

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

- - - - - X
 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, : ICSID Case No.
 and GLEN GREMILLION, : UNCT/13/2
 :
 Claimants, :
 :
 and :
 :
 REPUBLIC OF COSTA RICA, :
 :
 Respondent. :
 - - - - - x Volume 1

HEARING ON THE MERITS AND JURISDICTION

Monday, April 20, 2015

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

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

SIR DANIEL BETHLEHEM, QC, President of
the Tribunal

MR. MARK KANTOR, Co-Arbitrator

DR. RAÚL E. VINUESA, Co-Arbitrator

Also Present:

MS. GIULIANA CANÈ
Secretary to the Tribunal

Court Reporters:

MS. DAWN K. LARSON
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

MS. MARTA RINALDI
MS. ELIZABETH CICORIA
D.R. Esteno
Colombres 566
Buenos Aires 1218ABE
Argentina
(5411) 4957-0083

Interpreters:

MS. JUDITH LETENDRE

MS. STELLA COVRE

MR. CHARLIE ROBERTS

APPEARANCES:

On behalf of the Claimants:

DR. TODD WEILER
#19 - 2014 Valleyrun Boulevard
London, ON N6G 5N8
Canada

MR. GEOFFREY COWPER, QC
MS. TINA CICCHETTI
MS. TRACEY COHEN
MS. ALEXANDRA MITRETODIS
Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C0A3
Canada

LIC. VIANNEY SABORÍO HERNÁNDEZ
SaboríoLaw
Barrio Maynard #56
San Rafael, Escazú
San José, Costa Rica

Claimants and Claimants' Representative:

MR. ROBERT REDDY

MR. BOB SPENCE

MR. RONALD COPHER

MR. BRETT BERKOWITZ

APPEARANCES: (Continued)

On behalf of the Respondent:

MS. GEORGINA CHAVES
Procuraduría General de la República

MR. STANIMIR A. ALEXANDROV
MS. AVERY ARMACHAMBO
MS. MARÍA CAROLINA DURÁN
MS. JENNIFER HAWORTH MCCANDLESS
MS. COURTNEY HIKAWA
MR. CALEB RASPLER
MS. SAMANTHA TAYLOR
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005
United States of America

Representing COMEX:

MS. ADRIANA GONZÁLEZ

MR. JOSÉ CARLOS QUIRCE

MS. KARIMA SAUMA

MS. ANDREA ZUMBADO

APPEARANCES: (Continued)

On behalf of the United States of America:

MR. JEREMY K. SHARPE
Chief, Investment Arbitration,
Office of International Claims
and Investment Disputes
MS. NICOLE C. THORNTON
MS. ALICIA L. CATE
MR. GARY SAMPLINER
Attorney-Advisers,
Office of International Claims and
Investment Disputes
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800
United States of America

On behalf of the Republic of El Salvador:

MR. LUIS A. PARADA
MS. ERIN ARGUETA
Foley Hoag LLP
1717 K Street, N.W.
Washington, D.C. 20006-45350
United States of America

C O N T E N T S

PAGE

PRELIMINARY MATTERS: 7

OPENING STATEMENTS

ON BEHALF OF THE CLAIMANTS:

By Mr. Cowper 23

ON BEHALF OF THE RESPONDENT:

By Mr. Alexandrov 94

By Ms. McCandless 154

CLAIMANTS' REPLY ON JURISDICTION:

By Mr. Weiler 187

PROCEDURAL MATTERS: 214

P R O C E E D I N G S

1 PRESIDENT BETHLEHEM: Ladies and gentlemen,
 2 welcome. I'm Daniel Bethlehem presiding in these
 3 proceedings. I'll invite everyone, the Tribunal and
 4 the Parties, to introduce themselves in just a moment.
 5 Let me just begin with one or two, as it were,
 6 pre-housekeeping announcements so that we've got
 7 everything in order.
 8 I'd just like to note that the Hearing is
 9 being webcast, so both audio and video are on at the
 10 moment, and they will remain on until we are told that
 11 they are off. So just a reminder that everything is
 12 being picked up and being broadcast.
 13 Let me remind Claimants that one of your
 14 Witnesses is sequestered, and you should take all
 15 necessary steps, as I imagine you have done, to remind
 16 him that he should not view the proceedings or discuss
 17 the proceedings or his testimony in advance of his
 18 testimony tomorrow.
 19 I note, just as a pre-housekeeping matter,
 20 that the Tribunal has not been notified of any
 21 protected information that requires protection from
 22

10:31:19 1 disclosure in accordance with Paragraph 23.6 of
 2 Procedural Order Number 1. If that is incorrect,
 3 please make sure that you draw that to the attention
 4 of the Tribunal's Secretary, Giuliana Canè, as soon as
 5 possible. We don't want to inadvertently stumble into
 6 issues of protected information in the course of the
 7 proceedings.
 8 I also note--and after this I'll turn to the
 9 introductions--that these proceedings are being
 10 simultaneously translated, simultaneously interpreted.
 11 So please do have regard to the interpreters and speak
 12 at a pace that is--that they can manage. They will
 13 draw our attention to anyone who is speaking too fast
 14 or, for that matter, too slowly, just to ensure that
 15 everything is being managed properly.
 16 I think, with that, I would like to go
 17 through the introductions and, first of all, to call
 18 on my colleagues to introduce themselves. Mark
 19 Kantor.
 20 ARBITRATOR KANTOR: Thank you. I'm Mark
 21 Kantor from Washington, D.C. I do have an apology to
 22 make. I will be chewing gum throughout the entirety

10:32:28 1 of these proceedings or using throat lozenges. I've
 2 unfortunately developed a bit of a swallowing problem,
 3 and the gum alleviates, mitigates, that problem. It
 4 does not mean I'm being disrespectful to any of you.
 5 It also does not mean I've reverted to being a
 6 16-year-old.
 7 PRESIDENT BETHLEHEM: Raúl Vinuesa.
 8 ARBITRATOR VINUESA: Good morning, everyone.
 9 I'm Raúl Vinuesa from Argentina.
 10 PRESIDENT BETHLEHEM: And our Tribunal
 11 Secretary, Giuliana Canè.
 12 MS. CANÈ: Hello, I'm Giuliana Canè.
 13 Two points on this. You have on Channel 1,
 14 the English translation; and Channel 2 on this, the
 15 Spanish one. Remember to bring to me or to the
 16 interpreter any presentation or document you want to
 17 have in the record so they can be facilitated and to
 18 speak to the microphone and to switch off the
 19 microphone when you're off. Thank you.
 20 PRESIDENT BETHLEHEM: Mr. Cowper, would you
 21 like to introduce the Claimants?
 22 MR. COWPER: Yes, thank you. Mr. President,

10:33:25 1 Members of the Tribunal, my name is Jeff Cowper, and
 2 I'm counsel for the Claimants with other members of
 3 the team, who I'll introduce in a moment.
 4 I did want to say that it's a particular
 5 honor to complete this proceeding in this year, which
 6 is the 50th anniversary of the ICSID Convention, and
 7 many of us gathered earlier in this year to honor that
 8 anniversary. It's a particular honor, though, to be
 9 able to complete an investor-State dispute this year.
 10 My clients are present, either in person with
 11 their families or by webcast, and I wanted to thank
 12 you, Members of the Tribunal, for making that
 13 available to them.
 14 I wanted, as well, simply to note that this
 15 overall exercise we're engaged in from the perspective
 16 of the Claimants is enhanced by its public
 17 transparency and the availability of members of the
 18 public to see the webcast, and so we thank you for
 19 that. And, in advance, the Claimants would like to
 20 thank you for your service. I believe in the earlier
 21 Convention someone commented on investor-States
 22 bringing the rule of law to the globalization

10:34:40 1 phenomena and being a civilization-making exercise.
 2 Those are challenging terms for the professional
 3 community to fulfill. We'll do our best this week to
 4 merit that challenging note. And we note and respect
 5 the fact that they're also uncomfortable proceedings
 6 for States such as Costa Rica, and we will try in our
 7 submissions and through our evidence to respect Costa
 8 Rica in its efforts to deal with not only these
 9 claims, but the very many challenges that every State
 10 confronts in these times.
 11 So, with that, Mr. President, I've already
 12 indicated myself. To my immediate right is Tina
 13 Cicchetti, who is a partner in the firm of Fasken with
 14 me. To her immediate right is Dr. Todd Weiler, who is
 15 well-known in this field. And to his right is an
 16 associate of our office, Alexandra Mitretodis. To her
 17 right is Ms. Tracey Cohen, who is a partner in our
 18 office. At the end of the, if I may say, the battery
 19 of Claimants' counsel is Mr. Vianney Saborío. And let
 20 me use that moment to apologize for the rest of the
 21 week for my pronunciation of anything that looks or
 22 sounds Spanish. So, I hope that's a generic enough

10:36:05 1 apology that I don't have to repeat it too often in
 2 the coming days.
 3 Let me just say, while I'm doing the
 4 introductions, so the Members of the Tribunal know,
 5 you're going to be hearing from more counsel than me
 6 this week. And, in general, so you have in your
 7 minds, Ms. Cohen is going to be taking damages.
 8 You're going to be hearing largely from Dr. Weiler
 9 with respect to international law and investor-State
 10 technical issues, and you'll be hearing primarily from
 11 me with respect to the factual issues, and I will take
 12 the lead generally.
 13 So, that is more of an extended introduction
 14 than you, perhaps, anticipated, but that's Claimants.
 15 PRESIDENT BETHLEHEM: Are there any other
 16 members of your, as it were, attending representation
 17 that you would like to introduce?
 18 MR. COWPER: I think I'll just generally note
 19 the attendance of the Claimants and their members of
 20 the family. I won't go down, given the number, to
 21 identify them for present purposes.
 22 PRESIDENT BETHLEHEM: Thank you.

10:37:03 1 Mr. Alexandrov.
 2 MR. ALEXANDROV: Mr. President, I'll
 3 introduce the members of the team including the Party
 4 representatives and the client, but we would like to
 5 put a name to the face. Could we ask our colleague to
 6 introduce everybody in the room, please?
 7 MR. COWPER: People, are going to have to
 8 move out of their way.
 9 So, the person immediately to the right of
 10 Vianney is Mr. Brett Berkowitz. To his right is
 11 Mr. Bob Reddy, and I believe behind him is Mr. Ron
 12 Copher, and behind him is Mr. Bob Spence, and to the
 13 right of Mr. Bob Spence is his wife Marsha. And
 14 finally, the final individual is Joshua Copher, the
 15 son of Ron Copher.
 16 PRESIDENT BETHLEHEM: Thank you.
 17 MR. ALEXANDROV: Thank you, Mr. President.
 18 I will introduce Respondent's side in the
 19 order in which they sit at the table for ease of
 20 reference. Jennifer Haworth McCandless of Sidley
 21 Austin, María Carolina Durán of Sidley Austin, I'm
 22 Stanimir Alexandrov of Sidley Austin, Courtney Hikawa

10:38:06 1 of Sidley Austin.
 2 And then we have the representatives of the
 3 Government of Costa Rica: Adriana González, Karima
 4 Sauma, Andrea Zumbado, Georgina Chaves, Julio Jurado,
 5 Rotney Piedra. And then we have Andrew Preston, who
 6 is actually not present at the moment, but he was here
 7 a moment ago, from Navigant Consulting.
 8 PRESIDENT BETHLEHEM: Thank you very much.
 9 Let me invite the nondisputing parties, who
 10 are sitting so far at the back of the room that I
 11 require a telescope to see you, but just to introduce
 12 yourselves.
 13 For El Salvador.
 14 MR. PARADA: Luis Parada. Good morning,
 15 Mr. President, Members of the Tribunal. My name is
 16 Luis Parada, and with my colleague, Erin Argueta, we
 17 are representing El Salvador as a nondisputing party
 18 in this arbitration. Thank you.
 19 PRESIDENT BETHLEHEM: Thank you very much.
 20 For the United States as well.
 21 MR. SHARPE: Good morning, Mr. President,
 22 Members of the Tribunal. I'm Jeremy Sharpe from the

10:39:35 1 Office of the Legal Adviser at the Department of
 2 State. I'm here with my colleague, Nicole Thornton,
 3 also from the Legal Adviser's Office. It's a pleasure
 4 to be here. Thank you.
 5 PRESIDENT BETHLEHEM: Thank you very much.
 6 And I simply note for all of our attention in the room
 7 that we've got two written submissions from
 8 nondisputing parties from El Salvador and from the
 9 United States. El Salvador has already indicated that
 10 it wishes to make an oral submission, and the Tribunal
 11 has agreed that should come tomorrow morning.
 12 To the United States, I would invite you by
 13 the close of play today to indicate to us whether you
 14 would also like to make an oral submission as you
 15 would be entitled to do so, and that would then follow
 16 tomorrow morning as well.
 17 MR. SHARPE: Thank you very much.
 18 PRESIDENT BETHLEHEM: Thank you.
 19 A number of other housekeeping matters before
 20 we proceed to the substance. Publication of pleadings
 21 on the ICSID Web site, I think we've addressed--the
 22 Tribunal has addressed this to the Parties in

10:40:28 1 correspondence. We were hoping that we would get a
 2 response from the Parties at the start of these
 3 proceedings, whether you have any objections or not.
 4 I don't invite you to make any objections at
 5 this point, but, perhaps, you could signal that to the
 6 Tribunal's Secretary during the course of the break.
 7 The Tribunal would like to facilitate transparency
 8 insofar as the Parties do not have any objection.
 9 We note that Costa Rica has already published
 10 the pleadings on the Government Web site, although not
 11 the annexes. At the moment, I think--Giuliana, you
 12 can tell me whether there is a link to the Costa Rican
 13 Web site on the ICSID --
 14 MS. CANE: Not yet.
 15 PRESIDENT BETHLEHEM: Not yet. So there is
 16 no indication of pleadings on the ICSID Web site, but,
 17 subject to the views of the Parties, we would like to
 18 do so. So, if you could inform the Tribunal Secretary
 19 in due course if you are content with that.
 20 MR. COWPER: Well, I don't need time. That
 21 is satisfactory to the Claimants.
 22 MR. ALEXANDROV: Mr. President, no objection

10:41:27 1 on behalf Costa Rica either.
 2 PRESIDENT BETHLEHEM: Let me just be sure I
 3 understand, that relates to annexes, all the other
 4 submissions that the Parties have put in?
 5 MR. COWPER: Yes.
 6 PRESIDENT BETHLEHEM: Thank you. ICSID will
 7 turn to that as quickly as possible. Thank you very
 8 much.
 9 Did you have--sorry, Mr. Alexandrov.
 10 MR. ALEXANDROV: No. I was just going to
 11 confirm. And by the way, when you say "annexes," we
 12 refer to them as "exhibits." If that's what you mean,
 13 Mr. President, we have no objection to publishing the
 14 record of this proceeding.
 15 PRESIDENT BETHLEHEM: Yes, I was being
 16 generic. I think there are some appendices, there are
 17 some annexes. There is quite a lot of documentation
 18 that we see on the wall over there and that we've all
 19 got in our systems, but if you are content for all of
 20 that to be put on the Web site--
 21 MR. ALEXANDROV: No objection to publishing
 22 anything that's in the record.

10:42:12 1 PRESIDENT BETHLEHEM: Thank you very much,
 2 indeed.
 3 Let me, just for good housekeeping reasons,
 4 address the schedule of the hearing. Today, as we
 5 know from the Tribunal's correspondence with the
 6 Parties, we will have the Claimants' Opening this
 7 morning. We will then move to the Respondent's
 8 Opening this afternoon.
 9 Mr. Cowper, I would invite you, when you
 10 stand up, just to give us an indication of whether you
 11 intend to reserve a period of time for Claimants'
 12 Reply on Jurisdiction at the end of the day, simply
 13 for good housekeeping purposes, but that we'd already
 14 anticipated.
 15 Tomorrow, we will start with El Salvador as a
 16 nondisputing party with El Salvador's oral
 17 submissions. We await to hear from the United States
 18 whether it wishes the same facility.
 19 I should say at this stage that the Tribunal
 20 anticipates that we will have questions to put to the
 21 Parties in the light of your Opening this morning and
 22 this afternoon. We propose to raise some of those

10:43:15 1 questions, or the questions that occur to us of a
 2 general nature, after the nondisputing parties have
 3 made any oral submissions that they propose to do so
 4 tomorrow. And then to give you the opportunity,
 5 either or both, to give some immediate responses, if
 6 you'd like to give some immediate responses, or to
 7 save up those questions and to give responses as part
 8 of your Closing. But we thought it would be useful
 9 for you to have questions as early as possible.
 10 We will then, after those questions, move to
 11 the Claimants' witnesses of fact. Subject to issues
 12 of timing, on Wednesday we will then move on to the
 13 Respondent's witnesses of fact. Thursday is given
 14 over to the Expert evidence of both the Claimants and
 15 Respondents, and then on Friday we will have closing
 16 submissions.
 17 I imagine that there will be little issues of
 18 time management that we will have to address as we go
 19 along. We know both Parties have been given an
 20 equality of time, 12 hours apiece, to use as you think
 21 appropriate, subject to the guidance that we've given
 22 following consultation with you that we have a

10:44:33 1 2 1/2-hour period in Opening, a 2-hour period in
 2 response. Of course, any time that you use in
 3 response to questions from the Tribunal is our time
 4 rather than your time.
 5 We propose to break about halfway through the
 6 morning sessions and the afternoon sessions. I would
 7 invite counsel for the Claimants and the Respondent to
 8 indicate when would be a convenient time during those
 9 submissions to take a break.
 10 I'd like to remind you any procedural
 11 motions, applications, objections that you have that
 12 you can anticipate, please make them in a timely
 13 fashion. We'll give you an opportunity at the end of
 14 day, if there is anything you anticipate that you'd
 15 like to raise notably in respect the proceedings the
 16 following day, it would be helpful to have those as
 17 early as possible.
 18 Subject to anything that our Tribunal
 19 Secretary has to say, I think we will be getting
 20 transcripts at the end of the day. The Procedural
 21 Order addresses the time period within which you
 22 should be coming back with any corrections. I'd like

10:45:40 1 to, just for good order, invite the Parties to meet
 2 with the Tribunal Secretary at the end of every day
 3 just to ensure that there are no lingering
 4 difficulties over time allocation.
 5 Last point simply about questions from the
 6 Tribunal. I think we have concluded that we would
 7 like to be in a position to put to both sides
 8 immediately questions that seem to us to require
 9 clarification, immediate clarification, so we don't
 10 have any lingering uncertainty just in terms of our
 11 own understanding. But in terms of larger questions,
 12 we propose to save those up to the end of the two
 13 Opening submissions and then, as I suggested, to put
 14 those to you jointly, leaving you with the option of
 15 whether to reply then and there or to do so as part of
 16 your Closing.
 17 I think that's everything in terms of the
 18 formalities, unless either side has anything they
 19 would like to raise with us.
 20 Mr. Cowper, anything just in terms of the
 21 formalities that you'd like to raise?
 22 MR. COWPER: I just said, I'd like to start

10:46:47 1 my Opening, and nothing further by way of
 2 housekeeping.
 3 PRESIDENT BETHLEHEM: Thank you.
 4 Mr. Alexandrov?
 5 MR. ALEXANDROV: Mr. President, two points.
 6 Dr. Weiler signaled to me that our Experts from
 7 Navigant are now in the room, and I haven't introduced
 8 them. So, I'd like to introduce Mr. Kaczmarek, Brent
 9 Kaczmarek, and Mr. Andrew Preston, who are sitting at
 10 the end of the table.
 11 My second point is we have a pending
 12 application; and because opposing counsel suggested
 13 that they can start with the Opening, now I wondered
 14 whether you wanted to address that application before.
 15 PRESIDENT BETHLEHEM: Thank you,
 16 Mr. Alexandrov. That is my omission. I intended to
 17 address it. It was simply to say that we saw--we
 18 noted your application of last night. We saw the
 19 Claimants' response/objection to that application. We
 20 will come back to you during the lunch break with our
 21 decision.
 22 Thank you. I think then, without more ado,

10:47:35 1 Mr. Cowper, we return to you to kick us off.
 2 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS
 3 MR. COWPER: Thank you, Mr. President.
 4 Just by way of time allocation and to let you
 5 know how we have allocated our time, I will reserve
 6 30 minutes for Reply on Jurisdiction alone that will
 7 take place later in the day, and Dr. Weiler will
 8 address the question of jurisdiction. And for the
 9 purpose--as the Respondents bear the burden on both
 10 jurisdiction and the time bar within the Treaty, he'll
 11 be addressing both in Reply.
 12 I will also say in respect of questions, that
 13 in general, of course, there are questions which beg
 14 an immediate answer; and if I can give you an
 15 immediate answer, I will. If I defer to later, it
 16 will probably be as a consequence of knowing that my
 17 team will want me to make sure that I got it entirely
 18 right.
 19 So, don't take from my deferral that we don't
 20 have an answer or that I don't have an answer, but
 21 just given the allocation of responsibilities within
 22 the team I indicated earlier, we'll be fairly cautious

10:48:43 1 in permitting me to answer a question immediately.
 2 So, thank you very much.
 3 We have a PowerPoint; and pursuant to the
 4 Procedural Order, I have a PowerPoint I'd like to use
 5 for the purposes of our Opening. We have also
 6 provided a PowerPoint with the pinpoint references to
 7 the extent that they refer to the evidence or law
 8 references. The visual PowerPoint doesn't have those,
 9 so we'll file with the Secretary the references so the
 10 Tribunal will have those and my friend will have a
 11 copy of those.
 12 And I should also say, you invited me to
 13 stand, which is my normal posture in proceedings, but
 14 it's not convenient here, and I won't go to the center
 15 stage because my team wouldn't allow me to be that far
 16 away from them, I think. So, I believe the Opening is
 17 now being handed out. I'll wait a moment until I get
 18 the green light to proceed.
 19 (Comment off microphone.)
 20 MR. COWPER: Thank you, Mr. President.
 21 The first slide deals with, at the most
 22 general level, the Claimants' case. And by way of

10:50:43 1 Opening, we submit to you that the facts, which are
 2 already in the record and that you will hear by way of
 3 evidence this week, will establish that the Respondent
 4 has engaged in a consistent and ongoing refusal to
 5 honor its promise to foreign investors that, if their
 6 property is taken, the Fair Market Value of their
 7 property will be paid without delay.
 8 And I'll deal with this later, but in a case
 9 like this, it is important to define what is at stake.
 10 And let me say that we do not, of course, contest the
 11 right of Costa Rica to expropriate the Claimants'
 12 properties.
 13 We do call upon the State of Costa Rica to
 14 honor its promise as to how it will take properties
 15 and how and when it will compensate for them, those
 16 promises being embodied in the Treaty upon which the
 17 Claimants rely and in customary international law.
 18 The second point of general interest from a
 19 counsel point of view is that, in our submission--and
 20 we'll come back to this in our closing
 21 submissions--this is not a case involving novel
 22 questions of treaty law or novel questions of

10:52:02 1 international law. The Claimants' case calls upon the
2 core guarantees of international law, and in our
3 submission, you will not need to make any novel
4 conclusions of law in order to find in favor of the
5 Claimants.

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

17 And it's helpful for me to expand a little
18 bit on that and to say another matter, which the
19 Claimants do not contest, is the need for responsible
20 development in environmentally sensitive areas. None
21 of the Claimants ever anticipated, expected, or wanted
22 irresponsible development. Each of them saw the

10:53:15 1 proximity of the marine park as an asset to the value
2 and enjoyment of their property, both for themselves,
3 their families, and purchasers of the development that
4 was in mind.

5 And so, effectively what happened--and you'll
6 see this in greater detail--is that within Costa Rica
7 there was a spirited debate, which has a great deal of
8 detail about it, which is why we're taking five days,
9 in part, this week. But that debate was, "Ought you
10 to allow responsible development adjacent to the Park?
11 Ought you to define the parameters of the Park to
12 exclude the possibility of responsible development?"
13 The outcome of that has been concluded, but we say, in
14 essence, that the overall history is that it was
15 conducted with a view to delaying and avoiding the
16 liability to compensate for the properties that were
17 affected by the outcome of that debate.

