelevant, and whether Claimants—in this case Mr. Bergman—agreed with MINAE or not is not relevant. The fact is, MINAE thought at the time the property was inside the boundaries of the Park and Mr. Berkowitz knew of MINAE's interpretation.

The next slide, Slide Number 6, you see what Mr. Reddy says. He was asked:

*Question: But when you saw it at the registry during 2006 before you purchased the property, did you understand that MINAE's position on whatever legal basis, Decree '91, that the property was inside the Park based on the '91 Decree?

*Answer: Yes.*

Mr. Reddy also admitted, that even though he had seen the stamps, he still decided to purchase the property. On your next slide, you see that exchange from the record, and I quote:

*Question: So before you bought it, you knew MINAE had taken the position on whatever legal basis, Decree '91, that the property was inside the Park?

*Answer: Correct.*

*Question: And that was part of your due diligence?*

*Answer: Correct.*

*Question: And you bought the property nevertheless?

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So Claimants' counsel tried to defend their Witnesses by showing that—by arguing, I should say—that there were several other properties marked as being outside the Park, and that there are registry drawings that said that.

What Claimants' counsel failed to explain to you is that those registry drawings were either for properties located in Playa Ventanas and stamped before '95 when those properties were stamped as outside of the Park because Playa Ventanas was not joined to the Park until '95, or, in other cases, they have no stamps—the registry drawings—because they were dated 1980 and 1981. Obviously, they had no stamps saying that the properties were inside the Park.

And I can provide for the record the references for those particular registry drawings, Exhibit C-16(a), which relates to Lot A40, Exhibit C-17(a), which relates to Lot A38, Exhibit C-19(a), which relates to Lot C71.

Yes, we agree with Claimants, those registry drawings don't have a stamp that says they're inside the Park. But if you look at the date they were obtained, the year is 1980, 1981.

And it raises an interesting question, which is, were those drawings part of the Claimants' due diligence when they were purchasing the property more than 20 years ago, and where are the drawings with respect to those particular plots that were obtained at the time they conducted their due diligence?

And I repeat: Other drawings that are dated between '91 and '95 in relation to Playa Ventanas don't say, of course, that the properties were inside the Park because Playa Ventanas was not added to the Park until the '95 Law.

All this should be sufficient evidence that Claimants purchased their properties knowing that the property was inside the Park.

If you consider that this is not sufficient, there is abundant evidence on the record to show that they knew from other sources that their property was inside the Park and that it was subject to expropriation. If you don't consider the registry drawings, there is a lot more.

For example, Mr. Reddy bought on behalf of Spence Co. four properties after the Procuraduría had issued its 2005 Opinion with respect to the boundaries of the Park. Mr. Reddy admitted at the hearing that he had seen the Opinion in early 2006, but that he intentionally disregarded it. You see that on the slide.

"Question: When you performed due diligence with respect to those four purchases, the views of the Procuraduría that the Park extended 125 meters inland did not play a role; correct?"

"Answer: No. It played a role, but we did our analysis to believe that this opinion would not stand, and we were still comfortable to go through with the purchase."

The transcript reference is on the slide.

On the next slide you see that Mr. Reddy also bought these four properties after MINAE had initiated expropriation procedures for another of Spence Co.'s Lots, Lot A40.

"Question: So help me understand your due diligence then. You have a Declaration of Public Interest with respect to one of your properties which says it will be expropriated. It initiates the expropriation process. And after that you purchase four more properties?"

"Answer: That is correct."

You have the transcript reference on the slide.

In other words, there is no question Mr. Reddy purchased property fully aware that it was inside the Park and that MINAE intended to expropriate.

Mr. Berkowitz also had abundant evidence showing him that his property was inside of the Park. He simply decided to ignore that evidence or to interpret it his own way. At the hearing Mr. Berkowitz said on several occasions that his property was not inside the Park because, according to Costa Rican Law, private property only becomes part of the Park after it has been expropriated. So he relied
1161 02:29:40 1 on a legal/semantic distinction saying it may be
2 within the 75 meters but it's not yet part of the Park
3 because it's still mine. Once it's expropriated it
4 may become part of the Park.
5 This explanation, while legally or
6 technically may be true, is intended to confuse the
7 Tribunal. The point is not that; the point is that
8 the properties inside of the boundaries of the Park,
9 as set out in the law, that is inside of the 75-meter
10 strip of land. And that it is because of that that
11 the property is subject to expropriation.
12 You see on the next slide Mr. Berkowitz under
13 cross-examination had no other option but to accept
14 that:
15 "Answer: I agree," said Mr. Berkowitz, "that
16 MINAE was signaling to expropriate. I agree that they
17 had the right to proceed to expropriate. I agree that
18 I was informed that this process was starting. But
19 you are asking me to state something that I'm
20 unwilling to state, which is I did not believe at the
21 time that my property was inside the Park."
22 The transcript reference is on the slide.

1162 02:30:54 1 So, he knew. For whatever reasons, he didn't
2 want to believe or because of advice from his lawyer
3 he didn't believe, whatever his belief may have been
4 on a matter of law on advice of his lawyer, he knew
5 the facts.
6 Mr. Berkowitz tried to deny several times
7 that the Park included 125-meter strip of land that
8 extended inland. However, when faced with the
9 evidence, he had no choice but to admit that at least
10 two times, MINAE, the relevant Ministry, had told him
11 that the Park did include a piece of land, a strip of
12 land, 125 meters towards the land from the high tide
13 line.
14 First, in June 2003, Mr. Berkowitz received a
15 resolution from MINAE that stated that the Park
16 included 125-meter strip of land. You see that on the
17 next slide:
18 "Question: So then, Mr. Berkowitz, isn't it
19 correct that, in response to your formal application
20 to MINAE in March of 2003, MINAE issued a resolution
21 in June of 2003, and in that resolution relating to
22 the felling and pruning of trees, it also stated that

1163 02:32:26 1 the Las Baulas Park, under Decree of '91 and Law of
2 '95, extends 125 meters inland from the high tide. Is
3 that what MINAE said in this resolution?
4 "Answer: Yes, that's what they said."
5 The transcript reference is on the slide.
6 He knew. He knew what MINAE's position was.
7 Next in the meeting he allegedly--in the
8 meeting with Mr. Rodriguez, he allegedly received from
9 Mr. Rodriguez--I'm sorry.
10 Second, he allegedly received meeting minutes
11 from Mr. Rodriguez relating to a meeting in June of
12 2003 where the Minister refers without a doubt to a
13 Park including private property by virtue of the '91
14 Decree and '95 Law. And when Mr. Berkowitz was asked
15 by the President:
16 "So what do you understand by the
17 phrase"--you see this on your next slide, Slide 12:
18 "So what do you understand by the phrase, In
19 the private areas? You've just suggested there were
20 no private areas.
21 "Answer: They were referring to the private
22 areas in the zone, the conflicted zone, the

1164 02:33:53 1 75 meters."
2 The transcript reference is on the slide.
3 This is an important statement by one of the
4 key Witnesses and by one of the Claimants because you
5 will recall counsel was suggesting that the private
6 areas included in the 1995 Law--I'm sorry. I take
7 that back.
8 The suggestion was the '91 Decree that was
9 referring to land areas may have been referring to an
10 area called Cerro el Morro and to another area called
11 Isla Verde rather than the 75-meter strip of land that
12 was adjacent to the 50 meters of public zone; and, then
13 there was no private land--the indication
14 of private land, the reference to private areas in the
15 '91 Decree and then the '95 Law and all subsequent
16 references to private areas, could have been only to
17 the Cerro el Morro and the Isla Verde rather than the
18 areas within the 75-meter strip.
19 Well, you have Mr. Berkowitz saying, What was
20 your understanding of private areas? He says, Those
21 were the areas in the conflicted zone, the 75 meters.
22 Mr. Berkowitz's testimony on this is clear. He did
not have any different understanding of what the private areas were. In the end, Mr. Berkowitz readily admitted that in the Purchase Agreement when he bought the 24 B Lots, including the six B Lots that are at issue in this arbitration, he waived any claims against the purchaser if the property were to be expropriated because of its location. You see on the slide this testimony:

"Question: Is it correct, Mr. Berkowitz, that the document reflecting that transaction provided that you, as the purchaser, would not have a claim against the seller in case the properties were expropriated in the future?"

"Answer: That is correct."

Transcript reference is on the slide.

Mr. President, Members of the Tribunal, it is, therefore, undeniable. In this particular case the seller of the B Lots property knew they were within the 75-meter zone and subject to expropriation. Mr. Berkowitz knew he was purchasing plots within that zone and subject to expropriation. He purchased those properties with the full knowledge of where those properties were within the boundaries of the Park, and that they would be expropriated. All the Claimants did.

They were hoping that Costa Rica would not expropriate—and we will get to that point in a little bit. But Costa Rica did initiate expropriation proceedings with respect to a number of their properties. And as I said in the beginning, it was a gamble. Some of it may have paid off, given what we heard—and we’ll come back to that when we talk about damages—but we heard about the sales price of those properties, but with respect to the properties subject to expropriation, the gamble didn’t pay off. But it was a gamble made in full knowledge of the facts and the status of the properties.

So, Claimants knew the properties were within the 75—as Mr. Berkowitz calls it "conflicted zone" when they purchased the properties. They also knew of the expropriation in the period of 2005-2008. I’m sorry, between 2003 and 2008. We explained in our opening that Costa Rica started expropriating private property within the Park in November of 2005, and you have in the— I’m showing this on the slide, but you also have in the pocket of your binders an enlarged version of what is Appendix 2 to Claimants' Rejoinder on Jurisdiction. And I’ll be referring to it on several occasions.

So, while Claimants knew, as the testimony showed, that expropriation of properties within the Park began in November of 2003, with respect to their own properties, MINAE initiated the first expropriation proceedings in December of 2005, and you see that the Decree of Public Interest is the left-hand side column, and you see that the expropriation—I’m sorry, the Decrees of Public Interest were issued between 2005, with respect to the B properties, through 2007. This is the timing when, with respect to their individual properties, they knew the expropriation proceedings had been initiated with respect to 18 of those properties.

For those properties, as you see in the next column, for those 18 properties, the administrative appraisal was made between 2006 and 2008. The timing is important. I’ll come back to that point. It was before CAFTA entered into force, it was well before the critical date for the statute of limitations. In the period 2006–between 2006 and 2008, they knew what the Costa Rican Government was offering them as compensation for the 18 properties with respect to which expropriation proceedings had been initiated.

You’ve heard testimony and you’ve seen in our written submissions the legal situation at that time. Claimants could have accepted the administrative valuation and could have received payment. Instead, they decided to object to it. It was their choice to take advantage of the opportunities provided to them by the Costa Rican legal system to seek redress of their rights if they thought the administrative appraisal was too low. The point is, they knew what it was, the amount of compensation was offered to them at that time, and it was their choice not to accept it and to seek to appeal it.

From that point on, they were in the hands of the system that Costa Rica provided to Claimants in
such situations, Costa Rican or foreign, to seek redress from what they complained of, and what they complained of I emphasize is the insufficient amount of compensation. Based on this--based on this fact, based on these administrative appraisals, what Claimants initiated at that time was a dispute with Costa Rica on the quantum of compensation, on the value of the property.

So, let's take a step back. What did they knew at the time? What did they know at the time? They knew Costa Rica had initiated its expropriation proceedings with respect to those properties. They knew how the Costa Rican Government had valued the property, the exact amount. They didn't accept that amount. They had a dispute with Costa Rica about the amount of compensation. And, again, I remind you, the amount of compensation reflected in the administrative appraisals was offered to them before CAFTA entered into force and well before the critical date for the statute of limitations.

Now, this is about what they themselves have defined as their claims for direct expropriation. How about the claims for indirect expropriation? Claimants have alleged that, because SETENA suspended the issuance of environmental permits for properties inside of the Park, that properties have been indirectly expropriated. That is the claim as they have defined it in their written submissions.

We explained in our written submissions and in the Opening of the Hearing--here at the hearing that this suspension of the issuance of environmental permits resulted from an order of Costa Rica Supreme Court issued in December of 2008, a decision that resulted from a case brought by the neighbors of the Park who claim that the breach of the State's constitutional obligation to protect the environment. The decision is in the record as Exhibit C-1j. Claimants, having been faced with the argument on jurisdiction, have attempted to persuade the Tribunal that this decision only became public in 2009. This is Claimants' Reply on the Merits, at Paragraph 94.

Costa Rica responded in the Rejoinder that this was incorrect. The decision of the Supreme Court has effect on the date it is issued, December 16, 2008, and it became available to the public on that same date. And I refer you to Respondent's Rejoinder on the Merits, at Paragraph 52, and Milano's Expert Report, Paragraph 51 and 54. During the hearing, Mr. Berkowitz and Mr. Reddy admitted to have knowledge of this suspension since at least December of 2008.

