

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 5

HEARING ON THE MERITS AND JURISDICTION

Friday, April 24, 2015

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

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:30 a.m. before:

SIR DANIEL BETHLEHEM, QC, President of
the Tribunal

MR. MARK KANTOR, Co-Arbitrator

DR. RAÚL E. VINUESA, Co-Arbitrator

Also Present:

MS. GIULIANA CANÈ
Secretary to the Tribunal

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P R O C E E D I N G S

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

9 So, Mr. Cowper, over to you.
 10 CLOSING STATEMENT BY COUNSEL FOR CLAIMANTS
 11 MR. COWPER: Thank you, Mr. President,
 12 Members of the Tribunal.

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

09:33:22 1 Respondent.
 2 Now, let me say a couple things by way of
 3 introduction. I thought you had already my slides,
 4 but you're now going to have the hard copy of the
 5 slides.
 6 PRESIDENT BETHLEHEM: I note simply that a
 7 copy has been passed to the interpreters already.
 8 MR. COWPER: Now, just by way of
 9 introduction, let me say a few things purely by way of
 10 oral submission.
 11 What have we learned this week? In my
 12 submission, in the most general of terms in relation
 13 to the dispute between the Parties, what we have
 14 learned is that the determination of the State of
 15 Costa Rica to take the Claimants' properties and to
 16 defer and avoid, if at all possible, paying the value
 17 which is assured to them under the Treaty and under
 18 customary international law continues to this day and
 19 more State action will take place if the claims are
 20 dismissed and the Claimants and their properties are
 21 returned to the domestic legal order of Costa Rica. I
 22 think that is a fair summary of the record before you,

09:34:54 1 and I'll deal with some detail later.
 2 In short, if the Claimants' claims are
 3 dismissed, they will be left to--and the phrase
 4 "tender mercies" occurs to me at this point, but they
 5 will be left to a domestic legal order in which the
 6 Government has determined that their rights as
 7 guaranteed by customary international law and the
 8 Treaty will not be honored and discharged.
 9 By every measure, with respect to liability,
 10 the State's actions in this case are in breach of the
 11 Treaty guarantees and customary international law.
 12 In my Opening, I said that there is not
 13 really a central debate about the existence of
 14 liability on that measure, that the central debate on
 15 the record should be about damages. And I maintain
 16 that, because once jurisdiction has been established,
 17 the multitude of breaches is obvious and overwhelming.
 18 With respect to damages, I think a couple of
 19 things are of note.
 20 Firstly, the Treaty guarantee is of--I'm
 21 going to take it the most general--restitution in
 22 relation to the value of the properties. The explicit

09:36:18 1 guarantee is Fair Market Value, and we're all aware of
 2 how long and developed the evolution is to clear
 3 understandings of Fair Market Value before the date of
 4 expropriation. But I start with the fundamental
 5 proposition that it is value and not cost that is an
 6 issue. I'm going to come back to this in a moment;
 7 and I accept that, in the absence of any probative
 8 evidence, a purchase price may be a proxy for value.
 9 And in relation to the questions which have
 10 been asked by the Tribunal during the course of the
 11 week, Ms. Cohen will address the damages claim as
 12 articulated in the Memorial and will also respond to
 13 the questions in as specific a way as we can about any
 14 alternative based upon using purchase price as a proxy
 15 of value and what that would mean.
 16 To be clear, an award that was based on price
 17 as a loss is not consistent with the Treaty guarantee.
 18 Using price as a proxy for value and then using
 19 appropriate measures to increase that value to the
 20 Valuation Date and then adding to that a measure of
 21 interest from the Valuation Date to the date of the
 22 Award is at least, in principle, based upon value.

09:37:46 1 Now, we're going to say--and, of course, we
 2 stand by our primary claim--that the only valuation
 3 evidence you have before you is Mr. Hedden's Report,
 4 that you ought to give effect to that and use those
 5 values in your determination of Fair Market Value
 6 under the Treaty.
 7 That is your safe harbor as a Tribunal. And
 8 you're assisted in this case because there is
 9 essentially no act of professional debate about value
 10 in respect of the appropriate appraisal standards to
 11 be followed. What you have is a debate between a
 12 Valuation Expert and a Damages Expert who essentially
 13 has marshaled an argument in favor of price.
 14 Now, with respect to the period permitted to
 15 us this morning, I will be the principal person
 16 addressing you. I will address both the facts and
 17 liability. I will, in a summary way, address the
 18 jurisdiction and the answers to your questions.
 19 I expect that Dr. Weiler will correct me
 20 and/or supplement my submissions with respect to
 21 jurisdiction--and I say both "correct" and
 22 "supplement"--and he'll be addressing some of the

09:39:09 1 questions explicitly. And Ms. Cohen will be
 2 addressing both approaches to damages that we see
 3 active in the record. So that's who you'll be hearing
 4 from unless other people jump to the stand.
 5 So let me then try to start with some of the
 6 straightforward matters. And I'm afraid if I can have
 7 some kind of screen so I know what slide people are
 8 on.
 9 (Comment off microphone.)
 10 We need a new English word for a surplus of
 11 screens, so maybe we can have a cash award for that
 12 term. And it will be recognized by the OED, I'm sure,
 13 within record time.
 14 So, I'm going to do some straightforward
 15 summing up now with respect to some of the questions
 16 you'll want to consider. And feel free to interrupt
 17 me; and I'll either answer or, if I can't, I'll defer
 18 and come back and provide you an answer later in the
 19 morning.
 20 So firstly, in general, and I think it is
 21 worthwhile as we go through the facts, and I'll do my
 22 best--and I've been thinking about this through most

09:40:39 1 of the night--to try to assist you as best I can as to
 2 what are the factual questions and what's their
 3 relevance to the questions before you?
 4 This thing has been really fully briefed, but
 5 I've been trying to hone that to some degree as we go
 6 down. And as I go through this, I'll try to be of
 7 assistance to you. But, of course, there are factual
 8 disputes, the resolution of which you don't have to
 9 worry about, as in every case. And there are some in
 10 this case you don't have to worry about.
 11 The first one is, though, we do say that with
 12 respect to the knowledge of the Claimants which has
 13 been the subject matter of issue, placed in issue by
 14 the Respondents and spoken to in the pleadings and the
 15 evidence this week, I say that your findings should be
 16 that it was reasonable for the Claimants to conclude
 17 that the properties they were purchasing were outside
 18 of the Park. And I say that as a sufficient finding
 19 of fact for you to proceed further.
 20 It is actually not a necessary finding of
 21 fact to proceed further, but it is certainly
 22 sufficient. And you don't need to go beyond that and

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09:41:48 1 put a fine point on it. You don't need to conclude
2 that they were right, in my submission. And, indeed,
3 it is not necessary to conclude anything on that
4 question in order to support the expropriation claim.
5 Because, to be explicit about it, the State
6 has the right to expropriate the property, whether it
7 lies inside the Park or outside the Park. That, if it
8 is private land within the Park, as we know from the
9 general evidence, it may there be for a very long time
10 and the State has the right to expropriate it.
11 But, equally, if it lay outside the Park and
12 for public order or public purpose was needed to be
13 expropriated, that is quite appropriate. From the
14 Claimants' perspective, it is not necessary to
15 establish that as a question of fact or law under
16 Costa Rican Law, but it is certainly sufficient for
17 our purposes to say that the facts abundantly show it
18 was reasonable to conclude the properties they were
19 purchasing were outside of the Park.
20 Next slide, please.
21 Now, as I said in my Opening, this is a case
22 about people, and specific people. And the Claimants'

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09:43:02 1 claims have factual differences between them that you
2 will have to have regard to in respect of your
3 consideration of the facts and as they rest on their
4 separate claims for relief in this case.
5 With respect to the Spence Claimants, let me
6 say firstly that the evidence is clear that there was
7 no knowledge of a controversy in 2003 on the Spence
8 Claimants' parts, and that the purchase of the
9 Ventanas Lots in 2003 occurred, and there's a
10 reference to the Witness Statement there.
11 And the third point is that, of course, there
12 were no stamps on the registry documents, and I've
13 given you the references there.
14 And finally, with respect to the Spence--and
15 we'll come back to the significance of this--you'll
16 recall that, perhaps, the most dramatic evidence of
17 the skyrocketing prices during the material period was
18 the sale of Lot 35 for double the price in 2004.
19 Now, could we turn.
20 With respect to the Cophers and Holstens,
21 who, of course, didn't hear from either of those
22 Claimants during the course of the week, but you have

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09:44:18 1 their Witness Statements.
2 The Cophers had no knowledge of controversy
3 surrounding Park boundaries in 2003, 2004. They
4 purchased V39 and V40 in 2003, V38 in 2004, V46 and 47
5 in 2006. And the MINAE stamps on the registry
6 documents indicated those properties are outside the
7 Park. I'm going to come back to the issue of stamps
8 later, but that's the evidence as it relates to those
9 Claimants.
10 Next slide, please.
11 Now, with respect to Spence Co.--and Bob
12 Reddy was cross-examined and attended before you this
13 week. It is clear that Spence Co., through Mr. Reddy,
14 performed extensive due diligence. And he did
15 precisely what both Mr. Hedden and others indicated
16 would be appropriate due diligence.
17 He retained local counsel, he met with local
18 real estate agents, he reviewed the property surveys,
19 and that all supported a conclusion on his part that
20 the properties were outside the Park.
21 Now--and I say that's a reasonable
22 conclusion.

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09:45:34 1 Next slide, please.
2 With respect to Mr. Berkowitz, who also
3 testified before you this week--and there is some
4 subtlety here to the evidence, and I may take a few
5 minutes on this slide to indicate what I, as counsel,
6 see coming out of the documentary and live testimony
7 this week. But let me just review the slide firstly.
8 Firstly, I urge upon you a conclusion that he
9 had a genuine belief that before completing the
10 purchase of the B Lots--you may want to make a note of
11 that, because he had an agreement to purchase them but
12 he, on the Witness Statement and the evidence, clearly
13 deferred completing that purchase until he had
14 concluded that the Lots were outside the Park.
15 And his understanding of the law--and this is
16 a purely lay understanding--was that he could build on
17 the land until the Government expropriated the land.
18 It did not form part of the Park.
19 Now, if I can pause here and ask you to make
20 a mental or a physical note, you actually have
21 ambiguity in the documents with respect to discussions
22 about what's inside the Park, outside the Park, what

09:46:49 1 is "the Park." And I commend to you the Statement of
2 Mr. Ruiz, which is part of the Claimants' filing,
3 which sets out the background law.

4 Because it's clear, as I read the Witness
5 Statements, that when we talk about "the Decree," the
6 Decree does actually not create a Park. It creates a
7 proposed Park or decrees a proposed Park. That under
8 Costa Rican Law, the creation of the Park is actually
9 not perfected or consolidated until the private land
10 within the boundaries of the Park has been paid for
11 and expropriated.

12 And so there are, if you will, in the loose
13 sense, you can speak about lands that are within the
14 boundary of the Park that are not in the Park because
15 they haven't been purchased yet. But they are within
16 the boundaries of the Park and are clearly different
17 risks associated with private lands within the Park
18 and outside the Park.

19 My next point, though, is I'd commend to you
20 to recall that in general within the country, vast
21 stretches of park land are privately owned today.
22 This isn't a case where this Park is unusual--and I'll

09:48:04 1 give you the reference later when I turn up the slide,
2 but let me stay with the point for a moment.

3 The point is that, with respect to the Park
4 policy, it is commonplace to decree a Park or declare
5 a Park but to not actually create the Park under the
6 Park Law for a very long period of time. And people
7 enjoy their private rights, including construction,
8 development and otherwise, within the Park in the
9 meantime.

10 I think one of the Parks in the country has
11 90 percent private land, 40 percent, 60 percent.
12 Those are the portions of private land within the
13 boundaries of a Park.

14 And so it's not the case here that, if you
15 read the law, that the facts on the ground would marry
16 what the law appears to be, that you declare a Park,
17 you buy all the land in the Park, and then you have a
18 Park.

19 Rather, the policy supported by the facts on
20 the ground is you decree a park, you have boundaries
21 in the Park, and then you tolerate for indefinite
22 periods of time people to exercise their private

09:49:07 1 rights, including development rights, within the Park.
2 They are regulated, but they are clearly residences,
3 such as the residences Mr. Berkowitz contemplated
4 within the boundaries of the Park. Not only in this
5 Park, but in other Parks in the country.

6 And so the reason I dwell on this a bit is
7 because I was looking overnight with some care at the
8 evidence--and let me say this, and that is, I think it
9 should be concluded as a question of fact that the
10 Minister provided a positive reassurance to
11 Mr. Berkowitz that he could build his home on his
12 property. That's the first thing.

13 That--there is two ways to explain that, one
14 of them being that it was related to a statement that
15 the property lay outside the Park in the sense of
16 outside the boundaries of the Park.

17 Another way of understanding that would be
18 that it lay within the Park but that his policy was to
19 permit responsible low-density development within the
20 Park boundaries on private land.

21 The July Ayuda is completely consistent with
22 the reassurance that construction and development on

09:50:29 1 the part of Mr. Berkowitz could occur because the
2 State did not want to incur financial responsibility
3 for expropriation, and that it could occur within
4 private land, either within or outside the boundaries
5 of the Park. He clearly understood that he could
6 build and that his land was outside the boundaries of
7 the Park, but as counsel, it's open to you to find
8 that the representation was "you can build on your
9 property, you can do so responsibly. We don't want to
10 take your property," but that's not inconsistent with
11 it being within the boundaries of the Park, and that
12 would reconcile the letters by the Minister which were
13 put in evidence--which are roughly contemporaneous in
14 the spring, in which he positively averred in the
15 formal sense to the 75 meters being within the Park.
16 So, that's how I would deal with that narrow question
17 of fact.

18 Now, I think it is fair to say that there's
19 abundant evidence of confusion. So, one of the
20 singular features of this is the June 2004 IGN study,
21 in which it explicitly states that those properties
22 are not part of the Park. And I've given you the

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09:51:51 1 reference there, and the IGN is the national
 2 cartographic service, which whatever, some 12 years
 3 later, is about to produce a map of a park. And
 4 so--and I'm going to come back to our debate about
 5 coordinates in a moment. I can't avoid that because
 6 my father was a cartographer.
 7 But let me--in part, let me say that, for the
 8 present purposes, it's clear that there was a basis on
 9 which any reasonable person reviewing official
 10 documents could conclude that the properties are
 11 outside the Park. And so you are dealing with, from
 12 the Claimants' perspective, at its worst, a situation
 13 in which the State has, through its various organs,
 14 created a state of confusion. And I would say that
 15 confusion exists with respect to the '95 Law, it
 16 exists with respect to the '91 Law. It exists for all
 17 the reasons the Contraloría Report in 2010 says it is
 18 confusing and is not yet resolved. And I think--I
 19 reread the evidence last night, and my reading of the
 20 evidence is--just a small point of difference between
 21 myself and counsel for the Respondent.
 22 As I read the evidence, the map referred to

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09:54:30 1 So, effectively, if I can summarize that, the indirect
 2 measures now have continued for 12 years with respect
 3 to preventing any exercise of his property rights on
 4 that parcel.
 5 The final bullet point there is simply to
 6 recall that one of the consequences--and it may be
 7 more legal than practical, but one of the consequences
 8 of defining the boundaries of the Park is to exclude
 9 access to the beach area by the people who have the
 10 property, private property, located most closely to
 11 the beach.
 12 Go to the next slide, please.
 13 I'm just going to wrap up with the rest of
 14 the Claimants and move on to a different topic, but
 15 I'll remind you because the Gremillions didn't appear
 16 before you. We say that on the record they had no
 17 knowledge of controversy surrounding the Park in 2004,
 18 which is when they purchased it, and you'll recall
 19 that Mr. Kaczmarek--and I'm tempted to say "even
 20 Mr. Kaczmarek," but I say Mr. Kaczmarek agreed that
 21 Gremillion was unaware that Lot B7 would be within the
 22 Park boundaries.

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09:53:11 1 in answer to the Tribunal's comment is not the
 2 official map of the Park yet. It is a draft that has
 3 not yet been approved as an official map, and that's
 4 why, in the compliance chart, it is seen as being
 5 ongoing. It's a small point, but it is not an
 6 insignificant point in that, assume for the moment, we
 7 have an official map that is unpublished. That means
 8 that, as of the date of this hearing, we still don't
 9 have a published official map of the Park in any form,
 10 much less in a form that could allow us see what was
 11 necessary to define its parameters.
 12 So, just completing, then, with respect to
 13 Mr. Berkowitz, I recall and ask you to recall that he
 14 purchased those Lots in 2003, and we accept that the
 15 evidence is he paid \$1.5 million for those,
 16 Mr. Rodriguez--I've dealt with that.
 17 And, of course, the second-to-final slide
 18 there is that he pursued in good faith the development
 19 of the Lot, the building of his home, and then the
 20 indirect measures commenced with the rejection of
 21 permitting and the suspension of any development of
 22 his parcel, which has continued to the current day.

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09:55:57 1 Now, I don't want to spend an undue period of
 2 time on this. I think lawyers become curious about
 3 legal curiosities, and at the very least, this is sort
 4 of, from a foreign lawyer's point of view, a legal
 5 curiosity, but I do want to at least address--to be of
 6 assistance to you--what I see the record and
 7 establishing with respect to the creation of the Park.
 8 And, of course, very quickly, it's, I think,
 9 forgotten by Mr. Jurado in his opinion, but the first
 10 Decree is not the '91 Decree. The first Decree is the
 11 wild refuge--wildlife refuge. So, before the sun
 12 rises on the Park idea, this has already been created
 13 as a wildlife refuge, and that is a degree, as
 14 Mr. Jurado acknowledged in cross-examination, a degree
 15 of protection of the "inalienable zone." The
 16 significance of that, if I can go back to the end, is
 17 simply from a lawyer's point of view, one of the bases
 18 of his reasoning was that Congress could not have
 19 intended the protection of the Park to go seaward
 20 because, otherwise, there would be no protection for
 21 the beach. That's both in his--effectively, his oral
 22 evidence, as well as his opinion, and that ignored the

09:57:23 1 preceding existence of a wildlife refuge Decree and
 2 Law.
 3 With respect to the '91 Decree creating the
 4 Park, there's a curiosity here, and I say a "legal
 5 curiosity," and these are matters you don't have to
 6 resolve, but you'll recall that the '91 Decree only
 7 extends to the southern part of the territorial area
 8 we've been dealing with. And, yet, when we go to the
 9 end of the Constitutional Courts, we see that the
 10 Constitutional Courts are looking at the power of the
 11 '91 Decree to expropriate as a basis for finding that
 12 75 meters should be expropriated by the relevant
 13 authorities without an explanation of how the '91
 14 Decree, which is only on the southern half, conveyed
 15 any authority to expropriate the northern half because
 16 the northern half is only encompassed within anything
 17 by reason of the '95 Law. So, there's an enduring
 18 curiosity with respect to the '91 use. I did
 19 reread--and it's not necessary for you to find
 20 this--but in my reading, as best I can, as a foreign
 21 lawyer, it does not appear that the Court decisions
 22 adopted, as Mr. Jurado acknowledged, his reasoning

09:58:43 1 about the '95 Law. They just ended up at the same
 2 conclusion.
 3 And how is that relevant? Well, I think it's
 4 telling that the initial nonbinding Opinion and then
 5 the Legal Opinion of the Attorney General of the
 6 country ends up not being the means by which this land
 7 ends up being the subject matter of a mandatory order
 8 to expropriate. So, that's a third legal curiosity
 9 that is of some legal, historical significance.
 10 With respect to the Opinion and dictamen, I
 11 don't have much to say about them, other than to say
 12 that clearly the dictamen in 2005 represented--and I
 13 acknowledge my friend's point that the dictamen in
 14 2005 had a practical effect on the Government. And,
 15 of course, the Constitutional Court's Decisions
 16 equally had a practical effects, as well as legal
 17 effects.
 18 For the purposes of our position in advancing
 19 the claims, let me say this, and that is: Our
 20 interpretation of the evidence as a whole is that it's
 21 clear that the Court, in its final expression, did not
 22 take on itself the responsibility and office of

10:00:17 1 directing immediate expropriation, that the final
 2 expression of the Court and it's expressed in
 3 constitutional terms, is that, to the extent we've
 4 said that earlier, that's not our job, that's your
 5 job, which for our purposes means that the State's
 6 decisions, arising after the final expression by
 7 Constitutional Court, are the State's decisions within
 8 their sphere of authority.
 9 So, it's the not the case that the State's
 10 decisions in this case to suspend and to continue to
 11 paralyze the Claimants' properties are connected to or
 12 in obedience of the Constitutional Court's decision.
 13 They had a choice, and they exercised and have
 14 continued to exercise and have renewed their exercise
 15 of choice since those decisions to continue to
 16 sterilize the Claimants' properties and to continue to
 17 make them unavailable for any practical purposes.
 18 Next slide, please.
 19 So, I think we all recognize the purpose of
 20 the Park.
 21 Next slide.
 22 So, these are really small points in the

10:01:30 1 grand scheme of things, but let me say this with
 2 respect to the turtle population, because there was a
 3 debate in the pleadings with respect to what the
 4 principal causes of the effects of turtle population
 5 are: I just simply say to you I think it's clear,
 6 upon reading Mr. Piedra's testimony and Mr. Rusenko's
 7 testimony, in the context of the record that
 8 the--historically, in this area, the greatest cause of
 9 degradation was poaching, egg poaching, egg harvesting
 10 by people who--and I think one of the articles
 11 describes there being a commercial business of taking
 12 all the eggs and taking them to the city and selling
 13 them.
 14 The fisheries in a post--the post-Park period
 15 clearly are the principal means by which adult turtles
 16 are being killed, and then climate change is a
 17 concern, as it affects the conditions in the ocean,
 18 and then, finally, development. The point being that,
 19 if you're looking at hierarchies of care here, it is,
 20 I think, clear on the record that the Claimants'
 21 proposed developments--it was not necessary to prevent
 22 them to preserve the turtles. Now, it's not necessary

10:02:54 1 for you to find that, but I say that's a fair
 2 conclusion on the evidence.
 3 You may want to make a mental note there
 4 that, in rereading the opinion of Mr. Jurado
 5 in--earlier in the period, the one that I just
 6 referred to, his official opinion, one of the comments
 7 I see is that he says that, if there's no protection
 8 of the beaches in support of the 75 meters, then there
 9 is no protection of the turtles. There is really no
 10 recognition in his opinion at all of the distinction
 11 between protecting the "beaches" where the turtles
 12 nest and protecting the upland area, and, of course,
 13 the discussions with Minister Rodriguez, the
 14 professional discussion and otherwise, hinges on the
 15 fact that the turtles do not nest above the
 16 "inalienable zone," and that the area above the
 17 "inalienable zone" is fundamentally requiring
 18 regulation as part of what you would want to regulate
 19 going far further back.
 20 And so there's a legitimate Government
 21 question as to how far, if you need to go back at all,
 22 and how much further you need to go back, but from a

10:04:11 1 technical point of view, it's clear that it would be
 2 an entirely responsible position to take that the
 3 upland property could be regulated consistent with the
 4 development of single homes and managed.
 5 And I don't think we've given a--well, we've
 6 given a reference to Mr. Rusenko here. I just thought
 7 it was actually a fairly dramatic example of what's
 8 possible, that's he's managing successful turtle
 9 preservation, conservation project in Boca Raton,
 10 which, forget the first one-and two-story homes, Boca
 11 Raton is a highly developed, highly urbanized area.
 12 And we're not suggesting that was ever in the cards
 13 here, but the point is on the facts, what was driving
 14 the discussion around the 75 meters was not a nuanced
 15 or developed or considered assessment of the need to
 16 take the 75 meters.
 17 And in a sense, in my Opening, I said to you
 18 on a fair reading of the record, that you could reach
 19 the conclusion that the taking of the 75 meters is
 20 essentially an unnecessary and, to some degree,
 21 unwanted imposition on the State. And I support that
 22 because, in my respectful submission, the most senior

10:05:41 1 office of the State decided not to take the 75 meters
 2 and the net legal processes which resulted in it flew
 3 in the face of that unanimous intention of Congress.
 4 And we're all lawyers here, and we can sort our way
 5 through to the various legal analyses which would see
 6 that happen, but from a purely factual point of view,
 7 what occurred in the final result was that legal
 8 interpretation of the law ended up operating to defeat
 9 the specific intentional desire of Congress to have
 10 the boundary of the Park extend seaward and not
 11 inland.
 12 Next slide, please.
 13 With respect to Mr. Piedra, he was a
 14 passionate, and as best I could read, both informed
 15 and careful advocate for the turtles. I think it's
 16 fair to conclude that he would like to have boundaries
 17 far more extensive than either 50 meters or 75 meters,
 18 and that he would like to have a control over areas
 19 beyond the Park.
 20 With respect to the narrow question of his
 21 interview, it is difficult for me to reconcile his
 22 explanation for his statement with his statement. It

10:07:17 1 is not necessary for you to conclude anything, but,
 2 with respect, it's fairly clear that it may have been
 3 Mr. Piedra was speaking of the Park in the same
 4 practical way that the Minister was, which is we don't
 5 have a park that includes 75 meters, because we
 6 haven't taken those lands, and so he is the
 7 administrator saying "what we have is 50 meters and
 8 11 miles of territory." However, it goes far from
 9 saying and supporting his conclusion--and we answered
 10 this--which is his Witness Statement says
 11 everyone--everyone always knew it included 75 meters,
 12 and that's an assertion that can't be supported on the
 13 record.
 14 Next.
 15 So, this is just a reminder that the lobbying for
 16 protection went before the '91 Decree and included the
 17 Tamarindo wildlife refuge.
 18 Next slide, please.
 19 Sorry. Okay. That's good. And this is just
 20 a reminder of what the Tamarindo Refuge shows and the
 21 protection of the beach.
 22 Go ahead.

10:08:36 1 With respect to the '91 Decree--and this is
 2 the point I was trying to make. And, again, this
 3 is--I'm, perhaps, drawn by my enthusiasm for
 4 cartography, perhaps wrongly to this point, as it's
 5 not a necessary point for the Claimants, but the
 6 point, in essence, is, the '91 Decree and the '95
 7 Decree were not cartographic representations of an
 8 area. They had a northern point and a southern point.
 9 And on the whole of the evidence, I think you can
 10 conclude that any cartographer with that description
 11 would actually need to describe four points, neither
 12 which of--none of which were described in the '91 Law
 13 or the '95 Law, because the western points would be
 14 described by reference to high tide, and the eastern
 15 points would be described by reference to a line from
 16 high tide. Neither the northern point, the southern
 17 point in either law were so fixed. That's my point.
 18 So, what they do actually provide is a
 19 northern extent, a southern extent, each of them
 20 change. The idea that somehow they dictated a
 21 boundary of the Park is not correct.
 22 Next point.

10:09:54 1 With respect to the--I think we can go back a
 2 slide. I think I can skip that. Okay. I know I've
 3 said that. Let's keep going.
 4 Now, the '95 Park Law, I think I've said all
 5 I need to say about that. I would say that, in the
 6 documentation and in the pleadings, to some extent,
 7 there is a--and to some extent, the history of the
 8 question. One of the issues was, if there isn't a
 9 75-meter zone, why is there a reference to private
 10 property within the Park? Because if there isn't that
 11 terrestrial component, why are there references to
 12 taking private property? And the short answer is--on
 13 either reading--and Mr. Jurado agreed with this--there
 14 is lots of private property within the Park, even if
 15 the 75 meters does not form part of the boundaries.
 16 There's an entire area of Cerro el Morro and
 17 Isla Verde. And I don't know if you recall this, but
 18 Isla Verde not an island, it is essentially a large
 19 inland wetland area, it seems to be a wetland area.
 20 And, of course, Cerro el Morro is a large area in the
 21 northern part.
 22 Next slide, please.

10:11:11 1 This is just a reminder of the point that,
 2 under the Park Law, owners enjoy the full attributes
 3 of ownership until the expropriation process has
 4 commenced, and that is, as I said earlier, a general
 5 fact on the ground in the country as it relates to
 6 Parks, generally.
 7 Next point.
 8 I think you've got this, but this is just my
 9 reminder of how explicit and unanimous the decision to
 10 move the boundary of the Park offshore was.
 11 Next slide.
 12 And then--that's fine. Let's go to the next
 13 one.
 14 And I will say this, and that is--sorry, if
 15 you go back a slide.
 16 As I read the translation--and I apologize
 17 for not being able to read the original Spanish--that
 18 implicit in the motion was the principle that what was
 19 needed was a marine park and not a terrestrial park.
 20 And I say that as in respect to it meets the
 21 requirements of law of this type to protect Parks,
 22 especially it should have been "marine," and I see

10:12:26 1 that as referring to Deputy Fournier's comment about
 2 the '91 dimensions; that they, in fact, shouldn't have
 3 been landward. They should have been marine so that
 4 he knew he was changing what had happened in '91, and
 5 that the justification for it was because what was
 6 needed was a marine and beach, and he specifically
 7 talks about ordinary high tide there. So, that is
 8 unanimously agreed to by Congress. Obviously, their
 9 effort to accomplish that by way of amendment was
 10 ultimately unsuccessful.
 11 Next slide.
 12 I don't think we drew this to your attention
 13 in the opening, but the corroboration for the fact
 14 that it was not a casual conclusion is in his letter
 15 of January 5, 2007, in which he says there was no
 16 environmental justification whatsoever for going
 17 beyond the 50-meter strip.
 18 Next slide.
 19 And so I say, as a fact, you should have
 20 regard of the fact that Congress's decision was
 21 intentional and not a typographical error or a casual
 22 textual mistake.

10:13:40 1 So, I don't think--the final point on this
 2 would be--and this was supported by the Contraloría's
 3 Report in which the distinction between "territorial
 4 waters" and "internal waters" is another source of
 5 uncertainty in the description of the boundaries of
 6 the Park.
 7 Next. And then I think we've done that.
 8 So, let me just pause there and say I do want
 9 to say you can find, I think, that the boundaries--as
 10 a matter of fact, that the boundaries of the Park were
 11 not adequately defined in the 1991 Law or the 1995
 12 Law, and, through omission, they have not up until--in
 13 any relevant sense, up until the present, been
 14 adequately defined. And the significance of that, of
 15 course, is, as the backdrop to investors investing in
 16 lands adjacent to the Park, the absence of State
 17 action to carry out what their laws require, which is
 18 a clear definition of the law because the whole point
 19 that the Contraloría's point is that the law
 20 wasn't--the precise boundaries are not really intended
 21 to be defined by the description in Section 1 of the
 22 '91 or '95 Law. Further work is required for that.