18 In effect, that leads to my next general
19 point, which is, from a practical point of view, the
20 outcome for my clients was that their properties
21 became valueless, but the outcome of the debate, we
22 say, on a fair reading of the record, landed the

10:54:30 1 Government of Costa Rica with an unwelcome obligation
2 to compensate our clients. And like many Governments
3 confronted with an unwelcome fiscal obligation, they
4 have followed a variety of tactics and strategies to
5 avoid, minimize, delay, and defer the obligation to
6 compensate, and we say those are relevant, both under
7 the Treaty and under international law.

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

17 So, I'm speaking to Mr. Kantor, now, in this
18 respect. And I think the analogy with zombies is
19 appropriate. You know, a zombie is the half-dead,
20 suffering individual who isn't dead yet, but, to all
21 appearances, is useless. And that's exactly the
22 titles that our clients still have. They are half

10:55:49 1 dead. They haven't been killed because the property
2 has not been transferred to the State. They haven't
3 been compensated for, for the most part, and where
4 they have been compensated for, they haven't been
5 adequately compensated for. But they are still
6 around, so they still have to deal with the taxing
7 authorities, they still have to deal with the fact
8 that they still own these properties.

9 So, we stand today in an entirely
10 unsatisfactory stage and indeed--and I'm going
11 to summarize my friend's position--but my friend's
12 position, in general, appears to me, to be either that
13 these claims are out of date or premature, that the
14 titles we all have can't be the subject of a
15 proceeding because you have to wait, and the titles
16 which we don't have and which have effectively have
17 been gone are out of time, either by reason of the
18 Treaty period or limitation period we say neither is
19 true, and that the proper resolution is to bring an
20 end to their status of "zombie titles" to conclude
21 this unfortunate history by an appropriate declaration
22 of compensation, and, of course, as the Respondent has

10:56:57 1 requested and properly requires, a transfer of the
 2 title to Costa Rica to resolve the final issue. At
 3 that point, the expropriation process will be
 4 complete.
 5 Finally, by way of introduction, the
 6 Claimants, of course, are concerned that much of their
 7 experience with Costa Rica has been involved in the
 8 various Government agencies responsible for
 9 compensation using a variety of techniques to minimize
 10 and defer compensation. In this particular case, I
 11 brought to your attention from the beginning the
 12 unique quality of these properties because a great
 13 deal was at stake in the development of these
 14 properties, because they were unique, free title,
 15 beachfront properties on one of the most beautiful
 16 locations in the world. And that is what undergirds
 17 the claims and the quantum of the claims which have
 18 been claimed in these proceedings.
 19 So, if we could go to the next slide--and I
 20 promise you that the next 222 slides won't take me as
 21 long as the first slide. How did the Claimants come
 22 here? Well, let me summarize the situation for the

10:58:10 1 Cophers, Mr. Holsten, and Bob Spence. And I won't at
 2 this point ask you to make any notes because I'm going
 3 to draw a very general picture. But, in general, in
 4 2003, Ron and Brenda Copher, who were then in their
 5 mid-50s, were making plans for their retirement and
 6 they had been frequent visitors to Costa Rica, and
 7 they decided to spend part of a year in Costa Rica.
 8 If I can pause there, they are precisely the
 9 type of people Costa Rica wants to attract. They are
 10 well-off, well-to-do, successful individuals who want
 11 to enjoy the amenities of Costa Rica and to make it
 12 their home for part of the year. That was their goal.
 13 They began to investigate properties to build their
 14 dream retirement home.
 15 They purchased a home in Playa Conchal in
 16 which to live temporarily while they were doing that,
 17 and they fell in love with Playa Ventanas, which is
 18 the northern portion of the property at issue in this
 19 case, and which, of course, had, as you know, a
 20 secluded white beach, which at that point only had a
 21 few homes on it. Those Lots are accessible by a
 22 public road. It has an estuary on the opposite side,

10:59:19 1 and they regarded all of that as desirable, including
 2 the fact that there was a park adjacent to it. And
 3 they were told, as you'll see from the Witness
 4 Statement, that the Park went out to the sea. It was
 5 a marine park that went out to the sea.
 6 They also, by the way, when they were
 7 visiting the properties, were joined by their friend
 8 Bob Spence, who is another Claimant in these
 9 proceedings, and he had a similar goal in mind. And
 10 he ultimately, similarly, is a well-to-do individual
 11 who is very successful in business in the United
 12 States. He wanted to build a dream home, but he also
 13 saw the potential for an investment, a development,
 14 and a profit selling to similar people who had also
 15 been successful, would also see the potential for
 16 building dream homes, and would contribute to the
 17 general, frankly, huge success of Costa Rica in
 18 marketing itself as a safe, attractive, and enjoyable
 19 location for international people of means to come and
 20 spend part of their year.
 21 So, we'll get back later in that, but both
 22 the Cophers and Mr. Spence purchased properties in

11:00:34 1 2003 and following. And just to deal in general, they
 2 both proceeded to take steps to see what they could
 3 build. They hired--Mr. Copher hired an architect to
 4 draw up plans, to have an environmental impact
 5 statement prepared, and initially things went well
 6 until, of course, the very long delays--which we'll
 7 deal with in detail later--commenced.
 8 Mr. Reddy is the representative for Spence,
 9 the corporate entity of Spence involved, and Mr. Reddy
 10 has supplied Witness Statements, but he was very
 11 involved in locating the investments which were
 12 made--which form part of the claims here for the
 13 corporate defendant. And as you'll see from
 14 Mr. Reddy's Witness Statements, he was aware of the
 15 '90-'91 Park Decree--that wasn't a mystery--as well as
 16 the 1995 Park Law, which described the Park boundaries
 17 as being seaward from the main high tide. And some of
 18 the properties that were purchased were, of course,
 19 within the landward section of the high tide, which
 20 you'll see, as you know from the pleadings, ended up
 21 becoming the point of dispute.
 22 Just to draw to your attention at this time,

11:01:50 1 this was a place of great potential, and the debate,
 2 in part, was, how should that potential be realized?
 3 I'm going to skip a little bit to deal with
 4 Mr. Berkowitz's story because I think that bears on
 5 that. He had a history with Costa Rica. Earlier in
 6 his life, he was a surfer. He had suffered an injury
 7 as a chiropractor, not allowing him to continue with
 8 his profession, and so he decided to spend most of his
 9 time in Costa Rica, and in order to earn a living, he
 10 decided to be involved in building and residential
 11 development.
 12 He had seen, as a very attractive purchase,
 13 the parcels, many which are in issue in this
 14 proceeding, because a large subdivision and
 15 development had been proposed on those parcels and had
 16 been controversial, and the opportunity that he saw,
 17 which is explained in his Witness Statement, was of a
 18 low-density, high-end, selling-to-wealthy-individuals
 19 development, which would make use of the
 20 attractiveness of the--of being adjacent to the Park,
 21 make use of the fact that it was not a high-density
 22 development that has occurred elsewhere in the

11:03:08 1 country, and to take advantage of the general huge
 2 rise in the value of land and in the economic tourist
 3 potential of the northern part of Costa Rica, which
 4 arose, in part, because of the development of the
 5 airport in the north, in Liberia.
 6 He had a dream for a dream home as well, and
 7 he had an architect draw plans, and those plans
 8 included the types of things, which we have filed as
 9 evidence, are appropriate for properties which are
 10 adjacent to a turtle nesting site. They include
 11 architectural features to reduce the lights onto the
 12 beach. They include a voluntary setbacks from the
 13 property, they include fascia to block the shedding of
 14 lights.
 15 And I'll just pause here, and the reason that
 16 we filed Mr. Rusenko's Witness Statement, in large
 17 part, was to indicate that the responsible development
 18 that is spoken of by the Claimants here is not a pipe
 19 dream, and it's not an effort to, by indirection, have
 20 development which harms the nesting sites of the
 21 turtles. Rather, it actually represents the best
 22 thinking of how human beings can coexist with nesting

11:04:31 1 turtles. And as much as we're all concerned with the
 2 environment, we're also, of necessity, concerned with
 3 economy, as is Costa Rica, as were the Claimants. And
 4 their goal was to reconcile their economic dreams and
 5 aspirations, not only for the construction of highly
 6 valuable retirement homes for themselves, but also for
 7 resale of properties to others with similar dreams
 8 without contradicting the conservation goals of the
 9 marine park.
 10 Now, with respect to--I think I'll stop there
 11 in terms of the particulars, but, of course,
 12 Mr. Gremillion is another Claimant who purchased
 13 property and had a similar experience to Mr. Spence,
 14 the Cophers, Mr. Holsten, Mr. Berkowitz, and all of
 15 them experienced--and it's without question in these
 16 proceedings--a suspension of any right to develop and
 17 make use of their property as the years passed.
 18 So, that is intended to give you a little bit
 19 in a large international proceeding a perspective of
 20 the individuals involved and the fact that this case
 21 does not involve an international company. It doesn't
 22 involve an entity that is seeking to contradict the

11:05:58 1 public policy of a state or to influence public policy
 2 in any way other than to try to reconcile the stated
 3 goals of conservation and the desire to have
 4 responsible development alongside.
 5 So, if we could then go back--so, this is to
 6 orient you. This, of course, is the Guanacaste
 7 Region, is in the northwest of country, and this is
 8 within Guanacaste, and you'll see Liberia, which is
 9 the location of the relatively new airport, which was
 10 a key feature to opening the north of the country to
 11 tourism.
 12 If you go to the Claimants' Lots slide, which
 13 is next one, this is really just to orient you north
 14 to south. Ventanas, of course, is in the north;
 15 Playa Grande is on the south part of that map, and
 16 you'll see the Lots at issue identified by letters and
 17 numbers alongside.
 18 If you go next to some pictures--no
 19 PowerPoint is complete without pictures. I have to
 20 say that I militated for audio at this point to have
 21 the sound of beach waves and birds play at this point.
 22 I was overruled. I--apparently, I was the only person

11:07:15 1 who thought that would be effective, but I was
2 overruled, but I'm still speaking. So, if you could
3 just imagine the waves and the birds as you look at
4 this slide, there is no question that this is one of
5 the most beautiful and accessible areas for tourism in
6 the world, and that Costa Rica is rightly proud of its
7 natural resources.

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

11 MR. COWPER: Reluctantly.

12 The next slide is Playa Grande, similarly a
13 beautiful white beach, and from a legal perspective,
14 as is noted in the materials and is undisputed, the
15 properties at issue are unusual in that they represent
16 free-title land on a beach in Costa Rica. If we then
17 go next, I think I've commented on these features.

18 The next slide, which is just--you'll see
19 that dealing with money for a moment, foreign real
20 estate investment, you'll see that Santa Cruz, which
21 is the county in which we're dealing with was
22 fortunate to receive a substantial amount of foreign

11:08:25 1 real estate investment in 2004, 2007. And let me just
2 pause to say because during one of our preliminary
3 hearings I made this point, which is from the
4 Claimants' perspective, they are calling on the
5 promise of the state of Costa Rica to honor foreign
6 investment and to provide the minimum foreign
7 guarantees for foreign investment, which have been the
8 subject matter of international law for a very long
9 time and are the subject matter of the Treaty we rely
10 upon in these proceedings.

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

21 What we're engaged in here is that my
22 clients, being foreign investors, do not have to

11:09:33 1 content themselves with the domestic legal order, the
2 benefits and the disadvantages of that. We
3 fundamentally can rely upon the rule of law to have
4 their dispute decided according to the law before an
5 International Tribunal because of the existence of the
6 Treaty.

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

11:10:45 1 Next, if we could go to the leatherback
2 turtle: As you gather from our pleadings, our
3 fundamental position--this is actually not about the
4 turtles. My friends have said it is about the
5 turtles, so I didn't want to ignore the turtles in my
6 presentation, so here are two of them. The turtles,
7 of course, are massive, and they do require beaches to
8 nest. They don't climb trees, and they don't go into
9 vegetation to do. And that's the fundamental basis of
10 the ability to reconcile the need for nesting beaches
11 with the ability to develop alongside them. And we'll
12 deal with that. We've dealt with that in the
13 evidence.

14 And if we could go on, one of the tragedies
15 associated with the leatherback turtle, which, by the
16 way, is generally present in the Pacific, and,
17 actually, I'm from northwestern Canada, and we have
18 leatherback turtles off the coast of Vancouver Island
19 which have been seen. So, it's a general Pacific
20 population, and you'll see from this slide that, long
21 before the events that we're dealing with here, there
22 has been a catastrophic decrease in the turtle

11:11:53 1 population. It has not been, as a consequence, we
 2 say, of the development of the type of development
 3 that our clients had contemplated.
 4 If you go to the next slide, the causes of
 5 decline include egg harvesting. And by definition,
 6 these beaches are often found in areas of poverty.
 7 Emptying a turtle nest takes a very brief period of
 8 time, and you can harvest a hundred eggs for you and
 9 your family, and for poor people in poverty that is
 10 obviously an attractive source of protein and food.
 11 But it obviously can impair an entire world population
 12 of sea turtles and it has. Longline fishing has been
 13 a dramatic--has had a dramatic impact on all species
 14 of sea turtles because the longline fishing presents
 15 bait. The turtles take it, and you can characterize
 16 it as bycatch, but they are essentially killed as a
 17 consequence of the continuation of longline fishing.
 18 Some people, just to round out the thing,
 19 have cited global warming. I think that's unclear as
 20 to its role, and other people have referred to concern
 21 about development near nest sites, which is why the
 22 development has to be responsible. But there are--and

11:13:08 1 you'll see from the Witness Statements--successful
 2 nesting sites adjacent to highly developed locations
 3 in the world.
 4 You'll see this next slide just summarizes
 5 just how dramatic the decline in turtles has been, and
 6 this is just a note of how terrible poaching or egg
 7 harvesting can be, and then that will be the end of
 8 the turtle section of my Opening. And if we can then
 9 go to the facts around the Park, and so I will take it
 10 that Members of the Tribunal have read the pleadings
 11 generally, and, of course, you'll have time to read
 12 them more carefully.
 13 So, by way of Opening, I'm going to deal with
 14 it generally to try to introduce and sort of fasten in
 15 your mind some of the themes we rely upon here. In
 16 looking at the pleadings in preparation for today, it
 17 may be useful to think some of the details actually
 18 are not that critical in terms of resolving a case, as
 19 always. But if we start with the beginning, the Park
 20 was created by Decree in 1991, and when you say
 21 "creation"--and just to give you sort of a
 22 sense--parks are not actually fully created under

11:14:16 1 Costa Rican law until the private property within the
 2 Park is expropriated and paid for.
 3 That's a consequence of the general Park Law,
 4 consequence of constitutional guarantee of property,
 5 and that's why you'll see in the materials, Government
 6 materials and otherwise, references to proposed park
 7 or consolidation process, because the consolidation
 8 process inherently involves reconciling private
 9 property interests with a National Park. And, of
 10 course, that means that the fiscal consequences of
 11 building a park--if I can use the word rather than
 12 creating a park--are ever present.
 13 In some of the Respondent's materials, it's
 14 suggested that fiscal problems here were not real.
 15 That seems to be a controversy between the Parties.
 16 For our part, there are multiple references that make
 17 it abundant, both in terms of Witness Statements, as
 18 well as documents, that the cost of fully creating a
 19 park and taking all of the property within the
 20 boundaries of the Park was ever present in the minds
 21 of public officials, and the resolution of that was
 22 either to avoid doing that by defining the Parks so as

11:15:23 1 to not include property that would have to be
 2 compensated or otherwise seeking to avoid the
 3 consequences of the constitutional guarantee of
 4 property and the general requirements of the Park Law.
 5 The next thing is that the Decree in '91,
 6 just to anchor yourself, of course, deals with a
 7 southern part of the beaches we're talking about. So,
 8 it's Ventanas south. It doesn't deal with the
 9 northern part of the property--part of the beach.
 10 Now, so what you had was a Decree, not a law but a
 11 Decree, seeking to create a park in the southern part
 12 of the area, the Playa Grande area.
 13 Then, in 1995, you had a Park Law, and by way
 14 of the most broad thing, the--part of the reason we're
 15 here is because the 1995 Park Law created a marine
 16 park and not a terrestrial park. By reason of a long
 17 and somewhat complicated history, it ended up being
 18 both a marine and terrestrial park by reason of the
 19 final decision of the Supreme Court of Costa Rica.
 20 For reasons I'll get into here, in our view, that is
 21 clearly wrong, but every Supreme Court of every
 22 country is entitled to be wrong. That's what we

11:16:34 1 appoint them to do, but the consequences of that, of
2 course, is that having decided that, the obligation of
3 compensation clearly arose.

4 So the 1995 Park Law also expressly addressed
5 the rights of private land within the Park and
6 protected those, and it clearly contemplated that
7 there would be development, despite the existence of
8 the Park.

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

12 (Overlapping with video.)

13 (Video played.)

14 MR. COWPER: So, if we flip over to the
15 English translation of those remarks, and you may want
16 to make a flag here. This is a question of
17 controversy. Mr. Piedra says his comments are taken
18 out of context, but the comment we rely upon is "It is
19 a marine park." When we talk about a marine park,
20 we're referring to the more commonly known 50-meter
21 public area, and this was in the context of an effort
22 by many to expand the Park, to ensure that the Park

11:17:54 1 would include a terrestrial area and not be restricted
2 to a marine park, and I'll deal with that in detail,
3 and we'll deal with that in detail in our Closing.
4 What you need to have in mind is that after the 1995
5 park, there was a dissatisfaction by many with the
6 absence of a terrestrial component to the Park, and we
7 say that it's a rewriting of history to suggest that
8 everybody knew that the Park proceeded inland.

9 Now, if you go to the next slide, I've
10 already indicated this. I think we can just look.

11 But here is just another slide on the Tamarindo
12 Refuge, and we'll show you prior to '91, the protected
13 area along the coast, which is narrow, and the estuary
14 which is behind. So when I say the "estuary
15 opposite," you have both the freshwater estuary and
16 the ocean in the same area.

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

11:19:14 1 Decree contemplated a terrestrial component.

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

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

19 We then skip to the 1995 Park Law, and this
20 has the broader boundaries, which include both Playa
21 Grande and Ventanas, and that's clear from Article 1.
22 And here is where the historical event arises. It's

11:20:35 1 our case that the legislature specifically understood
2 that it was being requested to preserve a terrestrial
3 component to the Park which had been the subject of
4 the Decree in 1991, and that it specifically rejected
5 that request and that proposal.

6 And you'll see in the legislative debates in
7 the next slide, the motion at the bottom was to amend
8 Article 1 where it says (reading): After 125 meters
9 from the ordinary high tide at "into the water" or
10 "aguas adentro." And there's no doubt that those
11 phrases understood ordinarily meant that what was
12 being created in 1995 was a marine park as described
13 by Mr. Piedra and not a marine park with a terrestrial
14 component. So, essentially you would have the
15 50-meter public zone, and you would have a 125-meter
16 zone heading into the waters, and there was both
17 reason and justification for that.

18 If you go to the next slide, you'll see that
19 in the legislative debate, it says, in English
20 (reading): It appears to be me that it meets the
21 requirement of a law of this type to protect parks,
22 especially, it should have been marine because that is

11:22:01 1 what is customary in this case. It wasn't mentioned
 2 as being marine. When the Park is defined, it talks
 3 about 125 meters, an imaginary line, and that should
 4 extend into the water, exactly what I think this
 5 motion has clarified present unanimously approved.
 6 So, as a matter of pure history, we say there
 7 can be no doubt that there was a legislative decision
 8 as to the boundaries of the Park in 1995, and that
 9 decision was to exclude the terrestrial component that
 10 later arose through the complicated proceedings
 11 culminating in the judgment of the Costa Rican Supreme
 12 Court. And a later letter from Congressman Fournier
 13 speaks about this. If you go to the next slide, it
 14 says, "I recall at the time we discussed since it was
 15 a national marine park"--and I'm at the second
 16 body--"created to protect the leatherback sea turtles
 17 that use the beaches, it should be strengthened." It
 18 says, "Furthermore, as occurred with the Decree 1991,
 19 which created the Park, we were not presented with any
 20 environmental justification whatsoever for
 21 establishing an area of onshore protection, measured
 22 starting from the edge of the 50-meter strip, which

11:23:12 1 includes the most important part of the protected
 2 ecosystem, i.e., where they lay eggs. In that
 3 considerable strip of 50 meters that runs along more
 4 than 5 kilometers of the coastline, a beach area and a
 5 tree farm form natural protective barriers. These
 6 elements ensure that sea turtles have a nesting area
 7 that is free from anthropogenic effects."
 8 Now, whether--and that is something, if I may
 9 say, something that everybody could debate about how
 10 big the Park should be. What we rely upon is the pure
 11 factual history, which is that was the legislative
 12 decision at the time. And so when we come to deal
 13 with the history of the Claimants, they had every
 14 reason, both legally and factually, to believe that
 15 their lands were capable and appropriate for the
 16 developments that they had in mind and that they would
 17 receive an appropriate governmental response to
 18 efforts to develop and sell those lands or to develop
 19 them and enjoy them as retirement homes.
 20 Now, another, if I will say, corroborative
 21 point was the explicit effort to expand the Park, and
 22 a number of people in the historical period said the

11:24:34 1 '95 law is wrong. We should have actually a larger
 2 terrestrial component, the terrestrial and the large
 3 terrestrial component for the Park for both general
 4 conservation reasons, the reasons you create any park.
 5 You want to have a bigger park for preserving, not
 6 just for turtles, but for other reasons and making it
 7 attractive for turtles and et cetera--attractive to
 8 tourists, not "turtles." The beach makes the place
 9 attractive to turtles.
 10 If you go to the next slide, you'll see that
 11 in relation to the proposal to expand the Park, there
 12 are comments about the inadequacy of the marine park
 13 created in 1995, and you'll see considering the law
 14 which created the Park, there was no reference
 15 concerning the terrestrial portion that limits the
 16 marine area of the Park and no mention of any special
 17 protection to the existent resources, making it
 18 important today to offer this project of law, which
 19 will enable the enlargement of the Park limits and the
 20 necessary protection to the terrestrial ecosystems.
 21 And the next slide in our submission--and
 22 this has been cleaned up. We have it in Exhibit C-2F,

11:25:44 1 I believe, but for the purposes of this, we've cleaned
 2 it up a little bit so you can see it clearly. But
 3 you'll see--and this is an attachment to a letter from
 4 the Minister to the legislature, that the area we're
 5 speaking of has a 50-meter dimension and no more. We
 6 can slip through, the evidence deals with the need to
 7 protect the interior waters and thus, the going
 8 seaward had, in fact, a justification. There was a
 9 concern about protecting the turtles as they approach
 10 the beach. And you'll see the next one is simply a
 11 description of how that Park Law would, in fact, have
 12 operated, and you'll see that the 50-meter zone on
 13 this particular area demonstrates the beaches
 14 available to the turtles and there is, in fact, a
 15 berm, a natural berm, behind the beach, which can be
 16 used to, if you will, govern responsible development.
 17 The next slide makes the same point in a
 18 different part where you'll see the berm rises and the
 19 turtles, of course, don't go into the forest to lay
 20 their eggs. They lay their eggs at the upper portions
 21 of the beaches.
 22 The next slide simply with respect to the

11:27:07 1 internal relations of the Costa Rican Government makes
 2 the point that, as a matter of just pure historical
 3 fact, the municipality was purporting to zone the land
 4 that is now said to have always been part of the Park.
 5 The municipality didn't agree with that. They granted
 6 building permits. They purported to exercise zoning
 7 and, indeed, the subsequent--one of the subsequent
 8 Constitutional Court Decisions dealt with that
 9 conflict and resolved it in favor of the Park. And
 10 that is ultimately--but at this time, my clients were
 11 not alone in thinking that development was possible,
 12 that you could obtain building permits from the local
 13 municipality, and you could carry out a responsible
 14 development or a number of responsible developments.
 15 Now, the next slide deals in a very summary
 16 way, and I think we'll have to go in more detail in
 17 Closing to this so that we carry our way through it.
 18 The title of this is a little bit misleading. There
 19 have been about a hundred Constitutional Court
 20 Decisions by our count or more, which actually refer
 21 to the Park. They are not all Park boundary
 22 decisions, so the title is a little bit broader than

11:28:15 1 it should be. And there were a number of proposed
 2 bills to change the Park Law.
 3 And these decisions, like the decisions often
 4 in many countries, don't all go one direction.
 5 There's a certain state of confusion created from
 6 reading these decisions, and I'll just touch on it
 7 lightly at this point. In 2005, there's a decision
 8 ordering MINAE and SETENA to consider establishing new
 9 guidelines for environmental assessments to be
 10 conducted as part of development.
 11 If you go to the next slide, you'll see that
 12 there's a resolution by SETENA to suspend the
 13 processing environmental permits within 75 meters of
 14 the public zone. And just to be clear, the suspension
 15 of environmental assessments is suspending the rights
 16 of the owners to establish that their development is
 17 consistent with environmental protection. So, there's
 18 an irony here in the case, in that the actual means of
 19 freezing the Claimants properties was to disallow them
 20 the power and the ability to prove that their
 21 development would not interfere with the nesting of
 22 the turtles and was completely consistent with the

11:29:41 1 goals of the Park.
 2 Of course, to be blunt about it, if the Park
 3 was to embrace and include their lands and to be taken
 4 and expropriated and compensated for for that purpose,
 5 then you could understand why the taking needed to
 6 proceed before they built their properties. But in
 7 plain terms, what the Claimants were owed under the
 8 Treaty obligations and under international law, and
 9 under the Costa Rican Domestic Law, was the honesty of
 10 the Administration saying "That's what we're going to
 11 do, and we're going to compensate it pursuant to the
 12 general law, the domestic law, and our international
 13 obligations."
 14 The next decision is--there was a question of
 15 about the Court in that case refused to compel the
 16 administrative officials to consult with the
 17 cartographic service. IGN is the cartographic service
 18 of the Government, as I understand it.
 19 And then we have the next important decision,
 20 which is in the Spring of 2008, the Supreme Court of
 21 Costa Rica took the position that the 1995 Law
 22 contained a typographical error and the boundaries

11:30:53 1 were actually inland, and not seaward. And we'll go
 2 into some greater detail of this in our Closing, but
 3 you may recall from our pleadings that there was an
 4 opinion generated within the Government that proposed
 5 that there was a typographical error.
 6 We say that opinion and this decision is
 7 irreconcilable with the materials I've already put to
 8 you. It is irreconcilable with history. That doesn't
 9 mean it isn't a general law of Costa Rica. As I said
 10 before, Supreme Courts are entitled to be wrong.
 11 That's, in part, why we appoint them, but what it does
 12 show is a demonstration of the history is that should
 13 not be visited with our clients by the Respondent's
 14 position that they ought to have known all along that
 15 this fell within the Park. It required not just
 16 foresight but divine foresight to have reached that
 17 conclusion.
 18 So, I think I can skip to the next couple of
 19 decisions, but I would say this, and that is, there
 20 was--maybe I shouldn't. If you go back to May--I'm
 21 mindful of the time--this is not unimportant, which is
 22 that there was a decision in the Spring of 2008 in

11:32:08 1 which the Court appeared to have actually ordered
 2 either the immediate expropriation or the development
 3 of guidelines. And then in the December of 2008, the
 4 Ministry was ordered to expropriate all private
 5 property within the Park immediately. You would have
 6 thought that was the end of matters. It was actually
 7 more in medias res I think would be the modern
 8 expression, more in the middle of matters.