You see on the next slide, Mr. Reddy was asked, "So, your testimony is that, within the 75 meters, issuing building permits stopped sometime in 2008?" Answer: "Correct."

The transcript reference is on the slide. Mr. Berkowitz also confirmed his knowledge. You see that on the next slide. It's a long exchange on Slide 16. "In 2008, he said, I was informed of the Supreme Court's Decision by which, pursuant to Article 50 of the Constitution, it ordered MINAE to initiate the expropriation proceedings of the private property within the Park and required it to pay compensation for any undue delay in the expropriation proceedings."

You confirm this testimony, Mr. Berkowitz?

Answer: Yes.

Question: When in 2008 you were informed, do you recall? You were informed of the Supreme Court Decision?

Answer: I'm not certain whether I knew about it because it came in around Christmas, as I recall, and I believe I was on vacation. So, I'm not sure whether I knew about it around Christmas or when I came back in January, but thereabouts, within that 30-day period, I knew about it.

Question: Okay. Have you actually seen it and reviewed it, or were you just informed of it?

Answer: I was informed of it. It's in Spanish. It's a bit technical. I do read Spanish, but it's somewhat technical.

Question: Were you informed also, then, that the same Supreme Court Decision also ordered a definite suspension of the environmental permits...
inside the Park?

Answer: I was informed. I was so informed.

The transcript references are on the slide.

There is no doubt. Mr. President and Members of the Tribunal, on Claimants' own testimony that they knew of the suspension of the issuance of the environmental permits in 2008, and this is the argument relating to the indirect expropriation.

In another attempt to convince the Tribunal that the Tribunal has jurisdiction over this matter, Claimants have tried to allege that the indirect expropriation had actually "crystallized" in March of 2010, on March 19, 2010. This is factually incorrect. The Measure to suspend was ordered by the Supreme Court in December of 2008, and any subsequent or additional steps taken by Costa Rica's Government on that matter were consequences or an implementation--steps in implementation of that order and nothing more. If an indirect expropriation, indeed, occurred, it "crystallized" in December of 2008.

And so they knew that. What is their explanation for why, with this knowledge, they didn't proceed to initiate arbitration? In their last written submission and in the Opening, Claimants allege that they had not filed a claim because they were waiting to see whether Costa Rica would change the Park Law. They alleged that they were hopeful that Congress would approve a bill that they were lobbying for to change the conservation regime of the Las Baulas Park and that this would all be "sorted out." Expropriation would no longer be mandated, the law would be changed.

Mr. Weiler, in the Opening, seems to allege that because Claimants were hopeful for a solution, the statute of limitation had been tolled. He said, "It would seem to us that it would make a lot more sense that we would want to put ourselves in the shoes of the Claimants, not in the shoes of a lawyer looking at this years later, and say, well, probably as of that date, whether it be March or whether it be May or whether it be June, they were probably quite hopeful that this was all going to get sorted out."

Mr. President, Members of the Tribunal, hope does not toll the Statutes of Limitations. Claimants knew well before June of 2010 of all the alleged breaches. What they were hoping to achieve is a matter irrelevant for the purposes of the statute of limitation. But this point deserves a bit more attention for two reasons: First, we heard a lot, including in closing, that what the Costa Rican Government do was improperly or out of compliance with Costa Rica's constitutional order amend a law expressing the intent and the will of Congress. And the point I want to make is that Congress had an opportunity to at the status of the Las Baulas Park on several occasions with those bills that were being discussed and tabled.

Why the Costa Rican Congress decided to keep the status of the Park as it was and not to move forward with those bills is another matter. The point I'm making is, Congress had full opportunity to look at the status of the Park in 2010 when, according to Claimants, those bills were debated. Look at the status of the Park and say, if Congress so wished, "We disagree with the Supreme Court Decision. We disagree with the opinion of the Procuraduría. We disagree with the view of MINAE. We insist that the Park extends seawards." Congress didn't do that.

The second point in relation to the hopes that they had is somewhat different. On the one hand, Claimants' assertion is--and it was repeated by Mr. Berkowitz here--that they were okay with the expropriation of the property, provided the compensation was right. They--the whole point why we're here is the compensation they were offered was not high enough. And Claimants have used all avenues available to them under Costa Rican Law, which is their right, to challenge the amount of compensation and seek higher amounts.

Obviously, when they pursue those avenues, that delays the end result and the transfer of title, but in the meantime, they have been actively lobbying the Government to adopt a new Law that changes the status of the Park and that replaces expropriation with some sort of a controlled regime that would allow them to keep their property.
So on the one hand they're saying, "We're content to have our property expropriated provided we're properly paid. In fact, you heard the at the very end of closing arguments that they now prefer, not only that the property within the 75 meters be expropriated, but they expressed a preference on that all their plots that are partially within the Park be expropriated. Whether Claimants preference has any value for the purposes of this arbitration is another matter.

My point is that, on the other hand, they have taken the time to resist the amount of compensation, complain about it and seek a higher compensation, and in the interim, they have been hoping to amend the law to avoid the expropriation altogether. Whether this was reasonable for them to do so and to hope to amend the law is, again, irrelevant. Hope doesn't toll the statute of limitations.

Mr. President and Members of the Tribunal, what I'd like to do now is turn to a document that has become now famous in the hearing, the Contraloría Report. I'm trying to get the right pronunciation--because this has now, in Claimants' Closing, become the centerpiece of their claims, and I want to submit to you that this is nothing but a huge distraction. It is not a new measure.

First of all, I think this is probably clear for the Tribunal, but let me make it clear. First, the suspension of the issuance of the environmental permits, which is the basis for the claim of indirect expropriation, has nothing to do with the Contraloría Report.

Second, the Contraloría Report has two aspects. One is it criticizes the expropriation procedures and asks the Administration to improve them, and the other aspect, of which a lot was discussed, including this morning, was an issue that was not necessarily irrelevant to improving the expropriation procedures. It was an issue of whether titles of properties, including properties inside of the Park, had any defect that dated back a long time before the events at initial this arbitration. Well,
alleged decision to suspend the process was taken at least six years ago. An advanced copy of the Report was provided to MINAE and SINAC in January 2010. It is now, they say, 2014, and Respondent has yet to resume the expropriation process. And so on and so forth. They claim surprise. They claim that we disclosed to them only in the Counter-Memorial.

Well, Mr. President and Members of the Tribunal, they knew and they discussed extensively the Contraloría Report. They knew about both aspects of the Report. One, that it recommended an improvement of the expropriation procedures; and, two, that it recommended a study that would research whether there were any defects of titles of properties in that area, in fact, in a larger area. They knew that. When they obtained the Contraloría Report, we don't know. They had it when they submitted their Memorial on the Merits. The Contraloría reported was issued in February of 2010, and it was published on the Contraloría Web site, and it is still there, so it is a public document.

I said it's not a measure. Let us talk about that aspect of it of which they complain most, which is that Costa Rica--I think the allegation was Costa Rica is seeking for a--is looking for ways to expropriate the property without paying, and, therefore, the Contraloría hatches up this recommendation to look at the titles of the properties in the area, and if there are defects, then the State should go ahead and annul the titles and expropriate the property without paying, and that way the issue of the expropriation of the properties in the Park is resolved. That is, in my words, a summary of the claim.

Well, to begin with, the Contraloría recommendation is not a measure. The Contraloría Report is saying, "You need a study to look at whether there are defects in the titles of certain properties." That study, as Mr. Jurado testified, was commissioned. It should be coming this year. It's an independent third party that is looking at it. If the study finds defects--first of all, it may find no defects, in which case, issue closed. Where is the measure, is the question.
On Jurisdiction. So, if you look at the third column, these are the dates that Claimants objected to the administrative appraisal.

MR. ALEXANDROV: Excuse me, I'm looking for a reference to a law.

According to the law on expropriation, which I'm told is Exhibit C-1c, after an objection to the administrative appraisal is made, the law requires that the matter is moved to the judicial stage, which will review the objection within six months. And so if you look at the first batch of properties, the nine properties where the administrative proceeding was suspended, you see that with respect to all of them, the objection was made on 21 January 2009. Under the law, within six months--that is, by July 21, 2009--the matter should have moved to the judicial phase, and it didn't.

We don't--of course, we cannot get into the minds of Claimants to know what they knew and how, but they were advised all the time by their competent Costa Rican lawyers. They knew very well the administrative and the judicial process and they knew or should have known that within six months of January 21, 2009, the dispute about the amount of compensation should have moved to the judiciary phase, and it didn't. And if they didn't understand why--which we question--but if they didn't understand why, as of July it 21, 2009, they should have started asking questions because it would have been evident or should have been evident to them and their lawyers at the time that the process was not moving forward, according to the law.

Let me also emphasize--and I think it became clear during the discussion that we had--that, if the suspension of the administrative proceeding had any effect--and we deny that it had the intended effect, but for certain it did not apply to the nine properties that had already moved to the judicial stage, that are the second group of properties on this slide. The suspension of the administrative proceedings did not apply and could not have applied to the proceedings of expropriation that were already at the judiciary stage.
And Mr. Jurado explained that very well, and he said neither the Procuraduría, nor the Contraloría, nor SINAC, nor MINAE could in any way suspend the proceedings at the judiciary stage. The suspension related only to the nine properties that are on top of that chart. I think it was suggested this morning during Claimant’s closing that, well, in view of the recommendations of the Contraloría, other Government official did the best they could to slow down or grind to a halt the judicial proceedings.

There is no evidence whatsoever of any improprieties in the judicial proceedings. They are taking their course, as you can see, actually, from that chart, and I repeat that SINAC’s suspension of the expropriation proceedings relate to the administrative stage only.

What you don’t see, of course, here, is six properties, if I’m not mistaken, where a Declaration of Public Interest has not been issued. The administrative proceeding is not suspended there because there is no administrative proceeding. You heard testimony yesterday that, where the Declaration of Public Interest has not been issued, Claimants enjoyed their full rights in relation to that property and can sell it if they so wish.

This is, of course, subject to the restrictions on environmental permits, which is their claim for indirect expropriation, which is a separate matter. As I said, this is a separate matter from the proceedings relating to the direct expropriation. But with respect to the direct expropriation, those proceedings have not even started without the Declaration of Public Interest.

What you also heard yesterday from Ms. Chaves was that, with respect to the nine properties where the Administrative Procedure is suspended—and you see that on the screen, and you have the transcript reference there. What Ms. Chaves said was that the Declaration of Public Interest has an effect or legal validity for a year. And if the Decree of Expropriation is not issued within a year of the declaration of public interest, it loses legal force. And so with respect to those properties, they enjoy the rights as if the Declaration of Public Interest had not been issued. And that is the testimony that you have on the record in that regard.

Forgive me for a second to look at Mr. Kantor’s questions and to see what—-which ones of them I have not yet addressed.

If there are any questions in relation to the Contraloría Report, I may come back after the break.

Of course, Mr. Kantor had other questions.

(Comments off microphone.)

PRESIDENT BETHLEHEM: Did we lose translation?

Yes, for a moment.

MR. ALEXANDROV: I’m sorry. What I was saying was that I think I have tried to answer the questions relating to the Contraloría Report. If not, I’ll come back to them after the break, but, of course, Mr. Kantor had other questions that were a little bit broader. And I want to address those questions as well.

So Question Number 5, what standards should the Tribunal employ to distinguish between "measures" and "lingering effects," the lingering effects of earlier conduct and what evidence is relevant to determine the category into which this matter should be placed?

We submit that the standard is laid out in the International Law Commission’s articles on State Responsibility and elaborated upon in the commentaries to those articles. In particular, Article 14, and in relation to that article, the commentary explains the standard and says that the critical distinction for the purpose of Article 14 is between a breach, which is continuing, and one which has already been completed.

In accordance with Paragraph 1, a completed act occurs at the moment when the act is performed, even though its effects or consequences may continue. And it further says that, "An act does not have a continuing character merely because its consequences extend in time." And so, if you have an act that is a completed act, everything after the completion of the act is its consequences or "lingering effects." We submit that there should be no difficulty, at least conceptually, to apply the facts, to apply this...
concept to the facts. I’ll go into the facts in a moment.

The more difficult situation, of course, arises when there is a continuous act because it extends throughout a period of time. And it is explained in the commentary of the ILC Articles as follows: "In accordance with Paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with international obligation provided that the State is bound by the international obligation during that period." So, in a way part of the challenge here is to distinguish between a complete act that has consequences or effects and a continuing act.

