ICSID Secretariat File No. UNCT/13/2

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

BETWEEN:

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

INVESTORS / CLAIMANTS

AND

THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA

PARTY / RESPONDENT

CLAIMANTS' MEMORIAL ON THE MERITS

Dr. Todd Weiler
#19 - 2014 Valleyrun Blvd.
London, ON N6G 5N8
Canada

Ms. Tina Cicchetti
Mr. D. Geoffrey Cowper, Q.C.
Ms. Tracey Cohen
Ms. Mónica Jimenez Gonzalez
FASKEN MARTINEAU DUMOULIN LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
Canada

Lic. Vianney Saborío Hernández
Barrio Maynard #56
San Rafael, Escazú
San José
Costa Rica

I. INTRODUCTION

1. The Government of Costa Rica has taken some very valuable investments from the Claimants without paying for them. Over six years ago the boundaries of a national park were expanded to permit the Respondent to acquire control over the Claimants' lands. It has been over four years since the Respondent's creeping measures of expropriation completed the taking, thereby ending the Claimants' ability to exercise their property rights in these investments.

2. The Claimants seek full and fair compensation for the loss of their investments, which were taken from them for the purposes of expanding the landmass of an adjoining national marine park. The Respondent has breached its CAFTA obligations to abstain from the adoption or maintenance of measures of creeping expropriation, to provide prompt, adequate and effective compensation when engaging in a direct expropriation, to provide compensation without delay, and to treat the Claimants and their investment interests in a fair and equitable manner.

3. The Claimants invested in twenty-six picturesque beachfront lots, located at Playa Ventanas and Playa Grande on Costa Rica's Pacific coast. They enjoyed full rights of private property in their respective lots, which was extremely rare for the country as a whole. Their investments were valuable because they bordered on a national park, in a beautiful region that played host to exotic flora, fauna and animals, and which was nevertheless easily accessible and well supplied with services. The Claimants planned to develop their land both for sale and for private use, as high-end retirement and/or vacation homes. At all times, the Claimants were committed to developing their land in a manner that was not only sustainable, but was protective of one of Guanacaste's most famous seasonal visitors: nesting Leatherback turtles.

4. The Respondent imposed its creeping measures of indirect expropriation upon the Claimants using a haphazard and unpredictable process, which was informed by two factors. First, the establishment and expansion of national parks has long been a locally popular and internationally attractive policy, bolstering political support and international financial support. However this popular policy has been pursued by the respondent without concern for the need to compensate those whose property must be taken to create the park. .Popular support attaches to park announcements – not discharging the obligation to pay for them.

5. The second factor that drove Costa Rica's adoption of creeping expropriation, as the means by which it would ultimately deprive the Claimants of the use and enjoyment of their investments, was the failure of the proponents of park expansion to create the park by the conventional legislative means. Because park proponents were compelled to adopted indirect and opaque measures to expand the park, the result was a series of related executive and judicial events that – when taken together – formed a composite measure of expropriation that would ultimately deprive the Claimants of their investments.

6. The Respondent also ventured down the path of direct expropriation. The Claimants experience with the Respondent's municipal expropriation regime indicates that it falls short of international standards. It is not designed to provide full and fair compensation to rights holders, and it is not administered in a way that provides sufficient certainty for a litigant to plan and manage his/her affairs.

7. In any event, the Respondent appears to have been unaware of just how high fair market value is for the lands it has taken. Hence, the entire municipal legal regime governing cases of direct expropriation appears to have totally seized up, leaving the Claimants no less stranded under this regime than they are under the indirect one. In either case, they have been made to wait, perhaps indefinitely, to be paid the adequate compensation owed to them.

II. FACTS

A. The Investors and Their Investments in Playa Grande and Playa Ventanas

(a) The Investors

8. Spence International Investments, LLC ("Spence Co.") is a company established under the laws of California, USA.

9. The individual Claimants Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brett E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion are nationals of the United States of America.

10. Each of the Claimants made investments in land in Playa Grande and/or Playa Ventanas, which are neighbouring beaches located in the Canton of Santa Cruz, in the Province of Guanacaste, Costa Rica. Proof of US nationality for each Claimant is attached at Appendix A.

(b) The Commercial Strategy: Counting on Conservation

11. In Costa Rica, the opportunity to acquire freehold property rights in beachfront land is extremely rare. Less than five per cent of Costa Rica's coastline is privately titled. Normally, lesser property rights in beachfront land can be obtained by way of contract (e.g. lease agreement with a third party or concession agreement with a municipality). All foreign investors (whether residential or commercial) prefer the better security of tenure that comes with possession by right of freehold property. The opportunity to acquire freehold interest in a bespoke residential project located on a beachfront lot was thus highly prized.

12. Blessed with a long white sand beach, Playa Grande's ideal location greatly enhanced the value of the Claimants' real estate assets.[1] In addition, it is also reputed to host one of Central America's best surfing locations. Playa Ventanas, which is adjacent to Playa

[1] White sand beaches are very much preferred over brown, black or grey sand beaches, and especially beaches composed of stone or rocks.

Grande, provides a similarly beautiful white sand beach but with an estuary enveloping it, making each of its beachfront lots even more attractive to prospective, high-income purchasers, who would prize the exclusivity this topography could offer.

13. Playa Grande and Playa Ventanas are conveniently located within one hour's drive from the Liberia International Airport, and within half an hour of the commercial centre of Tamarindo (which served as the set location for the film "*Endless Summer*"), and other exclusive resorts, such as the Westin at Playa Conchal, the J.W. Marriott at Playa Mansita and the Palms at Playa Flamingo. Playa Grande's proximity to these locations provides access to an ever-growing number of restaurants, grocery stores and other desirable services. In addition, both Playa Grande and Playa Ventanas were accessible by paved road and benefitted from full access to utilities infrastructure (e.g. water, electricity, etc.).[2] Neither of these traits (of access to transportation and utilities infrastructure) is commonly found anywhere else in north-western Costa Rica.

14. Despite the proximity of Playa Grande and Playa Ventanas to Tamarindo, which is an urban and densely developed area, the development plans for Playa Grande and Playa Ventanas were very different. The existing development is mainly residential with a few small hotels. South Playa Grande features large lots, which were once farms. North Playa Grande and Playa Ventanas have relatively small lots, but still feature low density development mostly made up of single family dwellings, many of which are vacation properties for owners with primary residences elsewhere. Buyers in Playa Grande and Playa Ventanas were attracted to the more exclusive environment and many cherished the opportunity to own property on a quiet beach where Leatherback turtles nested.

15. In addition, Playa Grande has played host to the remarkable ritual of Leatherback turtle (Dermochelys coriacea) nesting, every winter, as long as human records have been kept in the area. Leatherbacks are the largest species of reptile in the world, and can be found in all of the world's oceans. The global population of Leatherbacks is comprised of seven geographical sub-populations. The Leatherbacks that visit Playa Grande form part of the eastern Pacific sub-population. The particular pattern of migration for this group is different from those of other Pacific subpopulations, which has them traveling from their nesting sites in Mexico and Costa Rica deep into the southeast Pacific Ocean. Researchers have attributed this migration pattern to the turtles' diet, which they believe is composed almost exclusively of jellyfish. Jellyfish appear to be found in abundance in ocean upwells located in the eastern Pacific.[3]

16. Unfortunately, this pattern of migration has made Playa Grande's Leatherbacks more vulnerable than other populations to changes in the distribution or abundance of jellyfish within their migration zone. Deaths caused directly by human activities within the same zone, such as being caught in fishing equipment (as a "secondary" or "by-catch") also appears to be of great risk for these turtles. Overall, the picture for Leatherbacks is not bad though. In fact, because of the relative health of many other sub-populations, some

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2 See First Witness Statement of Robert Reddy dated 21 April 2014 ("Reddy WS1").

3 *Helen Bailey et al.*, Identification of distinct movement patterns in Pacific leatherback turtle populations influenced by ocean conditions," 22 (2012) Ecological Applications 735. The study included tracking data gathered at Playa Grande.

predict that by 2020, "the global Leatherback population might no longer qualify as "Threatened"—i.e. a category listing of Vulnerable, Endangered, or Critically Endangered—according to the IUCN Red List Criteria."[4]

17. The number of Leatherbacks nesting at Playa Grande has fallen precipitously over the last twenty years. Scientific consensus appears to have been reached on at least two of the primary causes of this decline:[5] (1) incidental capture in commercial and artisanal fisheries, and (2) changes in resource availability in each ocean basin (possibly due to climate change).[6] Practical solutions for stemming any further decline in the numbers of Playa Grande's Leatherbacks will include continued monitoring and focusing international cooperation on restricting commercial fishing from zones where these majestic animals are now known to migrate for feeding.[7]

18. The devastation of the Playa Grande Leatherback population has been heartbreaking for all concerned. In spite of the fact that access to nesting beaches has been seasonally restricted since 1991 (which has virtually eliminated poaching), and the fact that there has been negligible development between 1991 and 2008, and then absolutely no development whatsoever from 2009 onwards, over that exact same timeframe the population has plummeted from 1500 nesting females to approximately five dozen today.

19. It is a shame that the public purposes for which the investments, described below, were never realized, but the Claimants are, by far, the biggest losers. They have not only shared in the community's loss. They also lost their investments five or more years ago, and they have been waiting for the Respondent to make good on its CAFTA promise of payment without delay ever since.

(c) Establishment

20. Each Claimant made his/her investment with an expectation of gains to be made in exchange for the commercial risk of committing capital and resources to the development of such real estate. Each Claimant also made his/her/its investment indirectly, by means of individual holding companies established under the laws of Costa Rica. The acquisition of each of the respective Claimant's lots is described in further detail below.

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4 It has also been posited that immune-depleted Leatherbacks may be more vulnerable to new threats such as fungal pathogens. See: Sarmiento-Ramírez at al, "Global Distribution of Two Fungal Pathogens Threatening Endangered Sea Turtles," 9 (2014) PLOS One.

5 Such consensus is not absolute, however. For example, it should be noted that in papers in which Leatherback Trust affiliated researchers have served as authors, "unsustainable egg harvesting" or "poaching" is consistently added as a primary causative factor. In such cases, the following study is inevitably cited: PS Tomillo *et al*, "Effects of illegal harvest of eggs on the population decline of leatherback turtles in Las Baulas Marine National Park, Costa Rica," 22 (2008) Conservation Biology 1226.

6 See, e.g.: Bryan P. Wallace *et al*, "Impacts of fisheries bycatch on marine turtle populations worldwide: toward conservation and research priorities," 4 (2013) Ecosphere 1; Eric Gilman et al, "Ecological risk assessment of the Marshall Islands longline tuna fishery" 44 (2014) Marine Policy 239; Jones T. Todd et al., "Resource Requirements of the Pacific Leatherback Turtle Population," 7 (2012) PLOS One.

7 See, e.g.: John H. Roe *et al*, "Predicting bycatch hotspots for endangered leatherback turtles on longlines in the Pacific Ocean" Proc. R. Soc. B 281: 20132559. http://dx.doi.org/10.1098/rspb.2013.2559, accessed 20 April 2014.

21. A map that identifies the approximate location of each lot at issue can be found at Exhibit C-2a.[8] In the interests of convenience, each lot shall be referred to using its subdivision abbreviation, as shown on the map, with cross-references to the unique parcel identifier or "*Folio Real*" number.

22. Documents evidencing each Claimant's right of ownership in the respective lots are appended and will be referenced further below. Documentary evidence reflecting the current status of the expropriation process for each individual lot has also been included in the exhibits, delineated by lot.

(i) The Spence Lots

23. On 20 August 2003, Bob F. Spence ("Spence") purchased two lots on Playa Ventanas, Lots V32[9] and V33.[10]

24. On 30 September 2003, Spence purchased two further lots on Playa Ventanas, Lots V30[11] and V31.[12]

25. All four of the aforementioned lots lay entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

26. In the intervening period, three of the four companies owned directly by Spence: My New Land of Costa Rica TRC, SA, Luxury Lands of Costa Rica QRZ, SA, and The Purple Esmerald, SA were consolidated, with all of their assets, into the fourth, Windows of the Blue Sky Net, SA, in 2012.[13] Thus, today, all four lots are owned by Windows of the Blue Sky Net, SA, which is an enterprise that is wholly owned by Spence.[14]

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[8] This exhibit was adapted by the Claimants from a map created by the environmental evaluation department of MINAET (which is publicly available) in order to provide the Tribunal with a geographic description of the lots at issue.

[9] Folio Real No. 5-042334-000. This lot was purchased through The Purple Esmerald, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.40. Also see Exhibit C-5b and the First Witness Statement of Bob F. Spence dated 21 April 2014 ("Spence WS1").

[10] Folio Real No. 5-042336-000. This lot was purchased through Windows of the Blue Sky Net, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.38. Also see Exhibit C-6b and Spence WS1.

[11] Folio Real No. 5-042330-000. This lot was purchased through My New Land of Costa Rica TRC, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.39. Also see Exhibit C-3b and Spence WS1.

[12] Folio Real No. 5-042332-000. This lot was purchased through Luxury Lands of Costa Rica QRZ, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.41. Also see Exhibit C-4b and Spence WS1.

[13] Appendices B.35, B.36.

[14] See Appendix B.37. Exhibit C-2b sets out the corporate structure of Spence's companies.

(ii) The Copher and Holsten Lots

27. Brenda Copher and Ronald Copher (referred to collectively as "the Cophers") acquired two lots on Playa Ventanas, Lots V39 and V40,[15] through the purchase of 100% of the shares of Corporación Lacheaven de Ventana, SA, on 25 September 2003.[16]

28. On 19 November 2004, Ronald Copher acquired an additional adjacent lot on Playa Ventanas, Lot V38,[17] through Seize the Day, SA.[18]

29. All three of these lots are located entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

30. Ronald Copher is the sole shareholder of Ronco Realty Investments, Ltda, an enterprise established under the laws of Costa Rica.[19] Joseph Holsten is the sole shareholder of Joeco Realty Investments Ltda, which was also established under the laws of Costa Rica.[20] On 8 February 2006, Ronald Copher and Joseph Holsten acquired joint ownership of two beachfront lots on Playa Ventanas, Lots V46 and V47,[21] through these holding companies. Both of these lots lie entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.[22]

(iii) The Spence Co. Lots

31. Spence Co. acquired a number of properties in Playa Ventanas and Playa Grande and invested in the development of those properties. In general, legal and beneficial title to the properties was vested into individual trust enterprises, which each transferred title in lots to new owners, using special purpose vehicles.[23]

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[15] The registered date of purchase is 27 September 2000 for both beachfront lots on Playa Ventanas known as V39 and V40 (Folio Real Nos. 5-042348-000 & 5-042350-000), the transfer of Corporación Lacheaven de Ventana, SA to Brenda and Ronald Copher included these two properties. See Exhibits C-8b and C-9b and First Witness Statement of Ronald E. Copher dated 23 April 2014 ("Copher WS1").

[16] Each of the Cophers hold 50% of the shares of Corporación Lacheaven de Ventana SA, an enterprise established under the laws of Costa Rica. See Appendices B.42, B.43, B.44, B.45 and B.46 and Copher WS1.

[17] The registered date of purchase for Lot V38 is 19 November 2004, it was assigned Folio Real No. 5-042346-000. See Exhibit C-7b and Copher WS1.

[18] Ronald Copher holds 100% of the shares of Seize the Day, Ltda., which is an enterprise established under the laws of Costa Rica. Subsequent to the purchase of Lot V38, Seize the Day, SA was transformed into a Limited Partnership in 2005. See Appendices B.47, B.48, B.49, B.50, B.51, and B.52 and Copher WS1.

[19] Appendices B.56, B.57, B.58, B.59, B.60, B.61, and B.62 and Copher WS1.

[20] Appendices B.53, B.54, and B.55 and Copher WS1.

[21] The registered date of purchase for Lots V46 and V47 is 8 February 2006. Lot V46 was assigned Folio Real Nos. 5-042362-001 and 002 and Lot V47 was assigned Folio Real Nos. 5-042364-001 and 002. Exhibits C-10b1, C-10b2, C-11b1 and C-11b2 and Copher WS1.

[22] The official documents signifying specific coordinates for each of the lots acquired by both the Cophers and Joseph Holsten were certified with a 1993 stamp indicating that they were not encompassed by the boundaries of the Park contemplated by the Government's 1991 Decree, as explained further below. Also see Copher WS1.

[23] To the extent it is relevant, the special purpose vehicles and their role in the acquisition and transfer of ownership are discussed in this section and documents are referred to and appended. If necessary, Spence Co. may refer to and rely on additional documents in subsequent pleadings that set out details of these arrangements. See Exhibits C-2c and C-2d for a diagrammatical summary of the relevant companies and Reddy

32. Thus, acting through two wholly-owned subsidiaries,[24] Spence Co. owned and controlled a number of enterprises established under the laws of Costa Rica, including Grande Beach Holdings, Ltda.; [25] Keeping Track, Ltda.; [26] Caminata En Pleamar, SA; [27] Guanacaste Sea Gull, SA;[28] Longboard Surf, SA;[29] Wake Up Call, Ltda.;[30] Forever Hold Your Peace, Ltda.;[31] and Building A Ruin, Ltda.[32]

33. On 4 February 2005, Spence Co. acquired Lot C71[33] on Playa Grande. On 22 October 2007, Spence Co. sold Lot C71.[34] The buyer did not honour the terms of the contract and possession of the lot reverted to Spence Co. on 10 December 2012.[35]

34. On 22 February 2005, Spence Co. acquired two lots on Playa Grande, Lots A39[36] and A40.[37]

35. On 28 June 2005, Spence Co. acquired Lot C96[38] on Playa Grande.

36. On 4 February 2005, Spence Co. acquired Lot V61 on Playa Ventanas.[39] On 6 February 2006, Spence Co. sold Lot V61 for approximately $600 m^2 subject to certain conditions,

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WS1, generally.

[24] Costa Rica Investments LLC, a Delaware corporation and Bromtence Investments Limited, a Cyprus company. See Appendices B.1 and B.2.

[25] Appendices B.12, B.14.

[26] Appendices B.3, B.6.

[27] Appendix B.26.

[28] Appendix B.27.

[29] Appendix B.18.

[30] Appendix B.28.

[31] Appendix B.19.

[32] Appendix B.20.

[33] Folio Real No. 5-043073-000. Following the transfer and subsequent transformation of a company called Counting the Stars, SA to Grande Beach Holdings, Ltda., a company established under the laws of Costa Rica, which was owned and controlled by Spence Co., Grande Beach Holdings, Ltda., became the registered owner (as trustee) for Lot C71. Appendix B.25. Also see Exhibit C-20b and Reddy WS1.

[34] Grande Beach Holdings, Ltda. sold Lot C71 to a third party. A Guaranty Trust was signed between the parties to secure the debt the buyer acquired with the seller, pursuant to which the collateral was the capital stock of the company Building A Ruin, Ltda., which was in turn the recorded owner of Lot C71. Appendices B.21, B.22, B.25.

[35] Appendix B.23.

[36] Folio Real No. 5-042781-000. Lot A39 was purchased through Caminata En Pleamar, SA, a company established under the laws of Costa Rica, which was owned and controlled by Spence Co. Appendix B.26. Also see Exhibit C-17b.

[37] Folio Real No. 5-042783-000. Lot A40 was purchased through Guanacaste Sea Gull, SA, a company established under the laws of Costa Rica, which was owned and controlled by Spence Co. Appendix B.27. Also see Exhibit C-16b.

[38] Folio Real No. 5-043133-000. Lot C96 was purchased through Grande Beach Holdings Ltda. (as trustee), a company established under the laws of Costa Rica, which was owned and controlled by Spence Co. Appendix B.16. Also see Exhibit C-18b.