9 If you then go, you'll see that in response
 10 to further requests, the Court in the Spring of 2009
 11 actually said that it was up to the Administration to
 12 decide what to expropriate and when, and that their
 13 earlier Decree to do so immediately was not intended
 14 to introduce the Court into the Administration of the
 15 Government.

16 And the next slide, which is an extract from
 17 that, you'll see that it says it is not their place to
 18 indicate when to expropriate nor how to go about it,
 19 as that is the responsibility of the Respondent and
 20 Administration. So the earlier judgment, which
 21 contemplated an immediate action, was mitigated by
 22 that reference. I think that slide's reference to a

11:33:21 1 resolution is wrong. I'll double-check that, but I
 2 think that, I believe, is an extract of the judgment
 3 itself and the English translation for it.

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

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

11:34:38 1 expropriation process.

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

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

11:36:06 1 the history.

2 Now, there are a number of failed efforts to
 3 resolve these problems, both before and after the
 4 Costa Rican Supreme Court's Decision, and the next
 5 slide summarizes some of those, and these are all
 6 genuine efforts. So, in 2002, there was an effort to
 7 expand and consolidate the Park which failed. I
 8 referred you earlier to the goal to actually expand
 9 the Park to make it clear and that, would, of course,
 10 make it clear, but that failed. In 2006, there was a
 11 bill, as I understand it, that advanced that would
 12 interpret "seaward" as "inland" before the Costa Rican
 13 Decision and that Bill failed.

14 In January of 2008, there was a bill to
 15 interpret "seaward" as "seaward," and that Bill
 16 failed. In then finally in 2009, there was an effort
 17 to reconcile the development adjacent to the Park and
 18 to have a mixed refuge, and that lapsed and was
 19 essentially archived in 2013. And I think the slide
 20 says "achieved," and it wasn't achieved in 2013. It
 21 was archived in 2013. There's a procedure, as I
 22 understand it, within the Administration where if a

11:37:34 1 Bill has not been acted on within a certain period of
2 time, it lapses and it's then archived. So that
3 should read "archived."

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

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

19 ARBITRATOR VINUESA: It's a continuation.

20 PRESIDENT BETHLEHEM: It's a continuation.

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

11:38:37 1 PRESIDENT BETHLEHEM: I'm just looking at the
2 one that said, if you go back to the previous one,
3 "The agenda of the meeting included the following."
4 That we don't have or it's been cut off in the packs
5 it looks like.

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

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

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

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

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

21 Yeah, I'll just keep plowing on, but the
22 mistake I'm drawing your attention to is within the

11:39:20 1 box. You should strike "minutes from meeting."

2 PRESIDENT BETHLEHEM: Yes.

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

20 So, for the purposes of deciding as a matter
21 of fact whether or not those statements were made, I
22 say that this provides substantial corroboration of

11:40:19 1 that fact. And you'll see, if you go--hopefully--do
2 you have a slide which says "It is important to point
3 out"?

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

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

22 And you'll see the next slide is "Any

11:41:35 1 development shall meet the criteria that shall be
 2 defined as low density, proper use and management of
 3 lighting, 'green curtain' use and implementation among
 4 others." That's a summary of what I've been calling
 5 "responsible development."
 6 Now, I think I can move through a number of
 7 slides quickly before the break. The next slide is
 8 not really controversial. Of course, you need, in
 9 order to get a building permit in this context, you
 10 need a number of things, including an environmental
 11 impact assessment. That's the critical matter that
 12 was halted. And then there's a number of slides here
 13 just to illustrate to you or show you dramatically
 14 that, if you had gone to the land registry and seen
 15 things, what would you have seen at the time? Well,
 16 here is what was on the land registry drawings for
 17 these Lots, and the English says, "In conformance with
 18 Article 47. This office does not object to the plan
 19 as it is outside the national park."
 20 And the next slide with respect to these
 21 Ventanas Lots says, "it is outside the national park."
 22 The next slide, which is V59, is interesting because

11:42:48 1 it refers to the '91 Law. It says it's in the Park
 2 according to the '91 Law. And you'll recall the
 3 changes to the boundaries of the Park in the '95 Law.
 4 And the next slide says that this is outside
 5 the Park. The next slide says C-96 is outside the
 6 Park, and then you'll see with respect to South Playa
 7 Grande 1 and 2--and you may want to make a note that I
 8 think it says 20 percent approximately is in the Park
 9 according to the 1991 Decree. This is an example of a
 10 reference to the Decree and part of SPG1 and SPG2
 11 being within the Park.
 12 With respect to the B Lots, you'll see it
 13 says approximately 40 percent, as I read it, in the
 14 Park according to the '91 Decree. That law says "'91
 15 Law." It should say "Decree," just to be clear.
 16 Now, Mr. President, I think that's--my note
 17 is that I was to stop about now for coffee break on
 18 time. I have a lot of slides to go, but the next 30
 19 or 40 will take very little time. They are sort of by
 20 way of a timeline demonstration. So I would suggest,
 21 if we could, that we take the coffee break now.
 22 PRESIDENT BETHLEHEM: Thank you. Let's do

11:44:11 1 that. Why don't we come back just after 5 'til.
 2 MR. COWPER: Thank you.
 3 (Brief recess.)
 4 PRESIDENT BETHLEHEM: Mr. Cowper, are we
 5 ready?
 6 MR. COWPER: Ready to go. Thank you,
 7 Mr. President.
 8 I have a couple of points to make in slides
 9 that I've gone by, but I thought it important to note
 10 that. If we're going to go back to Slide 40 as it
 11 relates to the 2000--
 12 PRESIDENT BETHLEHEM: I'm sorry. I'm not
 13 sure that slides are numbered, so you are going to
 14 have to--
 15 MR. COWPER: Yes. The slide on the--
 16 PRESIDENT BETHLEHEM: On the screen.
 17 MR. COWPER: --on the screen, which deals
 18 with the 30th of April 2008 Constitutional Court
 19 Decision.
 20 Is that my webcast audience calling in?
 21 PRESIDENT BETHLEHEM: That's the webcast
 22 generally, but it seems to be on a delay. But that's

12:06:47 1 fine. I'm just getting you in stereo.
 2 MR. COWPER: Thank you very much.
 3 If you could, simply if you get there, just
 4 make a note because we had a spirited review of this
 5 decision during the break, and if you just make a
 6 note, and the note I'd ask you to make is that there
 7 are varying readings of the 2008 Decision. But all of
 8 the Parties agree that the result of the Decision is,
 9 as I set out, to essentially confirm the view that the
 10 terrestrial portion extends, and that, therefore,
 11 there is an obligation to expropriate, and it's fair
 12 that--I think, in fact, that wording is wording the
 13 Respondents have used at various times.
 14 And there is in the reasoning the Court--and
 15 we'll deal with this in Closing argument--a view that
 16 the Court, in fact, did not adopt the reasoning of the
 17 typographical error but, rather, gave presence to the
 18 1991 Decree over the 1995 Park Law. And the end
 19 result doesn't matter for our purposes, but I just
 20 wanted to flag, since it's a very important decision
 21 of the Supreme Court, that there are varying readings
 22 of their legal reasoning, and I presented it as fairly

12:08:06 1 straightforward matter.
 2 I think it's fair to say, certainly from me
 3 as a non-Spanish speaking lawyer from the wilds of the
 4 Pacific Northwest, that I'm more dangerous than
 5 reliable in reading the Decisions of the Costa Rican
 6 Court, but we have people on our team who can keep me
 7 correct.
 8 The next slide, just quickly, when I was--we
 9 got a little bit off on the MINAE statement. I just
 10 wanted to pointed out to you--and I think it's--Alex,
 11 it's Slide 48 is what I was hoping for, I think. Yes,
 12 I'm sorry, just--it's the--if you go back a slide.
 13 If you just look at the slide, the reason I'm
 14 pointing out is I moved a little bit too quickly
 15 through it. I said earlier in my Opening that the
 16 documents are and have a number of references to the
 17 lack of financial resources, and this is just one of
 18 them. And I skipped over it. It says (reading): It
 19 does not encourage the expansion of the Park because
 20 there is a lack of financial resources to purchase
 21 lands.
 22 And that's just a reference in this Opening

12:09:18 1 to that. There are many other references in the
 2 pleadings, and we can marshal those in our final
 3 argument.
 4 So, the next section of the slides is fairly
 5 lengthy, but I'm not going to take very long with it
 6 at all. It is essentially an attempt to draw a
 7 timeline for you in relation to the various Lots in
 8 issue.
 9 And, Alexandra, maybe you could do that.
 10 So, this is the general timeline--if you can
 11 go to the next slide--and you'll see that those Lots
 12 were purchased in 2003. Next slide. And then other
 13 lots.
 14 Maybe Alexandra, I'll just--if you could just
 15 take a couple seconds per slide.
 16 You'll see we're moving through, in respect
 17 of these, there's a Decree of public interest in
 18 October '07. We're advised in the course of these
 19 proceedings that the expropriation process has been
 20 suspended. And then the next slide. The current
 21 status is "title is unchanged."
 22 Now, we've also given you Appendix 2, and

12:10:23 1 we've tried in a variety of ways to tell you the
 2 progress by lot of what's happened. Maybe we'll do
 3 the timeline on the Copher Lots.
 4 Let's do that, Alex.
 5 This is the general timeline. You'll see the
 6 purchase in '03. Keep going. The purchase of another
 7 lot.
 8 Just spend a couple of seconds on it, Alex.
 9 Thanks. Yep.
 10 The Decree of public interest, in '07. And,
 11 again, the expropriation process on those Lots has
 12 been suspended, and, finally, the title is unchanged.
 13 Go on to the next one.
 14 These are Spence Lots. You'll see there is
 15 more of a history here. They are purchased in '05 and
 16 other--various other dates. There's a Decree of
 17 interest in the spring of 2006 for A40. Lots
 18 purchased in 2006, a Decree of expropriation in April
 19 of '07, initiation of judicial proceedings in 2007,
 20 and you'll note from the pleadings that the Lots have
 21 proceeded through different--it's the same process,
 22 but there are different stages of the expropriation

12:11:34 1 process within the domestic law. This law is actually
 2 proceeded to judicial proceedings.
 3 Keep going. Decree of public interest. Keep
 4 going on those Lots.
 5 Another example of that, disposition dates
 6 for Lot A40 in 2008, and you'll see, of course, we're
 7 in 2015, which is the main point of these timelines.
 8 Keep going.
 9 And then we have the final valuation as an
 10 example for Lot A40 in 2011. And then a title
 11 transfer occurs in 2012, and the final valuation for
 12 Lot SPG is 2012, after the commencement of this
 13 proceeding. The final valuation in 2013 for SPG1.
 14 And the current status of those Lots is titles
 15 unchanged.
 16 And then we go to the Berkowitz Lots. Maybe,
 17 Alex, just flip through those for a couple seconds
 18 each.
 19 There's a different timeline, but similar
 20 stages in history, and the title transfer for that Lot
 21 and the title transfer for B8 in 2014. And then
 22 titles unchanged for Lots B1, 5, and 6.

12:13:04 1 And then Mr. Gremillion, who hasn't received
 2 a lot of attention, but we can go through his slides
 3 here. He's watching, I think, by webcast, he and his
 4 family. So, this is another zombie title. So, if we
 5 could then maybe go to the next slide now.
 6 So, the point of that slide--and, of course,
 7 is the vast extent of time we're dealing with from the
 8 beginning of the controversy to the current period.
 9 And as part of our claim, of course, we say that by no
 10 account and no definition of the term can this be an
 11 expropriation without delay. Delays have been typical
 12 rather than exceptional in the history of this
 13 dispute.
 14 Now, the other feature to note was that, in
 15 terms of the history, the effort to rescue the
 16 situation and to reconcile responsible development
 17 with the Park was ongoing after the Supreme Court's
 18 decision, and this next slide will show that one of
 19 the bills that I talked about earlier was
 20 reintroduced, and this would have made a mixed refuge,
 21 which was a different legal designation that would
 22 have permitted development, and you'll see the note at

12:14:36 1 the bottom, which one of the commentators says--
 2 Ballestero said she agrees with the law that would
 3 find a way to obtain the land from the private owners
 4 without having to use State money, and it's quoted in
 5 the article to say (reading): We need to resolve the
 6 problem so the State doesn't have to pay for the land.
 7 I believe there are more adequate mechanisms for us to
 8 be able to make this statement to have people inside
 9 the national park.
 10 And then this a failed proposal, but if you
 11 go to the next slide, you see in dealing with this in
 12 2010, the proposal would have reduced the Park and
 13 leave only 50 meters of beach for the leatherback
 14 turtles and allow for the construction on the beach.
 15 And then you'll know that that was unsuccessful.
 16 But, as an example of the conversation about
 17 responsible development, the next slide deals with a
 18 meeting between one of the Witnesses in this
 19 proceeding, Kirt Rusenko, and President Arias, and
 20 you'll see that, as reflected in Mr. Rusenko's, he met
 21 with President Arias, and he says, as you say here,
 22 that "a code with teeth would be needed to restrict

12:15:48 1 light, building heights, and building density."
 2 So you couldn't have, by this man's view,
 3 20-story buildings or 30-story buildings and the like,
 4 but you could have the kind of building that the
 5 Claimants contemplated (reading): If the 50-meter
 6 inalienable zone was respected, I thought the area
 7 could be developed with minimal impact to nesting sea
 8 turtles and their hatchlings. I also encouraged the
 9 President and his officials to engage in a national
 10 effort to keep records of sea turtle strandings, as
 11 well as a training program, so they could know what
 12 nesting activity exists before they allowed further
 13 development.
 14 That is just an abstract.
 15 So, I'd like to go next to a broad overview,
 16 by way of Opening only, of our complaints of about the
 17 expropriation process. And by way of a beginning, of
 18 course, I remind you that there is a sophisticated
 19 expropriation process within the country and within
 20 the domestic law. Our complaints primarily relate to
 21 how it was implemented, and there are challenges and
 22 complaints about some of the embedded means by which

12:16:54 1 compensation is understated in the process, but
 2 primarily the implementation is the subject of most of
 3 our complaints.
 4 If you go over to the respect for private
 5 property in the context of a park, I've given you the
 6 reference I promised you earlier in the 1995 Law,
 7 which says that (reading): The private lots of land
 8 included--will be susceptible to expropriation and
 9 will be considered part of the Park until they are
 10 acquired by the State by purchase, donation, or
 11 expropriation. In the meantime, the owners will enjoy
 12 the full exercise of the attributes of domain or
 13 ownership.
 14 So the law of Costa Rica did not contemplate
 15 the suspension and freezing of property rights while
 16 the development of the Park was underway.
 17 If you then go to a summary, this is my
 18 summary by way of Opening of some of the
 19 characteristics of the historical record. In my
 20 submission, they can be summarized in five different
 21 ways of the State avoiding the taking, which has both
 22 been ongoing and is still ongoing, freezing property

12:18:05 1 rights in the meantime, deferring obligations to
 2 compensate, deferring payment of compensation, and
 3 minimizing compensation. And I'll just give you some
 4 examples of each of those.
 5 The next slide deals with the first. And the
 6 most obvious point is today Respondent has only
 7 directly taken 3 out of the 28 Claimants' Lots. And I
 8 think that fact can't be more-- can be no persuasive
 9 fact of the fact that the State has avoided the taking
 10 in that fact. And that delay flies in the face of the
 11 decision requiring expropriations to be conducted
 12 immediately.
 13 The next is freezing of property rights.
 14 And, of course, you have a small, but telling example
 15 in Mr. Berkowitz's home. He presented an
 16 environmental impact assessment which demonstrated
 17 that his home would not adversely impact the
 18 environment and would be a responsible development.
 19 As he testifies in his Witness Statement, the agency
 20 receiving that purported to lose his application, and
 21 then we find out later that there was a suspension on
 22 the approval and review of environmental impact

12:19:19 1 assessments, and then later at some point a permanent
 2 suspension, unknown to the Claimants, but effectuated
 3 within the Government.
 4 The next approach is that of freezing
 5 property rights, and the fundamental one I mentioned
 6 earlier is essentially preventing environmental
 7 assessments, basically saying you can do any number of
 8 environmental assessments which show that development
 9 is fine. We don't care. We're not going to review
 10 them. We're not going to proceed any further at this
 11 point, but without actually expropriating and taking
 12 the property and compensating for it.
 13 And the next slide just points out that, in
 14 the meantime, there are obligations. The owners are
 15 required to pay taxes and required to maintain the
 16 properties.
 17 The next slide deals with deferring the
 18 obligation to compensate, and the points to be made
 19 there is for those Lots which are in the judicial
 20 phase. It says a slow pace to judgment. I think you
 21 might put "glacial" rather than "slow" there. For the
 22 Lots which are in the administrative phase, as I

12:20:26 1 pointed out just a few minutes ago, there has been
 2 essentially an indefinite suspension of the
 3 expropriation process to avoid triggering the
 4 obligation to deposit the administrative appraisal.
 5 That's our inference; that essentially faced
 6 with the fact that you have to deposit some money, the
 7 Government officials froze the process before that
 8 obligation came into being, and we say the inference
 9 can be drawn that that's, indeed, the case because at
 10 the time of the initial freeze, there was an
 11 administrative appraisal, which had been actually
 12 higher than previous appraisals. There was no report
 13 recommending a suspension. The suspension happened,
 14 and then the report came out very shortly afterwards.
 15 So, we say that is telling evidence that, in this
 16 context, the officials were seeking to defer the
 17 obligation to compensate.
 18 The next example is just as a concrete
 19 example of delay for Lot A40. This is one--only one
 20 of the Lots, but you have a Decree of public interest
 21 in 2006, nine years ago. You have an administrative
 22 appraisal in 2006, some months later, you have

12:21:29 1 judicial proceedings in 2007, and we'll deal in detail
 2 in our closing with who's in control of which stage of
 3 those proceedings. You have a judgment in 2010, the
 4 payment is received in 2012 of principle. The payment
 5 of interest is not received until 2015.
 6 The next point, of course, is in respect of
 7 the deferring of payment. The system is susceptible
 8 to permitting delay and we've identified two examples
 9 here between the determination of value and the actual
 10 deposit of that amount, and we've seen that, and
 11 between the deposit into the Court account and payment
 12 to the owner.
 13 Now, the final tool that I'm--by way of theme
 14 identifying for you that we see in the evidence is a
 15 variety of tactics to minimize the compensation. And
 16 I won't get into all the detail here, but just a
 17 couple of examples by way of highlighting. As you'll
 18 see, some of the valuations based on conservation is
 19 the highest and best use of the land. Of course, if
 20 you can treat the land as already park land and unable
 21 to be used for its highest and best use, you can then
 22 dictate a minimal value to the land.