If you allow me, I want to address that particular point when I get to the question of Article 10.7. I can foreshadow the answer, which is that its one obligation, and the failure to pay compensation is not a continuous act, but I will elaborate on that when I get to that point.

What I do want to say now is, if you look at Slide 21, which you will find familiar because we showed you some of those quotes from Claimants’ written submissions of how Claimants themselves characterized their claims. So, one of their claims, creeping expropriation, according to Claimants themselves, completed the creeping expropriation--the creeping expropriation completed in March of 2009.

The next bullet point, the Measures tantamount to expropriation: So, this presumably relates to the indirect expropriation--crystallized on 19 March 2010.

The third bullet point: The composite impact of Respondent's measure substantially deprived the

Claimants of their use and enjoyment of property on or about 19 March 2010.

And then the fourth bullet point: Consistent with the customary international law, it is at that point when the nine Lots have been subjected to direct expropriation that the State takes possession of the land thereby satisfying the customary requirements of a direct taking.

With respect to the direct expropriation, in sum, the only question--and I will address that question in a moment when I talk about Article 10.7--is whether the alleged nonpayment of adequate compensation. I will argue that the issue here is on adequate compensation, but let’s say for conceptual purposes, prompt, adequate and effective compensation. The only question with respect to the direct expropriation is whether the obligation to pay prompt, adequate, and effective compensation is a separate compensation, separate obligation, and then the nonpayment of that compensation is a continuous act. I will address that in a moment.

With respect to indirect expropriation, the question is whether the suspension of the issuance of the permits is a continuous act. And we claim, and they agreed in their Witness Statement, that as of 2008, those permits were no longer issued. And suspension, we submit, is a one-time act. There was a decision, an Order to suspend, and everything else after that, after the Supreme Court's decision, are the consequences of that Order. To the extent that the administration took any steps, those steps were to implement that Order. That Order may have continuing effects. They are not obtaining permits, but this is a one-time act, a one-time measure.

Mr. President, if you’ll allow me to now say a few words about Article 10.7, and then I’ll ask for a break.

PRESIDENT BETHLEHEM: Yes, please do.

MR. ALEXANDROV: Let me start by saying that under CAFTA, the jurisdiction of this Tribunal extends to measures under CAFTA and not to measures under domestic law. And so you don’t have jurisdiction to assess whether there was an expropriation under the law of Costa Rica and whether prompt, adequate, and
effectively compensation was paid in accordance with the requirements of the law of Costa Rica. Your jurisdiction extends to claims for breaches of CAFTA, and I don’t think that would be controversial.

The reason I’m saying that is there may be a dispute in relation to the amount of compensation, let us say, under the laws of Costa Rica, but that dispute is not before you.

So, let’s look at Article 10.7. The first question is, is the requirement to pay prompt, adequate and effective compensation a separate obligation. And the answer is—when I say "separate," is that a second obligation? And the answer is no because there is no first obligation. There is no obligation not to expropriate, period. The obligation is not to expropriate unless four conditions are met. If you allow for the purposes of simplicity to ignore the three other conditions, they are not in contention here, and focus on the condition of expropriation—on compensation.

So, there is no obligation not to expropriate. There is an obligation to expropriate upon payment of prompt, adequate, and effective compensation, and that is the one and only one obligation.

The question arises, well, how about Paragraph 2 which says "compensation shall be" A, B, C, D. And I submit to you that Paragraph 2 is an elaboration on Paragraph 1(c), which says on payment of prompt, adequate and effective compensation in accordance with Paragraphs 2 and 4. So Paragraph 2 explains what prompt, adequate, and effective compensation is. It doesn’t create an independent obligation.

So, our submission to you is that there is one and only one obligation, and that obligation is to expropriate upon payment of prompt, adequate, and effective compensation and Paragraph 2 explains what that means.

And indeed, I gave an example in my Opening. Counsel for Claimants restated that example. If these were two separate obligations, then you could have an expropriation, a one-time act, that took place many years ago. If compensation has not been paid and...
The failure to pay prompt and adequate compensation after CAFTA entered into force was the failure to pay prompt and adequate compensation. But to answer the question whether compensation was due in the first place, you have to ask the question whether there was an expropriation under CAFTA. And only if the answer to that question is yes, you move on to the point of, in this case, were the four conditions met, including the payment of prompt, adequate, and effective compensation. You don't get to that step.

President Bethlehem: Mr. Alexandrov, can we just explore that a little bit further? And I'm thinking aloud here, so there's going to be an inadequacy with the analogy. But let's say at Day 1 there is an expropriation decree which effects the taking of the property and provides for an amount of compensation to be paid immediately, and an amount is deposited, and there is no debate about the Fair Market Value.

Day 2 there is a general election and a change of Government. And Day 3 a new Government imposes an exchange control measure which prohibits the removal of the compensation payment from the bank account. And that somewhere in between those periods a time bar operates.

Are you saying that notwithstanding the fact that the imposition of exchange controls means that the payment of compensation is not effective, that otherwise bar on the effectiveness of the compensation is inextricably controlled by the original act of expropriation so that it would not be within the jurisdiction of the Tribunal? Is that the essence of your argument?

Mr. Alexandrov: No, Mr. President, because in your example there is a new measure interposed, which, as I understand your example, happens after the relevant Treaty enters into force.

President Bethlehem: This is precisely what I'm getting at, because may be--this is not quite the way in which Claimants have put their argument--but it may be that there are measures of delay, which in some shape or form, some accretion of form to a particular date, amount to a new measure that may be a consequence from the Contraloria Report or something of that nature.

So, really what I'm trying to explore with you in the hypothetical is whether acts or conduct after a time bar which are themselves--whether or not they amount to a breach is another matter--but are themselves frustrating of the payment of prompt, adequate, and effective compensation are inextricably linked to the act of expropriation itself. Now, I understand you to be saying no, but perhaps you could elaborate and help us to differentiate between those acts that are not inextricably linked and those acts that are inextricably linked.

Mr. Alexandrov: Well, Mr. President, let me address first your example, then our situation here in this case, and then maybe the hypothetical. First in your example, there is an additional measure that is transfer of currency restriction or currency conversion restriction which is clearly a new act, a new measure.

I don't think that you can relate that to the amount of compensation or, in fact, the effectiveness of the compensation because your example assumes that compensation is ordered, let's say, in U.S. dollars, and then Claimant--the potential Claimant cannot convert the local currency or take the amount out of the country because of that new act. So that new act is not necessarily an act that goes to the effectiveness of the compensation. The compensation has already been ordered to be effective. It what goes to a different point, which is, the Claimant cannot take its compensation out of the country in U.S. dollars.

President Bethlehem: Is that quite correct?

Mr. Alexandrov: Yes, and if that is ordered by whatever the expropriating bodies or the Court, then that requirement is complied with. A new restriction imposed on the convertibility of the
currency is not related to that expropriation.

Whether the Claimant cannot take out the amount of
compensation or dividends or profit is a matter that
is not directly related to this expropriation. I
think, if I can change your example a little bit--

PRESIDENT BETHLEHEM: Before you do, can I
just clarify: Would that be a new allegedly
expropriatory act?

MR. ALEXANDROV: I don’t know that it would
be a expropriatory act. It may be a breach. It may
or may not be a breach. It may be a breach of the
transfer provision.

PRESIDENT BETHLEHEM: Well, why wouldn't it
be in the hypothesis a new expropriatory act? Because
in those circumstances there would be deposited an
amount of money in the bank account of a putative
Claimant and then there would be an exchange control
imposed which would take away that amount of money.
So, it wouldn't be a taking of property. It would
just be the taking of the bank account.

MR. ALEXANDROV: Well, on that example, every
transfer restriction would be an expropriation. I
mean, the amount of money sits there. The Claimant
cannot take it out of the country or cannot take it
out of the country in dollars. I'm not sure exactly
what the example is. Claimant still has the money,
presumably, so I don't know--and maybe I don't--I
should not speculate whether this would amount to an
expropriation or not. It may, in the circumstances
that you describe, amount to a breach of a transfer
provision, may or may not. I would not believe that
it would amount to a breach of the expropriation
provision.

It may be different if I change your example
a little bit. If there is no--if the transfer
restriction is not of general application but if an
authority, an agency of the Court, says, “Here is your
compensation, Claimant, but we'll pay you in local
currency only, and you will not be able to take it out
the country,” that is a different situation. And if
that happens, I might agree with you that this would
be a violation of the expropriation provision.

The question however, which is a somewhat
different question, is--and if your example goes to
time bar falls after that promise before the next month. And the next month comes along and the State says, "Well, we've just had a little bit of an administrative difficulty. We promise to pay you in a month's time." And that this goes on for six months, and that six months thereafter, the time bar having passed, the State says, "Terribly sorry, we've considered. We have now decided that we're not going to pay you compensation."

Would it be your view that that statement, that decision not to pay compensation six months after the time bar, is somehow controlled by the pre-time bar expropriation, or would the decision not pay the compensation amount to--I think the language that I used was "an independent act"?

MR. ALEXANDROV: Well, Mr. President, in the scenario that you give, you started by saying there is an agreement that there is an expropriation. If there is an agreement that there is an expropriation, if there is an agreement that there's an--and assume we're under CAFTA or a relevant treaty--if there is an agreement between the Parties that there has been an expropriation that is a potential breach of the Treaty

if compensation is not paid according to the standards of that Treaty, then we are in a different situation, and I would agree with you.

But in a situation where there are acts or omissions that predate the Treaty and there is a dispute between the Parties of whether those acts or omissions constitute an expropriation under the Treaty or not, because that's the question here, not under Costa Rican Law but under the Treaty, and those acts or omissions predate the Treaty, and we take the position that, one, you don't have jurisdiction because of the statute of limitations; two, those acts cannot be a breach of the Treaty because of Article 1.1.3, and, therefore, there's a first missing step in the analysis, which is there is no expropriation within the meaning of Article 10.7. And if there is no expropriation within the meaning of Article 10.7, in other words, expropriation under CAPTA, where the obligation arises, or to use the language on which-I just want to make sure I don't mistake--I don't misquote the language--and that that expropriation is only possible under CAPTA on payment of prompt, adequate, and effective compensation, then you have--then you don't have jurisdiction, because, again, leaving the facts aside for the moment and assume as we have asserted in this case that all expropriatory acts or omissions happened before January 1, 2009, you cannot say that this is an expropriation within the meaning of Article 10.7 because the obligation of Article 10.7 did not extend backward under 1.1.3. And if this is not an expropriation within the meaning of Article 10.7, there is no obligation to pay prompt, adequate, and effective compensation.

PRESIDENT BETHLEHEM: Sorry, just to continue with this for a moment, before I just follow this train of questioning, can I just check with you. You referred us to the ILC Articles on State Responsibility in respect of Article 14, and I'd just like for clarity of my thinking and the record to establish that you are, as we're standing on the analysis of whether an act is completed or having a continuing character as the analysis in the commentary at Paragraphs 4 and following, in respect of Article 14 of the ILC Drafts; is that correct?

MR. ALEXANDROV: If you'll allow me a second to take a look at them.

PRESIDENT BETHLEHEM: Or it could be Paragraph 3 and following. But it's that analysis in the ILC Articles, is it?

MR. ALEXANDROV: Yes.

PRESIDENT BETHLEHEM: And, again, we'll be able to check this for ourselves, but you may be able to say more easily. I mean, the ILC Articles are Articles of 2001. Can you recall, direct us to whether there is anything in the record in your pleadings which updates the ILC analysis from 2001 to the present?

MR. ALEXANDROV: I will have to check and get back to you, Mr. President.

PRESIDENT BETHLEHEM: Thank you very much.

Now, I just wanted to come back to--let me just find it--to the language of--excuse me--10.1.3, for greater certainty, "this chapter does not bind any Party in relation to any act or fact before the date of entry into force of this
And we've heard quite a lot from both Parties about the generality of the interpretation of 10.1.3. We haven't, I don't think, heard of a detailed analysis of what weight we need to place on the words "in relation to any act or fact" before the date of entry into force, and whether that precludes us having regard to acts or facts, even if they did not bind. Because on your analysis, as I'm understanding it, we are precluded from having regard to whether there was an expropriation. You are shaking your head, so, I'm obviously--I'm misunderstanding.

MR. ALEXANDROV: No. I'm sorry that I did not communicate. That is not our position. We agree, and there is extensive authority, including Mondev, that you can take into consideration acts or facts that happened before the entry into force of the relevant Treaty to determine whether facts or acts that took place after or conduct that took place after constitute a violation of the Treaty or not. We agree with that and we don't argue.

