

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

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

CLAIMANTS,

v.

THE REPUBLIC OF COSTA RICA

RESPONDENT.

**RESPONDENT'S RESPONSE TO
CLAIMANTS' NOTICE OF ARBITRATION**

JULY 26, 2013

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I. Introduction

1. The Republic of Costa Rica (“Respondent,” “Costa Rica,” or the “Government”) hereby submits this Response to the Notice of Arbitration and Statement of Claim (“Notice of Arbitration”) of Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brett E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion (“Claimants”) dated June 10, 2013.¹

2. Claimants commenced this action against Respondent pursuant to Article 10.16(1)(a) of the Dominican Republic – Central America – United States Free Trade Agreement (“CAFTA”). Claimants complain that Respondent has expropriated Claimants’ investment in land in order to create a marine park to sustain the nesting grounds of endangered leatherback turtles in Costa Rica. Claimants allege that in expropriating their investment, Costa Rica has treated Claimants unfairly in violation of Articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of CAFTA.² As discussed below, Respondent rejects all claims raised by Claimants in their Notice of Arbitration.

¹ Although Claimants’ Notice of Arbitration is entitled a “Notice of Arbitration and Statement of Claim,” we understand from Claimants that they intend to file a full Memorial on the Merits separate and apart from their “Notice of Arbitration and Statement of Claim.” Respondent understands, therefore, that, although the document is entitled, in part, a “Statement of Claim,” it is not intended by Claimants to be such a document. Respondent reserves the right to submit its Statement of Defense/Counter-Memorial on the Merits pursuant to Article 21 of the United Nations Commission on International Trade Law Arbitration Rules (“UNCITRAL Rules”), and in accordance with the schedule determined by the parties and/or the Tribunal.

² See Notice of Arbitration and Statement of Claim of Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brett E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion, June 10, 2013 (“Claimants’ Notice of Arbitration”), paras. 17, 85-96. Respondent received a copy of Claimants’ Notice of Arbitration on June 12, 2013.

3. While Claimants assert that this dispute falls under the jurisdiction of CAFTA, whether such assertion is correct will depend on the evidence Claimants provide in connection with their substantive submissions. As discussed below, Respondent thus reserves the right to object on the basis of the Tribunal's lack of jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*.

4. Pursuant to Article 4 of the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules"), in the remainder of this Response we respond to Claimants' Notice of Arbitration and provide Respondent's procedural proposals. In Section II, we introduce the factual background to this dispute. In Section III, we expand on the issue of jurisdiction. In Section IV, we respond to each of Claimants' claims in their Notice of Arbitration. In Section V, we respond to Claimants' request for damages. In Sections VI-IX, we discuss proposals for the language of the arbitration, the number of arbitrators and constitution of the Tribunal, the Administering Authority and seat of arbitration, and the name and contact details of the Respondent, respectively. In Section X, we present our request for relief.

II. Factual Background

5. This case revolves around a quintessential function of a sovereign state—the right to protect the natural environment for the benefit of all of the state's citizens. Costa Rica has a responsibility to safeguard the environment and to balance public and private interests in pursuit of that goal. In this case, Costa Rica has undertaken not just responsibility for itself, but a global responsibility for the protection of one of the most endangered species on Earth—the leatherback sea turtle (*Dermochelys coriacea*), in

Spanish, *tortugas baulas*, or simply *baulas*. Costa Rica is home to some of the most important nesting sites of the leatherback sea turtles—including la Playa Grande and la Playa Ventanas, the beaches on which at least some of Claimants’ properties are located.