[39] Folio Real No. 5-042833-000. Lot V61 was purchased through Counting the Stars, SA, a company that was transformed into Grande Beach Holdings, Ltda. Grande Beach Holdings, Ltda., became the registered owner

including the availability of a building permit for the lot.[40] Lot V61 was subdivided into three lots and assigned new *folio real* numbers in December 2006.[41] These lots are referred to in this claim as Lot V61a,[42] Lot V61b[43] and Lot V61c.[44] As the buyer was unable to obtain a building permit for Lot V61, on 31 March 2008, ownership of the lot reverted to Spence Co. and the purchase price was refunded to the buyer.[45]

37. On 11 May 2007, Spence Co. acquired Lot V59 on Playa Ventanas.[46]

38. All six (eight after subdivision of Lot V61) of the aforementioned lots lay entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

39. In the intervening period, Caminata En Pleamar, SA; Guanacaste Sea Gull, SA; Longboard Surf, SA; Wake Up Call, Ltda.; Forever Hold Your Peace, Ltda.; and Building A Ruin, Ltda. and all of their assets were consolidated into Grande Beach Holdings, Ltda.[47] Thus, Lots A39, A40, C96, V61(a, b and c), V59 and C71 are all owned by Spence Co. today through Grande Beach Holdings, Ltda.[48]

40. In 2006, Spence Co., also acquired three very large estate lots in south Playa Grande, which have been identified on the map as SPG1, SPG2 and SPG3.[49] Approximately 15,000 m^2 of these three lots are situated within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

(as trustee) for Lot V61. Appendix B.32. Also see Exhibits C-13b, C-14b and C-15b.

40 Lot V61 was sold subject to certain conditions to Wake Up Call, Ltda. Appendix B.29.

41 Appendices B.32, B.33, B.34.

42 Folio Real No. 5-144808-000.

43 Folio Real No. 5-154432-000.

44 Folio Real No. 5-154433-000.

45 See Appendices B.30, B.31. The registered owner of Lot V61 was Wake Up Call, Ltda. The buyer purchased Lot V61 by acquiring the entire stock of Wake Up Call, Ltda. When the buyer was unable to obtain a building permit, the entire stock of Wake Up Call, Ltda. was transferred back to Spence Co. See Reddy WS1.

46 Folio Real No. 5-089606-000. Spence Co. acquired Lot V59 when it purchased the shares of Longboard Surf, S.A., a company established under the laws of Costa Rica. Lot V59 was subsequently transferred to Forever Hold Your Peace, Ltda., a company established under the laws of Costa Rica, which was owned and controlled by Spence Co., and later merged, with all of its assets, into Grande Beach Holdings, Ltda., a company established under the laws of Costa Rica, which was also owned and controlled by Spence Co. Appendices B.13, B.17, B18, B.19. Also see Exhibit C-12b.

47 Guanacaste Sea Gull, SA, Caminata En Pleamar, Ltda., and Longboard Surf, SA were merged into Grande Beach Holdings, Ltda. in 2007. Appendices B.11, B.18. Wake Up Call, Ltda., and Forever Hold Your Peace, Ltda. were merged into Grande Beach Holdings, Ltda. in 2012. Appendix B.13. Building A Ruin, Ltda. was merged into Grande Beach Holdings, Ltda. in 2013. Appendices B.24, B.25.

48 See Exhibit C-2c for the Spence Co. company structure at time of purchase and presently. Also see Reddy WS1.

49 These lots were purchased when Spence Co. acquired the shares of Field on the Beach, SA and Sendaluz, SA, both are companies established under the laws of Costa Rica. These two entities were subsequently merged with all of their assets into Keeping Track, Ltda., a company established under the laws of Costa Rica, which is also owned and controlled by Spence Co. See Appendices B.4, B.5, B.6, B.7, B.8, B.9, B10. See Exhibit C-2d for a diagram of the company structure at the time of purchase and presently. Also see Exhibits C-20b, C-21b, and C-22b.

(iv) The Estate Lots of Gremillion and of the Berkowitz Claimants

41. The Estate Lots consist of six very large, beachfront estate lots located in south Playa Grande. All six of these lots were purchased by Brett Berkowitz in September 2003 and owned through local holding companies in order to facilitate their development.[50] Today, Brett Berkowitz owns and controls three of these lots. Glen Gremillion owns and controls one lot, having purchased it in 2004.[51] The remaining two lots are owned and controlled by the adult sons of Brett Berkowitz: Trevor Berkowitz and Aaron Berkowitz.[52]

42. In particular, Trevor and Aaron Berkowitz jointly own and control Lot B1,[53] which comprises a total of 7,358.14 m^2, 2,838.41 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.[54] The acquisition was made on 22 September 2003.[55]

43. Brett Berkowitz owns and controls Lot B3,[56] which comprises a total of 7,117.53 m^2, 2,736.77 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 22 September 2003.[57]

44. Brett Berkowitz owns and controls Lot B5,[58] which comprises a total of 7,292.53 m^2, 2,878.98 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 24 September 2003.[59]

45. Brett Berkowitz owns and controls Lot B6,[60] which comprises a total of 7,316.35 m^2, 2,773.95 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 24 September 2003.[61]

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50 See First Witness Statement of Brett E. Berkowitz dated 21 April 2014 ("Berkowitz WS1").

51 The registered owner of Lot B7 was Jocote Mar Vista Estates, SA, a company established under the laws of Costa Rica, and owned and controlled by Brett Berkowitz. In 2004, Glen Gremillion purchased 100% of the shares of Jocote Mar Vista Estates, SA, which are today held through Vacation Rentals, SA, a company established under the laws of Costa Rica and owned and controlled by Glen Gremillion.

52 Lots B1 and B8 were purchased in September 2003 and were subsequently transferred to Trevor and Aaron Berkowitz. See Berkowitz WS1. For completeness, Lots B2 and B4 were also purchased by Brett Berkowitz in September 2003 and subsequently sold to third parties; those lots do not form part of the Claimants' claims in this arbitration.

53 Folio Real No. 5-130538-000. Each brother owns 50% of the shares of Aceituno Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.65, B.66.

54 See Exhibit C-2a. For the Berkowitz Estate Lots, the portion of each lot located within a distance of 125 metres from the mean high tide mark is labeled as "B" and the corresponding lot number. The portion of the lot east of the 125 metre mark is labeled as "R" and the corresponding lot number.

55 Aceituno Mar Vista Estates, SA is the sole, registered owner of Lot B1. See Exhibit C-23b and see Berkowitz WS1.

56 Folio Real No. 5-130540-000. Brett Berkowitz owns 100% of the shares of Guacimo Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.67, B.68 and Berkowitz WS1.

57 Guacimo Mar Vista Estates, SA is the sole, registered owner of Lot B3. See Exhibit C-24b and Berkowitz WS1.

58 Folio Real No. 5-130542-000. Brett Berkowitz owns 100% of the shares of Pochote Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.69, B.70 and Berkowitz WS1.

59 Pochote Mar Vista Estates, SA is the sole, registered owner of Lot B5. See Exhibit C-25b and Berkowitz WS1.

46. Glen Gremillion owns and controls Lot B7,[62] which comprises a total of 7,365.18 m^2, 3,012.20 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 21 April 2004.[63]

47. Trevor and Aaron Berkowitz jointly own and control Lot B8,[64] which comprises a total of 7,444.45 m^2, 2,830.91 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.[65] The acquisition was made on 21 September 2003.[66]

(d) The Claimants' Lots and the Park.

48. It is important to note that when the Claimants each purchased their lots, they purchased beachfront property that bordered upon (but was not within) the national marine park. There was development on nearby and adjacent lots. Although all were aware of the existence of the park, that, in and of itself, was not a concern.

49. To that point, the Government had announced its intentions publicly very clearly. There were no funds available to expand the park by expropriating privately-held land. As long as that was the case, property rights would be respected. Many people, including Mr. Berkowitz, specifically sought and received assurances in this respect.[67]

50. The various Governmental ministries responsible for the environment were active in reviewing environmental impact assessments which were required in order to receive building permits. Many owners had sought and received building permits and the Government was careful to ensure that the proposed plans would not have an adverse impact on the turtles.[68]

51. So, why is it that the Claimants, a decade later, find themselves owning land within the park?

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60 Folio Real No. 5-130543-000. Brett Berkowitz owns 100% of the shares of Saino Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.71, B.72 and Berkowitz WS1.

61 Saino Mar Vista Estates, SA is the sole, registered owner of Lot B6. See Exhibit C-26b and Berkowitz WS1.

62 Folio Real No. 5-130544-000. Glen Gremillion owns 100% of the shares of Vacation Rentals, SA, a company established under the laws of Costa Rica. See Appendices B.75, B.76 and First Witness Statement of Glen Gremillion dated 21 April 2014 ("Gremillion WS1") and C-46.

63 Vacation Rentals, SA is the sole, registered owner of Lot B7. See Exhibit C-27b.

64 Folio Real No. 5-130545-000. Each brother owns 50% of the shares of Nispero Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.73, B.74.

65 Exhibit C-28c corresponds to Decree of Public Interest for Lot B8. However, article 1 of the Decree of Public Interest for this lot incorrectly refers to an area of 2,878.98 square metres; the correct area is 2,830.91 square metres.

66 Nispero Mar Vista Estates, SA is the sole, registered owner of Lot B8. See Exhibit C-28b.

67 See, for example, Exhibits C-33, C-34 and C-51.

68 See Exhibits C-41 and C-59.

B. The Story of Las Baulas National Marine Park, Explained in Five Parts

(a) Las Baulas National Marine Park: The Legislative Narrative

52. Regulation of economic development in Guanacaste Province began with the establishment of Costa Rica's Institute of Lands and Colonization ("ITCO") in 1961.[69] Article 7 of ITCO's authorizing statute established a maritime zone of two hundred meters wide along the country's two coasts, demarcated by the median high tide line.[70] Municipalities were granted primary jurisdiction over the regulation of their respective portions of this maritime zone, which was declared to be an inalienable zone of public domain. Next, in 1970, the Law on Tourist Development within the Maritime Zone was adopted by the Government.[71] Article 2 of this law established an exception from the aforementioned prohibition, contained within the Land Colonization Law, for property rights in land located within the Maritime Zone designated as being a tourism area. The law also delegated authority to a governmental body known as the Tourism Board of Costa Rica ("ICT") to issue such designations. On 16 August 1970, the ICT exercised its authority to designate Playa Grande and its environs as a "tourism area."[72]

53. The Law on Tourist Development also contained a transitional provision for tourism areas that overlapped with the Maritime Zone. Under Article 3 of the law, individuals were entitled to acquire freehold rights of private property in land located within a tourism area right up to – but not including – the first fifty meters of [inalienable, public] land, measured from the median high tide line. When Playa Grande and its environs were declared to be a tourism area in 1970, individual landholders quickly moved to take advantage of the opportunity granted under Article 3, thereby obtaining freehold rights in beachfront land, which was then, and remains, a rarity in Costa Rica. But for the ICT's 1970 designation of the Playa Grande area as a tourist area, the first 200 meters from the median high tide line would have been public land, 150 meters of which could be subject to a concession agreement and municipal regulation, but no more. But the previous owners of all of the land at issue in this case did take advantage of the window of

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69 Law No. 2825, 14 October 1961, as amended by Law No. 6043 of 2 March 1977.

70 The Maritime Zone also included the country's offshore islands and a distance of 50 meters on the shores of all of the country's navigable rivers.

71 Law 4558, 22 April 1970.

72 ICT, session N° 1913 of 26 August 1970. The declaration read as follows:

The Board of Directors of the Costa Rican Tourism Board, in use of the power granted to it through Law N° 4558 of April 22, 1970 in its 4th Article and considered that in the sections of the land-maritime area referred to by said law…the Board of Directors agrees:

"To declare as a tourism area the sections or beaches of the land-maritime area, with the indication in each case of the province, the latitude, and longitude of the points that delimit its extension, according to the Lambert Graticule of Costa Rica, along the Pacific coast, pursuant with the following locations and nomenclature:…"

(…) Playa Grande:

Province of Guanacaste. Bordered to the North by the North point in the Lambert Graticule of Costa Rica, latitude 2/58.2 and longitude 3/33.2. This beach extends up to the point or latitude 2/55.1 and longitude 2/35.25…

opportunity that opened in 1970, and the Respondent has recognized the property rights pertaining to the land at issue as being freehold interests, ever since.[73]

54. Thus, the land bordering the 50-meter inalienable zone in Playa Ventanas and Playa Grande has been privately-titled property and bought and sold by individuals since the early 1970s. For many years, the area remained virtually undeveloped. By about 1990, there were only a few private residences and a small boutique hotel catering to "eco-tourists" in the area.[74]

55. In June 1987, the Government of Costa Rica issued an executive decree indicating its intent to establish the National Wildlife Refuge of Tamarindo ("RNVST"),[75] which consisted of a mix of mangrove swamps and beaches, primarily Playa Grande. As the RNVST was established to protect two migratory species of turtle, the giant Leatherback and the smaller Olive Ridley, it was intended that restrictions would only need to be imposed at Playa Grande on a seasonal basis (i.e. from October to March).[76]

56. The RNVST was originally established at the instigation of local eco-tour operators and conservationists already living in Playa Grande.[77] As such, its establishment was actually welcomed by private landholders in Playa Grande.[78] Not unlike the majority of Costa Rican citizens, most members of this small group of local and foreign investors were fervently in favour of environmental conservationism. Some even saw an opportunity to engage in the sustainable development of small-scale ecotourism, relying upon the existence of the RNVST and the turtles it was established to protect.[79] As indicated in Figure 1 and 2, the RNVST applied to the first 50 meters inland from the mean high tide line – an inalienable public zone composed exclusively of sandy beach and a berm, which

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73 Article 3 of Law 4558 was annulled approximately one and a half years after it came into force, through the enactment of Law 4847 of 4 October 1971, La Gaceta No. 206, 14 October 1971, thereby foreclosing upon the opportunity for landholders within a tourist zone to obtain free hold property rights in the first 150 meters adjacent to the 50-meter coastal zone.

74 See First Witness Statement of Marianela Pastor Vega dated 21 April 2014 ("Pastor WS1").

75 17566-MAG, 23 June 1987, La Gaceta No 118.

76 Despite the year-round protection now available to turtles at Playa Grande and Playa Ventanas, as incorporated into the Leatherback National Marine Park, their migratory patterns appear to have remained unchanged. For example, the 9-day "Costa Rican Sea Turtles Expedition" packages currently advertised on the Earth Watch Institute's web site are only available between 18 October 2014 and 11 February 2015. For only US$2,875.00 per person, every "team member" will receive an opportunity to "experience the life of a true research scientist." Each package also includes: "wireless internet, freshwater swimming pool and beachfront accommodations" at the "Goldring Marine Biology Field Station," along with a "hearty breakfast" served daily at a restaurant close to the "station" known as Kike's. See: http://earthwatch.org/expeditions/costa-rican-sea-turtles, accessed 15 April 2014.

77 See Pastor WS1.

78 Three individuals, in particular, have been given credit for instigating interest from officials from San José in Playa Grande, and its Leatherback Turtles: Louis Wilson, Marianela Pastor and María Teresa Koberg. See: Alonso Ramírez Cover, Neoliberalism and Territorialization at Las Baulas Marine National Park, Costa Rica (Graduate School of Development Studies, International Institute of Social Studies, The Hague: 2011) at 33, available at: http://thesis.eur nl/pub/10874/RP_FINAL_VERSION.pdf, accessed 15 April 2014.

79 See Pastor WS1.

is covered with dense overgrowth foliage, and completely obscures the beach from free held land for almost the entirety of both beaches on a year-round basis.[80]

Figure 1

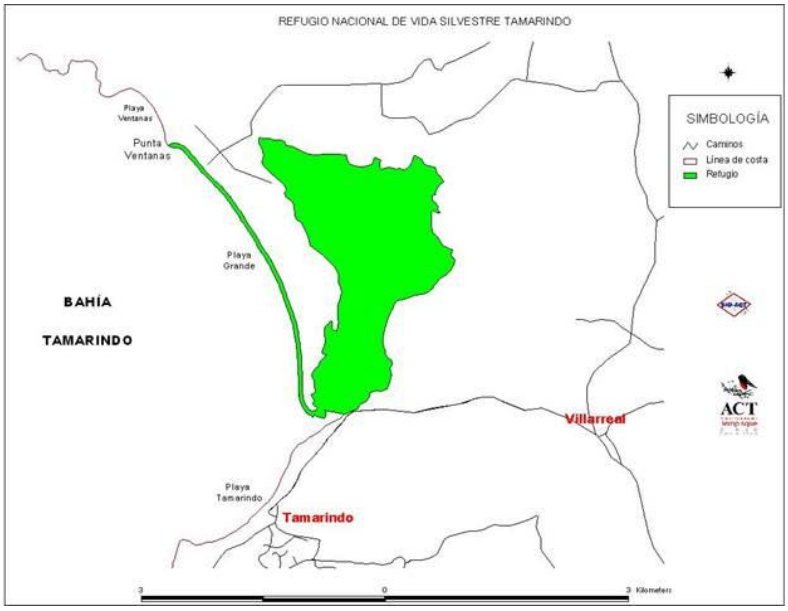

Figure 2

[80] Behind the berm, most of the lots at issue consist of secondary forest cover, by means of natural regeneration, populated mostly by tree species common to the zone, such as guacimo, chaperon, brasil, madero negro, naranjillo and saino.

57. In 1990, legislation was passed to formally establish the RNVST.[81] Under this legislation, some additional limitations on land use were placed upon landholders in Playa Grande and the Tamarindo Estuary. Thenceforth, permitted uses for the land located inside the Refuge's boundaries was restricted.

58. As soon as the RNVST's status was firmly ensconced in legislation, certain senior bureaucrats within the Ministry of Natural Resources, Energy, and Mines ("MIRENEM")[82] immediately developed a plan to both expand and convert it into a national park, also by means of legislation. The ultimate goal of these civil servants had long been to establish and maintain a growing network of national parks throughout the country.[83] One of the keystone premises of this "absolute conservation" agenda would be

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81 Law 7149, 27 June 1990, La Gaceta No. 121.

82 MIRENEM was subsequently reorganized as the Ministry of the Environment and Energy ("MINAE").

83 Xavier Basurto Guillermo, Policy, Governance and Local Institutions for Biodiversity Conversation in Costa Rica, Thesis, University of Arizona (Proquest: 2007) at 69-70:

"The expansion of the National Park Service during the seventies took place haphazardly and not without problems. It depended heavily on the ability of a few individuals, most visibly Ugalde and Boza, to capture every opportunity that presented itself to establish a national park. In some instances it was the availability of a private donor, a landowner who wanted to donate his estate or the initiative of a local or national group. In others it was the unexpected invasion of displaced poor and landless peasants to a biologically valuable piece of land. In any case, choosing what to conserve and what not to conserve was not an option. Once the opportunity was there, Ugalde and Boza would quickly move their political connections at the national level to obtain an executive decree and declare it a national park. The National Parks law requires that once an area was declared national park, it must be expropriated, and the government must pay the owner fair-market value. However, in

that the only private sector tourism development worthy of consideration would be the provision of services with no permanent footprint (e.g. tour guides).[84]

59. This was not the official policy of the Government of Costa Rica, rather it was the agenda of the men who had devoted the last two decades to growing a network of national parks who, by 1991, had reached the senior levels of the Government's staff.

60. Thus, on 1 May 1991, senior MIRENEM officials worked with a compatriot in the Legislative Assembly, Solón Chavarría Aguilar, to introduce their ***Bill for the Creation of the National Park Las Baulas de Guanacaste*** in the Legislature.[85] The primary object of this measure was to establish a new national park, which would cover a much wider footprint than the old RNVST. It would also be accompanied by the power to expropriate,

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many instances the government lacked the funds or the process of expropriation and payment was inherently cumbersome and thus payment lagged far behind park declarations."

[84] Mario A. Boza, Viceministro de Recursos Naturales Energia y Minas, "Conservation in Action: Past, Present, and Future of the National Park System of Costa Rica" 7 Conservation Biology (1993) 239 at 242:

"Basic reasons for expanding the park system have to do with size and fragmentation. We know, as a general rule, that the conservation importance of a wildland depends on its size. Furthermore, fragmentation of landscapes and restriction and isolation of wildlife populations have drastic consequences for preservation of biological diversity. Our goal is to have a national parks system that will cover about 800,000 ha of land, or 17% of the country's surface. We would like to expand the larger parks and connect them until they occupy at least 70,000 ha. This is an arbitrary figure, and we recognize that in some cases it is frankly impossible to consider such an expansion under present circumstances in a country as small as Costa Rica. Small parks, measuring from 1000 to 20,000 hectares, will not be expanded because the addition of land would have little biological importance and would divert funds from more critical areas.

We recently created two new parks… Las Baulas de Guanacaste National Park, located on the Pacific Coast, is the world's third most important nesting ground for the leatherback sea turtle. Two other areas are now under study for proposed new parks.