12:22:49 1 The other outstanding recommendation, one of
 2 the outstanding recommendations of the Contraloría
 3 Report was the direction to annul titles, that is to
 4 pursue the annulment of property titles which, of
 5 course, would, by necessity, then eliminate the
 6 obligation to pay compensation to the registered
 7 owner. So in summary, we think a fair reading of the
 8 history suggests that faced with an unwanted and
 9 undesirable obligation to compensate, the State has
 10 had recourse to every imaginatively available
 11 technique to either avoid the taking, defer the
 12 taking, defer compensation or otherwise, as I've said,
 13 minimize the financial consequences of their
 14 obligation to take the property and compensate for it.
 15 The next slide goes into valuations and we
 16 can go fairly quickly through this, but these are
 17 illustratives of the differences in valuation. So if
 18 I can deal with Lot V30, you'll see by way of a bar
 19 graph, the dramatic difference between the
 20 administrative appraisal in this situation and the
 21 Claimants' independent valuation. For Lot V31,
 22 similar discrepancy. We don't have judgments in these

12:24:13 1 cases. For Lot V32 again.
 2 PRESIDENT BETHLEHEM: Can I just ask--sorry.
 3 MR. COWPER: These are all expressed
 4 as--colones is the number at the top, and then we have
 5 U.S. dollars within the box, I believe, and price per
 6 meter. Lot V33 similarly, just by way of
 7 illustration. Lot V38, Lot V39, Lot V40, Lot V46,
 8 Lot V47, and then we have with Lot A40, a lot which
 9 has gone through more process, and you'll see
 10 interestingly enough there the administrative
 11 appraisal on the left, the FTI evaluation, you have
 12 the judgment and then you have the judgment on appeal.
 13 So, if you ignore the FTI appraisal, you'll see the
 14 dramatic difference in valuations even within the
 15 internal process.
 16 If you go to SPG1, there's a similar dramatic
 17 difference between the value attributed by FTI, but
 18 also the value between the administrative appraisal
 19 and in this case, the judgment. In SPG2, you'll see a
 20 dramatic variation, both with respect to the internal
 21 valuations and with respect to the FTI evaluation. If
 22 you go to Lot B1, you'll see the dramatic difference

12:25:48 1 between the administrative appraisal and the FTI
 2 evaluation. Lot B3, in that case there's a judgment
 3 applicable to that lot. Lot B5, Lot B6, and I think
 4 we can just flip--those are the only two lots left.
 5 B7, and then B8 you have another example where there's
 6 a dramatic discrepancy between the administrative
 7 appraisal, the judgment, the judgment on appeal, and
 8 the FTI evaluation.
 9 So, of course in closing, we'll deal with
 10 each of the Lots in detail, and we'll deal with the
 11 expert evidence on damages. I'm going to have a few
 12 comments on the damages issue by way of Opening, but
 13 that, of course, awaits the cross-examination of the
 14 Experts on their Reports later in the week.
 15 I'm just checking my time.
 16 So, I'm going to turn to a different topic,
 17 and I'm well within my two hours. I probably will
 18 finish a bit early, but I want to spend a few minutes
 19 on the legal side of this by way of Opening only. And
 20 I said some of this in the introduction to the whole
 21 case, but if we could go to the slide, Alex, and I did
 22 say in the introduction that in our view, this is

12:27:32 1 calling upon the Respondent State to honor what we
 2 submit to you is a core promise that is made to
 3 foreign investors under customary international law
 4 and CAFTA. And I think it's useful to reflect on what
 5 that promise is. The promise is not that we will not
 6 take your land. It is that we will take your land in
 7 accordance with acceptable principles. We'll take it
 8 for the right purpose, and when we take, we will
 9 compensate you and we'll compensate you in accordance
 10 with Fair Market Value, and we'll do so without delay.
 11 And in this case from, a legal question, we
 12 don't have to worry about some of these cases deal
 13 with unusual types of property. We don't have to.
 14 This is back to dirt law. In Canada we would call it
 15 "dirt law." This is compensation for land that has
 16 been taken. So there is no question about that.
 17 Similarly, if you look at the entire pleadings, there
 18 is no practical question now that Costa Rica has
 19 determined to expropriate all or at least the most
 20 valuable portion of each of the Claimants' titles.
 21 And as I said in my introduction, we're not disputing
 22 the outcome of the political and legal debate within

12:28:52 1 Costa Rica, however you interpret that. That is not
 2 the purpose of this hearing.
 3 But in our submission, what the history
 4 reflects and demonstrates abundantly is that the
 5 Respondent has renounced its obligations under
 6 international law and CAFTA, and that renunciation is
 7 ongoing to the present day. And indeed, at present,
 8 the Respondent remains unwilling to inform even this
 9 Tribunal when it will finish the recommendations it
 10 says remained to be outstanding in 2015 arising from
 11 the Contraloría Report in 2010.
 12 Now, fundamentally, that's what this case is
 13 about. As you know and my friend will deal in Reply
 14 with the timing issues which have been raised by the
 15 Respondent, for that purpose and other purposes, I
 16 would comment quickly on the FET claim which is both
 17 additive and alternative in the present case, and that
 18 is the Article 10.5 of the Treaty, and we have that
 19 slide in front of you. And I'll leave the detail and
 20 the scholarship of this to Dr. Weiler, but
 21 fundamentally, of course, the fair and equitable
 22 treatment obligation has similar historical origins to

12:30:13 1 the obligation to compensate for expropriation, and
 2 there's a broad consensus in my submission--this is
 3 remaining, this wasn't fixed. Okay. So this slide
 4 says "fair and equitable treatment" but that's
 5 expropriation. I saw that typo last night but it
 6 wasn't caught. So if you make a note, the second
 7 slide, it's the first slide says "core promise," and
 8 the second one is not FET, but is in relation to 10.7.
 9 So that's a typo with respect to the title and the
 10 reference to 10.5. FET is 10.5. So that was a typo
 11 we didn't get in this version. I'm sorry for that.
 12 So, I've covered the areas of reliance in
 13 10.7. So, with respect--if you go to what's in your
 14 slide the second fair and equitable treatment slide,
 15 but it's really the only one we've put in as part of
 16 the Opening, the CAFTA Parties have deemed FET to
 17 include denials of justice, I note that--and that, of
 18 course, applies to both executive and judicial
 19 branches of the State. The legitimate expectations
 20 doctrine, which we've directed, is relevant to the
 21 application of FET analyses, in addition to
 22 expropriation standards. They are additive in that

12:31:45 1 sense. And abuse of right is another well-established
 2 international law doctrine that can help in applying
 3 the FET standard. And in this particular case, FET
 4 claims arise with particular force because of the
 5 arbitrary manner in which the Respondent has imposed
 6 and maintained new delay measures, we say, without
 7 even notifying the Claimants, that the Claimants
 8 detrimentally relied on the explicit terms of Costa
 9 Rican laws, the conduct and representations of Costa
 10 Rican officials and, indeed, in one case, the
 11 representations of the Environment Minister himself.
 12 Thirdly, the arbitrary nature of the
 13 expropriation regime, which I indicated earlier, has
 14 inconsistent standards and offers an abuse of the
 15 right of property owners to fair market compensation.
 16 And, of course, we say that the inadequacy of that
 17 regime amounts to a de facto denial of justice under
 18 the FET Standard.
 19 So, the final comment is on damages. And in
 20 our submission, you'll be satisfied at the end of the
 21 analysis that this case primarily concerns the
 22 question of what is the appropriate amount of the

12:33:03 1 Award, rather than whether there should be an award,
 2 and I said that earlier in our prehearing submissions.
 3 That, of course, is a point on which my friend
 4 vigorously disagrees, but it remains my point.
 5 So, in relation to the damages, we've
 6 submitted a real property appraisal report which
 7 values the subject Lots with an effective date of
 8 value of May 27, 2008. And our appraisal report was
 9 prepared by an accredited and licensed appraiser in
 10 conformity with the Uniform Standards of Appraisal
 11 Practice, and the Code of Professional Ethics and
 12 Standards. And this is not getting into the detail of
 13 lots or comparables or otherwise, but the point is
 14 that the appraisal report, if you go to the next
 15 slide, determines Fair Market Value in a manner
 16 specified and in accordance with customary standards
 17 in Article 10.7(2). And then it concludes that the
 18 aggregate value of the takings is 36 1/2 million
 19 dollars, or the equivalent in colones, and you'll
 20 recall that we've claimed the Award in colones plus
 21 interest and costs.
 22 But in relation to damages, let me just make

12:34:19 1 this observation by way of Opening. You do not have
 2 to select between appraisal reports in this case
 3 because there is only one appraisal report, and, of
 4 course, you'll want to be satisfied that appraisal
 5 report is properly and appropriately prepared, but the
 6 Respondent has not presented you with an appraisal
 7 report. Rather, they filed a report from a Valuation
 8 Expert, who is not an appraiser, and his fundamental
 9 report is, if I may put it this way, an appeal to you
 10 to apply a different measure of damages, being the
 11 purchase price of the Claimants for their Lots. And
 12 our fundamental answer to that is actually not a
 13 factual answer, it's a legal answer, which is that's
 14 not the standard which you're required by law to
 15 apply. That's not open to you to apply. It is not an
 16 appropriate standard in expropriation cases, it's not
 17 a proper standard in any evaluation in this context.
 18 And so I note that because it's an unusual thing in a
 19 case of this complexity to have only one appraisal
 20 report, and I, in my submission on behalf of the
 21 Claimants, that's a telling observation. It doesn't
 22 mean we abandon our attention at that point but you'll

12:35:43 1 see that that is very much the approach we take to the
 2 conflict on the factual question of the damages to be
 3 drawn in this case. And, of course, we claim pre- and
 4 post-award interest and costs.
 5 I think we'll conclude my Opening at that
 6 point, Mr. President, Members of the Tribunal, and as
 7 I said, we reserve 30 minutes for our Reply, but I
 8 think I finished before my time, but maybe that's a
 9 good trend to start the week with.
 10 PRESIDENT BETHLEHEM: You've got no other
 11 co-counsel who's going to be presenting in your
 12 Opening at this stage?
 13 MR. COWPER: Not directly, no.
 14 PRESIDENT BETHLEHEM: Okay. Thank you very
 15 much. Mr. Alexandrov.
 16 MR. ALEXANDROV: Mr. President, just one
 17 procedural point, if I may. Counsel went through
 18 about 100 slides very quickly. Those are
 19 demonstratives, and under the instructions of the
 20 Tribunal, they are to be used in the context of the
 21 Opening Statement. So we reserve the right to--this
 22 is not a written submission, so we reserve the right

12:37:03 1 to object to some demonstratives, so-called
 2 demonstratives, that weren't actually used in the
 3 Opening Statement. I just want to make a reservation
 4 of rights right away.
 5 PRESIDENT BETHLEHEM: Okay. Thank you.
 6 Let me just take a moment with my colleagues
 7 to see if there are any points of clarification that
 8 they would like to raise at this point. I think,
 9 Mr. Cowper you have got us off to a speedy start. I
 10 think we can adjourn now. We have on the schedule an
 11 hour and a half for the break. I suggest that we come
 12 back at the hour and a half, rather than at the
 13 allocated time which was 2:30, if you are both content
 14 with that. So if you break now, I'm looking at that
 15 clock which is just before 20 to, if we said 10 past
 16 2, would that suit both sides?
 17 MR. COWPER: That's fine.
 18 MR. ALEXANDROV: Yes.
 19 PRESIDENT BETHLEHEM: Let's break, then, and
 20 we'll reconvene at 10 past 2:00. Thank you very much.
 21 (Whereupon, at 12:37 p.m., the Hearing was
 22 adjourned until 2:10 p.m., the same day.)

1 AFTERNOON SESSION
 2 PRESIDENT BETHLEHEM: Mr. Alexandrov, over to
 3 you.
 4 MR. ALEXANDROV: Thank you, Mr. President.
 5 MS. MCCANDLESS: Mr. President, Members of
 6 the Tribunal, we are passing out--or I guess have
 7 passed out--binders that include the slides that are
 8 part of the presentation. Included with that in the
 9 left-hand side you'll see are translations of three
 10 documents that we'll be talking about in the Opening,
 11 and they are exhibits on the record. But these
 12 portions of those exhibits were not translated; and
 13 pursuant to the Tribunal's letter of March 5, 2015, we
 14 are providing those translations for you at this time.
 15 PRESIDENT BETHLEHEM: May I ask, have these
 16 been provided previously to Claimants?
 17 MR. ALEXANDROV: They actually discussed
 18 those same stamps in their Opening, so we believe that
 19 there should not be any controversy.
 20 PRESIDENT BETHLEHEM: Have you had a chance
 21 to have a look at that?
 22 MR. COWPER: Just go ahead. If we have any

02:10:35 1 concerns, we'll raise them.
 2 PRESIDENT BETHLEHEM: Okay.
 3 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
 4 MR. ALEXANDROV: Mr. President, Members of
 5 the Tribunal, this is a case about individuals and
 6 real estate developers who purchased land in Costa
 7 Rica that was part of a national park, the Las Baulas
 8 National Park, created to protect the nesting habitat
 9 of the leatherback sea turtle, which is an critical
 10 endangered species.
 11 Claimants purchased their land, knowing that
 12 it was located in the Park and, therefore, subject to
 13 being expropriated, but they hoped that either the
 14 Government would never get around to expropriating
 15 their property or that it would amend its laws to
 16 allow Claimants to develop their land.
 17 But Claimants gamble did not pay off.
 18 Instead, the Government began the process of
 19 expropriating properties located inside the Park,
 20 including Claimants' properties, and offering Fair
 21 Market Value for the land inside the Park. Rather
 22 than allowing the Costa Rican Government's

02:11:54 1 expropriation procedures to run their course,
 2 Claimants chose to seek millions from Costa Rica under
 3 the Dominican Republic-Central America-United States
 4 Free Trade Agreement, which I shall refer to as CAFTA.
 5 To maximize their damages claims, Claimants
 6 seek to recover more in damages than they themselves
 7 were willing to pay when they purchased the land
 8 knowing that it was inside the Park. They now assert
 9 that they did not know that the land they purchased
 10 was in the Park and, therefore, they say, they're
 11 entitled to the value of their land as if it were
 12 outside of the Park.
 13 The truth is the land Claimants purchased is
 14 part of the Park, and has been part of the Park as
 15 least since 1991. And Claimants were fully aware of
 16 that fact, and they are simply, therefore, not
 17 entitled to the windfall they now seek.
 18 If you turn to Slide 1, these are the three
 19 topics we'll discuss in our Opening. First, as a
 20 factual matter, Claimants knew that their land was
 21 located within the boundaries of the Las Baulas Park,
 22 and that, as a result, their property was subject to

02:13:22 1 being expropriated.
 2 Second, I will show that Claimants' claims
 3 fall outside of the Tribunal's jurisdiction for two
 4 reasons: First, all of the alleged breaches about
 5 which Claimants complain occurred before CAFTA entered
 6 into force; and, second, Claimants first acquired
 7 knowledge of the alleged breaches and their harmful
 8 effects more than three years before Claimants
 9 submitted their Notice of Arbitration.
 10 And finally, my colleague, Ms. Haworth
 11 McCandless, will outline the many problems with
 12 Claimants' assertions that Costa Rica has breached its
 13 CAFTA obligations and their request for damages.
 14 Please turn to Slide 3. This slide provides
 15 a timeline of the key events in this dispute. Because
 16 the timing is important, I will explain in
 17 chronological order the events relevant to the
 18 dispute. Please note that all these events were
 19 before CAFTA entered into force and before the
 20 critical date for the statute of limitations.
 21 Please also note that all the Declarations of
 22 Public Interest issued so far for Claimants'

02:14:47 1 properties have been issued between 2005 and 2007.
 2 All Decrees of Expropriation issued so far with
 3 respect to Claimants' properties have been issued
 4 between 2006 and 2008, and all the Acts of
 5 Dispossession issued so far with respect to Claimants'
 6 properties have been issued in 2008. And you'll see
 7 that in the box at the bottom left-hand side of the
 8 slide. I'll come back to this, but now let me start
 9 with 1991.
 10 The first date on the timeline is 1991, and
 11 that's the date when the Las Baulas National Park was
 12 created. It was created by Decree No. 20518, which is
 13 on the record as Exhibit C-1b. And the 1991 Decree
 14 created as part of the Park a 75-meter strip buffer
 15 zone in addition to the 50 meters public zone that
 16 runs along the coast.
 17 The 50 meters public zone was declared an
 18 inalienable zone in 1977, meaning that no private
 19 property--no private party could own or develop land
 20 in that 50-meter zone. The law that created that
 21 50-meter public area is in the record as
 22 Exhibit R-001. The '91 Decree added a 75-meter zone

02:16:26 1 to create a park of 125 meters.
 2 The 1991 Decree provided in the Whereas
 3 section, in particular numbers 4 and 5 of that
 4 section, that, and I quote, "If tourist infrastructure
 5 were developed in those sites, serious disruptions
 6 shall be produced, and these would seriously affect
 7 the turtles. It is thus necessary to create a
 8 national park to perpetually protect the colony of
 9 leatherback turtles and other existing natural
 10 resources in the area."
 11 In other words, the Park was created to
 12 prevent any urban development that would affect the
 13 leatherback sea turtles that nested in the Park.
 14 We believe counsel for Claimants said this
 15 morning that the 1991 Decree included a terrestrial
 16 component, so what I just said seems to be common
 17 ground between the Parties.
 18 Now, please turn to Slide Number 4. This is
 19 a map. The map on the slide is the Villareal and
 20 Matapalo map sheet that is referenced in Article 1 of
 21 the 1991 Decree to describe the boundaries of the
 22 Park. Article 1 of the Decree provides that, "From a

02:18:01 1 point located in the southern end of Playa Ventanas,"
 2 which is identified in the map in front of you with a
 3 green dot, the limited--I continue the quote, "The
 4 limit continues along an imaginary line parallel to
 5 the public zone in distance 75 meters, which means a
 6 total of 125 meters. 75 meters from it towards the
 7 southeast until the point of coordinates end 25500 and
 8 east 335050. And that is identified in the map in
 9 front of you with a purple dot down to the south.
 10 So, as you can see on the map, the Park
 11 covered a strip of land of 125 meters. There no
 12 question that the coordinates I gave you, the purple
 13 is inland. Clearly the 125-meter strip is inland
 14 because it runs towards the southeast.
 15 I ask you to note--and I'll come back to
 16 this. I'll ask you to note that the 1995 Law, The
 17 Park Law, references the exact same map in the same
 18 southern coordinates as the 1991 Decree. But now back
 19 to the 1991 Decree for a moment.
 20 In addition to the Park, the 1991 Decree
 21 created a protective zone in addition to the Park.
 22 This is stated in Article 2 of the Decree. According

02:19:48 1 to Article 2 of the Decree, "Playas Carbon y Ventanas
 2 including a strip of land of 75 meters from the public
 3 zone is declared a protected zone."
 4 The Decree states that "Every residential
 5 development of any other type made in this zone shall
 6 be approved by the Ministry of Natural Resources,
 7 Energy, and Mines."
 8 What this means is that while Playa Ventanas
 9 was not at this point in time part of the Park, it was
 10 declared a protected zone and no development within
 11 that protected zone could occur without the express
 12 approval of the Ministry of Natural Resources, Energy,
 13 and Mines. It was--"it," Playa Ventanas--was
 14 subsequently included in the Park by virtue of the
 15 1995 Park Law.
 16 Article 4 of the 1991 Decree provides
 17 that "Resources to purchase lands for the Park are to
 18 be included in the budget," which means that the
 19 property inside the Park would be expropriated.
 20 Please turn to Slide 5. The entire 125-meter
 21 strip of land that formed the Park and the protected
 22 zone was selected for a very particular reason: To

02:21:22 1 protect the beaches where the leatherback sea turtles
 2 lay their eggs from urban invasion and development.
 3 Mr. Rodney Piedra, manager of the Park since
 4 1998, which who will be testifying at this hearing,
 5 explained in his Witness Statements the abundant
 6 scientific evidence that shows that one of the biggest
 7 threats to the turtles in their reproduction is urban
 8 development in or near the nesting beaches. And thus,
 9 the 125-meter strip of land is intended to protect the
 10 nesting and surrounding areas from, among other
 11 things, adverse impact from development.
 12 Now, 1995, the Costa Rican Congress passed a
 13 law that set out in greater detail the means to
 14 achieve the Park's environmental objectives.
 15 Please turn to the next slide, which has an
 16 excerpt of Article 1 of the 1995 Park Law. Article 1
 17 refers to the same map you already saw. And
 18 Article 1 of the Park Law provides the limits of the
 19 Park including the start and end point of the
 20 125-meter strip of land. The north point now includes
 21 Playa Ventanas, which means now the protective zone of
 22 Playa Ventanas is now made part of the Park. Counsel

02:23:04 1 confirmed this this morning, so it also seems common
2 ground that Playa Ventanas was included in the Park by
3 virtue of the law in 1995.

4 Please note that the south point is the same
5 coordinates referenced in the 1991 Decree, the exact
6 same coordinates. And that point is inland. That is
7 the end point of the Park on the south. And so the
8 125-meter strip of land that runs along the coast of
9 Playa Ventanas and Playa Grande is now part of the
10 Park, and the Park includes a strip of land of
11 125 meters because the southernmost coordinate is the
12 same as the 1991 Law.

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

15 Article 2 of the 1995 Law provides that the
16 property within the Park would be expropriated. The
17 1995 Park Law is Exhibit C-1e. And as Respondent has
18 explained in its written submission, the Costa Rican
19 Congress made an obvious mistake which describing the
20 borders of the Park.

21 As you can see from the slide, in describing
22 the area of the Park, the law stated that 125 meters

02:24:47 1 ran from the ordinary high tide offshore. Offshore,
2 this is Claimants' translation. We use the term
3 "seawards," I think it's common ground between the
4 Parties that it means towards the sea. The term in
5 Spanish is aguas adentro.

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

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

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

22 Second, The Park Law would be determined

02:26:19 1 inconsistent if the term "seaward" were not a mistake.
2 Article 2 of the Park Law authorizes the expropriation
3 of private land within the Park, and I quote, "The
4 private lots of land included in the delimitation will
5 be susceptible of expropriation and will be considered
6 part of the National Marine Park Las Baulas." If the
7 Park were only at sea, there would be no land that
8 could be expropriated.

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

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

02:27:52 1 is rebutted.

2 And thus, looking at the text and the purpose
3 of the law, there is no doubt that the Park included a
4 125-meter strip that runs along the coastline inland,
5 not seawards. And that this was true was obvious to
6 anyone who looked carefully at the Park Law.

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

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

19 It also says that the 125-meter strip of land
20 is in addition to the Cerro el Morro and the
21 Isla Verde land areas covered by the Park. If MINAE,
22 the relevant Ministry of Costa Rica, understood that

02:29:34 1 the Park were seawards, it would have said so and it
2 would not have described the Park as inland. This is
3 on the record as Exhibit R-100.

4 I also want to refer to Exhibit C-53, which
5 was shown to you this morning, minutes of meetings of
6 Costa Rican Government officials. It was a slide, if
7 you recall, where the text on the screen was not quite
8 the text on the paper, but this doesn't matter. You
9 can look at the exhibit itself.

10 And what was not pointed out to you was the
11 text--it was partially read--saying MINAE does not
12 cover the expansion of this National Park. The
13 sentence continues, "up to 100 meters to the public
14 zone because there is the lack of financial resources
15 to purchase lands."

16 So the question was not whether the Park
17 extends 125 meters inland. The question discussed was
18 whether the inland area should be extended to
19 1,000 meters, and that's what MINAE at the time did
20 not support.

21 But if you also look further down the text,
22 there's a language that I will quote from Page 2 that

02:31:12 1 says, "In the private areas declared as a National
2 Park in 1991 and 1995, we would like to promote a
3 voluntary conservation regime instead of resorting to
4 the respective expropriations."

5 So what MINAE was discussing is whether,
6 instead of the respective expropriations, they could
7 find a way to impose a voluntary conservation regime.
8 That didn't happen. But what this shows is that MINAE
9 understood--and this is an internal Government
10 document--that the National Park, both in '91 and in
11 '95, provided for the expropriation of the private
12 property within the 125 strip of land.

13 Please turn to Slide 8. The expropriations
14 of private property inside the Park started in
15 November 2003. In a letter from the Minister of
16 Environment of Costa Rica, MINAE, to the National
17 Environmental Technical Secretariat, referred to as
18 SETENA, MINAE states that the issuance of the first
19 Declaration of Public Interest in November of 2003
20 marked the initiation of the expropriation proceedings
21 inside the Park.

22 Again, if MINAE had understood that the Park

02:32:58 1 boundaries ran 125 meters seaward, it would not have
2 needed to start any expropriation proceedings. This
3 document is Exhibit C-74.

4 Next, please turn to Slide 9. MINAE stamps
5 on the land registry drawings dated 2002 certify that
6 the properties located within the 125-meter strip of
7 land are inside the Park. This slide shows a stamp
8 that was issued for Lot B3. And this registry drawing
9 is on the record at Exhibit C-24a.

10 The MINAE stamp is dated 2002, before any
11 purchase was made by Claimants, and it specifically
12 states that the property is located inside the Park.
13 As you see, and I quote, "Based on the location that
14 appears in the land registry drawing, the described
15 property is located within the Las Baulas National
16 Park." The date of the stamp is September 9, 2002.

17 Claimants' counsel walked you through some of
18 those. I represent to you--because it's in the record
19 and in our submissions now-- that the same stamp from
20 2002 also appears in the registry drawings for the
21 other B Lots: B1, B5, B6, B7, and B8.

22 Claimants started purchasing their properties

02:34:47 1 in late 2003. Notwithstanding evidence like the land
2 registry drawing I just showed you and that you see on
3 the screen demonstrating that the property is inside
4 of the Park, Claimants deny that this is true. They
5 deny that the land registry drawings show Claimants'
6 property was inside of the Park. We'll get to that in
7 a moment.

8 But now please turn to the next slide,
9 Slide 10. It shows that the land registry drawing for
10 Lot B3 dated this time 2005. The MINAE stamp also is
11 dated 2005. This registry drawing clearly shows that
12 Lot B3 was inside the Park in 2005 as well. So, you
13 have evidence the registry drawings of 2002 and 2005,
14 and they show that this piece of property was part of
15 the Park in 2002 and in 2005.