10:15:21 1 Further work was required in any event, and further
 2 work has now had to be carried out to carry that out.
 3 So, that failing ought not to be visited upon the
 4 Claimants.
 5 Now, that is just a remainder--if you go back
 6 to the slide, please, thank you--and I think, as in
 7 many civil jurisdictions, Congress is the ultimate
 8 interpreter of the law. We often, in common law
 9 jurisdictions, don't think that because we're fond,
 10 more fond, perhaps, of the judicial functions, but it
 11 was totally legitimate to seek to have Congress
 12 clarify the matter, and there were efforts to do that,
 13 both to clarify it as going inland and to clarify it
 14 as going seaward, neither of which, as I understand
 15 the record, succeeded.
 16 And until the Constitutional Court clarified
 17 the matter, it was clear that that was afoot, and from
 18 a practical point of view, the Congress ultimately was
 19 the appropriate body to clarify its intentions when it
 20 clearly had acted on a specific intention in 1995.
 21 That wasn't done, but--and then ultimately it was left
 22 to the Court, which happens in not a few cases around

10:16:47 1 the world.
 2 The final bill, of course, was an attempt to,
 3 again, go to Congress and say the net result of the
 4 Court's decisions is that your intentions have been
 5 frustrated, and you have not had a Congressional
 6 decision, an informed Congressional decision on the
 7 very question of whether the 75 meters ought to be
 8 protected in addition to the 50 meters, and just to
 9 remind you that the bill, which was on place and being
 10 debated after 2000--January 2009 was seeking not to
 11 remove protection from the turtles but to, rather,
 12 have a mixed refuge and to rectify the limits of the
 13 Park. And there's a typo there. It should say
 14 "lapsed and archived in 2013." I think that's a typo
 15 from the original slide.
 16 Next slide, please.
 17 So, I think I'll speed up here a little bit,
 18 but just to remind you, we didn't deal with this in
 19 the Opening specifically, but just to remind you that
 20 the Constitutional Court Decision, the first one in
 21 May, was this conflict between zoning regulations, and
 22 I remind you in the pleading, we brought your

10:18:09 1 attention to the fact that another official source of
 2 confusion is that the municipality exercised and
 3 purported to exercise zoning authority over these
 4 lands, and so ultimately one of the consequences of
 5 the Constitutional Court Decisions was that those
 6 zoning provisions were found to be invalid or
 7 ineffective.
 8 Next one.
 9 And then, of course, you'll recall that there
 10 was a decision which, on any reading, appears to have
 11 ordered an immediate expropriation or a decision to
 12 encourage environmentally sensitive development.
 13 And then continue.
 14 And then we're actually missing the point
 15 which is the December 2008 one, but I'll just remind
 16 you that was on, I think, any fair reading, appeared
 17 to be an immediate order to expropriate. And then
 18 when we get to the spring of 2009, it is back to the
 19 administration to decide.
 20 Next slide.
 21 Now, with respect to the Contraloría Report,
 22 at which I'll have much to say later in our

10:19:18 1 submissions, this is a summary. First of all, it is
 2 quite harshly critical of all of the boundaries in the
 3 1995 Law, and I think that is justified. Secondly, it
 4 is harshly critical of delays in the conduct of
 5 expropriation, and that, again, is clearly justified.
 6 The next point is a point of some
 7 significance is that on the record, you should
 8 conclude, in my submission, that what the Contraloría
 9 Report recommended was a short suspension--that is, a
 10 matter of months--pending a determination by the
 11 responsible agency whether to seek annulment, and I'll
 12 try to give you the specific pinpoint reference later.
 13 But Mr. Jurado admitted that, and the concept
 14 there--and I think I have a slide coming up with
 15 it--but just the concept there was you have to decide
 16 whether to take the next step, which is to actually
 17 annul all the Claimants' properties, and it is general
 18 and it's no question that the--if you look at the
 19 text, there is actually explicit reference to the
 20 source of the Claimants' properties, but it is also
 21 more general than that.
 22 But the point is, in respect of due order, is

10:20:35 1 that Contraloría said, "This is a significant step.
 2 You have to decide whether you're going to do that and
 3 report back to us in the spring." Spring five years
 4 ago. Just the decision of whether to do it was the
 5 spring of five years ago. That, on the pleadings, was
 6 justified as the suspension which is still ongoing,
 7 and what I say you ought to find as a finding of fact
 8 is the Contraloría did not recommend an indefinite
 9 suspension.
 10 And I'm going to come back to what you ought
 11 to conclude, but what you ought to conclude is that
 12 the responsible agency and the Government of Costa
 13 Rica as a whole intervened to use the Contraloría
 14 Report as support for a more general indefinite
 15 suspension, which is ongoing and which intervened in
 16 the historical period as a fresh decision that is
 17 within the Treaty period and within the limitation
 18 period and is ongoing.
 19 The reference I promised you is apparently
 20 Transcript Day 3, Page 602 to 604, Mr. Jurado's
 21 testimony. Now--I haven't finished yet with that
 22 slide--I say that you ought to find as a fact that the

10:22:05 1 deadlines for decision and action within the
 2 Contraloría Report appear to have been ignored by the
 3 responsible agencies. I say you ought to conclude, as
 4 I mentioned earlier, that the official map project
 5 based on the compliance document and the Report is
 6 ongoing and unpublished. And most remarkably, in
 7 respect of the evidence this week, that the
 8 consideration of annulment, on the record, by the
 9 responsible agency, will start after an external
 10 report which has not yet been received, will be
 11 received sometime in the indefinite future.
 12 And I want to pause here and say that is,
 13 with respect, the most remarkable chapter of evidence
 14 in this unhappy history, for the Claimants to be
 15 present in this Hearing and to learn that their
 16 properties will be the subject of some future decision
 17 about annulment that has not been made five years
 18 after it was recommended to be made, and that for
 19 Mr. Jurado to say the decision-making process will
 20 start after an external adviser apparently--we don't
 21 know who it is or what it is or anything--will report
 22 back sometime in the future, which he hopes to have

10:23:45 1 happen by the end of the year, but he can't promise
 2 anything.
 3 That is a remarkable renewal of--and promise
 4 that this is not an ancient matter. This is a fresh
 5 and ongoing dispute between the Parties. And it's the
 6 most clear evidence, corroborative and supportive, of
 7 the State's determination to take the Claimants'
 8 properties and to do so either with no compensation if
 9 f achievable, or as late as possible and not in
 10 accordance with their obligations under the Treaty.
 11 Next slide, please.
 12 I've given you the references there in
 13 summary of that submission, and I think that
 14 that's--those are helpful to you.
 15 Next slide, please.
 16 Now, that's a small--for our purposes a small
 17 point because the manual expropriation clearly isn't
 18 dealing with the annulment or legal process, but it is
 19 helpful, I think, to--as a context of you deciding the
 20 liability--and this is one of many, many, points of
 21 light, if I can put it that way--the absence of a
 22 manual for expropriation internally within the agency

10:25:02 1 is supportive of our fundamental position, which is
 2 that the State has not discharged its obligation to
 3 proceed to expropriation. It is determined upon
 4 without delay.
 5 Next.
 6 With respect to the land registry drawings, I
 7 think that, with respect to relevant matters, I've
 8 dealt with them, but I've said, for example, that we
 9 have these stamps. There are either--there are no
 10 stamps or stamps saying outside the Park. With
 11 respect to the 1991 stamps, you have the evidence that
 12 those were reviewed. So, it's not the case that they
 13 were missed. Legal opinions were given with respect
 14 to the significance of stamps which refer to the 1991
 15 Decree, and they were explained as not being
 16 inconsistent with the lands being outside the Park.
 17 And that's the kind of due diligence you would expect
 18 and that supports the reasonableness of the Claimants'
 19 conclusions.
 20 With respect to the 1995 stamps, they appear
 21 to have been added after the, if you will, fresh
 22 determination by the Attorney General that that's what

10:26:18 1 was required, and so those are not indicative of an
 2 official indication of the boundaries of the Park
 3 under the '95 law at the relevant time period.
 4 Next stamp, please.
 5 And that's a summary of what I've said, and
 6 Ms. Chaves in her testimony eventually came to admit
 7 as much.
 8 Next stamp--slide.
 9 Now, as part of the context of delay, of
 10 course, you will recall Ms. Chaves--or Dr. Chaves--I
 11 apologize--acknowledging that in--under her carriage,
 12 the State has been appealing and deferring finality
 13 and it has actually been seeking to change dates of
 14 dispossession and, as she acknowledged, dispossession
 15 under Costa Rican Law is not the final step of the
 16 expropriation process, and that is the transfer of
 17 title.
 18 If you want to make a note, the ILC concept
 19 of expropriation is the same, which is that the actual
 20 act of expropriation is a transfer of title, and if I
 21 can flag for you--and I'll come back to it in a
 22 moment--that with respect to indirect expropriation,

10:27:34 1 the notion of indirect expropriation is simply to
 2 acknowledge the need for a remedy where the State does
 3 not acknowledge that that's what's going on. And the
 4 remedy provided, as the Respondent in this case asks
 5 for, is to conclude the expropriation in the normal
 6 form, in an indirect setting, because the Award is
 7 conditioned upon a transfer of title.
 8 So, there is a significant difference between
 9 the two because, where a State does not acknowledge
 10 that its actions are, indeed, a process of
 11 expropriation, but they legally constitute acts which
 12 are tantamount to expropriation, the end point of the
 13 exercise is the same. The end point is that that act
 14 of expropriation is completed, finalized legally, on
 15 the transfer of title after the rendering of the
 16 Award.
 17 PRESIDENT BETHLEHEM: Mr. Cowper, may I just
 18 ask a point of clarification. You say, the "ILC
 19 concept of expropriation." Can you just clarify what
 20 you mean by the "ILC concept of expropriation"?
 21 MR. COWPER: Well, I--sorry, it's ILC
 22 reference--I'll take you to the specific reference.

10:28:51 1 But Judge Schwebel's Opinion quotes the ILC, and I'll
 2 get the specific reference, but--and it essentially
 3 says expropriation is the transfer of title.
 4 PRESIDENT BETHLEHEM: I just want to be sure
 5 whether you're talking about the International Law
 6 Commission's Articles on State Responsibility, which
 7 deal with restitution, the consequences of a wrongful
 8 act, or whether you're talking about some other
 9 document. So, if you could--
 10 MR. COWPER: I'm referring to the definition
 11 that is quoted, and I'll get the specific reference.
 12 I apologize if I misreferred to it, but I think it's
 13 in the concept--the context. But it's in Judge
 14 Schwebel's Opinion.
 15 My point is that--and let me urge upon you
 16 the conclusion, then I'll give you citations--that the
 17 fundamentally--in international law and in domestic
 18 regimes, there actually is a remarkable consistency of
 19 treatment, which is that that taking of real property
 20 by the State is accomplished by the transfer of title
 21 from the individual to the State. That that direct
 22 expropriation where the State acknowledges that is its

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10:29:59 1 purpose is taken when the title is transferred and
 2 paid for, and there's some variation as to whether
 3 payment happens or title happens, because some State
 4 transfer title and then undertake the obligation to
 5 pay. Other states pay first as a condition of title.
 6 In respect of indirect expropriations, where
 7 the State denies that it is seeking title, the State
 8 in an indirect expropriation is exercising State power
 9 which has the effect of taking the property but is not
 10 acknowledged to be a taking. But the end result of
 11 that is that the Measures which are tantamount to
 12 expropriation conclude with a legal conclusion--a
 13 legal conclusion--that there has, in effect, been a
 14 taking, and appropriate legal response under
 15 international law and in this Treaty is that the State
 16 has to discharge its obligations as if it had
 17 determined on an expropriation and its right to have
 18 the title is acknowledged as part of that.
 19 Next step, please.
 20 Okay. Now the--just because my friends are
 21 trying to help me as I go, so, I'll give you a
 22 reference to that, and I'll come back to if it's

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10:31:21 1 wrong. It is Footnote 17 on Judge Schwebel's Opinion.
 2 It's the ILC Articles on State Responsibility, and I
 3 have a note here about RLA-5.
 4 ARBITRATOR KANTOR: May I just clarify that's
 5 a reference to Crawford's commentary on the ILC
 6 Articles and not the ILC Articles themselves.
 7 MR. COWPER: Yes. Thank you.
 8 So, apart from my citation, though, I think
 9 I'm standing on the submission I made with respect to
 10 the concept of expropriation under international law
 11 and domestic law.
 12 Next slide, please.
 13 And this is where you're getting to, I think,
 14 an important point that you'll need to consider. And
 15 to some extent, this is freshly plowed ground, so I
 16 want to go a little bit slower. But in reviewing the
 17 record and the pleading there seem to be three
 18 categories of investment in relation to the totality
 19 of measures that you have before you. The first, of
 20 course, is you have Lots that are awaiting a valid
 21 Decree of Public Interest followed by a Decree of
 22 Expropriation. You can express those a different way,

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10:32:55 1 but those--that's the first category.
 2 And the second ones are those which are in
 3 the judicial phase.
 4 And the third are those in which there has
 5 been--a final determination of compensation has been
 6 given and, whether or not it's actually reached this
 7 stage, the final transfer has not yet to occur.
 8 Next stage, please.
 9 Sorry--and I would say all of those are
 10 properties that are directly or indirectly under a
 11 process of expropriation that has not been completed.
 12 With respect to the first Lots, I remind you
 13 that Costa Rica's position in this proceeding has been
 14 unequivocal; and that is it will complete the
 15 consolidation by expropriating all remaining private
 16 Lots, all of the Claimants' properties that have not
 17 yet been expropriated. And its basis for doing so in
 18 the pleading has been compliance with the
 19 Constitutional Court. And you have my submissions as
 20 to whether that is true or not. I say you ought to
 21 find as a fact that it's an independent decision by
 22 administrators rather than a mandatory order from the

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10:34:16 1 Constitutional Court, but it's a point of detail. To
 2 be obvious about it, it doesn't matter for purposes of
 3 our case whether it's one or the other.
 4 The further expropriations are imminent, as
 5 I've said earlier, because of the recommendation
 6 relating to annulment. And, in fact, as we've said,
 7 the Court lifted the immediacy requirement in its
 8 March 2009--I think that should be "decision," not
 9 "letter," but I stand to be corrected.
 10 And then the--secondly, the three-month delay
 11 I've talked about and, at some point after May of
 12 2010, a decision or decisions have been made to
 13 maintain the suspension on new and somewhat
 14 undisclosed grounds.
 15 Next.
 16 Now, with respect to continuing this
 17 category, the new delay measure--and it truly is new
 18 if you look at the historical record here--is within
 19 the Treaty period and was only known to the Claimants
 20 during course of this arbitration, and so no
 21 jurisdictional objection can apply.
 22 Now, if you're to find--and you need--you

10:35:46 1 feel you need to consider what the conclusion on the
 2 facts is, on a balance of probabilities, I think you
 3 can safely conclude that that measure is intended to
 4 be of indefinite duration save for the possibility
 5 that title to the properties could be annulled, which
 6 would then obviate the need for any compensation.
 7 And the third slide--no, sorry--go back a
 8 slide. Third bullet point. Sorry.
 9 And Costa Rica, in our submission, has
 10 admitted that its measure has had the intended effect
 11 of delaying commencement of the formal--or
 12 recommencement of the formal expropriation process.
 13 And there, in our submission, that measure is prima
 14 facie inconsistent with the obligations under 1(c) or
 15 2(a) of Article 10.7.
 16 And I'll foreshadow an answer to one of
 17 Mr. President's--your questions, which is, we say, in
 18 principle, that with respect to the specifics here,
 19 that there is a--and you used the word "free standing
 20 and independent" whether I do that or not--there is a
 21 separate Treaty obligation that is evidenced in both
 22 10.7 and 10.7(2) in relation to delay.

10:37:20 1 And the point in principle that I would make
 2 is that if an expropriation has been commenced with
 3 due order for a proper public purpose and Fair Market
 4 Value has not only been established but has been
 5 declared and that that is all in due order and
 6 appropriate, and then, for whatever reason, the State
 7 then engages in an undue delay--because it doesn't
 8 want to pay for one reason or another--then
 9 that--those acts of delay are in breach of that
 10 obligation under the Treaty. And they are separate
 11 breaches of those obligations, and it's knowledge of
 12 those breaches which is at issue with respect to the
 13 running of the time bars.
 14 So, that--I'll come back and I'm going to
 15 answer your questions later, but that is the short
 16 answer to, I think, your first question or part of
 17 your first question.
 18 The--with respect to 10(5), and I said in our
 19 Opening it's a secondary consideration, but I will say
 20 this, and that is I think the remarkable situation
 21 that Claimants have been left in for the last five
 22 years arising out of the Contraloría Report are the

10:38:35 1 type of arbitrary state measure against an investor
 2 that are contemplated by--as being prohibited by the
 3 FET standard, separately from the expropriation
 4 concepts entirely. I think it's a fair conclusion to
 5 say that those facts justify a conclusion that there
 6 has been a breach of the FET standard, and if that's a
 7 relevant matter for you to consider you ought to be
 8 able to conclude that on those facts.
 9 And to foreshadow a little bit, the net
 10 conclusion of that is, you still at the end have the
 11 same appropriate measure of damage for that breach
 12 because ultimately what you need to do is to make the
 13 Claimants whole for that breach which requires an
 14 award giving them the value they ought to have been
 15 granted plus a measure for the time bar.
 16 And I've said that, in a sense--and you can
 17 say it a number of different ways--but under
 18 any--either theory of liability the deprivation is
 19 total and thus, the valuation and the damages ought to
 20 be--whether you call them compensation or
 21 damages--ought to be the same for both.
 22 Next slide, please.

10:39:52 1 Now, moving to the second category--and these
 2 are the ones in the judicial phase--and I recall that
 3 the delay in this case, in respect to the judicial
 4 phase, is very lengthy by itself, and we commend to
 5 you the comparison with the conclusion of the
 6 four-year delay in the IO European case--and we say
 7 that the delays experienced by the Claimants in the
 8 judicial phase, this category, are inconsistent with
 9 10.7, as I say, because the delay constitutes a
 10 self-standing and independently actionable breach of
 11 the promptness standard, the prohibition of being--the
 12 promise to compensate without delay, and the
 13 concurrent, if you will, or related denial of justice
 14 associated with arbitrary measures under 10.5.
 15 With respect to the--again, the theory of
 16 liability for each of those breaches concerns evidence
 17 of Costa Rica's conduct after the Treaty came into
 18 force. That is the Contraloría and the response to
 19 it.
 20 Next--next, please.
 21 With respect to the--just continuing--with
 22 respect to Article 10.18, of course, there's an

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10:41:26 1 objective test for knowledge of breach and I've
2 already foreshadowed that. The appropriate question
3 is at what point a reasonable investor would have been
4 expected to conclude that the delays he or she had
5 endured since the Treaty came into force should be
6 regarded as a repudiation of Costa Rica's Treaty
7 promises. And by that measure objectively, there can
8 be no objection by reason of time bar. And then, with
9 respect to 10.7, I don't think I need to read the next
10 bullet point. You can read that.

11 Next slide, please.

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

18 And with respect to the failure to provide
19 investors with compensation values equal to Fair
20 Market Value, that's inconsistent with the standard
21 under the Treaty and the Fair Market Value standard
22 guaranteed by 2(b), and the point there, of course, is

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10:42:44 1 that with respect to those measures, they are
2 concerned with facts arising in respect to the breach
3 that occur within the Treaty period.

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

18 And it may be useful--and I'm sure I'll be
19 corrected if it's not useful--to say that there are
20 many different circumstances which will justify
21 different conclusions as to when it's fair to start
22 the time potentially. And so, a taking in which

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10:44:08 1 there's a round rejection of any obligation
2 whatsoever, and a taking of the actual title, so that
3 there's nothing further to be done from the State's
4 perspective, may justify a different conclusion.
5 Those aren't the facts here. But you can imagine
6 different scenarios.

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

14 Next slide.

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

17 So, I think, I'm going to suggest we have one
18 coffee break. I think I've gone for an hour and a
19 quarter, if we want to take the break now. And then
20 I'll come back and we'll...

21 PRESIDENT BETHLEHEM: That's fine. Let's
22 take a break now until 11:00.

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10:45:11 1 (Brief recess.)

2 PRESIDENT BETHLEHEM: Mr. Cowper.

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

5 Just to give you some signpost of where we're
6 going, I'm going to complete this section of the
7 slides and the presentation, I'm going to answer your
8 questions, I will then hand the podium to Ms. Cohen,
9 and if there is time available after she's finished, I
10 may return to sum up.

11 So, the slide that I was on--just had gone to
12 just before the break deals with the potential
13 annulment of all the Lots. Just with respect to the
14 surrounding facts, and I'll state the significance of
15 them just to remind you that it's clear on the record,
16 this proposal includes all of the Claimants'
17 properties.

18 And secondly, it's clear that it is a
19 consideration which is long overdue in that it was
20 intended to have a decision made within a brief period
21 of time, and five years later we still have no
22 decision. And I gather we're awaiting the report of

11:03:12 1 an independent consultant who we had not known existed
 2 before yesterday or day before yesterday.
 3 So, the other point is, of course, that, as I
 4 understand--and I read this a couple times, but I
 5 think it's a fair reading of Mr. Jurado's
 6 evidence--that this Independent Report of this
 7 third-party is not the end of the process but it's
 8 actually the beginning of the end of the process. I'm
 9 not sure which of the Churchill references are correct
 10 there.
 11 But that what is intended is that, on the
 12 receipt of the Report, the Ministry will then consider
 13 whether to decide--or consider the decision about
 14 whether to annul. And, as he indicated, that that
 15 will be a start.
 16 And in a sense, the last bullet point, it's
 17 difficult to reconcile that evidence in any practical
 18 sense with the Respondent's "lingering effects" idea
 19 that these are merely "lingering effects." The very
 20 present efforts being made by officials are continuing
 21 and ongoing breaches which have not come to an end.
 22 And if the Claimants' claims are dismissed, clearly

11:04:37 1 there is much to come.
 2 If I can say at this point--and I want to
 3 return and say something about the State and the
 4 State's Witnesses in this case, but as respectfully as
 5 I can. But let's just say that all analogies are
 6 imperfect and some are dangerous.
 7 But my friend called upon the analogy of a
 8 train leaving the station in his Opening. And in my
 9 submission it is clear that, whatever is happening,
 10 the train did not leave the station long ago.
 11 Whatever analogy, if you stay with the train station
 12 analogy--we're probably in a subway, not a train, with
 13 trains coming and going and new ones coming and new
 14 ones to come.
 15 Or, you could say we're--if we're in a
 16 conventional train station, that we have many
 17 platforms. Some trains have left. They left at
 18 different times during the historical period. Some
 19 have left very recently, and some are still in the
 20 station that are going to leave at some undefined
 21 point in the future.
 22 What is very clear, in my respectful

11:05:51 1 submission, is these are not the types of acts in
 2 which time bars are rightly concerned with clearing
 3 the decks. These are not ancient disputes. These are
 4 not dated disputes. They are essentially fresh and
 5 ongoing disputes between the Claimants and the State.
 6 And, perhaps, that leads me to my next point,
 7 which is--and I recognize that the existence of a
 8 right of action to hold a sovereign state responsible
 9 for the exercise of its sovereign powers is a heavy
 10 responsibility and a serious development in the rule
 11 of law. And my clients take that both seriously and
 12 are appreciative of it.
 13 And let me say equally that I appreciate that
 14 agents of the Government--and it's not an uncommon
 15 observation--find it awkward and difficult and, to
 16 some extent, inconsistent with their normal experience
 17 to be held accountable in a venue like this for
 18 actions which they carry out as agents of the State,
 19 which are normally not accountable for except within
 20 the domestic legal regime and in any cases not
 21 accountable for at all.
 22 Having said that, with respect to the lens,

11:07:24 1 the legal lens that the Treaty requires you to apply,
 2 in my respectful submission, Ms. Chaves' speech to
 3 you, Mr. President, after your question to her, is a
 4 vivid and powerful evidence of the determination of
 5 the State to take these properties. And her frank
 6 hostility to the Claimants in respect of their claim
 7 to hold the State accountable in this case ought to,
 8 in my respectful submission, support that finding of
 9 fact on your behalf.
 10 We don't often have, if you will, a living
 11 expression of that determination. We did in this
 12 case.
 13 And I understand that and I'm, to some
 14 degree, sympathetic for it. But in the context of the
 15 legal lens in this case, that supports the Claimants'
 16 claims.
 17 Secondly, this case is fundamentally about
 18 unconscionable delays. And we know as lawyers, all
 19 systems can, from time to time, fall into either
 20 practices, habits, or otherwise in individual cases
 21 circumstances where unconscionable delays occur. That
 22 is not the question. The question is what

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11:08:45 1 accountability exists for that.
 2 The Treaty essentially says that, if you as a
 3 State have engaged in unconscionable delays in the
 4 exercise of your State powers in respect of foreign
 5 investors, you can be held to account in the practical
 6 sense that you can be compelled to compensate the
 7 investors in the terms in which you've undertaken to
 8 compensate them formally.
 9 And it's, of course, a heavy burden on anyone
 10 to bring a matter to this Tribunal, to an
 11 international Tribunal, but that opportunity is one
 12 fundamentally of driving a just conclusion in
 13 accordance with the law in this context of the
 14 domestic law as well. It simply provides a means by
 15 which the State can be held accountable for the
 16 fundamental obligation of timeliness.
 17 At the end of the day, all the Claimants are
 18 seeking is what they ought to have received within the
 19 domestic legal order and that they've been frustrated
 20 from obtaining and which they ask for you to obtain.
 21 I say to you that Mr. Jurado's evidence is
 22 supportive of a conclusion that the State in this

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11:10:10 1 record has had a consistent indifference at the least
 2 to its obligations of timeliness, to process the
 3 expropriations without delay, and to act promptly.
 4 The new evidence is corroborative of the fact that the
 5 historical delays are a product of State action and
 6 not a product of happenstance. They're a product of a
 7 series of decisions and not a single decision.
 8 They are not a product of a lingering air of
 9 delay. They're a product of a series of decisions to
 10 delay the Claimants' receipt of the property value and
 11 the compensation that they're accorded and entitled
 12 to.
 13 And so, in some senses, it's unusual to have
 14 as vivid a display of determination to pursue delay as
 15 you have in the Contraloría Report and the Ministry's
 16 Response to it and Mr. Jurado's evidence of where we
 17 stand today. And I say that that evidence
 18 overwhelmingly supports a conclusion that what you
 19 have here is a full support for the necessity and the
 20 justice of enforcing the State's solemn promise to act
 21 without delay.
 22 Now, my--I think that covers the next two

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11:11:59 1 slides. Hopefully it covers them better than the
 2 slides themselves.
 3 I'll go, if I may, then, to deal with your
 4 questions, Mr. President, and then I'll deal with
 5 Mr. Kantor's questions. And Dr. Weiler is closer to
 6 me now, and so I'm closer to correction, I think, is
 7 the proper way to put it.
 8 So--and I think I foreshadowed the answers to
 9 many, if not all, of the questions, but it may be
 10 worthwhile--you've asked for a sort of deliberative
 11 answer period, and so I'll endeavor to try to do that.
 12 So, commencing with your first question,
 13 Mr. President, as I indicated earlier, our answer to
 14 it is that it does, indeed, constitute a separate
 15 Treaty obligation and it is not restricted--the legal
 16 consequences are not restricted to the original act,
 17 whether a direct act or an indirect act.
 18 I'm not sure in a logical sense whether
 19 there's a binary choice there because we rely upon our
 20 pleadings. And I should say in the context of this,
 21 of course, we rely on our pleadings of jurisdiction
 22 which, of course, have a number of arguments and

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11:13:18 1 submissions that I haven't repeated here.
 2 I think it's perhaps worth saying that there
 3 are two respects in a practical sense at least
 4 relevant to this case in which there is an independent
 5 breach, and that is either with the occasion of a
 6 delay or delays or Measures which bring about a delay
 7 or prolong a delay, but also a subsequent
 8 determination of value that is a breach of the Treaty.
 9 The series of steps, for example, that lead
 10 up to the transfer of title may bring about separate
 11 breaches of the Treaty during the course of the actual
 12 history of a particular event. Those may be
 13 compressed into one event. It may happen
 14 instantaneously, depending on the circumstances; and,
 15 of course, the law of expropriation encompasses simply
 16 more than real property and, of course, that
 17 introduces other complexities.
 18 So, the second question is one which is in
 19 relation to the point in which it can be said that the
 20 alleged breach in respect to the failure to pay
 21 compensation effectively crystallized--and let me--let
 22 me say this. And that is, I think that we have to be

11:14:59 1 careful to, in a sense, not transfer terms that are,
 2 perhaps, applicable but not fully appropriate to the
 3 circumstances of a delay claim.
 4 And let me put it this way: You can use a
 5 term like "crystallization" in a way that predisposes
 6 that it's an instantaneous event. And my submission
 7 in respect of an indirect expropriation, the ongoing
 8 nature of the obligations of the State mean that the
 9 point at which you can claim an indirect
 10 expropriation, I would submit, can more properly be
 11 spoken of as the point at which the indirect--the
 12 conditions for a complaint of indirect expropriation
 13 have arisen.
 14 So, it isn't that they crystallize at a point
 15 in time. That time will be relevant for valuation
 16 purposes, it will be relevant for all sorts of
 17 purposes, but it isn't a frozen moment.
 18 We said in our Opening that there isn't a
 19 frozen moment other than the actual transfer of title
 20 moment. But in my submission what happens in respect
 21 of an indirect expropriation is that the complainant
 22 has to decide when the facts are sufficient to support

11:16:25 1 the conclusion that the Measures taken separately or
 2 together are tantamount to expropriation. That's what
 3 happens at that point.
 4 And so that's the point at which an action
 5 for expropriation, if you will, or a complaint about a
 6 breach of the obligation of expropriation can be
 7 taken. It isn't a point in time.
 8 PRESIDENT BETHLEHEM: Before you move on to
 9 the third question, may I just ask a clarification?
 10 And please don't take this as an indication that in my
 11 mind anything necessarily turns on this, but just to
 12 clarify the point.
 13 At various points in your submissions this
 14 morning--and I think Dr. Weiler in his observations on
 15 Monday--you've made the point or the suggestion or the
 16 contention that there is a potential delay breach
 17 under Article 10.7(1) and then separately under
 18 10.7(2).
 19 I'd just like to be clear whether you are
 20 alleging or you are submitting that Article 10.7(2),
 21 "compensation shall," is a separate provision which
 22 can be--which is amenable to breach or whether it is

11:17:51 1 simply an articulation of the standard set out in
 2 10.7(1)(c)?
 3 MR. COWPER: I have all sorts of people
 4 helping me here, but I actually think I knew the
 5 answer anyway, but I'm glad I'm being held
 6 accountable.
 7 So the short answer, and I think I'll be
 8 formal about it, is we do rest on and leave with you
 9 our submission in the Memorial and to be explicit
 10 about it that, properly construed, Paragraph 2 is a
 11 separate obligation and is not simply a definition of
 12 the obligation under Paragraph 1.
 13 Having said that--and I do commend to you the
 14 reasoning in that and that there is a reason and a
 15 purpose and a--in our submission, under the Vienna
 16 Convention and otherwise, a logic to not rendering
 17 that provision inutile and to actually giving it a
 18 separate life, if necessary.
 19 Having said that, as you probably have
 20 observed, it's not necessary for our submissions for
 21 you to conclude that because, in our fundamental
 22 submission, it's a necessary part of the obligations

11:19:23 1 under the first paragraph that the obligation to
 2 compensate in terms of its timeliness and its value
 3 are separate obligations.
 4 So it's not necessary, but we do make the
 5 submission that on this particular Treaty, there is a
 6 separate provision, and that supports the
 7 separateness, if you will, of the obligation.
 8 PRESIDENT BETHLEHEM: Thank you.
 9 MR. COWPER: So, I think I'm at the third
 10 question. And the answer to that is on the terms of
 11 the Treaty, it's the Claimants' knowledge of the
 12 breach arising from CAFTA that's spoken of, so it is
 13 contingent on the existence of a right under CAFTA.
 14 Put another way, the Claimants acknowledge
 15 the alleged breach is contingent on the existence of a
 16 right under CAFTA.
 17 Now, let me say this. And that is, we
 18 acknowledge that the right spoken of is the right in
 19 investor-State treaties where in a sense the right
 20 vests in the State and the means of enforcing that
 21 right has been opened to the investor. So, we're
 22 mindful of that, but that doesn't change the answer to

11:20:48 1 that question in respect to the interpretation of the
2 Treaty.

3 PRESIDENT BETHLEHEM: I think, Mr. Cowper,
4 the sense behind the question was trying to identify
5 whether the entry to force of the CAFTA on the 1st of
6 January 2009 for these purposes, to use the word that
7 you've already identified we should be cautious of,
8 was, "crystallizes" the breach.

9 So, in other words, let's take the
10 hypothetical. And I think counsel for the Respondent
11 in his submissions speculated about an expropriation
12 that may have happened 30 years ago. If an
13 expropriation happened in the 1970s and then all of a
14 sudden the CAFTA enters into force on the 1st of
15 January 2009, the only possible breach of the CAFTA
16 that could have arisen would be on the 1st of
17 January 2009.

18 So, I'm looking at the language here of
19 Article 10.18(1), "No claim may be submitted to
20 arbitration under this Section if more than
21 three years have elapsed from the date on which the
22 Claimant first acquired or should have first acquired

11:23:14 1 There may be breaches associated with it, but it's
2 completed.

3 If it's an ongoing expropriatory process,
4 then it folds into the Treaty period. And the State
5 has undertaken promises on the commencement of the
6 Treaty period in relation to expropriations which have
7 not been completed. There is no provision in this
8 Treaty that says the State's obligations do not extend
9 to ongoing expropriatory processes. That's our
10 fundamental point.

11 And our fundamental point here is that these
12 are ongoing expropriatory processes. And we've made
13 the point already, but there are measures taken by the
14 State after the coming into force of the Treaty and
15 within the three-year period which make it clear that
16 there is no basis for the jurisdictional objection.

17 PRESIDENT BETHLEHEM: Let me just clarify,
18 again, that I understand something that you just said.
19 You've said, "Delay in respect of the pre-Treaty
20 period does not arise." I'd just like to clarify then
21 the Expert evidence yesterday from Claimants' Expert
22 was that he took under instructions a May 27, 2008

11:22:02 1 knowledge of the breach."