6. The *Las Baulas* National Park (the “Park”) was established to protect the leatherback sea turtle, as well as other species and natural resources. It was first created by an Executive Decree (No. 20518) in June 1991. As the Decree explained, the government was concerned that tourist development in the vicinity of the beaches (including light, noise, and other forms of pollution) would seriously affect the nesting of the leatherback turtles.³ The Decree thus called for the creation of a National Park whose boundaries would include a “strip of land of 75 meters from the public zone [of 50 meters from high tide].”⁴

7. As a matter of law dating back to 1977, along Costa Rica’s entire coastline, the first 50 meters of land running inland from the mean high tide line is non-transferable (inalienable) property of the State known as the “public zone” (*zona pública*).⁵ The additional 75 meter zone beyond the “public zone” is necessary to protect the turtles, because it encompasses a tall “green curtain” of trees that borders the beach. The Park also includes the waters offshore, approximately 12 miles into the Pacific Ocean. Hence, the

³ See Executive Decree No. 20518-MIRENEM, July 9, 1991 (“Executive Decree No. 20518-MIRENEM”), Preamble at para. 4 [Exhibit C-1b].

⁴ See Executive Decree No. 20518-MIRENEM at Art. 2 (“. . . *incluyendo una franja de terreno de 75 metros, contada a partir de la zona pública . . .*”) [Exhibit C-1b].

⁵ See Law on the Terrestrial Maritime Zone, Law No. 6043, March 2, 1977 [Exhibit R-001].

Park's official name is the *Parque Nacional Marino Las Baulas de Guanacaste* (National Leatherback Turtle Marine Park of Guanacaste).⁶

8. On July 10, 1995, the Costa Rican Congress passed Law No. 7524 (the “*Las Baulas National Park Law*”), which set out in greater detail the means to achieve the environmental protection objectives that had motivated the creation of the Park.⁷

Importantly, Article 2 of the *Las Baulas National Park Law* authorizes the State to acquire, either through direct purchase or expropriation, any private properties (or portions thereof) that are located within the boundaries of the Park.⁸

9. In furtherance of the establishment of the Park, the Costa Rican Government adopted Resolution No. 2238-2005-SETENA (the “Resolution”) on August 30, 2005, which suspended all environmental assessment proceedings for privately owned land located within the 125 meter inland boundary of the Park.⁹ Due to controversy over a typo in the *Las Baulas National Park Law* and in keeping with the 1991 Decree, the Government explicitly defined in the Resolution the boundary of the Park as “seventy five meters after the fifty-meter public zone, for a total of one hundred and twenty five meters”¹⁰ and then confirmed such boundary again in a statement from the Attorney

⁶ See Executive Decree No. 20518-MIRENEM at Art. 1 [Exhibit C-1b].

⁷ See generally Law Creating the Law Baulas National Park, Law No. 7524, July 10, 1995 (“*Las Baulas National Park Law*”) [Exhibit C-1e].

⁸ See *Las Baulas National Park Law* at Art. 2 (“*Para cumplir con la presente Ley, la institución competente gestionará las expropiaciones de la totalidad o de una parte de las fincas comprendidas en la zona delimitada en el artículo anterior. Los terrenos privados comprendidos en esa delimitación serán susceptibles de expropiación y se considerarán parte del Parque Nacional Marino las Baulas, hasta tanto no sean adquiridos por el Estado, mediante compra, donaciones o expropiaciones; mientras tanto los propietarios gozarán del ejercicio pleno de los atributos del dominio.*”) (emphasis omitted) [Exhibit C-1e].

⁹ See Resolution No. 2238-2005-SETENA, August 30, 2005 (“Resolution No. 2238-2005-SETENA”), p. 11 [Exhibit C-1f].

¹⁰ Resolution No. 2238-2005-SETENA at p. 11 [Exhibit C-1f].

General on December 23, 2005.¹¹ The Constitutional Chamber of the Supreme Court of Justice of Costa Rica also confirmed the 125 meter inland boundary of the Park in its subsequent decision on May 23, 2008, and assumed a 125 meter inland boundary in its decisions on May 27, 2008 and December 16, 2008.¹²

10. Continuing with the procedure for establishing the Park, the Government began expropriation proceedings as early as December 1, 2005 with Decrees of Public Interest on portions of certain of Claimants' properties that fall within the boundaries of the Park.¹³ Claimants base their claims in this dispute not only on property within the boundaries of the Park but also on property that falls outside of the 125 meter inland strip that constitutes part of the Park, property that is not subject to expropriation.¹⁴