16 The Claimant in the registry of properties is
17 Mr. Berkowitz, and he alleges that he disregarded the
18 2002 stamp, which dates before the purchase, because
19 it only mentioned the 1991 Decree. And he then argues
20 that only in 2005 do MINAE stamps started referring to
21 the 1995 Law. This argument was repeated this morning
22 by counsel for Claimants saying that, Well, you should

Sheet 29 Page 110

110

02:36:31 1 disregard the 2002 stamp saying the property is inside
2 the Park because it only refers to the '91 Decree and
3 not to the '95 Law.
4 Mr. President and Members of the Tribunal,
5 whether or not the stamp in 2002 refers to the '95 Law
6 or the '91 Decree is entirely irrelevant. The fact is
7 that before Claimants purchased their property, and in
8 this particular case of the B Lots, around the time
9 Mr. Berkowitz was purchasing the property before, in
10 2002 and after in 2005, the land registry drawings
11 told him the property was inside the Park. Both the
12 2000 and the 2005 registry drawings show that the
13 property is inside the Park.
14 Please turn to Slide 11. Claimants Copher
15 and Spence argue that the land registry drawings for
16 their properties even certified that their properties
17 were located outside of the Park. What they failed to
18 explain, however, is why the stamps provided that the
19 properties are outside the Park.
20 So, let's take, for example, the land drawing
21 for Lot V38, which is on the record as Exhibit C-7a.
22 You have that on the screen and, as you can see, the

Page 111

111

02:38:05 1 stamp is dated 1993. Lot V38, as all of the Copher
2 and Spence Lots, is located in Playa Ventanas. As I
3 just discussed, Playa Ventanas only became part of the
4 Park in 1995, and so any stamp predating 1995,
5 predating the 1995 Park Law, would provide that Playa
6 Ventanas and the lots in Playa Ventanas are outside of
7 the Park. But let's look at what happens after 1995.
8 Please turn to Slide 12. In contrast, land
9 registry drawings for Playa Ventanas registered after
10 1995 do indicate that the property is located inside
11 the Park. Claimants have not submitted the post-'95
12 registry drawings for the same lots, but they have
13 submitted post '95 registry drawings for another lot
14 located in Playa Ventanas.
15 So, we look, for example, to Lot V59 owned by
16 Spence International Investments, which is in Playa
17 Ventanas. And you see on the slide the land registry
18 drawing for this lot, Exhibit C-12a. The stamp on
19 this land registry is dated September '96, after the
20 Park Law. And if you look at the stamp from MINAE on
21 the back of the page, it states that, "On the base of
22 the location that appears on this map, the property

Page 112

112

02:39:44 1 described is located inside the Las Baulas National
2 Park."
3 A similar stamp is on the land registry
4 drawings for Lots V61a, V61b, and V61c, all dated
5 2006. And so the argument that the properties in
6 Playa Ventanas are outside the Park because the
7 registry drawings say so is simply wrong. After Playa
8 Ventanas was incorporated into the Park in 1995, the
9 registry drawings bear a stamp showing that those
10 properties are inside the Park.
11 According to Costa Rican Law, landowners are
12 responsible for updating the land registry drawings.
13 This includes requesting MINAE to certify whether the
14 property is inside a national park. Had Claimants
15 updated the land registry drawings at the time of
16 their purchases, MINAE would have certified that the
17 properties were inside of the Park. Instead, some of
18 the Claimants prefer--at least for the purposes of
19 this arbitration--to rely on drawings that had been
20 registered as many as 10 years before they purchased
21 their land.
22 We find it hard to believe that they didn't

Page 113

113

02:41:22 1 obtain such registry drawings at the time of purchase
2 and we wonder why they weren't submitted if they were
3 saying that the properties were outside of the Park.
4 And so, in spite of the fact that the
5 registry drawings of 2002, before the purchases in
6 2005, show that their properties are inside of the
7 Park, Claimants insist, they allege that they could
8 not have known that the property was located in the
9 Park because the 1995 Park Law provided that the Park
10 extended seawards. And as I already explained, that
11 reference in the law was a mistake. And indeed, in
12 2004, the Procuraduría issued an opinion confirming
13 the understanding of the law that the Park area
14 extended inland.
15 The Procuraduría serves as a function of a
16 legal advisory body to the Costa Rican Government,
17 among its other functions. Its interpretations of law
18 are authoritative, and in some cases, legally binding.
19 In 2003, MINAE requested from the Procuraduría an
20 interpretation of the 1995 Park Law. In particular,
21 MINAE inquired about the meaning of the "seaward"
22 language in Article 1. MINAE's request is on the

02:42:55 1 record as Exhibit R-93.
 2 Please turn to Slide 13. This is an excerpt
 3 from Procuraduría's response in February of 2004. The
 4 Procuraduría clarified that the only logical
 5 interpretation of the boundaries of the Park was that
 6 Congress had mistakenly included the "seaward"
 7 reference, and that the 125-meter strip referenced in
 8 the law ran inland. Exhibit C-1t.
 9 Claimants make much of the point that the
 10 First Opinion of the Procuraduría was not binding on
 11 MINAE for technical reasons. Nevertheless, this First
 12 Opinion was significant. Claimants try to argue that
 13 because the Opinion was not binding, it did not have
 14 any effect, and that is not true; it did have effect.
 15 It informed interested Parties of what was, according
 16 to the Procuraduría, the proper interpretation of the
 17 law. The Opinion was made public through the Costa
 18 Rican system of legal information on the Web site.
 19 And so if Claimants had any doubts regarding the
 20 boundaries of the Park, they could have consulted this
 21 opinion to clarify the matter.
 22 The 2004 Procuraduría opinion was not binding

02:44:24 1 on MINAE for a technical reason. MINAE addressed the
 2 question to the Procuraduría but did not attach a
 3 study supporting the question, which was required
 4 under Costa Rican law. In 2005, MINAE corrected this
 5 technical defect and requested a new opinion from the
 6 Procuraduría, this time supporting the question with a
 7 study. The Procuraduría issued a new opinion on
 8 December 23, 2005, which was legally binding this
 9 time. This is Exhibit C-1g, and this opinion
 10 essentially reproduced the 2004 opinion and logically
 11 confirmed it.
 12 The very last sentence of the 2005 opinion
 13 concludes that the Park, "runs on land at a distance
 14 of 125 meters from the normal high tide."
 15 If you'll allow me to draw your attention
 16 again to the timeline we showed you earlier, which is
 17 now on Slide 14. This timeline shows all the events
 18 through 2008, and I will discuss some of them in a
 19 moment, but the point here is that, if Claimants had
 20 any doubt whatsoever, if they knew nothing of any of
 21 these developments that you see on the timeline, if
 22 they had not obtained recent registry drawings at the

02:45:59 1 time of the purchase, if they did not pay any
 2 attention to the Procuraduría opinions, then they
 3 would have certainly found out they were being
 4 expropriated when MINAE initiated expropriation
 5 procedures for some of Claimants' own properties in
 6 December of 2005, when it issued a declaration of
 7 public interest, for example, for all the B Lots. In
 8 December of 2005, they had no idea of anything else
 9 that was going on, they would have found out.
 10 Further, as early as 2005, the constitutional
 11 division of the Supreme Court declared that: One, the
 12 Park includes 125-meter strip of land; two, private
 13 property had to be expropriated; and, three, the State
 14 should adopt any relevant actions to protect the
 15 environmentally fragile area of the Park.
 16 In deciding cases on the constitutionality of
 17 the laws and regulations that impacted the Park, the
 18 Supreme Court, in two different proceedings, reached
 19 the same interpretation of the 1995 Park Law as the
 20 Procuraduría. One decision was rendered in 2005;
 21 another in 2008. They are Exhibit C-1v and C-1h
 22 respectively.

02:47:44 1 Finally, in August 2005, SETENA issued
 2 Resolution Number 2238, 2005, Exhibit C-1f,
 3 temporarily suspending the issues of all environmental
 4 permits located inside the Park. This suspension was
 5 a result of the Supreme Court's decision and
 6 subsequent orders by MINAE.
 7 In 2008, the Supreme Court issued Decision
 8 2008-18529, in which it ordered SETENA to permanently
 9 suspend all environmental and building permits within
 10 the Park area, Exhibit C-1j. This Supreme Court
 11 decision resulted from a case brought by neighbors of
 12 the Park, who insisted that SETENA's issuance of
 13 environmental permits inside of the Park was contrary
 14 to the State's constitutional obligation to protect
 15 the environment. And the Supreme Court so decided.
 16 In compliance with this decision, the State
 17 suspended all environmental permits inside the Park
 18 and adopted several other measures to further protect
 19 the area of the Park. They are listed in
 20 Exhibit R-035 and Exhibit C-z1. And I want to
 21 emphasize the significance of the December 2008
 22 Decision of the Supreme Court. It ordered SETENA to

02:49:20 1 permanently suspend all environmental and public
 2 permits within the Park in December of 2008.
 3 In sum, there is no basis for Claimants to
 4 argue that the 125-meter strip runs seawards rather
 5 than inland. Any uncertainty regarding the Park's
 6 boundaries that may have been caused by the mistake in
 7 the use of the word "seawards" in the 1995 law was
 8 definitively resolved as early as February of 2004 by
 9 the Legal Opinion of the Procuraduría, which was
 10 subsequently endorsed by the Supreme Court. And
 11 drawings in the record as early as 2002, before
 12 Claimants purchased their properties, indicate with a
 13 stamp by MINAE that the properties were inside of the
 14 Park.
 15 And so what happened here was that Claimants
 16 made a risky investment. They knew that the land they
 17 were purchasing was inside of the Park and was subject
 18 to being expropriated. They thought perhaps it might
 19 not be or they would sell it before it was
 20 expropriated. We don't know. What we know is that
 21 they took a calculated risk and lost. But Costa Rica
 22 should not have to pay for Claimants' ill-fated

02:50:50 1 gamble. The Government maintained the Park's
 2 boundaries and began to expropriate properties
 3 therein. And Claimants should not be allowed now to
 4 blame Costa Rica because they underestimated Costa
 5 Rica's commitment to environmental conservation.
 6 Let me now turn to questions of jurisdiction.
 7 As I mentioned, everything about which Claimants
 8 complain in these proceedings is time-barred for two
 9 independent reasons: First, CAFTA entered into force
 10 on January 1, 2009, and the alleged breaches about
 11 which Claimants complain took place before that date.
 12 And, second, CAFTA Article 10.18 provides
 13 that, "No claim may be submitted to arbitration if
 14 more than three years have elapsed from the date in
 15 which the claim first acquired or should have first
 16 acquired knowledge of the breach alleged and knowledge
 17 that the Claimant or enterprise has incurred loss of
 18 damage."
 19 Claimants filed their Notice of Arbitration
 20 on June 10, 2013, and, therefore, the key date for
 21 statute of limitations purposes is June 10, 2010.
 22 They knew or should have known about the breaches they

02:52:19 1 allege before June of 2010.
 2 So, let me discuss those two grounds or lack
 3 of jurisdiction, in turn. I will start with the
 4 argument that Claimants' claims are time-barred under
 5 CAFTA because the alleged breaches occurred before
 6 CAFTA entered into force. The jurisdiction of this
 7 Tribunal covered alleged breaches that occurred after
 8 CAFTA entered into force; that is, after January 1,
 9 2009. Article 28 of the Vienna Convention of the Law
 10 of Treaties establishes that, unless a different
 11 intention appears from the Treaty unless otherwise
 12 established, a treaty's provisions do not bind a party
 13 in relation to any act or fact which took place before
 14 the date of the entering into force of the Treaty with
 15 respect to that party.
 16 In addition, Article 10.13(3) of CAFTA
 17 provides, quote/unquote, for greater certainty that
 18 "This chapter does not bind any Party in relation to
 19 any act or fact that took place or any situation that
 20 ceased to exist before the date of entering into force
 21 of this agreement."
 22 In short, CAFTA does not apply retroactively.

02:53:35 1 If a Claimant in CAFTA is based on measures that
 2 occurred before January 1, 2009, such measures cannot
 3 breach any provisions of CAFTA because there was no
 4 obligation at the time under CAFTA, and the claim,
 5 therefore, must fail.
 6 In this case, the Measures about which
 7 Claimants complain occurred before January 1, 2009.
 8 Therefore, Costa Rica is not in breach of its CAFTA
 9 obligations, cannot be found liable for any damages
 10 that may have resulted from those measures, and this
 11 Tribunal lacks jurisdiction to hear Claimants' claims
 12 regarding such measures.
 13 First, with respect to nine of Claimants'
 14 properties--and those are Lots A40, SPG1, SPG2, B1,
 15 B3, B5, B6, B7, and B8. With respect to those nine
 16 properties, Claimants assert direct expropriation.
 17 With respect to timing, they point in their Memorial
 18 on the Merits to the Act of Dispossession as the
 19 moment when direct expropriation occurred. According
 20 to Claimants, at that point in time, "The State takes
 21 possession of the land therefore"--"thereby satisfying
 22 the customary requirement of a direct 'taking.'"

02:55:04 1 This is Claimants' Memorial on the Merits at
 2 Paragraph 207. Well, the Acts of Dispossession for
 3 those nine properties were issued on March 12, 13, and
 4 14, 2008, and on December 9, 2008. All those dates
 5 are before CAFTA entered into force.
 6 Second, with respect to the remaining 17
 7 properties, Claimants assert indirect expropriation.
 8 Claimants allege that they lost the use and enjoyment
 9 of those properties as a result of the State's
 10 confirmation of the boundaries of the Park and the
 11 State's restriction on development within the Park.
 12 In particular, Claimants allege that, "It is manifest
 13 that the only measure that could crystallize the
 14 creeping expropriation started in 2004 would be a
 15 final decision by MINAE to permanently terminate the
 16 permitting process and to revoke all existing permits.
 17 This event took place in 2010, after the CAFTA had
 18 come into force."
 19 This is from their Reply on the Merits at
 20 Paragraph 294. But as a matter of fact, Claimants are
 21 incorrect. This event took place in 2008, not 2010,
 22 and that's before CAFTA entered into force. The

02:56:34 1 termination of the permitting process and the
 2 revocation of the permits occurred in December--
 3 actually, on 16 December 2008--when, as I already
 4 discussed, the Costa Rican Supreme Court ordered the
 5 Administration to stop issuing--to permanently stop
 6 issuing environmental impact permits and revoked all
 7 existing environmental impact permits for properties
 8 located inside the Park.
 9 So, the indirect expropriation, the creeping
 10 expropriation that occurred crystallized in December
 11 of 2008, and this is also before CAFTA entered into
 12 force.
 13 Now, in their Memorial, Claimants complain
 14 that Respondent has breached its obligations under
 15 CAFTA by not paying Claimants prompt and adequate
 16 compensation and otherwise treating them unfairly and
 17 equitably by the following allegedly arbitrary
 18 Government actions: One, the violations of the
 19 property by independent appraisers; two, the judicial
 20 decisions from the valuation of the property; and,
 21 three, the partial expropriation of the properties
 22 with respect to the portions of the properties that

02:57:51 1 lie within the boundaries of the Park; and, four, the
 2 temporary suspension of the expropriation process for
 3 properties not yet at the judicial stage in the
 4 proceedings.
 5 As a matter of fact, most of these acts
 6 occurred before CAFTA entered into force, but to the
 7 extent that they did not, they represent the lingering
 8 effects of completed acts; that is, the acts of the
 9 alleged direct and indirect expropriation. Those are
 10 the lingering effects of the direct and indirect
 11 expropriation, which on their own case, was completed
 12 before CAFTA entered into force. None of these acts,
 13 which I refer as to the lingering effects, is a breach
 14 in and of itself of CAFTA's obligations. The
 15 foundation of Claimants' complaints is the alleged
 16 expropriation of their properties, which was complete
 17 before CAFTA entered into force. Delayed payment,
 18 allegedly inadequate payment, allegedly stole judicial
 19 procedures, these are purported harms stemming from a
 20 completed act of expropriation.
 21 The Tribunal in Mondev, for example, agreed
 22 with this reasoning in its analysis of claims

02:59:18 1 strikingly similar to this case. There, the Tribunal
 2 found that it did not have jurisdiction over Mondev's
 3 expropriation claim because the Claim concerned
 4 alleged breaches that took place before NAFTA entered
 5 into force. The Tribunal held that, if there were an
 6 expropriation of Mondev's rights in the investment, it
 7 was completed at the time that the alleged
 8 expropriation had definitive effect pre-NAFTA. Mondev
 9 may have experienced harm that continued into the time
 10 NAFTA entered into force, but the Tribunal held that
 11 the mere fact that an act may have continue to cause
 12 harm does not make that act of a continuing nature.
 13 Members of the Tribunal, let us look
 14 carefully at what Claimants are actually arguing.
 15 They say that both the direct and the indirect
 16 expropriation happened, crystallized, and completed
 17 before CAFTA entered into force. They say, however,
 18 that, when CAFTA entered into force in on January 1,
 19 2009, CAFTA imposed on Costa Rica the obligation to
 20 pay prompt and adequate compensation for those
 21 expropriations that happened before.
 22 Counsel repeated this morning the obligation

03:00:41 1 that was breached was an obligation of expropriation
 2 in a manner consistent with CAFTA, but that obligation
 3 did not exist when the expropriations took place.
 4 When the expropriations took place, Costa Rica had no
 5 obligation to expropriate in the manner consistent
 6 with CAFTA because CAFTA did not apply retroactively.
 7 So, Claimants essentially argue that, with the
 8 entering into force of CAFTA, the CAFTA Parties became
 9 obligated to pay compensation for expropriations that
 10 occurred at an earlier point in time.

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

18 Before CAFTA entered into force, Costa Rica
 19 did not have under CAFTA an obligation to provide
 20 compensation for expropriation. In other words, prior
 21 to its entering into force, CAFTA could not have and
 22 did not have--and did not prohibit uncompensated

03:02:05 1 expropriation, at the time the alleged expropriation
 2 occurred--expropriations occurred, Costa Rica had no
 3 CAFTA obligation to Claimants to pay prompt and
 4 adequate compensation, or any compensation, for that
 5 matter. And an obligation cannot arise under CAFTA to
 6 pay compensation with respect to an earlier
 7 expropriation, an expropriation that occurred when
 8 payment of compensation under CAFTA was not required.

9 To the same extent that Claimants'
 10 expropriation claims are time-barred, by the entering
 11 into force of CAFTA, so, too, are Claimants'
 12 allegations regarding whether such expropriations were
 13 conducted in accordance with CAFTA's standard of fair
 14 and equitable treatment. At the time Claimants'
 15 property was expropriated, Costa Rica had no CAFTA
 16 obligation to carry out the expropriations in a fair
 17 and equitable manner, whatever that standard means,
 18 and we'll come back to that standard.

19 In essence, Claimants' other claims, other
 20 than the claims for direct and indirect
 21 expropriation--it is the claims for nonpayment of
 22 prompt and adequate compensation, denial of fair and

03:03:24 1 equitable treatment, denial of justice, et cetera--are
 2 nothing but the lingering effects of the alleged
 3 expropriation. That expropriation took place before
 4 NAFTA entered into force, and Claimants now seek to
 5 portray the lingering effects of those expropriations
 6 as new breaches that took place after January 1, 2009.

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

21 In the words of the Clayton Tribunal--and I
 22 quote from Paragraph 268--the Tribunal's position that

03:04:41 1 an act can be complete even if it has continuing
 2 ongoing effects is in line with the Tribunal in Mondev
 3 and further consistent with Article 14.1 of the
 4 International Commission's Article on the
 5 responsibility of States for Internationally Wrongful
 6 Acts, according to which the breach of an
 7 international obligation by an act of a State not
 8 having a continuing character occurs at the moment
 9 when the act is performed, even if its effects
 10 continue.

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

21 In sum, this Tribunal has no jurisdiction
 22 because the alleged expropriations took place before

03:05:48 1 CAFTA entered into force, and Claimants complain
2 simply of the lingering effect of those
3 expropriations, some of which may have continued after
4 January 1, 2009, but whether or not the lingering
5 effects continue after CAFTA entered into force, this
6 Tribunal has no jurisdiction.

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

18 Claimants filed their Notice of Arbitration
19 on June 10, 2013, and, therefore, the critical date
20 regarding CAFTA statute of limitations is June 10,
21 2010, three years prior to the filing of the notice.
22 It is absolutely clear from the record in this case

03:07:20 1 that the Claimants first knew about the facts that
2 they--about the acts that they allege breach Costa
3 Rica's statutory obligations and the harms resulting
4 from those acts well before June 10, 2010.

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

18 Please turn to Slide 16. This is a list of
19 quotes from Claimants' Notice of Arbitration and their
20 Memorial. These are some of the dates Claimants
21 themselves identify in the Notice of Arbitration of
22 the Memorial on the Merits.

03:08:32 1 So, let's look at them carefully. They say
2 at some point towards the end of 2005, all of the
3 Claimants eventually heard--all of the Claimants
4 eventually heard--about SETENA's decision to
5 temporarily suspend its environmental assessment
6 procedure, and at some point in 2006, each Claimant
7 would have individually heard from a SETENA official
8 that the Attorney General has issued some sort of
9 opinion apparently requiring them to treat their Lots
10 as being located within the Park. The seriousness of
11 their situation only dawned on Claimants once the
12 string of decisions rendered by the Constitutional
13 Court in 2008 started to emerge.

14 All this, well outside the statute of
15 limitations. Next, they say it was not until 2005 for
16 the Berkowitz group of Claimants and 2007 for the
17 Spence group of Claimants that they realized the
18 status quo ante might have changed; again, well before
19 2010.

20 Next, together these two judicial
21 decisions--they are talking about May 2008 and
22 December 2008--constituted a final and binding

03:09:52 1 prohibition of the development of all land within the
2 eastern boundary of the Park.

3 Next, thus, commencing with the
4 Constitutional Court Decision in May of 2008 directing
5 MINAE to expropriate the land and concluding with the
6 Constitutional Court's clarification of 27 March 2009,
7 the Respondent--and I emphasize--"completed the
8 creeping expropriation of the rest of the Claimants'
9 properties."

10 So, with the Decision of May of 2008 and the
11 clarification of March 2009, on their case, Costa Rica
12 completed the creeping expropriation of the rest of
13 the properties. It was mentioned earlier that
14 Respondent has the burden to prove that they first
15 knew of the acts they complain of before the statute
16 of limitations kick in. With their own admissions, on
17 their own case, we've made a prima facie case that
18 they knew. The burden now would shift on them to
19 disprove their own statements, because what they say
20 here is clear. They argue Costa Rica completed the
21 creeping expropriation before the statute of
22 limitations kicked in. They could not have not known

03:11:13 1 about that.
 2 And, finally, on this slide, May 27, 2008, is
 3 the date used by their Damages Expert as the date on
 4 which he determines the value of the property because
 5 of the requirement that the value of property is
 6 determined on the eve of expropriation. There is
 7 more. I invite you to turn to Slide 17. It
 8 continues. "By 2009, they say, Respondent, through
 9 various agencies, Ministries, and Courts, had passed a
 10 series of Resolutions and made a number of decisions
 11 without taking title to land resulted in total
 12 deprivation of the Claimants' rights to own and enjoy
 13 the property."
 14 By 2009, they say, there was a total
 15 deprivation of their rights to own and enjoy the
 16 property. They must convince you now that they didn't
 17 know about that, total deprivation of the rights to
 18 own and enjoy the property. They cannot. This is
 19 their case.
 20 Next, second bullet, "Claimants lost their
 21 investments five or more years ago." This is in their
 22 Memorial filed in April 2014. So, they claim they

03:12:29 1 lost their investments before April 2009.
 2 Next, the Respondent has maintained measures
 3 tantamount expropriation of most of Claimants'
 4 investment which began with the Decision of the
 5 Constitutional Court rendered on 23 May 2008, and
 6 crystallized, crystallized with an order of the
 7 Minister of MINAE on 19 March 2010 in which he ordered
 8 his staff to terminate all pending environmental
 9 viability permit applications and never accept
 10 another. So the Measures tantamount expropriation
 11 crystallized on 19 March 2010, again before the
 12 critical date.
 13 Next, the order issued in 19 March 2010, they
 14 say, finally abolished any opportunity for the
 15 Claimants to freely exercise their property rights.
 16 On their own case, the exercise of their property
 17 rights was finally abolished in March 2010. They have
 18 a very, very heavy burden to persuade you they didn't
 19 know about that in March 2010.
 20 And, finally, finally in terms of our
 21 examples, the answer they say to the question of when
 22 the composite impact of Respondent's measure

03:14:00 1 substantially deprive the Claimants of their use and
 2 enjoyment of their property rights and interest in
 3 their investment was on or about 19 March 2010. The
 4 composite impact substantially deprived them of their
 5 property on or about 19 March 2010. All this, all
 6 this on their own case was before June 10, 2010, the
 7 critical date for the statute of limitation purposes.
 8 And in fact, in Claimants' Memorial, they provide a
 9 summary list of all the Respondent's acts about which
 10 Claimants are complaining today.
 11 If you turn to Slide 18, this is Claimants
 12 own summary of their case. Their own summary of the
 13 measures or acts which they allege are a breach of
 14 CAFTA. I'm not going to read them all, but you will
 15 see that those acts begin in 1995 and end in March of
 16 2010. All before the critical date of June 2010.
 17 This is their case. And to avoid their statute of
 18 limitation problem, they have to persuade you that
 19 they had no knowledge whatsoever about any of these
 20 measures until after June 2010. They cannot do that.
 21 There is ample evidence in the record that they
 22 acquired such a knowledge. And even if there weren't

03:15:44 1 such an evidence, those are public measures and
 2 Claimants could have and should have known about them
 3 at the time they were adopted.
 4 Mr. President, Members of the Tribunal, we
 5 really could stop here because on their own case,
 6 they're out because of the statute of limitations in
 7 CAFTA. And we should have, because we believe that on
 8 that basis alone, those claims are frivolous. We'll
 9 return to that when we ask you for costs and fees.
 10 I would add that Claimants also first knew or
 11 should have known of the alleged breaches of what they
 12 say is a breach of the Fair and Equitable Treatment
 13 Standard, more than three years before they filed
 14 their Notice of Arbitration. They allege that
 15 Respondent has treated them unfairly and inequitably
 16 in violation of CAFTA Article 10.5 by conspiring to
 17 deny Claimants' payment and by delaying the
 18 expropriation process that started many years ago.
 19 But these are the same harms that they claim as a
 20 result of the violation of the expropriation
 21 provision, and as I just discussed, all those measures
 22 occurred well before June 2010.