2 And the issue of "knowledge of the breach," I
3 think, is, at least in my mind, intended to try to
4 elicit from you some clarification of whether
5 knowledge of the breach is the factual circumstances
6 relating to the breach or the cause of action
7 associated with the CAFTA entering into force.

8 MR. COWPER: Yes. And we say it's the
9 latter, not the former.

10 Now, to be clear, we have not claimed that
11 CAFTA permits us to claim for the delay associated
12 with the pre-Treaty period, so we'd acknowledge that.
13 I think the--let me try to say a couple things.

14 In response to my friend's example, if an
15 expropriation has been completed and it is completed
16 before the Treaty period, then that's fine. I think
17 you have to define "completed," and you obviously have
18 to define "completed."

19 And if it's a completed expropriation and the
20 title has been transferred, then that is a completed
21 expropriation. There may be all sorts of problems
22 with it, but it is, you know, factually completed.

11:24:25 1 period for valuation. Could you just clarify whether
2 that period from 27th of May 2008 to the 1st of
3 January 2009, when CAFTA entered into force, falls
4 within the scope of your pre-Treaty period, as worth
5 exclusion? Or is that simply a sort of a valuation
6 methodology, if you like, if one can distinguish
7 between the two?

8 MR. COWPER: So, there are two separate
9 questions, of course, the appropriate method of
10 compensation and the question of determination of
11 delay. And, perhaps, take my friend's example and
12 twist it a little bit and say that you don't have a
13 completed expropriation. What you have is an
14 expropriation which has been running as an "open sore"
15 for an extended period of time. It hasn't been
16 resolved by title or otherwise.

17 The Treaty comes into force. And the State,
18 discharging its obligation, immediately pays the Fair
19 Market Value on the commencement of the Treaty period.
20 There is a compelling force to say at that point the
21 State is not in violation of its obligations under the
22 Treaty.

11:25:43 1 In respect of the present circumstance--and,
 2 as I say, I'll stand to be corrected--but the
 3 valuation date we've taken is related to the predicate
 4 fact of when would you properly date the assessment of
 5 compensation for the property?

6 We also say in respect of interest--and I'm
 7 sure I'm right on this, but having not gotten much
 8 sleep last night, let me just...

9 So your question caused me to wonder whether
 10 I was getting it right, but I am getting it right.
 11 That we have not claimed interest until the
 12 commencement of the Treaty period.

13 So, there's the question of how do you
 14 determine the value? And then that's the other
 15 question of a valuation date, which depends upon
 16 predicate facts and likewise. And in respect of an
 17 indirect expropriation, it's, we say, appropriate to
 18 say--well, in these facts appropriate to use that
 19 valuation date for those purposes.

20 In respect of the assessment of the State's
 21 discharge of its obligations, in a sense--and I don't
 22 want to be misleading by grabbing a phrase--but the

11:27:01 1 State has a fresh undertaking on the commencement of
 2 the Treaty, and it can discharge those fresh
 3 undertakings. We acknowledge that.

4 And so it would be--it would be quite
 5 reasonable to expect a State to say, We're going to
 6 review ongoing controversies and ongoing disputes to
 7 resolve them because we've now undertaken to make
 8 those promises not just as a matter of domestic legal
 9 requirements but also assurances to foreign investors
 10 who have made investments in the Host State, and they
 11 now have that right to do that.

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

18 PRESIDENT BETHLEHEM: But you have just said
 19 that you're not claiming interest in respect to the
 20 period before the 1st of January.

21 MR. COWPER: That's correct.

22 PRESIDENT BETHLEHEM: But you are in terms of

11:28:04 1 your, as it were, valuations for damages, you are
 2 claiming damages that go back before that period.

3 I'm not asking you to address this now,
 4 because I know that Ms. Cohen is going to be
 5 addressing the issue of damages. So if you would like
 6 to defer a response to this to her, please feel free
 7 to do so.

8 I'm just seeing a little bit of--maybe it is
 9 not an inconsistency, but a lack of clarity in my own
 10 mind, if you are not claiming interest in the pre-1st
 11 of January 2009 period but you are claiming damages in
 12 respect of that.

13 MR. COWPER: So, first of all, let me repeat
 14 my answer. But then maybe--because it's a very, very
 15 important point, but I may spin out a little bit--and
 16 I'm quite happy to deal with it. I don't have to
 17 defer to Ms. Cohen. I can be corrected by her, but I
 18 don't have to defer to her.

19 So the question of your Award has different
 20 components to it. If the State is accountable purely
 21 and simply for the payment of an Award which is
 22 responsive to its obligation under the Treaty, those

11:29:18 1 components will include of necessity, whether it's a
 2 breach of the expropriation provision or a breach of
 3 the delay provision or the breach of the valuation
 4 provision--of necessity, you have to determine what,
 5 if you will, that principal amount should have been.

6 Because the delay clearly arises in the
 7 Treaty period; and in the period within the Treaty,
 8 it's actionable. You have jurisdiction over it. The
 9 Award would be incomplete. I mean, let me posit two
 10 examples.

11 So, for example, if you were to say, Oh,
 12 well, the interest attributable is only X dollars, so
 13 you get \$10,000, you don't get the principal. Then,
 14 of course, that would be an incomplete Award because
 15 it's of necessity that what's been delayed is the
 16 payment of the Fair Market Value.

17 In determining the Fair Market Value, in
 18 principle you must determine the Fair Market Value by
 19 reference to the taking, and that event may occur
 20 before the Treaty because you're determining as a
 21 matter of fact what the appropriate valuation is. The
 22 Treaty doesn't require you to value it during the

11:30:33 1 Treaty period. And let me give you a perfect example
 2 of this, I think, as a case example.
 3 Assume that 10 years earlier that the State
 4 had determined that it owed \$10 million to the
 5 Claimants in respect of their properties pursuant to
 6 an expropriation which was not complete. But they had
 7 determined the value, they had undertaken to pay, but
 8 they had not paid. And then 10 years later, the
 9 Treaty comes into force and then five years later
 10 payment has not yet been received.
 11 In my submission, the Award would be: You
 12 have breached your undertaking to pay without delay,
 13 you've not acted promptly, whether you regard the
 14 five years as the only period or you regard the entire
 15 15-year period. And the Award of necessity would be
 16 the amount of the Fair Market Value that's 15 years in
 17 the past on that scenario.
 18 So, in this case, the fact that it's a couple
 19 of years before is indifferent to the analysis.
 20 PRESIDENT BETHLEHEM: Thank you.
 21 MR. COWPER: I'm not indifferent to the
 22 analysis, but the fact is indifferent to the analysis.

11:31:57 1 So the fifth question that you asked is the
 2 date on which knowledge of the alleged breach could
 3 first have been acquired. If that is 1st of January
 4 2009, what impact does it have on the operation of the
 5 three-year limitation period in this case?
 6 Now, of course our point is, of course, with
 7 respect to the handful of cases in which a final
 8 determination is rendered after 10th of
 9 January 2010 -- so I remind you, there are values
 10 determined clearly within the three-year period. So,
 11 in our analysis, it's impossible to have known that
 12 those would be in breach of the Fair Market Value
 13 standard any earlier than that.
 14 And I'm not dealing with the scenario where
 15 the State has completely rejected any Fair Market
 16 Value analysis. That's a different case, right?
 17 Because in our case the State assumed a Fair Market
 18 Value analysis based on the evidence. It, in our
 19 submission, simply didn't discharge it. But you can't
 20 know of that failure to discharge on those facts until
 21 then.
 22 A different scenario, it could be in a

11:33:06 1 circumstance where the State has clearly told the
 2 Claimant it's not going receive Fair Market Value,
 3 that a different analysis might apply. But in a
 4 present analysis, that's the answer to that question.
 5 With respect to the other Lots, the ones
 6 which haven't been paid, then the two objections, of
 7 course, remain distinct and come back to the
 8 self-standing nature of the obligations under the
 9 Treaty. And in my respectful submission, that
 10 occurred within the three-year period.
 11 And so it's not focused on when the conduct
 12 could be construed as a measure but on when the
 13 investor first knew or should have known that the
 14 breach had occurred. And so those fall within that
 15 three-year period, and I put emphasis in that context
 16 on the more recent events and steps taken by the
 17 State.
 18 PRESIDENT BETHLEHEM: Thank you.
 19 MR. COWPER: Okay. The next--I'd like to
 20 proceed, if I can, to answer Arbitrator Kantor's
 21 questions and answers. And I may have foreshadowed
 22 some of this in my submission, so I won't--I'll try

11:34:20 1 not to intentionally repeat them, although that is not
 2 necessarily a guarantee of performance on my part.
 3 But with respect to the first one, I think
 4 you have now, as opposed to when you handed up, a
 5 pretty full understanding of what was done by the
 6 Contraloría and by SINAC and MINAE and when. But let
 7 me just summarize for the purposes of giving you the
 8 formal answer, which is I've already said to you that,
 9 in our submission, what the Contraloría did was to
 10 advocate a brief submission for the purpose of
 11 deciding whether or not to suspend.
 12 What the agency has done is to have decided
 13 to suspend indefinitely. And it seems pretty clear
 14 that there's a series of decisions on that point that
 15 occur afterwards; but whether it's a series or
 16 otherwise, that is the agency decision and that's what
 17 we know.
 18 We know for sure that SINAC suspended the
 19 proceedings, and I'll just give you a couple
 20 references to that. Loasiggia Witness Statement 2
 21 Paragraph 4, and Mr. Jurado's transcript on Day 1 is
 22 602-603, Lines 21 to 22.

11:35:36 1 Sorry, you were about to ask me a question, I
 2 think.
 3 ARBITRATOR KANTOR: The word "when" is a very
 4 important part of that question.
 5 MR. COWPER: Yes. Okay.
 6 ARBITRATOR KANTOR: If you can give me
 7 Claimants' perspective on when those events occurred.
 8 MR. COWPER: So, the decision to suspend,
 9 based upon their reception the Contraloría Report, can
 10 occur no earlier than May of 2010, and our submission
 11 on a balance of probabilities occurred then and some
 12 point thereafter.
 13 ARBITRATOR KANTOR: Why do you say "May" when
 14 the Report was February?
 15 MR. COWPER: Because the decision that at
 16 issue is not the Report's decision but the agency's
 17 response to the decision.
 18 ARBITRATOR KANTOR: And where in the record
 19 do you direct me for "May"?
 20 MR. COWPER: Sorry. For?
 21 ARBITRATOR KANTOR: "May," as the--
 22 MR. COWPER: Oh, okay. I can do that.

11:36:41 1 It's--well, the actual expression, Mr. Jurado uses
 2 is--there's two deadlines, and it's, I think, 4(1)(b)
 3 and 4(1)(c) in the chronology of compliance, and I can
 4 actually take you to those. But let me--it is
 5 Section 2.1.1. I think you know the sections that I'm
 6 talking about. It is 4.1(b) and (c), and one is a
 7 reference to April and one is a reference to May.
 8 But let me be clear that that's the Report,
 9 that that's not the decision. And, in fact, it's
 10 simply an advisory to the agency, and what we know is
 11 the agency took that, and we know that there was a
 12 suspension before the Report was delivered, and we
 13 know there's a suspension or suspensions afterwards,
 14 that continue continuity of suspensions, and we also
 15 know, for the purposes of jurisdiction, that the
 16 Claimants didn't know of those suspensions. So, in
 17 terms of knowledge, it occurred during the course of
 18 the proceedings and clearly falls within the
 19 three-year period.
 20 (Pause.)
 21 ARBITRATOR KANTOR: For hypothetical
 22 purposes, assuming those suspensions might be legally

11:38:12 1 significant acts, to what would you direct me in the
 2 record to understand when Claimants "should" have
 3 first acquired knowledge as distinct from when they
 4 "actually" acquired knowledge?
 5 MR. COWPER: Okay. I'll take that under
 6 advisement, but I don't, at the moment, know of any
 7 clear evidence in the record that they had the means
 8 of obtaining knowledge of that decision. They know
 9 that no steps are being taken, but they don't have the
 10 means of acquiring that, the knowledge that there has
 11 been a fresh decision by the agency to suspend
 12 activities or to suspend expropriatory proceedings
 13 after the Contraloría Report has been expressed.
 14 And the difference on the evidence, if you
 15 understand between the Claimant and Respondent--and
 16 this is on my reading of the record, that the
 17 Respondent's submission to you, which was the
 18 Contraloría Report, was the decision which suspended
 19 the proceedings. I say that's not so on the record,
 20 and that was conceded, I say, not to be so in
 21 cross-examination by Mr. Jurado.
 22 And the one point of detail--so that--you'll

11:39:40 1 get the transcript--the one point of detail, prior to
 2 the hearing, there was some suggestion that there was,
 3 if you will, an act of suspension prior to the receipt
 4 of the Report and in anticipation of the Report. It
 5 doesn't matter for our purposes, but I'm not sure that
 6 is actually supported on the history here. But what
 7 is clearly the case is that the agency decided to
 8 suspend independently of the recommendations of the
 9 Report, and that's why I say it occurred sometime
 10 after the deadline of, if you will, referral, because
 11 that has to have occurred after that point, it may
 12 have occurred before and after that point, but it has
 13 to, in its operative sense, occurred afterwards. And
 14 for our purposes, there is no means by which that
 15 could have been known earlier than the three-year
 16 period under the Treaty. That's my submission.
 17 ARBITRATOR KANTOR: Does that submission
 18 relate only to the matters in administrative
 19 proceeding or also to the matters in judicial
 20 proceeding?
 21 MR. COWPER: I've given you the submissions
 22 earlier in the slide with respect to the right

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11:40:54 1 analysis on the judicial proceedings, so I largely
 2 rest on those. I think, on the whole of the evidence,
 3 the evidence of the agency is that they did not
 4 purport to suspend those matters that are within the
 5 judicial proceedings. I think it is a fair conclusion
 6 from Ms. Chaves's evidence and the evidence we put in
 7 the record that there were efforts to delay the
 8 judicial proceedings by the actions of other
 9 Government actors. They are restricted in terms of
 10 they don't have the same direct chain effect, but we
 11 do say that you can conclude in fairness that the
 12 State sought to delay the judicial proceedings as and
 13 when it could as well.

14 (Pause.)

15 MR. COWPER: I may come back to that when I
 16 have some supplemental, but...

17 By the way, before I forget,
 18 Arbitrator Kantor, you've demonstrated a passion for
 19 detail here. There is another typo that you ought to
 20 be aware of, that you pointed out a typo, but in the
 21 compliance report--and my friends can say whether they
 22 agree with this or not--but in the English and, I

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11:43:55 1 With respect to the Question 2, Mr. Kantor,
 2 the question was, if the matters resulted in a
 3 continuation or establishment of a suspension, is
 4 there evidence that the expected duration--and I think
 5 I've already spoken of this, but just formally in
 6 answer to your question, I understand the current
 7 situation to be that the suspension is contingent or
 8 related to the consideration of annulment on
 9 Mr. Jurado's evidence, and that the current situation
 10 is that there's a third party who is conducting an
 11 analysis of that, that has not yet been received.

12 In respect of the critical question, which is
 13 the duration, by connecting those two, Mr. Jurado said
 14 he could not assure the Tribunal of when that Report
 15 would be received. And then that would not, as I said
 16 earlier, not be the end of the process, even if it
 17 would be the beginning of that process. And so that's
 18 the evidence you have about the--about, if you will,
 19 the expected duration.

20 With respect to Question 3, the impact of the
 21 matter, because those measures did not commence until
 22 after the Treaty period, you have jurisdiction *ratione*

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11:42:41 1 believe, also the Spanish transcription, 4.1(c), that
 2 recommendation actually should read Sector 4, which is
 3 a sector within which our--some of our Complainants
 4 rest, rather than Section 6. Now, we have the general
 5 admission that included all the Complainants'
 6 properties, but that's the typo.

7 ARBITRATOR KANTOR: Just to be clear, you're
 8 identifying a typo in the comparison chart or the
 9 chart of--

10 MR. COWPER: Yes, the comparison chart.

11 ARBITRATOR KANTOR: --completed actions?
 12 Thank you.

13 MR. COWPER: Yeah. Thank you.

14 (Comments off microphone.)

15 MR. COWPER: The other--the other point that
 16 Mr. --Dr. Weiler referred me to, which is the--in
 17 relation to the Contraloría Report, there's a
 18 reference to a "2.2.1," but it's actually "2.1.1," so
 19 when you go--and I think you can sort that out
 20 yourself, but those are two navigation problems
 21 between the two documents which we identify.

22 Could I go to Question 2?

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11:45:12 1 *temporis* to consider the claims, and because the
 2 Claimants' knowledge of them arose clearly, we say,
 3 within the three-year period, and the capacity to know
 4 them arose, at the earliest, within the three-year
 5 period, there is no time bar under the Treaty
 6 applicable to those matters.

7 With respect to the fourth question, whether
 8 there's a differential impact between the directional
 9 direct expropriation claims and the indirect
 10 expropriation claims, the claims for indirect
 11 expropriation, just to be clear, logically apply to
 12 every lot, which has not yet passed from the Claimants
 13 to the host State by--based on our definition of
 14 "expropriation." And so even those Lots that have
 15 been subject to measures of direct expropriation have
 16 also been subject to indirect expropriation. So, that
 17 population may contain Lots you hadn't thought of as
 18 indirect--subject matters of indirect expropriation.
 19 So, in our submission, the only exceptions are those
 20 Lots in which title has already been passed to Costa
 21 Rica, which are clearly within the three-year period.

22 Now, with respect to the new measures, I've

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11:46:27 1 already acknowledged to you that the suspension on its
2 terms on the evidence as a whole essentially applies
3 to the Lots that are not in the judicial process.

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

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

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

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11:49:22 1 of that Fair Market Value, that, in my submission,
2 would not be a lingering effect of the original
3 expropriation, but would be a, if you will, a measure
4 and not a lingering effect.

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

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

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11:47:44 1 you asked me the question, so let me do my best.

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

16 If a State had, under its domestic legal
17 order, all that we would hope for, and in a given case
18 had done the right and proper thing of noticing an
19 expropriation and moving to expropriate, and it had,
20 under its domestic legal order, an obligation to
21 competent for Fair Market Value, and some later period
22 in time, it acted so as to deprive the property owner

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11:50:51 1 ARBITRATOR KANTOR: Well, not my proposition,
2 of course. I'm merely quoting back language that--

3 MR. COWPER: I understand.

4 ARBITRATOR KANTOR: --we have heard from
5 counsel on both sides.

6 MR. COWPER: Yes. I wasn't suggesting the
7 contrary. Sorry.

8 ARBITRATOR KANTOR: In your response, one of
9 the phrases you just used--and here again I'm quoting
10 back what counsel just provided--you used the phrase
11 "acted so as to delay."

12 Without suggesting that this time period is
13 the legally operative time period, we are all well
14 aware of the three-year period that would commence in
15 June 2010 because in June 2013 the Notice of
16 Arbitration is filed. Can you identify for me
17 Claimants' position for conduct of the State that
18 falls within the phrase "acted so as to delay" from
19 and after the time period that commences three years
20 prior to the filing of notice of the arbitration?

21 MR. COWPER: Well, I think the fundamental
22 answer to that are under my submissions arising out of

11:52:02 1 the agency's response to the Contraloría Report. And
 2 I'll come back maybe at the end and give you the
 3 colored version of that, but that's the fundamental
 4 answer to that question.
 5 My point in the concept for you, Mr. Kantor,
 6 is that, in relation to a concern over undue delay,
 7 there are delays of different characters, if you will,
 8 if you're going to adopt this analysis, and since
 9 we're dealing with State responsibility for State
 10 action, an action to prolong a delay is as much an
 11 action as an action to start a delay in my submission.
 12 And so, the ongoing nature of the suspensions, the
 13 ongoing nature and consideration of the agency, in my
 14 view, extends to the current time, and for that
 15 reason, that's my submission in relation to it.
 16 ARBITRATOR KANTOR: Just to be clear--
 17 MR. COWPER: Yeah.
 18 ARBITRATOR KANTOR: --is it Claimants'
 19 position that, once a delay commences or a suspension
 20 commences, every day thereafter is a--is conduct to
 21 continue that suspension, which is independently
 22 capable of being considered for purposes of the

11:53:18 1 three-year period?
 2 MR. COWPER: I'll give you an answer, and
 3 then I'll tell you if I have to nuance it later, but I
 4 think that you're combining two submissions there in
 5 the question. With respect to the first point, it's
 6 our general submission that a delay represents an
 7 ongoing breach after the reasonable period of time has
 8 lapsed, and that's a proper application of the facts
 9 and the law to this case, whether or not the State
 10 decides to do anything. Okay? That's our primary
 11 submission.
 12 If you find, contrary to that, that that's
 13 wrong on these facts and that--and that in order for
 14 the Claimants to succeed, they have to attach
 15 themselves to new decisions, the next point I make is,
 16 those decisions don't have to be different in
 17 character. They don't have to be relying on a
 18 different law or a different basis.
 19 All that you have to establish is that the
 20 State has actively sought to delay in order to avoid,
 21 if you will, the definition of "lingering effects."
 22 And in our submission, the State's actions after and

11:54:38 1 more recently and up until the present time, represent
 2 that type of ongoing, if you will, decisions to delay.
 3 You can characterize them as "prolonging the delay"
 4 which has existed or "renewing the delay" or
 5 "extending the delay," but I think that's not of any
 6 great moment.
 7 PRESIDENT BETHLEHEM: Mr. Vinuesa would like
 8 to, I think, come in on this point as well.
 9 ARBITRATOR VINUESA: Thank you very much.
 10 Thank you very much.
 11 It's on the same line, to see if I can
 12 understand your point. You mention--you distinguish
 13 "new delays" from "continuing delays." Could you
 14 explore a little bit more on that, the difference that
 15 you see? Even with examples through different
 16 measures, which will be "new delays" as opposed to a
 17 "continuing delay"?
 18 MR. COWPER: I think the more--the way I was
 19 intending to describe it is that, in relation to a
 20 period of delay there, may be different Government
 21 measures which have brought about the total delay.
 22 So, if you accept the rationing--and I'm doing this

11:55:42 1 under the premise that I accept arguendo--the
 2 "lingering effects" principle, then, in my submission,
 3 decisions which are in the historical period and which
 4 distinctly represents the State's decision to continue
 5 or prolong the delay represent measures which are in
 6 relation to the delay and which are, to use your
 7 phrase, "new measures."
 8 So, they don't have to be--and my point that
 9 I was saying, Mr. Vinuesa, if we try to bring it in
 10 this case as an example, the fact that the decision
 11 was anchored on the Contraloría Report or
 12 independently means that you've made a fresh decision.
 13 There's a fresh measure by the State to continue the
 14 delay, and so if that decision hadn't been made, then
 15 the State would have proceeded and not prolonged the
 16 delay. And so what's remarkable in this context on
 17 behalf of Claimants is that we have the treaty
 18 obligations arise, and that's actually a month and a
 19 half later, the Contraloría Report basically
 20 recommending a short-term suspension, but the State
 21 acting to engineer, with respect, an indefinite
 22 suspension, which has been continued and which is

11:57:05 1 lacking transparency in that we don't know what it's
 2 based on, other than a determination and a decision to
 3 continue that suspension.
 4 So, I don't--so, I could, perhaps, say this
 5 just to give you sort of the anatomy of potential
 6 cases, is you can imagine a situation where, under the
 7 domestic law, there's a timeline for each of these
 8 matters, and under the normal course, you would have a
 9 determination of value, a taking in the sense of an
 10 announcement of a future taking, a determination of
 11 value and a payment date. And you can then imagine a
 12 scenario, which is not uncommon, that the person
 13 responsible for that process the eve before the
 14 payment is due decides to defer the payment. That's a
 15 State decision. That's a State measure which results
 16 in a delay.
 17 When you come back in hindsight, you may be
 18 years later looking at it, and you sit there and say,
 19 "Well, is that a delay associated with the first
 20 measure?" No, it isn't. There's a--if you're
 21 distinguishing lingering effects and other measures,
 22 that's a new measure. So, in the evidence you have

11:58:20 1 here, we know that the agents of the Government, in
 2 the respectful sense, the officers of the Government,
 3 made a fresh decision arising out the Contraloría
 4 Report. We've talked about what you conclude the
 5 basis of that decision was, but that was clearly a
 6 fresh decision, and it's not clear to all of us, and
 7 it's a fresh decision that was unknown to the
 8 Claimants.
 9 PRESIDENT BETHLEHEM: Mr. Cowper, sorry to
 10 dwell on this. It is obviously a point that you can
 11 tell is exercising us all a little a little bit. But
 12 I'd like to follow that point with one more question,
 13 at least from me, and to ask you whether you think
 14 that it's at all useful to think of it in these terms,
 15 and if it is, what the consequences of thinking of it
 16 in these terms is? I'm trying differentiate between,
 17 as it were, a single dispute of a composite nature but
 18 which has a series of acts, or thinking of it as
 19 separate disputes.
 20 So, for example, if we look at the time bar
 21 period, a dispute that arose in respect of an
 22 expropriation and then a dispute that rose in respect

11:59:33 1 of delay, so it would be useful to hear from you
 2 whether you think that what we are concerned with is a
 3 single dispute that has an antecedent period and a
 4 more recent period, or whether they are separate
 5 disputes; and if you think that it's a--if you
 6 characterize it as a single dispute, it would be
 7 useful to have your views in a rather focused fashion
 8 on the language of Article 10.1.3.
 9 For greater certainty, this chapter does not
 10 bind any Party in relation to any act or fact before
 11 the date of entry into the force of this agreement.
 12 And the question that follows from that is: To what
 13 extent are we then taken into sort of a terrain of
 14 artificiality, where we are looking to pre-1st of
 15 January 2009 acts or facts, but, you know, in order to
 16 inform a post-1st of January 2009, as it were, a
 17 determination, but in circumstances in which this may
 18 preclude us from doing so?
 19 MR. COWPER: I may want to return to this the
 20 end of the hour. I'm just trying to answer your
 21 question about whether it's useful or not.
 22 PRESIDENT BETHLEHEM: Let me just sort of

12:01:10 1 elaborate a small point. I mean, there is--not in the
 2 context of these kinds of disputes, at least insofar
 3 as I'm aware, but there is case law out there which
 4 suggests that there may be a measure of artificiality
 5 in trying to pass up a composite dispute into
 6 different composite parts because it doesn't allow a
 7 Tribunal or a court to actually get to grips with the
 8 whole of the dispute. So, that's the point that I'm
 9 trying to grapple with.
 10 MR. COWPER: Well, I think the answer I would
 11 give you--and I don't know whether I'm using your
 12 language or my own language, but it is that the
 13 dispute that the Claimants bring you here is that they
 14 have not received the discharge of the promise under
 15 the Treaty within the Treaty period, and in order to
 16 determine whether that dispute is proven, you have to
 17 decide whether the incidence of that dispute have been
 18 made out. That may require you to have regard to
 19 precedent facts, but it most definitely does not, in
 20 principle, require you to retroactively apply the
 21 Treaty. And maybe I'll give the perfect--I think what
 22 is a very clear example is--and maybe we'll give two

12:02:33 1 examples in the present case.
 2 If you assume for the moment that there has
 3 been an announcement of a taking, a public purpose, a
 4 Fair Market Value, and then an unconscionable delay
 5 within the Treaty period for payment of that Fair
 6 Market Value, that dispute is one over which you have
 7 jurisdiction. You must assess whether or not the
 8 delay has breached the provisions of the Treaty during
 9 the Treaty period; and I say, you know, in terms
 10 artificiality, it would be entirely artificial to
 11 disregard the delay before the Treaty period in
 12 determining whether it is conscionable or not. But it
 13 isn't governing, and in the facts of this case, we say
 14 the delays are sufficient, even if you disregarded the
 15 previous delays, and in--in connection with that, then
 16 you're honoring the Treaty period, you're honoring the
 17 State's undertaking, and you're acting on matters
 18 which are at the heart of your jurisdiction. You're
 19 not reaching back in any material way.
 20 In order to discharge and to make an award in
 21 that circumstance, it requires you to determine what
 22 value it should have been otherwise--otherwise you

12:04:03 1 can't restore the Party to the--and provide
 2 restitution for breach of the obligation because
 3 wrapped into the delay is what they failed to receive.
 4 PRESIDENT BETHLEHEM: Thank you. Sorry to
 5 delay you on this question.
 6 ARBITRATOR KANTOR: And if I could,
 7 Mr. Cowper, trying to continue to understand, as it
 8 relates to the three-year time period, my Chair has
 9 been inquiring thereabout the start date for CAFTA,
 10 but the 10.18 three-year time period. You noted that
 11 I am detail oriented. I would like some specific fact
 12 details, assuming hypothetically and without deciding
 13 that your proposed language from what you just said
 14 acted so as to delay or State decisions were the
 15 legally operative tests, the Notice of Arbitration
 16 here is June 10, 2013. Working backwards, that means
 17 June 10, 2010, is a date that has legal significance
 18 in some form or another.
 19 You've mentioned that the response to the
 20 Contraloría Report had to have occurred no earlier
 21 than May 2010, but May, of course, predates June. Can
 22 you identify which specific decisions or acts your

12:05:49 1 client relies upon that arose from and after June 10,
 2 2010?
 3 MR. COWPER: Well, I think what I need to do
 4 is I'll--I think I've answered that, but I'll come
 5 back at the end and answer it more specifically, but
 6 what I say you ought to be able to readily conclude on
 7 a balance of probabilities is that the decisions that
 8 were made in relation to the Contraloría Report
 9 occurred after May, okay. Now, the record doesn't
 10 permit to you pin it to a date, but, of course, the
 11 two operative legal questions are, what was known by
 12 the Claimants?
 13 So, if--let's assume for the moment you have
 14 an "ought-to-know" standard. In order for us to
 15 succeed, all we have to do on an ought-to-know
 16 standard is to say we couldn't or ought not to have
 17 known until the 10th of June 2010 that that's what had
 18 happened. And we, of course, say, you couldn't have
 19 known until, in fact, the pleadings were received, but
 20 that brings it way, way past 2010. So, our primary
 21 position is that the knowledge spoken of under 10.18
 22 occurred during the course of these proceedings.

12:07:04 1 ARBITRATOR KANTOR: Thank you for your
 2 patience. Please proceed now.
 3 MR. COWPER: I can--just for the sake of
 4 completeness, and I know Ms. Cohen is champing at the
 5 bit to take the podium from me, I can answer 6, 7, and
 6 8 pretty quickly, I think, and I think you probably
 7 know what the answers are.
 8 We say that the--essentially--what we've been
 9 speaking of falls within the bounds of our Statement
 10 of Claim, and you'll have regard to 67 as an example
 11 of the Notice of Arbitration that speaks of a policy
 12 of refraining, commencing, or otherwise completing
 13 steps necessary for delay, so refusing the grant. So,
 14 I think it fits within the existing pleadings.
 15 With respect to--it's not a new claim for
 16 which a Statement of Claim is required, but out of an
 17 abundance of caution, on October 4, we said if it was,
 18 we sought leave to amend, given that it had been
 19 disclosed in the context of this proceeding.
 20 In terms of how you should treat it, of
 21 course, it is Article 22 of the relevant UNCITRAL
 22 rules. And if you consider it to require an

12:08:29 1 amendment--we say we don't require an amendment--we
 2 say you ought to, in the circumstances, grant that
 3 amendment.
 4 I think I'll do--do you want to
 5 do--Dr. Weiler promises to do Chapter 17 in under
 6 30 seconds.
 7 PRESIDENT BETHLEHEM: The clock is ticking.
 8 30 seconds.
 9 MR. WEILER: You asked about the--Chapter 17.
 10 The important thing to note is that Article 10.2(1)
 11 provides, "In the event of any inconsistency between
 12 this chapter and other chapter, the other chapter
 13 shall prevail to the extent of the inconsistency."
 14 (Comments off microphone.)
 15 MR. WEILER: We don't have an inconsistency.
 16 So, really, Chapter 17 is not going to apply directly,
 17 though, I would think, say, that you might want to
 18 look at Chapter 17 within the context of the Vienna
 19 Convention, Article 31(3) context arm because there
 20 are some interesting provisions there which
 21 don't--which would suggest that, again, that there are
 22 some procedural problems with regard to the delays in

12:09:37 1 this case. I would direct your attention to
 2 Article 17.6, Opportunity For Public Participation,
 3 and I would also direct your attention to
 4 Article 17.9, Environmental Cooperation.
 5 MR. COWPER: I'll give the podium to
 6 Ms. Cohen now.
 7 PRESIDENT BETHLEHEM: Thank you. And I'll
 8 just mention that she's--presumably you're going to
 9 swap seats or she--
 10 (Comments off microphone.)
 11 PRESIDENT BETHLEHEM: And I'll just say for
 12 your ease as you start, that I'm not proposing to cut
 13 the microphone off at 12:30. The Tribunal has delayed
 14 counsel with a number of questions, so we will...
 15 MR. COWPER: And just to be clear, that was a
 16 "distinct act of delay." It was not--
 17 PRESIDENT BETHLEHEM: That's a matter we'll
 18 have to decide upon.
 19 (Comment off microphone.)
 20 (Laughter.)
 21 PRESIDENT BETHLEHEM: As long as it's not
 22 "lingering effects."