We now have a draft bill before the Legislative Assembly to create a system of conservation areas in the country. Briefly, we propose to build a buffer zone around a core of absolute conservation consistent of a national park as large as possible. In the buffer zone, the government would offer incentives for private owners to carry out sustainable activities oriented toward maintaining permanent forest cover. These activities could include natural forest management, reforesting with native species, agroforestry systems, and private natural reserves for research and ecotourism."

[85] Representative Chavarría demonstrated her indifference towards private property rights with the following explanation as to why she was introducing her bill in 1991:

"The importance of this area is so great because, according to information obtained by the National Parks Foundation, the Neotropical Foundation, and currently by the Sea Turtle Rescue Program of the Ministry of Natural Resources, Energy and Mines, it has been shown that the Leatherback Turtle nests throughout the entire year, at an average of 60 turtles every night. Another three species of sea turtles also nest on those beaches: the Olive Ridley Sea Turtle (Lepidochelys olivacea), the Galápagos Green Turtle (Chelonia agassizi) and the Hawksbill Sea Turtle (Eratmochelys imbricata), of which Costa Rica is truly proud.

We must also mention the existence of several projects to build major hotel infrastructure in the area, which will have space for 1000 rooms. As a consequence of the hotel construction, lighting will be installed, and there will be accumulation of waste, the passage of people, noise from outboard motors, music, discotheques and automobiles, all of which would end up destroying this natural habitat.

For these reasons, and in accordance with the new worldwide ecological order regarding the policy to conserve and protect natural resources, this area must be protected from any destruction and alteration, so that it can be conserved.

Record of the Special Environment Commission considering dossier No 11.202, 4 July 1991, at 2.

as contemplated in Costa Rica's Organic Law on the Environment ("LOA").[86] Armed with the authority to expropriate, officials knew that they would be better placed to exercise greater control over that rarest of legal commodities in Costa Rica: free held property rights in beachfront land. The legislation would also lead to the year-round regulation of territory that had only ever been used by the two species of migrating turtle it was ostensibly supposed to protect, on a seasonal basis. In truth, legislation was being sought because these officials saw, in Playa Grande, an opportunity to add yet another national park.[87]

61. Representative Chavarría proposed that the park's boundaries be fixed as follows:

> We hereby create the National Park Las Baulas de Guanacaste, whose boundaries will be the following, according to the Villareal and Matapalo cartographic sheets, 1:50.000 scale of the national Geographic Institute:
>
> Starting from a point located at the coordinates N 259.100 and E 332.000 it follows a straight line until it reaches an imaginary line parallel to the coast, ***125 meters from the ordinary high tide***. The border then continues on this imaginary line with a Southeast direction ending on the point of the coordinates N 225.000 and E 335.050.
>
> This national park will also cover the estuaries of Tamarindo, Ventanas, and San Francisco and its mangrove swamps, the hill immediately behind Punta Ventanas, the El Morro Hill, Captain Island, Green Island, the 50-meter Public area measures as of the ordinary high tide, between Punta San Francisco and the San Francisco Estuary and the territorial waters of the Tamarindo Bay, located between Punta Conejo and the Southern extreme of Playa Langosta up to the ordinary high tide line.[88] [***Emphasis added***]

62. The area encompassed by the proposed park was originally intended to be much larger than the RNVST, which it would ostensibly replace. As indicated in Figure 3, in addition to Playa Grande and the Tamarindo Estuary (which formed the territory of the RNVST), the proposed national park would be extended to include the territorial waters of Tamarindo Bay, as well as to the beaches, Carbon, Langosta and Ventanas, San Francisco Point and the adjoining San Francisco Estuary, two small islands, and to a coastal highlands peak, and surrounding area, known as El Morro. Perhaps counter-intuitively, the bill was not accompanied by any significant, new scientific studies, which could bolster the case for a dramatic enlargement and enhancement of the existing nature

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86 Exhibit C-30, Law 7149, 27 June 1990, La Gaceta N^{o} 121.

87 See note 84, above.

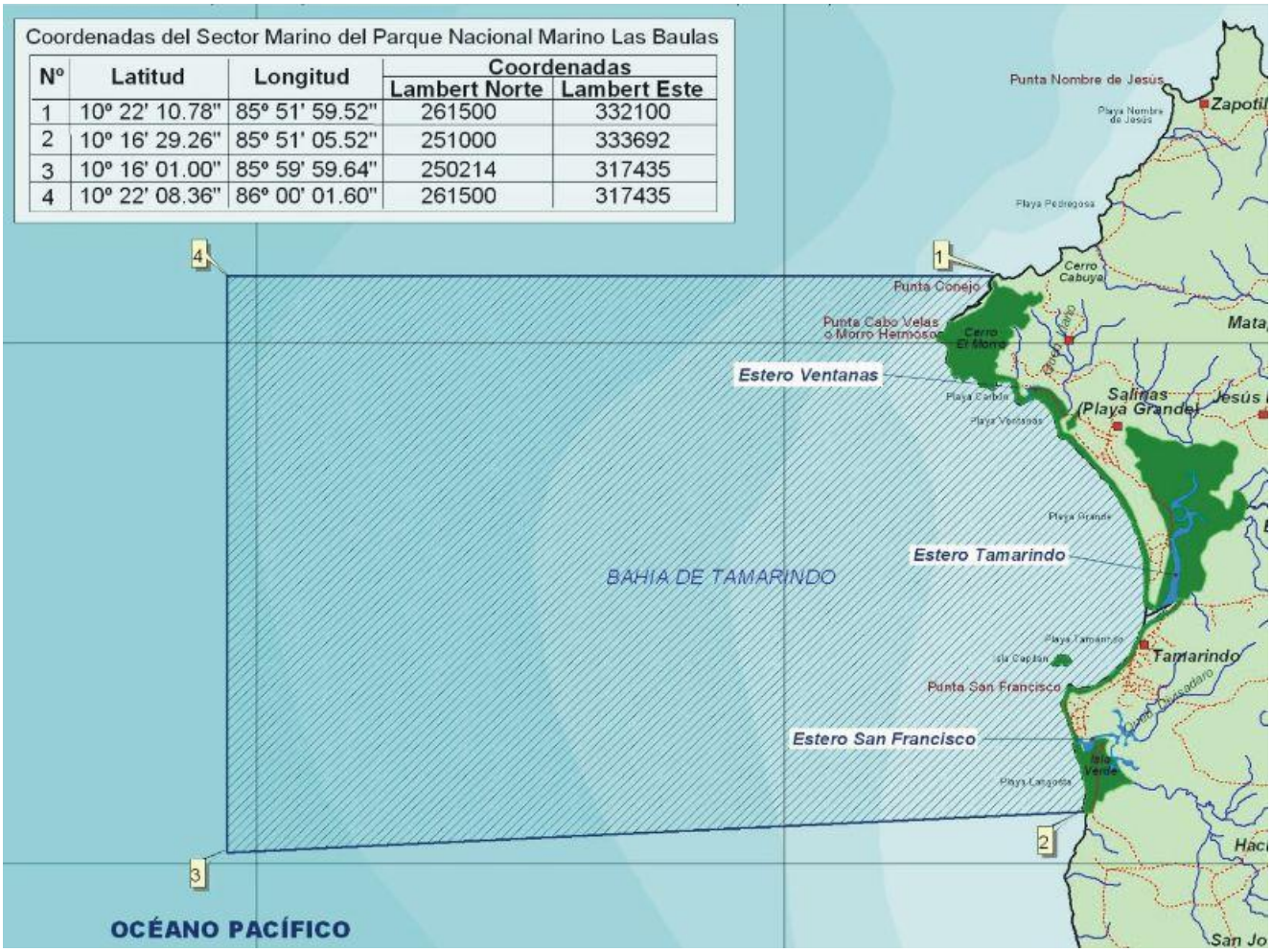
88 Record of the Special Environment Commission considering dossier N^{o} 11.202, Session N° 37, 14 May 1992. During the same session, a separate trio of legislators, Bolaños Salas, Cruz Álvarez, and Soto Valerio, proposed the following provision be added to the draft (which would eventually become Article 2 of the measure at issue in the instant proceeding:

Article 8.

The private properties included within the previous demarcation will be susceptible of expropriation and they will be considered part of the National Marine Park Las Baulas until acquired by the State, either through their purchase or through donations or expropriations. In the meantime, the owners will enjoy full exercise of the attributes of ownership.

reserve.[89] Instead, they pursued the same strategy that had been most successful elsewhere in the past: a two-pronged political agenda based upon: (1) swift passage of legislation and (2) drawing both attention and donations from outside of Costa Rica.

Figure 3



63. These same officials had enjoyed considerable success in deploying these strategies in the 1970s and 1980s, having gone so far as to establish a non-profit, Costa Rican NGO called the National Parks Foundation. The foundation was established as a means of (1) soliciting foreign contributions for the acquisition of lands as part of the establishment of national parks, and (2) funneling proceeds directly towards the acquisition of land, in order to by-pass entirely the revenue agencies of the Costa Rican State.[90] In the case of

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89 One glance at the rocky approaches that surround the imposing cliffs of Cerro El Morro is enough to dispell any notion that a turtle as large and heavy as a SmartCar could accidentally select that part of the Park as a suitable nesting site – which provokes the still unanswered question of how and/or why the park's boundaries were drawn as such in the first place?

90 Jens Brüggemann, "National Parks and Protected Area Management in Costa Rica and Germany: A Comparative Analysis," in: Social Change and Conservation, Krishna Ghimire & Michael Pimbert eds.

the proposed BNMP, considerable political savvy would be required, because these officials had no intention of working with the many local landholders who supported enhanced protection for nesting turtles. As indicated in a 1991 promotional video distributed by a foreign NGO, but in which MIRENEM's Vice Minister himself played a prominent role, the object was to dramatically expand the territory of the RNVST, prohibiting any development of privately held land in the process.[91]

64. Such efforts notwithstanding, the legislative committee tasked with consideration of the MIRENEM proposal did not greet it with enthusiasm. The primary concern appears to have been fiscal. The bill's proponents could not explain how the mass expropriations of private property that would eventually be required to establish the park they envisioned could be adequately financed through public funds. Opposition to the bill may well have been unexpected. After all, it had been common practice for over two decades, already, for a park to be declared before the funds needed to compensate all necessary expropriations had been identified. This may be why MIRENEM quickly changed tack in 1991, causing an executive decree to be issued that included language similar to that of their draft bill, announcing establishment of the BNMP. While going the legislative route would have made it much more difficult for future opponents to have sought changes to the new park's boundaries,[92] opting for the issuance of an executive decree did not require the consent of legislators.

(London: Routledge, 1997) 71 at 75.

[91] World Turtle Trust, "For All Time" (1991), accessed at: https://www.youtube.com/watch?v=iVTQyogAPbs&feature=player_embedded, 15 April 2014. At 6:02 to 6:42 of the ten minute video, [then] scientific advisor to the Government of Costa Rica, Dr. Peter Pritchard, likened private landholders to termites, which must not be permitted to destroy the interior of the desired park. MINAE Vice Minister Mario Boza appears at 3:11 to 4:08 and 5:22 to 5:48 of the video. At 4:00, Mr. Boza stresses his belief that the park must be extended inland in order to protect the nesting practices of the turtles. He omits any explanation as to how a turtle would ever find itself more than 50 meters inland, given the topography and vegetation involved. Notably, perhaps, Dr. Pritchard did not claim that the park should be extended inland for the protection of turtle nesting. Instead at 7:43 to 8:12, he explained:

"Development pressure is on. People have bought this land. They have, in their minds and on paper, sub-divided these lots. They are starting to build on them, and some of the plans that have been drawn up are, to those who love wild places, truly frightening. So development is the key reason that something drastic needs to be done to keep Playa Grande and its environs… in a natural and attractive condition."

Dr. Pritchard ended the video with an appeal for "millions of dollars" in donations, which he explained would be necessary to acquire the land necessary to establish his park. In so doing, Dr. Pritchard truly tipped his hand, with regard to whether there really was any direct connection between extending the park far inland and protecting nesting turtles, as he said, at 8:51:

"We have an incredible variety of ecosystems here. We have dry forest. We have hills. We have spectacular, surf-beaten rocks and cliffs on the north side … We've got beautiful estuaries, and we've got these wonderful beaches with these leatherback turtles."

[92] Article 13 of Law 6084, 24 August 1977, which established the National Park Service (Exhibit C-1n), then provided:

"It shall correspond to the National Park Services to propose to the Executive Power the creation of new national parks. These parks shall be established through an executive decree, which shall indicate, with the greatest precision possible, the boundaries previously stated by the Geographical Institute of Costa Rica. Such boundaries may only be subsequently varied by means of legislation."

65. MIRANEM officials thus pursued executive fiat for what had appeared increasingly unlikely to be achieved by legislative means. The text of the Park Decree, defining the park area, thus provided:

> We hereby create the National Marine Park Las Baulas de Guanacaste, whose boundaries will be the following, according to the Villareal and Matapalo cartographic sheets, 1:50.000 scale of the national Geographic Institute:
>
> Starting from a point located on the Southern extreme of Playa Ventanas, it follows a straight line with a N 45 x E orientation and a distance of 125 meters as of the ordinary high tide. The border continues on an imaginary line parallel to the coast***, 125 meters from the ordinary high tide***. The border continues on an imaginary line parallel to the public area and separated from the same by 75 meters, with a Southeast direction toward the point of the coordinates N 225.000 and E 335.050.
>
> This national park will also cover the Ventanas estuary and its mangrove swamps, the hill immediately behind Punta Ventanas, Punta Carbón, Captain Island, the Public area, located between Punta Conejo and Punta Ventanas and the territorial waters of the Tamarindo Bay, located between Punta Conejo and the Southern extreme of Playa Langosta up to the ordinary high tide line. [***Emphasis added***]

66. As they probably expected, the version of the Park Law championed by MIRENEM officials was defeated, on a unanimous vote of the legislative committee responsible for its review.[93] An amended version of the bill was approved early in the next legislative session, however,[94] which had been proposed by Representative Hernán Fournier Origgi. Fournier's motion was aimed at changing the boundaries of the new park, simply by making a small change to one of the phrases found in Article 1 of the MIRENEM bill. Apparently motivated by fiscal prudence, Fournier proposed that the term, *"aguas adentros"* or "off-shore," be added to the end of the phrase: *"125 meters from the ordinary high tide line."* At the time he must have thought he had just helped his country avoid continuing the dubious game of granting expropriatory power to government agencies without the budgetary means to fulfill the concomitant obligation of paying compensation.[95]

67. As amended, the 1995 Park Law laid the foundations for MIRENEM to exercise reasonable but constrained governmental authority for the benefit of Leatherback and Olive Ridley turtles. Such authority would extend both to administration of the new park and to its regulation, in respect of the important role of environmental assessment and review for all future plans for development within the affected zone. The Park Law also

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93 Legislative Session No 004, 7 June 1995.

94 Exhibit C-1e, Ley de Creaci6n del Parque Nacional Marino the Las Baulas de Guanacaste, Law No. 7524 ("the Park Law"), 5 July 1995, La Gaceta No. 154, 16 August 1995.

95 Hernán Fournier Origgi, letter to Representative Yalile Esna Williams, President, Special Permanent Commission for Tourism, Legislative Assembly of Costa Rica, 5 January, 2007: Exhibit C-1z.

invested MIRENEM with the necessary authority to undertake the expropriation of land that remained part of the Park [e.g. Cerro El Morro and its immediate environs].[96]

68. The Fournier amendment thus appeared to remove the threat of potential, future expropriation from landholders in Playa Grande and Playa Ventanas. In addition, Fournier's amendment solved a potential drafting flaw in the MIRENEM bill. The same flaw was, in fact, contained in both the draft bill and the matching Park Decree. MIRENEM officials appear to have overlooked that, in referring to the "territorial waters of Tamarindo Bay," they had left totally unregulated a portion of the route through which turtles would necessarily have to traverse in order to make it to the beach. By only referring to Costa Rica's territorial waters, they had omitted mention of the interior waters of the Bay (i.e. "aguas interiores"). In fact, it was in these shallower, internal waters where a Leatherback would typically gather herself together, before making a final push onto the beach at Playa Grande.[97]

69. Under Costa Rican law, the term "territorial waters" is defined by reference to a baseline test, which can be found in Executive Decree No. 18581.[98] As indicated in Figure 3, below, it was actually necessary for the legislation to provide that the park extended 75 meters from the median high tide mark, "off-shore." Both versions of the Park Law, as well as the Park Decree, accordingly applied to the waters where commercial fishing needed to be eliminated (i.e. Costa Rica's "territorial waters"), [99] but only the amended Park Law provided MIRENEM (later MINAE) officials with the necessary legislative basis to regulate activities such as surfing, snorkeling and subsistence fishing in the shallower waters of Tamarindo Bay.[100]

Figure 3

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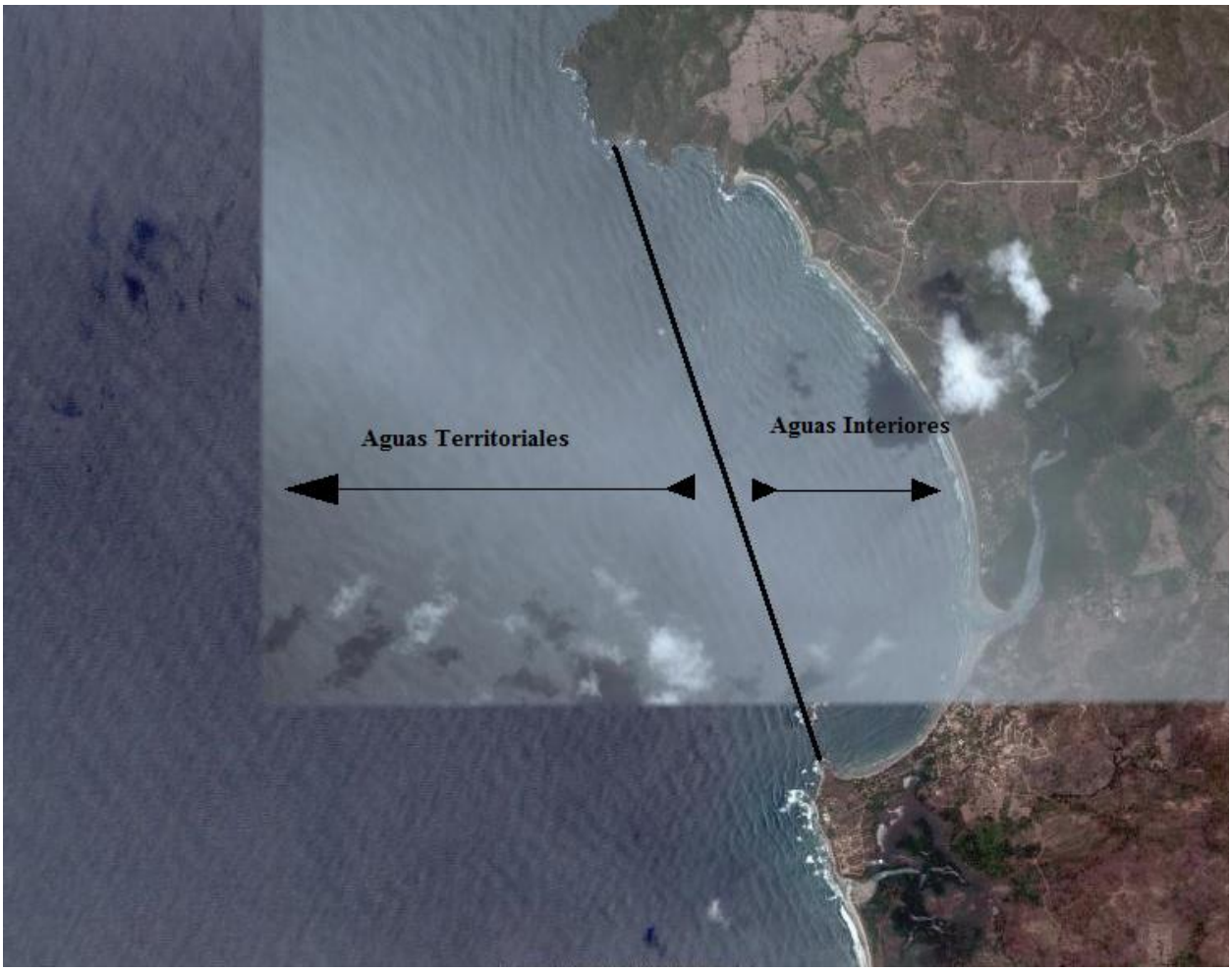
96 See Exhibit C-1e.