Again, what we're saying is that you cannot determine that acts or facts before that took place constitute a violation of the Treaty or not. And because, in our submission, the acts or facts that Claimants' own case constitute expropriation, whether direct or indirect, took place before the entry into force of the Treaty, you cannot determine whether that is an expropriation within the meaning of Article 10.7. And because you cannot determine that this is an expropriation within the meaning of Article 10.7, you cannot decide--you're not free to decide that compensation is owed.

In other words, to put it differently--and I think I tried to put it differently in the Opening, before CAFTA, there was no duty--before CAFTA entered into force, an uncompensated expropriation under CAFTA was not prohibited and Costa Rica could carry out an uncompensated expropriation of Claimants' property before CAFTA entered into force, and that would not be actionable under CAFTA. And I will take it a step further, and I would say not only that, but before CAPTA entered into force, Costa Rica had no duty under CAPTA to carry out an expropriation and provide prompt, adequate, and effective compensation. It had a duty under Costa Rican Law to provide whatever it--whatever that duty is, and we're not discussing the issue of Costa Rican Law, but under CAFTA there was no duty to provide prompt, adequate, and effective compensation before CAFTA entered into force.

PRESIDENT BETHLEHEM: Well, presumably--and this may be a side point, but just to clarify--presumably Costa Rica had an obligation under customary international law in respect of any expropriation to provide prompt and adequate and effective compensation because that was customary international law. It may not have been an obligation under CAFTA because CAFTA was not in force. The issue may not be material here because the Claimants would not have had a procedural route to address it. But there would have been an obligation on Costa Rica.

MR. ALEXANDROV: I agree with that. I think that, if Claimants are able to show a provision of customary international law, and I don't want for the purposes of this proceeding to discuss whether or not there is a breach of customary international law in this case, but, yes, I would agree with you that, if a Claimant would show that a Respondent State is in breach of the customary law rules of prohibiting uncompensated expropriation and requiring a prompt, adequate, and effective compensation, there would be a breach of customary international law.

The question then arises, one, is this a claim under the customary international laws of expropriation? The answer is no. And two, do you as a CAFTA Tribunal have jurisdiction to rule on breach of customary international law? And the answer to that question is also no.

PRESIDENT BETHLEHEM: Just--apologies, just one last question for me on this, and--from what you've said, the Respondent's position is that in circumstances in which the Respondent does not accept that there is an expropriation contrary to CAFTA, we, the Tribunal, do not have jurisdiction to assess that going back before 1st of January 2009; is that correct?

MR. ALEXANDROV: Yes.
PRESIDENT BETHLEHEM: In circumstances in which there may be--and I'm hypothesizing here because I don't have the issues closely in mind--but in circumstances in which there may be on the record, because of an administrative or judicial decision of the Costa Rican authorities, that an expropriation has taken place, even though they have not characterized that expropriation as an expropriation under CAFTA, would you maintain your objection to jurisdiction?

MR. ALEXANDROV: Yes, because I started my discussion on this point by saying regardless of what domestic courts have ruled under domestic law with respect to whether there is or there isn't expropriation, that ruling is with respect to Costa Rica's domestic law.

The mandate of this Tribunal is to determine whether there has been an expropriation within the meaning of Article 10.7. And that question is the first question you need to answer in your analysis to reach Step 2 and Step 3 of whether compensation is due and whether it meets the requirements of prompt, adequate, and effective. And my view is, if you cannot answer the first question with respect to CAFTA, then you cannot proceed with your analysis to the second and third, because the only way you proceed to your analysis is if you answer the question in the affirmative, and the question is, has there been an expropriation within the meaning of CAFTA?

PRESIDENT BETHLEHEM: Thank you very much. Let me just, on this question, just turn to my colleagues to see whether either of them want to raise any question. And then we will take a break.

ARBITRATOR KANTOR: In light of the Chairman's promise that we will take a break, I will be quite brief on these questions only. I'll defer other questions until another more appropriate time.

Only focusing on the questions, the line of questions our Chair was pursuing, I heard Claimants argue earlier today that to illustrate that items in Article 10.7(2) give rise to independent obligations, obligations of independent legal significance, one might look at 10.7.1(d), which refers to due process and cross-refers to Article 10.5 of CAFTA, the Minimum Standard of Treatment provision. And counsel for example, Mr. Kantor, is that act in accordance with due process of law and Article 10.5?

The question of whether the alleged expropriation is carried out in accordance with subparagraph (d) does not arise if there is no expropriation within the meaning of Article 10.7; and our argument is that there is no expropriation within the meaning of Article 10.7 because the relevant acts and fact happened before CAFTA entered into force. And so the question of whether any of the four conditions is complied with simply does not arise.

My second--the second way I would like to address that question, and I will address it, perhaps, a little bit differently. If we can put the Mondev--I have put on the screen--not that my presentation was necessarily in some particular order, but you have, of course, with your questions, forced me to further change the order, but that is very helpful to us, so I'm not at all objecting.

So, with respect to compensation, the Mondev culture is, of course, with respect to NAFTA, but the language is the same. And so, what the Tribunal says
in Mondev is that Article 11.10 of NAFTA requires that the nationalization compensation be on payment of compensation in accordance with those provisions. The word "on," the Mondev Tribunal says, should be interpreted to require that the payment be clearly offered or be available as compensation for taking through a readily available procedure at time of the taking.

And so, my other way of answering the same question is if you look at this chart, you will see that with respect to the expropriation proceedings that have already been initiated, that is with respect to the 18 properties, in the words of the Mondev Tribunal, a payment was clearly offered and made available on the dates that you see in the second column, that is, between 2006 and 2008. It was clearly offered because the administrative appraisal, the amount of the administrative appraisal, was made available to Claimants. It was clearly offered and it was available as compensation. And the time period is 2006-2008. So, with respect to speaking of the condition of compensation, with respect to those properties where expropriation procedures have been initiated, the requirement, according to the standards laid out--set forth by the Mondev Tribunal, if Article 10.7 were to apply, the requirement of 10.7.1(c) on payment of compensation would be met. And so, let's deal then with two requirements. There is no issue of effectiveness here, or there is nothing. So, the issues are prompt and adequate, as explained in Paragraph 2. And I argue that Paragraph 2 simply elaborates on what "prompt and adequate means." "Prompt" is timing. You will see, if you look at those dates, that the administrative appraisal and the amount under the administrative appraisal was made available, was offered to and made available to Claimants within less than a year.

We heard arguments that 18 months may be a long time, that 40 years may be a long time. We haven't heard an argument that less than a year does not meet with the requirement of promptness provided interest is paid, and we will deal with the issue of interest in a moment.

If that is the case, and there has been no assertion here that offering the amount of the administrative appraisal was not prompt, then the only element that remains in terms of a basis of a claim is that the amount was not adequate, meaning not Fair Market Value. That claim arose with respect to those properties between 2006 and 2008.

So, even if you look at this--and that's a response to your--one of your other questions, Mr. President, assuming arguendo they are different obligations. Even assuming that, and we don't agree, but assuming arguendo that there is a separate obligation to provide prompt and adequate compensation, our argument is in compliance with the Mondev standard, the requirement of on payment of et cetera was met, compensation was clearly offered, made available, and from that point on, with respect to different properties from '06 to '08, the issue in dispute was the adequacy, the Fair Market Value.

And that dispute--and you asked a question of a dispute and when this dispute--that dispute arose well before the statute of limitations and well before CAFTA entered into force, and that is a dispute we're having here today, whether they were paid or were offered and whether the amount that was made available to them was Fair Market Value or not. And again, that dates back to '06, '08.

And, perhaps, just to complete the answer to your other question, because it's very short and in this context, for the purposes of the statute of limitations, even if we assume--and again, we disagree with that, because we don't believe that this dispute about the amount of compensation could become actionable under CAFTA when CAFTA enters into force--but even assuming that that were the case, because Article 10.16 talks about a breach, and your question goes to--well, the word "breach" must mean something, and how could they know--I'm interpreting a bit liberally your question to make sure I understand it--but your question seems to go to how could they know there was a breach if CAFTA was not yet into force.

PRESIDENT BETHLEHEM: Is that the breach only arises when there is something to breach, when CAFTA
MR. ALEXANDROV: Right. Right. Yes. So, how could there be a breach, let alone how could they have known about it, if there was no breach as a matter of law.

So, there is a factual argument to that, which is easy, which is in this case, even if they learned about the breach on January 1, 2009, they are still out for the purposes of the statute of limitations. But to address the question as a legal matter, this provision in our submission must not have envisaged a situation where there was an act or omission or a conduct that predated CAFTA, because it cannot be that continuous conduct—and this is a purely hypothetical, this is not our situation—but it cannot be that conduct, that is no question continuous conduct, that started 20 years ago and continues until today, but they learned about this conduct—they, the hypothetical Claimants—20 years ago, is not time barred because yesterday CAFTA entered into force and, therefore, the breach only arose yesterday. And that is the legal answer to the question.

MR. ALEXANDROV: Mr. President and Members of the Tribunal, I want to go back for a minute to Slide 21 where we gave you quotes from Claimants' Memorial on the Merits just to show the case is set forth on their Memorial on the Merits and how this case shifted and continued shifting through their Rejoinder on Jurisdiction, their Opening and now their Closing.

I want to focus on the last quote, the last bullet point. And towards the end of the quote where— the last sentence where Claimants allege in their Memorial on the Merits that, "Consistent with customary international law practice, it is at that point that the State takes possession of the land, therefore, satisfying the customary requirements of a direct taking." And that point is the point of dispossession, the taking of possession.

So if you look at the chart that I keep referring you to, you’ll see in the seventh column a dispossession date. You’ll go down, because the dispossession date is relevant only to the third—well, on the chart, the second. But in terms of categories of property, the third category, which is in the judicial phase.

And you'll see there the dates of dispossession may vary somewhat, but they are all in 2008. So the customary requirement of a direct taking on Claimants' own case happened sometime in 2008. Obviously, with respect to the other properties, hasn't happened yet.

What is interesting is that we heard in the Opening, and then in the Closing of Claimants—and this is an echo of their amended case in the Rejoinder On Jurisdiction, which obviously is not the appropriate time to amend one's Claims on the Merits. But they are now saying that it is the transfer of title that is the act that constitutes an expropriation. And they're saying that, for obvious reasons, that the voice—they have jurisdictional problems.

What we say is several things. One, these are claims that are not timely. They have not been developed. They should not have been raised in the Rejoinder on Jurisdiction to begin with.
If they were to raise those claims and substantiate them, we’re talking about three properties. And so with respect of the other properties, then, according to their own argument, expropriation has not yet taken place.

Again, it’s a significant shift from what has been argued so far. But I think what is most important here to emphasize is this has not been their claim until the Rejoinder on Jurisdiction.

Another claim that was very briefly referred to in the Rejoinder on the Merits and voiced in the Opening and somewhat in the Closing was a denial of justice claim. Again, a new claim raised in the Rejoinder on Jurisdiction. Entirely unsubstantiated. We all know the high standards for denial of justice, and they have to—just asserting that the Costa Rican courts take a long time is no substantiation of a denial of justice claim. And we’ve pleaded that and I’ll leave it at that. They have to show much more: Why the delay, who caused the delay, what are the steps that are taken?

And our argument would be if they were to argue that point that Costa Rican Law allows them a number of opportunities to challenge the decisions, and we have explained in our written submissions, the Expert Report on Valuation, how they can challenge those Experts Reports and what happens next and so on and so forth. And they have to show the high standards of denial of justice claim. And we’ve pleaded that and I’ll leave it at that. They have to show much more: Why the delay, who caused the delay, what are the steps that are taken?

We don’t—Costa Rica doesn’t deny there are many issues that have to be addressed. What Costa Rica insists is that urban development is a huge problem, and Claimants' own Witness, who is also an Expert in the matter, testified before you. And he stated—he made some very helpful statements, which I want to go quickly through with you to then make the case that I want to make.

With respect to urban development he said the following:

"Question: What you’re saying is urban development may be harmful to the nesting of the turtles, and, in fact, in most cases, unless it is careful and strictly controlled, it is. Is that generalization more or less correct?"

"Answer: It is very close to being correct, yes." The transcript reference is there.

He also said in response to a question, and the question was:

"Question: As I understand from your testimony, you do agree that expropriating private property within the 75 meters is a measure that does protect the turtle?"

"Answer: That is correct." You have the transcript reference.

You don't have it on the slide, but I will quote another statement by Dr. Rusenko:

"Question: So in a way it, the expropriation of the 75-meter strip, is a stronger measure than controlling development. It may be unnecessarily stronger, but it is stronger?"

"Answer: It is stronger. But you will need to control development beyond that 125 meters."

This is transcript Page 472, Line 19, to Page 473, Line 1.

So Dr. Rusenko is saying urban development a very serious problem. He’s saying expropriation may not be necessary, but it is certainly help with -- it may be stronger than necessary, but it does protect the turtles.