03:17:06 1 And so the claims regarding fair and
 2 equitable treatment are also time-barred. So let me
 3 briefly discuss then what is it that they say in their
 4 attempt to seek to avoid the statute of limitations
 5 provision. Well, they have several arguments, and
 6 I'll discuss them briefly.

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

21 Allow me to use a very simple example to
 22 illustrate how untenable Claimants argument is. Let's

03:18:31 1 assume that Claimants were subjected to discriminatory
 2 treatment, make a discriminatory taxation, that
 3 started 20 years ago and continues to this day. Their
 4 claims would have been time-barred because they first
 5 acquired knowledge or should have acquired knowledge
 6 of that alleged discriminatory conduct and harm
 7 20 years ago. The fact that this may be a continuous
 8 breach does nothing to remove the operation of the
 9 statute of limitations. Under CAFTA statute of
 10 limitation, it is enough that Claimants knew about the
 11 alleged breach and harm more than three years before
 12 they filed for arbitration, and that results in a
 13 failure for this Tribunal to accept jurisdiction.

14 This issue has been addressed by NAFTA
 15 tribunals and resolved in favor of Costa Rica's
 16 position. According to the Grand River Tribunal,
 17 allowing investors to evade limitation periods by
 18 basing their claims on the most recent
 19 transgression--is the word used by the Grand River
 20 Tribunal--the most recent regression in a series of
 21 similar and related actions by Respondent State would
 22 render the statute of limitations ineffective. This

03:19:41 1 is the Decision on Jurisdiction at Paragraph 81.

2 And in the words of the Grand River Tribunal
 3 where, "a series of similar and related actions by a
 4 Respondent State" is at issue, an investor cannot
 5 evade the statute of limitations period by basing its
 6 claim on "the most recent transgression in that
 7 series." Paragraph 81 on the Decision on
 8 Jurisdiction.

9 To allow an investor to do so would, in the
 10 view of the Grand River Tribunal, "render the
 11 limitation provision ineffective." Again,
 12 Paragraph 81. That argument was also addressed by the
 13 Clayton Tribunal. Claimants in that case allege that
 14 certain acts and omissions of the Canadian Government
 15 with respect to their investments were discriminatory,
 16 arbitrary and unfair, and Canada, much like Costa Rica
 17 in this case, argued that investors' claims were
 18 time-barred because of the alleged breaches occurred,
 19 and Claimants knew about the harm they suffered as a
 20 result of those breaches, more than three years before
 21 Claimant filed their Notice of Arbitration. The
 22 Claimants in Clayton disagreed asserting that the

03:20:52 1 actions which constituted the alleged breaches were
 2 continuing in nature and had continued into the time
 3 period within NAFTA's three-year statute of
 4 limitations. The Clayton Tribunal ruled in favor of
 5 Canada.

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

10 The second argument, Claimants assert that
 11 they could not have known of the extent of the harm
 12 that they suffered as a result of the alleged breaches
 13 until the continuing measures had ended. And so in
 14 this case, they say, they allegedly could not have
 15 known the extent of the harm until they received some
 16 compensation and could quantify the exact amount of
 17 the damages suffered because they didn't know what
 18 they would receive because so they didn't know what
 19 the delta would be between what they received and what
 20 they think they were entitled to.

21 Several problems with that argument.
 22 Acquiring specific detail and precise knowledge of the

03:22:04 1 quantum of damages is not required. It is sufficient
 2 that a Claimant knows or should have known that he or
 3 she has suffered harm as a result of the alleged
 4 breach. Knowing the extent of the loss or quantifying
 5 the exact amount of damages is not an event that
 6 triggers the statute of limitations period. And
 7 several NAFTA Tribunals have made that point very
 8 explicitly. I'm referring to Mondev, Grand River, and
 9 Clayton. As a Tribunal in Clayton stated in
 10 Paragraph 275, "the Tribunal agrees with the reasoning
 11 of its predecessors on this point. The plain language
 12 of Article 1116(2) does not require full or precise
 13 knowledge of loss or damage. It might be that some
 14 qualification can be read into the plain language such
 15 as a requirement that the laws be material. To
 16 require a reasonably specific knowledge of the amount
 17 of loss would however involve reading into
 18 Article 1116(2) a requirement that might prolong
 19 greatly the inception of the three-year period and add
 20 a whole new dimension of uncertainty to the time limit
 21 issue. It would have to be determined in each case,
 22 not only whether there's actual constructive knowledge

03:23:25 1 of loss or damages, but whether the Investor has
 2 knowledge that is sufficiently actual or concrete.
 3 The Grand River Tribunal reached the same
 4 conclusion. According to that Tribunal--and I quote
 5 from Paragraph 77 of the Decision on
 6 Jurisdiction--"Damages for injury may be incurred even
 7 though the amount or extent may not become known until
 8 some future time."
 9 And the same Tribunal, one paragraph later,
 10 Paragraph 78, said, "In this respect, the Tribunal's
 11 views parallel those of the NAFTA Tribunal in Mondev.
 12 The Claimant there also faced difficulties arising
 13 from the time limitations of Article 1116(20),
 14 1117(2). The Claimants sought to surmount these with
 15 the argument that it could have certain knowledge that
 16 it had incurred injury from the events prior to the
 17 limitations period only after it knew the outcome of
 18 subsequent litigation that stood to quantify the
 19 extent of loss was known. The Tribunal did not agree
 20 finding that a Claimant may know that it has suffered
 21 loss or damage, even if the extent of quantification
 22 of the loss or damage is still unclear."

03:24:42 1 Thus, Claimants lack of full knowledge of the
 2 extent of their damages does not reset or toll the
 3 statute of limitations period.
 4 Mr. President, Members of the Tribunal, even
 5 today Claimants do not know the exact amount of their
 6 damages. In fact, they are still seeking to,
 7 quote/unquote, "update" their damages and that attempt
 8 shows that they will not know the amount of damages,
 9 the exact amount of damages until all judicial
 10 proceedings in Costa Rica have been completed.
 11 Now Claimants go as far as asserting that
 12 "knowledge of both loss and breach is not possible
 13 until the system fails to provide a final compensation
 14 result." That is their Rejoinder on jurisdiction,
 15 Paragraph 108. So they admit that it is not possible
 16 to know the exact quantum of damages until the Costa
 17 Rican system fails to provide a final compensation
 18 result. Obviously, under this theory, the statute of
 19 limitations under CAFTA would be rendered meaningless.
 20 Let me also point out, however, that Claimants' own
 21 theory--and that's their theory, not our theory as
 22 they referred to this morning--under Claimants' own

03:26:14 1 theory their claims are premature. They either have a
 2 claim today of a specific amount of damages or they
 3 will not know the quantum of damages or, in fact,
 4 whether they're damaged until a Costa Rican system
 5 fails to provide a final compensation result. If they
 6 don't know yet the extent of the damage or whether
 7 there would be harmed or whether they would be paid in
 8 full, there will be no breach, and they won't know
 9 whether there is a breach until all domestic
 10 proceedings in Costa Rica are completed, which
 11 obviously raises the issue if that is true, why are we
 12 here and why Claimants don't wait for all domestic
 13 proceedings to render a final result. They cannot
 14 have their cake and eat it too.
 15 If Claimants first acquired knowledge of the
 16 breach and the harm when the domestic proceedings
 17 provide a final compensation result, there is no claim
 18 ripe for adjudication yet. If there is a claim ripe
 19 for adjudication here, they must know that they are
 20 harmed.
 21 Their third argument, to avoid the
 22 devastating effect of the statute of limitations, they

03:27:28 1 have shifted their case dramatically, in an attempt to
 2 show that their claims are based on events after
 3 June 2010. Claimants' case as set forth in their
 4 Notice of Arbitration and their Memorial on the
 5 Merits, as we just demonstrated, clearly shows their
 6 knowledge of the alleged harms caused by the State,
 7 and that knowledge goes back well before June 2010.
 8 What I showed you on the slides is in stark contrast
 9 to statements that they make, now, in their Rejoinder
 10 on Jurisdiction, where, in essence, they try to add
 11 new measures to their case in an attempt to show that
 12 something happened after June 2010.

13 Please turn to Slide 19. This slide compares
 14 statements made in a Notice of Arbitration, the
 15 Memorial and the merits with statements made in the
 16 Rejoinder on Jurisdiction. I'm not going to go
 17 through the statements on the left-hand side of the
 18 slide. We talked about them already, but let us see
 19 what they now say in their Rejoinder on Jurisdiction.
 20 They allege that other measures that have occurred
 21 later in time constitute the basis of their claim.
 22 Let's see what they say. They say, in May 2010, there

03:28:56 1 was a new legislation, but it failed to reach the
 2 floor for a vote before a new administration and a new
 3 Congress were installed. And it is then when this new
 4 legislation failed that they started considering their
 5 CAFTA options within six months.

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

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

22 Next, Claimants submit that the Respondent's

03:30:05 1 position, the proposed part, only solidified in
 2 June 2010, following the installation of President
 3 Chinchilla and her administration. We don't know what
 4 "solidified" means, but they don't talk here about the
 5 measure.

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

13 None of this talks about a measure adopted
 14 after June 2010. But, of course, it is not surprising
 15 that Claimants claim in their Rejoinder on
 16 Jurisdiction that they based their claims, now, on new
 17 allegations compared to their Notice of Arbitration
 18 and the Memorial. They do need to point to something
 19 that would anchor their claims to the time after CAFTA
 20 came into force and within three years of the statute
 21 of limitations. Interestingly, only when Claimants
 22 were faced with the possibility that their claims

03:31:20 1 could be time-barred did they assert that the actual
 2 date when the Acts about which they complain
 3 crystallized later than what they initially said was
 4 the March 2010 date. This attempt, of course, as I
 5 just showed is not effective. And moreover, those
 6 newly invented allegations have no merit whatsoever.

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

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

22 Interesting in Paragraph 310 of their Reply,

03:32:44 1 they say--that is the Reply on the Merits and the
 2 Counter-Memorial on Jurisdiction, they say "that they
 3 shouldn't be denied relief on the basis of three
 4 months' worth of extra patience." They said, we just
 5 had to wait three more months to see if this would be
 6 resolved. We should not now be bumped out because of
 7 the statute of limitations. Even if there was any
 8 merit to this assertion that it was only three months
 9 they had to wait and be patient because the issue was
 10 just about to be resolved, and we don't see any merit
 11 to this claim, but even if that were the case, my only
 12 answer is a story that I can tell you about the client
 13 who was visiting from New York and who texted me to
 14 say I was only five minutes late, and the train had
 15 departed Penn Station. It doesn't matter whether it's
 16 three months, three weeks, or three days. They were
 17 out. They are out because the statute of limitations
 18 kicks in this June of 2010. And whether they should
 19 not--whether it's unfair because of three months or
 20 three years or three days is irrelevant. This is not
 21 a sliding slope. It's a fixed date.
 22 And, finally, Claimants go as far as to

03:34:00 1 allege that the Government of Costa Rica has breached
 2 its CAFTA obligations through new delay measures that
 3 it discovered as a result of reading about them in
 4 Costa Rica's Reply on Jurisdiction and Rejoinder on
 5 the Merits. Claimants allege that the Ministry of the
 6 Environment suspension of the administrative phases of
 7 the expropriation in order to implement the
 8 recommendations of the Procuraduría is a new breaching
 9 measure because it denies Claimants justice.
 10 Well, if Claimants didn't know about this
 11 measure at the time they filed a Notice of
 12 Arbitration, they say they didn't--they cannot raise a
 13 new claim, now, in this arbitration. They would need
 14 to submit a new Notice of Arbitration, a new
 15 proceeding about a new measure they complain of. They
 16 cannot simply tack on every Government action. They
 17 cannot simply tack on every Government action that has
 18 taken place since CAFTA entered into force and within
 19 the three year statute of limitations so that they
 20 claim their claims are not time-barred. And again, I
 21 refer back to the Grand River Tribunal's conclusion:
 22 Allowing investors to evade statute of limitation

03:35:12 1 period by basing their claims on the most recent
 2 transgression in a series of similar unrelated actions
 3 by a Respondent State would render the statute of
 4 limitations ineffective. So no matter how Claimants
 5 may try to recast their claims, they're outside this
 6 Tribunal's jurisdiction.
 7 The fundamental breach about which Claimants
 8 complain is the expropriation of their properties.
 9 The acts that allegedly affected that expropriation
 10 can have effects that continue beyond the time when
 11 the acts themselves were completed, but that does not
 12 mean that those effects are separate breaches or that
 13 the acts themselves are continuing or composite in
 14 nature. Even if Claimants try to recast them in an
 15 attempt to squeeze them into a Tribunal's
 16 jurisdiction.
 17 Mr. President, Members of the Tribunal, I
 18 will take one more minute before I ask for a break,
 19 and ask my colleague, Jennifer Haworth McCandless to
 20 continue with merits and damages, but I need this
 21 minute because I must address Claimants' accusations
 22 of improper conduct by Respondent in this proceeding.

03:36:23 1 In Paragraph 8 and elsewhere in the Rejoinder
 2 on Jurisdiction, Claimants assert that introducing the
 3 Expert Report by Judge Schwebel is "nothing short of
 4 improper." They base this accusation on two grounds.
 5 First, they say "an expert opinion on international
 6 law is unnecessary in a dispute that is governed
 7 exclusively by CAFTA and applicable international
 8 law." This argument is as nonsensical as it sounds.
 9 They say an opinion on international law is
 10 unnecessary where a dispute is governed by
 11 international law. We disagree.
 12 Second, they say "any Expert Legal Opinion
 13 that purports to provide a Tribunal with the answer to
 14 the decision its members have been appointed to make
 15 is unnecessary and inappropriate." Well, this is what
 16 Expert Opinions do, they seek to address and provide
 17 an answer to a question or questions that are before
 18 the Tribunal to decide. There is nothing
 19 inappropriate in presenting an Expert Opinion on
 20 international law providing answers by the Expert to
 21 questions that are before this Tribunal. And we have
 22 read that Claimants have leveled such a serious

03:37:37 1 accusation and we are compelled to place on the record
 2 that objection.
 3 With that, Mr. President, perhaps we should
 4 take a break.
 5 PRESIDENT BETHLEHEM: Thank you very much. I
 6 think that is an appropriate moment to take a break.
 7 So if we reconvene, let's say, at 5 to on that clock.
 8 Thank you very much.
 9 (Brief recess.)
 10 PRESIDENT BETHLEHEM: It is over to you to
 11 pick up.
 12 MS. McCANDLESS: Thank you, Mr. President.
 13 Mr. President, Members of the Tribunal, if
 14 you disagree with us on our Objections to
 15 Jurisdiction, then you'll want to look at the
 16 expropriation process. Costa Rica's position is that
 17 it acted in good faith at all times to regulate the
 18 use of land in the Park, to protect the nesting
 19 habitat of the leatherback sea turtles while
 20 respecting landowners' rights.
 21 Each of Claimants' claims is without merit.
 22 Costa Rica's actions are fully consistent with its

03:57:31 1 obligations under CAFTA. In the interest of time, I
 2 will keep my discussion of the legal issues limited.
 3 The Tribunal may refer to Paragraphs 175-229 of
 4 Respondent's Rejoinder on the Merits for a more
 5 detailed discussion of Costa Rica's Legal Arguments.
 6 Claimants allege that Respondent has breached
 7 its obligations under Article 10.7 of CAFTA.
 8 Article 10.7 of CAFTA provides that. "No Party may
 9 expropriate or nationalize a covered investment,
 10 either directly or indirectly, through measures
 11 equivalent to expropriation or nationalization,
 12 except," quote, "for a public purpose in a
 13 nondiscriminatory matter on payment of prompt,
 14 adequate, and effective compensation and in accordance
 15 with due process of law" and in the Minimum Standard
 16 of Treatment.
 17 Each of these elements has been met in this
 18 case. Respondent's efforts to expropriate the
 19 57-meter portion of Claimants' properties that are
 20 within the Park's boundaries are and have been fully
 21 lawful and under international law and under municipal
 22 law.

03:58:42 1 Article 2 of the 1995 Park Law expressly
 2 provides Costa Rica the authority to expropriate all
 3 such lands and Respondent is now carrying out that
 4 expropriation with respect to certain of Claimants'
 5 properties consistent with its obligations under
 6 international law and municipal law.
 7 I will now briefly describe Costa Rica's
 8 expropriation procedure, and the status of each of the
 9 Claimants' properties in those proceedings. If you
 10 turn to Slide 21, this is a flowchart which describes
 11 the expropriation procedure under Costa Rican Law.
 12 The expropriation procedures in Costa Rica
 13 are governed by Law Number 7495. Respondent and
 14 Ms. Georgina Chaves, who will testify at this hearing,
 15 have already described in detail in the written
 16 pleadings the steps Costa Rica must take in order to
 17 expropriate private property. I will only summarize
 18 briefly now the process.
 19 The expropriation procedure is designed to
 20 protect the owners' rights of due process at all
 21 times. The procedure is divided into two stages: The
 22 administrative stage, which is on the left, and the

03:59:51 1 judicial stage, which is on the right.
 2 As you can see in the flowchart on the slide
 3 in front of you, the administrative stage begins with
 4 the Declaration of Public Interest. The judicial
 5 stage begins with a Decree of Expropriation. At the
 6 administrative stage, the National System of
 7 Conservation Areas, or SINAC, is the entity that
 8 decides to initiate the expropriation proceedings. At
 9 this stage, an administrative valuation is issued.
 10 The owner may accept or object to that valuation.
 11 If the owner accepts the valuation, the State
 12 will pay the amount awarded and title to the property
 13 will pass to the State. If the owner objects to the
 14 valuation, SINAC issues a Decree of Expropriation and
 15 sends the file to the Procuraduría to initiate a
 16 judicial proceeding to determine the Fair Market Value
 17 of the property.
 18 At that time, MINAE must deposit the amount
 19 of the administrative appraisal into an account with
 20 the Court. The owner may take the amount--this amount
 21 at any point in time. Up to this point, the owner can
 22 fully use and enjoy his or her property.

04:01:07 1 The State may take possession of the property
 2 two months after the initial deposit of the
 3 administrative appraisal has been made. With the
 4 State taking possession of the land, the property
 5 owner then loses possession but not title to the
 6 property. The property owner does not lose title to
 7 the property until after the Court has issued a final
 8 decision and the Fair Market Value on the property has
 9 been made.

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

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

22 And Costa Rica has followed this procedure

04:02:15 1 with respect to all of Claimants' properties that have
 2 been subject to expropriation and that are at this
 3 stage.

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

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

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

18 PRESIDENT BETHLEHEM: It should be no --

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

21 The second category of properties is where a
 22 Declaration of Public Interest has been issued, but

04:03:22 1 where there is no Decree of Expropriation. These are
 2 the properties where expropriation procedures were
 3 suspended at the administrative stage but before the
 4 properties were transferred to the judicial stage.
 5 And nine properties fall into that category, and they
 6 are listed there: Lots V30, V31, 32, 33, 38, 39, 40,
 7 46 and 47.

8 The third category of properties is where the
 9 Decree of Expropriation has been issued and, thus, the
 10 properties are in the judicial stage. And nine
 11 properties fall into this category. They are A40,
 12 SPG1, SPG2, B1, B3, B5, B6, B7, and B8.

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

16 As we've explained in our written
 17 submissions, the expropriation of properties in the
 18 first and second categories, that is, properties that
 19 have not yet reached the judicial stage, are currently
 20 suspended until SINAC completes the implementation of
 21 recommendations from the Contraloría which was issued
 22 in 2010. The Contraloría is Costa Rican Government's

04:04:42 1 inspection and oversight agency. Its recommendations
 2 are binding on the entity being supervised.

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

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

18 Properties in this category or these two
 19 categories have not yet been expropriated, directly or
 20 indirectly. First, the suspension of the
 21 expropriation procedures do not themselves constitute
 22 a taking. According to Costa Rican Law, Claimants may

04:05:47 1 still enjoy use or dispose of their property as they
 2 please. Thus, the properties are practically in the
 3 same position that they would have been--where they
 4 were when they bought the land, they are inside the
 5 Park with the possibility that they will be
 6 expropriated.

7 Contrary to Claimants' allegations, Costa
 8 Rica never redrew the boundaries of the Park.
 9 Instead, the Claimants bought properties hoping that
 10 Costa Rica would redraw the boundaries of the Park or
 11 change its protective status, but it did not.

12 Claimants also allege that the definite
 13 suspension of all environmental permits by SETENA
 14 accounts for indirect expropriation under Annex 10-C
 15 of CAFTA. If a Tribunal were to decide that it has
 16 jurisdiction to hear that claim, even though the
 17 suspension was adopted before CAFTA came into force,
 18 this measure was taken to safeguard environmentally
 19 fragile area of the Park. As such, it is not an
 20 indirect expropriation as provided under Annex 10-C
 21 of CAFTA.

22 Specifically, Article 4(b) of Annex 10-C

04:06:55 1 provides that, "Except in rare circumstances,
 2 nondiscriminatory regulatory actions by a party that
 3 are designed and applied to protect the legitimate
 4 public welfare objectives, such as public health,
 5 safety, and the environment, do not constitute
 6 indirect expropriations." Thus, the suspension of the
 7 environmental permits does not constitute an indirect
 8 expropriation.

9 Please turn to Slide 23. Let us now consider
 10 the properties--the status of the properties in the
 11 third category. These are the properties that are at
 12 the judicial stage.

13 To date, a final judicial decision on
 14 compensation has been issued for six of the nine lots,
 15 Lots A4, SPG2, B3, B5, B6, and B8. Claimants allege
 16 that these properties have been directly expropriated.
 17 However, Claimants have presented different arguments
 18 regarding exactly when that expropriation occurred.

19 In their Memorial on the Merits, Claimants
 20 argued that expropriation occurred at the moment the
 21 State took possession of the property, and this occurs
 22 when an Act of Dispossession is issued. If this were

04:08:14 1 true, then all their claims would be outside of the
 2 Tribunal's jurisdiction, because the State took
 3 possession of these properties in 2008.

4 In their Rejoinder On Jurisdiction, which is
 5 their latest submission, Claimants changed their
 6 argument to argue that expropriation occurs when the
 7 State takes title of the property. That was at
 8 Claimants' Rejoinder On Jurisdiction at Paras 4 and
 9 153.