12:10:36 1 (Comment off microphone.)
 2 PRESIDENT BETHLEHEM: Ms. Cohen, over to you.
 3 (Comment off microphone.)
 4 PRESIDENT BETHLEHEM: Okay.
 5 MS. COHEN: Some of the submissions that I
 6 was going to make I think have been covered, so I will
 7 try and stay as close to the 12:30 mark as I'm able
 8 to.
 9 With respect to damages, first--the next
 10 slide--just an overview of the Report and the
 11 different methodologies that have been applied here.
 12 In my submission, the only appraisal of the subject
 13 Lots before the Tribunal is the appraisal that was
 14 provided by Mr. Hedden, and in my submission, he's a
 15 qualified appraiser who has followed the appropriate
 16 methodologies in coming up with the proper values for
 17 the subject Lots that are before you.
 18 Just turning to the next slide, I think the
 19 Tribunal is, by now, very familiar with the fact that
 20 the Fair Market Value is the appropriate measure for
 21 compensation. The comparables that were used to
 22 determine the Fair Market Values in my submission are

12:12:45 1 reasonable. While they were not comparables that are
 2 as, perhaps, easily available in other markets, the
 3 comparables that were chosen do reflect, in my
 4 submission, what are appropriate values when adjusted
 5 in accordance with the methodology that was applied by
 6 Mr. Hedden.
 7 For the V Lots, the comparables used--and I
 8 have listed the three comparables--were all located
 9 within 75-meter zone, beyond the 50-meter "inalienable
 10 zone," and the sales prices for those Lots would
 11 reflect any lawful and nonexpropriatory measures or
 12 actions of the Republic. So, I think that covers the
 13 question that was being addressed yesterday.
 14 The next slide, the sales prices for the Lots
 15 are consistent with what would be expected upon a
 16 considered and supported market analysis in my
 17 submission. And I've set out the references in
 18 Mr. Hedden's Report where he analyzes the market
 19 in--the real estate market in Costa Rica and why it is
 20 not in my submission correlative to the U.S. market.
 21 In my submission, the extreme boom in the real estate
 22 market in Costa Rica was not comparable to many other

12:14:07 1 markets. It was substantial increases in value over
 2 the period of time from 2003 right through to 2007,
 3 and those extreme increases in value are reflected in
 4 the purchase prices that you see both in the
 5 comparables and in the values that we are submitting
 6 as being the appropriate values for compensation.
 7 Turning to the next slide, I say that this is
 8 particularly so when we look at the subject Lots,
 9 which are, in this case, Lots that were in the prime
 10 area. They were unique in the sense not only that
 11 they were beachfront lots, but also in that they were
 12 fee-simple Lots, which is unusual in the area. I
 13 refer in these slides to the market timing, and I have
 14 given references in the slides, and so I will leave
 15 that with the Tribunal.
 16 But there are a number of references in the
 17 record which clearly indicate in my submission that
 18 the market did not peak and then decline in 2006, but,
 19 rather, it continued to increase in value right
 20 through 2007, and it was only in 2008 where it tapered
 21 off, and we see no further significant increases in
 22 value, but it held its value for a period of time,

12:15:35 1 and, at the earliest, I say, the decline in value
 2 happened in the fall of 2008. I've included a graph
 3 that shows the market timing. I don't intend to spend
 4 any time on that.
 5 Turning next to the Reports of Mr. Kaczmarek,
 6 in my submission, it is clear from the scope of work,
 7 when one reads Mr. Kaczmarek's First Report, that he
 8 was not asked, nor did he do an appraisal or any
 9 formal methodology applied in valuing the properties
 10 that are in issue in this proceeding. Mr. Kaczmarek
 11 was not--is not qualified to do so. He's not a
 12 certified or licensed appraiser, and he did not
 13 prepare his Report in conformity with any of the
 14 applicable appraisal standards.
 15 Turning to the next slide, in my submission,
 16 Mr. Kaczmarek was a partial Witness, whose
 17 presentation, in my respectful submission, sounded
 18 more like Closing Submissions of legal counsel. He
 19 engaged in a fact-finding mission, he reviewed Witness
 20 statements, and came to his own conclusions on facts
 21 and legal analysis in respect of the very
 22 Constitutional Court Decisions and Park Law, which are

12:16:59 1 at issue in this proceeding.
 2 I've given a number of examples in his Report
 3 in my submission, which I say are evidence, in my
 4 submission. His presentation and his answers to
 5 questions in this proceeding were also evident of
 6 that. I say many of his conclusions go to the
 7 ultimate issues which are within the purview of the
 8 Tribunal.
 9 Turning to the next slide I say, again, still
 10 referring to Mr. Kaczmarek's reports, that he did not
 11 identify the source of many of the statements
 12 contained in his Report, and there is no evidence that
 13 he did any independent verification beyond reviewing
 14 some Articles that he's attached to his Report. I say
 15 the Articles that he has attached do not support the
 16 conclusions that he reaches, and in any event, they
 17 are not sufficient for this Tribunal to draw
 18 conclusions about the market timing in Costa Rica and,
 19 in particular, the areas at Playa Grande and Playa
 20 Ventanas. He acknowledged that his findings of fact,
 21 if they are not concurred in by the Tribunal, may
 22 influence the outcome his opinions.

12:18:06 1 Turning to a couple of specific examples of
 2 credibility, and I apologize for the number of words
 3 on this particular slide, but in my submission,
 4 Mr. Kaczmarek was guided with a view to an objective,
 5 which was to compensate the Claimants for the lowest
 6 possible amount, using the facts to try and manipulate
 7 that outcome, in my submission. And two examples that
 8 I have included in my presentation, in my submissions
 9 to you this afternoon, are, firstly, his conclusions
 10 or his opinions with respect to his appraisal, the
 11 administrative appraisals that were rendered with
 12 respect to these subject Lots, it was clear in his
 13 cross-examination yesterday that, although in his
 14 Reports he states that, in his opinion, the
 15 administrative appraisals were reasonable, he did
 16 nothing to actually verify either the methodology that
 17 were used by the appraisers who came to those
 18 administrative appraisals. He did no analysis of the
 19 comparables that they used to see if they were at all
 20 relevant to the subject Lots. He did no analysis of
 21 evaluation valuation dates that were chosen by those
 22 appraisers, nor did he do anything else to verify

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12:19:32 1 whether those reports have any bearing on the Fair
 2 Market Value of the subject Lots. And in my
 3 submission, it's clear on the face of the
 4 administrative appraisals, on the amounts that they
 5 used, that they are at all not reflective of Fair
 6 Market Value. And that is further confirmed by the
 7 fact that, in the judicial process, a number of the
 8 administrative appraisals were substantially increased
 9 as a result of the judicial process, and I say even
 10 those judicial appraisals did not result in a Fair
 11 Market Value for the Claimants' properties.

12 I say his own--the second example that I give
 13 is with respect to his conclusions with respect to
 14 Fair Market Value. In his own Report--and you'll
 15 recall yesterday the cross-examination of his belief
 16 with respect to the B Lots and whether they could
 17 possibly have actually had a purchase price of \$1,200
 18 per Lot. And in my submission, based on the
 19 information that he had at hand, including the
 20 document that he relied upon from the registry, which
 21 showed that there were mortgages on the one B1 Lot
 22 that were in access of \$400,000, he could not in

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12:20:55 1 exercising any professional judgment have possibly
 2 concluded that the actual purchase price was \$1,200.
 3 And I will come back to that point, because it's
 4 relevant to the basis upon which the Tribunal decides
 5 to award compensation.

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

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

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12:22:19 1 So, just to be clear, we have valued the Lots
 2 that were taken, and the proportion of the Lot that
 3 was taken, and then included in Mr. Hedden's Report is
 4 the severance damages. But the preference--and it is
 5 within the jurisdiction of the Tribunal to award the
 6 Claimants the--and require the Republic of Costa Rica
 7 to expropriate the entirety of those Lots and not to
 8 leave the remnant behind.

9 With respect to the Treaty guarantee of
 10 restitution in relation to value immediately prior to
 11 the taking, in my submission that requires the payment
 12 of full Fair Market Value. It's tied to the concept
 13 of Fair Market Value. It's not tied to the cost or
 14 the price that was paid by the particular individual
 15 who happens to be holding the Lot at the time of the
 16 taking. It is tied to the Fair Market Value at the
 17 time of expropriation.

18 And just while I have it in mind, I would
 19 refer you to, in the Memorials--
 20 (Comment off microphone.)

21 I would refer you in the Memorials with
 22 respect to that point to Page 95 of the Claimants'

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12:24:07 1 Memorial on the Merits, and, in particular, in the
 2 Sedco and National Iranian Oil Company, the Tribunal
 3 there concludes the Tribunal must not consider as an
 4 element of value the taking itself nor events
 5 preceding the taking calculated to diminish the value
 6 of the property.

7 And again in Compañía del Desarrollo and
 8 Santa Elena, which I'm sure the Republic of Costa Rica
 9 is well aware of because that was a decision in which
 10 Costa Rica was also involved, the Tribunal there
 11 determined that the date of expropriation for
 12 valuation is important because there's no evidence
 13 that its value at that date was adversely affected by
 14 any prior belief or knowledge that it was about to be
 15 to expropriated. And so that the concept that the
 16 regulatory action, expropriatory action, or unlawful
 17 conduct ought not to be taken into account in respect
 18 of the value is very much a principle that has been
 19 applied in international law commonly and
 20 appropriately.

21 PRESIDENT BETHLEHEM: Can I just make sure
 22 that we've got the right reference. It is Page 95 of

12:25:33 1 your first Memorial?
 2 MS. COHEN: Yes, it is. And it's in the
 3 Footnote 251.
 4 PRESIDENT BETHLEHEM: I don't have a
 5 Footnote 251 on that page.
 6 ARBITRATOR KANTOR: It's on Page 96.
 7 PRESIDENT BETHLEHEM: Ninety six. Is it the
 8 footnote beginning Sedco against National Iranian Oil
 9 Company.
 10 MS. COHEN: That's correct. I apologize.
 11 For some reason mine is Page 95.
 12 And in my submission, there is a distinction
 13 between the date upon which--the valuation date that's
 14 chosen and the date for calculation of interest, and
 15 that is because of the statutory requirement that the
 16 date of value is the date immediately affected by the
 17 expropriation, so that it doesn't take into account
 18 the expropriatory measures or regulatory--unlawful
 19 regulatory conduct in thereby diminishing the
 20 restitution that is given to the Claimants, whereas
 21 the compensation of interest is tied to the date of
 22 breach.

12:26:37 1 So, the breach occurs. That doesn't mean one
 2 doesn't look back in time to assess when to measure
 3 the appropriate compensation. But in terms of the
 4 interest and international law relating to the
 5 requirement to pay interest, it is calculated from the
 6 date of the actual breach, which in this case, would
 7 be the date of the delay, which is after the CAFTA was
 8 in effect.
 9 So, I may come back to that when I get to
 10 interest, but I'm trying to be economical with my
 11 time. Still on the Slide 62, any Award based upon a
 12 return of the purchase price would have to ensure that
 13 the genesis for the analysis or the proxy for the
 14 analysis being the purchase price is actually
 15 reflective of the Fair Market Value at that time, and
 16 there are certainly some issues with respect to that
 17 in the record because there is debate about what the
 18 appropriate purchase price was at the time.
 19 I have handed up a chart that has been
 20 prepared, demonstrative evidence that has--that
 21 summarizes the evidence and performs an analysis, an
 22 alternative measure of damages. And in our

12:27:58 1 submission, this is not the appropriate measure of
 2 damage. The appropriate measure of damage is that as
 3 quantified by Mr. Hedden. But if one were to adopt an
 4 analysis based on the purchase price in order to
 5 ensure appropriate restitution, one would at least
 6 have to take into account a proper return on the real
 7 estate value or a proper return on value for that
 8 taking. And in my submission, up until the time of
 9 expropriation, the owner of the property is entitled
 10 to the use and enjoyment of that property, and that
 11 use and enjoyment includes the increase in value that
 12 the property experiences over that time period.
 13 And just to give the references, because I
 14 didn't have time to add the references into this
 15 summary chart that I have handed up separately, with
 16 respect to Lots 40 and 39, the first two, those are
 17 taken from Mr. Kaczmarek's--the purchase price amount
 18 is taken from Mr. Kaczmarek's Second Report on
 19 Page 17. B7 is taken from Mr. Gremillion's Witness
 20 Statement at Paragraph 7. C71 is taken from--sorry, I
 21 can't--C71 through to V61-c, those purchase price
 22 amounts are taken from Mr. Kaczmarek's Second Report

12:29:53 1 on Page 17.
 2 PRESIDENT BETHLEHEM: Ms. Cohen, I think I
 3 can probably save you sometime here. You've got all
 4 of those noted down. Rather than trying to read them
 5 into the record here, why don't you just sort of
 6 annotate that on the basis that all you're going to be
 7 doing is putting in the references and provide that to
 8 us as soon as possible, unless the Respondents would
 9 like to have those references in order to be able to
 10 prepare their Reply.
 11 MR. ALEXANDROV: Mr. President, we anticipate
 12 objections, because we are wondering where those
 13 numbers are coming from. And the sooner we are
 14 provided the references, perhaps as early as possible
 15 after the beginning of the lunch break the better so
 16 that we can digest and potentially object in the
 17 afternoon.
 18 PRESIDENT BETHLEHEM: Digest the references
 19 rather than the lunch, right?
 20 MR. ALEXANDROV: Absolutely.
 21 PRESIDENT BETHLEHEM: Well, Ms. Cohen, if you
 22 could do that as quickly as possible after we sort of

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12:30:44 1 adjourn now to provide those to the Respondents so
 2 that they're on notice, I think that will save time in
 3 going through all of these 26 Lots.
 4 MS. COHEN: I would be happy to do so.
 5 So, but, just to take you through the chart
 6 itself, what it indicates is the property cost and the
 7 date of acquisition, the monthly return that is
 8 applied over the period, and I submit to you that
 9 those monthly returns for 2003, 2004, 2005 are
 10 conservative, if anything, and I will take you through
 11 a number of examples of why that is in a moment.
 12 For 2006, 2007, and 2008, the monthly return
 13 percentages are those that were determined by
 14 Mr. Hedden to be appropriate for the market at
 15 that--at those points in time. And then that amount
 16 is calculated on the basis of the amount or the square
 17 footage of property that was taken to come up with a
 18 per-square-meter compensation amount for those subject
 19 Lots.
 20 The--and just to explain that, with respect
 21 to the Lots that are at the second portion of the
 22 page, the lower portion, the B Lots and the SPG Lots,

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12:32:11 1 with respect to those Lots, because the Lots were
 2 aggregated, they are larger Lots, it was difficult to
 3 perform this analysis on a price--on a purchase price
 4 basis. And so for the entirety of the square footage,
 5 the Unglaube--the amount that was awarded in Unglaube
 6 is used as the per-square-meter value as of
 7 January 2006, and then the returns are applied
 8 thereafter.
 9 MR. ALEXANDROV: Mr. President, just to
 10 register a quick objection; in the closing statement
 11 what we have been provided with is an entirely new
 12 damages calculation. We move that this be stricken
 13 from the record.
 14 PRESIDENT BETHLEHEM: Thank you.
 15 MS. COHEN: In my submission, it's a pure
 16 mathematical calculation. It's demonstrative evidence
 17 which is taken from the evidence that is in the
 18 record. It's not the basis upon which the Claimants
 19 submit the Award of damages and compensation ought to
 20 be made but rather is intended to address an
 21 alternative methodology for quantification of
 22 compensation along the lines that was being questioned

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12:33:25 1 yesterday.
 2 PRESIDENT BETHLEHEM: We'll reflect on the
 3 objection but notwithstanding if you could please
 4 annotate this with all the references just to make
 5 sure that those are there and the Respondent has those
 6 if they need to continue.
 7 MS. COHEN: Yes, I will do so.
 8 And just turning to the next slide, I think I
 9 have covered most of the comments that I wanted to
 10 make on this slide. I do refer to--and as I said in
 11 my submission the amounts are conservative--the
 12 transaction with respect to Lot V61 in my submission
 13 is indicative of the conservativeness of the amount,
 14 and there were substantial values that were obviously
 15 being experienced in that market at the time.
 16 Turning to the next slide, with respect to
 17 severance damages, I don't intend to say much about
 18 that other than that the hand-up that I did give you
 19 does not take into account severance damages, and so
 20 severance damages would have to be added on top of
 21 that or, as I indicated earlier, alternatively, if the
 22 entirety of the properties is taken, the square

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12:34:41 1 footage would have to be increased to reflect the
 2 entire square footage of those properties.
 3 Turning to the next slide, with respect to
 4 Article 10.7 of the CAFTA, I have already submitted to
 5 you that in my submission the intention is to ensure
 6 full restitution and that is why the basis of the
 7 compensation is Fair Market Value.
 8 With respect to the next slide, the
 9 Respondent suggests that to pay Fair Market Value
 10 would result in the Claimants receiving a windfall.
 11 And in my submission I would submit to you that in
 12 doing otherwise would result in a potential
 13 encouragement to States to take unlawful and
 14 expropriatory measures and to delay the payment of
 15 compensation so as to drive down the price or Fair
 16 Market Values of the properties and then have to pay
 17 lesser compensation.
 18 It is the very, in my submission, unlawful
 19 and expropriatory measures that have created the
 20 possibility for speculation in the marketplace, and
 21 the Respondent should not be rewarded for having taken
 22 those measures by awarding them compensation on the

12:36:13 1 basis--by awarding compensation to the Claimants based
2 on the prices that they paid rather than the Fair
3 Market Value at the time of the taking.

4 I also would refer you to the Second
5 Memorial, the Reply Memorial on the Merits, and I
6 direct your attention to Paragraphs 259 through
7 263--sorry, through 265. I will not take you through
8 them now, but I think they also address the case law
9 with respect to these issues which is of assistance to
10 the Tribunal.

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

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

22 But with respect to the conclusions of the

12:39:18 1 January 2006. And so I note that for that six-month
2 period, the difference in value was a 67 percent
3 increase in value for the period, for that six-month
4 period between January 2006 and July 2006, for the
5 Unglaube property, which in my submission, is very
6 comparable to the subject Lots in this proceeding
7 given that it is on the same strip of beachfront, and
8 that would be an 11 percent per month increase which
9 is substantially less than the values that are being
10 either included Mr. Hedden's Report or in the chart
11 I've handed up to you.

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

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

21 Turning to the next slide--skipping over to
22 the next slide on--sorry, damages, staying on this

12:37:47 1 Experts on compensation, I note that they varied
2 widely. The Tribunal comments that the Claimants
3 sought compensation at a valuation date of July 2006,
4 which they characterized as the peak of demand in the
5 market.

6 The Respondent's Expert, who is
7 Mr. Kaczmarek, advocated for a valuation date of
8 2003/2004, just turning to the next slide.

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

15 And I note here, based on the math--and this
16 isn't in the slide, so I note it for your
17 reference--at Paragraph 299 of the Unglaube decision,
18 it refers to the values that were contained in the
19 Expert Reports. And the appraisal dated the July 2006
20 values for the 75-meter strip at \$5,190,000 per square
21 meter, or--sorry, per meter--or \$692 per square
22 meter--the value awarded was 3,100,000 as of

12:40:43 1 slide for a moment--I think I've covered most of what
2 I intended to say at this slide but for one thing,
3 which is that in this case there is also a claim for
4 damages based on Article 10.5. Given the
5 circumstances of this case, the amount of compensation
6 being sought is the same. There is no difference in
7 compensation.

8 The intention is to put the Party in the same
9 position that they would have been in as if the
10 wrongful conduct had not occurred and in this case we
11 say the measure of damages is the same, irrespective
12 of which basis of--upon which basis it is awarded.

13 Turning to the next tab on interest, in my
14 submission the interest that could have been earned if
15 compensation had been paid and invested favorably is
16 the appropriate measure of interest. And just
17 referring to the Memorial on the Merits,
18 Paragraph 322, the principle of full reparation
19 requires that the Claimants be awarded interest at a
20 rate that fully compensates for the delay. And in
21 Footnote 268, it's noted that pursuant to
22 Article 38(2), interest runs from the date when the

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12:42:06 1 principal sum should have been paid until the date the
 2 obligation to pay is fulfilled. And so I refer to--I
 3 refer the Tribunal to both of those portions of the
 4 Memorial, and also commend you to the Reply on the
 5 Merits at paragraph--sorry, I just want to
 6 double-check because I think it's Page 71, but I'll
 7 just refer you to the paragraph reference so I am sure
 8 that's the correct paragraph. Paragraphs 259 through
 9 to 265.

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

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

22 PRESIDENT BETHLEHEM: There are one or two

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12:45:14 1 within the Park, and so to the extent that the risk of
 2 expropriation was present, it would already be "baked
 3 in," to use a sort of inartful slang. It would be
 4 "baked in" to the prices that were seen with respect
 5 to those comparables.

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

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

18 ARBITRATOR KANTOR: Last question: I note
 19 that the chart you've handed up and are later going to
 20 annotate further covers up through the period of 2008.
 21 There are some who advocate that in thinking about
 22 compensation for the breach of a Minimum Standard of

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12:43:44 1 questions from the Tribunal.

2 ARBITRATOR KANTOR: Ms. Cohen, thank you.
 3 Very quickly, as you know, the Parties are in dispute
 4 over whether or not Claimants knew or had reason to
 5 know, prior to purchasing their properties, of a risk
 6 of expropriation, or, as alternatively stated, that
 7 the property was "in the Park" or there was confusion
 8 as to whether the property was "in the Park."

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

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

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

20 MS. COHEN: Well, I think that the way that
 21 Mr. Hedden has performed his valuation report, it
 22 takes into account--it uses comparables that were

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12:46:47 1 Treatment, including fair and equitable treatment,
 2 that the proper date for determining damages in that
 3 scenario would be the Award date, not the date of a
 4 hypothetical expropriation.

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

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

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

12:48:10 1 but the evidence is pretty scant.
 2 ARBITRATOR KANTOR: In speaking of an option
 3 on the part of Claimants and case law relating to that
 4 for a later date, are you referring to the Awards that
 5 have drawn distinctions between lawful and unlawful
 6 expropriations?
 7 MS. COHEN: I am, yes.
 8 ARBITRATOR KANTOR: Is such an option in your
 9 knowledge also found in Awards dealing with a breach
 10 of the Fair and Equitable Treatment standard or the
 11 Minimum Standard Treatment including fair and
 12 equitable treatment?
 13 MS. COHEN: Not to my knowledge, no.
 14 ARBITRATOR KANTOR: Thank you. No additional
 15 questions.
 16 PRESIDENT BETHLEHEM: Mr. Vinuesa.
 17 ARBITRATOR VINUESA: Thank you very much,
 18 Mr. President.
 19 Ms. Cohen, I have a very general question
 20 just to try to understand the dimension of your work
 21 on damages.
 22 And it's if you consider that the only

12:49:05 1 appropriate applicable standards to be applied for
 2 real estate prices in Costa Rica to determine Fair
 3 Market Value conformity with international law should
 4 be assumed to be U.S. of America--United States of
 5 America standards, or United States of America
 6 standards as defined by American professional
 7 institutions?
 8 It seems to me you're relying on a way of
 9 thinking that defines your standards, that are the
 10 only standards you apply as American standards, even
 11 if you call it international standards, you do refer
 12 to American organizations, professional organizations,
 13 defining those standards.
 14 MS. COHEN: In Mr. Hedden's Report, he refers
 15 to both--or in his analysis he refers to both the
 16 American standards and also the International
 17 Valuation Standards, and he has applied both with
 18 respect to the rendering of his opinions. But he is
 19 an American expert, and so he has applied the
 20 standards that are applicable to him in rendering the
 21 Report.
 22 ARBITRATOR VINUESA: Right. And I assume

12:50:20 1 that when he's talking about international standards,
 2 refers to the international standards that are
 3 applicable for these American institutions?
 4 MS. COHEN: I don't think with respect to the
 5 matters that are an issue in this proceeding that
 6 there was any distinction between the International
 7 Valuation Standards and the USPAP.
 8 ARBITRATOR VINUESA: Okay. I will check
 9 that. Thank you.
 10 PRESIDENT BETHLEHEM: Mr. Cowper, you want
 11 some concluding remarks?
 12 MR. COWPER: Yes. Yes. Thank you.
 13 And one point that I may offer in response to
 14 Mr. Kantor's comments of detail, which I've--Ms. Cohen
 15 can strike me if I'm off--but is on the evidence here
 16 to the extent that the Claimants purchased on the
 17 conclusion that there wasn't a risk associated with
 18 expropriation or in the Park, that fact renders a more
 19 close proxy for Fair Market Value, just to state that
 20 obviously.
 21 We stand on the fact that the Treaty
 22 expressly guarantees that people whose property will

12:51:33 1 be taken will not be visited by a diminution in value
 2 associated with the expropriation becoming known
 3 earlier.
 4 Finally, let me say that with respect to--and
 5 I'm only going to be a minute or two--just, I said I
 6 would come back to you with respect to the "ought to"
 7 standard, and I don't know that I said that precisely.
 8 So, I probably covered it in one of my several answers
 9 to you, but the point I sought to make or I would make
 10 is that if the Claimants ought to have known that the
 11 Contraloría Report in February of 2010 and then
 12 they're held to have ought to have known of the
 13 deadline for the decision under the--by the Ministry,
 14 that is distinct from holding that they ought to have
 15 known of the decision that was made sometime later.
 16 And so, with respect to the proper operation
 17 of the three-year period, my point was May is not a
 18 magic date. It's the date on which they "ought to
 19 have known" that some other measure has intervened,
 20 and that date clearly has to be within the three-year
 21 period. We say it's actually through the pleadings,
 22 but even if it's not through the pleadings, it has to

12:52:48 1 have occurred after June of 2010. That's my "ought to
 2 have known" answer to you.
 3 Finally, with respect to costs, and I'll be
 4 very brief on that, the Claimants do ask for costs in
 5 the normal course and ordinary measure of costs of
 6 attorneys' fees. I do want to say that, with respect,
 7 my friend characterized his claim for costs as
 8 attendant upon the frivolous nature of the Claimants'
 9 claims in this case.
 10 In my submission, you ought not to--even if
 11 you conclude that these claims are defeated for any of
 12 the reasons set out by the Respondent, they are
 13 clearly not frivolous in any measure, and you ought to
 14 consider, in exercising your discretion, if the matter
 15 is dismissed for any of the reasons offered by the
 16 Respondent declining to award the Respondent costs,
 17 even if there's an unfavorable outcome for the
 18 Claimants in view of the general circumstances of
 19 State action in this case.
 20 And those are the submissions for the
 21 Claimants. Thank you for your patience, and the
 22 enjoyable morning.

12:53:52 1 PRESIDENT BETHLEHEM: Thank you very much,
 2 Mr. Cowper.
 3 Mr. Alexandrov, we're in your hands now. We
 4 were due to break from 12:30 through to 2:00. If you
 5 feel you need the extra half an hour or so, we will
 6 recommence at 2:30. Otherwise, I think we'd be quite
 7 content to recommence at 2:00.
 8 MR. ALEXANDROV: Mr. President, we are
 9 content to recommence at 2:00. I want to ask for two
 10 clarifications. One is, if we have to go a little bit
 11 beyond the time allocated to us, I hope that we'll be
 12 granted the same courtesy as Claimants' counsel.
 13 PRESIDENT BETHLEHEM: You can take it that
 14 you'll be granted the same courtesy. I think
 15 Claimants were delayed because of the questions from
 16 the Tribunal and we will certainly grant you the same
 17 courtesy.
 18 MR. ALEXANDROV: We hope that there will be
 19 questions to us as well.
 20 And my second question is, we ask that you
 21 repeat your--restate or repeat your instructions that
 22 we be provided with those references as soon as

12:54:57 1 possible.
 2 MR. COWPER: That's not necessary.
 3 MR. ALEXANDROV: So that we can look at them
 4 and be ready at 2:00 to address the issue that I
 5 raised in the context of my objections.
 6 PRESIDENT BETHLEHEM: I think it's in the
 7 record. I see Ms. Cohen scribbling away. Claimants
 8 will provide you with a copy of those references as
 9 soon as possible.
 10 MS. COHEN: I will switch copies with you in
 11 about two minutes.
 12 MR. ALEXANDROV: In that case, we are content
 13 to start at 2:00.
 14 PRESIDENT BETHLEHEM: Thank you very much.
 15 Then we will adjourn until 2:00. Thank you very much.
 16 (Whereupon, at 12:55 p.m., the hearing
 17 was adjourned until 2:00 p.m., the same day.)
 18
 19
 20
 21
 22

1 AFTERNOON SESSION
 2 PRESIDENT BETHLEHEM: I think Mr. Cowper
 3 wanted to make a quick correction for the record.
 4 MR. COWPER: Thank you.
 5 Members of our team were talking and I have
 6 to correct a correction because I said to you earlier
 7 that we thought there had been a typo, and I believe
 8 on the record I said that the typo was in 4.1. And I
 9 misdirected you on two scores. I ought to have
 10 referred to 4.2 of the Contraloría Report,
 11 Paragraphs (b) and (c), not Paragraph 4.1. And my
 12 friends have pointed out that in that paragraph it is
 13 not a typo because it refers in 4.1(c), to Zone 4.
 14 And just to be clear, the reporting date is
 15 in respect of Mr. Berkowitz's properties fall within
 16 Zone 4. And the reporting date on that, which may be
 17 of some significance, not to my theory but to some of
 18 the questions, is 30th July 2010.
 19 PRESIDENT BETHLEHEM: Thank you very much for
 20 that correction.
 21 There was an objection made before the break
 22 to the table put in by counsel for the Claimants.