And he's going beyond that and saying, you need to control development even beyond that 125-meter zone. He is also saying, and you have that quote on the slide, the third quote that you have on the slide:
"Question: Do you have any reason to doubt, Dr. Rusenko, that the Government of Costa Rica was willing and interested in making a genuine effort to protect the turtles?"

"Answer: No, I don't."

And you have the transcript reference on the slide.

So what transpires from this discussion is Claimants' own Witness with expertise in the matter—who, by the way, also expressed in his Witness Statement and confirmed on the stand his appreciation and respect for the Head of the National Park, Mr. Piedra, and for the efforts that the Park rangers make to protect the area.

He's saying urban development is a problem. Costa Rica—there is no doubt that Costa Rica is driven by a genuine desire to protect the turtles, the measures are justified, Costa Rica is expropriating private property. That may be unnecessary because strictly controlled development, he says, a code with teeth is sufficient or may be sufficient, but they are going beyond that. Nothing wrong with that.

In fact, what transpires from Dr. Rusenko’s testimony and from the testimony of Mr. Berkowitz is that the Costa Rican Government through MINAE, through members of the Congress engaged in a public debate, in a public discussion, transparent, with the obvious desire to collect the views of all constituents and understand how better to protect the turtles.

You know from Mr. Berkowitz’s testimony that he had an opportunity to meet with the Minister himself and express his views and have a discussion with the Minister of what is the best way to protect the turtles.

You have seen from the documents that Mr.—that Minister Carlos Manuel Rodriguez had the view—they had meetings, and they were discussing whether there is a need to extended the Park, as Dr. Rusenko himself testified might be necessary beyond the 125 meters.

This was all a transparent debate. The minutes of those meetings were provided to Mr. Berkowitz.

Dr. Rusenko engaged in a discussion with the Minister. He answered questions. He met with the Minister. The Costa Rican Government sought input by the affected constituents, by experts in the area. We don't know the full extent of that effort, it's not in the record. But what we have in the record is sufficient.

Congress dealt with bills that discussed potentially a different regime. At the end of the day a democratic Government engaged in a democratic process of collecting views and processing those views, of discussing them openly and transparently, came to a conclusion. And that conclusion was the Park is there, it's 50 meters public zone plus 75 meters buffer zone, the property in the 75 meters should be expropriated, and that's what the Government is trying to do.

There is no question of lack of goodwill. There is no question that this is in the Public Interest.

The question is—and there are several questions that arise, and, again, I will refer you to our written submissions. One question is, is this an expropriation not under Costa Rican Law but within the terms of Article 10.7?

And our argument there is that you don't have jurisdiction. But if you did, you would also have to have a look at Annex 10-C to see if in particular with respect to the regulatory measures at issue here, whether they fall within the scope of that Annex.

Because there is no question that those are measures of general application for the purposes of environmental protection.

And I refer you to our Written Submissions. If you ever get to that point, you will have to make that determination. And we submit to you, as we did in our Written Briefs, that Claimants have not made the case and those Regulatory Measures that they have put at issue in this case do not fall within the scope of Annex 10-C.

I also to want draw your attention, perhaps in response to the Tribunal’s admonition that we might wish to address an argument or a statement made by El Salvador in these proceedings in relation to Chapter 17. And we draw your attention—again, we are...
a little bit constrained in terms of time, but I want to be brief and point you to Article 17.2, which is on Slide 25 and on your screen. Which requires that the Party--it says, The Party shall not fail to effectively enforce its environmental laws, in Paragraph 1(a).

And then if you look at the end of Paragraph 1(b), a party--I will read the whole sentence: "Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion or results from a bona fide decision regarding the allocation of resources. And the discretion is with respect to enforcement of environmental matters that may have different priorities."

So, Article 17.2 allows Costa Rica a measure of discretion in implementing environmental laws, including a measure of discretion in terms of how to carry out the expropriation, taking into account allocation of resources. And unless that discretion is unreasonable, Costa Rica is in full compliance with CAFTA.

I'm raising that point because there has been a discussion about arbitrary choices made by Costa Rica in terms of what to expropriate and what not to expropriate. This allegation has not been proven at all.

And there has been an allegation that Costa Rica does not proceed quickly with the expropriations because of lack of funds. And I will submit to you that even if that were the case--and there is no evidence that it is the case--the evidence is that they are looking to improve the expropriation procedures. But even if that were the case, there is a certain level of discretion that Costa Rica is provided under CAFTA.

And then, finally, you have Paragraph 2, which states that the Parties recognize that it is inappropriate to encourage trade, or in this case, investment, by weakening or reducing the protections afforded in domestic environmental law. And so each Party shall strive to ensure it does not waive or otherwise derogate from such laws in a manner that reduces the protections afforded in those laws as an encouragement for trade with another Party or as an encouragement for the establishment, acquisition, expansion, or retention of an investment.

And so, Costa Rica cannot weaken its environmental laws adopted well before Claimants made their investments to encourage them to expand or retain their investments.

Mr. President and Members of the Tribunal, I will now pass the floor to Ms. Haworth McCandless to discuss issues of damages, and after that I will make some very brief concluding remarks.

Before I do that, though, I do want to address a couple of other points that are in relation to this calculation. It's not just calculation, what we refer to as a new methodology, new calculation of damages that Claimants submitted with their-at the very end of their Closing Argument.

And you have already decided to admit this into the record, and I'm not going to challenge that decision. I do want to say, though, that--a couple of points. First, if you can pull this out and look at it because I want to refer to it very quickly.

We have been provided with references for the first group or category, which is the A, B, C, and V Lots. The reference is to the B and SPG Lots, as we understand them, are to Unglaube. And I want to point out a couple of things. First, the column, Property Costs.

We understand, and we may be wrong because we didn't have time to study that, but we understand that refers to the purchase price. If that is the case, we understand that, the point that I want to make is that throughout this proceeding we have asked that they provide the Contracts that would evidence the purchase price and they have not done that.

You will recall the discussion of the document that you in the end decided you did not want to allow into the record when we submitted to the Tribunal an application to enter it into the record for the purposes of the purchase price. The objection was essentially--well, the objection was, one, surprise and ambush, even though that document had been in their possession since 2003 and Mr. Berkowitz

CAPTA.
had quite a vivid recollection of what this document said.

The other objection was inconvenience, they were not close to their files.

The substantive objection was those prices are not relevant. At the very end of their Closing Argument they have made them relevant for this purpose, and we still don't have any of the Contracts for the purchases of their property. And the reliance here is on extraneous--I won't even call it evidence, but extraneous information.

You'll also recall that Mr. Kaczmarek was cross-examined yesterday on the purchase price of the B Lots property. Mr. Kaczmarek relies on--relied for that on Claimants' own Expert and Claimants' Expert's statements as to what the value of those properties for the B Lots.

And Mr. Kaczmarek was challenged and was asked whether it was not more reasonable to adopt a different view, a different view from what their own Expert was advocating?

And we don't believe it is quite appropriate to ask our Expert to speculate based on indirect, to put it mildly, information about the purchase price might be when the purchase contracts are in the possession of Claimants and they refuse to provide them.

Mr. Kaczmarek was asked a question in relation to Exhibit C-24b which shows the recorded price as half a million colones, which is $1,200. Well, but Mr. Berkowitz has taken a mortgage of $370,000. And how can this price be?

PRESIDENT BETHLEHEM: I think it was 450,000, wasn't it, 370, plus 80?

MR. ALEXANDROV: Well, there is--there is one--I may be using a different exhibit, but we have the same situation, so if you allow me to use Exhibit C-24b to save time. And at the very end--and I realize you don't have it. I'm told you have it in the pocket of the binder, so if you would like to take it and look at it, and I'm looking at the very last page in the Spanish. You can look at the--whichever page that is in English.

If you look at the very end of the document in English, which is the second-to-last page, carrying over to the last page, in Spanish, it talks about--what is it?--370,000, which is why I used this language--in favor of, and the company in favor of which this amount is, and I'll say what this amount is, is Mr. Berkowitz's company. This amount in Spanish is described as "cebuli puticaria," (phonetic) which in English is a mortgage bond. So, what's happening here is Mr. Berkowitz is issuing a bond to his company, against which he may borrow if somebody is willing to lend him that amount of money against his property. This is not a mortgage.

And we say it is unfair to bring this document to Mr. Kaczmarek without explaining to him that this is not really a mortgage and how this operates and asking him to say whether this changes his view on what the proper purchase price is, given that Claimants have in their possession the Purchase Contracts which would state the purchase price of the property. And if they wanted to make a different submission on the base of this document and the document they actually referred to yesterday, they should have developed that evidence through Mr. Berkowitz. And in the absence of that, this document is in the record, and it speaks for itself, and I'm just bringing to your attention what it actually says.

Mr. President, with that, if you allow me to pass to Ms. Haworth McCandless to talk about damages.

PRESIDENT BETHLEHEM: Please do. Just before we do, let me just inquire of my colleagues whether they have got any questions to put to you on the basis of your submissions.

ARBITRATOR KANTOR: You want me to ask now?

PRESIDENT BETHLEHEM: I think if they relate to, yes.

ARBITRATOR KANTOR: With apologies to Ms. Haworth McCandless, I do have a question or two for you, Mr. Alexandrov.

I inquired of Claimants' counsel this morning regarding which legally significant events they would point me to that would have occurred from and after June 2010. From that colloquy, and without seeking to characterize whether these events are or are not
legally significant, and if so, for what purpose, I came away with three types of conduct that had been mentioned. The first was maintaining a suspension of the administrative proceedings. The second was investigation of possible annulment of title, and the third was conduct in judicial proceedings. I would like to hear from you on those three points.

MR. ALEXANDROV: Thank you, Mr. Kantor. If you'll allow me to start backwards, the conduct of the judicial proceedings, as I said, to the extent that there is a dispute about the amount of compensation, this dispute arose in 2008 when compensation was clearly offered to them and placed at their disposal, and they could have taken it. They chose not to. They proceeded and submitted the--how they disagreed. They objected to the administrative appraisal, and under Costa Rican Law, the dispute went to judiciary.

Under the Mondev standard, Costa Rica, if Article 10.7 applied, Costa Rica would be in compliance with that article because compensation was offered. They say it was not adequate. That dispute arose in 2008, and I've made the arguments on jurisdiction. The fact that this dispute is before the judiciary as a result of their submission, as a result of their objection to the administrative appraisal, cannot make the expropriation or the payment of compensation a continuous act. It is an act that is now being reviewed by Costa Rica's judiciary. This does not make it a continuous conduct or a composite act. And so for them to say the Costa Rican judiciary takes a long time, that would not be a claim under Article 10.7, including 10.7.2. That would be a claim of denial of justice that they have not developed.

ABRUTATOR KANTOR: Just to be clear, I think, although I may be putting words in Claimants' counsel's mouths here, that they were seeking to comment on the approach of the Government towards the litigation process, not on the conduct of the Courts themselves.

MR. ALEXANDROV: Well, I apologize. That's not the way I understood it, but if that is the allegation, we have not seen any evidence that the

Government is doing anything other than what the Procuraduría normally would do and what the Attorney General's Office of any Government would normally do in an adversarial proceeding. We have seen no evidence of any impropriety of the conduct of the Government in the judicial proceeding.

Your--the second--I apologize, it was not 'your.' You're simply conveying that to me. The second answer that you received related to the so-called annulment of title, and I think I already addressed that. There has been no annulment of title. What we have is a recommendation to conduct a study. The study is being conducted. It may or may not identify defects. If it did, there would be an assessment of what those defects are and whose responsibility those defects, and if it turns out that it's the owner's responsibility, then the Procuraduría will make a judgment call of whether to seek judicial proceedings because title can only be announced through a judicial proceeding, whether to seek a judicial proceeding that may result in annulment of title. The bottom line is this not a measure. This is simply a study at this point.

The suspension of administrative proceedings: Our point on this is, first, in relation to statute of limitations, continuous or composite or one-time act doesn't matter. What matters is when they first acquired knowledge, and our argument, as you know, on the fact is, regardless of whether there is a one-time or a continuous or a composite act, they first acquired knowledge in 2008, and, therefore, for the purposes of statute of limitations, that's sufficient.

For the purposes of the entering into force of the Treaty, where the general standard is a conduct would be covered to the extent that it extends after the date of the entry into the force of the Treaty. On the application of the Treaty for that conduct, we submit what matters here is the suspension order. This is the Measure. The Court orders a suspension. The administrative divisions comply with and implement the decision of the Court. This cannot be a one-time act. The Court--this cannot be a continuous act, I'm sorry, it is a one-time act. The Court makes that order, and then it's just a matter of compliance with
that order. That compliance with the order we call
the "effects of the order," but there is no question
that the Measure is the order.