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

16 In any case, with respect to the three
 17 properties--A40, B3, and B8--for which there has been
 18 title that has passed, Respondent's actions have been
 19 fully consistent with its obligations under
 20 Article 10.7 of CAFTA. As I discussed a short while
 21 ago, Article 10.7(1) provides that no Party may
 22 expropriate or nationalize a covered investment

04:09:25 1 directly or indirectly through measures equivalent to
 2 expropriation, except for a public purpose in a
 3 nondiscriminatory manner on a payment of prompt,
 4 adequate, and effective compensation, and in
 5 accordance with due process of law. Each of these
 6 elements has been met in this case.

7 First, Las Baulas National Park was created
 8 for a valid public purpose. As Mr. Alexandrov
 9 discussed in detail earlier today, the creation of the
 10 Park and, in particular, the inclusion of the
 11 125-meter strip of land along the coast, was necessary
 12 to protect the fragile nesting area of one of the most
 13 endangered species in the world, the leatherback sea
 14 turtle. This is supported by scientific evidence,
 15 international organizations, and the Costa Rican
 16 authorities.

17 Second, Costa Rica has not acted in a
 18 discriminatory manner while expropriating Claimants'
 19 property. Claimants have not submitted any evidence
 20 to support this statement. In fact, Costa Rica has a
 21 detailed plan concerning expropriations and will
 22 expropriate all property located inside the Park

04:10:31 1 without consideration as to whether the land owner is
2 foreign or not. And those plans are at Exhibits R-009
3 and R-010.

4 Third, Costa Rica has provided or is in the
5 process of providing prompt, adequate, and effective
6 compensation. Costa Rica has also paid compensation
7 without delay equivalent to the Fair Market Value of
8 the expropriated investment before the expropriation
9 took place and has not reflected any change in value
10 occurring because of the intended expropriation had
11 become known earlier.

12 This is, perhaps, the point in where there is
13 the most contention between the Parties. But as Costa
14 Rica has explained in its written submissions, and as
15 Claimant now argues, under Costa Rican law, an
16 expropriation has ripened when title passes to the
17 State. This occurs after the final judgment of the
18 Fair Market Value for the property as rendered and
19 executed, and around that time, payment of the amount
20 awarded by the Court is made available to the
21 landowner. It happens at the same time almost.
22 Claimants themselves admit that prompt payment occurs

04:11:40 1 when compensation has been paid at the time of the
2 taking, and, thus, under Claimants' own definition of
3 "prompt payment," Costa Rica has complied with this
4 obligation.

5 For each of the three Lots--A40, B3,
6 B8--Costa Rica has made available the principal
7 awarded by the Court, including the amount of
8 administrative appraisal, before title passed to the
9 State. Lot A40 has requested and received payment of
10 the principal and legal interest. Lot B3 has
11 requested and received payment of the principal.
12 Lot B8 has yet to request payment of the principal,
13 and, therefore, no payment of principal has been made.
14 In the Costa Rican system, in order for the individual
15 property owner to receive the payment, they have to
16 make the request to the State. Lots B3 and B8,
17 payment for legal interest is being processed.

18 Now, with respect to Claimants' allegations
19 that the amount awarded by Costa Rica is not
20 equivalent to the Fair Market Value or that
21 compensation has not been adequate, Claimants'
22 evidence is unreliable. Claimants base their

04:12:49 1 allegation on FTI's Expert Report, however, FTI's
2 reports are overstated, and as I will discuss in
3 greater detail a little bit later.

4 In addition, Claimants are asking this
5 Tribunal to act as an appeal court. Claimants are
6 asking you to second-guess the decisions made by the
7 domestic courts.

8 Finally, ample due process has been provided.
9 Claimants have had opportunity to present their
10 arguments and to defend their interest throughout the
11 entire expropriation procedure. As I discussed, there
12 are several steps along the way in which the Claimants
13 and which the property owners are able to appeal
14 decision or ask for a different decision. Thus, there
15 is no merit to Claimants' allegations concerning
16 expropriation.

17 If you turn to Slide 24, in their first two
18 written submissions, Claimants limited their
19 allegations to claims of Costa Rica contravening
20 Claimants' legitimate expectations and acting in an
21 arbitrary matter, but in their Rejoinder on
22 Jurisdiction, Claimants have a new claim with respect

04:13:53 1 to denial of justice. Each of these claims is without
2 merit. With respect to legitimate expectations,
3 Article 10.5 of CAFTA provides for the Minimum
4 Standard of Treatment under customary international
5 law. As Respondent has explained in its written
6 submissions, the Minimum Standard of Treatment under
7 customary international law sets a very high standard
8 or a very high threshold. In other words, the
9 Measures need to be sufficiently egregious or shocking
10 to fall below that accepted international standard.

11 This interpretation has been supported by the
12 Tribunal in the Glamis Gold versus United States Case,
13 when interpreting a similar standard of treatment
14 under NAFTA. Respondent also argued that other
15 Tribunals, such as those at Merrill & Ring versus
16 Canada, International Thunderbird Gaming Corporation
17 versus Mexico, and ADF versus the United States, in
18 those cases they have also interpreted the Minimum
19 Standard of Treatment. And they've interpreted it to
20 exclude the protection of investors' legitimate
21 expectations unless there has been an action by the
22 Government inducing the Investor to invest.

04:14:59 1 And in this case, Costa Rica has never
 2 induced or invited or prompted Claimants to buy their
 3 properties; thus, Claimants' legitimate expectations
 4 are not protected under CAFTA. However, even if the
 5 Tribunal were to find that Claimants alleged
 6 legitimate expectations were protected, Claimants
 7 could not have legitimately expected that their land
 8 was outside the Park or that it would not be
 9 expropriated.

10 Please turn to Slide 25. This is the
 11 timeline slide that you have seen before, earlier
 12 today, and a brief review of the chronology of events
 13 prior to Claimants' investment shows why Claimants'
 14 legitimate expectations claims are baseless. In light
 15 of the Claimants' knowledge before they purchased
 16 their properties, there is simply no basis for
 17 Claimants to assert that they had a legitimate
 18 expectation that their properties would not fall
 19 within the Park boundaries of all the-- all of the
 20 properties were already in the Park when Claimants
 21 purchased them or that the State would not expropriate
 22 the Claimants' land. They were, in fact, entitled to

04:16:05 1 do so under the 1995 Park Law.
 2 The truth is that Claimants were hoping that
 3 none would occur, that none of this would occur, that
 4 none of their properties would be taken, and in their
 5 Opening they were mentioning the
 6 legislations--legislative acts that were being
 7 considered, but in the end, those legislative acts
 8 that would have changed the rules or the law with
 9 respect to where the Park boundaries were, never were
 10 passed. So, Claimants hoped that that law would
 11 change. They hoped that it would be such that they
 12 would not--that their land would not be in land that
 13 would be expropriated. They took a chance, but they
 14 lost that chance. The law stayed the same. The
 15 Claimants' alleged expectations to the contrary are
 16 just simply not legitimate.

17 Members of the Tribunal, this takes us to
 18 Claimants' claims of arbitrariness. Claimants
 19 complain about variations in property valuation.
 20 However, there is nothing arbitrary about such
 21 valuations. The Parties agree that the applicable
 22 standard to determine whether a State's conduct is

04:17:11 1 arbitrary is the one set forth in ELSI Case. In ELSI,
 2 the ICJ held that an arbitrary act "is not so much
 3 something opposed to a rule of law as something
 4 opposed to the rule of law. It is a willful disregard
 5 of due process of law, an act which shocks or at least
 6 surprises a sense of judicial propriety." That's at
 7 Paragraph 128 of the ELSI Award.

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

20 The fact that judges come out--or the
 21 decisions, the valuations come out differently is not
 22 a surprise. It depends upon the elements and the

04:18:17 1 facts that are before the judge when they're making
 2 that decision. So, there is nothing inherently
 3 arbitrary about this process. And it's intended to
 4 give rights to both Parties in trying to determine
 5 what the final value should be for the property.

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

14 These recommendations are aimed at improving
 15 the expropriation procedures related to Las Baulas
 16 National Park and guaranteeing landowners' property
 17 rights. In their Rejoinder on jurisdiction, Claimants
 18 allege, for the first time in these proceedings, that
 19 the suspension was adopted to further delay payment of
 20 compensation to Claimants and that the delay in
 21 payment constitutes a constructive denial of justice.
 22 Members of the Tribunal, this claim is

04:19:24 1 untimely. First, Claimants cannot raise a claim in
 2 the middle of an arbitration proceeding if they did
 3 not include it in their Notice of Arbitration, nor may
 4 they raise an argument on the merits of this new
 5 claim, in particular on a Rejoinder on Jurisdiction.
 6 So, not only is it at the very end of the proceeding,
 7 but it's even in a time in which they are not supposed
 8 to be discussing issues on merits. This is a
 9 Rejoinder on Jurisdiction. This issue is a merits
 10 claim. Respondent has not been given time to--or an
 11 opportunity to properly respond to the Claim; thus,
 12 the claim should be excluded from this arbitration.
 13 Second, it is not a new measure. With
 14 respect to the alleged delay of payment of indirect
 15 expropriation, this corresponds to the lingering
 16 effects of the Measure that was adopted by CAFTA
 17 before CAFTA came into force. Therefore, before 2009,
 18 Costa Rica had no international obligation to pay
 19 promptly, as Mr. Alexandrov had explained earlier.
 20 Let me now turn to the--briefly to the issue
 21 of damages in Claimants' damages claims. Respondent
 22 maintains that it has acted in accordance with its

04:20:30 1 CAFTA obligations at all times; thus, the Tribunal
 2 should not award any damages beyond those that
 3 Claimants have already received or will receive
 4 through the expropriation procedures in Costa Rica.
 5 At this point, Claimants have already received or will
 6 receive, once requested, by them, the value of
 7 colones--1,706,180,610 colones, and that's for the
 8 nine properties that are at the judicial stage of
 9 expropriation. And Claimants will receive Fair Market
 10 Value for each of the remaining 17 properties that the
 11 Government will expropriate.
 12 However, if a Tribunal were to determine that
 13 Costa Rica has breached obligations under CAFTA and
 14 award Claimants compensation accordingly, it goes
 15 without saying that any amounts Claimants have
 16 received in the domestic legal proceedings must be
 17 offset against any Award.
 18 In addition, if the Tribunal were to award
 19 damages based on the value of property, Claimants must
 20 be required to surrender that property to the State
 21 without further court proceedings.
 22 In the Reply, Claimants agreed to both of

04:21:36 1 these requests, that is Claimants agreed that any
 2 amount that has been paid to them should be offset
 3 by--against any final amount Awarded and by the
 4 Tribunal, and that they will surrender title to the
 5 property to the State if the Tribunal were to award
 6 damages in the value of their property. So in this
 7 point, the Parties agree.
 8 Claimants seek a total amount of damages of
 9 \$59,484,100, which is comprised of \$36,000,543 of
 10 value in their allegedly expropriated properties and
 11 \$22,941,100 in interest. These values, as I will
 12 discuss momentarily, are grossly overstated. But I
 13 wanted to mention one thing at this moment. Counsel
 14 for Claimants had said in the Opening Statement that
 15 this is the only appraisal report that's on the
 16 record, and this is not true. First, there are many
 17 appraisal reports that have been made with respect to
 18 these properties. There are the administrative
 19 appraisals, the judicial appraisals, and there are two
 20 judicial appraisals for each of the processes, they
 21 are the judicial proceedings and then the final
 22 judicial decision. In addition, Respondents' Damages

04:22:48 1 Expert has in his Second Report at Paragraph 130
 2 identified a value for the properties if the Tribunal
 3 were to agree or accept the prices that have been put
 4 on the record as the prices that have been paid for
 5 the properties, and that amount is \$4,529,490. So
 6 there is an alternative amount that is before you.
 7 Claimants' principle complaint is one of
 8 wrongful expropriation. According to CAFTA,
 9 compensation for a breach of the expropriation
 10 provision is equal to the Fair Market Value of the
 11 expropriated investment. This is at Article 10.72(b)
 12 of CAFTA, which is Exhibit C-1A. The date of the
 13 valuations to occur "immediately before the
 14 expropriation took place." But rather than valuing
 15 the Fair Market Value of the expropriated investment
 16 immediately before the expropriation took place,
 17 Claimants seek to base the value of their properties
 18 on a but-for scenario that ignores the fact that their
 19 properties are located in a national park.
 20 But, in fact, as discussed earlier, Claimants
 21 knew or should have known when they purchased their
 22 land that they were purchasing property within the

04:23:55 1 Park, and, therefore, their land was subjected to
 2 restrictions and eventual expropriation that would
 3 negatively affect the value of their investment.
 4 Thus, if the Tribunal were to value Claimants'
 5 investment, Respondent respectfully requests that the
 6 Tribunal take into consideration the fact that
 7 Claimants' properties are currently located in the
 8 Park and were located in the Park on the date the
 9 Claimants purchased them.

10 Each of Claimants purchased their properties
 11 at a significant discount because the properties are
 12 located in the Park. Therefore, awarding Claimants
 13 anything more than they originally purchased for them
 14 would give Claimants an improper windfall. The most
 15 Claimants should receive if the Tribunal should find
 16 that they should receive anything at all since they
 17 will eventually receive fair compensation through the
 18 expropriation process, is price--is the price that
 19 Claimants paid for them, paid for the properties.

20 In fact, no damage should be awarded at all
 21 because Claimants will receive fair and adequate
 22 compensation for the properties that Costa Rica

04:24:58 1 expropriates. Claimants will actually receive more
 2 than Fair Market and adequate compensation through
 3 Costa Rica's expropriation process. To it, some of
 4 Claimants' properties that have been complete, have
 5 gone through the--have been completed in the judicial
 6 stage of expropriation are receiving a surprising
 7 amount more than what they paid for them. For
 8 example, Spence Company, which will receive
 9 697,625,000 colones for the portion of Lot SPG2 that
 10 is being expropriated. That, portion of SPG2 cost
 11 Spence Company 85,014,297 colones, thus, Spence Co.
 12 received 721 percent more from the Government of Costa
 13 Rica for that property than Spence Co. originally paid
 14 for it.

15 In the case of Lot B8 as another example,
 16 based on the evidence that's currently on the record,
 17 Mr. Berkowitz will receive 326,078,368 colones for the
 18 portion of the property that is being expropriated.
 19 That is a whopping 171,398 percent more than the
 20 190,136 colones it cost him to purchase that property
 21 based on evidence on the record.

22 Claimants' damages claims are overstated and

04:26:29 1 undeserved for other reasons as well. In this
 2 respect, Respondents' damages Expert Mr. Kaczmarek has
 3 identified a number of fundamental flaws in Claimants'
 4 and their real estate appraisers, FTI's approach to
 5 the valuation of Claimant's properties. First, FTI
 6 ignores the reality of the real estate market in
 7 Guanacaste at the time that the alleged breach
 8 occurred, and that is May 2008, and the reason why I
 9 select that date is because that's the date the
 10 valuation has been made by Mr. Hedden. As
 11 Mr. Kaczmarek explains in his Report, the Costa Rican
 12 market underwent a boom in the early 2000s, and a bust
 13 in 2008. FTI ignores this fact completely.

14 Second, with respect to the properties that
 15 are partially expropriated, FTI argues that Claimants
 16 should receive damages for both portion that was
 17 expropriated and the portion that is not expropriated.
 18 This is their severance and damages claim. But FTI's
 19 claim on severance damages does not make any sense.
 20 They are attributing beachfront value to the entire
 21 lot subject to partial expropriation. FTI claims that
 22 the portion of the property that was closest to the

04:27:41 1 beach was expropriated, and, therefore, the remaining
 2 parcel has lost its beachfront value. So not only
 3 should the expropriated portion be valued at
 4 beachfront property, but the remaining portion that is
 5 no longer--is also no longer considered beachfront
 6 property. This is true even though it is now, after
 7 the expropriation, the property closest to the beach.

8 And the truth is as for beach--the truth is
 9 as for beachfront value or so-called beachfront value,
 10 there never really was any beachfront view or access
 11 to lose. This is because of environmental regulations
 12 that prohibit the removal of vegetation that borders
 13 and covers access to the beach.

14 Finally, FTI employs comparable sale approach
 15 in its property valuations. It analyzes similar
 16 properties and sales of similar properties to
 17 Claimants' properties in order to determine the value
 18 of Claimants' properties. Yet none of these
 19 transactions are properties it uses are comparable or
 20 appropriate, and for these reasons FTI's analysis is
 21 unreliable. Mr. Kaczmarek will discuss this--more
 22 flaws in detail in his Expert testimony later this

04:28:52 1 week.

2 In sum, Claimants' damages claims are grossly
3 overstated and unreliable. Claimants are reaching for
4 every cent that they think they can squeeze out of
5 this arbitration, and, in so doing, they have raised
6 serious doubts about the credibility of their damages
7 claims. For the foregoing reasons, and for those
8 stated in Mr. Kaczmarek's two Expert Opinions,
9 Claimants are simply not entitled to the damages they
10 seek.

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

13 MR. ALEXANDROV: Mr. President, this
14 completes our Opening Statement. We renew our request
15 that the Tribunal dismiss this case for lack of
16 jurisdiction, or, in the alternative, if the Tribunal
17 decides to take jurisdiction, then the Tribunal
18 dismiss the claims on the Merits, and we respectfully
19 request costs and attorneys' fees.

20 Thank you very much.

21 PRESIDENT BETHLEHEM: Thank you. I'm sure
22 we'll come back to that at the end of the session.

04:29:40 1 Dr. Weiler.

2 MR. COWPER: Mr. President, just before I
3 turn the podium or, in this case, the on-microphone to
4 Dr. Weiler, like my friend, I would like to reserve
5 the right to make objections with respect to the
6 overheads used, and in particular, and we may be quite
7 wrong on this, but I would like my friend to check to
8 see whether or not they made use of the documents
9 which they objected to us introducing into the record
10 earlier which were withdrawn. As far as we can tell
11 it seems like there were references to those
12 documents. I apologize if I'm wrong on that. But
13 that's a particular concern we had with respect to
14 that. And if that's the case, we'll deal with that
15 later in the hearing. Thank you.

16 PRESIDENT BETHLEHEM: So we have two dueling
17 reserved objections, or reserved right to make
18 objections.

19 Dr. Weiler, I understand that the microphone
20 passes to you. We had scheduled in the daily schedule
21 for today, a break after Respondent's Opening
22 submissions by intention to allow a little bit of, as

04:30:40 1 it were, a pause before we have a change of voice.

2 I'm quite content that we rise now for that pause for
3 a change of voice, but I'm in your hands if you want
4 to continue straight on or you would like a little bit
5 of a pause.

6 MR. WEILER: We'll take a short break.

7 PRESIDENT BETHLEHEM: So, we'll rise for 15
8 minutes.

9 MR. WEILER: That's perfect.

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

12 (Brief recess.)

13 PRESIDENT BETHLEHEM: Okay. I think we can
14 make a start. Before I pass the microphone over to
15 Dr. Weiler, let me just draw everyone's attention. I
16 think it's not going to be so relevant for the
17 submissions that we're about to hear and probably only
18 now next for the closing submissions on Friday, but
19 I've just had a plea from the interpreters that, if
20 you have a written script from which you are reading,
21 please ensure that you pass a copy to the interpreters
22 beforehand. I think they've struggled. Written

04:47:10 1 scripts tend to be much denser. They struggle to keep
2 up. Just a request that if there is a written script,
3 particularly on Friday, that you pass that to the
4 interpreters beforehand.

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

13 MR. WEILER: It is what we are going to be
14 addressing but I am going to be taking some of the
15 time that was originally allocated to Jeffrey to--in
16 his submissions, I'm going to allocate
17 probably--probably take about 15 of his minutes over,
18 which I understand from the Secretary still leaves us
19 with lots of time.

20 PRESIDENT BETHLEHEM: Well, let me just make
21 the point that I think that the Tribunal is minded to
22 exercise a degree of sort of flexibility. But as you

04:48:11 1 will recall from the prehearing organizational
 2 meeting, there was quite a lot of discussion about
 3 this, and I think it was quite clearly -- I think the
 4 Agreement of the Parties, which then the Tribunal
 5 reflected in Paragraph 7, that this should be 30
 6 minutes and it should be focused on issues of
 7 jurisdiction.

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

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

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

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

21 MR. WEILER: Okay.

22 REPLY ON JURISDICTION BY COUNSEL FOR CLAIMANTS

04:49:07 1 MR. WEILER: With that, I'll begin.
 2 There's a couple of points I wanted to
 3 mention, though. First, I'm just going to describe
 4 documents that are being sent to you. These are
 5 actually not new documents. These are documents that
 6 appeared in your USB drives; but unfortunately only
 7 the first page of them, of the four or five of them,
 8 came to you in hard copy. So this is just the entire
 9 bundle of them.

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

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

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

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

22 (Comment off microphone.)

04:50:34 1 PRESIDENT BETHLEHEM: And then what is that?
 2 MR. WEILER: This would be those four pages I
 3 just mentioned. So you received one of them in hard
 4 copy and all of them in digital copy, and this is now
 5 to complete them in hard copy.

6 PRESIDENT BETHLEHEM: Thank you very much.
 7 Your time.

8 MR. WEILER: Thank you.

9 So before I begin, there were a couple of
 10 comments that my friends made about jurisdiction
 11 issues that I wanted to just address right away.

12 I think the first thing to say would be
 13 obviously a party's compensation of his claims, or the
 14 responses, are going to be shaped by the process of
 15 pleading -- Counter Reply, Rejoinder. And I think,
 16 therefore, that generally, as a rule, if you want the
 17 most accurate articulation of either Party's
 18 submissions, you go to their last submission. So, I
 19 would certainly recommend that in this case.

20 I know my friends were more interested in
 21 quoting from earlier iterations, and I think it would
 22 be more useful to look at the Party's final arguments.

04:51:41 1 I consider my friend's claim about the
 2 Claimants being barred from making claims about the
 3 new delay measures. He implies that we can't base our
 4 claims on these measures because there's a process
 5 that we must observe and that we didn't. For that, he
 6 relies on the passage from Grand River in the
 7 jurisdictional decision in support.

8 And it just so happens I was counsel on the
 9 Grand River case, and ironically in that case the
 10 claims that were not time-barred, they actually were
 11 raised for the very first time by myself at the last
 12 five minutes of a five-day hearing orally. And the
 13 Tribunal accepted the petition for an amendment under
 14 Article 22 of the UNCITRAL rules, so I don't think
 15 that would be the best passage to rely on for my
 16 friend's position.