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02:01:44 1 Just to say the Tribunal has reflected on this, and
 2 we've concluded that the table should be admitted. It
 3 is responsive to issues that were raised by the
 4 Tribunal in questioning. So the table is admitted.
 5 Mr. Alexandrov, over to you.
 6 MR. ALEXANDROV: Thank you very much,
 7 Mr. President.
 8 Mr. President, we'll distributing binders
 9 that we'll be using during the Closing Statement.
 10 Those binders contain the slides, and there are a
 11 couple documents in the pocket.
 12 PRESIDENT BETHLEHEM: Has a copy been
 13 provided to the interpreters?
 14 MR. ALEXANDROV: A while ago.
 15 PRESIDENT BETHLEHEM: A while ago. Thank you
 16 very much.
 17 CLOSING STATEMENT BY COUNSEL FOR RESPONDENT
 18 MR. ALEXANDROV: Mr. President, Members of
 19 the Tribunal, good afternoon. We are ending this
 20 hearing where we started, which is Costa Rica should
 21 not be here.
 22 In our Opening Statement, we said that

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02:03:19 1 Claimants have used this arbitration to make Costa
 2 Rica pay on a gamble they made, a gamble that did not
 3 pay off. Claimants took a risk and they lost.
 4 Claimants knew that they had purchased
 5 property inside the Park which was subject to
 6 expropriation, and this hearing has only reinforced
 7 that statement.
 8 It has become clear, not only that Claimants'
 9 claims are frivolous, but also that the testimony of
 10 Claimants' own Witnesses actually supports
 11 Respondent's arguments. And in this Closing, we'll be
 12 focusing primarily on their own words and on what they
 13 tried, but failed, to prove.
 14 And what I'll be doing is I'll be addressing
 15 different topics, not necessarily in a consistent
 16 narrative, and I'll be addressing a little bit in
 17 that--in my Closing the Tribunal's questions. But
 18 once I get into the Closing and lay out some of the
 19 facts, I'll address specifically the Tribunal's
 20 questions.
 21 Before we get into the details, Respondent
 22 notes that Claimants' initial claims--

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02:04:39 1 PRESIDENT BETHLEHEM: Mr. Alexandrov, may I
 2 just stop you for a moment. I've just had a note from
 3 the interpreters saying that, if you've got a script
 4 that you're reading from, it would be very helpful for
 5 the interpreters to have that. This is one of the
 6 struggles that they've had. When counsel read from a
 7 script, it's much more difficult to translate at the
 8 speed. So if there is a script that you could let
 9 them have, that would be of help.
 10 MR. ALEXANDROV: Unfortunately, as you will
 11 discover, it's not much of a script.
 12 PRESIDENT BETHLEHEM: That will reassure the
 13 interpreters.
 14 MR. ALEXANDROV: So before we get into the
 15 details, we want to note that Claimants' initial
 16 claims as set forth in their Memorial were based on an
 17 imaginary conspiracy theory, at the minimum, involving
 18 a former Vice Minister of the Environment, Mr. Mario
 19 Boza, a member of Procuraduría, Mr. Julio Jurado, and
 20 a former Ministry of the Environment, Mr. Carlos
 21 Manuel Rodriguez. All of whom, according to
 22 Claimants, banded together to create a National Park

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02:05:57 1 to protect the leatherback sea turtle and to
 2 expropriate the private property that was within the
 3 boundaries of that Park.
 4 Claimants have yet to submit a single piece
 5 of evidence to support those conspiracy theories.
 6 They have never been able to prove that any of these
 7 persons were not acting in good faith. They have
 8 never been able to prove that any of these individuals
 9 did anything but carry out their responsibilities as
 10 independent professionals and civil servants.
 11 And in fact, it seems that they have dropped
 12 their allegations of conspiracy because not a single
 13 word on that matter was heard in the course of the
 14 hearing.
 15 Nevertheless, those outlandish allegations
 16 remain in the record in Claimants' written submissions
 17 which are public, and therefore they need to be
 18 addressed. And I need say a few words about that.
 19 Claimants have alleged that Costa Rican
 20 Government officials for selfish reasons and in
 21 pursuit of a dubious political agenda have conspired
 22 to deprive Claimants of their property. In their

02:07:10 1 Memorial, they allege that the Costa Rican Government
 2 has intentionally created National Parks without
 3 having the necessary funds to consolidate the
 4 boundaries of the Parks. And the creation of the
 5 Las Baulas Park was allegedly the result of such
 6 flawed policy.

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

11 They allege that the creation of the Las
 12 Baulas National Park "was not the official policy of
 13 the Government of Costa Rica; rather, it was the
 14 agenda of the men who had devoted the last two decades
 15 of growing a network of National Parks and who by 1991
 16 had reached the senior levels of the Government
 17 staff."

18 This is Memorial on the Merits, Paragraph 59.

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

02:08:21 1 Further, according to Claimants' Memorial,
 2 Mr. Boza's agenda failed. When the Costa Rican
 3 Congress approved the '95 Park--the '95 Park Law,
 4 pardon me--because the Park extended seawards.

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

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

21 In their Memorial, in those paragraphs,
 22 Claimants allege that Mr. Mario Boza pulled Mr. Jurado

02:09:54 1 into the conspiracy to change the '95 Park Law and to
 2 expand the Park. Then they further allege that
 3 Mr. Boza and Mr. Jurado pulled a third person into the
 4 big conspiracy, Minister Carlos Rodriguez. And you
 5 have that slide on the screen.

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

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

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

02:11:37 1 Further, according to Claimants, Mr. Jurado
 2 played a cure-all because he was in charge of
 3 launching, "the next stage in the plan to expand the
 4 Park." That is, to order SETENA in 2005 to refuse any
 5 new applications for environmental assessments.
 6 That's Paragraph 147 of the Memorial.

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

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

21 So according to Mr. Berkowitz's testimony
 22 here at the hearing, he trusted the Minister. The

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02:12:59 1 Minister was almost his trusted friend, and the
 2 Minister was very much in favor of protecting the
 3 landowners.
 4 Well, I submit that Mr. Berkowitz's own
 5 testimony at the hearing defeats the allegations
 6 advanced by Claimants' written submissions of this
 7 grand conspiracy.
 8 As I stated, those allegations of grand
 9 conspiracy were not voiced at the hearing and did not
 10 come out through any Witness testimony. So those very
 11 serious allegations including against Mr. Jurado, a
 12 Witness in this case, were advanced with written
 13 submissions but not discussed at the hearing.
 14 Let me talk a little bit about Mr. Jurado.
 15 Claimants describe Mr. Jurado's opinions--and they
 16 called them Mr. Jurado's opinions--as being, "highly
 17 dubious." Claimants' Reply at Paragraph 103.
 18 Not only that, but Claimants' Costa Rican Law
 19 Expert even suggested that Mr. Jurado had abused his
 20 power and should be criminally liable for issuing the
 21 opinion on the interpretation of the Park. And you
 22 see the quote from their Expert on Costa Rican Law,

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02:14:20 1 Mr. Ruíz, on the screen, Slide 3. That is from his
 2 Expert Report, Pages 13 and 14.
 3 He has committed, he says of Mr. Jurado, an
 4 abuse of power to be sanctioned under the penal code
 5 of Costa Rica with imprisonment for up to 10 years for
 6 this kind of case, "corrupcion agravada," aggravated
 7 corruption. And yet the conclusion of the Legal
 8 Expert is that the Government has apparently condoned
 9 Jurado's actions.
 10 Based on these allegations, Claimants accuse
 11 the Respondent of intentionally hiding Mr. Jurado's
 12 testimony from this arbitration. There is a whole
 13 section in Claimants' Reply titled, "Where
 14 Mr. Jurado's Statement?" The allegation was that, if
 15 Mr. Jurado did not present a Witness Statement, the
 16 Tribunal should draw adverse inferences from that
 17 fact. This is the Reply, Paragraphs 198-206.
 18 But Mr. Jurado did testify. Respondents
 19 submitted Mr. Jurado's testimony. He was subject to
 20 rigorous cross-examination at the hearing. He
 21 explained what analysis he performed to reach the
 22 conclusions set forth in the Procuraduría Opinion. He

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02:15:48 1 explained that he consulted entities and Experts on
 2 matters on which he was not an Expert, such as
 3 geography and geographical coordinates.
 4 He further explained that his opinion was
 5 not, in fact, his opinion. It was not a personal
 6 opinion, a personal creation, but a formal document of
 7 the Institution, the Procuraduría, approved by the
 8 Head of the Procuraduría.
 9 And he also testified that the conclusions
 10 reached in the Opinion have been supported by the
 11 Supreme Court of Costa Rica.
 12 So Claimants had their wish. Mr. Jurado did
 13 appear to testify. In his testimony, if there was any
 14 doubt whatsoever, his testimony put to rest Claimants'
 15 conspiracy theories. During Mr. Jurado's
 16 cross-examination, Counsel did not even attempt to
 17 probe the accusations of conspiracy.
 18 This just emphasizes the outlandish nature of
 19 the conspiracy theories advanced by Claimants in their
 20 written submissions.
 21 So the answer to Claimants' question of
 22 "Where is Mr. Jurado" is Mr. Jurado is here. He

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02:17:21 1 testified, he was cross-examined, and he was not even
 2 asked about those conspiracy theories.
 3 Of course, Mr. President and Members of the
 4 Tribunal, those conspiracy theories are unsustainable
 5 and they should be completely disregarded. Those are
 6 very serious allegations against Government officials
 7 in a sovereign government. They cannot be taken
 8 lightly.
 9 Claimants did not present any--and I
 10 emphasize "any"--evidence to support those theories.
 11 There is not a shred of evidence to support those
 12 theories. They were not even maintained at the
 13 hearing, but they were not withdrawn; and we expected
 14 that they would be withdrawn, but they weren't.
 15 It is unfortunate that Claimants have chosen
 16 to advance such theories against Costa Rica contained
 17 in a public document and, therefore, we believe we
 18 have an obligation to address those theories, even
 19 though the allegations don't seem to be maintained.
 20 That Claimants would even advance those
 21 theories in their written submissions speaks volumes
 22 about Claimants' credibility and good intention. And

02:18:54 1 I will come back at the end of our Closing Argument to
 2 the issue of costs, but we ask you to keep in mind the
 3 dozens of pages of Claimants' written submissions
 4 filled with conspiracy theories and accusations
 5 against Costa Rica.

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

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

21 To begin with, was the property inside of the
 22 75-meter strip? There should be no doubt any more

02:20:29 1 that Claimants bought property inside of the Park,
 2 inside of the 75-meter strip, fully aware of the
 3 property's location within the boundaries of the Park
 4 and fully aware that the property would be
 5 expropriated.

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

14 When we examined Mr. Reddy and Mr. Berkowitz,
 15 we went through the exercise of showing them land
 16 registry drawings for their Lots. And you will, of
 17 course, recall that they had a stamp from MINAE
 18 certifying that the property was inside the Park.

19 Both Mr. Reddy and Mr. Berkowitz came up with
 20 several excuses as to why they had disregarded those
 21 stamps. First, they both allege that they had been
 22 advised by their local lawyers that the stamps had no

02:21:49 1 value because they only referenced the 1991 Decree and
 2 not the '95 Law.

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

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

12 "Answer: The stamp in my mind shows that
 13 MINAE was of the opinion that it was in the Park.
 14 This was not my opinion."

15 You have the reference to the transcript on
 16 the slide.

17 Well, whether MINAE's opinion was correct or
 18 incorrect for the purposes of the point I'm making is
 19 irrelevant, and whether Claimants--in this case
 20 Mr. Bergman--agreed with MINAE or not is not relevant.
 21 The fact is, MINAE thought at the time the property
 22 was within the boundaries of the Park and

02:23:06 1 Mr. Berkowitz knew of MINAE's interpretation.

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

4 "Question: But when you saw it at the
 5 registry during 2006 before you purchased the
 6 property, did you understand that MINAE's position in
 7 2003 was the property was inside of the Park based on
 8 the '91 Decree?

9 "Answer: Yes."

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

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

17 "Answer: Correct.

18 "Question: And that was part of your due
 19 diligence?

20 "Answer: Correct.

21 "Question: And you bought the property
 22 nevertheless?

02:24:19 1 "Answer: Correct."
 2 You have the transcript reference on the
 3 slide.
 4 So Claimants' counsel tried to defend their
 5 Witnesses by showing that--by arguing, I should
 6 say--that there were several other properties marked
 7 as being outside the Park, and that there are registry
 8 drawings that said that.
 9 What Claimants' counsel failed to explain to
 10 you is that those registry drawings were either for
 11 properties located in Playa Ventanas and stamped
 12 before '95 when those properties were stamped as
 13 outside of the Park because Playa Ventanas was not
 14 joined to the Park until '95, or, in other cases, they
 15 have no stamps--the registry drawings--because they
 16 were dated 1980 and 1981. Obviously, they had no
 17 stamps saying that the properties were inside the
 18 Park.
 19 And I can provide for the record the
 20 references for those particular registry drawings,
 21 Exhibit C-16(a), which relates to Lot A40,
 22 Exhibit C-17(a), which relates to Lot A38,

02:25:44 1 Exhibit C-19(a), which relates to Lot C71.
 2 Yes, we agree with Claimants, those registry
 3 drawings don't have a stamp that says they're inside
 4 the Park. But if you look at the date they were
 5 obtained, the year is 1980, 1981.
 6 And it raises an interesting question, which
 7 is, were those drawings part of the Claimants' due
 8 diligence when they were purchasing the property more
 9 than 20 years ago, and where are the drawings with
 10 respect to those particular plots that were obtained
 11 at the time they conducted their due diligence?
 12 And I repeat: Other drawings that are dated
 13 between '91 and '95 in relation to Playa Ventanas
 14 don't say, of course, that the properties were inside
 15 of the Park because Playa Ventanas was not added to
 16 the Park until the '95 Law.
 17 All this should be sufficient evidence that
 18 Claimants purchased their properties knowing that the
 19 property was inside of the Park.
 20 If you consider that this is not sufficient,
 21 there is abundant evidence on the record to show that
 22 they knew from other sources that their property was

02:27:08 1 inside of the Park and that it was subject to
 2 expropriation. If you don't consider the registry
 3 drawings, there is a lot more.
 4 For example, Mr. Reddy bought on behalf of
 5 Spence Co. four properties after the Procuraduría had
 6 issued its 2005 Opinion with respect to the boundaries
 7 of the Park. Mr. Reddy admitted at the hearing that
 8 he had seen the Opinion in early 2006, but that he
 9 intentionally disregarded it. You see that on the
 10 slide.
 11 "Question: When you performed due diligence
 12 with respect to those four purchases, the views of the
 13 Procuraduría that the Park extended 125 meters inland
 14 did not play a role; correct?
 15 "Answer: No. It played a role, but we did
 16 our analysis to believe that this opinion would not
 17 stand, and we were still comfortable to go through
 18 with the purchase."
 19 The transcript reference is on the slide.
 20 On the next slide you see that Mr. Reddy also
 21 bought these four properties after MINAE had initiated
 22 expropriation procedures for another of Spence Co.'s

02:28:24 1 Lots, Lot A40.
 2 "Question: So help me understand your due
 3 diligence then. You have a Declaration of Public
 4 Interest with respect to one of your properties which
 5 says it will be expropriated. It initiates the
 6 expropriation process. And after that you purchase
 7 four more properties?
 8 "Answer: That is correct."
 9 You have the transcript reference on the
 10 slide.
 11 In other words, there is no question
 12 Mr. Reddy purchased property fully aware that it was
 13 inside the Park and that MINAE intended to
 14 expropriate.
 15 Mr. Berkowitz also had abundant evidence
 16 showing him that his property was inside of the Park.
 17 He simply decided to ignore that evidence or to
 18 interpret it his own way. At the hearing
 19 Mr. Berkowitz said on several occasions that his
 20 property was not inside the Park because, according to
 21 Costa Rican Law, private property only becomes part of
 22 the Park after it has been expropriated. So he relied

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02:29:40 1 on a legal/semantic distinction saying it may be
2 within the 75 meters but it's not yet part of the Park
3 because it's still mine. Once it's expropriated it
4 may become part of the Park.

5 This explanation, while legally or
6 technically may be true, is intended to confuse the
7 Tribunal. The point is not that; the point is that
8 the properties inside of the boundaries of the Park,
9 as set out in the law, that is inside of the 75-meter
10 strip of land. And that it is because of that that
11 the property is subject to expropriation.

12 You see on the next slide Mr. Berkowitz under
13 cross-examination had no other option but to accept
14 that:

15 "Answer: I agree," said Mr. Berkowitz, "that
16 MINAE was signaling to expropriate. I agree that they
17 had the right to proceed to expropriate. I agree that
18 I was informed that this process was starting. But
19 you are asking me to state something that I'm
20 unwilling to state, which is I did not believe at the
21 time that my property was inside the Park."

22 The transcript reference is on the slide.

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02:30:54 1 So, he knew. For whatever reasons, he didn't
2 want to believe or because of advice from his lawyer
3 he didn't believe, whatever his belief may have been
4 on a matter of law on advice of his lawyer, he knew
5 the facts.

6 Mr. Berkowitz tried to deny several times
7 that the Park included 125-meter strip of land that
8 extended inland. However, when faced with the
9 evidence, he had no choice but to admit that at least
10 two times, MINAE, the relevant Ministry, had told him
11 that the Park did include a piece of land, a strip of
12 land, 125 meters towards the land from the high tide
13 line.

14 First, in June 2003, Mr. Berkowitz received a
15 resolution from MINAE that stated that the Park
16 included 125-meter strip of land. You see that on the
17 next slide:

18 "Question: So then, Mr. Berkowitz, isn't it
19 correct that, in response to your formal application
20 to MINAE in March of 2003, MINAE issued a resolution
21 in June of 2003, and in that resolution relating to
22 the felling and pruning of trees, it also stated that

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02:32:26 1 the Las Baulas Park, under Decree of '91 and Law of
2 '95, extends 125 meters inland from the high tide. Is
3 that what MINAE said in this resolution?

4 "Answer: Yes, that's what they said."

5 The transcript reference is on the slide.

6 He knew. He knew what MINAE's position was.

7 Next in the meeting he allegedly--in the
8 meeting with Mr. Rodriguez, he allegedly received from
9 Mr. Rodriguez--I'm sorry.

10 Second, he allegedly received meeting minutes
11 from Mr. Rodriguez relating to a meeting in June of
12 2003 where the Minister refers without a doubt to a
13 Park including private property by virtue of the '91
14 Decree and '95 Law. And when Mr. Berkowitz was asked
15 by the President:

16 "So what do you understand by the
17 phrase"--you see this on your next slide, Slide 12:

18 "So what do you understand by the phrase, In
19 the private areas? You've just suggested there were
20 no private areas.

21 "Answer: They were referring to the private
22 areas in the zone, the conflicted zone, the

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02:33:53 1 75 meters."

2 The transcript reference is on the slide.

3 This is an important statement by one of the
4 key Witnesses and by one of the Claimants because you
5 will recall counsel was suggesting that the private
6 areas included in the 1995 Law--I'm sorry. I take
7 that back.

8 The suggestion was the '91 Decree that was
9 referring to land areas may have been referring to an
10 area called Cerro el Morro and to another area called
11 Isla Verde rather than the 75-meter strip of land that
12 was adjacent to the 50 meters of public zone; and,
13 therefore, there was no private land--the indication
14 of private land, the reference to private areas in the
15 '91 Decree and then the '95 Law and all subsequent
16 references to private areas, could have been only to
17 the Cerro el Morro and the Isla Verde rather than the
18 areas within the 75-meter strip.

19 Well, you have Mr. Berkowitz saying, What was
20 your understanding of private areas? He says, Those
21 were the areas in the conflicted zone, the 75 meters.
22 Mr. Berkowitz's testimony on this is clear. He did

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02:35:19 1 not have any different understanding of what the
 2 private areas were.
 3 In the end, Mr. Berkowitz readily admitted
 4 that in the Purchase Agreement when he bought the 24 B
 5 Lots, including the six B Lots that are at issue in
 6 this arbitration, he waived any claims against the
 7 purchaser if the property were to be expropriated
 8 because of its location. You see on the slide this
 9 testimony:
 10 "Question: Is it correct, Mr. Berkowitz,
 11 that the document reflecting that transaction provided
 12 that you, as the purchaser, would not have a claim
 13 against the seller in case the properties were
 14 expropriated in the future?
 15 "Answer: That is correct."
 16 Transcript reference is on the slide.
 17 Mr. President, Members of the Tribunal, it
 18 is, therefore, undeniable. In this particular case
 19 the seller of the B Lots property knew they were
 20 within the 75-meter zone and subject to expropriation.
 21 Mr. Berkowitz knew he was purchasing plots within that
 22 zone and subject to expropriation. He purchased those

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02:36:59 1 properties with the full knowledge of where those
 2 properties were within the boundaries of the Park, and
 3 that they would be expropriated. All the Claimants
 4 did.
 5 They were hoping that Costa Rica would not
 6 expropriate--and we will get to that point in a little
 7 bit. But Costa Rica did initiate expropriation
 8 proceedings with respect to a number of their
 9 properties.
 10 And as I said in the beginning, it was a
 11 gamble. Some of it may have paid off, given what we
 12 heard--and we'll come back to that when we talk about
 13 damages--what we heard about the sales price of those
 14 properties, but with respect to the properties subject
 15 to expropriation, the gamble didn't pay off. But it
 16 was a gamble made in full knowledge of the facts and
 17 the status of the properties.
 18 So, Claimants knew the properties were within
 19 the 75--as Mr. Berkowitz calls it "conflicted zone"
 20 when they purchased the properties. They also knew of
 21 the expropriation in the period of 2005-2008. I'm
 22 sorry, between 2003 and 2008. We explained in our

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02:38:38 1 Opening that Costa Rica started expropriating private
 2 property within the Park in November of 2005, and you
 3 have in the--I'm showing this on the slide, but you
 4 also have in the pocket of your binders an enlarged
 5 version of what is Appendix 2 to Claimants' Rejoinder
 6 on Jurisdiction. And I'll be referring to it on
 7 several occasions.
 8 So, while Claimants knew, as the testimony
 9 showed, that expropriation of properties within the
 10 Park began in November of 2003, with respect to their
 11 own properties, MINAE initiated the first
 12 expropriation proceedings in December of 2005, and you
 13 see that the Decree of Public Interest is the
 14 left-hand side column, and you see that the
 15 expropriation--I'm sorry, the Decrees of Public
 16 Interest were issued between 2005, with respect to the
 17 B properties, through 2007. This is the timing when,
 18 with respect to their individual properties, they knew
 19 the expropriation proceedings had been initiated with
 20 respect to 18 of those properties.
 21 For those properties, as you see in the next
 22 column, for those 18 properties, the administrative

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02:40:29 1 appraisal was made between 2006 and 2008. The timing
 2 is important. I'll come back to that point. It was
 3 before CAFTA entered into force, it was well before
 4 the critical date for the statute of limitations. In
 5 the period 2006--between 2006 and 2008, they knew what
 6 the Costa Rican Government was offering them as
 7 compensation for the 18 properties with respect to
 8 which expropriation proceedings had been initiated.
 9 You've heard testimony and you've seen in our
 10 written submissions the legal situation at that time.
 11 Claimants could have accepted the administrative
 12 valuation and could have received payment. Instead,
 13 they decided to object to it. It was their choice to
 14 take advantage of the opportunities provided to them
 15 by the Costa Rican legal system to seek redress of
 16 their rights if they thought the administrative
 17 appraisal was too low. The point is, they knew what
 18 it was, the amount of compensation was offered to them
 19 at that time, and it was their choice not to accept it
 20 and to seek to appeal it.
 21 From that point on, they were in the hands of
 22 the system that Costa Rica provided to Claimants in

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02:42:17 1 such situations, Costa Rican or foreign, to seek
 2 redress from what they complained of, and what they
 3 complained of I emphasize is the insufficient amount
 4 of compensation. Based on this--based on this fact,
 5 based on these administrative appraisals, what
 6 Claimants initiated at that time was a dispute with
 7 Costa Rica on the quantum of compensation, on the
 8 value of the property.
 9 So, let's take a step back. What did they
 10 knew at the time? What did they know at the time?
 11 They knew Costa Rica had initiated its expropriation
 12 proceedings with respect to those properties. They
 13 knew how the Costa Rican Government had valued the
 14 property, the exact amount. They didn't accept that
 15 amount. They had a dispute with Costa Rica about the
 16 amount of compensation. And, again, I remind you, the
 17 amount of compensation reflected in the administrative
 18 appraisals was offered to them before CAFTA entered
 19 into force and well before the critical date for the
 20 statute of limitations.
 21 Now, this is about what they themselves have
 22 defined as their claims for direct expropriation. How

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02:45:35 1 has effect on the date it is issued, December 16,
 2 2008, and it became available to the public on that
 3 same date. And I refer you to Respondent's Rejoinder
 4 on the Merits, at Paragraph 52, and Milano's Expert
 5 Report, Paragraph 51 and 54. During the hearing,
 6 Mr. Berkowitz and Mr. Reddy admitted to have knowledge
 7 of this suspension since at least December of 2008.
 8 You see on the next slide, Mr. Reddy was
 9 asked, "So, your testimony is that, within the
 10 75 meters, issuing building permits stopped sometime
 11 in 2008?"
 12 Answer: "Correct."
 13 Question: "And you've testified that you
 14 knew that?"
 15 Answer: "Correct."
 16 The transcript reference is on the slide.
 17 Mr. Berkowitz also confirmed his knowledge.
 18 You see that on the next slide. It's a long exchange
 19 on Slide 16. "In 2008, he said, I was informed of the
 20 Supreme Court's Decision by which, pursuant to
 21 Article 50 of the Constitution, it ordered MINAE to
 22 initiate the expropriation proceedings of the private

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02:44:01 1 about the claims for indirect expropriation?
 2 Claimants have alleged that, because SETENA suspended
 3 the issuance of environmental permits for properties
 4 inside of the Park, that properties have been
 5 indirectly expropriated. That is the claim as they
 6 have defined it in their written submissions.
 7 We explained in our written submissions and
 8 in the Opening of the Hearing--here at the hearing
 9 that this suspension of the issuance of environmental
 10 permits resulted from an order of Costa Rica Supreme
 11 Court issued in December of 2008, a decision that
 12 resulted from a case brought by the neighbors of the
 13 Park who claim that the breach of the--who claimed a
 14 breach of the State's constitutional obligation to
 15 protect the environment. The decision is in the
 16 record as Exhibit C-1j. Claimants, having been faced
 17 with the argument on jurisdiction, have attempted to
 18 persuade the Tribunal that this decision only became
 19 public in 2009. This is Claimants' Reply on the
 20 Merits, at Paragraph 94.
 21 Costa Rica responded in the Rejoinder that
 22 this was incorrect. The decision of the Supreme Court

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02:47:01 1 property within the Park and required it to pay
 2 compensation for any undue delay in the expropriation
 3 proceedings.
 4 You confirm this testimony, Mr. Berkowitz?
 5 Answer: Yes.
 6 Question: When in 2008 you were informed, do
 7 you recall? You were informed of the Supreme Court
 8 Decision?
 9 Answer: I'm not certain whether I knew about
 10 it because it came in around Christmas, as I recall,
 11 and I believe I was on vacation. So, I'm not sure
 12 whether I knew about it around Christmas or when I
 13 came back in January, but thereabouts, within that
 14 30-day period, I knew about it.
 15 Question: Okay. Have you actually seen it
 16 and reviewed it, or were you just informed of it?
 17 Answer: I was informed of it. It's in
 18 Spanish. It's a bit technical. I do read Spanish,
 19 but it's somewhat technical.
 20 Question: Were you informed also, then, that
 21 the same Supreme Court Decision also ordered a
 22 definite suspension of the environmental permits

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02:48:09 1 inside the Park?
 2 Answer: I was informed. I was so informed."
 3 The transcript references are on the slide.
 4 There is no doubt, Mr. President and Members
 5 of the Tribunal, on Claimants' own testimony that they
 6 knew of the suspension of the issuance of the
 7 environmental permits in 2008, and this is the
 8 argument relating to the indirect expropriation.
 9 In another attempt to convince the Tribunal
 10 that the Tribunal has jurisdiction over this matter,
 11 Claimants have tried to allege that the indirect
 12 expropriation had actually "crystallized" in March of
 13 2010, on March 19, 2010. This is factually incorrect.
 14 The Measure to suspend was ordered by the Supreme
 15 Court in December of 2008, and any subsequent or
 16 additional steps taken by Costa Rica's Government on
 17 that matter were consequences or an
 18 implementation--steps in implementation of that order
 19 and nothing more. If an indirect expropriation,
 20 indeed, occurred, it "crystallized" in December of
 21 2008.
 22 And so they knew that. What is their

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02:49:57 1 explanation for why, with this knowledge, they didn't
 2 proceed to initiate arbitration? In their last
 3 written submission and in the Opening, Claimants
 4 allege that they had not filed a claim because they
 5 were waiting to see whether Costa Rica would change
 6 the Park Law. They alleged that they were hopeful
 7 that Congress would approve a bill that they were
 8 lobbying for to change the conservation regime of the
 9 Las Baulas Park and that this would all be "sorted
 10 out." Expropriation would no longer be mandated, the
 11 law would be changed.
 12 Mr. Weiler, in the Opening, seems to allege
 13 that because Claimants were hopeful for a solution,
 14 the statute of limitation had been tolled. He
 15 said, "It would seem to us that it would make a lot
 16 more sense that we would want to put ourselves in the
 17 shoes of the Claimants, not in the shoes of a lawyer
 18 looking at this years later, and say, well, probably
 19 as of that date, whether it be March or whether it be
 20 May or whether it be June, they were probably quite
 21 hopeful that this was all going to get sorted out."
 22 Transcript Page 202, Line 17, to Page 203, Line 1.

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02:51:32 1 Mr. President, Members of the Tribunal, hope
 2 does not toll the Statutes of Limitations. Claimants
 3 knew well before June of 2010 of all the alleged
 4 breaches. What they were hoping to achieve is a
 5 matter irrelevant for the purposes of the statute of
 6 limitation. But this point deserves a bit more
 7 attention for two reasons: First, we heard a lot,
 8 including in closing, that what the Costa Rican
 9 Government do was improperly or out of compliance with
 10 Costa Rica's constitutional order amend a law
 11 expressing the intent and the will of Congress. And
 12 the point I want to make is that Congress had an
 13 opportunity to at the status of the Las Baulas Park on
 14 several occasions with those bills that were being
 15 discussed and tabled.
 16 Why the Costa Rican Congress decided to keep
 17 the status of the Park as it was and not to move
 18 forward with those bills is another matter. The point
 19 I'm making is, Congress had full opportunity to look
 20 at the status of the Park in 2010 when, according to
 21 Claimants, those bills were debated. Look at the
 22 status of the Park and say, if Congress so wished, "We

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02:53:05 1 disagree with the Supreme Court Decision. We disagree
 2 with the opinion of the Procuraduría. We disagree
 3 with the view of MINAE. We insist that the Park
 4 extends seawards." Congress didn't do that.
 5 The second point in relation to the hopes
 6 that they had is somewhat different. On the one hand,
 7 Claimants' assertion is--and it was repeated by
 8 Mr. Berkowitz here--that they were okay with the
 9 expropriation of the property, provided the
 10 compensation was right. They--the whole point why
 11 we're here is the compensation they were offered was
 12 not high enough. And Claimants have used all avenues
 13 available to them under Costa Rican Law, which is
 14 their right, to challenge the amount of compensation
 15 and seek higher amounts.
 16 Obviously, when they pursue those avenues,
 17 that delays the end result and the transfer of title,
 18 but in the meantime, they have been actively lobbying
 19 the Government to adopt a new Law that changes the
 20 status of the Park and that replaces expropriation
 21 with some sort of a controlled regime that would allow
 22 them to keep their property.

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02:54:34 1 So on the one hand they're saying, "We're
 2 content to have our property expropriated provided
 3 we're properly paid. In fact, you heard the at the
 4 very end of closing arguments that they now prefer,
 5 not only that the property within the 75 meters be
 6 expropriated, but they expressed a preference on that
 7 all their plots that are partially within the Park be
 8 expropriated. Whether Claimants preference has any
 9 value for the purposes of this arbitration is another
 10 matter.

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

20 Mr. President and Members of the Tribunal,
 21 what I'd like to do now is turn to a document that has
 22 become now famous in the hearing, the Contraloría

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02:57:42 1 so the Contraloría Report is not a new measure.

2 Let me start, perhaps, with Mr. Kantor's last
 3 question of the series, the question of does the
 4 manner in which the matter was disclosed to Claimants
 5 affect how the Tribunal should treat the assertions?

6 Let me start with that. The matter was not
 7 disclosed to Claimants by Respondent. First of all,
 8 they had the Contraloría Report. When they obtained
 9 it, they don't say, but it was first submitted by
 10 Claimants as Exhibit C-12k with their Memorial on the
 11 Merits. Claimants, in their Memorial on the Merits,
 12 before Costa Rica made any written submissions,
 13 referred to the Contraloría Report on six pages, which
 14 include at least two pages and a half of block quotes
 15 from that Report.

16 If you can move to Slide 18, please.

17 You'll see an excerpt, and this is just two
 18 pages, and you'll see here that they refer to the
 19 Contraloría Report, and then you see extensive quote,
 20 five paragraphs, and then again a new quote beginning
 21 at the bottom of the next page, in Paragraph 86, which
 22 carries over to the following page. So, I submit to

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02:56:01 1 Report--the Contraloría Report. I'm trying to get the
 2 right pronunciation--because this has now, in
 3 Claimants' Closing, become the centerpiece of their
 4 claims, and I want to submit to you that this is
 5 nothing but a huge distraction. It is not a new
 6 measure.

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

13 Second, the Contraloría Report has two
 14 aspects. One is it criticizes the expropriation
 15 procedures and asks the Administration to improve
 16 them, and the other aspect, of which a lot was
 17 discussed, including this morning, was an issue that
 18 was not necessarily irrelevant to improving the
 19 expropriation procedures. It was an issue of whether
 20 titles of properties, including properties inside of
 21 the Park, had any defect that dated back a long time
 22 before the events at initial this arbitration. Well,

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02:59:36 1 you that at least two and a half pages of block quotes
 2 from the Contraloría Report appeared in Claimants'
 3 Memorial on the Merits. It was cited on seven
 4 different occasions in the Memorial on the Merits. It
 5 was referred to in at least eight different paragraphs
 6 in Claimants' Memorial on the Merits. For the record,
 7 84, 85, 86, 87, 89, 90, 110, 112.