11. Costa Rica subsequently accorded Claimants all of the procedural rights as set forth in Law No. 7495 (the "Expropriation Law") and Law No. 8505,¹⁵ the Administrative contentious Procedural Code modifying the Expropriation Law, in administrative appraisals, judicial proceedings, and appeals of judgments.¹⁶ Many of those

¹¹ See Resolution No. 2238-2005-SETENA at p. 11 [Exhibit C-1f]; *see also* Letter from the Attorney General to the Minister of the Environment, December 23, 2005, pp. 18-21 [Exhibit C-1g].

¹² See CR Supreme Court, Constitutional Chamber, Res. No. 08-008713, File No. 06-008369-0007-CO, May 23, 2008, pp. 2, 15, 27 [Exhibit C-1h]. *See also generally* CR Supreme Court, Constitutional Chamber, Res. No. 2008-008770, File No. 06-003614-0007-CO, May 27, 2008 [Exhibit C-1i]; CR Supreme Court, Constitutional Chamber, Res. No. 2008-018529, File No. 07-005611-0007-CO, December 16, 2008 [Exhibit C-1j].

¹³ See Decrees of Public Interest (Decreto de Interés Público) for LOTS B1, B3, B5, B6, B7, and B8, December 1, 2005 [Exhibits C-23c, C-24c, C-25c, C26c, C-27c, and C-28c].

¹⁴ See Claimants' Notice of Arbitration at paras. 42, 44-49, 91, and 96.

¹⁵ See Expropriation Law, Law No. 7495, June 8, 1995 [Exhibit C-1c]; Administrative Contentious Procedural Code Modifying the Expropriation Law, Law No. 8505, January 1, 2008 [Exhibit C-1d].

¹⁶ See Decrees of Public Interest, Administrative Appraisals, Judicial Proceedings, and Appeals Judgments [Exhibits C-3 – C-11, C-16 – C-17, C-20 – C-21, and C-23 – C-28].

proceedings were ongoing before the Costa Rican judiciary at the time Claimants filed their Notice of Arbitration.

III. Jurisdiction

12. Claimants assert that the Tribunal has jurisdiction to hear this case based on Claimants' nationalities and their alleged interest in properties in Costa Rica, but Claimants have the burden to prove that they are investors under CAFTA and that they held qualifying investments in Costa Rica at the time of the alleged breaches. Respondent, therefore, reserves the right to object to jurisdiction *ratione personae* and *ratione materiae* subject to any further evidence Claimants may submit in conjunction with their additional written submissions. Respondent also reserves the right to object to jurisdiction *ratione temporis* based on the fact that the alleged breaches may have taken place before CAFTA came into force in 2009 or may be time-barred under CAFTA, Article 10.18(1).

IV. Response to Claimants' Claims

13. Claimants allege that in violation of Article 10.7 (Expropriation and Compensation) of CAFTA, Respondent has not provided Claimants prompt review of the expropriation of their investment and prompt, adequate, and effective compensation for the expropriated properties.¹⁷ They further assert that from the beginning of the expropriation process, Respondent has not treated them fairly and equitably, in violation of Article 10.5 (Minimum Standard of Treatment).¹⁸ Specifically, Claimants allege that Respondent has conducted its expropriation process in an arbitrary manner and, thus, failed to provide

¹⁷ See Claimants' Notice of Arbitration at paras. 85, 87-94.

¹⁸ See Claimants' Notice of Arbitration at paras. 95-96.