ARBITRATOR KANTOR: Thank you. A second
question: In addition to the expropriation claims
before the Tribunal, there are also claims that the
conduct of Costa Rica was contrary to the Minimum
Standard of Treatment, including fair and equitable
treatment, leaving to one side the portion of that
claim that relates to legitimate expectations, there
is a portion of that claim that asserts the conduct of
Costa Rican Government as arbitrary, and my impression
is that both Parties have common ground that the
definition of "arbitrary" starts with the judgment in
the LC ruling of the International Court of Justice.
It's not so much something imposed to a rule of law as
something opposed to the rule of law, a willful
disregard of the process of law, an act that shocks,
or at least surprises a sense of juridical propriety.
I understand the Parties disagree whether or
not the conduct of the Government is properly
categorized as arbitrary or not, but what is your
view about when, in the circumstances, it would become
obvious to Claimants that the delay is conduct that
could be characterized or not characterized as
arbitrary? In other words, I don't want you to tell
me whether you think it's arbitrary or not. I know
your answer to that question. I want you to focus on
the timing issue.

MR. ALEXANDROV: Well, first of all, it is
incorrect factually that the suspension is indefinite.
Second, it is very difficult to say when one
acquires knowledge of an indefinite suspension. I
think they are making an argument, first, that the
suspension in itself is arbitrary, and we have shown
that they knew about that suspension at the time when
the timing of that knowledge deprives this Tribunal of
jurisdiction. The suspension, whether the suspension
is arbitrary or not--and this is the reason why we
explained and we provided Witness Statement to explain
what was the reasons for the suspension, the
recommendation of the Contraloría, et cetera.
And so we believe that they have to make an
argument of why the suspension is arbitrary, and all
they have said is it's indefinite, and we now know
that it's indefinite. If that's their argument, they
don't know and can't know that its indefinite because
it is not. They have not said whether that
suspension, if that were one year or two years or
three years, would be arbitrary, and, therefore, we
cannot speculate whether they knew or didn't know that
it would be one or two or three years because we don't
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05:02:52 I know what time limit they set to arbitrariness in the context of that suspension. They have simply said its indefinite. It factually is incorrect, and I think we rest our case there.

ARBITRATOR KANTOR: Thank you for your patience, Mr. Alexandrov.

PRESIDENT BETHLEHEM: No additional questions, Mr. President.

MS. MCCANDLESS: Thank you, Mr. President.

I'm--my colleague, Mr. Alexandrov, touched on a couple of things that are in the realm of damages, so hopefully my comments will be relatively short in light of the time. But I'm going to, as Mr. Alexandrov did, kind of touch on various issues that came up in the course of the hearing, as opposed to going methodically through arguments that we have already raised before, and we, of course, stand by our arguments in our pleadings. This is merely supplemental to that.

There has been an assertion of valuations and arbitrariness with respect to the valuations, and one thing that Claimants--they, in particular, have alleged in these proceedings that various valuations of Claimants' properties in the administrative and judicial phases of expropriation are arbitrary, in large part, because their values fluctuate between and within each phase. But what has become evident during the hearing and, in particular, during the examination and cross-examination with Mr. Hedden is that, in fact, there is nothing arbitrary about the valuation process in Costa Rica.

First, the expropriation system in Costa Rica is designed to give the Parties in the expropriation proceeding sufficient opportunities to identify the value of the property being taken so that the Fair Market Value is the ultimate value reached, either in the administrative phase or in the judicial phase. So, what is perceived to be varying values is actually the process working its way through to find a common ground at the end, where the judicial, in particular, judicial branch has listened to the various arguments and evidences of the Parties at various stages.

And there are lots of opportunities for the private Party, the one that owns the property, to make submissions at various stages of the proceedings. The nature of the real estate market in Costa Rica, and this goes to the testimony of Mr. Hedden. As he testified under cross-examination, it is difficult to value properties in the Guanacaste region, and you can see the quote there on the slide.

Second, even if the valuations identified in the two phases are not identical, that does not result—that result is not surprising, given the nature of the real estate market in Costa Rica, and this goes to the testimony of Mr. Hedden. As he testified under cross-examination, it is difficult to value properties in the Guanacaste region. And there are lots of opportunities for the private Party, the one that owns the property, to make submissions at various stages of the proceedings. The nature of the real estate market in Costa Rica, and this goes to the testimony of Mr. Hedden. As he testified under cross-examination, it is difficult to value properties in the Guanacaste region, and you can see the quote there on the slide.

And as Mr. Reddy--I have to correct that--it actually says "Mr. Berkowitz," but it's Mr. Reddy, so I apologize for that. Mr. Reddy readily admitted that, anyway, there is a lot of documentation that would have this Tribunal believe that they came to Costa Rica to build their dream homes and live out their retirement years in tranquil Guanacaste area in Costa Rica, it became apparent during the hearing that, at least for some of the Claimants, their real goal was to enter into the hot real estate market with the goal of making a quick dollar, buying and flipping, or, perhaps--buying and flipping property.
the real estate market here was just absolutely booming, you know, skyrocketing. And so these properties were growing in value at an exponential pace. We thought we were in early, and so we thought it was still a good investment opportunity for us to buy at that time.' And the location in the transcript is identified on the slide.

This was true despite the fact that the property Claimants were buying was in Las Baulas National Park. This fact apparently did not bother Claimants, or some of Claimants, as their goal was to get in early and flip the property before the Government had a chance to expropriate their land. In essence, Claimants didn't care if the property that they were buying was in the Park and subject to expropriation, so long as they were able to sell it to an unsuspecting purchaser before Costa Rica took any action against their property.

And there's a slide up. And, again, this is Mr. Reddy, and I apologize, that's another error. The President is saying, a question: "Yes. Was there, in your mind, at the time any appreciation that purchasers coming after you, those whom you may have wanted to sell the property, would not have had the same robust confidence that you had in the interpretation of the 1991 Decree and the 1995 Law?"

Answer: "You know, I don't think I tried to put myself in their mind. It was very clear to us that we were buying private property titled in the 50-meter line, that--that we'd maintain full use and enjoyment of that private property and that Park extended seaward. So I had no issue with that. Any buyer would be represented by a Costa Rican attorney and would get their advice and make their own decisions." And the location on the transcript is identified in the slide.

And Mr. Berkowitz readily admitted the fact that their properties were in or near a park was an added advantage to their scheme. And we have the quote on the slide: "For me, it was a very positive factor that we were bordering a park and that the turtles laid their eggs--laid their nests--laid their nests in front of our land. It was--to me it--I had already had inquiries from one Hollywood magnet to purchase the property. This is just the type of client that we had envisioned." And the location on the transcript is on the slide.

And the strategy almost worked. In fact, Mr. Berkowitz admitted in cross-examination that he was able to sell three parcels of land for around $400,000 each. Those parcels gave Mr. Berkowitz a total of about $1.25 million, and that's at Transcript Page 436, Line 22, to 437, Line 2. This is almost the entirety of the 1.5 million that he mentioned that he had spent on all 24 B Lots parcels, and I think the calculation of that percentage is around 83 percent. And that amount that he is getting there doesn't include other money that he may have received through the Government.

And as Mr. Alexandrov was mentioning, with respect to sale and purchase agreements, throughout these proceedings and particularly with respect to damages calculations, Respondent has argued that it needs to receive copies of Claimants' sale and purchase agreements. However, no sale and purchase agreements have been provided to Respondent.

In light of this history, it was very surprising to hear counsel for Claimants argue during cross-examination of Mr. Kaczmarek, "Do you know whether the sale and purchase agreement has been formally requested at that point?" And that was in the Transcript Page 949, Lines 2 to 3.

And for the record, such documentation has, in fact, been requested by Respondent or Mr. Kaczmarek on more than one occasion. For example, Mr. Kaczmarek, in his first report, said, "The preferred documentation to support the purchase prices and purchase dates would be Claimants' sale and purchase agreements. However, Claimants have not provided any sale and purchase agreements as evidence to support their purchase prices for any of the properties at issue." That's his First Report, at Paragraph 11.

And in this proceedings, Claimants themselves be believe, as we now have seen through the alternative damages calculation provided, but even independent of that, Claimants themselves believe information in those sale and purchase agreements are
important because, for example, in Mr. Reddy's testimony, he, when he first came to the stand, he corrected some dates and purchase prices with respect to his Witness Statement. And clearly, he has those documents, otherwise he would not have been able to make those corrections.

In fact, when Respondent found a Sale and Purchase Agreement--and Mr. Alexandrov had made mention of this a little bit earlier--with respect to Mr. Berkowitz's property and tried to introduce it into the record, Claimants' counsel vehemently objected. Thus, it has been difficult to get this type of evidence on the record, and during the hearing, it has become apparent that this type of evidence is very important.

And, in fact, Claimants' Damages Expert, Mr. Hedden, admitted during cross-examination that, in fact, they were relevant, and this is in the slide in front of you:

"And you would agree, would you not, that sales and purchase contracts contain and can contain useful information about the specific terms of a particular sale?"

Answer: Yes.'

And the transcript cite is on the slide.

Q. Mr. Hedden also admitted in a response to a question from the Tribunal that the use of purchase prices could be an alternative basis for estimating Fair Market Value of property, and it's up there on the slide.

"Question: I've seen proposed, in connection with valuations, in circumstances where comparables are not available and the property does not lend itself to an income method... One means of estimating Fair Market Value in those circumstances would be to identify the original purchase price and then to seek to calculate over the duration of the entire period... an average Rate of Return on that profit... Is that approach for which data is or could be obtained for these properties, in your professional view?"

Answer: Yes. I believe that, again, relative to these specific properties, I believe it would be very difficult... but it is done, it is done with fixed assets. It is done with other types of assets.'

And the location on the transcript is on the slide.

And, in fact, Mr. Hedden also admitted that the purchase price of Mr. Berkowitz's Lots and, in fact, with respect to the Fair Market Value may be lower than the Fair Market Value and, therefore, this is a relevant point with respect to the valuation of the property. And this is at Page 840, starting at Line 20. It's a further response to the question that Mr. Kantor had raised in the quote that I had just listed.

"In the specific case, as I've talked about in my Reports, trying do that from prices that are not necessarily reflective of a market value at that time, you can try to calculate return on investment and to determine whether or not that's an appropriate return or not, but I'm not sure that would really work in the case because they're trying to trend and bend value prices, prices that were paid, unless you were able to establish that they were market prices at that time. You don't necessarily get you to the right point and a conclusion, because they are not supported by the Market Value."

And in that case, as you may recall, Mr. Hedden was assuming for his market value that there was no knowledge or of Park risk.

So it appears that Claimants now agree that purchase prices of the property at issue here can be used as a basis for returning value and that it's important, but nevertheless that information and documentation is not in the record.

It has become very apparent during the Hearing, also, that any damages Claimants seek in these proceedings has been limited to claims of expropriation, and this became clear during Mr. Hedden's cross-examination. And the dialogue is up on the screen. Oh, no, it's not. I'm sorry. I will quote it to you:

"Question: In Section 2 of your Report, which you have identified in that first paragraph that you are to provide your Expert Opinion regarding the value of vacant lands taken from the Claimants as part of the expropriation from the Respondent; is that..."
05:15:35 1 correct?
  2 Answer: Yes.
  3 Question: So, you were not calculating
  4 damages for a breach of fair and equitable treatment
  5 provision or for any other provision of CAFTA; is that
  6 correct?
  7 Answer: I was only focused on the Market
  8 Value of the parts taken from the property.
  9 Question: In the context with respect to
  10 expropriation; correct?
  11 Answer: Yes.'
  12 And that's Transcript Page 752, Lines 11 to
  13 22, and 753, Lines 1 to 4. And, indeed, today in
  14 closing comments, counsel for Claimants also admitted
  15 again that the date that they had provided for the
  16 valuation is the date of expropriation, and that was
  17 also something Mr. Hedden had discussed in his
  18 cross-examination.
  19 One other point with respect to the market in
  20 the Guanacaste area. Mr. Hedden was resistant to
  21 indicate that--that the market might have hit a peak
  22 somewhere around 2006, 2007, and fallen thereafter,

05:16:40 1 but information that Claimants' counsel was focusing
  2 on today with respect to the market and, in
  3 particular, pointing the Tribunal to the Unglaube
  4 case, which was also measuring the market at that
  5 time, the real estate market in the Guanacaste region
  6 at that the period, the same period of time, and the
  7 Parties there and also the Tribunal had found that the
  8 market peaked in 2006 and fell thereafter.
  9 Under Mr. Hedden's severance damages theory,
 10 when analyzing a piece of property, one must analyze
 11 the entire parcel before the taking and then after the
 12 taking. And then you subtract the expropriated
 13 portion and compare the value of the remaining parcel
 14 before the taking with the value of the remaining
 15 parcel after the taking. The difference is the
 16 severance damages. And Mr. Hedden asserted that there
 17 was a diminution in value to the remaining
 18 non-expropriated portion of the parcel because that
 19 parcel could no longer be considered "beachfront."
 20 This is, in part, because, according to
 21 Mr. Hedden, the land that has been expropriated, which
 22 then forms part of the Las Baulas National Park, would