8 Paragraph 84 describes the 2010 Contraloría
 9 Report as follows, and I quote, "This seeming state of
 10 denial in which new Parks are designated but no plans
 11 are made to pay for their consolidation is not limited
 12 to the population at large. One portion of the 2010
 13 Report issued by the Respondent's Controller General
 14 on the management of the BNMP stands out in this
 15 regard. Unsurprisingly, the Controller General took
 16 both SINAC and MINAE to task for having failed to
 17 quickly wind up the process of expropriation for the
 18 Park."

19 They now claim in their Reply, Paragraph 136,
 20 that Respondent's Counter-Memorial was the first
 21 notification provided to Claimants that the
 22 expropriation process had even been suspended. The

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03:01:21 1 alleged decision to suspend the process was taken at
 2 least six years ago. An advanced copy of the Report
 3 was provided to MINAE and SINAC in January 2010. It
 4 is now, they say, 2014, and Respondent has yet to
 5 resume the expropriation process. And so on and so
 6 forth. They claim surprise. They claim that we
 7 disclosed to them only in the Counter-Memorial.
 8 Well, Mr. President and Members of the
 9 Tribunal, they knew and they discussed extensively the
 10 Contraloría Report. They knew about both aspects of
 11 the Report. One, that it recommended an improvement
 12 of the expropriation procedures; and, two, that it
 13 recommended a study that would research whether there
 14 were any defects of titles of properties in that area,
 15 in fact, in a larger area. They knew that. When they
 16 obtained the Contraloría Report, we don't know. They
 17 had it when they submitted their Memorial on the
 18 Merits. The Contraloría reported was issued in
 19 February of 2010, and it was published on the
 20 Contraloría Web site, and it is still there, so it is
 21 a public document.
 22 I said it's not a measure. Let us talk about

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03:04:05 1 Mr. Jurado, I think, used the word
 2 "hypothetical" and it is hypothetical. We don't know
 3 yet what the study will find. If the study finds a
 4 defect--and this is, again, the testimony of
 5 Mr. Jurado--it is not clear whose responsibility this
 6 defect may be. It may be the responsibility of the
 7 State, not of the property owner. If the defect is
 8 the responsibility of the property owner, then the
 9 Procuraduría will take a look at it and decide what to
 10 do. It may be hypothetical, he said, in Mr. Jurado's
 11 situation, where the Procuraduría may initiate legal
 12 proceedings against the property owner if a defect the
 13 title is discovered that is the responsibility of the
 14 owner and is sufficiently serious.
 15 I ask you, Mr. President, Members of the
 16 Tribunal, where is the measure here? This is all
 17 hypothetical. The study has not yet come out. It's a
 18 recommendation to conduct a study. That's all that
 19 there is.
 20 Now, on the other point, the other part of
 21 the Contraloría Report, the suspension of the
 22 expropriation proceedings so that they can be

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03:02:47 1 that aspect of it of which they complain most, which
 2 is that Costa Rica--I think the allegation was Costa
 3 Rica is seeking for a--is looking for ways to
 4 expropriate the property without paying, and,
 5 therefore, the Contraloría hatches up this
 6 recommendation to look at the titles of the properties
 7 in the area, and if there are defects, then the State
 8 should go ahead and annul the titles and expropriate
 9 the property without paying, and that way the issue of
 10 the expropriation of the properties in the Park is
 11 resolved. That is, in my words, a summary of the
 12 claim.
 13 Well, to begin with, the Contraloría
 14 recommendation is not a measure. The Contraloría
 15 Report is saying, "You need a study to look at whether
 16 there are defects in the titles of certain
 17 properties." That study, as Mr. Jurado testified, was
 18 commissioned. It should be coming this year. It's an
 19 independent third party that is looking at it. If the
 20 study finds defects--first of all, it may find no
 21 defects, in which case, issue closed. Where is the
 22 measure, is the question.

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03:05:18 1 improved, and, again, I'm answering or attempting, at
 2 least, to answer a question by Mr. Kantor of exactly
 3 what conduct was taken by the Contraloría, at least in
 4 that regard and by SINAC and when. And what we have
 5 in the record--and, of course, we have to stick with
 6 the record--is the Witness testimony submitted by
 7 Respondent of Ms. Sabrina Loasiggia Arias--
 8 Exhibit RWE-003. And I point you to Paragraphs 8--18,
 9 19--I'm sorry, 18, 19, and 20 of that Witness
 10 Statement, and unfortunately for me and everybody
 11 else, I have it in Spanish, so my English rendering of
 12 it may not be quite the same as the English translation
 13 we have provided, but I will paraphrase what she says.
 14 That the suspension of the expropriation at the
 15 administrative phase was carried out as response to
 16 the study, carried out by the Contraloría, relating to
 17 the expropriations in the National Park. Handling
 18 those expropriations was not an easy task, and this is
 19 exactly why the Contraloría decided to conduct an
 20 audit in relation to the expropriations in the
 21 National Park. This audit started--and here is a data
 22 point. This audit, she says, started in the middle of

03:07:19 1 2008, when the Contraloría conducted various meetings
 2 with functionaries of SINAC. I was present in those
 3 meetings, and the purpose of the meetings to
 4 discuss--was to discuss all the details relating to
 5 the expropriations of the Park. So, those meetings
 6 between the Contraloría and SINAC started in the
 7 middle of 2008.

8 She then continues, during those meetings in
 9 2008 it became evident that the Contraloría would
 10 recommend in its final report that the process of
 11 expropriation for the purposes of improve the process
 12 of expropriation--I'm sorry, would recommend the
 13 suspension of the process of expropriation in order to
 14 improve the process of expropriation and safeguard the
 15 rights of the owners.

16 For this reason, and for the purpose of
 17 allowed improvement of the expropriation process,
 18 SINAC decided to suspend the process, which was at
 19 that point in the administrative stage. So, SINAC
 20 suspended that process sometime in 2008, when it
 21 became evident to them during those meetings, that
 22 that would be the recommendation of the Contraloría.

03:08:40 1 And for the same reason, she testifies, SINAC
 2 decided to suspend the initiation of new expropriation
 3 procedures. And then she continues in Paragraph 20,
 4 in 2010, the Contraloría issued its final Report, and
 5 it recommended that MINAE and SINAC, in the general
 6 directorate of taxes related to administration and the
 7 management of the Park, improve the expropriation
 8 processes. And I'm not going to read the whole
 9 paragraph.

10 So this is the testimony we have in the
 11 record. To sum up, some time in the middle of 2008,
 12 there are those meetings. SINAC understands that will
 13 be the recommendation. They suspend at that time to
 14 look at what they can improve. The Report is issued,
 15 made public in February of 2010. This is what we have
 16 on the record. Claimants have reviewed this
 17 testimony, and the Witness was not called to explain
 18 further exactly what and how happened.

19 Let me also say, in addition to the fact that
 20 the Report was public, that Claimants already knew the
 21 administrative proceedings were suspended. If I can
 22 refer you again to Appendix 2, to Claimants' Rejoinder

03:10:23 1 On Jurisdiction. So, if you look at the third column,
 2 these are the dates that Claimants objected to the
 3 administrative appraisal.
 4 (Pause.)
 5 MR. ALEXANDROV: Excuse me, I'm looking for a
 6 reference to a law.
 7 According to the law on expropriation, which
 8 I'm told is Exhibit C-1c, after an objection to the
 9 administrative appraisal is made, the law requires
 10 that the matter is moved to the judicial stage, which
 11 will review the objection within six months. And so
 12 if you look at the first batch of properties, the nine
 13 properties where the administrative proceeding was
 14 suspended, you see that with respect to all of them,
 15 the objection was made on 21 January 2009. Under the
 16 law, within six months--that is, by July 21, 2009--the
 17 matter should have moved to the judicial phase, and it
 18 didn't.

19 We don't--of course, we cannot get into the
 20 minds of Claimants to know what they knew and how, but
 21 they were advised all the time by their competent
 22 Costa Rican lawyers. They knew very well the

03:12:32 1 administrative and the judicial process and they knew
 2 or should have known that within six months of
 3 January 21, 2009, the dispute about the amount of
 4 compensation should have moved to the judiciary phase,
 5 and it didn't. And if they didn't understand
 6 why--which we question--but if they didn't understand
 7 why, as of July it 21, 2009, they should have started
 8 asking questions because it would have been evident or
 9 should have been evident to them and their lawyers at
 10 the time that the process was not moving forward,
 11 according to the law.

12 Let me also emphasize--and I think it became
 13 clear during the discussion that we had--that, if the
 14 suspension of the administrative proceeding had any
 15 effect--and we deny that it had the intended effect,
 16 but for certain it did not apply to the nine
 17 properties that had already moved to the judicial
 18 stage, that are the second group of properties on this
 19 slide. The suspension of the administrative
 20 proceedings did not apply and could not have applied
 21 to the proceedings of expropriation that were already
 22 at the judiciary stage.

03:14:08 1 And Mr. Jurado explained that very well, and
 2 he said neither the Procuraduría, nor the Contraloría,
 3 nor SINAC, nor MINAE could in any way suspend the
 4 proceedings at the judiciary stage. The suspension
 5 related only to the nine properties that are on top of
 6 that chart. I think it was suggested this morning
 7 during Claimant's closing that, well, in view of the
 8 recommendations of the Contraloría, other Government
 9 official did the best they could to slow down or grind
 10 to a halt the judicial proceedings.

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

17 What you don't see, of course, here, is six
 18 properties, if I'm not mistaken, where a Declaration
 19 of Public Interest has not been issued. The
 20 administrative proceeding is not suspended there
 21 because there is no administrative proceeding. You
 22 heard testimony yesterday that, where the Declaration

03:15:31 1 of Public Interest has not been issued, Claimants
 2 enjoyed their full rights in relation to that property
 3 and can sell it if they so wish.

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

12 What you also heard yesterday from Ms. Chaves
 13 was that, with respect to the nine properties where
 14 the Administrative Procedure is suspended--and you see
 15 that on the screen, and you have the transcript
 16 reference there. What Ms. Chaves said was that the
 17 Declaration of Public Interest has an effect or legal
 18 validity for a year. And if the Decree of
 19 Expropriation is not issued within a year of the
 20 declaration of public interest, it loses legal force.
 21 And so with respect to those properties, they enjoy
 22 the rights as if the Declaration of Public Interest

03:16:56 1 had not been issued. And that is the testimony that
 2 you have on the record in that regard.

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

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

8 Of course, Mr. Kantor had other questions.

9 (Comments off microphone.)

10 PRESIDENT BETHLEHEM: Did we lose
 11 translation?

12 Yes, for a moment.

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

20 So Question Number 5, what standards should
 21 the Tribunal employ to distinguish between "measures"
 22 and "lingering effects," the lingering effects of

03:18:51 1 earlier conduct and what evidence is relevant to
 2 determine the category into which this matter should
 3 be placed?

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

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

03:20:36 1 concept to the facts. I'll go into the facts in a
 2 moment.
 3 The more difficult situation, of course,
 4 arises when there is a continuous act because it
 5 extends throughout a period of time. And it is
 6 explained in the commentary of the ILC Articles as
 7 follows: "In accordance with Paragraph 2, a
 8 continuing wrongful act, on the other hand, occupies
 9 the entire period during which the act continues and
 10 remains not in conformity with international
 11 obligation provided that the State is bound by the
 12 international obligation during that period." So, in
 13 a way part of the challenge here is to distinguish
 14 between a complete act that has consequences or
 15 effects and a continuing act.
 16 If you allow me, I want to come to that point
 17 in relation to expropriation, in particular, when I'm
 18 addressing the President's questions about whether the
 19 obligation under Article 10.7 is one or two, and
 20 whether we can--whether it can be argued that the
 21 failure to pay prompt, adequate, and effective
 22 compensation is a continuing, or continuous act,

03:22:05 1 rather than the effect of a one-time act that took
 2 place before.
 3 So, if you allow me, I want to address that
 4 particular point when I get to the question of
 5 Article 10.7. I can foreshadow the answer, which is
 6 that its one obligation, and the failure to pay
 7 compensation is not a continuous act, but I will
 8 elaborate on that when I get to that point.
 9 What I do want to say now is, if you look at
 10 Slide 21, which you will find familiar because we
 11 showed you some of those quotes from Claimants'
 12 written submissions of how Claimants themselves
 13 characterized their claims. So, one of their claims,
 14 creeping expropriation, according to Claimants
 15 themselves, completed the creeping expropriation--the
 16 creeping expropriation completed in March of 2009.
 17 The next bullet point, the Measures
 18 tantamount to expropriation: So, this presumably
 19 relates to the indirect expropriation--crystallized on
 20 19 March 2010.
 21 The third bullet point: The composite impact
 22 of Respondent's measure substantially deprived the

03:23:53 1 Claimants of their use and enjoyment of property on or
 2 about 19 March 2010.
 3 And then the fourth bullet point: Consistent
 4 with the customary international law, it is at that
 5 point when the nine Lots have been subjected to direct
 6 expropriation that the State takes possession of the
 7 land thereby satisfying the customary requirements of
 8 a direct taking.
 9 With respect to the direct expropriation, in
 10 sum, the only question--and I will address that
 11 question in a moment when I talk about
 12 Article 10.7--is whether the alleged nonpayment of
 13 adequate compensation. I will argue that the issue
 14 here is on adequate compensation, but let's say for
 15 conceptual purposes, prompt, adequate and effective
 16 compensation. The only question with respect to the
 17 direct expropriation is whether the obligation to pay
 18 prompt, adequate, and effective compensation is a
 19 separate compensation, separate obligation, and then
 20 the nonpayment of that compensation is a continuous
 21 act. I will address that in a moment.
 22 With respect to indirect expropriation, the

03:25:21 1 question is whether the suspension of the issuance of
 2 the permits is a continuous act. And we claim, and
 3 they agreed in their Witness Statement, that as of
 4 2008, those permits were no longer issued. And
 5 suspension, we submit, is a one-time act. There was a
 6 decision, an Order to suspend, and everything else
 7 after that, after the Supreme Court's decision, are
 8 the consequences of that Order. To the extent that
 9 the administration took any steps, those steps were to
 10 implement that Order. That Order may have continuing
 11 effects. They are not obtaining permits, but this is
 12 a one-time act, a one-time measure.
 13 Mr. President, if you'll allow me to now say
 14 a few words about Article 10.7, and then I'll ask for
 15 a break.
 16 PRESIDENT BETHLEHEM: Yes, please do.
 17 MR. ALEXANDROV: Let me start by saying that
 18 under CAFTA, the jurisdiction of this Tribunal extends
 19 to measures under CAFTA and not to measures under
 20 domestic law. And so you don't have jurisdiction to
 21 assess whether there was an expropriation under the
 22 law of Costa Rica and whether prompt, adequate, and

03:27:30 1 effective compensation was paid in accordance with the
 2 requirements of the law of Costa Rica. Your
 3 jurisdiction extends to claims for breaches of CAFTA,
 4 and I don't think that would be controversial.
 5 The reason I'm saying that is there may be a
 6 dispute in relation to the amount of compensation, let
 7 us say, under the laws of Costa Rica, but that dispute
 8 is not before you.
 9 So, let's look at Article 10.7. The first
 10 question is, is the requirement to pay prompt,
 11 adequate and effective compensation a separate
 12 obligation. And the answer is--when I say "separate,"
 13 is that a second obligation? And the answer is no
 14 because there is no first obligation. There is no
 15 obligation not to expropriate, period. The obligation
 16 is not to expropriate unless four conditions are met.
 17 If you allow for the purposes of simplicity to ignore
 18 the three other conditions, they are not in contention
 19 here, and focus on the condition of expropriation--on
 20 compensation.
 21 So, there is no obligation not to
 22 expropriate. There is an obligation to expropriate on

03:29:02 1 payment of prompt, adequate, and effective
 2 compensation, and that is the one and only one
 3 obligation.
 4 The question arises, well, how about
 5 Paragraph 2 which says "compensation shall be" A, B,
 6 C, D. And I submit to you that Paragraph 2 is an
 7 elaboration on Paragraph 1(c), which says on payment
 8 of prompt, adequate and effective compensation in
 9 accordance with Paragraphs 2 and 4. So Paragraph 2
 10 explains what prompt, adequate, and effective
 11 compensation is. It doesn't create an independent
 12 obligation.
 13 So, our submission to you is that there is
 14 one and only one obligation, and that obligation is to
 15 expropriate upon payment of prompt, adequate, and
 16 effective compensation and Paragraph 2 explains what
 17 that means.
 18 And indeed, I gave an example in my Opening.
 19 Counsel for Claimants restated that example. If these
 20 were two separate obligations, then you could have an
 21 expropriation, a one-time act, that took place many
 22 years ago. If compensation has not been paid and

03:30:30 1 continues not to be paid, then a CAFTA Tribunal would
 2 have jurisdiction for alleged breaches of CAFTA
 3 because compensation was not paid for all alleged
 4 expropriations that happened from time immemorial
 5 until the day CAFTA entered into force, if
 6 compensation is not paid. Not only that, not only if
 7 compensation wasn't paid, but if compensation was paid
 8 but it was not prompt, adequate, or effective. And so
 9 you could have a CAFTA Tribunal dealing with Claims
 10 that compensation paid for an expropriation a long
 11 time ago was not adequate, for example, because it
 12 didn't reflect Fair Market Value and that became a
 13 breach on the day CAFTA entered into force and,
 14 therefore, a CAFTA Tribunal has jurisdiction to
 15 entertain a claim that the State had failed to pay
 16 adequate compensation for an expropriation that
 17 happened early on.
 18 Let me also look at this in a different way.
 19 A Tribunal performing an analysis under Article 10.7
 20 will have to go through the following steps.
 21 Step 1: Is there an expropriation? Because
 22 it may be that there is no expropriation to begin

03:31:58 1 with. Is there an expropriation? Is there some
 2 Tribunal--some Tribunals have defined that as
 3 substantial deprivation. Other have said total
 4 deprivation, it doesn't matter what the standard is.
 5 The first step of the analysis for the Tribunal to
 6 determine is is there an expropriatory measure. In
 7 doing that, the Tribunal will have to look at Annex
 8 10-C to see whether it's a regular taking, whether it
 9 falls within the scope of that annex, and the
 10 Tribunal's analysis will be informed by customary
 11 international law, et cetera, et cetera. But the
 12 first step of the analysis is to answer the question
 13 was there an expropriation.
 14 The second step of the analysis would be:
 15 Was compensation paid?
 16 The third step would be whether that
 17 compensation was prompt, adequate, and effective. And
 18 I submit to you that you have no jurisdiction to
 19 answer the first question because those events, the
 20 expropriation happened both before the critical date
 21 for the statute of limitations and before CAFTA
 22 entered into force on their own case. The only thing

03:33:06 1 that happened after CAFTA entered into force was the
 2 failure to pay prompt and adequate compensation.
 3 But to answer the question whether
 4 compensation was due in the first place, you have to
 5 ask the question whether there was an expropriation
 6 under CAFTA. And only if the answer to that question
 7 is yes, you move on to the point of, in this case,
 8 were the four conditions met, including the payment of
 9 prompt, adequate, and effective compensation. You
 10 don't get to that step.

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

20 Day 2 there is a general election and a
 21 change of Government. And Day 3 a new Government
 22 imposes an exchange control measure which prohibits

03:34:26 1 the removal of the compensation payment from the bank
 2 account. And that somewhere in between those periods
 3 a time bar operates.

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

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

16 PRESIDENT BETHLEHEM: This is precisely what
 17 I'm getting at, because may be--this is not quite the
 18 way in which Claimants have put their argument--but it
 19 may be that there are measures of delay, which in some
 20 shape or form, some accretion of form to a particular
 21 date, amount to a new measure that may be a
 22 consequences from the Contraloría Report or something

03:35:55 1 of that nature.

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

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

20 I don't think that you can relate that to the
 21 amount of compensation or, in fact, the effectiveness
 22 of the compensation because your example assumes that

03:37:25 1 compensation is ordered, let's say, in U.S. dollars,
 2 and then Claimant--the potential Claimant cannot
 3 convert the local currency or take the amount out of
 4 the country because of that new act. So that new act
 5 is not necessarily an act that goes to the
 6 effectiveness of the compensation. The compensation
 7 has already been ordered to be effective. It what
 8 goes to a different point, which is, the Claimant
 9 cannot take its compensation out of the country in
 10 U.S. dollars.

11 PRESIDENT BETHLEHEM: Is that quite correct?
 12 Because 10.7.1(c), which is the prompt, adequate, and
 13 effective compensation, as you say, is in accordance
 14 with Paragraphs 2-4, and then Paragraph 2 says
 15 compensation shall, inter alia, be fully realizable
 16 and fully transferable. And, indeed, I think that's
 17 the common appreciation of effective compensation, is
 18 that it is fully realizable and freely transferable.

19 MR. ALEXANDROV: Yes, and if that is ordered
 20 by whatever the expropriating bodies or the Court,
 21 then that requirement is complied with. A new
 22 restriction imposed on the convertibility of the

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03:38:45 1 currency is not related to that expropriation.
 2 Whether the Claimant cannot take out the amount of
 3 compensation or dividends or profit is a matter that
 4 is not directly related to this expropriation. I
 5 think, if I can change your example a little bit--

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

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

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

21 MR. ALEXANDROV: Well, on that example, every
 22 transfer restriction would be an expropriation. I

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03:39:47 1 mean, the amount of money sits there. The Claimant
 2 cannot take it out of the country or cannot take it
 3 out of the country in dollars. I'm not sure exactly
 4 what the example is. Claimant still has the money,
 5 presumably, so I don't know--and maybe I don't--I
 6 should not speculate whether this would amount to an
 7 expropriation or not. It may, in the circumstances
 8 that you describe, amount to a breach of a transfer
 9 provision, may or may not. I would not believe that
 10 it would amount to a breach of the expropriation
 11 provision.

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

21 The question however, which is a somewhat
 22 different question, is--and if your example goes to

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03:41:09 1 the actual expropriation happens earlier and this act
 2 restricting Claimants' ability to receive effective
 3 compensation happens later, I come back to my analysis
 4 which is, if you're sitting as arbitrators in a
 5 hypothetical situation like that, you still have to go
 6 through the analysis of whether the initial act was an
 7 expropriation to begin with. And in your
 8 hypothetical, you're saying, but what if there is an
 9 agreement between the Parties that there's an
 10 expropriation, what if there's an agreement that the
 11 compensation is prompt and adequate, and the only
 12 question is whether it's effective. Maybe.

13 If the question that is posed to the Tribunal
 14 is only whether there's a violation of that particular
 15 provision that requires effective compensation, maybe
 16 you have jurisdiction. But that's the reason I
 17 started my discussion by saying "in this case, you
 18 have first to determine whether, indeed, there has
 19 been an expropriation". Because we have argued on the
 20 merits that there hasn't been. And you have to
 21 determine as Step Number 1 whether the Measures are,
 22 indeed, expropriatory or not. And you have to

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03:42:25 1 determine that they are before you go to the next
 2 step, which is, therefore, you can only do that, Costa
 3 Rica, on payment of prompt, adequate, and effective
 4 compensation.

5 But you don't get to that step because, in
 6 our submission, you don't have jurisdiction to
 7 determine whether the Measures alleged that
 8 expropriatory or not under CAFTA because they happened
 9 at the time period that is outside of this Tribunal's
 10 jurisdiction.

11 PRESIDENT BETHLEHEM: On that thesis, there
 12 would be, as it were, a lock, because we would not be
 13 able to look at anything going back before the 1st of
 14 January 2009, and perhaps you'll come a little bit
 15 later to give us your views on the interpretation of
 16 paragraph--whichever one it is, 10.1.3, and that
 17 language of conduct or act.

18 But let me just explore a little bit further
 19 with you the point. Assuming that there is an
 20 expropriation, just for the sake of the analysis, that
 21 there is an expropriation, and the State says, "We
 22 promise to pay you compensation next month." And the

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03:43:36 1 time bar falls after that promise before the next
2 month. And the next month comes along and the State
3 says, "Well, we've just had a little bit of an
4 administrative difficulty. We promise to pay you in a
5 month's time." And that this goes on for six months,
6 and that six months thereafter, the time bar having
7 passed, the State says, "Terribly sorry, we've
8 considered. We have now decided that we're not going
9 to pay you compensation."

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

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

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03:46:22 1 of prompt, adequate, and effective compensation, then
2 you have--then you don't have jurisdiction, because,
3 again, leaving the facts aside for the moment and
4 assume as we have asserted in this case that all
5 expropriatory acts or omissions happened before
6 January 1, 2009, you cannot say that this is an
7 expropriation within the meaning of Article 10.7
8 because the obligation of Article 10.7 did not extend
9 backward under 1.1.3. And if this is not an
10 expropriation within the meaning of Article 10.7,
11 there is no obligation to pay prompt, adequate, and
12 effective compensation.

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

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03:44:54 1 if compensation is not paid according to the standards
2 of that Treaty, then we are in a different situation,
3 and I would agree with you.

4 But in a situation where there are acts or
5 omissions that predate the Treaty and there is a
6 dispute between the Parties of whether those acts or
7 omissions constitute an expropriation under the Treaty
8 or not, because that's the question here, not under
9 Costa Rican Law but under the Treaty, and those acts
10 or omissions predate the Treaty, and we take the
11 position that, one, you don't have jurisdiction
12 because of the statute of limitations; two, those acts
13 cannot be a breach of the Treaty because of
14 Article 1.1.3, and, therefore, there's a first missing
15 step in the analysis, which is there is no
16 expropriation within the meaning of Article 10.7. And
17 if there is no expropriation within the meaning of
18 Article 10.7, in other words, expropriation under
19 CAFTA, where the obligation arises, or to use the
20 language on which--I just want to make sure I don't
21 mistake--I don't misquote the language--and that that
22 expropriation is only possible under CAFTA on payment

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03:47:47 1 Article 14 of the ILC Drafts; is that correct?

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

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

7 MR. ALEXANDROV: Yes.

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

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

17 PRESIDENT BETHLEHEM: Thank you very much.

18 Now, I just wanted to come back to--let me
19 just find it--to the language of--excuse me--10.1.
20 So, 10.1.3, for greater certainty, "this chapter does
21 not bind any Party in relation to any act or fact
22 before the date of entry into force of this

03:49:14 1 agreement."
 2 And we've heard quite a lot from both Parties
 3 about the generality of the interpretation of 10.1.3.
 4 We haven't, I don't think, heard of a detailed
 5 analysis of what weight we need to place on the words
 6 "in relation to any act or fact" before the date of
 7 entry into force, and whether that precludes us having
 8 regard to acts or facts, even if they did not bind.
 9 Because on your analysis, as I'm understanding it, we
 10 are precluded from having regard to whether there was
 11 an expropriation. You are shaking your head, so, I'm
 12 obviously--I'm misunderstanding.
 13 MR. ALEXANDROV: No. I'm sorry that I did
 14 not communicate. That is not our position. We agree,
 15 and there is extensive authority, including Mondev,
 16 that you can take into consideration acts or facts
 17 that happened before the entry into force of the
 18 relevant Treaty to determine whether facts or acts
 19 that took place after or conduct that took place after
 20 constitute a violation of the Treaty or not. We agree
 21 with that and we don't argue.
 22 Again, what we're saying is that you cannot

03:50:31 1 determine that acts or facts before that took place
 2 before the entry into force of the Treaty constitute a
 3 violation of the Treaty because of the plain language
 4 of the provision. And because, in our submission, the
 5 acts or facts that Claimants' own case constitute
 6 expropriation, whether direct or indirect, took place
 7 before the entry into force of the Treaty, you cannot
 8 determine whether that is an expropriation within the
 9 meaning of Article 10.7. And because you cannot
 10 determine that this is an expropriation within the
 11 meaning of Article 10.7, you cannot decide--you're not
 12 free to decide that compensation is owed.
 13 In other words, to put it differently--and I
 14 think I tried to put it differently in the Opening,
 15 before CAFTA, there was no duty--before CAFTA entered
 16 into force, an uncompensated expropriation under CAFTA
 17 was not prohibited and Costa Rica could carry out an
 18 uncompensated expropriation of Claimants' property
 19 before CAFTA entered into force, and that would not be
 20 actionable under CAFTA. And I will take it a step
 21 further, and I would say not only that, but before
 22 CAFTA entered into force, Costa Rica had no duty under

03:52:06 1 CAFTA to carry out an expropriation and provide
 2 prompt, adequate, and effective compensation. It had
 3 a duty under Costa Rican Law to provide whatever
 4 it--whatever that duty is, and we're not discussing
 5 the issue of Costa Rican Law, but under CAFTA there
 6 was no duty to provide prompt, adequate, and effective
 7 compensation before CAFTA entered into force.
 8 PRESIDENT BETHLEHEM: Well, presumably--and
 9 this may be a side point, but just to
 10 clarify--presumably Costa Rica had an obligation under
 11 customary international law in respect of any
 12 expropriation to provide prompt and adequate and
 13 effective compensation because that was customary
 14 international law. It may not have been an obligation
 15 under CAFTA because CAFTA was not in force. The issue
 16 may not be material here because the Claimants would
 17 not have had a procedural route to address it. But
 18 there would have been an obligation on Costa Rica.
 19 MR. ALEXANDROV: I agree with that. I think
 20 that, if Claimants are able to show a provision of
 21 customary international law, and I don't want for the
 22 purposes of this proceeding to discuss whether or not

03:53:15 1 there is a breach of customary international law in
 2 this case, but, yes, I would agree with you that, if a
 3 Claimant would show that a Respondent State is in
 4 breach of the customary law rules of prohibiting
 5 uncompensated expropriation and requiring a prompt,
 6 adequate, and effective compensation, there would be a
 7 breach of customary international law.
 8 The question then arises, one, is this a
 9 claim under the customary international laws of
 10 expropriation? The answer is no. And two, do you as
 11 a CAFTA Tribunal have jurisdiction to rule on breach
 12 of customary international law? And the answer to
 13 that question is also no.
 14 PRESIDENT BETHLEHEM: Just--apologies, just
 15 one last question for me on this, and--from what
 16 you've said, the Respondent's position is that in
 17 circumstances in which the Respondent does not accept
 18 that there is an expropriation contrary to CAFTA, we,
 19 the Tribunal, do not have jurisdiction to assess that
 20 going back before 1st of January 2009; is that
 21 correct?
 22 MR. ALEXANDROV: Yes.

