

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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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,

1 P R O C E E D I N G S  
 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

09:34:54 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

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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.

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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

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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.

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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

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

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

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

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

11:22:02 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.

11:23:14 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

11:24:25 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

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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

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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

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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

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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

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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

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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."

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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

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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

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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

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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

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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

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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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12:43:44 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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12:45:14 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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12:46:47 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.

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

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

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

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

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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.

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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

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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.

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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. Ruiz, 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

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

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

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

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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02:56:01 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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02:57:42 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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02:59:36 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 report 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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03:02:47 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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03:04:05 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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03:05:18 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.

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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

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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

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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

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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

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

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

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

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:

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.

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

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

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.

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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

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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.

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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,

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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