17 And further, I would note that in this case,
 18 we actually asked leave to amend our two Statements of
 19 Claim to cover these measures under Article 22 in our
 20 Counter-Memorial On Jurisdiction and Reply on the
 21 Merits. So to be clear, it was not released for the
 22 first time in our Rejoinder or today, it was actually

04:52:59 1 as soon as we heard about it. So that would be my
 2 initial point and then let's move on right to our
 3 slides here.
 4 MR. ALEXANDROV: Mr. President, I object. I
 5 think Dr. Weiler is testifying as a Witness about what
 6 he did or didn't do in another case. If the point is
 7 to made here without testimony of a witness of fact,
 8 then we should be directed to the materials in the
 9 case.
 10 MR. WEILER: Read the Decision. The Decision
 11 actually describes the process, so we don't need my
 12 word for it.
 13 PRESIDENT BETHLEHEM: I think we understand
 14 the point, and we've heard what you've had to say.
 15 MR. WEILER: Okay. So, here there's two
 16 objections, both *ratione temporis*. The one is about
 17 Treaty nonretroactivity, and the other is about a
 18 three-year time bar. The nonretroactivity objection
 19 revolves around how one would constitute
 20 expropriation, what constitutes a measure, what
 21 constitutes continuing or composite breaches, whereas
 22 a time-bar obligation is interested in similar

04:54:01 1 questions but primarily in respect of what constitutes
 2 a breach in this case.
 3 It is also important to note that there are
 4 different perspectives that one takes with respect to
 5 these objections. They aren't identical. From the
 6 nonretroactivity perspective, you're really looking at
 7 the timing of the measures as alleged breaches,
 8 whereas the time-bar objection has one looking at the
 9 timing of the Claimants' knowledge of the alleged
 10 breaches. So, there are differences, but the bottom
 11 line is that the breach is the most important element.
 12 So, here in these first three slides, I've
 13 just set out the language of the CAFTA. And I'll just
 14 skip to the second slide here, which shows us
 15 Articles 10--I'm sorry, 10.16. So we see that the
 16 investment dispute is triggered when someone believes
 17 they have a Claim, and the Claim is based on when
 18 someone thinks there has been a breach of something,
 19 and then we'll click further.
 20 And we go further then on, of course, to the
 21 most important provision in this regard and that's
 22 10.18. Under 10.18, we see that the question is

04:55:14 1 "Should have first acquired knowledge of what?" Well,
 2 of the alleged breach.
 3 We would submit in this case--and we will
 4 explain within this presentation why we're really not
 5 concerned in this case about the second branch of that
 6 test about the knowledge of loss or damage.
 7 So, when one wants to articulate what the
 8 breaches are, we've done it on a few occasions. Of
 9 course, we did it with these documents that we
 10 submitted with a Rejoinder, and we did it in the
 11 Rejoinder. And, I'm essentially, once again, putting
 12 them before you here.
 13 So there are seven breaches. I styled them
 14 as five breaches in our Memorial. They--whether you
 15 call them seven or five, you'll see, as we continue,
 16 is immaterial. But those are the breaches right
 17 there. And what I'd like to do is go through each
 18 breach and try to explain why these objections are not
 19 sustained based on the actual breaches we have alleged
 20 rather than the breaches our friends would have liked
 21 us to have alleged. There is the other five. I'll
 22 give you -- the other three. I'll give you a second

04:56:29 1 to read them.
 2 So, with respect to the first one, so the
 3 Respondent says that it doesn't matter whether it's
 4 direct or indirect expropriation, it always
 5 constitutes some single act in time and, therefore,
 6 that it's merely a subsequent effect if you didn't pay
 7 enough or you didn't pay promptly.
 8 And I think our position is that if the
 9 Respondent's argument is true, host States would
 10 always avoid liability. They have two ways of doing
 11 it. Either they could commit to a creeping
 12 expropriation but just never formalize it by
 13 transferring title, or they could declare an
 14 expropriation and just never pay. After three years,
 15 on their theory, they would be set. They wouldn't
 16 have to worry about it.
 17 Basically it would be a contest. You'd have
 18 to make sure that, if the Claimant didn't get in in
 19 that period, they are out of luck.
 20 So, we don't think that's the proper approach
 21 and neither did the Tribunal in IO European Group
 22 versus Venezuela. This is an award which was cited by

04:57:38 1 our friends from the United States in their
 2 submission, which we receive on Friday, and we had a
 3 quick look at it. It's in Spanish, so the quotation
 4 you're about to see on the second page is an informal
 5 translation with our friends from Google rather than
 6 anything official, and so I would recommend to you
 7 reading the Spanish version.

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

18 So, and the quotation there is that the
 19 Tribunal concludes that the Bolivarian Republic has
 20 not offered a plausible explanation justifying the
 21 delay of more than four years in fixing at least the
 22 fair value owed in compliance with the LECUPS, which

04:58:44 1 implies that it cannot be considered to satisfy the
 2 requirement of Article 6(c).

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

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

17 With regard to direct expropriation, the way
 18 that this would apply is fairly straightforward. Even
 19 if we were to accept, though, in our case that the
 20 Respondent was correct and that the direct
 21 expropriation was actually triggered and completed by
 22 a particular event--in this case, I believe they would

05:00:11 1 say the Decree of Expropriation, it wouldn't
 2 actually--it wouldn't actually matter. Let me
 3 rephrase it. I'm sorry, I'm going to strike that.
 4 If one assumes that a direct expropriation
 5 takes place under Costa Rican law, that would be when
 6 title transfers, and that is Article 49 of the
 7 Expropriation Law, and that is the position of my
 8 friends in their Memorials. So, if we take that as
 9 the position, we don't have a problem with the three
 10 cases where we actually have that kind of direct
 11 expropriation because in all three cases, that final
 12 transfer of title took place after the dates which are
 13 relevant in our case. The most recent one--I'm sorry,
 14 the first one was on June 29, 2012.

15 With regard to indirect expropriations, the
 16 problem with my friend's single moment in time theory
 17 is that it just isn't consistent with what all of the
 18 case law and the authorities, such as people like
 19 Professor Crawford, as we cited in our Memorial, they
 20 say that this is not a correct way to look at an
 21 indirect expropriation. Instead, in a case of
 22 indirect expropriation, it would actually be illogical

05:01:34 1 to assume that breach has occurred until actually all
 2 of the breaches which form--sorry, all of the Measures
 3 which form the breach have actually occurred. And in
 4 this regard, we'd also just like to remind the
 5 Tribunal, as we did in our Memorial, that there is a
 6 difference between the Parties' arguments with respect
 7 to the appropriate date for valuation versus the
 8 appropriate date for breach.

9 Professor Mendelson had a rationale in which
 10 he was responding to Judge Schwebel's Opinion, and we
 11 adopt it for our own. We think it's quite useful. He
 12 points out that if the Claimants still retain title in
 13 all of their Lots, in the case of indirect
 14 expropriation, until there actually is an official
 15 transfer of title, well, if that's the case, then it
 16 is actually logically impossible for that breach to
 17 solidify until after title has been transferred. And
 18 so in that--if one applies that logic, the result
 19 would be that indirect expropriations never toll based
 20 on a three-year rule because they would be continuing
 21 until such time as compensation was actually paid.

22 So, that's why, in our submissions, we talk

05:03:14 1 to about the totality of the measures which constitute
 2 interference which rises to a substantial level as
 3 being an appropriate point at which one could bring a
 4 claim. But because title is perennially
 5 nontransferred, as a result, during this whole period,
 6 after there has been that level of substantive
 7 interference, during that whole period until they
 8 actually transfer title, you have a live breach, and,
 9 therefore, you can't have a problem with a time
 10 limitation. It is an ongoing breach. And we
 11 definitely support that.

12 How much time by the way?

13 (Comment off microphone.)

14 So, in this case, we have a few examples
 15 here. We have a SETENA adopting these temporary
 16 annual moratoriums on accepting environmental permit
 17 applications, and it's a little murky as to exactly
 18 the basis upon which they did it. From the best that
 19 we can grasp from the record, essentially, they
 20 referred to the one-year suspensive effect rule in the
 21 expropriation statute and just reapplied it annually.
 22 Alternatively, they did it once and then just sua

05:04:43 1 sponte actually maintained the suspensions annually on
 2 the basis of some expected or pending court decision.

3 So, it's not exactly clear how they did it.

4 But what's clear is that it was only ever temporary,
 5 and it didn't actually become permanent until after
 6 the Constitutional Court had had its say in multiple
 7 times. And as we've described in our Memorials, in
 8 the case of the Constitutional Court, we have, in May,
 9 it's saying to the Government that it has a choice.
 10 Either it expropriates or it provides compensation.
 11 It's got to do one or the other, and it's got to move.
 12 And then in December of that same year, just a
 13 few days actually, just a few weeks the CAFTA comes
 14 into force for Americans, the Court now says, "No, you
 15 have to do it immediately."

16 And so that concerns obviously--I think
 17 rightly so--that concerns both MINAE and SETENA
 18 officials, which is why in January and February of the
 19 following year, just about a month and a month and a
 20 half later, they write to the Court and say, "We think
 21 your decisions are contradictory. We need some
 22 guidance here. Which one is it?"

05:06:02 1 And the Court, amusingly enough, said, "No,
 2 we actually think it makes perfect sense, and you
 3 should know constitutionally that you have the
 4 discretion to decide when and how to expropriate.
 5 That's not our job. We just tell you, you have to do
 6 it."

7 So, the Court's explanation essentially
 8 modified its December decision to take the immediate
 9 out of "you must expropriate." So interestingly
 10 enough, it's another year before the Minister actually
 11 gets around to doing that. It is not until March 19,
 12 2010, that the Minister actually exercises that
 13 discretion and makes those suspensions permanent,
 14 which, of course, is an element which is necessary in
 15 finding an expropriation. There has to be an element
 16 of permanence. It can't be ephemeral, it must be
 17 permanent. So we now have a very nice peg along the
 18 road towards expropriation with the Minister's
 19 decision.

20 So, when one, though, is trying to ascertain
 21 whether there has been an indirect expropriation, we
 22 now know that we have a suspension which effectively

05:07:31 1 eviscerated the Claimants' rights in property, and we
 2 now know that it became permanent as of March 10, but
 3 what we don't know, if we put ourselves in the
 4 Claimants' shoes at that time, is whether the
 5 Government is actually going to own up, follow this
 6 decision, and actually either change the law, as the
 7 environment minister was attempting to do, at the same
 8 time it was issuing this order. He and the President
 9 were both actually working hand in hand with the
 10 Claimants to change the law so that they actually
 11 would be able to. And I should say, change the law,
 12 as interpreted by the Court rather than change the law
 13 as it was written.

14 So, from the Claimants' perspectives, if you
 15 put yourself in their shoes, they have court decisions
 16 going this way and that. And then have--they don't
 17 know, of course, about these letters that have been
 18 made by the two ministries asking the Court to clarify
 19 itself, and they don't know about the Court's
 20 clarification. All they know is that, in the middle
 21 of working with the President's office and the
 22 Minister's office, the Minister's office issues this

05:08:41 1 final binding suspension of all consideration of
 2 application for environmental permits.
 3 So, from a Claimants' perspective, what are
 4 they to do? They've got the very same Ministry doing
 5 one thing and another, which seemed completely at
 6 odds. I think probably they were really just covering
 7 both of their bases because a new administration was
 8 about to come in. And they know that there's a good
 9 chance that because the President is in support of the
 10 Measure that would allow them to continue and
 11 sustainably develop their land, why would one think at
 12 that point in time--or, perhaps, I should say, why
 13 would a reasonable claimant in those circumstances be
 14 held to assume that it was at that very point that
 15 they actually had to make their decision, that their
 16 claim tolled from that day?
 17 It would seem to us that it would make a lot
 18 more sense that we would want to put ourselves in the
 19 shoes of the Claimant, not in the shoes of a lawyer
 20 looking at it years later, and say, well, probably as
 21 of that date, whether it be March or whether it be
 22 May, or whether it be June, they were probably quite

05:09:54 1 hopeful that this was all going to get sorted out.
 2 And, of course, they have promises, all sorts
 3 of promises from the others--from the Costa Rica
 4 saying, "Don't worry. At the end of the day, our
 5 statute says you're going to get paid. You're going
 6 to have compensation. It's going to be full,
 7 adequate, and effective."
 8 Well, how were they to know at that date? On
 9 the other hand, go about a year forward, after the
 10 Chinchilla Administration has been in, there's no new
 11 bills. Everything looks pretty firm. I would say
 12 that about a year after that, let's say, sometime in
 13 March of the following year, it looks pretty desperate
 14 for them. It looks like nothing is going to change.
 15 The Government is going to be in force for another
 16 couple of years. That is probably a good time to
 17 suggest that that is when a reasonable Claimant would
 18 have actually expected--been expected to make a claim.
 19 So, I'm going to skip forward now, just a
 20 couple slides, and for the sake of the record, I've
 21 been talking about these slides without clicking them
 22 forward. I'll move to 2 and 3, the second and third.

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

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

05:13:33 1 promptness standard and you have to satisfy a without
2 delay standard, and that appears to be what the
3 Tribunal in that recent Venezuelan case did. It asked
4 itself what was the test for "without delay."

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

18 And that--to be clear, that's the meter for
19 the retroactivity objection. The meter for the
20 three-year time rule objection is a little bit--about
21 a year further. That one is June 10, 2010. So I
22 would leave it to the Tribunal to decide whether it

05:14:52 1 prefers the first or the second ultimately. You might
2 want to apply--there's an argument to be made that it
3 actually should just be--that the delay counts from
4 the day the obligation was in force.

5 I think actually, I take it, back. I
6 wouldn't leave it to you. I would actually say it's
7 got to be that day, and the reason why is, the time
8 limitation question isn't about whether--when the
9 breach occurred. It's about when knowledge of the
10 breach or constructive knowledge of the breach would
11 have happened. So, you count the timing of delay from
12 2009, which means today, in the cases that we have
13 going forward right now, we're into seven years. So
14 we're way past the four years of this Tribunal.

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

05:16:04 1 the Witness's Statement to actually articulate these
2 standards.

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

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

21 Interestingly, one of those recommendations
22 was to use other legal processes to try to invalidate

05:17:17 1 title for everybody who still has land to be
2 expropriated. That hasn't happened in our case, but
3 it's just interesting that that is one of the
4 recommendations. We don't know if that is one of
5 the--exactly how one actually "implements" that or if
6 that is what is holding them up. But for some reason,
7 they can't tell us at what point they're going to
8 start going again.

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

17 So, that whole group of cases, there seemed
18 to be in this permanent state of stasis, I guess,
19 zombified, and we don't know when they're going to
20 end. But that's what we mean by "delay," and that
21 delay we would submit is so arbitrary that it is not
22 just a breach of Article 17(2)(b). It is also a

05:18:36 1 breach of the Minimum Standard of Treatment because
 2 it's simply not fair and equitable to come up with a
 3 suspension without giving any notice to the people who
 4 are going to be affected by it and to not even mention
 5 it to them until they sue you and then you mention it
 6 to them in the course of your pleadings. The basis
 7 for it, we just don't have enough information from the
 8 Respondent to be able to tell us if it's actually
 9 rational. It really doesn't appear. It appears that,
 10 based on the evidence we have, that the reason they
 11 really did it, was because they didn't want to pay
 12 those four administrative appraisals, which were about
 13 \$400 a square foot, which was a lot more than the
 14 previous ones. It's not even half of what they should
 15 be paying, but it's substantially more than what they
 16 thought they were going to get and what they got from
 17 the other appraisers.

18 So, moving on to 6. This one we don't need
 19 to go into too much detail. You've seen this in all
 20 of our submissions. We basically say that fair and
 21 equitable treatment is violated when due process is
 22 not provided, and we also say that evidence of fair

05:19:49 1 and equitable treatment being not provided can be
 2 manifest in the arbitrariness of the results of a
 3 process.

4 So, for example, the crazy high and low
 5 numbers that were coming in, and seem to still be
 6 coming in, that arbitrariness is a hallmark of a lack
 7 of fair and equitable treatment in a process. We also
 8 say that that process itself, because they are
 9 providing a process that, in fact, is completely
 10 inferior, even though, just like the Soviet
 11 Constitution looks great on paper, that also is a
 12 failure to provide access to a process as required
 13 under the customary international law expropriation
 14 standard, which says you must give access to a process
 15 that give us prompt, adequate, and effective
 16 compensation.

17 The same is true with our detriment to
 18 reliance obligations--I'm sorry, allegations. Again,
 19 to be clear, we're actually not making an allegation
 20 that detrimental reliance is a delict in and of
 21 itself. It isn't. It is simply a doctrine, much like
 22 the abuse of rights doctrine that can be used to

05:21:00 1 demonstrate in the analysis that a Tribunal
 2 undertakes, whether or not something is fair and
 3 equitable. It may be in some cases that detrimental
 4 reliance is not relevant to a fair and equitable
 5 analysis. Sometimes it is. We submit that in this
 6 case, it is. Just like in the Bilcon Case and we
 7 would certainly commend to you the Bilcon analysis
 8 with respect to this area of FET because in that case
 9 they did actually believe that or find that legitimate
 10 expectations included the general category of
 11 expectations. So, this general category would include
 12 the laws as they found them, the regulatory
 13 environment and the regime that they found. Obviously
 14 they don't get any kind of guarantee that it's always
 15 going to stay the same, but by the same token, they do
 16 have some expectation that if the law says X, that
 17 they're not going to get Y.

18 So just like in Bilcon, we submit that that
 19 evidence in this case is useful for you to find an FET
 20 breach. It's particularly useful in the case of Brett
 21 Berkowitz and the Berkowitz Claimants because, as the
 22 record definitely demonstrates, he went to the

05:22:18 1 Minister before he--he went all in on his investment
 2 and asked, "am I going to be able to do this?" And
 3 when he did that, that was at the time when the
 4 Minister was--the Minister kept changing his mind, or
 5 maybe he was just of two minds at the same time, but
 6 this is at the time where we know on the record we
 7 have him saying, we're going to sustainable
 8 development. We're going to get this so that you guys
 9 are going to be able and do a sustainable construction
 10 of your homes.

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

18 So, if the Environment Minister has promised
 19 you that you are going to be able to go ahead isn't
 20 worth anything, then I don't know what is. So I would
 21 say that that's a great example of why his detrimental
 22 reliance demonstrates a breach of the FET standard.

05:23:23 1 And with that, I have reached my 30, probably
 2 31 minutes right now and I'm finished.
 3 PRESIDENT BETHLEHEM: I was just going to say
 4 that if you'd hit the buffers, we'd give you an extra
 5 minute or two if you wanted flexibility, but if you'd
 6 finished--
 7 MR. WEILER: No. I hesitate because I know
 8 my friend is worried about too many slides that
 9 weren't spoken to, but I feel--I would feel
 10 comfortable that I've actually addressed all of them,
 11 even though I didn't hit the button often enough. So
 12 thank you very much.
 13 PRESIDENT BETHLEHEM: Thank you all very
 14 much. I take it that that's the end of the formal
 15 submissions of the Parties for today's session. There
 16 are a number of housekeeping issues that I'd like to
 17 address with you all before we bring today's session
 18 to a close.
 19 Really, all of this is in prospect for
 20 tomorrow.
 21 I indicated at the start of today's session
 22 that we would begin tomorrow's proceedings with the

05:24:18 1 oral submissions of El Salvador as a non-disputing
 2 State. I'd like to ask the counsel for El Salvador,
 3 you indicated to us previously that you would like 20
 4 minutes. Would you like to just affirm or revise that
 5 time period simply for our planning purposes, please.
 6 And in just a moment I'm going to ask the United
 7 States whether you want to make an oral submission as
 8 well.
 9 MR. PARADA: Thank you, Mr. President,
 10 Members of the Tribunal. I would like to affirm that
 11 I will not take more than 20 minutes tomorrow on
 12 El Salvador's oral submission.
 13 PRESIDENT BETHLEHEM: Thank you very much.
 14 As I'll remind you, we'll start tomorrow at 9:30, and
 15 I think we will start with El Salvador's oral
 16 submission.
 17 United States, would you like to just--you
 18 reserved your position on whether you want to make an
 19 oral submission as you're entitled to do under the DR
 20 CAFTA.
 21 MR. SHARPE: Thank you, Mr. President, and
 22 Members of the Tribunal. The United States does not

05:25:25 1 intend to make an oral submission tomorrow. We thank
 2 you for having accepted the written submission, and we
 3 would just respectfully reserve any rights under the
 4 Treaty. Thank you.
 5 PRESIDENT BETHLEHEM: Okay. Thank you.
 6 Thank you very much for that.
 7 So, we have a starting 20 minutes with
 8 El Salvador. I indicated also in Opening this morning
 9 that I anticipated that the Tribunal would have a
 10 number of questions arising out of today's session,
 11 and I think I can say, without conferring in detail
 12 with my colleagues that we are likely to have
 13 questions that we would like to put to you. What we
 14 propose to do is to put those questions to you
 15 tomorrow after El Salvador has made its oral
 16 submission. Invite you, if you would like to, to
 17 spend a little bit of time actually addressing such
 18 questions as you may want to there, either in whole or
 19 partially, and if you would like to reserve the
 20 opportunity to either address them completely or
 21 return to them at the time of your Reply submissions
 22 on Friday, that will be fine as well. But I think

05:26:26 1 this is really for purposes of giving you as much
 2 advanced notice of some of the issues that are
 3 concerning us in the light of today.
 4 I remind you that if you do have any
 5 applications, motions, objections in prospect of the
 6 Witness testimony that is going to be begin tomorrow,
 7 this is the opportunity if you've got them already in
 8 mind, to raise these with us in a timely fashion. I'd
 9 like not to be in a position where we're bumping up
 10 against objections which you've been sitting on for
 11 some period of time. But only make them as the
 12 Witness is called.
 13 So, if you have in mind any objections at
 14 this stage or applications or motions, now is the time
 15 to raise them. Of course, if they only occur to you
 16 tomorrow, you can raise them tomorrow, but let me just
 17 pause for a moment and ask you whether there are any
 18 pending motions, applications, objections.
 19 MR. COWPER: I'm not sitting on any
 20 objections at present, Mr. President.
 21 PRESIDENT BETHLEHEM: Thank you.
 22 That's helpful to know.

05:27:31 1 We've got--Sorry. You're right in saying
 2 that we should get Mr. Alexandrov's shaking of his
 3 head negatively on the record.
 4 MR. ALEXANDROV: We're not sitting on any
 5 objections at the moment. Thank you.
 6 PRESIDENT BETHLEHEM: Thank you very much for
 7 that.
 8 After the questions and any answers tomorrow
 9 morning, we'll be moving to the Claimants' fact
 10 witnesses, and I think we have them--if I'm
 11 correct--in the order of Mr. Reddy, Mr. Berkowitz, and
 12 then Dr. Rusenko. Is that correct?
 13 MR. COWPER: Yes, that's correct,
 14 Mr. President.
 15 PRESIDENT BETHLEHEM: Thank you.
 16 We've set this out in correspondence to the
 17 Parties previously. I would just like to remind you
 18 that, although we--we, the Tribunal, will proceed with
 19 a degree of flexibility in terms of timing, so this is
 20 not going to, as it were, bind you in an inflexible
 21 way, but we would like to endeavor, if at all
 22 possible, to ensure that Witnesses do not

05:28:44 1 unnecessarily straddle the lunch break or the break at
 2 the end of the day. I appreciate that this is going
 3 to depend on the cross-examination and any
 4 reexamination that might follow, but I just urge you
 5 to take that in mind, keep that in mind.
 6 One last point, I think, to draw to your
 7 attention, and the members of the Tribunal have
 8 discussed this previously in the light of the
 9 reservation of rights to object on the part of both
 10 Parties. As we move into the Witness testimony
 11 tomorrow and in the coming days, we will, of course,
 12 entertain whatever objections you may feel that you
 13 want to make, but just to put down a marker at this
 14 stage, our inclination is to allow a degree of
 15 flexibility. We don't propose to run this like a U.S.
 16 courtroom or a common-law courtroom. But needless to
 17 say, if there are objections, we will consider those
 18 objections as made.
 19 So, I think that's it from me. I remind you
 20 that we're starting again tomorrow at 9:30, but let me
 21 just ask the Parties whether there is anything of a
 22 housekeeping nature that you'd like to raise at this

05:29:57 1 stage before we close.
 2 MR. COWPER: Just one brief matter. The
 3 sequestered Witness, Dr. Rusenko, we haven't met to
 4 prepare his brief chief, and we intend to do that this
 5 evening. We will respect your ruling, of course, and
 6 not inform him of anything that has happened in
 7 today's hearing by way of Openings or otherwise, but
 8 we will, of course, develop his evidence in chief this
 9 evening, and respect that limitation. I just bring
 10 that to your attention because practice on that does
 11 vary from jurisdiction to jurisdiction.
 12 PRESIDENT BETHLEHEM: Thank you very much.
 13 The Tribunal has reflected on this previously, and I
 14 think we've come to the conclusion that we are not in
 15 a position to police the sequestration. It's the
 16 reason why I admonished you, the Claimants, right at
 17 the start of this to ensure that Dr. Rusenko was aware
 18 of the requirements of his sequestration, and as
 19 counsel before the Tribunal, we will assume that you
 20 will proceed accordingly.
 21 Mr. Alexandrov, any issues that you would
 22 like to raise before we close?

05:30:59 1 MR. ALEXANDROV: No, Mr. President.
 2 PRESIDENT BETHLEHEM: Well, thank you very
 3 much then. We will reconvene tomorrow at 9:30 with
 4 El Salvador's oral submission. Thank you very much.
 5 (Whereupon, at 5:31 p.m., the Hearing was
 6 adjourned until 9:30 a.m. the following day.)
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22

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.


DAWN K. LARSON