97 Keeping in mind that the RNVST neither extended to Punta San Francisco and Green Island,

98 14 October 1988.

99 In this regard, commercial fishing interests twice challenged the constitutionality of the Park Law, both times unsuccessfully on the merits.

100 It should be noted that neither did the Fournier amendment render the discretionary authority to expropriate, as contained in the original bill, superfluous. Park maps published by the Government of Costa Rica, such as Figure 1, identify a very large, albeit poorly defined, northern sector of the BMNP – generally labelled as the Cerro El Morro. The entirety of this alleged portion of the Park remains privately owned – and thus subject to expropriation under the Park Law – up to the present day.



70. Properly construed, the 1995 Park Law has been seen, by some, as a natural complement to the 1990 RNVST Law, which extended protection over the same 50-meter strip of land recognized as inalienable public domain, whilst also increasing such protection both with respect to a longer stretch of coastline and with respect to the waters from which the turtles emerge each winter, and to which hatchlings will return.

Figure 4

71. It would thus appear to have been manifest to all parties that the only area that was placed under a Damoclean threat of expropriation, following the passage of the amended Park Law, was Cerro el Morro. The legislature had unanimously rejected MIRENEM's version of the Park law, which was unambiguously designed to designate far more land than was necessary to protect turtle nesting each season. Instead, the legislature chose to maintain the *status quo* with respect to the existing 50-meter public zone, while adding accidentally omitted protection for the first 125 meters of Tamarindo Bay, measured from the median high tide line. Nevertheless, although it would take ten years of hard lobbying and activism, the [then] Vice Minister of MIRENEM, Mr. Mario Boza, along with a small cadre of fellow travellers, would eventually manage to obtain a complete reversal of this legislative defeat.

72. Boza had served as the first director of Costa Rica's National Park Service, beginning in 1970. From the start, he was single-minded in his devotion to the establishment, and continuing growth, of the network of national parks. Two decades, and more than one dozen new parks later, Boza ascended to the highest administrative position within MIRENEM – Vice Minister – in 1990, which he would hold until 1994. Even upon assuming the office of Vice Minister, Boza did not alter his fundamental objectives. He quickly set about pursuing the adoption of new legislation that would institutionally reinforce the system of national parks and nature reserves he had established over the previous two decades.[101] His plans would not come to fruition, however, as Boza would

[101] Eduardo Silva, Forests, Livelihood, and Grassroots Politics: Chile and Costa Rica Compared," 66 (1999)

end up spending most of his tenure working on, and unsuccessfully lobbying for the passage of, a highly contentious forestry bill, in addition to establishing a new park at Playa Grande.

73. Boza appeared to abandon much hope for the success of either bill by the third year of his tenure as Vice Minister, but he did not give up without a fight. It was also Boza, for example, who reached out to the future co-founders of the Leatherback Trust, American biologists Jim Spotila and Frank Paladino, persuading them to establish a physical presence in Playa Grande, by acquiring a beachfront residence and converting it into a "research station." Spotila recalled that Boza was Vice Minister on the day he called him, announcing: "You need to come over here, because scientific presence on the beach makes the turtles important. From the government and the local people's point of view. The local people say, 'Gee, these people are coming to do something. There must be something important.'"[102]

74. After leaving the government, Boza accepted additional leadership positions within non-governmental environmental organizations. He also helped to establish the Leatherback Trust, and continues to serve on its Board of Directors today. The Leatherback Trust is a U.S.-registered charitable institution that raises funds in support of its Costa Rican advocacy for expansion of the Park, based upon Boza's preferred model of "absolute conservation." Since its inception in 2001, the Leatherback Trust has effectively functioned as the leadership and strategic policy arm of the BNMP – whilst enjoying intimate ties between its own members and both Park administrators and other MINAE officials. The one item that consistently remained at the top of the agenda shared by these three organizations – until it was essentially achieved in April 2008 – was to redress the wrong they believed they had suffered at the hands of intransigent legislators. The Park Law, as passed in 1995, represented a stinging defeat for Boza and his colleagues – which they regarded as an act of betrayal that imprudently "reduced" the Park's landmass in 1995. As candidly observed in a 2004 planning report initiated and approved by Boza's subsequent successors:

> Limitations of Las Baulas Marine National Park.
>
> Less than 15 years after the creation of the Park, the protected area is as endangered as the leatherback turtles. Many factors are affecting the management capacity and the efficient achievement of the Park's objectives of conservation and creation. For example:
>
> a. Reduced area: ***Las Baulas Park was established with a reduced and almost inexistent land area***. The protected area is composed of the beaches Ventanas, Carbón, Grande, and Langosta, [which] consists of the public zone (50 m strip of land from the ordinary high tide mark) [and land] registered as private. This registration was done in spite of it being part of the leatherback turtles nesting site, the park's main objective of protection. For that reason, hotels and large

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European Review of Latin American and Caribbean Studies 39 at 55.

[102] Annika Hipple, "Saving Costa Rica's sea turtles: a conversation with Dr. Jim Spotila of the Leatherback Trust," 9 March 2011, available at: http://crossingtimezones.com/2011/03/09/saving-costa-ricas-sea-turtles-a-conversation-with , accessed on 15 April 2014.

houses have been built within the public zone of these beaches, which should have been natural and protected areas. ***Since its creation, the park has not had the desired border lines. San Francisco Estuary, for instance, is not included within the park's boundaries.***

The urban planning throughout this protected area has neglected to preserve these nesting beaches from human development. Furthermore, it has also disregarded safeguarding a minimal continental strip for the park's species, which have almost no territory, and a place for the park to build its own infrastructure to be able to patrol these beaches more efficiently. Up to this date, two main actions have been taken in order to expand Las Baulas Park's continental zone:

(i) Legislative Bill No. 14989 "Ampliación, Consolidación y Desarrollo del Parque Nacional Marino Las Baulas de Guanacaste" ("Enlargement, Consolidation and Development of Las Baulas de Guanacaste Marine National Park"), prepared by the Marine Parks' professional team and Las Baulas Park's personnel. It protects a 300-hectare land strip that connects the coastal zones of the beaches Grande, Langosta, and Ventanas with Tamarindo Estuary's wetland and other remains of the coastal-dry forest to the Northwest. This legislative bill is still under study at the Legislative Assembly since November 2002. (<http://www.racsa.co.cr/asamblea/proyecto/ 14900/14989.doc>)

(ii) Consultation to the Attorney General's Office about the real boundaries of Las Baulas Park according to what was defined in its Decree and Law of Creation. Mario Boza presented it in May 2003. ***The interpretation of this request will provide Las Baulas Park with an additional 75 meter-continental strip from the high tide line.***

…

The legislative bill for the Enlargement, Consolidation and Development of Las Baulas Park (No. 14989) includes the elements required for the implementation of the effective co- management of Las Baulas Park's resources that can be carried out with the support of the communities. Clear strategies and visions are necessary for allowing the communities to get truly involved with safeguarding the protected areas. However, there are some residents and land owners in Playa Grande, Ventanas, and Langosta who do not share the interests related to the Park's conservation (for example, the tourist development) and fulfillment of the regulations. Residents should understand that they live in a national park's service area that is of worldwide importance; therefore, their support is necessary for the survival of the Park and of the leatherbacks. In a short-term period, the residents are expected to take into account the relevant alternatives and opportunities for their communities' economic development, which are related to the existence and protection of "Las Baulas" Park. [103] **[*emphasis added*]**

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[103] Centro Científico Tropical. Plan de acción del plan de manejo del Parque Nacional Marino Las Baulas de Guanacaste 2005-2010. Guanacaste: MINAE, 2004, translated by Adriana Fernández Estrada (2005) at 26 & 30. This Management Plan was commissioned by Park officials and coordinated by the Leatherback Trust, which sub-contracted facilitation to the Tropical Science Centre. Its content was developed through the cooperative efforts and participation of numerous officials from MINAE, the Park and the Leatherback Trust. The final draft was subject to, and received, the approval of MINAE before it was adopted in 2004. See pages 32-45 of the Report, generally, and pages 40-42 for a specific list of participants.

75. As evidenced both in the frank admissions contained both within this MINAE-sanctioned 2004 planning report and the video referred to above, there could not possibly have been any doubt in the minds of the senior officials responsible for the measures at issue in this claim, including Mr. Boza, that (1) they had originally sought an expanded territorial footprint for the BNMP; (2) this proposed expansion had been denied by the legislative branch (save for an extension of the PNMB's official boundaries to include Ventanas, San Francisco and Cerro El Morro), which passed its own, less territorially expansive Park Law; and (3) they would take all available steps to ensure that this reversal was eventually remedied. As explained in more detail, below, their most successful avenue of redress would turn out to be the Office of the Attorney General.[104] First, however, Boza and his comrades attempted to obtain more than they had lost, by sponsoring new Park legislation in 2002.

76. In explaining the alleged need for this new legislation, sponsored by the Leatherback Trust, the authors were surprisingly candid (at least in light of future events, which will be described in more detail further below. They stated:

> Considering the Law number 7524 from July 3rd, 1995, which created the National Marine Park Las Baulas de Guanacaste***, there was no reference concerning the terrestrial portion that limits the Marine area of the National Park***, and there was no mention of any special protection to the existent resources, ***making it important today to offer this project of law that will enable the enlargement of the park limits and the necessary protection to the terrestrial ecosystems***" [***Emphasis added***].[105]

77. The existing Park Law did not mandate the expropriation of any particular parcel of land within the territorial boundaries it established, however, nor did it specify any sort of timeline. Essentially, the common template for national park laws simply placed discretion into the hands of MIRENEM/MINAE officials as to whether, where and when they might proceed with any given expropriation. In the meantime, as demonstrated in the language of Article 2 of the Park Law:

> In order to comply with the present Law, the competent institution shall proceed with the expropriations of the totality or a part of the properties included in the area demarked in the previous article. Privately held land included in this demarcation shall be susceptible of expropriation and will be considered part of the National Marine Park Las Baulas once they have been acquired by the State, either by means of purchase, donation or expropriation. ***In the meantime, landholders shall continue to enjoy full exercise of their rights of property rights in that land.*** **[*Emphasis added*]**.[106]

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[104] In this regard, it is interesting to note that Boza did not appear to have been successful after his visit to the AG's office. As noted below, it was in the same year in which the strategic report (which recalled Boza's visit with the AG) was issued, that the AG's Office issued its first opinion on the interpretation of the Park Law.

[105] Tropical Science Center & Leatherback Trust, Project of law: Enlargement, consolidation and development of the National Marine Park Las Baulas de Guanacaste, 8 July 2002 at 8, available at: http://playagrandeinfo.org/docs/Project_of_Law_eng.pdf, accessed 16 April 2014.

78. As a result of this apparent *lacunae* in Costa Rica's national park laws, it has not been uncommon for private landholders with assets located somewhere within one of the country's many "unconsolidated" national parks, to wait - indefinitely until one day in the distant future – a declaration of public interest arrives. Waiting has long been a rational response, in Costa Rica, when news arrives that one's land has been designated as lying within the boundaries of a national park. This is because park legislation will typically include language such as the following text of the Park Law: **"*landholders shall continue to enjoy full exercise of their rights of property rights in that land*." [*Emphasis added*]**

79. In fact, in testimony before a legislative committee last year, Rafael Gutiérrez, the current Executive Director of SINAC, admitted that the Respondent has not even finished acquiring all of the privately-held land located within the boundaries of a park it established ***in 1971*** – the Poás Volcano National Park. After making this admission, he posed the following rhetorical question: "How long must these owners expect to wait before the State acquires their land?"

80. Later on, Mr. Gutiérrez addressed himself to the situation in other parks, including the BNMP:

> ***[W]e have failed to fulfill our obligation to pay all of those owners, who have somehow been adversely affected by our not having either purchased or expropriated their lands. Obviously this leads to frustration and conflicts with the owners, as well as decreasing operational effectiveness at times, because we have private lands within our national parks.***
>
> I'm going to briefly mention a few examples. Within the famous National Marine Park, Juan Castro Blanco, the percentage of privately owned lands is over 90%; in the Arenal Volcano National Park, private property makes up 40%; in the south of Piedras Blancas National Park, it is about 30%. Barra Honda National Park, which, incidentally, was established in the 1970s, also contains 48% in private lands. In the Leatherback National Marine Park - which is very well known to you for its failings - half is composed of private land. 73% of Diria National Park, in the province of Guanacaste, is also located on private land. The Tenorio Volcano Park: 58.36% lies on private property. Cangreja Mountain, Cangreja Mountain National Park: 75%, and the Alberto Manuel Brenes biological reserve in the area of San Ramon: 66.20% is composed of private land. La Cangreja has 2933 hectares, of which 74% are on private land.
>
> Should we extrapolate from the amount of resources that we are obviously owing, the case will be different if we are talking about the Leatherback National Park, for example, as compared to the lands located around the Irazu volcano, or talk about land in other parts of the country, such as Hitoy Cerere. Nevertheless, if we were to make reference to the approximate costs of these lands, we are talking about more than seventy thousand hundred eighty and five million in a first list of lands where payment is owed, for which we have thus far been unable to consolidate.
>
> I also wanted to mention that there are a large number of companies and people who are on the list, where there are appraisals, where they have done studies,

> where we have almost complete records for the purchase of land. However, we simply lack the resources needed to acquire the land, and that's across the country.
>
> …
>
> In addition, it is important to mention that throughout this process, many of the people who have been affected have requested or sought judicial remedies, so that the State will pay for their lands.
>
> ***Also, different courts across the country have been ordering the State to buy the land. For example, last year we received about twelve rulings that compelled us to acquire the land.*** It is important to mention that the allocation contained within the national budget for this item is 1 billion colones. I could provide the example of a property within the Poás Volcano National Park for which a single property is worth one billion colones. That is, in many cases we would be talking about amounts that match the annual budget for the purchase of a property. And if we multiply it by the need across the country, obviously we will never arrive.
>
> Some projections tell us that we will be carrying on for nearly eighty years - at the rate we are going, to acquire these lands. Again, this raises two very serious problems. On the one hand we have the private owners who are limited by regulations on the use of their land, and on the other, we want to consolidate the land and manage national parks, but ***we cannot act with total freedom to protect the resources that are there, because they are effectively within private grounds.*** **[*Emphasis added*]**.[107]

81. What is most telling about Mr. Gutiérrez's testimony was not the litany of expropriation/consolidation delays he willingly recounted. Instead, it was his admission that, absent court intervention, SINAC does not even consider private land it has yet to acquire for "consolidation" as actually being ***part*** of a national park. SINAC also acknowledges that the presence of privately held land within the designated boundaries of a national park will necessarily impact negatively upon operational efficiency, on the basis that – until the land is legally acquired by the State – SINAC cannot exercise full dominion over what official signage suggests is *already* national park territory.

82. Whilst this distinction – between park territory over which the State exercises exclusive dominion and park territory in which an individual still possesses property rights – may seem innocuous, it is not, at least not in Costa Rica. For over three decades, this distinction has permitted proponents to announce new parks and nature reserves, without budgeting for the acquisition of all of the privately held land located inside of that new park's boundaries. The citizens who cheered each new park announcement between 1971 and 1995 likely had no idea that the people making the announcements were largely indifferent as to how, when or from whom funding would be arranged to compensate those whose property rights would be affected on each occasion.

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[107] Legislative Assembly Of The Republic Of Costa Rica, Permanent Select Committee on Environment, 4th Legislature, 1 May 2013 - 30 April 2014, Minutes of Regular Meeting No. 4, 26 June 2013.

83. Indeed, during the 2000's it was an open secret amongst thoughtful business people, legislators and some bureaucrats that the Government of Costa Rica had habitually failed to budget for land acquisitions needed in order to eventually "consolidate" all of the national parks of which Costa Ricans are so proud. In particular, it was widely known in Guanacaste that the Government could not afford to acquire all of the privately held lots located in Playa Grande and its environs had MINAE officials been able to act during the window between the 1991 Park Decree and the 1995 Park Law. Instead, it was well known then, as it remains so today, that – as Mr. Gutiérrez admitted to legislators last year[108] – in the twenty-three years since the Park Decree was issued, the Respondent has only even commenced expropriations on a small fraction of the available inventory of privately held lots.

84. This seeming state of denial – in which new parks are designated but no plans are made to pay for their consolidation is not limited to the population at large. One portion of the 2010 report issued by the Respondent's Comptroller General on management of the BNMP stands out in this regard. Unsurprisingly, the Comptroller General took both SINAC and MINAE to task for having failed to quickly wind up the process of expropriation for the BNMP. The only possible basis for such criticism, given the Respondent's straightened circumstances, is to retreat to legal formalism. Simply claim that the law says what it says (or at least what the individual believes that it says) and find the money to get it done.

85. What gives the Comptroller General's report its added "through the looking glass" quality however, is how it can make such formalistic claims on the same pages that it freely admits that no budget exists to perform the tasks it says must be done:

> Added to this is the SINAC's limited budget to face the outlays that the expropriation process requires from time to time; which, in light of the differences in the appraisals above, it would seem, given its aforementioned inaction, that such action was not this office's responsibility. On this point, the SINAC's Executive Board indicated to this Comptroller General, in the official letter cited above, what is transcribed below:
>
> "*…you are aware of the need to have a budget to take on the corresponding procedural stage and then the initiated expropriation process; however, despite that, this budget does not exist right now, which is why any intervention necessary is being done with the Ministry of the Environment, in order to take on what it must and to finish the expropriation process in full. Nonetheless, it is a process that has yet to be defined, but even having knowledge of the projects submitted for the Legislative Assembly's consideration, which eventually may change this office's actions."*
>
> In this scenario, it makes no sense to endorse the inaction by the SINAC in dealing with the cases described in this point, with the hope of eventual action from other offices, such as approval of the bill of law in the Legislative Assembly that seeks to reduce the PNMB's limits, and with it to resolve the dilemma that exists with certain expropriations; this is because the SINAC has its

[108] See para. 80, above.

> responsibility legally defined in terms of expropriating land, without taking into account the substantial effort that needs to be given in terms of protecting and conserving the PNMB and the optimal use of the public funds allocated to the management of that park, among other duties.
>
> Moreover, this Comptroller General is of the opinion that, as it informed the Special Permanent Environmental Committee of the Legislative Assembly, there being only a budget-related order to decrease the current boundaries of Las Baulas National Marine Park and to transfer part of it into a mixed wildlife refuge, this is insufficient in light of the requirements that current regulations set forth, along with constitutional principles and regulations and jurisprudence; from this perspective, the proposed measure would be unfounded, due to the fact that it lacks proper technical justification, above all because the complete protection of a zone that is at risk enables humanity to enjoy ecosystems that without said protection may be irremediably threatened, with the negative effect that this may have on our development as human beings and on our global environment.
>
> On the contrary, any preventive measure with an eye on constitutional principles such as "*in dubio pro natura*" would be associated with the guarantee that since 1991 has been attempted to be promoted under articles 50 and 89 of the Costa Rican Constitution; these articles, in conjunction with the rest of the country's environmental law and international conventions executed on this matter, constitute the State's policy that the country as a whole has decided to adopt with respect to the environment and natural resources, and with which the MINAET should circumscribe its actions as the leader and primary party responsible for their fulfillment.[109]

86. It is evident that the senior MIRENEM officials who pursued the conversion of the RNVST into the BNMP were following Mr. Boza's 'acquire now, pay later' playbook. Under this political stratagem, one's position was easy enough to demonstrate. One only needed to show that she was responsible for x-many acres of new parkland. Understanding how these priorities guided the decisions of top MIRENEM officials, one can better comprehend why drafters of the Park Law could allow it to proceed with the new park's boundaries. One supposes this reasoning might also explain why MIRENEM and SINAC officials have been avoiding having the BNMP officially surveyed for over twenty years now. As noted by the Respondent's Comptroller General, in 2010:

> Unlike the sector corresponding to the 125 meters from the ordinary high tide, defined between the two geographical coordinates cited in article one, other zones like the hill behind Ventanas beach, El Morro hill, and the sector known as Verde Island, are not clearly defined in terms of location and geographic extent, which has caused confusion with respect to the park's true limits. Likewise, the Ventanas, Tamarindo and San Francisco wetlands, along with their mangroves, which by their nature are themselves part of the State's Natural Heritage, ought to be appropriately delimited, not just to establish the park's extent with greater

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[109] Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 21-22.