Claimants with due process of law.¹⁹ Claimants also allege that Costa Rica has treated foreign investors more favorably than they have been treated, in violation of Article 10.4 (Most-Favored-Nation Treatment). Additionally, Claimants gratuitously allege a breach of Article 10.3 (National Treatment) without referring to any facts related to any such breach.²⁰

14. Respondent rejects Claimants allegations that Costa Rica has breached its obligations under CAFTA. The steps required for the establishment of the Park are circumscribed by each property within the Park boundaries and do not even apply to property that falls outside of the 125 meter zone. As such, Claimants have failed to prove their case of expropriation with respect to the investments at issue in this arbitration. Claimants have also not proven that Respondent failed to provide prompt, adequate and effective compensation for Claimants' investments or demonstrated that Respondent has not provided due process of law, much less in a manner that rises to the level of a breach of the fair and equitable treatment provision. Claimants have also not shown that Respondent's actions toward Claimants have somehow been less favorable than similarly situated domestic or foreign investors. Respondent will respond in full to Claimants' allegations once it has received Claimants' full merits pleadings.

V. Damages

15. Claimants seek damages in the amount of US \$49 million plus interest, costs and legal fees associated with the arbitration, property taxes, and a fee to compensate

¹⁹ See Claimants' Notice of Arbitration at paras. 95-96.

²⁰ See Claimants' Notice of Arbitration at para. 86.

Claimants for taxes levied on any award.²¹ Claimants have provided no support whatsoever for the alleged damages sought. Respondent reserves the right to rebut any and all damages claims sought by Claimants once they have submitted support for their damages argument.

VI. Language of the Arbitration

16. As of the date of this filing, the parties have not agreed on the language of the arbitration. Therefore, pursuant to Article 19 of the UNCITRAL Rules, Respondent proposes that the procedural languages be English and Spanish. Respondent specifically proposes that:

- (1) routine, administrative or procedural correspondence that is addressed to or sent by the Administrating Authority may be made in either procedural language; any written requests and applications may be submitted in either procedural language;
- (2) pleadings, expert opinions, and witness statements, as well as accompanying documentation, may be submitted in either procedural language;
- (3) exhibits be submitted in their original language if that language is either English or Spanish; if the original language of the exhibits is other than English or Spanish, the exhibits be translated into either English or Spanish;

²¹ See Claimants' Notice of Arbitration at para. 101.

- (4) translations need not be certified; if a dispute arises as to the accuracy of a translation, the matter be decided by the Tribunal; and
- (5) witnesses and experts may testify at the hearing in their native language; witness and expert testimony in Spanish shall be translated simultaneously into English and witness and expert testimony in English shall be translated simultaneously into Spanish; witness and expert testimony shall be translated into English and Spanish if their native language is, and they wish to testify in, a language other than English or Spanish.

VII. Number of Arbitrators and Constitution of the Tribunal

17. As of the date of this filing, the parties have agreed that the Tribunal will consist of three arbitrators. The parties are currently discussing the process for constituting the Tribunal. Respondent will notify Claimants of the appointment of its party-appointed arbitrator in accordance with the schedule to be agreed between the parties.

VIII. Administering Authority and Seat of the Arbitration

18. As of the date of this filing, the parties have agreed that the Administering Authority of the arbitration shall be the International Centre for Settlement of Investment Disputes (“ICSID”).

19. The parties have also agreed that the seat of the arbitration shall be, and that the hearing will be held in, Washington, D.C. The Tribunal may meet for deliberations without the parties in any place and manner convenient to its members, in person or by any means of communication that the Tribunal considers appropriate.

IX. Name and Contact Details of Respondent

20. Respondent is the Republic of Costa Rica. For the purposes of this case, all correspondence and notices to Respondent should be addressed to:

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All electronic communications should be sent to Ms. González, Mr. Aguilar, Mr.

Alexandrov, Ms. Carlson and Ms. Haworth McCandless at their respective email addresses listed above.

X. Relief Requested

21. Respondent respectfully requests that the Tribunal find that it has no jurisdiction to hear this dispute. If the Tribunal were to find that it had jurisdiction to hear this dispute, Respondent respectfully requests that this Tribunal dismiss Claimants' claims in their entirety. Respondent also respectfully requests that the Tribunal order Claimants to pay all costs and fees incurred by Respondent in connection with this dispute. Respondent reserves the right to amend or supplement the above arguments.

Respectfully submitted,



Stanimir A. Alexandrov
Counsel for Respondent

Dated: July 26, 2013