03:54:29 1 PRESIDENT BETHLEHEM: In circumstances in
 2 which there may be--and I'm hypothesizing here because
 3 I don't have the issues closely in mind--but in
 4 circumstances in which there may be on the record,
 5 because of an administrative or judicial decision of
 6 the Costa Rican authorities, that an expropriation has
 7 taken place, even though they have not characterized
 8 that expropriation as an expropriation under CAFTA,
 9 would you maintain your Objection to Jurisdiction?
 10 MR. ALEXANDROV: Yes, because I started my
 11 discussion on this point by saying regardless of what
 12 domestic courts have ruled under domestic law with
 13 respect to whether there is or there isn't
 14 expropriation, that ruling is with respect to Costa
 15 Rica's domestic law.
 16 The mandate of this Tribunal is to determine
 17 whether there has been an expropriation within the
 18 meaning of Article 10.7. And that question is the
 19 first question you need to answer in your analysis to
 20 reach Step 2 and Step 3 of whether compensation is due
 21 and whether it meets the requirements of prompt,
 22 adequate, and effective. And my view is, if you

03:55:49 1 cannot answer the first question with respect to
 2 CAFTA, then you cannot proceed with your analysis to
 3 the second and third, because the only way you proceed
 4 to your analysis is if you answer the question in the
 5 affirmative, and the question is, has there been an
 6 expropriation within the meaning of CAFTA?
 7 PRESIDENT BETHLEHEM: Thank you very much.
 8 Let me just, on this question, just turn to my
 9 colleagues to see whether either of them want to raise
 10 any question. And then we will take a break.
 11 ARBITRATOR KANTOR: In light of the
 12 Chairman's promise that we will take a break, I will
 13 be quite brief on these questions only. I'll defer
 14 other questions until another more appropriate time.
 15 Only focusing on the questions, the line of
 16 questions our Chair was pursuing, I heard Claimants
 17 argue earlier today that to illustrate that items in
 18 Article 10.7(2) give rise to independent obligations,
 19 obligations of independent legal significance, one
 20 might look at 10.7.1(d), which refers to due process
 21 and cross-refers to Article 10.5 of CAFTA, the Minimum
 22 Standard of Treatment provision. And counsel for

03:57:18 1 Claimants asked an open question: How can we know
 2 with respect to matters such as promptness and
 3 adequacy of compensation whether there has been a
 4 failure within the meaning of Article 10.5 until the
 5 events that are alleged to be the failure crystallize?
 6 Therefore, there must be at least more than one
 7 possible time period. I draw that inference from his
 8 argument. I'd appreciate if you could comment on that
 9 argument and your views regarding it.
 10 MR. ALEXANDROV: Thank you.
 11 I would give you two--I will answer that
 12 question in two ways: One is--and I'm sorry that I'm
 13 repeating myself, but it is similar to the answer that
 14 I gave to the President, which is--except I gave it
 15 with respect to Paragraph (c), but my answer is the
 16 same with respect to Paragraph (d), which is that, in
 17 your analysis of a potential breach of Article 10.7,
 18 you, or a tribunal, would have to answer first the
 19 question of whether there's an expropriatory act. And
 20 only within the meaning of CAFTA, and only if the
 21 answer to that question is in the affirmative, you ask
 22 yourselves the second question, which is, in your

03:58:54 1 example, Mr. Kantor, is that act in accordance with
 2 due process of law and Article 10.5?
 3 The question of whether the alleged
 4 expropriation is carried out in accordance with
 5 subparagraph (d) does not arise if there is no
 6 expropriation within the meaning of Article 10.7; and
 7 our argument is that there is no expropriation within
 8 the meaning of Article 10.7 because the relevant acts
 9 and fact happened before CAFTA entered into force.
 10 And so the question of whether any of the four
 11 conditions is complied with simply does not arise.
 12 My second--the second way I would like to
 13 address that question, and I will address it, perhaps,
 14 a little bit differently. If we can put the Mondev--I
 15 have put on the screen--not that my presentation was
 16 necessarily in some particular order, but you have, of
 17 course, with your questions, forced me to further
 18 change the order, but that is very helpful to us, so
 19 I'm not at all objecting.
 20 So, with respect to compensation, the Mondev
 21 culture is, of course, with respect to NAFTA, but the
 22 language is the same. And so, what the Tribunal says

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04:00:32 1 in Mondev is that Article 11.10 of NAFTA requires that
 2 the nationalization compensation be on payment of
 3 compensation in accordance with those provisions. The
 4 word "on," the Mondev Tribunal says, should be
 5 interpreted to require that the payment be clearly
 6 offered or be available as compensation for taking
 7 through a readily available procedure at time of the
 8 taking.

9 And so, my other way of answering the same
 10 question is if you look at this chart, you will see
 11 that with respect to the expropriation proceedings
 12 that have already been initiated, that is with respect
 13 to the 18 properties, in the words of the Mondev
 14 Tribunal, a payment was clearly offered and made
 15 available on the dates that you see in the second
 16 column, that is, between 2006 and 2008. It was
 17 clearly offered because the administrative appraisal,
 18 the amount of the administrative appraisal, was made
 19 available to Claimants. It was clearly offered and it
 20 was available as compensation. And the time period is
 21 2006-2008. So, with respect to speaking of the
 22 condition of compensation, with respect to those

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04:03:27 1 If that is the case, and there has been no
 2 assertion here that offering the amount of the
 3 administrative appraisal was not prompt, then the only
 4 element that remains in terms of a basis of a claim is
 5 that the amount was not adequate, meaning not Fair
 6 Market Value. That claim arose with respect to those
 7 properties between 2006 and 2008.

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

20 And that dispute--and you asked a question of
 21 a dispute and when this dispute--that dispute arose
 22 well before the statute of limitations and well before

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04:02:09 1 properties where expropriation procedures have been
 2 initiated, the requirement, according to the standards
 3 laid out--set forth by the Mondev Tribunal, if
 4 Article 10.7 were to apply, the requirement of
 5 10.7.1(c) on payment of compensation would be met.

6 And so, let's deal then with two
 7 requirements. There is no issue of effectiveness
 8 here, or there is nothing. So, the issues are prompt
 9 and adequate, as explained in Paragraph 2. And I
 10 argue that Paragraph 2 simply elaborates on what
 11 "prompt and adequate means." "Prompt" is timing. You
 12 will see, if you look at those dates, that the
 13 administrative appraisal and the amount under the
 14 administrative appraisal was made available, was
 15 offered to and made available to Claimants within less
 16 than a year.

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

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04:04:47 1 CAFTA entered into force, and that is a dispute we're
 2 having here today, whether they were paid or were
 3 offered and whether the amount that was made available
 4 to them was Fair Market Value or not. And again, that
 5 dates back to '06, '08.

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

21 PRESIDENT BETHLEHEM: Is that the breach only
 22 arises when there is something to breach, when CAFTA

04:06:16 1 enters into force.
 2 MR. ALEXANDROV: Right. Right. Yes. So,
 3 how could there be a breach, let alone how could they
 4 have known about it, if there was no breach as a
 5 matter of law.
 6 So, there is a factual argument to that,
 7 which is easy, which is in this case, even if they
 8 learned about the breach on January 1, 2009, they are
 9 still out for the purposes of the statute of
 10 limitations. But to address the question as a legal
 11 matter, this provision in our submission must not have
 12 envisaged a situation where there was an act or
 13 omission or a conduct that predated CAFTA, because it
 14 cannot be that continuous conduct--and this is a
 15 purely hypothetical, this is not our situation--but it
 16 cannot be that conduct, that is no question continuous
 17 conduct, that started 20 years ago and continues until
 18 today, but they learned about this conduct--they, the
 19 hypothetical Claimants--20 years ago, is not time
 20 barred because yesterday CAFTA entered into force and,
 21 therefore, the breach only arose yesterday. And that
 22 is the legal answer to the question.

04:07:36 1 PRESIDENT BETHLEHEM: And I think that that's
 2 probably an appropriate point at which to have a brief
 3 recess. It's now approaching 10 minutes past 4:00.
 4 Let's take a break until 25 past 4:00, 25 minutes past
 5 4:00.
 6 (Brief recess.)
 7 PRESIDENT BETHLEHEM: Mr. Alexandrov, back to
 8 you.
 9 MR. ALEXANDROV: Thank you, Mr. President.
 10 As I mentioned in the beginning, I don't have
 11 a script; if I had, I wouldn't know where I was in the
 12 script. But, given the questions from the Tribunal, I
 13 don't think we will manage in the remaining half an
 14 hour, 35 minutes, so we ask for your indulgence for a
 15 few minutes more.
 16 PRESIDENT BETHLEHEM: You certainly have
 17 latitude. We've been the ones who have been delaying
 18 you, so you've got the latitude.
 19 MR. ALEXANDROV: On issues of delay, we have
 20 a somewhat different view.
 21 PRESIDENT BETHLEHEM: These are not lingering
 22 effects, Mr. Alexandrov.

04:27:04 1 MR. ALEXANDROV: Mr. President and Members of
 2 the Tribunal, I want to go back for a minute to
 3 Slide 21 where we gave you quotes from Claimants'
 4 Memorial on the Merits just to show the case is set
 5 forth on their Memorial on the Merits and how this
 6 case shifted and continued shifting through their
 7 Rejoinder on Jurisdiction, their Opening and now their
 8 Closing.
 9 I want to focus on the last quote, the last
 10 bullet point. And towards the end of the quote
 11 where -- the last sentence where Claimants allege in
 12 their Memorial on the Merits that, "Consistent with
 13 customary international law practice, it is at that
 14 point that the State takes possession of the land,
 15 therefore, satisfying the customary requirements of a
 16 direct taking." And that point is the point of
 17 dispossession, the taking of possession.
 18 So if you look at the chart that I keep
 19 referring you to, you'll see in the seventh column a
 20 dispossession date. You'll go down, because the
 21 dispossession date is relevant only to the
 22 third--well, on the chart, the second. But in terms

04:28:35 1 of categories of property, the third category, which
 2 is in the judicial phase.
 3 And you'll see there the dates of
 4 dispossession may vary somewhat, but they are all in
 5 2008. So the customary requirement of a direct taking
 6 on Claimants' own case happened sometime in 2008.
 7 Obviously, with respect to the other properties,
 8 hasn't happened yet.
 9 What is interesting is that we heard in the
 10 Opening, and then in the Closing of Claimants--and
 11 this is an echo of their amended case in the Rejoinder
 12 On Jurisdiction, which obviously is not the
 13 appropriate time to amend one's Claims on the Merits.
 14 But they are now saying that it is the
 15 transfer of title that is the act that constitutes an
 16 expropriation. And they're saying that, for obvious
 17 reasons, that the voice--they have jurisdictional
 18 problems.
 19 What we say is several things. One, these
 20 are claims that are not timely. They have not been
 21 developed. They should not have been raised in the
 22 Rejoinder on Jurisdiction to begin with.

04:29:53 1 If they were to raise those claims and
 2 substantiate them, we're talking about three
 3 properties. And so with respect of the other
 4 properties, then, according to their own argument,
 5 expropriation has not yet taken place.
 6 Again, it's a significant shift from what has
 7 been argued so far. But I think what is most
 8 important here to emphasize is this has not been their
 9 claim until the Rejoinder on Jurisdiction.
 10 Another claim that was very briefly referred
 11 to in the Rejoinder on the Merits and voiced in the
 12 Opening and somewhat in the Closing was a denial of
 13 justice claim. Again, a new claim raised in the
 14 Rejoinder on Jurisdiction. Entirely unsubstantiated.
 15 We all know the high standards for denial of
 16 justice, and they have to--just asserting that the
 17 Costa Rican courts take a long time is no
 18 substantiation of a denial of justice claim. And
 19 we've pleaded that and I'll leave it at that. They
 20 have to show much more: Why the delay, who caused the
 21 delay, what are the steps that are taken?
 22 And our argument would be if they were to

04:31:03 1 argue that point that Costa Rican Law allows them a
 2 number of opportunities to challenge the decisions,
 3 and we have explained that in our written submissions,
 4 the Expert Report on Valuation, how they can challenge
 5 those Experts Reports and what happens next and so on
 6 and so forth. And they have to show the high
 7 standards of denial of justice with respect to those
 8 steps. And I refer you to our written submissions in
 9 the interest of time because I don't have anything new
 10 to add to that point.
 11 I will say, though, since we are
 12 transitioning to the Merits, that what is happening
 13 here in this case is Costa Rica is taking steps to
 14 protect the environment and protect an endangered
 15 species. We thought that would not be controversial,
 16 but we read in Claimants' Witness Statements in
 17 particular statements to the effect that what Costa
 18 Rica is doing has nothing to do with the turtles.
 19 We heard arguments by counsel including today
 20 in the Closing that it's not necessarily the urban
 21 development that's a problem. There are problems with
 22 poaching, and so on and so forth.

04:32:31 1 We don't--Costa Rica doesn't deny there are
 2 many issues that have to be addressed. What Costa
 3 Rica insists is that urban development is a huge
 4 problem; and Claimants' own Witness, who is also an
 5 Expert in the matter, testified before you. And he
 6 stated--he made some very helpful statements, which I
 7 want to go quickly through with you to then make the
 8 case that I want to make.
 9 With respect to urban development he said the
 10 following:
 11 "Question: What you're saying is urban
 12 development may be harmful to the nesting of the
 13 turtles, and, in fact, in most cases, unless it is
 14 careful and strictly controlled, it is. Is that
 15 generalization more or less correct?
 16 "Answer: It is very close to being
 17 correct, yes." The transcript reference is there.
 18 He also said in response to a question, and
 19 the question was:
 20 "Question: As I understand from your
 21 testimony, you do agree that expropriating private
 22 property within the 75 meters is a measure that does

04:33:56 1 protect the turtle?
 2 "Answer: That is correct." You have the
 3 transcript reference.
 4 You don't have it on the slide, but I will
 5 quote another statement by Dr. Rusenko:
 6 "Question: So in a way it, the expropriation
 7 of the 75-meter strip, is a stronger measure than
 8 controlling development. It may be unnecessarily
 9 stronger, but it is stronger?
 10 "Answer: It is stronger. But you will need
 11 to control development beyond that 125 meters."
 12 This is transcript Page 472, Line 19, to
 13 Page 473, Line 1.
 14 So Dr. Rusenko is saying urban development a
 15 very serious problem. He's saying expropriation may
 16 not be necessary, but it is certainly help with -- it
 17 may be stronger than necessary, but it does protect
 18 the turtles.
 19 And he's going beyond that and saying, you
 20 need to control development even beyond that 125-meter
 21 zone. He is also saying, and you have that quote on
 22 the slide, the third quote that you have on the slide:

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04:35:12 1 "Question: Do you have any reason to doubt,
 2 Dr. Rusenko, that the Government of Costa Rica was
 3 willing and interested in making a genuine effort to
 4 protect the turtles?
 5 "Answer: No, I don't."
 6 And you have the transcript reference on the
 7 slide.
 8 So what transpires from this discussion is
 9 Claimants' own Witness with expertise in the
 10 matter--who, by the way, also expressed in his Witness
 11 Statement and confirmed on the stand his appreciation
 12 and respect for the Head of the National Park,
 13 Mr. Piedra, and for the efforts that the Park rangers
 14 make to protect the area.
 15 He's saying urban development is a problem.
 16 Costa Rica--there is no doubt that Costa Rica is
 17 driven by a genuine desire to protect the turtles, the
 18 measures are justified, Costa Rica is expropriating
 19 private property. That may be unnecessary because
 20 strictly controlled development, he says, a code with
 21 teeth is sufficient or may be sufficient, but they are
 22 going beyond that. Nothing wrong with that.

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04:36:18 1 In fact, what transpires from Dr. Rusenko's
 2 testimony and from the testimony of Mr. Berkowitz is
 3 that the Costa Rican Government through MINAE, through
 4 members of the Congress engaged in a public debate, in
 5 a public discussion, transparent, with the obvious
 6 desire to collect the views of all constituents and
 7 understand how better to protect the turtles.
 8 You know from Mr. Berkowitz's testimony that
 9 he had an opportunity to meet with the Minister
 10 himself and express his views and have a discussion
 11 with the Minister of what is the best way to protect
 12 the turtles.
 13 You have seen from the documents that
 14 Mr.--that Minister Carlos Manuel Rodriguez had the
 15 view--they had meetings, and they were discussing
 16 whether there is a need to extended the Park, as
 17 Dr. Rusenko himself testified might be necessary
 18 beyond the 125 meters.
 19 This was all a transparent debate. The
 20 minutes of those meetings were provided to
 21 Mr. Berkowitz.
 22 Dr. Rusenko engaged in a discussion with the

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04:37:25 1 Minister. He answered questions. He met with the
 2 Minister. The Costa Rican Government sought input by
 3 the affected constituents, by experts in the area. We
 4 don't know the full extent of that effort, it's not in
 5 the record. But what we have in the record is
 6 sufficient.
 7 Congress dealt with bills that discussed
 8 potentially a different regime. At the end of the day
 9 a democratic Government engaged in a democratic
 10 process of collecting views and processing those
 11 views, of discussing them openly and transparently,
 12 came to a conclusion. And that conclusion was the
 13 Park is there, it's 50 meters public zone plus
 14 75 meters buffer zone, the property in the 75 meters
 15 should be expropriated, and that's what the Government
 16 is trying to do.
 17 There is no question of lack of goodwill.
 18 There is no question that this is in the Public
 19 Interest.
 20 The question is--and there are several
 21 questions that arise, and, again, I will refer you to
 22 our written submissions. One question is, is this an

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04:38:36 1 expropriation not under Costa Rican Law but within the
 2 terms of Article 10.7?
 3 And our argument there is that you don't have
 4 jurisdiction. But if you did, you would also have to
 5 have a look at Annex 10-C to see if in particular with
 6 respect to the regulatory measures at issue here,
 7 whether they fall within the scope of that Annex.
 8 Because there is no question that those are measures
 9 of general application for the purposes of
 10 environmental protection.
 11 And I refer you to our Written Submissions.
 12 If you ever get to that point, you will have to make
 13 that determination. And we submit to you, as we did
 14 in our Written Briefs, that Claimants have not made
 15 the case and those Regulatory Measures that they have
 16 put at issue in this case do not fall within the scope
 17 of Annex 10-C.
 18 I also to want draw your attention, perhaps
 19 in response to the Tribunal's admonition that we might
 20 wish to address an argument or a statement made by
 21 El Salvador in these proceedings in relation to
 22 Chapter 17. And we draw your attention--again, we are

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04:39:56 1 a little bit constrained in terms of time, but I want
 2 to be brief and point you to Article 17.2, which is on
 3 Slide 25 and on your screen. Which requires that the
 4 Party--it says, The Party shall not fail to
 5 effectively enforce its environmental laws, in
 6 Paragraph 1(a).
 7 And then if you look at the end of
 8 Paragraph 1(b), a party--I will read the whole
 9 sentence: "Accordingly, the Parties understand that a
 10 Party is in compliance with subparagraph (a) where a
 11 course of action or inaction reflects a reasonable
 12 exercise of such discretion or results from a bona
 13 fide decision regarding the allocation of resources."
 14 And the discretion is with respect to enforcement of
 15 environmental matters that may have different
 16 priorities.
 17 So, Article 17.2 allows Costa Rica a measure
 18 of discretion in implementing environmental laws,
 19 including a measure of discretion in terms of how to
 20 carry out the expropriation, taking into account
 21 allocation of resources. And unless that discretion
 22 is unreasonable, Costa Rica is in full compliance with

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04:41:29 1 CAFTA.
 2 I'm raising that point because there has been
 3 a discussion about arbitrary choices made by Costa
 4 Rica in terms of what to expropriate and what not to
 5 expropriate. This allegation has not been proven at
 6 all.
 7 And there has been an allegation that Costa
 8 Rica does not proceed quickly with the expropriations
 9 because of lack of funds. And I will submit to you
 10 that even if that were the case--and there is no
 11 evidence that it is the case--the evidence is that
 12 they are looking to improve the expropriation
 13 procedures. But even if that were the case, there is
 14 a certain level of discretion that Costa Rica is
 15 provided under CAFTA.
 16 And then, finally, you have Paragraph 2,
 17 which states that the Parties recognize that it is
 18 inappropriate to encourage trade, or in this case,
 19 investment, by weakening or reducing the protections
 20 afforded in domestic environmental law. And so each
 21 Party shall strive to ensure it does not waive or
 22 otherwise derogate from such laws in a manner that

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04:42:40 1 reduces the protections afforded in those laws as an
 2 encouragement for trade with another Party or as an
 3 encouragement for the establishment, acquisition,
 4 expansion, or retention of an investment.
 5 And so, Costa Rica cannot weaken its
 6 environmental laws adopted well before Claimants made
 7 their investments to encourage them to expand or
 8 retain their investments.
 9 Mr. President and Members of the Tribunal, I
 10 will now pass the floor to Ms. Haworth McCandless to
 11 discuss issues of damages, and after that I will make
 12 some very brief concluding remarks.
 13 Before I do that, though, I do want to
 14 address a couple of other points that are in relation
 15 to this calculation. It's not just calculation, what
 16 we refer to as a new methodology, new calculation of
 17 damages that Claimants submitted with their--at the
 18 very end of their Closing Argument.
 19 And you have already decided to admit this
 20 into the record, and I'm not going to challenge that
 21 decision. I do want to say, though, that--a couple of
 22 points. First, if you can pull this out and look at

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04:44:12 1 it because I want to refer to it very quickly.
 2 We have been provided with references for the
 3 first group or category, which is the A, B, C, and V
 4 Lots. The reference is to the B and SPG Lots, as we
 5 understand them, are to Unglaube. And I want to point
 6 out a couple of things. First, the column, Property
 7 Costs.
 8 We understand, and we may be wrong because we
 9 didn't have time to study that, but we understand that
 10 refers to the purchase price. If that is the case,
 11 the point that I want to make is that throughout this
 12 proceeding we have asked that they provide the
 13 Contracts that would evidence the purchase price and
 14 they have not done that.
 15 You will recall the discussion of the
 16 document that you in the end decided you did not want
 17 to allow into the record when we submitted to the
 18 Tribunal an application to enter it into the record
 19 for the purposes of the purchase price. The objection
 20 was essentially--well, the objection was, one,
 21 surprise and ambush, even though that document had
 22 been in their possession since 2003 and Mr. Berkowitz

04:45:47 1 had quite a vivid recollection of what this document
 2 said.
 3 The other objection was inconvenience, they
 4 were not close to their files.
 5 The substantive objection was those prices
 6 are not relevant. At the very end of their Closing
 7 Argument they have made them relevant for this
 8 purpose, and we still don't have any of the Contracts
 9 for the purchases of their property. And the reliance
 10 here is on extraneous--I won't even call it evidence,
 11 but extraneous information.
 12 You'll also recall that Mr. Kaczmarek was
 13 cross-examined yesterday on the purchase price of the
 14 B Lots property. Mr. Kaczmarek relies on--relied for
 15 that on Claimants' own Expert and Claimants' Expert's
 16 statements as to what the value of those properties
 17 for the B Lots.
 18 And Mr. Kaczmarek was challenged and was
 19 asked whether it was not more reasonable to adopt a
 20 different view, a different view from what their own
 21 Expert was advocating?
 22 And we don't believe it is quite appropriate

04:46:55 1 to ask our Expert to speculate based on indirect, to
 2 put it mildly, information about the purchase price
 3 might be when the purchase contracts are in the
 4 possession of Claimants and they refuse to provide
 5 them.
 6 Mr. Kaczmarek was asked a question in
 7 relation to Exhibit C-24b which shows the recorded
 8 price as half a million colones, which is \$1,200.
 9 Well, but Mr. Berkowitz has taken a mortgage of
 10 \$370,000. And how can this price be?
 11 PRESIDENT BETHLEHEM: I think it was 450,000,
 12 wasn't it, 370, plus 80?
 13 MR. ALEXANDROV: Well, there is--there is
 14 one--I may be using a different exhibit, but we have
 15 the same situation, so if you allow me to use
 16 Exhibit C-24b to save time. And at the very end--and
 17 I realize you don't have it. I'm told you have it in
 18 the pocket of the binder, so if you would like to take
 19 it and look at it, and I'm looking at the very last
 20 page in the Spanish. You can look at the--whichever
 21 page that is in English.
 22 If you look at the very end of the document

04:48:32 1 in English, which is the second-to-last page, carrying
 2 over to the last page, in Spanish, it talks
 3 about--what is it?--370,000, which is why I used this
 4 language--in favor of, and the company in favor of
 5 which this amount is, and I'll say what this amount
 6 is, is Mr. Berkowitz's company. This amount in
 7 Spanish is described as "cebuli puticaria," (phonetic)
 8 which in English is a mortgage bond. So, what's
 9 happening here is Mr. Berkowitz is issuing a bond to
 10 his company, against which he may borrow if somebody
 11 is willing to lend him that amount of money against
 12 his property. This is not a mortgage.
 13 And we say it is unfair to bring this
 14 document to Mr. Kaczmarek without explaining to him
 15 that this is not really a mortgage and how this
 16 operates and asking him to say whether this changes
 17 his view on what the proper purchase price is, given
 18 that Claimants have in their possession the Purchase
 19 Contracts which would state the purchase price of the
 20 property. And if they wanted to make a different
 21 submission on the base of this document and the
 22 document they actually referred to yesterday, they

04:50:14 1 should have developed that evidence through
 2 Mr. Berkowitz. And in the absence of that, this
 3 document is in the record, and it speaks for itself,
 4 and I'm just bringing to your attention what it
 5 actually says.
 6 Mr. President, with that, if you allow me to
 7 pass to Ms. Haworth McCandless to talk about damages.
 8 PRESIDENT BETHLEHEM: Please do. Just before
 9 we do, let me just inquire of my colleagues whether
 10 they have got any questions to put to you on the basis
 11 of your submissions.
 12 ARBITRATOR KANTOR: You want me to ask now?
 13 PRESIDENT BETHLEHEM: I think if they relate
 14 to, yes.
 15 ARBITRATOR KANTOR: With apologies to
 16 Ms. Haworth McCandless, I do have a question or two
 17 for you, Mr. Alexandrov.
 18 I inquired of Claimants' counsel this morning
 19 regarding which legally significant events they would
 20 point me to that would have occurred from and after
 21 June 2010. From that colloquy, and without seeking to
 22 characterize whether these events are or are not

04:51:26 1 legally significant, and if so, for what purpose, I
 2 came away with three types of conduct that had been
 3 mentioned. The first was maintaining a suspension of
 4 the administrative proceedings. The second was
 5 investigation of possible annulment of title, and the
 6 third was conduct in judicial proceedings. I would
 7 like to hear from you on those three points.

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

19 Under the Mondev standard, Costa Rica, if
 20 Article 10.7 applied, Costa Rica would be in
 21 compliance with that article because compensation was
 22 offered. They say it was not adequate. That dispute

04:53:20 1 arose in 2008, and I've made the arguments on
 2 jurisdiction. The fact that this dispute is before
 3 the judiciary as a result of their submission, as a
 4 result of their objection to the administrative
 5 appraisal, cannot make the expropriation or the
 6 payment of compensation a continuous act. It is an
 7 act that is now being reviewed by Costa Rica's
 8 judiciary. This does not make it a continuous conduct
 9 or a composite act. And so for them to say the Costa
 10 Rican judiciary takes a long time, that would not be a
 11 claim under Article 10.7, including 10.7.2. That
 12 would be a claim of denial of justice that they have
 13 not developed.

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

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

04:54:39 1 Government is doing anything other than what the
 2 Procuraduría normally would do and what the Attorney
 3 General's Office of any Government would normally do
 4 in an adversarial proceeding. We have seen no
 5 evidence of any impropriety of the conduct of the
 6 Government in the judicial proceeding.

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

04:55:54 1 is simply a study at this point.
 2 The suspension of administrative proceedings:
 3 Our point on this is, first, in relation to statute of
 4 limitations, continuous or composite or one-time act
 5 doesn't matter. What matters is when they first
 6 acquired knowledge, and our argument, as you know, on
 7 the fact is, regardless of whether there is a one-time
 8 or a continuous or a composite act, they first
 9 acquired knowledge in 2008, and, therefore, for the
 10 purposes of statute of limitations, that's sufficient.

11 For the purposes of the entering into force
 12 of the Treaty, where the general standard is a conduct
 13 would be covered to the extent that it extends after
 14 the date of the entry into the force of the Treaty.
 15 On the application of the Treaty for that conduct, we
 16 submit what matters here is the suspension order.
 17 This is the Measure. The Court orders a suspension.
 18 The administrative divisions comply with and implement
 19 the decision of the Court. This cannot be a one-time
 20 act. The Court--this cannot be a continuous act, I'm
 21 sorry, it is a one-time act. The Court makes that
 22 order, and then it's just a matter of compliance with

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04:57:11 1 that order. That compliance with the order we call
 2 the "effects of the order," but there is no question
 3 that the Measure is the order.
 4 ARBITRATOR KANTOR: Thank you. A second
 5 question: In addition to the expropriation claims
 6 before the Tribunal, there are also claims that the
 7 conduct of Costa Rica was contrary to the Minimum
 8 Standard of Treatment, including fair and equitable
 9 treatment, leaving to one side the portion of that
 10 claim that relates to legitimate expectations, there
 11 is a portion of that claim that asserts the conduct of
 12 Costa Rican Government as arbitrary, and my impression
 13 is that both Parties have common ground that the
 14 definition of "arbitrary" starts with the judgment in
 15 the LC ruling of the International Court of Justice.
 16 It's not so much something imposed to a rule of law as
 17 something opposed to the rule of law, a willful
 18 disregard of the process of law, an act that shocks,
 19 or at least surprises a sense of juridical propriety.
 20 I understand the Parties disagree whether or
 21 not the conduct of the Government is properly
 22 characterized as arbitrary or not, but what is your

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04:58:32 1 view about when, in the circumstances, it would become
 2 obvious to Claimants that the delay is conduct that
 3 could be characterized or not characterized as
 4 arbitrary? In other words, I don't want you to tell
 5 me whether you think it's arbitrary or not. I know
 6 your answer to that question. I want you to focus on
 7 the timing issue.
 8 MR. ALEXANDROV: Well, it is for Claimants to
 9 explain when, if it's a matter of--I have argued to
 10 you, Members of the Tribunal, that, in the context of
 11 Article 10.7, the administrative appraisals were
 12 issued in 2008. That's when a dispute about the
 13 amount arose. And so there is really no issue of
 14 delay here beyond that. To the extent that we're
 15 talking about a delay any further, they have alleged
 16 the length of the judicial proceedings, for example.
 17 It is not a delay in the sense of promptness of the
 18 sense of compensation because the compensation has
 19 already been offered. If it is a delay, it would be a
 20 delay in the resolving the dispute about the amount;
 21 that is, the adequacy of the compensation.
 22 Arbitrariness is a very high standard, in our

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05:00:05 1 view, and I'm not going to go into why we agree or
 2 disagree. It is up to them to say when they concluded
 3 that there was arbitrary conduct, but, again, from the
 4 perspective of the statute of limitations, and with
 5 respect to the suspension of the expropriation
 6 proceedings, they knew or should have known about
 7 that, that there was a suspension. That is a claim of
 8 arbitrariness--sometime no later than six months after
 9 they objected to the administrative appraisal.
 10 But as a general matter, because we don't
 11 understand the Claim of arbitrariness, we don't
 12 believe that it ever actually crystallized as an
 13 arbitrary conduct, and we think, unless they specify
 14 when they believe the arbitrary conduct crystallized,
 15 we cannot take a position, and articulate their claim
 16 for them.
 17 ARBITRATOR KANTOR: Claimants have asserted
 18 that it is the indefinite duration of the suspension
 19 that is conduct that is legally significant. When, in
 20 your judgment, would it have become obvious to
 21 Claimants regarding the duration of the suspension?
 22 MR. ALEXANDROV: Well, first of all, it is

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05:01:34 1 incorrect factually that the suspension is indefinite.
 2 Second, it is very difficult to say when one
 3 acquires knowledge of an indefinite suspension. I
 4 think they are making an argument, first, that the
 5 suspension in itself is arbitrary, and we have shown
 6 that they knew about that suspension at the time when
 7 the timing of that knowledge deprives this Tribunal of
 8 jurisdiction. The suspension, whether the suspension
 9 is arbitrary or not--and this is the reason why we
 10 explained and we provided Witness Statement to explain
 11 what was the reasons for the suspension, the
 12 recommendation of the Contraloría, et cetera.
 13 And so we believe that they have to make an
 14 argument of why the suspension is arbitrary, and all
 15 they have said is it's indefinite, and we now know
 16 that it's indefinite. If that's their argument, they
 17 don't know and can't know that its indefinite because
 18 it is not. They have not said whether that
 19 suspension, if that were one year or two years or
 20 three years, would be arbitrary, and, therefore, we
 21 cannot speculate whether they knew or didn't know that
 22 it would be one or two or three years because we don't

05:02:52 1 know what time limit they set to arbitrariness in the
 2 context of that suspension. They have simply said its
 3 indefinite. It factually is incorrect, and I think we
 4 rest our case there.
 5 ARBITRATOR KANTOR: Thank you for your
 6 patience, Mr. Alexandrov.
 7 No additional questions, Mr. President.
 8 PRESIDENT BETHLEHEM: Ms. Haworth McCandless.
 9 MS. McCANDLESS: Thank you, Mr. President.
 10 I'm--my colleague, Mr. Alexandrov, touched on
 11 a couple of things that are in the realm of damages,
 12 so hopefully my comments will be relatively short in
 13 light of the time. But I'm going to, as
 14 Mr. Alexandrov did, kind of touch on various issues
 15 that came up in the course of the hearing, as opposed
 16 to going methodically through arguments that we have
 17 already raised before, and we, of course, stand by our
 18 arguments in our pleadings. This is merely
 19 supplemental to that.
 20 There has been an assertion of valuations and
 21 arbitrariness with respect to the valuations, and one
 22 thing that Claimants--they, in particular, have

05:03:59 1 alleged in these proceedings that various valuations
 2 of Claimants' properties in the administrative and
 3 judicial phases of expropriation are arbitrary, in
 4 large part, because their values fluctuate between and
 5 within each phase. But what has been become or what
 6 became evident during the hearing and, in particular,
 7 during the examination and cross-examination with
 8 Mr. Hedden is that, in fact, there is nothing
 9 arbitrary about the valuation process in Costa Rica.
 10 First, the expropriation system in Costa Rica
 11 is designed to give the Parties in the expropriation
 12 proceeding sufficient opportunities to identify the
 13 value of the property being taken so that the Fair
 14 Market Value is the ultimate value reached, either in
 15 the administrative phase or in the judicial phase.
 16 So, what is perceived to be varying values is actually
 17 the process working its way through to find a common
 18 ground at the end, where the judicial, in particular,
 19 judicial branch has listened to the various arguments
 20 and evidences of the Parties at various stages.
 21 And there are lots of opportunities for the
 22 private Party, the one that owns the property, to make

05:05:14 1 pleadings before the judiciary, and the judiciary take
 2 those factors into consideration. And, indeed, I
 3 think we had talked about this earlier, that, in the
 4 end, for these particular Claimants that have gone
 5 through the proceeding, the ultimate value is quite
 6 higher than the administrative value. So, the process
 7 for them, in some measure, is effective.
 8 Second, even if the valuations identified in
 9 the two phases are not identical, that does not
 10 result--that result is not surprising, given the
 11 nature of the real estate market in Costa Rica, and
 12 this goes to the testimony of Mr. Hedden. As he
 13 testified under cross-examination, it is difficult to
 14 value properties in the Guanacaste region, and you can
 15 see the quote there on the slide.
 16 Question: "Would you say, Mr. Hedden, that it
 17 is difficult to value properties in the Guanacaste
 18 region?"
 19 "Answer: I think it is challenging."
 20 And the location on the transcript is
 21 identified in the slide.
 22 And a bit later, he said:

05:06:13 1 Question: "Given the difficulty or challenge
 2 that you faced, do you think it's fair to say that the
 3 different people could come up with different
 4 conclusions of the valuation of the property in the
 5 area?"
 6 Answer: "Yes. Professional valuers often
 7 come up with different opinions of value."
 8 And, again, that information, as far as to
 9 where that is in the transcript, is on the slide.
 10 While Claimants would have this Tribunal
 11 believe that they came to Costa Rica to build their
 12 dream homes and live out their retirement years in
 13 tranquil Guanacaste area in Costa Rica, it became
 14 apparent during the hearing that, at least for some of
 15 the Claimants, their real goal was to entered into the
 16 hot real estate market with the goal of making a quick
 17 dollar, buying and flipping, or, perhaps--buying and
 18 flipping property.
 19 And as Mr. Reddy--I have to correct that--it
 20 actually says "Mr. Berkowitz," but it's Mr. Reddy, so
 21 I apologize for that. Mr. Reddy readily admitted
 22 during cross-examination, "So besides the legal side,

05:07:16 1 the real estate market here was just absolutely
 2 booming, you know, skyrocketing. And so these
 3 properties were growing in value at an exponential
 4 pace. We thought we were in early, and so we thought
 5 it was still a good investment opportunity for us to
 6 buy at that time." And the location in the transcript
 7 is identified on the slide.