> legal certainty, but also to keep them from being damaged or invaded by the land owners who are located around them.
>
> This situation, which we could call an actual omission from Law 7524, has consequences such as not having an official map of the park that shows its true boundaries. Neither the park's administration nor the Regional Office of the Tempisque Conservation Area, which bears responsibility for the park, nor the SINAC's Executive Department of Management of Protected Wilderness, has an official map of Las Baulas National Marine Park. Not even the National Geographic Institute, which supports this Comptroller General's study, has sufficient information to prepare a map with the required precision and official nature.[110]

87. Such criticism deserves further context. It turns out that SINAC's parent agency, MIRENEM, was ordered by the Constitutional Court "to take immediate action so that the proper office of that Ministry will coordinate with the National Geographical Institute in order to properly place milestones in Las Baulas Marine Park, which should be completed within three months from receipt of this notification" in early 2009.[111] Such willful indifference on the part of senior MIRANEM officials indicates that they are largely indifferent to practical difficulties that attend their policy-making. Clearly it was in their interest to convert the RNVST into the BNMP, and dramatically increase its size in the process. Surely they were not blind to the potential opportunities (for international recognition, and fundraising) that lay in being seen as the defenders of the largest turtles in the world. Yet, without accurate cartographical information, the boundaries of the BNMP could legitimately be challenged in respect of any individual landholding.[112] As demonstrated below, this sort of technical, legal detail could be overcome over time.[113]

88. Thus, the Claimants' land, which was not included in the 1995 Park Law's boundaries, as a result of an interpretation of that law offered a decade later by the Attorney General's office is now considered to be in the Park. Since then, the Respondent has taken steps to expropriate the privately-held property now within the Park's boundaries including some of the Claimants' lots. It has also brought to a halt environmental assessment application reviews, thus freezing the state of development of the rest of the properties pending their official expropriation.

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[110] Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 5.

[111] Constitutional Court Judgment No. 1056-09, 28 January 2009, Case No. 07-014812-0007-CO.

[112] See, e.g.: Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 18-20.

[113] Another question that could be asked about the Attorney General's opinion – described below – is how, in light of the manifest inaccuracies identified in the Park Law's boundary definition clause, anyone could have logically adopted the a priori position that the cartographical points, upon which the Attorney General relied to conclude that "aguas adentro" must have been a typo, were accurate?

(b) Las Baulas National Marine Park: The Expropriation Narrative

89. As noted above, the Respondent has directly expropriated some of the Claimants' lots, subjecting them to its municipal expropriation process. As demonstrated below, the Claimants' experience suggests that this process lacks rationality and predictability. As the Respondent's Comptroller General has observed:

> MINAET initiated the process of expropriating the lands located in the PNMB without it having formally established a strategy that set out, among other significant topics, the fundamental actions to be done for the purpose of fulfilling the expropriation mandate, the deadline for enforcement of said actions, those responsible, and the resources required to accomplish it. Likewise, documents could not be identified that showed the criteria that motivated the incorporation of the 64 cases that are currently in the process of expropriation.[114]

90. MINAE took the first step towards expropriating the first nine of the Claimants' lots for "consolidation" into the PNMB in 2005.[115] It did so with little fanfare. It sent out the nine notices of public interest to the companies listed on of title for each of the nine affected lots. Neither a public relations campaign nor a series of local meetings with stakeholders accompanied the issuance of these notices. Unless it was in personal receipt of one of those notices, a landholder would have remained ignorant of the development (ten years after the Park Law had been adopted).

91. Although the Comptroller General pilloried MINAE for having had no plan for how to proceed with the expropriations, it seems as though there may have been a pattern. The first handful of notices appears to have been sent to foreigners who had effectively brought themselves to the attention of SETENA/MINAE officials by applying for development permits.

92. Costa Rica's Law on Expropriation[116] establishes two phases: an administrative phase and a judicial phase. The decision to initiate both phases rests solely with the responsible Government officials – which, in turn, depends upon the department responsible for administration of the legislation that has provided the ostensible public purpose for the expropriation. In this case, the responsible department was MINAE, which later established SINAC, under its purview, to administer the country's national park network.

93. Article 18 of the Law on Expropriation provides that the first step on the administrative side of the process involves publishing a notice of public interest, notified to the landholder. The notice typically refers to the legislation authorizing the expropriation,

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[114] Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 17.

[115] The Comptroller General incorrectly wrote that the notices of public interest were first launched in 2005. The first notice was actually issued on 8 November 2004. See: Resolution No. R-421-MINAE, Gaceta No. 237, 3 December 2004; Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 7.

[116] Exhibit C-1e, Law No. 7495, 8 June 1995.

which is thereby intended to establish the stated public purpose. The next step, as per Article 21, is for the responsible agency to request Costa Rica's Tax Authority, a division of the Department of Finance to perform an administrative appraisal on the selected lot.

94. Article 22 provides a long list of factors that are to be taken into consideration by the Tax Authority in order to determine a "fair price," most of which are descriptions of certain characteristics of land, generally. Unfortunately, it appears as though these factors have lent themselves towards cost- or asset-based approach to valuation, given their generic, descriptive character. Article 22 also contains a comparative item in its list of factors, which could be used as the basis for a market-based approach, but it appears outweighed by the many other descriptive factors on the list.

95. For example, in many of the ongoing municipal expropriation proceedings involving the Claimants, the Respondent has asserted that the Law requires an appraisal to "exclusively refer to the expropriated lot, without considering the prices of other land located in the same area."[117] Over the same period of time, however, the Respondent has actually also argued in favour of lowering a lot's value by comparing it to lots undergoing the same process of expropriation, based upon the aforementioned comparison clause of Article 22:

> … concerning "the estimated price of adjoining properties in the zone or that of recent sales in the area, especially if dealing with a highway or another project similar to that of the part of a property being evaluated, in order to compare prices in the surrounding context of the property in question, as well as to obtain a usual and homogenous value according to the area.

96. Article 21 provides that the administrative appraisal must be completed within two months from the date of request. Once the assessor has determined a value, she will notify the landholder as per the terms of Article 25, which stipulates that he will have no less than eight days to indicate whether he accepts the assessment. If the landholder accepts the valuation, which would be a rare occurrence in the case of the BNMP[118], an expropriation decree shall be issued and arrangements made for the payment of compensation to the landholder. Silence is deemed to be acceptance.

97. If the landholder has indicated her opposition to the administrative appraisal value, Article 29 requires SINAC, as the responsible agency, to take the next step – which involves issuing a decree of expropriation. This step must be undertaken within six months from the date upon which notice of the landholder's opposition was received.

98. The judicial phase follows the issuance of an expropriation decree. It establishes a process that is very close to being *de novo*,[119] establishing a *lis inter partes* format as between the State and the landholder, both of whom are entitled to adduce new evidence. As per Article 31, the judge of first instance will order a formal sequestration of the land, including the surrender of title, and appoint an appraiser from a list provided by the State.

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[117] Exhibit C-28h at 8.

[118] Law No. 7495, 8 June 1995, Article 22.

[119] Law No. 7495, 8 June 1995, Article 40.

Articles 36-36 supposedly require acceptance/rejection of the appraiser's appointment within eight days, thereafter providing a "non-extendable" one-month period, within which the appraisal must be conducted and submitted to the Court.

99. Article 36 also prescribes the tasks to be performed by the specialist/appraiser, stipulating that he is to work under the Article 22 list of factors mentioned above, with the objective of reviewing "the administrative appraisal so that the value of property is adjusted to the moment it was carried out. If the specialist disagrees with the administrative appraisal, there should be a detailed explanation of the reasons for variance in criterion and estimate of the value of the property." In other words the specialist appraiser is mandated to use the same vague and indefinite list of factors in construing valuation, which will inevitably be guided by the original assessment, because he must explain any deviation from it.

100. Article 38 provides that either party may seek recourse to a third assessment, from a second appraiser, which is *de rigueur* in practice, This second specialist is apparently constrained by the same short timelines and the same restrictive approach as the other judicially-appointed expert. The inevitable result of such a weighing of the process in favour of the Tax Authority's administrative appraisal, is that it serves as a *de facto* baseline for the entire judicial process – effectively anchoring it to the very same result that gave rise to the opposition of the landholder and, eventually, the launch of the judicial process.

101. Article 44 also imbeds a preference in favour of the administrative appraisal, in that it stipulates that the judge must "make sure that the value assigned by the specialist or other proofs conform to the reality of the circumstances," and also requires her to examine all new evidence "according to the rules of healthy and rational criticism and taking into consideration the criteria of article 22 of this law." Thus the judge is only asked to determine whether the specialists' opinions are objectively incorrect, not the administrative appraisal. Her assessment must also be undertaken in consideration of the same criteria upon which the administrative appraisal is determined.

102. Article 41 provides for the second, and final, level of judicial assessment, ostensibly permitting either party to seek an appeal to the Higher Court for Administrative Disputes, appearing to leave the criteria for the Court's evaluation of the appeal, as well as the underlying merits of the case, undefined. The appeal would also appear to be weighted in the State's favour because Article 40 prohibits the judge (and, presumably, also the Court in arriving at its judgment on appeal) from awarding any amount exceeding the higher of the two specialist valuations. In other words, regardless of what evidence might be produced by a claimant, at either step of the judicial phase, it can never do any better than the amounts reported by the two specialists. By contrast, if the result of a judgment of first instance coincides with the higher of the amounts contained within the two specialist reports, the State has nothing to lose in seeking an appeal. In such a scenario, the State cannot do any worse than the result already obtained from the judgment of first instance, whereas the landholder would have nothing to gain – since it can do no better than the highest of what two specialists have said.

103. Given the yawning chasm that has thus far existed between the appraisals provided by these so-called "specialists" in proceedings involving the Claimants' lots, it is not

difficult to conceive of a scenario in which a landholder would be deprived of fair market value for his land because he drew the short straw with respect to the two specialists chosen to work on his case. Of course this is a problem of degree. Although the unluckiest of landholders would suffer zero-valuations from both specialists (meaning that she could do no better than whatever the State had originally offered her with its administrative appraisal), she could still wind up with one specialist reporting back with a zero amount, and the other choosing an amount below the median for all specialist valuations undertaken for comparable lots expropriated at around the same time.

104. In practice, this process seems responsible for the delays that the Claimants have faced. The B Lots, which were appraised in the administrative phase at a very low value, proceeded to the judicial phase relatively quickly. In contrast, the lots on Playa Ventanas received a relatively high administrative appraisal (although nothing approaching FMV), but the Respondent took no further steps in the process for those lots. It is difficult to know which of these Claimants is worse off: those who have had access to the process relatively quickly but are doomed to receive a low valuation or those who wait indefinitely for the process to move forward.

(i) Problems of Delay

105. Given how incredibly long the Claimants have been waiting for a definitive outcome for the handful of lots that have been made the subject of expropriation decrees, the superficial nature of the supposedly mandatory timelines found in the Expropriation Law becomes manifest. Article 40, for example, actually provides that the judge of first instance must render her decision within no more than 15 business days from the closure of the oral hearing. Article 47 further stipulates that, if payment of the compensation determined by the Court is not paid within three months, the Budget Office of the Ministry of Finance must ensure compliance by registering the amount payable in the national accounts, apparently to ensure immediate satisfaction for the landholder.

106. A similarly efficient schedule is apparently prescribed in Articles 41 to 45, which provide that: appeals must be made within five business days of the judicial decision of first instance; the parties are provided with five working days to submit their arguments; and a decision on the merits of the appeal must be issued within 15 days from the date upon which the parties' arguments were submitted. The Law on Expropriation only seems to allow for some uncertainty with respect to the length of time taken by a judge to set a case down for hearing and for the parties to submit new evidence. If all of the other time limitations found in the Law actually constrained decision-makers as advertised, it appears that there would be no excuse – under Costa Rica's municipal regime – an expropriation to take longer two years, from start to finish (i.e. from the day the expropriation decree is issued to the day the landholder deposits the cash into its bank account).

107. The Claimants' collective experience with Costa Rica's expropriation regime has been remarkably different. The majority of the Claimants' lots sit in a state of legal limbo, awaiting an expropriation decree with no foreseeable payment date in sight.[120] Given how

[120] See Appendix 2.

the Park Law has been construed by the Respondent's Constitutional Court, as explained below in the next section, any reasonable landholder might have expected that the process would have been underway for every single, targeted lot by the end of 2009, at the very latest. No such movement has occurred. The Claimants have been subjected to a different kind of purgatorial experience in respect of the handful of lots for which a decree of expropriation has been issued. It has been between 8 and 6 years since the first and last of the Claimants' lots subjected to the Respondent's labyrinthal municipal expropriation process received a declaration of public interest, and between 7 and 5 years since they were made the subject of an expropriation decree.

108. To be sure, the Respondent's flagrant non-compliance with the timelines laid out in its own Law on Expropriation does not establish its concomitant failure to live up to international expropriation norms. At the very least, however, the timelines set out in the Law on Expropriation could certainly bear the weight of any foreign investor's legitimate expectations concerning how long the process might take if it should one day be subjected to a declaration of public interest. The same provisions could have also grounded a legitimate expectation, as to the likely timing of the process, in the event that an investor's lot became the subject of an order, - issued by the highest court in the land – that the expropriation of its lot must occur immediately. At the very least, the timelines mandated by the Law on Expropriation should at least be seen as setting a ceiling, in cases where the international obligation to provide prompt compensation qualifies the term "delay" with a modifier such as "undue" or "unreasonable." As described further below, the customary norm simply does not countenance any margin of error for the host State when it is engaged in the direct taking of property in land.

(ii) Merits Problems

109. The most serious flaw in Costa Rica's expropriation regime is not its apparently superficial rules concerning timing and the avoidance of delay. On paper, at least, the Respondent's regime appears efficient. The same cannot be said, however, for the free-for-all methodology espoused in the Law on Expropriation. Officials of the host State tasked with conducting an administrative appraisal enjoy relative *carte blanche* when it comes to choosing how to justify a desired valuation amount. The same breadth of discretion appears to be enjoyed by decision-makers responsible for conducting the judicial phase of the regime – except for one crucial *caveat*. The judicial phase is fundamentally skewed in the State's favour.

110. Given the systemic flaws inherent in Costa Rica's expropriation regime, it should come as no surprise that different valuations of similar lots would run the gamut in terms of uneven results. The only predictable outcomes would involve some regression towards the norm, as dictated by the administrative appraisal. The Comptroller General's report provides an interesting example of the former phenomenon. It involved two BNMP lots selected for expropriation, which – it turned out –overlapped each other substantially. In spite of this fact, two separate administrative appraisals were conducted – presumably by different officials. The first administrative appraisal produced a valuation of ₡98,738.645.00, while the second came back with a value of ₡587,553,288.00. Sadly, such wild variation does not appear to have reflected an isolated event:

> The review conducted by the Comptroller General enabled us to prove significant differences between the administrative appraisals and the judicial appraisals, which have been prepared as part of the expropriation process of the lands within the park's limits, as well as between the amounts of administrative appraisals themselves, even when dealing with properties that have similar characteristics.
>
> In this regard, a good example – among the many that exist – is the case of a 2,860m2 lot whose administrative value was set at ₡20.6 million, which, eleven months later, was appraised in court at ₡1.264.2 million, amounting to an approximate increase of 6,037% to the price initially determined for that land (₡7,200.00 per square meter in the administrative appraisal versus ₡442,012.00 per square meter in the judicial appraisal).[121]

111. This is not to suggest that Costa Rica's expropriation regime was incapable of producing results that, at least in the aggregate, could be relied upon as a useful indication of the magnitude at which the market value of the Claimants' land increased in the period between 2006 and 2008, and perhaps even thereafter. For example, although the numbers reflected in the data collected by Respondent's Comptroller General between 2006 and 2008 appear to have appalled him, his reaction undoubtedly says more about his unswerving commitment to ensuring a quick and low cost "consolidation" of all remaining privately held land in the BNMP.

112. The bottom line, as demonstrated in the data collected by the Comptroller General concerning valuations conducted in 2006 versus 2008, is that there was a dramatic increase in market value over that period.[122] His attempts to explain away the trend only demonstrated ignorance of professional valuation standards and practices.

(c) Las Baulas National Marine Park: The Expropriation Narrative

113. In the interests of brevity and economy, the Claimants have not translated all of the administrative appraisals, judgments of first instance and appellate judgments issued in respect of their respective lots. The following samples illustrate the manifest weakness of the Respondent's expropriation regime: A40 [Claimant Spence Co.]; SPG1 [Claimant Spence Co.]; SPG2 [Claimant Spence Co.]; B3 [Claimant B. Berkowitz]; and B8 [Claimants A&T Berkowitz].

(i) Lot A40[123]

114. The first instance judge began from the premise that the valuation amount found in an administrative appraisal should be regarded as *prima facie* accurate, so long as it adequately described the land (which should perhaps not come as too great a surprise, given the descriptive character of the Article 22 list of criteria mandated for both the official's and judge's valuation decision). He then concluded that both specialist reports

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[121] Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 20.

[122] Comptroller General of the Republic, Assessment Report on the Management of the PNMB by SINAC and MINAE, Rep. No. DFOE-PGAA-IF-3-2010, 26 February 2010 at 25-29..

[123] Exhibit C-16.

should be disregarded because they contained valuation amounts that were ***too*** different from those that appeared in the administrative appraisal. Next, he relied upon the very fact of the measure responsible for the taking – i.e. the establishment of a park – to justify a lower valuation, concluding that any property rights located within a park must be seriously impaired as a result. He did not state precisely what that impairment might be, or how it would operate.

115. For its part, the Respondent sought to introduce valuations provided by specialists in different cases involving land being expropriated for the BNMP. There was no indication that any explanation was provided of the methodology or analyses used in obtaining these results: just the numbers. The numbers, themselves, told a story that should have caused grave concern for an informed observer familiar with the international law principles governing compensation for expropriation. (1) no amount; (2) ₡7,200.00, (3) ₡26,062.50, (4) ₡0.00, (5) ₡80,050.87 (all per m^2). In addition, it included a self-serving report from the Leatherback Trust in its submissions, which proffered valuation amounts much lower than those it had paid certain of the Claimants for non-beachfront land nearby its existing lot.

116. The Respondent also attempted to rely upon reports its own agencies had produced, years after the declaration of public interest, in claiming that the land was worth very little because of alleged problems with the local aquifer, relating both to water volume and potential fragility. In this regard, the Respondent proceeded to attack one of the specialists for providing a valuation based upon present value, rather than providing one contemporaneous with the date of the administrative appraisal. It only attacked one specialist because the other had reported back with a valuation amount of ₡0.00. Interestingly, although the judge chastised this expert for reporting back with a zero value, he nonetheless used the reasoning in this report attractive enough for the purposes of discounting the work of the other specialist:

> Additionally, it must be highlighted that all the lands found in the Las Baulas Marine Park zone cannot be valued, nor much less can they expect to be charged at these exorbitant prices as if they were lands suitable for building or developing tourist or real property projects with no restriction; it is very different to purchase real estate by negotiation with the owner who buys it to meet a public interest; in the negotiation between investors, for example, prices rise or fall depending on the zone, the view, the services, the short- or long-term development plans or the free will and desire of the parties, and above all, thinking of the economic gains to be obtained, both by the owner and by the investor; but in the case of an expropriation to satisfy a public interest, the same thing does not take place. The State does not seek to become enriched or to gain at the expense of the owner, and therefore speculative circumstances of the real property market in the zone cannot be considered in defining the fair price; those described, then, are two diametrically different situations. They are different because the owner of the lands located inside the National Park cannot pretend the same economic advantage or gain as that expected on a site outside its limits, because obviously, the attributes of the property rights, especially those of construction, are limited; it is a restriction that that not all the real properties of the zone have, but rather only those located inside the limits of the Park and this influences the value. It cannot be forgotten that when they determine the expert valuation of land to be

> expropriated, expropriation proceedings endeavor to leave the owner in conditions equal to those he had before the expropriation began, fair compensation is sought that allows the expropriated party to look for other land with equal conditions, in this way avoiding unjust enrichment for the parties; now, therefore, considering what was said before, we cannot know if the inquiries done by the expert Elizondo encompassed a very wide zone, therefore including properties that do not have the restrictions of the lands located inside the limits of the Park, a reason that is basic in not confirming his study, and considering that it does not undermine the administrative appraisal. Taking the foregoing into account, it would be unfair and would create unjust enrichment for the expropriated party to value the expropriated land, subject to the limitations and restrictions of the Park, by comparing it with coastal lands that are not subject to these conditions; as for the real property, it has to be valued in relation to its specific conditions and characteristics, which distinguish it from the rest of the lots in the zone.[124]

117. With its second instance judgment, the Court cited and relied upon the *post facto* evidence concerning the aquifer and water levels, years after the expropriation had taken place. Second, it hypothesized about the future of tourism development in the area, seemingly without evidence. Third, it relied upon a 2008 Constitutional Court decision to radically alter the status of the landholder's property rights at the time of the taking (concluding that the lot had actually been "circumscribed and incorporated into the park" in 1995, and was therefore of little value). The arbitrariness of this was exacerbated by the fact that it contained no analysis of how the land's being "circumscribed and incorporated into the park" would actually have impacted the landholder's property rights in any event.