05:17:51 1 exist between the private owner's lot and the ocean.
  2 This, Mr. Hedden viewed as problematic and a fact that
  3 adversely impacted the value of the unexpropriated
  4 property.
  5 But what became clear in response to
  6 questions from the Tribunal is that, in fact, that
  7 alleged interior property might even be more valuable
  8 than it was before the 75-meter strip of land had been
  9 expropriated. Why? This is because the more western
 10 portion of the remaining property would then be
 11 bordering Park land. And Mr. Kantor had asked a
 12 question to Mr. Hedden regarding the remaining
 13 property and the fact that it would be next to the
 14 Park.
 15 "Question: Would that have any positive
 16 impact on the value of the first row of the eight
 17 Lots, putting them near the Park land--next to the
 18 Park land?
 19 Answer: Yes.'
 20 And that's at Page 849 of the Transcript,
 21 Lines 16 to 22.
 22 One other factor that Mr. Hedden had said

05:18:51 1 could contribute to the diminution in the value of the
  2 properties is a lack of beachfront access. That is,
  3 lack of accessibility to the beach from the parcel.
  4 While Mr. Piedra, the Park Administrator,
  5 mentioned in response to questions from the Tribunal
  6 that the Park currently has limited signage, he did
  7 not state that there were any fences or other
  8 landmarks limiting access to the National Park. And
  9 that's at the Transcript--English Transcript,
 10 Page 551, Lines 1 through 7. Thus, the restrictions
 11 that Mr. Hedden has mentioned as adversely affecting
 12 the value of that property simply does not apply in
 13 this case.
 14 As part of his severance damages argument,
 15 Mr. Hedden also asserted that for the Lots where there
 16 is only a partial taking, the value of severance
 17 damages may be greater if, following expropriation of
 18 a portion of the land, the remaining portion were too
 19 small for purposes of building homes on the land.
 20 Mr. Hedden asserted that no such need to increase
 21 severance damages exists with respect to the SPG Lots,
 22 for example, because they have a "unity of title," and
05:19:56 1 a "unity of use."
2 But Mr. Hedden did not apply--did apply a
3 higher amount of severance damages to the B Lots on
4 the understanding that parcels remaining after
5 expropriation would not be large enough to develop.
6 But in the case of B Lots, there is land that is east
7 of which is owned by and controlled by Mr. Berkowitz.
8 Thus, with the SPG Lots, the B--as with the SPG Lots,
9 the B Lots too have unity of title and unity of use,
10 and accordingly, there should be an adjustment made
11 downward to reflect that fact.
12 And I have that conversation on the slide in
13 front of you:
14 "If you had the understanding that if you
15 knew that those Lots behind the B Lots that are shown
16 in the picture here belonged to Mr. Berkowitz, would
17 you feel the need to adjust your severance value to
18 reflect it more along the lines of what you did with
19 the SPG Lots because, in that instance, there would be
20 a unity of title and a unity of ownership?"
21 Answer: I would have to take that under
22 advisement, but, if it met the test of unity in use,
23 unity in title, and the physical continuity, and they
24 weren't separated and could, in fact, be joined, they
25 would get similar treatment than--to the SPG Lots,
26 and/or, you know, how I ascribed a value to B Lots 5
27 and 6, where they were adjoining and could be
28 assembled to create one plus or minus
29 8,000-square-foot lot.'
30 And the location on the Transcript is on the
31 slide.
32 And today, Claimants' counsel introduced
33 another new concept, and that was an admonition that
34 the State acquire the entire property if the State is
35 going to acquire only a partial portion of that.
36 Well, obviously the State is not obligated to
37 do so, and their request only further supports the
38 concept that they entered into the market in a
39 speculative time and they were not able to capitalize
40 on that, and now they're asking for the Government to
41 pay for that risky investment.
42 Mr. President, Members of the Tribunal, if
43 you were to decide, notwithstanding Respondent's
44 argument to the contrary that you have jurisdiction to
45 hear this case, and that Respondent has somehow
46 breached its obligations under CAFTA, then you would
47 need to decide what type of damage--or what damages
48 amount would be appropriate to award Claimants.
49 It seems to to us you have two choices from
50 the outset. The key issue is to decide whether a risk
51 of expropriation existed at the time Claimants
52 purchased their property or not. If you believe that
53 there was a risk at the time Claimants purchased
54 their property, then you must go with Mr. Kaczmarek's
55 valuation. If, on the other hand, you believe that
56 there was no risk of expropriation at the time of
57 purchase, then you must go with Mr. Hedden's
58 valuation.
59 But if you were to go with Mr. Hedden's
60 valuation you would need to consider his valuation in
61 light of all the circumstances and criticisms that
62 Mr. Kaczmarek has identified in his two Reports,
63 including that Claimants failed to provide the sale
64 and purchase agreements for the affected Lots, the
65 fact that the FTI's appraisals were inconsistent with
66 the market trends, the fact that Claimants' severance
67 damages claims are calculated is difficult to
68 understand and appears may well be overvalued, and,
69 indeed, the failure to provide a complete transparency
70 with respect to his calculations. As you will recall,
71 in the cross-examination or in the presentation of
72 Mr. Hedden's slides, he included information about
73 assumptions that he was making he had not yet revealed
74 to the Parties and to the Tribunal.
75 It may also be useful at this point to
76 consider what to do if you were to award damages to
77 Claimants. We, of course, do not believe that the
78 Tribunal ever needs to reach this point, but in case
79 you do, we believe the following steps would need to
80 be taken.
81 First, the Tribunal will need to determine
82 the Fair Market Value for each of the 24 Lots at issue
83 in this proceeding, to the extent that you were to
84 find that they each need to be valued and awarded
85 damages.
86 Second, the Tribunal will need to determine
87 the amount of each Party--that each Party in the
88 expropriation proceeding has already received, so you
can reduce that amount from the payments that have already--that--for the damages that are being requested.

Third, the property owners would need to transfer title to the State.

And, finally, all domestic expropriation proceedings with respect to these properties at issue would need to be discontinued in some way or another. And also, with respect to colones, they are requesting colones--and the payment in colones, and, therefore, we would need make that calculation as to the amount of colones that would be due.

So, there are a number of steps that would need to happen. And with respect to interest, during cross-examination of Respondent's Damages Expert, Mr. Kaczmarek, Claimants' counsel asked Mr. Kaczmarek why he had calculated a simple rate of interest, when in other cases in which he had been an expert he had indicated that compound interest was applicable.

Well, Mr. President, Members of the Tribunal, this is a rather surprising question coming from Claimants' counsel, as it is in their Memorial on the Merits at Paragraph 328. According to Mr. Kaczmarek, who referred to an official Costa Rican Government Web site that provides a proper calculation of interest under Article 1163 of the Civil Code, that Web site calculates a simple, not compound interest, as Claimants advocate. Thus, having selected this source for the purpose of the calculating interest to be added to Claimants' damages calculation, Claimants cannot now seek a greater amount because they believe that they will receive more in interest by compounding the interest semiannually.

And that is all that I have with respect to damages. I think Mr. Alexandrov has some concluding remarks.

PRESIDENT BETHLEHEM: Thank you.

Mr. Alexandrov.

Mr. Alexandrov: Thank you, Mr. President.

Mr. President, just two points that I would add to Ms. Haworth McCandless' presentation on damages. Article 10.7, Paragraph 2(c), requires, as I think Mr. Kantor pointed out--or if I misremember I apologize--but it requires that the compensation shall not reflect any change in value occurring before the intended expropriation had become known earlier. And obviously if there's an expropriation, this provision has to be complied with.

In compliance with that provision, we assume Claimants have instructed Mr. Hedden, their Damages Expert, to value all property as of May 27, 2008. He admitted that it was on this date that the Constitutional Chamber of the Supreme Court issued its decision holding that the 125 meters run inland rather than seaward. And, therefore, this is the assumption made by Claimants as to when the expropriation took place, and obviously we've discussed the significance of that date for jurisdictional purposes.

And this question was, I think the President probed with Mr. Hedden this matter, and I'm not going to elaborate on it further other than to say this shows also the understanding that Claimants had of what was the date of the expropriation and all the consequences in relation to jurisdiction that flow from that.

I think the other relevant point for damages is that, as Mr. Hedden admitted and Ms. Haworth McCandless stated, he calculated damages and, therefore, Claimants calculated damages only in the event of an expropriation. So, you're not equipped to consider damages if you come--what we consider would be a very long way--to a conclusion that other provisions of CAFTA have been breached. And in the context of expropriation, there was an exchange, I think, between Mr. Kantor and counsel for Claimant on the--could it be--I'm summarizing and, I apologize, it may be a little bit liberal because I don't have the--a transcript in front of me--but the question was is it possible that the date of valuation be after the expropriation, let's say at the time of the Award.

And I think our answer to that is it may be possible in some cases of expropriation where the Tribunal finds that the expropriation doesn't meet other conditions in addition to the nonpayment of
prompt, adequate, and effective compensation, such as, for example, public purpose, nondiscriminatory, et cetera, and that one case that comes to mind is ADC versus Hungary where the Tribunal found that the expropriation was arbitrary and otherwise unlawful, in addition to the fact that compensation had not been paid, and decided that because of historic reasons, the value of the property in that case and airport terminal had increased between the time of the expropriation, the time of the Award, to pay--to value the Concession at the time of the Award.

Obviously this is not the case here. Again, as I discussed, there is no question that whatever measures Costa Rica took were for a public purpose and, therefore, any variation of the date as of which the value of property should be valued should not be permissible. There is no such a concept in relation to other breaches, so, to the extent that we're talking about breaches of other provisions of the Treaty, the date of the breach is the date as of which the property should be valued.

And let me now conclude by saying on behalf of Costa Rica, we ask that you dismiss all claims for lack of jurisdiction on the grounds of lack of temporal jurisdiction that we have discussed. In the alternative, if you reach issues of liability, we ask that you conclude that Costa Rica has not breached any provision of CAFTA.

If you come that far and conclude that there is a breach, we ask that you don't award damages because no proper damages have been calculated, and the reason is very simple. Mr. Hedden and generally Claimants are calculating damages on the basis of the fact that the property was not within a park, and, therefore, the value of that property should not be discounted by what has been called here a "risk factor;" in other words, the possibility that it might be one day expropriated.

The facts as we've shown you are very different. And if you conclude that Claimants did have knowledge and, therefore, the purchase of the property did include a risk factor that the property one day might be expropriated, and that obviously had an effect on the value of the property at the time it was purchased, Mr. Hedden has not performed those calculations for you, and you cannot rely on his damages reports unless you conclude, which in our view is extremely unlikely, that Claimants had no knowledge and their purchase did not reflect the fact that the property was within the Park and was, therefore, at a minimum at risk of being expropriated or otherwise its use and enjoyment were restricted.

And finally, Mr. President, Members of the Tribunal, we do ask for costs and fees. Article 42(1) of the UNCITRAL rules provide that the cost of the arbitration shall in principle be borne by the unsuccessful Party or Parties. And so, if you rule in favor of Costa Rica, we respectfully request costs and attorneys' fees. Counsel for Claimants focused on the sentence that follows, which says that the Tribunal may do differently, taking into account the circumstances of the case. Our argument is that if you take into account the circumstances of the case, you should--you will have a stronger basis to award Costa Rica cost and fees.

PRESIDENT BETHLEHEM: Thank you very much, Mr. Alexandrov, Ms. Haworth McCandless.

That brings the closing submissions of both Parties to an end. I'm going to ask for the indulgence of everyone. I don't think it's going to be necessary for the Tribunal to, as it were, rise for half an hour to consider the closing formality issues.
<table>
<thead>
<tr>
<th>Time</th>
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<tr>
<td>05:34:06</td>
<td>But we'll just go off the microphone, off the record just for a few minutes just to confer. (Brief recess.)</td>
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<td>05:36:54</td>
<td>But on very narrow points. We've concluded that we</td>
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<td>05:38:10</td>
<td>invitation for you to address issues of fact relating to the proceedings. Really simply to engage with the issues of law and interpretation that were set out in the submissions of the nondisputing parties.</td>
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<td>05:39:33</td>
<td>really an invitation to you to proceed in agreement. Third issue, we would like--the Tribunal would like to be informed of any factual development in relation to the issues engaged in these proceedings without any annotation or argumentation. For example, if there is a new Decree or new declaration of Public Interest, the publication of a study on the Contraloría Report, or anything of that nature, we would like to be informed of that through the Tribunal Secretary. As I say, without any annotation or argumentation. If the Tribunal considers that it's necessary to be further informed, we will give both Parties an opportunity to comment.</td>
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We've had an opportunity to reflect on the issues, both during course of this week and today, and have concluded the following.