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

19 And there's a slide up. And, again, this is
 20 Mr. Reddy, and I apologize, that's another error. The
 21 President is saying, a question: "Yes. Was there, in
 22 your mind, at the time any appreciation that

05:08:21 1 purchasers coming after you, those whom you may have
 2 wanted to sell the property, would not have had the
 3 same robust confidence that you had in the
 4 interpretation of the 1991 Decree and the 1995 Law?"

5 Answer: "You know, I don't think I tried to
 6 put myself in their mind. It was very clear to us
 7 that we were buying private property titled in the
 8 50-meter line, that--that we'd maintain full use and
 9 enjoyment of that private property and that Park
 10 extended seaward. So I had no issue with that. Any
 11 buyer would be represented by a Costa Rican attorney
 12 and would get their advice and make their own
 13 decisions." And the location on the transcript is
 14 identified in the slide.

15 And Mr. Berkowitz readily admitted the fact
 16 that their properties were in or near a park was an
 17 added advantage to their scheme. And we have the
 18 quote on the slide: "For me, it was a very positive
 19 factor that we were bordering a park and that the
 20 turtles laid their eggs--laid their nests-- laid their
 21 nests in front of our land. It was--to me it--I had
 22 already had inquiries from one Hollywood magnet to

05:09:27 1 purchase the property. This is just the type of
 2 client that we had envisioned." And the location on
 3 the transcript is on the slide.

4 And the strategy almost worked. In fact,
 5 Mr. Berkowitz admitted in cross-examination that he
 6 was able to sell three parcels of land for around
 7 \$400,000 each. Those parcels gave Mr. Berkowitz a
 8 total of about \$1.25 million, and that's at Transcript
 9 Page 436, Line 22, to 437, Line 2. This is almost the
 10 entirety of the 1.5 million that he mentioned that he
 11 had spent on all 24 B Lots parcels, and I think the
 12 calculation of that percentage is around 83 percent.
 13 And that amount that he is getting there doesn't
 14 include other money that he may have received through
 15 the Government.

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

05:10:36 1 And in light of this history, it was very
 2 surprising to hear counsel for Claimants argue during
 3 cross-examination of Mr. Kaczmarek, "Do you know
 4 whether the sale and purchase agreement has been
 5 formally requested at that point?" And that was in
 6 the Transcript Page 949, Lines 2 to 3.

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

18 And in this proceedings, Claimants themselves
 19 be believe, as we now have seen through the
 20 alternative damages calculation provided, but even
 21 independent of that, Claimants themselves believe
 22 information in those sale and purchase agreements are

05:11:35 1 important because, for example, in Mr. Reddy's
 2 testimony, he, when he first came to the stand, he
 3 corrected some dates and purchase prices with respect
 4 to in his Witness Statement. And clearly, he has
 5 those documents, otherwise he would not have been able
 6 to make those corrections.

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

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

20 "And you would agree, would you not, that
 21 sales and purchase contracts contain and can contain
 22 useful information about the specific terms of a

05:12:32 1 particular sale?

2 Answer: Yes."

3 And the transcript cite is on the slide.

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

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

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

05:13:33 1 assets."

2 And the location on the transcript is on the
 3 slide.

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

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

05:14:32 1 conclusion, because they are not supported by the
 2 Market Value."

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

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

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

18 "Question: In Section 2 of your Report,
 19 which you have identified in that first paragraph that
 20 you are to provide your Expert Opinion regarding the
 21 value of vacant lands taken from the Claimants as part
 22 of the expropriation from the Respondent; is that

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

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

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

05:18:51 1 could contribute to the diminution in the value of the
 2 properties is a lack of beachfront access. That is,
 3 lack of accessibility to the beach from the parcel.
 4 While Mr. Piedra, the Park Administrator,
 5 mentioned in response to questions from the Tribunal
 6 that the Park currently has limited signage, he did
 7 not state that there were any fences or other
 8 landmarks limiting access to the National Park. And
 9 that's at the Transcript--English Transcript,
 10 Page 551, Lines 1 through 7. Thus, the restrictions
 11 that Mr. Hedden has mentioned as adversely affecting
 12 the value of that property simply does not apply in
 13 this case.
 14 As part of his severance damages argument,
 15 Mr. Hedden also asserted that for the Lots where there
 16 is only a partial taking, the value of severance
 17 damages may be greater if, following expropriation of
 18 a portion of the land, the remaining portion were too
 19 small for purposes of building homes on the land.
 20 Mr. Hedden asserted that no such need to increase
 21 severance damages exists with respect to the SPG Lots,
 22 for example, because they have a "unity of title," and

05:19:56 1 a "unity of use."
 2 But Mr. Hedden did not apply--did apply a
 3 higher amount of severance damages to the B Lots on
 4 the understanding that parcels remaining after
 5 expropriation would not be large enough to develop.
 6 But in the case of B Lots, there is land that is east
 7 of which is owned by and controlled by Mr. Berkowitz.
 8 Thus, with the SPG Lots, the B--as with the SPG Lots,
 9 the B Lots too have unity of title and unity of use,
 10 and accordingly, there should be an adjustment made
 11 downward to reflect that fact.
 12 And I have that conversation on the slide in
 13 front of you:
 14 "If you had the understanding that if you
 15 knew that those Lots behind the B Lots that are shown
 16 in the picture here belonged to Mr. Berkowitz, would
 17 you feel the need to adjust your severance value to
 18 reflect it more along the lines of what you did with
 19 the SPG Lots because, in that instance, there would be
 20 a unity of title and a unity of ownership?"
 21 Answer: I would have to take that under
 22 advisement, but, if it met the test of unity in use,

05:20:57 1 unity in title, and the physical continuity, and they
 2 weren't separated and could, in fact, be joined, they
 3 would get similar treatment than--to the SPG Lots,
 4 and/or, you know, how I ascribed a value to B Lots 5
 5 and 6, where they were adjoining and could be
 6 assembled to create one plus or minus
 7 8,000-square-foot lot."
 8 And the location on the Transcript is on the
 9 slide.
 10 And today, Claimants' counsel introduced
 11 another new concept, and that was an admonition that
 12 the State acquire the entire property if the State is
 13 going to acquire only a partial portion of that.
 14 Well, obviously the State is not obligated to
 15 do so, and their request only further supports the
 16 concept that they entered into the market in a
 17 speculative time and they were not able to capitalize
 18 on that, and now they're asking for the Government to
 19 pay for that risky investment.
 20 Mr. President, Members of the Tribunal, if
 21 you were to decide, notwithstanding Respondent's
 22 argument to the contrary that you have jurisdiction to

05:22:05 1 hear this case, and that Respondent has somehow
 2 breached its obligations under CAFTA, then you would
 3 need to decide what type of damage--or what damages
 4 amount would be appropriate to award Claimants.
 5 It seems to to us you have two choices from
 6 the outset. The key issue is to decide whether a risk
 7 of expropriation existed at the time Claimants
 8 purchased their property or not. If you believe that
 9 there were a risk at the time Claimants purchased
 10 their property, then you must go with Mr. Kaczmarek's
 11 valuation. If, on the other hand, you believe that
 12 there was no risk of expropriation at the time of
 13 purchase, then you must go with Mr. Hedden's
 14 valuation.
 15 But if you were to go with Mr. Hedden's
 16 valuation you would need to consider his valuation in
 17 light of all the circumstances and criticisms that
 18 Mr. Kaczmarek has identified in his two Reports,
 19 including that Claimants failed to provide the sale
 20 and purchase agreements for the affected Lots, the
 21 fact that the FTI's appraisals were inconsistent with
 22 the market trends, the fact that Claimants' severance

05:23:02 1 damages claims are calculated is difficult to
 2 understand and appears may well be overvalued, and,
 3 indeed, the failure to provide a complete transparency
 4 with respect to his calculations. As you will recall,
 5 in the cross-examination or in the presentation of
 6 Mr. Hedden's slides, he included information about
 7 assumptions that he was making he had not yet revealed
 8 to the Parties and to the Tribunal.
 9 It may also be useful at this point to
 10 consider what to do if you were to award damages to
 11 Claimants. We, of course, do not believe that the
 12 Tribunal ever needs to reach this point, but in case
 13 you do, we believe the following steps would need to
 14 be taken.
 15 First, the Tribunal will need to determine
 16 the Fair Market Value for each of the 24 Lots at issue
 17 in this proceeding, to the extent that you were to
 18 find that they each need to be valued and awarded
 19 damages.
 20 Second, the Tribunal will need to determine
 21 the amount of each Party--that each Party in the
 22 expropriation proceeding has already received, so you

05:24:03 1 can reduce that amount from the payments that have
 2 already--that--for the damages that are being
 3 requested.
 4 Third, the property owners would need to
 5 transfer title to the State.
 6 And, finally, all domestic expropriation
 7 proceedings with respect to these properties at issue
 8 would need to be discontinued in some way or another.
 9 And also, with respect to colones, they are requesting
 10 colones--and the payment in colones, and, therefore,
 11 we would need make that calculation as to the amount
 12 of colones that would be due.
 13 So, there are a number of steps that would
 14 need to happen. And with respect to interest, during
 15 cross-examination of Respondent's Damages Expert,
 16 Mr. Kaczmarek, Claimants' counsel asked Mr. Kaczmarek
 17 why he had calculated a simple rate of interest, when
 18 in other cases in which he had been an expert he had
 19 indicated that compound interest was applicable.
 20 Well, Mr. President, Members of the Tribunal,
 21 this is a rather surprising question coming from
 22 Claimants' counsel, as it is in their Memorial that

05:25:01 1 they apply the legal interest rate published by the
 2 Costa Rican Central Bank in accordance with
 3 Article 1163 of the Civil Code of Costa Rica. That's
 4 at Claimants' Memorial on the Merits at Paragraph 328.
 5 According to Mr. Kaczmarek, who referred to an
 6 official Costa Rican Government Web site that provides
 7 a proper calculation of interest under Article 1163 of
 8 the Civil Code, that Web site calculates a simple, not
 9 compound interest, as Claimants advocate. Thus,
 10 having selected this source for the purpose of the
 11 calculating interest to be added to Claimants' damages
 12 calculation, Claimants cannot now seek a greater
 13 amount because they believe that they will receive
 14 more in interest by compounding the interest
 15 semiannually.
 16 And that is all that I have with respect to
 17 damages. I think Mr. Alexandrov has some concluding
 18 remarks.
 19 PRESIDENT BETHLEHEM: Thank you.
 20 Mr. Alexandrov.
 21 MR. ALEXANDROV: Thank you, Mr. President.
 22 Mr. President, just two points that I would

05:26:00 1 add to Ms. Haworth McCandless' presentation on
 2 damages. Article 10.7, Paragraph 2(c), requires, as I
 3 think Mr. Kantor pointed out--or if I misremember I
 4 apologize--but it requires that the compensation shall
 5 not reflect any change in value occurring before the
 6 intended expropriation had become known earlier. And
 7 obviously if there's an expropriation, this provision
 8 has to be complied with.
 9 In compliance with that provision, we assume
 10 Claimants have instructed Mr. Hedden, their Damages
 11 Expert, to value all property as of May 27, 2008. He
 12 admitted that it was on this date that the
 13 Constitutional Chamber of the Supreme Court issued its
 14 decision holding that the 125 meters run inland rather
 15 than seaward. And, therefore, this is the assumption
 16 made by Claimants as to when the expropriation took
 17 place, and obviously we've discussed the significance
 18 of that date for jurisdictional purposes.
 19 And this question was, I think the President
 20 probed with Mr. Hedden this matter, and I'm not going
 21 to elaborate on it further other than to say this
 22 shows also the understanding that Claimants had of

05:27:36 1 what was the date of the expropriation and all the
 2 consequences in relation to jurisdiction that flow
 3 from that.
 4 I think the other relevant point for damages
 5 is that, as Mr. Hedden admitted and Ms. Haworth
 6 McCandless stated, he calculated damages and,
 7 therefore, Claimants calculated damages only in the
 8 event of an expropriation. So, you're not equipped to
 9 consider damages if you come--what we consider would
 10 be a very long way--to a conclusion that other
 11 provisions of CAFTA have been breached. And in the
 12 context of expropriation, there was an exchange, I
 13 think, between Mr. Kantor and counsel for Claimant on
 14 the--could it be--I'm summarizing and, I apologize, it
 15 may be a little bit liberal because I don't have
 16 the--a transcript in front of me--but the question was
 17 is it possible that the date of valuation be after the
 18 expropriation, let's say at the time of the Award.
 19 And I think our answer to that is it may be
 20 possible in some cases of expropriation where the
 21 Tribunal finds that the expropriation doesn't meet
 22 other conditions in addition to the nonpayment of

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05:28:56 1 prompt, adequate, and effective compensation, such as,
 2 for example, public purpose, nondiscriminatory,
 3 et cetera, and that one case that comes to mind is ADC
 4 versus Hungary where the Tribunal found that the
 5 expropriation was arbitrary and otherwise unlawful, in
 6 addition to the fact that compensation had not been
 7 paid, and decided that because of historic reasons,
 8 the value of the property in that case and airport
 9 terminal had increased between the time of the
 10 expropriation, the time of the Award, to pay--to value
 11 the Concession at the time of the Award.

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

22 And let me now conclude by saying on behalf

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05:30:10 1 of Costa Rica, we ask that you dismiss all claims for
 2 lack of jurisdiction on the grounds of lack of
 3 temporal jurisdiction that we have discussed. In the
 4 alternative, if you reach issues of liability, we ask
 5 that you conclude that Costa Rica has not breached any
 6 provision of CAFTA.

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

17 The facts as we've shown you are very
 18 different. And if you conclude that Claimants did
 19 have knowledge and, therefore, the purchase of the
 20 property did include a risk factor that the property
 21 one day might be expropriated, and that obviously had
 22 an effect on the value of the property at the time it

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05:31:32 1 was purchased, Mr. Hedden has not performed those
 2 calculations for you, and you cannot rely on his
 3 damages reports unless you conclude, which in our view
 4 is extremely unlikely, that Claimants had no knowledge
 5 and their purchase did not reflect the fact that the
 6 property was within the Park and was, therefore, at a
 7 minimum at risk of being expropriated or otherwise its
 8 use and enjoyment were restricted.

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

22 We don't have to prove that the claims were

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05:32:51 1 frivolous. But, and I'm not going to go, again,
 2 through all the factors that you need to take into
 3 consideration, but the outlandish conspiracy theories
 4 which were on dozens of pages of the Memorial, the
 5 accusations, the arguments that Costa Rica did not act
 6 in the Public Interest, the ever-changing and shifting
 7 case and arguments from the Memorial on the Merits to
 8 the Rejoinder and at the Hearing, the intentional, we
 9 believe, decision to withhold documents that would
 10 have proven the purchase price which, at the end of
 11 the day, was admitted as relevant, all these are
 12 factors that you should consider and should lead you
 13 to stay with the first sentence of Article 42(1) of
 14 the UNCITRAL rules should you decide in favor of Costa
 15 Rica. And on that, we end our closing argument.

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

18 That brings the closing submissions of both
 19 Parties to an end. I'm going to ask for the
 20 indulgence of everyone. I don't think it's going to
 21 be necessary for the Tribunal to, as it were, rise for
 22 half an hour to consider the closing formality issues.

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05:34:06 1 But we'll just go off the microphone, off the record
 2 just for a few minutes just to confer.
 3 (Brief recess.)
 4 PRESIDENT BETHLEHEM: So, there are a number
 5 of closing formalities that we have to deal with, and
 6 to start off, first of all, let me just draw your
 7 attention, remind you what Paragraph 25, Paragraph 1
 8 of Procedural Order Number 1 says: The Tribunal notes
 9 that the Parties do not at this stage see the need for
 10 Post-Hearing Submissions. At the conclusion of any
 11 hearing, the Tribunal shall decide whether the Parties
 12 may or are requested to file Post-Hearing Memorials,
 13 as well as when and in what form the Parties shall
 14 file evidence regarding the quantification of costs.
 15 The Tribunal shall thereafter at an appropriate point
 16 declare the hearings closed.
 17 We've had an opportunity to reflect on the
 18 issues, both during course of this week and today, and
 19 have concluded the following.
 20 First of all, the Tribunal has concluded
 21 that, in fact, we would like to present the Parties
 22 with an opportunity to file Post-Hearing Submissions,

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05:36:54 1 but on very narrow points. We've concluded that we
 2 would like to have Post-Hearing Submissions amounting
 3 to observations on the issues of law and
 4 interpretation that were addressed in the submissions
 5 of the non-disputing parties. That's it. Issues of
 6 law and interpretation addressed in the submissions of
 7 the non-disputing parties.
 8 And we've got some constraints relating to
 9 those Post-Hearing Submissions. First of all, we
 10 would like those to be not more than 30 pages. We are
 11 not going to prescribe the point form or the size of
 12 the margins, but we certainly don't expect that they
 13 come with a magnifying glass. So, we expect, you
 14 know, something around a normal submission, but if you
 15 want to do that in single space or double space, that
 16 is a matter for you, but not more than 30 pages.
 17 We would like those on or before Monday the
 18 18th of May, close of business EST, Monday, the 18th
 19 of May, and to be communicated by each Party
 20 separately to the Tribunal Secretary, and the Tribunal
 21 Secretary will then send each submission on to the
 22 other Party and to the Tribunal. So, this is not an

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05:38:10 1 invitation for you to address issues of fact relating
 2 to the proceedings. Really simply to engage with the
 3 issues of law and interpretation that were set out in
 4 the submissions of the non-disputing parties.
 5 Second, the issue goes to quantification of
 6 costs. And in the first instance, we would like the
 7 Parties to seek to reach an agreement on the template
 8 of a cost schedule that you would be content with. In
 9 other words, the headings under which the costs should
 10 be submitted. If you can reach agreement on that,
 11 that's without the figures, that will be helpful. We
 12 don't want to prescribe to you at this stage, you
 13 know, whether it should be, you know, partners,
 14 associates, assistants. It may simply be counsel's
 15 Experts, other costs. But we would like in the first
 16 instance for the two Parties to put their heads
 17 together to seek to reach agreement on that template.
 18 Once again, on or before Monday, 18th of May. If you
 19 can both reason agreement on that template, we will
 20 thereafter invite you to quantify your costs under
 21 that template. If you cannot reach agreement on that
 22 template, we will then prescribe a template. So, it's

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05:39:33 1 really an invitation to you to proceed in agreement.
 2 Third issue, we would like--the Tribunal
 3 would like to be informed of any factual development
 4 in relation to the issues engaged in these proceedings
 5 without any annotation or argumentation. For example,
 6 if there is a new Decree or new declaration of Public
 7 Interest, the publication of a study on the
 8 Contraloría Report, or anything of that nature, we
 9 would like to be informed of that through the Tribunal
 10 Secretary. As I say, without any annotation or
 11 argumentation. If the Tribunal considers that it's
 12 necessary to be further informed, we will give both
 13 Parties an opportunity to comment.
 14 Apart from these issues, in other words, the
 15 Post-Hearing Submissions, the quantification of costs,
 16 and these factual updates, we do not expect any
 17 further submissions from the Parties, save to the
 18 extent that any Party wishes to make an application to
 19 the Tribunal to do so on notice to the other Party or
 20 that the Tribunal explicitly requests any further
 21 submissions. So, beyond that, we don't expect any
 22 further submissions.

05:40:53 1 One further point to draw to your attention
 2 by way of the transparency of the Tribunal's
 3 thinking--and let me again enjoin you not to try and
 4 read the tea leaves as to where we're going because we
 5 don't yet know where we're going--we have various
 6 issues to consider going to jurisdiction and to
 7 liability, and we have not formulated our view.
 8 We have, however, preliminarily--and I
 9 emphasize preliminarily--concluded that if we are with
 10 the Claimant on jurisdiction and on any issue of
 11 liability, we are likely to require additional
 12 evidence and, perhaps, submissions on the issue of
 13 damages, because that may very well be contingent on
 14 any findings of fact that we come up with. So, this
 15 is simply to put you on notice that we don't at the
 16 moment feel that we are in a position to address
 17 comprehensively the issue of damages. That may
 18 change, so, it's simply putting down a marker so that
 19 nothing takes you by surprise in due course.
 20 Now, I note that Paragraph 25(1) of the
 21 Procedural Order says the Tribunal shall thereafter at
 22 an appropriate point declare the hearings closed, and

05:42:14 1 that Article 31(2) of the UNCITRAL Rules says the
 2 Arbitral Tribunal may, if it considered it necessary
 3 owing to exceptional circumstances, decide on its own
 4 initiative or upon application of a Party to reopen
 5 the hearings at any time before the Award is made.
 6 Now, notwithstanding Article 31(2), I'm not
 7 declaring the hearing closed at this stage. We've got
 8 further submissions to come from you that we will
 9 address in due course.
 10 I think the only other point to come from me
 11 is really a point of thanks, which I will give in just
 12 a moment. But before I do so, let me just give an
 13 opportunity to both Parties to raise any issue in the
 14 light of what I've just said that they would like to
 15 raise.
 16 Mr. Cowper.
 17 MR. COWPER: One point which is, I hope
 18 small, but most of the members of the Claimants' team
 19 are starting other hearings on Monday. Ms. Cicchetti
 20 gets to fly back to her four-year old tomorrow and
 21 starts a two-week hearing here on Monday morning. A
 22 privilege, no doubt. I have to go to other things.

05:43:27 1 And I'm just wondering, and I'm not seeking a much
 2 longer time, whether we could have until the 25th of
 3 May for the submission on the non-party, nondisputing
 4 parties.
 5 In order to try to induce you to accept that,
 6 I don't think there's--we're not going to come
 7 anywhere close to the space limit you provided, but it
 8 would be helpful--and I don't know if Mr. Alexandrov
 9 has any views on that--but it will be necessary for me
 10 to recruit other people to do the work that otherwise
 11 would be done by the existing members of the team if
 12 we don't get that extra time.
 13 PRESIDENT BETHLEHEM: Mr. Alexandrov, do you
 14 have any difficulty that?
 15 MR. ALEXANDROV: Mr. President, may I respond
 16 to that question and address other points?
 17 PRESIDENT BETHLEHEM: Sure.
 18 MR. ALEXANDROV: The short answer is, we have
 19 absolutely no difficulty with that. And we are happy
 20 to accept the date of 25 May, I think it was. Yes.
 21 But I want to comment a little bit on what we're doing
 22 by that date. So, with respect to your first point,

05:44:29 1 the 30-page submission on law and interpretation
 2 issues in the nondisputing parties' submissions. Are
 3 the Parties free to agree on a lower page limit? The
 4 submissions were fairly short, and 30 pages seems to
 5 us a lot, and if we reach an agreement, will the
 6 Tribunal allow us the flexibility to agree on a lower
 7 page limit?
 8 PRESIDENT BETHLEHEM: Mr. Alexandrov, I can
 9 say that if the Parties agree, the Tribunal is very
 10 likely to be minded to agree. The 30-page limit is
 11 not an injunction or a request to cover 30 pages in
 12 close type. It's simply giving you an opportunity.
 13 If you wanted to do it in one page or frankly not to
 14 submit anything at all because you didn't think there
 15 was anything to be said, you'd be free to do that.
 16 But if you can agree on a lower page limit, you'd be
 17 very welcome to agree.
 18 MR. ALEXANDROV: I appreciate that,
 19 Mr. President. We--the reason I'm raising the
 20 question is we understand that we don't have to fill
 21 in 30 pages, but in the absence of an agreement
 22 between the Parties, one Party submits five pages and

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05:45:30 1 the other one 30 pages, that may seem to be unfair.
2 So, if the Tribunal allows us that flexibility, we may
3 seek to reach a different agreement. If we don't,
4 we'll stick with the 30 pages.

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

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

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05:46:40 1 PRESIDENT BETHLEHEM: Yes, indeed.

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

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

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

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

20 PRESIDENT BETHLEHEM: By the 25th, if that's
21 going to be the date, it will be for a template. And
22 we will then invite you to fill in that template. I

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05:47:37 1 think we've had submissions from both Parties on the
2 costs that you are both seeking, so this is a
3 quantification of costs exercise rather than an
4 argument of costs exercise.

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

13 PRESIDENT BETHLEHEM: Yes, indeed.

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

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05:48:42 1 PRESIDENT BETHLEHEM: Well, Mr. Alexandrov,

2 we'll take that as well under advisement, under
3 consideration, and when the Tribunal comes back to
4 both Parties and asks to you fill in that cost
5 schedule, we'll indicate. It may be, whatever the
6 outcome in due course, that it's going to be useful to
7 have a quantification of costs up until the 25th of
8 May to crystallize those costs.

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

18 PRESIDENT BETHLEHEM: Let me try and capture
19 it as I think the Tribunal has it in its collective
20 mind. By the 25th of May, we would expect to have the
21 Post-Hearing Submissions as we've described them. We
22 would also expect and hope that we will have an

05:49:55 1 agreement on a cost schedule. Thereafter, the
 2 Tribunal will come back to the Parties and invite the
 3 Parties to complete that cost schedule. The
 4 completion of that cost schedule will relate to the
 5 quantification of costs up until the point at which
 6 the cost schedule is due to be completed.

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

20 I also wanted to observe that it does refer
 21 back, of course, to the Application that the Claimants
 22 had made to update the record of the proceedings with

05:51:09 1 respect to some of the Lots. And I think where we are
 2 at present is that in the course of the Respondent's
 3 cross-examination, the substance of those documents
 4 are all solicited or from, I believe, Ms. Chavez, or
 5 otherwise, and so, I'll just leave this request on the
 6 record. I think those are updated documents which
 7 ought to be received by the Tribunal, and I invite my
 8 friend to agree with that. But otherwise, those are
 9 updates which we have, actually, presently in hand.
 10 Otherwise, I think I'd suggest the general procedure
 11 be adopted going forward.

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

16 MR. ALEXANDROV: Mr. President, when you
 17 communicated to us the Tribunal's desire to allow
 18 updates if such updates are necessary, you said
 19 without annotations and without argument. We
 20 understand the point "without argument." Perhaps you
 21 could clarify what you mean when you say "without
 22 annotation." Do you mean that you want a narrative of

05:52:24 1 an update without documents? Or you want documents
 2 without narrative, which may or may not contain
 3 arguments? We're not sure what the form or the format
 4 would be of such updates.

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

10 Mr. Cowper, I don't have directly in mind the
 11 detail of your seven documents, but my recollection is
 12 that you wanted to submit them because they were
 13 relevant to valuation. And indeed, Mr. Alexandrov,
 14 your application in respect of the one document that
 15 was refused, the way that you put it was that this was
 16 directly relevant to valuation. So, we don't--are not
 17 soliciting those types of documents. I think what we
 18 are trying to avoid, and Mr. Cowper, I take absolutely
 19 your suggestion that this would be usefully first
 20 handled by an exchange between the Parties themselves
 21 rather than to the Tribunal directly, what we would
 22 like to avoid or ensure is that the Tribunal is

05:53:37 1 informed of any development in relation to these Lots
 2 which may have a bearing on any decision that we make.

3 For example, we are aware that there are a
 4 number of Lots that have not so far been subject to a
 5 Declaration of Public Interest. It may be--and I'm
 6 not doing anything other than speculating--but it may
 7 be that the Tribunal considers that the fact of a
 8 Declaration of Public Interest is important. What we
 9 don't want to do is that we are putting a signature on
 10 the bottom of a page of an Award only to find out that
 11 the day before there was some material development.

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

22 Mr. Alexandrov.

05:54:47 1 MR. ALEXANDROV: Mr. President, thank you for
 2 that clarification, and we accept the offer to confer
 3 with the other Party should such a situation arise,
 4 and obviously if there is a dispute about what should
 5 be provided to the Tribunal and how and when you will
 6 hear about it.

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

19 PRESIDENT BETHLEHEM: Yes, indeed. And
 20 again, to try and clarify a little bit further, if
 21 this is necessary, and we've been told throughout this
 22 hearing that there are documents that, for example,

05:55:50 1 are published on various Web sites of the Costa Rican
 2 Government or elsewhere. That's the kind of
 3 information that we would like to ensure is brought to
 4 our attention. So, we are not inviting the Parties to
 5 continue a process of repeating submissions to us
 6 through documents. It's really factual
 7 submissions--factual developments--that we may wish to
 8 take account of.

9 MR. ALEXANDROV: Understood.

10 PRESIDENT BETHLEHEM: Thank you very much.
 11 Anything else? Mr. Cowper?

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

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

05:56:53 1 And we've noticed some lovely typographicals
 2 in the LiveNote as it's been developing, and it's a
 3 pity we can't capture those lovely typographicals, but
 4 thank you very much.

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

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

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

17 And I'd also like to close. I take it--you
 18 can take it for granted that this comes from the
 19 Tribunal and the Tribunal Secretary, all of these
 20 thanks as well--but I'd just like to close with a note
 21 or an acknowledgment both to Claimants personally and
 22 to the representatives of the Government, Government

05:58:11 1 officials. I think amongst the lawyers, and I include
 2 the Tribunal, members and counsel, we appreciate very
 3 much how difficult it can be to see the issues with
 4 which you are dealing with at a personal level come
 5 before an international Tribunal in these
 6 circumstances and in a public fashion. So, we very
 7 much appreciate your assistance and your indulgence
 8 with us this week in assisting us in reaching what we
 9 hope will be a considered judgment in due course. So,
 10 thank you very much.

11 As I said, I'm not declaring the hearings
 12 closed. I'm simple adjourning the hearings and
 13 declaring this phase of the proceedings closed. And
 14 safe travels to everyone. thank you very much indeed.

15 (Whereupon, at 5:58 p.m., the Hearing was
 16 concluded.)

CERTIFICATE OF REPORTER

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

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


DAWN K. LARSON