118. The Court also dismissed valuations based upon comparative lots on the basis that they were not comparable, owing to undisclosed "limitations" that allegedly encumbered the land under its consideration. Next, it accepted the State's argument that it ought to consider valuations derived from the expropriations of other BNMP lots, by drawing and applying an average amount from them, without having analyzed whether those other valuations had been obtained through the application of a sound methodology or correct information.

119. This was one of the cases in which approximately half of the lot was considered to be inside of the Park only. It was also one of the cases in which the State purported to expropriate only the portion of the lot that lay within the 125 meter Park zone, leaving an essentially worthless remainder. The Court caught this error, but in explaining itself, it incorrectly relied upon an aspect of the expropriatory measure itself, in determining the fair market value of the rights that the measure had abridged:

> It should be indicated as from this moment that it is not possible to consider the appraisals of the third expert in disagreement, since the assessment that concedes for the property part of the premise that the area in which it is located corresponds to a National Park and therefore, unalienable and without economic value. Nevertheless, the expert forgets, that it is precisely the declaration of that

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[124] Exhibit C-16d.

> public interest, which promotes the need to expropriate the lands that are located in the area, and therefore, it is not possible to consider that the value is reduced to zero colones if, the constitution of the National Park will depend on the expropriations of the properties that are located there. Should one accept the considerations of the expert, one would be ignoring the nature itself of the Institute of the expropriation and, above all, the logic of the declaration of public interest that implies the opening of all these processes.

(ii) Lot SPG1[125]

120. The judge of first instance made his first error, from the standpoint of international law, by relying upon the results of two 2008 Constitutional Court judgments, both of which had materially altered the *status quo ante* – for valuation – by treating the contemporary building permit regime as though it was applicable at the time of the expropriation. He underscored this error by citing a 2012 Constitutional Court judgment, which had also materially changed the applicable standards with respect to groundwater use, but explaining that it could not be applied because it was rendered after the expropriation had taken place. In addition, as with both first and second interest judgments for A40, the first instance judgment for SPG1 also included a finding that the expropriated land had a lower value because it was located within the very park that was serving as the public policy basis for the taking.

121. The judge of first instance deciding the value for SPG1 also assigned no value to the portion of the lot that was not included in the expropriation decree. Astonishingly, he appears to have reasoned that the portion of the lot not listed in the decree had no value before the taking, and thus would have none after. There was also no mention of the fact that the owner had applied for an environmental assessment to support its plans to build a 44 lot subdivision.[126]

(iii) Lot SPG2[127]

122. From the standpoint of international law, the judge of first instance in the SPG2 case also started off the wrong premise – by relying on the reason for expropriation (i.e. establishment of park) as a valid reason to reduce the fair market value of the land being expropriated for "consolidation" into the park. The following excerpt is illustrative:

> This legal body concurs with the administrative appraisal, in that the proximity of the lot to Las Baulas Maritime National Park, reduces not only its potential suitability to be used for any other human activity different from the regeneration of the secondary forest and the spawning of turtles, without leaving aside that the growth that covers the public zone does not allow good visibility to the ocean, and also that the lot is an enclave, lacks essential public services, is not altogether flat, its soil is sandy and therefore not apt for planting, as well as the access roads are of gravel. All these factors logically reduce to a great extent the value of the property, for they make it sterile, because its condition is that of a reserve forest

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125 Exhibit C-20.

126 See Reddy WS1 and Exhibit C-40.

127 Exhibit C-21.

> and place of refuge for species in danger of extinction.[128]

123. He also rejected both specialist valuations on the ground that neither was formatted as a response to, or critique of, the administrative appraisal (as opposed to constituting a specialist appraisal of the value of the lot at issue). As such, this judgment illustrates the pro-State bias that has been built into Costa Rica's Law on Expropriation, which accords an unreasonable amount of weight to the State's own direct opinion of what the land it is taking should be worth, rather than the fair market value before the taking.

124. The judge also concluded that specialists must have been wrong because both arrived at valuation amounts that were significantly higher than the valuation contained within the administrative appraisal.[129] The logic of his reasoning is, of course, necessarily based upon an untested premise: i.e. that the administrative appraisal was, itself, correct. On appeal, the only correction made by the court, in its remarkably short judgment, was to correct the judge's error in awarding no damages for the diminishment in value of the remnant of the landholder's lot, not included in the expropriation decree. The court nevertheless proceeded to arbitrarily assign a lesser value – than that it had ordered as compensation for the portion of the lot named in the decree, without meaningful explanation.

(iv) Lot B3[130]

125. Demonstrating, yet again, the biased nature of the Respondent's expropriation regime, the judge of first instance for B3 criticized one specialist for failing to explain why his appraisal of fair market value was not consistent with (i.e. not as low as) the administrative appraisal. In so doing, he stated an unsustainable interpretation of the specialist's role in the regime, observing that a specialist's report "cannot be accepted in full for fixing the final amount for the just price, but only as the maximum limit that can be allowed according to the parameters of the guidelines in vogue."[131]

126. The judge refused to accept the findings contained within the report issued by Leatherback Trust because he thought the report did not provide a contemporaneous valuation.[132] Like the other judges mentioned above, this judge also ignored the principle of contemporaneity – both by taking into account the existence of the park, for which the land was being expropriated, as a reason to lower the value of the land being taken, and by also relying on events that only took place years after the expropriation process had commenced, in order to lower the valuation even further, as illustrated in the following two excerpts from his judgment:

> Possibilities of use: Taking into consideration that the land is located within a protected area, as disposed by the Law of Creation of Las Baulas Marine Park of Guanacaste - Law 7524 - of August fifteen of 1995, as well as the votes of the

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128 Exhibit C-21g.

129 Exhibit C-21g, at 18-19.

130 Exhibit C-24.

131 Exhibit C-24g, at 12.

132 Exhibit C-24g at 13.

> Constitutional Court numbers 2008-8713 and 2008-18529, the possibilities real and present of use of the land remain severely limited, as there is no possibility of erecting constructions for habitation or touristic exploitation or commercial use of the property under discussion. It is also important and of great relevance that the last vote of the Constitutional Court contributed by the representation of the State, in relation to the property being discussed is located within the zone of vulnerability and protection of the aquifers, which limits access to water service and this includes the excavation wells, a factor that reduces the desirability of the property and therefore of future developments of any sort on it. Having stated the above, we will proceed to detailing the elements taken into consideration to define the final price.[133]
>
> For matters of fact and of law indicated supra, in criteria of the undersigned the administrative appraisal of the property object of this process is obsolete, note that more than six years have passed since this valuation was practiced, carrying this judge to the conviction that the price per square meter in administrative appraisal N2 AA-114-2006, does not fit the reality of the value of land in this moment. Now, this judge, due to the reasons indicated ut supra, separates from the criteria of the specialist, since the report presented is not the most appropriate for the legal demands of this type of process, as it does not indicate clearly whether he reviewed the other evidence. In the same way the judicial expert does not indicate if he took into consideration the legal restrictions that this lot carries. Neither does it take into consideration because it is recent, the new vote of the Constitutional Court that makes reference to the vulnerability of the zone with respect to the water, and being so, and seeing the proof in the proceedings, takes into consideration that the property does not have vocation for tourism, has legal limitations, and the vulnerability of the zone, and that neither does the expropriation cover all the lot of the proprietor, rather only a part, and because of this there is no effective remaining damage. For this reason the Judge, based on the constitutional principle of just indemnity, finds that the value per square meter must be adjusted to the time transpired from its realization in the administrative appraisal to the dictating of the present sentence.[134]

(v) Lot B8*[135]*

127. The manner in which the Court that heard the appeal for B8 constructed its authority is instructive:

> **VII. <u>REGARDING FAIR PRICE</u>**. In order to satisfy this guarantee explained above, it becomes necessary to value the expropriated object in such a way that the result is **fair compensation**. The doctrine has tried to establish the parameters to follow in order to determine a fair price, which, according to García Enterría, is only attained through judicial routes, the only route where that "justice" would be verified in each case, and he understands it to be **the replacement value of the expropriated thing, sufficient to acquire another similar asset, of which he is deprived due to expropriation.** Others refer to fair price as an element that acts as a determining factor of the objective value of the

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133 Exhibit C-24g, at 15.

134 Exhibit C-24g, at 17-18.

135 Exhibit C-28.

> good expropriated, whether it is the current price in business, that is**, the fair price must coincide with the true economic value of the expropriated goods, with the objective of providing sufficient money to obtain an adequate replacement of those assets.** Dromi, an Argentine treatise writer, believes that fair value assumes that **the expropriated party should receive an amount that is equal to the amount of which he is deprived, currently and in full.** That value should represent a cash amount or reasonably equivalent terms to which the owner of the asset, desiring to sell but not obligated to do so, would have sold his property to a purchaser who wished to buy it, but who was not obligated to do so. **As seen, in the concept of fair price, what is sought is to find the balancing point where the expropriated party is not going to be harmed by deterioration of his real estate equity, nor should it become a source of earnings in his favor, with the consequent harm to the expropriating entity, which is only attained with the wise combination of the principles of equity and justice, such that a fair price, always [as a discretionary] concept and [amount], should refer in an expropriation lawsuit to what the property is worth according its condition and manner of development when it is taken by the expropriator, according to the values and elements of conviction indicated in the legal proceedings.** [Emphasis in original]

128. The Court began well enough, with a recitation of principles familiar to those found in international law, before suddenly veering off course, towards an entirely different methodology (as indicated in the emphasis it added to the original text of its judgment). Starting with admirable exhortations to concepts such as the like-for-like principle, the Court seemed to understand the baseline concept of ensuring that compensation awarded would be sufficient enough to afford the expropriated landholder an opportunity to acquire a similar quality of asset elsewhere. The paragraph ends, however, with the court embracing an entirely different principle – *viz.* ensuring that compensation paid does not raise the specter of unjust enrichment being enjoyed by deprived party. The Court acceded to the Respondent's request to have the judgment amount lowered.

129. The judgment of second instance is also illustrative of how the flawed expropriation regime led to arbitrariness as between decision-makers. For example, whereas a specialist hired for the A40 expropriation proceeding saw his report dismissed on the basis that his valuation reflected current prices, rather than those that obtained as of the time when the administrative appraisal was undertaken, a specialist hired for the B8 expropriation proceeding was criticized by the Attorney General's representative for having failed to submit a valuation based upon current information.[136] The Respondent's counsel also took a position opposite to the one taken by his colleagues in the A40 proceeding – claiming that it would be improper for a judge to rely on any factors apart from the descriptive characteristics found at Article 22 of the Law on Expropriation (whereas in the Lot 16 proceeding, the Respondent's counsel had relied heavily on what they claimed were comparable figures from other expropriation proceedings conducted for land located nearby).[137]

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[136] Exhibit C-28g, at 7.

[137] Exhibit C-28g, at 8.

130. Adhering to the now all-too-familiar pattern, the judgment of second interest was also based upon three "proven facts" expressly added to those found in the judgment of first instance:

> The group of facts proved is allowed, as they are founded on the elements contained in the legal proceedings, however, the following are added:
>
> 13) That, according to Official Document DIGH- 038-09 of FEBRUARY 13, 2009 from SENARA, due to protection of the resource of water, drilling wells in the low-lying areas of aquifers in Huacas Tamarindo and Costeros Norte is restricted given the potential risk of over-exploitation and contamination of the water due to saline intrusion, which in turn is a limitation for developing new economic activities in the northern coastal zones of Santa Cruz. (Pages 489 to 495 of the principal lawsuit).
>
> 14) That the land that is the object of expropriation in this lawsuit is located in the area of Playa Grande, which is qualified as an area of Extreme Vulnerability, therefore it is prohibited to perform urban, cattle-raising and agricultural activities, as well as any other commercial, or industrial activity, or storage, etcetera. (See Vulnerability Map of the Huacas-Tamarindo Aquifer on pages 48a, 488, and the Matrix of Soil Use Criteria (on pages 483 to 484, all in the principal lawsuit).
>
> 15) By means of Vote No. 2012-8892 at 4:03 p.m. on June 27, 2012, the Constitutional Court confirmed the validity and mandatory use of the Vulnerability Map and of the Matrix of "Soil Use Criteria According to Vulnerability to Contamination of the Huacas-Tamarindo Aquifer" approved by Agreement 3303 of the Managing Board of SENARA.[138]

131. Each of these findings was fundamentally at odds with international law principles of valuation. Even if one were to ignore the fact that the issuance of an expropriation decree, alone, would have obviously had a material impact upon the value of any lot in Playa Grande, this is one of the cases in which a court is considering evidence that actually post-dates the transfer of title in the subject lot to the State.[139] The Respondent took possession of B8 to itself on 13 May 2008, and yet the Court somehow justified considering evidence generated from 2009 to 2012 in its analysis of the "fair" value of this land to Claimants Trevor and Aaron Berkowitz.

132. Nevertheless, the Court decided that, in light of this *post hoc* evidence, a value could only be ascribed to the lot that reflected its current status as being allegedly suitable only for "conservation and preservation, that is, there is no chance that the expropriated land can bear urban, tourist, cattle, agricultural, commercial or industrial activities."[140] Valuation was thus lowered through the Court's reliance upon manifestly inappropriate evidence.[141]

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138 *Ibid*, at 5.

139 Article 33 of the Law on Expropriation provides for the transfer of title in land, with corresponding notations made on the official register, upon commencement of the trial of first instance.

140 Exhibit C-28g1.

141 *Ibid*, at 8, citing Constitutional Court Ruling No. No. 2012-8892, 27 June 2012, in which the Court declared that a matrix of vulnerability, originally prepared for an entirely different area of the country, ought to be applied to

133. This error was only compounded by the fact that it was based upon a logical inconsistency. Each of these courts assumed that general information concerning the alleged sensitivities of an aquifer could be used within the context of an individual case. Even if it had not been wrong to introduce *post hoc* evidence into the judge's analysis, it was still illogical either to assume the technical accuracy of the evidence (absent a thorough investigation into its provenance and the credibility of the process that produced it) or to assume that a specific conclusion about one lot could be drawn from general statements about the entire area in which that lot could be found. In other words, even if Playa Grande's aquifer was as sensitive as some opponents of development (both in and outside of Government) now maintain – which it is not – it would still be illogical to assume that the particular lot subject to expropriation cannot be developed safely without evidence to that effect.

134. For example, the Government is currently requiring piezometer studies as part of its evaluation of building permits being sought for non-beachfront lots.[142] The fact that SENARA is now requiring individualized studies as part of its permitting process for lots located outside of the expanded Park zone demonstrates the folly of the decisions made in the judicial phase of the Respondent's municipal expropriation regime.

(vi) Summary

135. The reasons for decision generated by the Respondent's municipal expropriation regime demonstrate its unsuitability as a means of providing compensation consistent with international standards. The system is slanted in favour of the State's original determination of value and the standards upon which decisions are to be based habitually generate idiosyncratic decisions that lead an objective observer to conclude that the regime operates too arbitrarily to provide results consistent with those one would expect from a tribunal applying international standards.

(d) The Leatherback National Marine Park: the Constitutional Court Narrative

(i) The Legislators' Perspective

136. Costa Rica's municipal expropriation regime has not been the only judicial forum that has generated uneven and unexpected results for the Playa Grande landholders over the past five or ten years. If the string of judgments that the Constitutional Court rendered on the Park Law between 2005 and 2008 were any indication, Costa Rica's highest Court performs more of a post hoc legislative and policy-making function than that of an appellate court or a court of review. It would seem that, although the legislature is free to draft laws as it sees fit, the Constitutional Court is equally free to vary them as it sees fit.

137. This observation is not necessarily intended as a criticism, as much as a practical appreciation of how decisions are really taken in the country. A similar lesson was likely learned, albeit not without considerable consternation, by the legislators who passed the Park Law in 1995. After all, they had rejected, outright, a version of the law prepared by

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the entire country.

142 Exhibit C-45.

Mr. Castro-Rodriguez MIRENEM. Instead, they voted for a bill including "aguas adentro" amendment for Article 1 definition of the new park's boundaries. Indeed, the legislative record also demonstrates the most pressing concern for a majority of legislative committee members: how could the State actually pay for the expropriations that passage of MIRENEM's preferred version of the bill would eventually have presaged?

REPRESENTATIVE GONZALEZ SALAZAR:

I believe that the initiative of Representative Chavarría Aguilar is an initiative that is laid out in a bill whose objective and ultimate goal I fully share, which is the creation of an area of absolute protection in a region where, due to its conditions, it is necessary not only to preserve life and the marine animals that always go there to lay their eggs, but also due to the nature itself of the protection that is required in an area to sustain a situation that has been ongoing for thousands of years.

On the other hand, the observations made by the Department of Technical Services of the Legislative Assembly imply a series of changes to the project, and furthermore, it must be enriched with the pronouncement that Court IV recently made in relation to expropriations and to the validity of the laws protecting the areas of national parks according to the interpretation of Article 45 of the Political Constitution.

From the viewpoint of drafting and formal presentation of the bill, there are some drafts that do not agree with the Political Constitution and that would allow the immediate approval of such a bill.

That is to say, perhaps taking a somewhat disorderly approach. In the first place, if it is necessary to expropriate property, the process as it is established in the law should be followed, and the area of the national park will not become a national park until the lands are acquired by the State.

This is not subterfuge or worse, rather it is a real mechanism to eliminate the problems in the majority of the areas that are currently protected from the constitutional viewpoint. I repeat, it would be to acquire the total area of the park and to establish in the regulations that if it was indeed necessary to expropriate properties it will be done in accordance with the law in force.

…

REPRESENTATIVE GONZALEZ SALAZAR:

Another thing that seems important to me is to include financing matters in this bill. The duty of the Executive Authority to include the necessary funds in the 1991 or 1992 Budget might be difficult for the other representatives to approve.

I prefer for this article to be broader, for the funds necessary to purchase land or for expropriations to be obtained from the National Budget, or from national and international donations from public and private entities. Something more general in order to promote obtaining funds from friendly donor countries or from donor

> organizations interested in this type of project. By broadening the financing possibilities, the winds might be more favourable in the Legislature when it comes time to discuss and make this type of bill into a law of the Republic.
>
> THE PRESIDENT:
>
> With this ruling from Arenal, the concern remains that what is going to happen with the National Parks, there must be more than thirty million dollars in interest alone for all of the lands that have not been paid for. From that perspective, continuing to look at national parks is my concern.
>
> If at this time MIRENEM and the Costa Rican State have a serious problem, it is the search for funds, pursuant to that ruling, in order to pay for the lands that comprise national parks, thus although Costa Rica is a pioneer in national parks, it is on the verge of being without them due to lack of funds to pay for them. The ruling from Court IV is quite complicated. It did not outline the interests we have today in environmental matters, because it is a serious consequence.[143]

138. This process of legislative bargaining did not take place over a couple of days, nor did it take place behind closed doors. Instead, the debate lasted for four years and it revolved around one issue: whether the Government could afford to extend a park intended to protect turtles nesting on a beach by expropriating privately held land where it was impossible for a turtle to tread. As it was obviously not an issue of environmental necessity, a majority of legislators passed the Park Law only after the term "aguas adentro" had been inserted into Article 1. It should accordingly have come as no surprise, whatsoever, that MINAE did not move to expropriate any land in the vicinity of Playa Grande, because the only land that was mentioned in Article 1 of the Park law was the ill-defined "Cerro el Morro" - where there did not appear to be any threat of imminent development.