First of all, the Tribunal has concluded that, in fact, we would like to present the Parties with an opportunity to file Post-Hearing Submissions, but on very narrow points. We've concluded that we would like to have Post-Hearing Submissions amounting to observations on the issues of law and interpretation that were addressed in the submissions of the nondisputing parties. That's it. Issues of law and interpretation addressed in the submissions of the nondisputing parties.

And we've got some constraints relating to those Post-Hearing Submissions. First of all, we would like those to be not more than 30 pages. We are not going to prescribe the point form or the size of the margins, but we certainly don't expect that they come with a magnifying glass. So, we expect, you know, something around a normal submission, but if you want to do that in single space or double space, that is a matter for you, but not more than 30 pages.

We would like those on or before Monday the 18th of May, close of business EST, Monday, the 18th of May, and to be communicated by each Party separately to the Tribunal Secretary, and the Tribunal Secretary will then send each submission on to the other Party and to the Tribunal. So, this is not an

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One further point to draw to your attention by way of the transparency of the Tribunal's thinking—and let me again enjoin you not to try and read the tea leaves as to where we're going because we don't yet know where we're going—we have various issues to consider going to jurisdiction and to liability, and we have not formulated our view. We have, however, preliminarily—and I emphasize preliminarily—concluded that if we are with the Claimant on jurisdiction and on any issue of liability, we are likely to require additional evidence and, perhaps, submissions on the issue of damages, because that may very well be contingent on any findings of fact that we come up with. So, this is simply to put you on notice that we don't at the moment feel that we are in a position to address comprehensively the issue of damages. That may change, so, it's simply putting down a marker so that nothing takes you by surprise in due course.

Now, I note that Paragraph 25(1) of the Procedural Order says the Tribunal shall thereafter at an appropriate point declare the hearings closed, and that Article 31(2) of the UNCITRAL Rules says the Arbitral Tribunal may, if it considered it necessary owing to exceptional circumstances, decide on its own initiative or upon application of a Party to reopen the hearings at any time before the Award is made.

Now, notwithstanding Article 31(2), I'm not declaring the hearing closed at this stage. We've got further submissions to come from you that we will address in due course. I think the only other point to come from me is really a point of thanks, which I will give in just a moment. But before I do so, let me just give an opportunity to both Parties to raise any issue in the light of what I've just said that they would like to raise.

Mr. Cowper.

MR. COWPER: One point which is, I hope small, but most of the members of the Claimants' team are starting other hearings on Monday. Ms. Cicchetti gets to fly back to her four-year old tomorrow and starts a two-week hearing here on Monday morning. A privilege, no doubt. I have to go to other things.
the other one 30 pages, that may seem to be unfair.

So, if the Tribunal allows us that flexibility, we may seek to reach a different agreement. If we don't, we'll stick with the 30 pages.

PRESIDENT BETHLEHEM: Well, Mr. Alexandrov,
I'd invite you to do so. Let me just illuminate,
perhaps a little bit more why we have requested these Post-Hearing Submissions. It's not simply because we felt that from the Friday night when the two nondisputing parties put in their written submissions or on the Tuesday morning when El Salvador made its oral statement that you didn't have an adequate time to respond. It's because we feel we would like to hear the Parties more explicitly on the issues addressed in the nondisputing parties' Post-Hearing Submissions. So, this is not an invitation to you to, as it were, crystallize your thinking. It's an invitation to you to inform us better than we think we've so far been informed about those issues.

MR. ALEXANDROV: Thank you. With respect to the costs submission template, I assume the date is also moving to 25 May, which is fine with us.

PRESIDENT BETHLEHEM: Yes, indeed.

MR. ALEXANDROV: I also assume that this date relates to an agreement on the template rather than the actual submissions.

PRESIDENT BETHLEHEM: Yes, indeed. That would be the agreement on the template and then thereafter we would invite you to fill in that template if you can reach agreement. If not, we'll prescribe the template and invite you to do so.

MR. ALEXANDROV: And just to confirm, the cost submissions would not include arguments as to why costs should be paid to one or the other Party, but simply a statement of what costs and fees were incurred?

MR. COWPER: I'm sorry I'm leaving, because I was thinking I was understanding the conversation till that moment. I thought that the request was for a template and not a filled-in template. But maybe I misunderstood.

PRESIDENT BETHLEHEM: By the 25th, if that's going to be the date, it will be for a template. And we will then invite you to fill in that template. I think we've had submissions from both Parties on the costs that you are both seeking, so this is a quantification of costs exercise rather than an argument of costs exercise.

MR. ALEXANDROV: Mr. President, I apologize for the misunderstanding. I was asking about the actual submission that will come later, and I wanted to make sure, which is our desire, that we don't present argument as to why costs should be paid but simply a statement of what the costs are. And the reason I'm asking that question now is obviously that will reflect on the template.

PRESIDENT BETHLEHEM: Yes, indeed.

MR. ALEXANDROV: And then, perhaps, our final point is if the Tribunal will require—or you mentioned the Tribunal may require additional submissions in whatever form on updates and, perhaps, other matters such as costs. We will then ask that any cost submissions be made as a last step when we know what costs have been incurred through those additional steps that the Tribunal may require us to perform.

PRESIDENT BETHLEHEM: Well, Mr. Alexandrov,
we'll take that as well under advisement, under consideration, and when the Tribunal comes back to both Parties and asks you to fill in that cost schedule, we'll indicate. It may be, whatever the outcome in due course, that it's going to be useful to have a quantification of costs up until the 25th of May to crystallize those costs.

MR. ALEXANDROV: Mr. President, then, I'm now a little bit lost. I understood that by the 25th of May, we are agreeing and providing to the Tribunal an agreement on the template, not the actual costs submission. And I was asking about the actual submissions that will be made in compliance with that template and whether they can be made after the other steps are taken so that we can we deflect the costs associated with those steps.

PRESIDENT BETHLEHEM: Let me try and capture it as I think the Tribunal has it in its collective mind. By the 25th of May, we would expect to have the Post-Hearing Submissions as we've described them. We would also expect and hope that we will have an...
agreement on a cost schedule. Thereafter, the Tribunal will come back to the Parties and invite the Parties to complete that cost schedule. The completion of that cost schedule will relate to the quantification of costs up until the point at which the cost schedule is due to be completed.

MR. COWPER: Sorry, Mr. President. I don't want to extend, but on a related matter, I thought we should, while we're all happily gathered together and, of course, fresh as daisies, just address the question of the update. And I have a procedural suggestion, to avoid any controversy, is that in the event that either Party seeks to advance an update and that invitation, that the other Party have advance notice and an opportunity to comment with-between Parties only, so that nothing immediately be sent to the Tribunal. That is a procedural suggestion which I think is, particularly in the context of the present case, a helpful one.

I also wanted to observe that it does refer back, of course, to the Application that the Claimants had made to update the record of the proceedings with respect to some of the Lots. And I think where we are at present is that in the course of the Respondent's cross-examination, the substance of those documents are all solicited or from, I believe, Ms. Chavez, or otherwise, and so, I'll just leave this request on the record. I think those are updated documents which ought to be received by the Tribunal, and I invite my friend to agree with that. But otherwise, those are updates which we have, actually, presently in hand. Otherwise, I think I'd suggest the general procedure be adopted going forward.

PRESIDENT BETHLEHEM: Unless Mr. Alexandrov—well, let me invite Mr. Alexandrov to respond to your suggestion as regards the seven documents, if I recall correctly.

MR. ALEXANDROV: Mr. President, when you communicated to us the Tribunal's desire to allow updates if such updates are necessary, you said without annotations and without argument. We understand the point "without argument." Perhaps you could clarify what you mean when you say "without annotation." Do you mean that you want a narrative of an update without documents? Or you want documents without narrative, which may or may not contain arguments? We're not sure what the form or the format would be of such updates.

PRESIDENT BETHLEHEM: In the first instance, let me make it clear that what we are not seeking at this stage is any updated information relating to valuation, because, of course, we've indicated that, if at all, we're going to need that later.

Mr. Cowper, I don't have directly in mind the detail of your seven documents, but my recollection is that you wanted to submit them because they were relevant to valuation. And indeed, Mr. Alexandrov, your application in respect of the one document that was refused, the way that you put it was that this was directly relevant to valuation. So, we don't--are not soliciting those types of documents. I think what we are trying to avoid, and Mr. Cowper, I take absolutely your suggestion that this would be usefully first handled by an exchange between the Parties themselves rather than to the Tribunal directly, what we would like to avoid or ensure is that the Tribunal is informed of any development in relation to these Lots which may have a bearing on any decision that we make. For example, we are aware that there are a number of Lots that have not so far been subject to a Declaration of Public Interest. It may be—and I'm not doing anything other than speculating—but it may be that the Tribunal considers that the fact of a Declaration of Public Interest is important. What we don't want to do is that we are putting a signature on the bottom of a page of an Award only to find out that the day before there was some material development.

So, this is not an invitation to you, to either Party to continue your submissions in respect of any document, but rather to draw to the Tribunal's attention material developments of fact. And I'm quite content to leave it to the two Parties to have an inter partes discussion as to whether it's a matter that ought to be drawn to the Tribunal's attention. If you have a dispute, no doubt, you will come to us about that. But I think that's the most that we can say at the moment.

Mr. Alexandrov.
MR. ALEXANDROV: Mr. President, thank you for that clarification, and we accept the offer to confer with the other Party should such a situation arise, and obviously if there is a dispute about what should be provided to the Tribunal and how and when you will hear about it.

In relation to the documents that Claimants sought to introduce into the record at the end of last week, they withdrew that request, and any request to introduce those documents because they are relevant as updates, therefore, should follow the procedure that we just discussed. In other words, we should be approached and there should be a discussion about whether those are updates, what are they updating and so on and so forth. So, those documents that were withdrawn, if they want to reintroduce them, then we propose to follow the procedure that we just agreed to.

PRESIDENT BETHLEHEM: Yes, indeed. And again, to try and clarify a little bit further, if this is necessary, and we’ve been told throughout this hearing that there are documents that, for example, are published on various Web sites of the Costa Rican Government or elsewhere. That’s the kind of information that we would like to ensure is brought to our attention. So, we are not inviting the Parties to continue a process of repeating submissions to us through documents. It’s really factual submissions--factual developments--that we may wish to take account of.

MR. ALEXANDROV: Understood.

PRESIDENT BETHLEHEM: Thank you very much.

Anything else? Mr. Cowper?

MR. COWPER: No, Mr. President. Thank you for your patience and thank you for the week.

PRESIDENT BETHLEHEM: Well, I think it’s really my happy duty to give the thanks. And I’m going to start giving the thanks briefly with the most important people, the interpreters and the court reporters, so, thank you very much, indeed. It is often challenging to have a hearing in more than one language, and we appreciate very much the indulgence and assistance of the interpreters and the court reporters.

And we’ve noticed some lovely typographicals in the LiveNote as it’s been developing, and it’s a pity we can’t capture those lovely typographicals, but thank you very much.

I’d also like to thank the nondisputing parties for their written submissions. In the case of El Salvador, for its oral submission as well, and for your attendance at the back of the room. Your participation is very much appreciated.

And I’d like to both thank and commend the Parties’ counsel and Experts for your extremely courteous, thorough, thoughtful, well addressed submissions which have helped us immeasurably.

As a footnote, I don’t for the life of me see how we could have done this in less than five days, but that’s another matter entirely.

And I’d also like to close. I take it--you can take it for granted that this comes from the Tribunal and the Tribunal Secretary, all of these thanks as well--but I’d just like to close with a note or an acknowledgment both to Claimants personally and to the representatives of the Government, Government officials. I think amongst the lawyers, and I include the Tribunal, members and counsel, we appreciate very much how difficult it can be to see the issues with which you are dealing with at a personal level come before an international Tribunal in these circumstances and in a public fashion. So, we very much appreciate your assistance and your indulgence with us this week in assisting us in reaching what we hope will be a considered judgment in due course. So, thank you very much.

As I said, I’m not declaring the hearings closed. I’m simply adjourning the hearings and declaring this phase of the proceedings closed. And safe travels to everyone. thank you very much indeed. (Whereupon, at 5:58 p.m., the Hearing was concluded.)
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