139. Again, the legislative record is also unambiguous with respect to the "aguas adentro" amendment. Immediately before the "aguas adentro" motion was discussed, Committee members considered a new amendment proposal by Mr. Boza's ally, the now former Representative Chavarría Aguilar. It was an even more ambitious gambit, and it was unanimously rejected. As indicated below, the next motion was unanimously approved:

> THE SECRETARY:
>
> Motion by the former Representative Chavarría Aguilar, No. CPL-1(4-1):
>
> "To have as replacement text for the Bill for Creation of the Las Baulas de Guanacaste National Marine Park, File No. 11.202, the following: ARTICLE 1: Declare the following areas to be the Las Baulas de Guanacaste National Marine Park: The area where the current Tamarindo National Wildlife Refuge is located, and the total extent of the mangroves in the Tamarindo Estuary or Río Palo Seco, the Ventana Estuary, the Carbón Estuary, and the Río San Francisco Estuary, including those estuaries twenty meters away from the edge of those mangroves;

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[143] Legislative Assembly Of The Republic Of Costa Rica, Permanent Select Committee on Environment, 4th Legislature, 1 May 2013 - 30 April 2014, Minutes of Meeting No. 35, at 24-26.

furthermore, one hundred meters from the regular high tide line from Punta Conejos to the extreme northern point of Playa Ventana and all of Playa Ventana, including the land between the inalienable public area and the Ventana mangrove. From the southern boundary of Playa Ventana, continue 50 meters parallel to the line of boundary markers up to boundary marker number eleven of the National Geographic Institute at Playa Grande, and continue seventeen meters and thirty- three centimeters north of boundary marker number sixteen. The straight line of this boundary is curved between boundary marker twelve and boundary marker thirteen, and it approaches the boundary marker line at seventeen meters between boundary marker numbers fifteen and sixteen. The boundary continues from this demarcation fifty meters parallel to the line of boundary markers and up to the mouth of the Tamarindo Río Palo Seco Estuary. The boundary continues from the National Park from the mouth of the Rio San Francisco estuary one hundred meters from the regular high tide line and to the extreme southern point of Playa Langosta. The demarcation of the national park includes the territorial waters in Tamarindo Bay, from Punta Conejos to the extreme southern point of Playa Langosta, Isla Verde, and Isla Capitán.

…

THE PRESIDENT:

The motion is discussed.

REPRESENTATIVE FOURNIER ORIGGI:

We have studied this bill and it seems somewhat complex to us in relation to what is provided, especially as it involves the Municipality and many other institutions, and approval of this bill does not seem advisable to me.

REPRESENTATIVE VILLATA FERNÁNDEZ:

I agree with Representative Hernán Fournier in that, for example, Article 5 is indisputably unconstitutional. This type of draft cannot be placed in the municipal system by this Assembly, because it is contrary to its independence, thus I agree with Mr. Fournier in that the bill would require some articles established here to be modified.

THE SECRETARY:

Has the motion been sufficiently discussed?

THE PRESIDENT: Discussed. Fifteen representatives present. Unanimously REJECTED.

Another motion has been presented by Representative Hernán Fournier, which the Secretary will now read.

THE SECRETARY:

Motion by Representative Fournier Origgi and other representatives CPL-2(4-2):

"In Article 1, after '125 meters from the regular high tide line,' add: "seaward."

THE PRESIDENT:

The motion is discussed.

REPRESENTATIVE FOURNIER ORIGGI:

Studying the original text, it seems to me that it does comply with the requirements of a law for this type of protection of parks, especially one that should have been a marine park, because that is what it is in this case; however, the word marine was not included. Upon defining the Park, they talk about one hundred and twenty-five meters, with an imaginary line of one hundred and twenty-five meters from the regular high tide line, and that should be understood as out to sea, which is exactly what I think this motion clarifies.

THE SECRETARY:

Has the motion been sufficiently discussed?

THE PRESIDENT:

Discussed. Fourteen representatives present. Unanimously APPROVED. To explain the vote, Deputy Saúl Weisleder has the floor. REPRESENTATIVE WEISLEDER WEISLEDER:

After hearing the explanations from the technicians in the matter, the representatives of the National Liberation Party have come to the conclusion that the motion that Representative Fournier Origgi just approved was very timely, as it seeks to clarify the point regarding delimitation of the Park, whose creation we are legislating at this time, such that all representatives in the National Liberation Party have voted in favour, based on reasons of a technical nature.

…

In discussion of the first debate on the bill for Creation of the Las Baulas de Guanacaste National Marine Park. File No. 11.202.

THE SECRETARY:

Has the bill been sufficiently discussed?

THE PRESIDENT:

Discussed. Fifteen representatives present. Unanimously APPROVED.[144]

140. In the first of many decisions it would render on the Park Law, on 27 October 1995 the Court issued a judgment confirming that the 1991 Park Decree could not be construed as expropriatory. Article 5 of the Park Decree provided that "[the] declaration of national

[144] Legislative Assembly of Costa Rica, Third Full Legislative Committee, Regular Session, Second Legislature, Minutes of Meeting No. 4 , 7 June 1995, at 3-8.

park shall be fully valid [only] once the State has purchased the private properties existing within these delimitations," so it was apparent that the Decree only supplied the "public purpose" required for a legal expropriations, and no more. Costa Rica's Law on Expropriation would have to be used to carry out expropriations in line with Boza's BNMP objectives. Had it been considering a challenge to the final text of the Park Law, instead, its provisions would have undoubtedly led the court to a similar conclusion, at least at that time:

> In order to fulfill this law, the competent institution will take the necessary steps to expropriate the totality or part of the properties found in the area delimited in the previous article. The private lots of land included in this delimitation will be susceptible of expropriation and will be considered part of the [BNMP], once they have been acquired by the State, through purchase, donation or expropriation, In the meantime the owners will continue to enjoy the full exercise of their rights as property holders.[145]

141. Years would pass without any appreciable movement from MIRENEM, and then MINAE, with respect to the Park Law. No expropriations were commenced and property in land was exchanged freely in what became a burgeoning market for luxury tourism and real estate.[146] Land values rose rapidly throughout the period, as the heretofore isolated region was opened up with the 1995 establishment of Daniel Oduber International Airport outside of the City of Liberia. The airport was located only a 65 kilometer drive northeast from Playa Grande. In 2002, a Paradiso golf resort was being constructed 15 kilometers to the north of Playa Grande, along the coast. The luxury market was driven further, in 2004, with the establishment of an exclusive Four Seasons Resort, 25 kilometers north of Playa Grande along the coast. Between 2003 and 2006, traffic at the International Airport grew by 500%, to 300,000 passengers, which encouraged the developers of the three most luxurious resorts to donate $3,000,000 towards further airport expansion.[147] By 2007, 45% of all tourists entering Costa Rica visited Guanacaste Province, and construction was well underway for the 2008 opening of a J.W. Marriott golf resort and condominium community located just 6 kilometers to the south of Playa Grande, immediately below the resort town of Tamarindo.[148]

142. Meanwhile, as mentioned above, between 2002 and 2003, the Leatherback Trust sponsored a planning exercise for the BNMP, from which two strategies sprang for the

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145 Exhibit C-1e, Article 2.

146 See Expert Report of Michael Hedden dated 23 April 2014 ("FTI Report").

147 Janelle Brown, "In a Corner of Costa Rica, a Beachhead for Luxury" (New York Times, 3 February 2006). http://travel2 nytimes.com/2006/02/03/realestate/03costa html? r=0&pagewanted=all, accessed 19 April 2014. A favourable spotlight was also shone on Guanacaste by MSNB, which labelled it as "one of the hottest real estate markets on the planet." See: Michael Hegedus, "Mike on the Money," CNBC, first aired 6 March 2006. https://www.youtube.com/watch?v=Zi42YmCB8NY, accessed 19 April 2014.

148 In many ways, Tamarindo was an outlier in terms of tourism development of Guanacaste. It was a town that attracted surfers and backpackers before the international airport opened, and the development that took place there was rather haphazard, and not geared towards high value clientele. While it is by no means a cautionary tale about no-holds-barred development, its reputation suffers by comparison to smaller communities, such as Playa Grande, and the various, exclusive luxury resort enclaves that now dot the coast.

expansion of the boundaries of BNMP beyond the forested berms of both beaches and across the lots held by the Claimants and their neighbours. One strategy was transparent: proposing and lobbying for the adoption of a new piece of legislation, which would change the 1995 law in a manner consistent with Costa Rican constitutional law.

143. The other approach was more surreptitious: to quietly lobby a fellow environmentalist named Julio Jurado, who occupied the position of Attorney General in 2003.[149] Mr. Jurado was likely more than happy to assist Mr. Boza, who, as Vice President of the San Jose based ENGO, CEDARENA (Centro de Derecho Ambiental y de los Recursos Naturales), would welcome Mr. Jurado to its Board of Directors in 2004. CEDARENA had been established in 1989 with the following vision statement: "To be agent of change through law and environmental management…"[150] At some point, it appears as though the two men decided to rope in a third accomplice: none other than the Minister of Environment and Energy, Carlos Manuel Rodríguez Echandi.

144. At that time Rodríguez, another staunch environmentalist, was actually occupying the very seat on CEDARENA's Board of Directors that Mr. Jurado would take in 2004. Mr. Rodríguez apparently resigned it, so as to avoid the appearance of potential conflicts when he became Minister. Mr. Rodríguez was also no stranger to the peculiarly Costa Rican policy stratagem of pulling the trigger first on any opportunities to establish new national parks, and locating the budget later. Long before becoming Minister, between 1990 and 1994, Mr. Rodríguez served as counsel to the Tropical Science Centre (the NGO that produces reports on the BNMP for the Leatherback Trust) and the National Parks Foundation (which Mr. Boza founded). He had also served as Deputy Minister in the two years leading up to his appointment as Minister and, from 1994 to 1998, Mr. Rodríguez had served as the Director of Costa Rica's National Park Service. Of course this was the period during which the fate of MIRENEM's original BNMP legislation had been sealed – in preference for legislation with the "*aguas adentro*" amendment included.

145. Staying true to Cedarena's vision statement, the three men decided that Mr. Jurado would use his authority, as Attorney General, to issue a binding interpretation that would effectively read the "*aguas adentro*" amendment out of the 1995 Park Law – simply by labeling it as a typographical error. Jurado's office published the planned opinion on 10 February 2004, intimating that it had been prepared in response to a request from Mr. Rodríguez's office eight months earlier.[151] It appears that Mr. Rodríguez must have expected great things from the Attorney General, in response to his May 2003 letter, because he did not wait for an answer before ordering his officials to issue a notice of public interest for a portion of Ms. Unglaube's land.[152] His enthusiasm might have been somewhat tempered when Ms. Unglaube successfully challenged the notice in court.

146. Perhaps in order to avoid another flaw upon which Ms. Unglaube might again capitalize, Mr. Rodríguez commissioned his department to prepare its own legal study, which was

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[149] The position of Attorney General was staffed as a non-political appointment.

[150] CEDARENA, http://www.cedarena.org/003/?i=1, accessed 24 April 2014.

[151] Letter from OJ-11-2014, 10 February 2004, referring to: Note No. DM-821-2003 of 5 May 2003.

[152] MIRENEM Resolution No. 375, 22 July 2003, published in La Gaceta No. 213, 5 November 2003.

completed on 16 September 2005. One month later, on 19 October 2005, he also sent an "official" letter to his friend, Mr. Jurado, essentially requesting the same opinion, which he received on 23 December 2005.[153] In the meantime, Mr. Rodríguez re-booted his Department's plan to expropriate a portion of Ms. Unglaube's land, by issuing another notice of public interest.[154] He also took the opportunity to request administrative appraisals on three of the Berkowitz lots, believing that his Department had been promised enough money from Mr. Boza's Leatherback Trust to cover those costs, about which he proved to be at least partially mistaken.[155]

147. Three months later, on 28 February 2005, Mr. Rodríguez launched the next stage in the plan to expand the BNMP. He issued an order to SETENA instructing its staff to refuse any new applications for environmental assessments. Then, on 10 March 2008, purporting to respond to a Constitutional Court decision of the previous day, Mr. Rodríguez ordered SETENA to temporarily freeze all environmental assessment work being undertaken on, as he put it, "properties within the park."[156] Next, on 19 August 2005 Mr. Rodriguez directed SETENA to continue these temporary freezes, on the basis of purported authority to suspend activities in relation to a subject of expropriation for one year, under the Law on Expropriation – whilst claiming that it will be extended as long as necessary for the Constitutional Court to render its decision in one of many cases pending on the Park Law. It did so on 30 August 2005.[157]

148. Upon retiring from his post in the spring of 2006, Mr. Rodríguez was named the new Regional Vice-President of Conservation International, and NGO that had often financially supported activities of the Leatherback Trust. Also of note is that Mr. Rodríguez received the Blue Moon Fund's first annual Conservation Leadership Award, worth $150,000.00. This honour was bestowed upon Mr. Rodríguez in 2006 for having "been a leader in ***expanding the Las Baulas National Marine Park***, organizing an internationally protected marine corridor, and calling for a United Nations moratorium on high-seas bottom trawling" [***Emphasis added***].[158] Actually, Mr. Rodríguez was also the first ever recipient of the Global Ocean Conservation Award, which he received in 2005, while still Minister. Among his other notable accomplishments, listed in explanation of why he was chosen, was the fact that "In 2004, ***he expanded Costa Rica's Las Baulas National Marine Park.***"[159]

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[153] C-444-2005, 23 December 2005, at 1, referring to DAJ-1142-2005, 16 December 2005 and DM-1725-05, 19 October 2005.

[154] Resolution No. R-421-MINAE, 8 November 2004.

[155] Constitutional Court Resolution No 2008007549, File: 05-002756-0007-CO, 30 April 2008.

[156] The information contained within this paragraph can also be found at para. 4 of Constitutional Court Resolution No 2008007549, File: 05-002756-0007-CO, 30 April 2008.

[157] No. 2238-2005-SETENA, dated 30 August 2005.

[158] "Costa Rican Environmentalist Receives Conservation Award," http://www.worldwatch.org/node/4418, accessed 20 April 2014. Other examples of reports noting how the former Minister "expanded" BNMP have included: María Gabriela Díaz, "Minister Lost, Found in Corcovado Wilderness" Tico Times, 28 April 2006, http://www.ticotimes net/2006/04/28/minister-lost-found-in-corcovado-wilderness, accessed 20 April 2014;

[159] "Costa Rica minister is first global ocean conservation awardee," http://oneocean.org/overseas/200507/coastal_alert html, accessed 20 April 2014.

149. While Mr. Rodríguez was busy ordering new stationary embossed with Conservation International's logo, however, the Legislative Council for the Municipality of Santa Cruz was busy consulting legal experts on whether the Attorney General's 2005 interpretation could really have the effect of expanding the park 75 meters inland. The answers it received were: (1) that the Attorney General could not change the Park's boundaries simply by publishing an opinion; but (2) that the Attorney General's opinion was binding on the government agency that had requested it (i.e. MINAE).

150. Upon further consideration, the Council decided to adopt zoning regulations that were consistent with the Park Law, as enacted in 1995.[160] As municipalities enjoy primary jurisdiction over the regulation of economic activities within the Maritime Zone (i.e. the first 200 meters, inland, from the mean high tide mark), Council obviously believed that it was acting well within its rights to establish a zoning regulation. At this point, in mid-2006, SETENA was just coming to the end the one-year freeze it was permitted to impose on its own assessment work for the Playa Grande area, so it only made sense that Santa Cruz prepare itself for more permit applications, once the backlog of environmental assessments had been completed. As noted below, these regulations were nullified on 24 May 2008 by the Constitutional Court – in which MINAE/SETENA participated as interested parties.

151. In retrospect, it was, perhaps, only logical that Mr. Rodríguez, a man who had obviously devoted his life to environmentalism, and who had personally witnessed what he would have seen as the defenestration of MIRENEM's attempt to grow the country's national park network Park in 1995 – by a penny-pinching legislative committee. Mr. Rodríguez had probably taken the legislative defeat as personally as had Mr. Boza. After all, as Mr. Rodríguez himself boasts, he "was also a key player in the establishment of a multinational marine park — Las Baulas National Marine Park."[161]

(ii) The Judges' Perspective

152. It appears that there was actually a third prong of attack for Mr. Boza and his colleagues, which was not mentioned in the five-year plan: challenges at the Constitutional Court. The first of many BNMP cases, launched both by friends and foes of the expanded BNMP, starting with a judgment dated 9 March 2005.[162] On this date the Constitutional Court rendered a decision in which it ordered MINAE, and its agency, SETENA, to consider establishing new guidelines for SETENA's consideration of applications environmental assessments – which were required before a municipal building permit could be obtained. With its order, the Court directed SETENA to ensure that, whatever

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[160] Mediante acuerdo dictado por el Concejo Municipal en su sesión extraordinaria Nº 17-2006, artículo 7, inciso 01 de fecha 25 de abril de 2006, se acordó acoger el informe de la Asesoría Legal y autorizar al señor Alcalde Municipal para que proceda a la publicación en el Diario Oficial La Gaceta , de acuerdo adoptado en la Sesión Ordinaria Nº 38, artículo 9, inciso 1, 20 September 2005, La Gaceta No. 127

[161] Official biography for Carlos Manuel Rodriguez, Vice President, Conservation Policy, Conservation International, http://www.conservation.org/newsroom/experts/pages/Experts_Detail.aspx?ExpertID=35&name=Carlos%20Manuel-Rodriguez, accessed 20 April 2014.

[162] Constitutional Court, Judgment, File # 05-002576-0007, 9 March 2005.

guidelines it issued, the result could not have any deleterious impact upon Leatherback nesting activities.

153. As noted above, one day later Mr. Rodriguez and his staff had taken full advantage of this order by instructing SETENA officials to temporarily cease all work on any pending environmental assessments, putatively so that they could focus their energies on preparing the guidelines mentioned in the Court's judgment. SETENA staff immediately, which included the formal suspension of Ms. Unglaube's environmental viability assessment application.[163]

154. The Constitutional Court issued its next important BNMP-related judgment on 28 June 2005.[164] On this occasion, the Court refused to compel MINAE officials to consult with the Respondent's National Geographic Institute, in order to actually determine the proper measurements of the Park boundaries. The request seems to have been made by a frustrated landholder in the vicinity of the Cerro del Morro, who had apparently been prevented by officials from constructing a retaining wall in a location that was nowhere near 125 meters from the median high tide line. The Court appeared to conclude that SETENA officials would have done better busying themselves on complying with its March 9th order instead. Taking his cue from the Court again, on August 19th Mr. Rodriguez and BNMP officials jointly wrote to SETENA, asking it to suspend any and all pending administrative appraisal applications, pending the Constitutional Court's resolution of the aforementioned Unglaube dispute.[165] SETENA responded on August 30th by issuing the executive decree mentioned above, which "temporarily" that ceased all work on assessment applications, as requested.[166] Unglaube appealed against this decree on September 7th, albeit to no practical effect.[167]

155. Another landholder with pending applications for environmental assessments also appealed the April 30th SETENA order, arguing that the blanket nature of the suspension constituted an excess of authority by SETENA, which, it was argued, had to decide environmental assessment applications on a case-by-case basis. On 19 October 2005,[168] the Constitutional Court confirmed that the general order was legitimate, explaining that it had been issued under the authority of Article 4 of the Law on Expropriation. The Constitutional Court thus justified one dubious act of executive rulemaking (i.e. the blanket suspension decree) with an equally dubious interpretation of a statutory provision

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[163]MINAE Letter No. DM-394-2005, 10 March 2005; Resolution No. 647 - 2005-SETENA, re: File No. 773-2003.

[164] Exhibit C-1u..

[165]ACT-641-05-PNMB, 19 August 2005.

[166]No. 2238-2005-SETENA, dated 30 August 2005.

[167]Nearly three years later, in a cursory judgment, the Court dismissed the Unglaube's appeal on the bizarre basis that a SETENA executive order suspending any consideration of environmental assessment applications by SETENA did not "effect the core property rights" of the appellant. It further observed that SETENA was really just complying with the Court's request, after all, and that the suspension of assessments and approvals was reasonable and balanced given the importance of the constitutional rights to a clean and healthy environment enshrined in Costa Rica's constitution.

[168] Sentence # 14289, File # 05-13125-007-CO, 19 October, 2005, Exhibit C-1v.

– which had obviously been intended to authorize measures of conservation in cases were the subject of expropriation was a precious *objet d'art* or a perishable good, rather than a tract of land.[169] More notable is the fact that the authority to issue precautionary measures under the Expropriation Law was only one year, and yet the SETENA moratorium was kept in place until the end of 2008, as described further below.

156. Almost one year later, on 25 July 2007,[170] the Constitutional Court was asked by Ms. Unglaube to annul the Park Law on the ground that it was inconsistent with constitutional rights to property and specific rules that apply to legislation authorizing expropriation. The Court dismissed this case on the basis that the Park Law did not actually authorize expropriation. It merely provided MINAE with a public purpose, upon which an act of expropriation could be validly pursued under the Law on Expropriation. The Court's reasoning also seemed generally consistent with longstanding practice, in which an authorization and/or justification for expropriation was not confused with a positive obligation to expropriate.

157. The next important decision was not rendered until 30 April 2008. In rendering it, the Constitutional Court appeared to shift from its traditional position, of regarding the expropriation clause in the Park Law as discretionary to one in which the duty to expropriation was considered mandatory and immediate. While the mandatory versus discretion issue would occupy much of the court's time over the coming year, the April 30th decision was more important in that it consecrated the "typographic error" theory for Article 1 of the Park Law – which meant that it was no longer possible for a disgruntled owner to expect success in arguing that his land could not be expropriated because the Law still said that it was a marine park. In a nutshell, the Court managed to ignore the plain meaning of the text, as well as its legislative history, to arrive at a manifestly inadequate and inequitable construction instead, based upon the patently false supposition that the term, "*aguas adentro*" – which was the subject of its very own, separate amendment in committee, was somehow no more than a typo.[171]

158. Nevertheless, with the release of this judgment, it became clear that the Supreme Court had construed the law as requiring MINAE to expropriate, not merely investing it with authority to do so as its budget permitted (which had been the established custom since

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[169] Article 4 of the Law on Expropriation provides:

Precautionary measures. The Public Administration can adopt the necessary measures so as not to alter the conditions of the Article 4.- Precautionary measures. The Public Administration can adopt the necessary measures so as not to alter the conditions of the property or good that is pretended for expropriation.

When it is a property or good that has artistic, historical or archaeological value, these measures should be adopted, necessarily and in a timely moment, by the expropriating institution. As part of this, it can be prohibited that these goods leave the country during the expropriation process.

These measures will be practiced for a period of one year. The Administration shall pay indemnity for damages caused by the unreasonable limitations to property rights, especially when they affect the economic use of the property or good.

[170] Exhibit C-1zc.

[171] Exhibit C-1zb.

the Respondent commenced its spree of national park announcements in 1970. Indeed, the Court harshly criticized MINAE for allegedly having allegedly failed to launch any expropriations from the date upon which the Park Decree had come into force (i.e. in 1991). Such criticism seems disingenuous, given how it had only been since late 2005 that MINAE's minister had managed to obtain the binding opinion he wanted from the Attorney General to commence "consolidation" (i.e. expropriations of privately held lands within the new Park boundaries) in earnest.

159. Less than one month later, however, the Court appeared to perform a dramatic *volte face* on the issue of whether MINAE officials actually possessed discretion as to whether or when expropriations would commence. Given that the practical effect of the Court's April 30th judgment had merely been to bump expropriations slated for the new BNMP to the top of a very, very long list of expropriations required to "consolidate" land for earlier-declared parks, the Court could have been forgiven for second-guessing its stance on the mandatory/discretionary issue for the Park Law (which was just one of more than a dozen such laws and decrees to which the same provisions of the LOA applied in equal measure). In a judgment it rendered on 27 May 2008,[172] the Court presented MINAE with what would have appeared to be a stark but simple choice: either immediately expropriate the land of Ms. Unglaube, and the other landholders, or encourage environmentally sensitive development to proceed by developing guidelines that would permit SETENA to issue permits without endangering the nesting activities of the Leatherbacks and other turtle species.[173] The choice put to MINAE was stark in that it sharply contrasted with the judgment it had rendered on April 30th – which very much appeared to indicate that there was no choice to be had. Expropriation had been the only option under its new interpretation of the Park Law.

160. Indeed, the Court issued yet another BNMP judgment just four days earlier, on 23 May 2008, in which it gave no hint of its impending change of heart. The decision involved a challenge brought by proponents of Park enlargement to zoning rules that had been issued by the local municipality, which would govern the issuance of building permits to landholders located in the vicinity of the BNMP. While acknowledging the municipality's right to regulate within the Maritime Zone, the Court concluded that its zoning regulations conflicted with the general suspension of environmental assessment activities that had been ordered by Mr. Rodriguez and immediately implemented by SETENA, on 30 August 2005.[174] The Court reasoned that, as SETENA had [apparently] issued the order to implement international obligations owed by Costa Rica to protect turtles and that, in so doing, it was [purportedly] exercising its authority under Article 37 of the LOA, as vouchsafed under Article 50 of the Respondent's Constitution, the executive decree trumped the municipality's zoning rules, because the latter had been issued later in time and without the benefit of an environmental assessment.

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[172] Exhibit C-1i.

[173] As demonstrated in the witness statement of Dr. Kirt Rusenko, Playa Grande's landholders, including the Claimants, were sincere believers in conservationism generally, and in protecting the turtles' nests in particular.

[174] Exhibit C-1h

161. The irony implicit in these reasons for decision appears to have been lost on the Court, given how neither the Park Law nor SETENA's executive order had been adopted with the benefit of an environmental assessment themselves. It also failed to explain precisely how the SETENA decree's adoption would actually honour international obligations, or whether Costa Rica would have been in breach of any of its international obligations had no such order been issued. It also appears as though the Court was unaware of how the SETENA decree was implemented immediately after a letter from Minister Rodriguez had been received, rather than as a result of careful reflection, much less the kind of thoroughgoing cost benefit analysis that is the hallmark of sound environmental assessment. It also appears to have forgotten the 2005 judgment in which it upheld the same SETENA decree on the basis that it has been issued pursuant to a precautionary rule found in the Law on Expropriation (omitting the fact that such authority was limited to one year in application).

162. Next, on 27 July 2008, the Court had reason to revisit its interpretation of the Park Law once again. This time the dispute was over SETENA's refusal to comply with the order of a lower court for it to immediately process Ms. Unglaube's environmental viability assessment application. In answering this complaint, the Court recalled its judgment of two months earlier, in which MINAE was put to a choice between expropriation and allowing development on a basis that would ensure no interference with turtle nesting activities. Although the Court accepted that MINAE did appear to be in breach of the Park Law obligation to get on with the expropriation followed by the prompt payment of appropriate compensation, it allowed that the Government might simply not be in a position to pay that expropriation. If that were true, the Court indicated, again, that the alternative was to permit Ms. Unglaube to proceed with appropriate development plans. Nevertheless, Ms. Unglaube received no satisfaction on this occasion either. SETENA was not ordered to comply with the lower court's ruling forthwith. It was merely reminded of its options again.

163. Just as it appeared settled, on the basis of the Court's May 27th and July 25th reasons for decision, that the reasons for decision contained within its April 30th decision might have been a little too unambiguous about MINAE's duties under the Park Law in respect of the decision to expropriate, the Court issued another judgment on the topic. On this occasion, 16 December 2008, the Court vehemently returned to the position it had exhibited in the April 30th judgment. MINAE had no choice but to expropriate, immediately. Reinforcing its stance, the Court went further by declaring any permits previously issued for lots found within the [expanded] boundaries of the BNMP to be annulled and declaring any environmental assessment or other permitting process pertaining to these lots to be invalid – now and forever. MINAE received another judicial upbraid for appearing to have approved environmental assessments in the same area for which it was required [as opposed to authorized] to expropriate.

164. The Court capped this emphatic judgment with one more ruling, issued on 23 January 2009, in which it recalled both its reasons for decision in the April 30th judgment and in the December 16th judgment. The dispute involved a complaint by proponents of BNMP expansion that Park officials were not adequately enforcing strict conservation rules within the boundaries of the Park. MINAE denied the charges. In resolving the dispute,

the Court explained that the two aforementioned judgments addressed the complaints before it, as they clarified both the BNMP's [expanded] boundaries and MINAE's unalterable duty to immediately proceed with all expropriations [apparently regardless of budgetary constraints]. The only order it needed to issue, in order to close the matter once and for all, was one that compelled Park officials to finally take the steps necessary to properly delimit the boundary lines of the BNMP on the ground. Roberto Dobles Mora, then Costa Rica's Minister of Environment and Energy, was personally ordered to ensure both that MINAE would coordinate its efforts with the Respondent's National Geographic Institute and to complete the assigned task within three months' time.

165. For the purposes of foreclosing upon any reasonable expectation that landholders caught up within the expanded BNMP might have about ever enjoying full rights of use in their lots, this decision was undoubtedly the end of the story. Assuming that MINAE must have complied with the Court's stern and personal order,[175] there would appear to be nothing left to prevent MINAE from engaging in the wholesale expropriation of lots that the Court has most definitively stated is its duty. And yet, the majority of the Claimants' lots remain in limbo – with any hope of development stymied because the Court put an end to any permitting and environmental assessment procedures on 16 December 2008. Although the fiscal reasons for the delay are manifest, it turns out that there may still be a legal reason too. On 27 March 2009, the Constitutional Court issued another Park Law decision, this time having been jointly petitioned by both Costa Rica's Minister of Environment & Energy and his colleague, the General Secretary for SETENA. The petition was for the Court to issue a clarification of either its judgment dated 27 May 2008 or its judgment dated 16 December 2008.

166. It thus appears that landholders in Playa Grande were not the only persons left wondering where they stood after the Court issued its decision on 16 December 2008. In fact, the Respondent, acting through the two petitioners, has admitted that it cannot logically reconcile the two decisions either. No doubt its officials were hoping for a return to the more flexible interpretation that was reflected in the judgment of 30 April 2008. As indicated above, MINAE has never been allocated a budget large enough to continue with even a moderate resumption of expropriations for consolidation into the BNMP. To MINAE, this budgetary reality would justify returning to the customary approach, in which MINAE was largely left to its own devices to figure out how it might exercise the duty/authority contained within the Park Law to expropriate land for the purposes of consolidation for the common weal.

(e) The Leatherback National Marine Park: the Claimants' Narrative

167. When one attempts to relate a complicated and multifaceted story, the incentive exists to explain it in a way that allows the reader to see how all of the pieces eventually came together. Unlike the participants in the events that contributed to the overall story, the narrator enjoys the perspective that comes with hindsight and the relative objectivity of a

[175] The assumption must be hypothetical because, as it turns out, Dr. Gobles and SETENA never did complete the task of properly delineating the boundaries of the BNMP, although this lack of specificity has not been raised as a complication in the handful of expropriation cases that have made it as far as the judicial phase, at least not yet.

third party. Therein lies a danger, in that the intended recipients of his explanation might not obtain a full sense of what circumstances were like for any individual participant in the story.

168. In this case, although the Claimants have come to know one another over the past few years, some were entire strangers to each other when most of the events described above transpired. Had they all ultimately been permitted to take advantage of their property rights in the land that the Respondent has taken from them, they likely would have eventually known each other as neighbours. There can be no doubt that they all would have preferred to know each other, today, as neighbours rather than as co-claimants.

169. Spence, the Holstens and the Cophers were friends and business associates before they purchased their properties. Similarly, the Berkowitz Claimants became acquainted with Gremillion in 2004 when he purchased Lot B7. However, the members of these two groups were not made aware of each other until a number of years after all of their investments had been made. As such, the each investor relied upon his or her own counsel, and own real estate agents, etc., in performing due diligence and ultimately making their own respective investments. They also ended up learning about the cascade of acts and omissions, described above, which – taken together – would eventually have a determinative impact upon their investments.

170. To be sure, the Claimants never enjoyed the same bird's eye view of the bureaucratic machinations being orchestrated behind the scenes by characters such as Messer's Boza and Gonzales that has been conveyed, above. The story has only unfolded as a result of the documentary research undertaken in preparation of the Claimants' case.

171. Anybody with a passing familiarity of Costa Rican politics would have known that the country has to watch its budget closely, for example, so it would have come as no surprise to the Claimants, respectively, that the Respondent simply did not have the funds available to exercise the powers of expropriation in respect of their individual lots. They may have known that the Government had actually possessed such authority over their lots from 1991 until 1995, when the Park Law was purposefully varied to made it primarily a marine park. None of them was familiar with the details of the Unglaubes' battle with the State, or reason to assume that those battles portended anything about the status of other landholders in the area.

172. Similarly, the Spence group of Claimants were unaware the Berkowitz Claimants were being notified of the State's apparent intent to lawfully expropriate their lots in 2005 and 2006. Otherwise they obviously would not have still been adding to their portfolios at at roughly the same time.

173. At some point towards the end of 2005, all of the Claimants eventually heard about SETENA's decision to temporarily suspend its environmental assessment procedure, and, at some point in 2006, each would have individually heard from a SETENA official that the Attorney General has issued some sort of opinion apparently required them to treat their lots as being located within the BNMP – but the notion would have appeared ludicrous to anybody in their position. Even non-lawyers generally understand that the terms of a law trump those of an executive decree or other regulation. Over the coming

year or two, each Claimant would eventually hear about this or that court case challenging the – at the time – absurd notion that the plain text of a law could be changed by the declaration of an unelected official. The seriousness of their situation only dawned on the Claimants once the string of decisions rendered by the Constitutional Court in 2008 started to emerge.

174. In the same way, none of the Claimants were aware that a longstanding political play was regularly being Played in Costa Rica over the span of four decades: i.e. the stratagem of announcing a new national park, usually by declaration, without much thought, if any, being given to how the State would compensate private landholders with lots located within the new park's boundaries. They had no way of knowing, either, that Mr. Rodriguez ascended to the Minister's office around the same time that they were planning the development of their investments – apparently with a plan firmly in hand to expand the BNMP back to the size they had originally conceived for it in 1991. Because Messer's Boza and Rodriguez chose to pursue their legislative counter-coup by stealthy means – i.e. by conniving with the Attorney General's Office to do an end-run around the Legislature – the Claimants hardly knew what was coming at them.

175. Still, it was not until 2005, for the Berkowitz group of Claimants, and 2007, for the Spence group of Claimants, that they realized the *status quo* ante might have changed. Before then, anybody who cared to research the point would have discovered that, although the Respondent had possessed the power to expropriate parts of the vast estate that sprawls over Cerro del Morro and its adjacent forest and pasture lands since 1991, no effort whatsoever had been made to start "consolidating" the park by means of expropriation.

176. As described below, however, it turned out that the *status quo* really had not changed that much. Almost a decade later, only three of the Claimants' lots had managed to progress to the end of the Respondent's interminable municipal expropriation regime. If not for the other steps taken by the Court and SETENA between 2005 and 2010, which led to a permanent end for the environmental assessment process and extinguished Santa Clara's zoning authority, it is unclear whether more than a few expropriations would have been almost completed by now anyway.

177. Meanwhile, between 2008 and 2010, the legislative committee responsible for parks and the environment (the *Comision Permanente Especial de Ambiente*) considered a number of BNMP related bills, some of which had the backing of the President.[176] The primary goal of most was to reinstall its boundaries as stated in the 1995 Law. During this same period, the Claimants had become better apprised of the growing risk posed to their investments by upcoming Constitutional Court decisions and subsequent implementation by MINAE and/or SETENA. As such, the Claimants supported these legislative efforts and had been hopeful for a potential return to normal. In the face of loud disapproval

[176] See, e.g.: Legislative Record No. 16.916, "Law of amendment of the limits of the Baulas Marine National Park and Creation of the Baulas National Wildlife Refuge of Mixed Property," first introduced by Deputy Jorge Eduardo Sánchez Sibaja on 23 January 2008 (archived on 27 November 2008) and reintroduced on 21 May 2009 (archived 23 May 2013).

from environmental NGOs and media commentators,[177] and opposition from both the Attorney General's Office and the Office of the Comptroller,[178] none of the bills received sufficient support during debates that were held in 2008, 2009 and 2010.

C. Current Status of Claimants' Lots

(a) The Spence Lots

178. Spence owns four lots on Playa Ventanas: Lots V30, V31, V32 and V33. All four of these lots were declared to be in the public interest in October of 2007. Administrative appraisals were performed for these lots on 18 September 2008 and notified to Spence at a later date. Spence filed objections to the administrative appraisals in January 2009 and April 2009 (in the case of V33). There have been no further steps in the expropriation proceedings since those dates. Spence continues to pay property taxes on those properties to the municipality.[179]

(b) The Spence Co. Lots

179. Spence Co. owns nine lots now considered to be in the park. For six of these lots: V59, V61, A39, C71, C96 and SPG3, the Respondent has taken no steps to expropriate these lots. For the other three lots: A40, SPG1 and SPG2, a final judgment has been issued by the local courts valuing the properties. Partial payments have been made to Spence Co. on all three lots.[180]

(c) The Cophers' Lots

180. Ronald and Brenda Copher together own three lots on Playa Ventanas: Lots V38, V39 and V40. All three of these lots were declared to be in the public interest in October of 2007. Administrative appraisals were performed for these lots on 18 September 2008 and

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[177] See, e.g.: Vanessa Loaiza N, "Minaet impulsa degradar parque Baulas para evitar expropiaciones: Estado Alega Ahorro De $500 Millones En Pago De Tierras," Nación, 9 November 2009, http://wvw.nacion.com/ln_ee/2009/noviembre/09/pais2051656.html, accessed 22 April 2014; PRETOMA, "Costa Rican Congress Could Revoke Historic Decision To Protect Leatherback National Park," Press Release, 25 November 2008, http://www.pretoma.org/costa-rican-congress-could-revoke-historic-decision-to-protect-leatherback-national-park/, accessed 24 April 2014; and: Andy Bystrom, The Final Leatherback Battle Has Begun, Costa Rica Conversation Network Blog, 8 March 2010, http://costaricanconservationnetwork.wordpress.com/2010/03/08/the-final-leatherback-battle-has-begun-update-on-bill-17-383/, accessed 24 April 2014; Alejandra Vargas, "Importante Playa De Anidacion De Tortugas Marinas," Periódico La Nación, 5 November, 2008; http://www.propertiesincostarica.com/articles/importante_playa_anidacion.html, accessed 24 April 2014.

[178] See, e.g.: Legal Opinion OJ—098-2008, 13 October 2008, Gloria Martinez Solano, Office of the AG, to Hannia Durán, Comisión Permanente Especial de Ambiente, http://www.pgr.go.cr/scij/busqueda/normativa/pronunciamiento/pro_repartidor.asp?param1=PRD&param6=1&nDictamen=15510&strTipM=T, accessed 20 April 2014; Legal Opinion DAGJ-1170 -2008, 28 August 2008, Silvia Chanto Castro & Ingrid Brenes Guevara to Hannia Durán, Comisión Permanente Especial de Ambiente, http://www.pgr.go.cr/scij/busqueda/normativa/pronunciamiento/pro_repartidor.asp?param1=PRD&param6=1&nDictamen=15510&strTipM=T, accessed 22 April 2014.

[179] Spence WS1 and Exhibits C-36, C-3, C-4, C-5 and C-6.

[180] Reddy WS1 and Exhibits C-44, C-12, C-13, C-14, C-15, C-16, C-17, C-18, C-19, C-20, C-21 and C-22.

notified to the Cophers at a later date. The Cophers filed objections to the administrative appraisals in January 2009. There have been no further steps in the expropriation proceedings since those dates. The Cophers continue to pay property taxes on those properties to the municipality.[181]

(d) The Copher & Holsten Lots

181. Ronald Copher and Joseph Holsten together own two lots on Playa Ventanas: Lots V46 and V47. Both of these lots were declared to be in the public interest in October of 2007. Administrative appraisals were performed for these lots on 17 September 2008 and notified to both Copher and Holsten at a later date. They filed objections to the administrative appraisals in January 2009. There have been no further steps in the expropriation proceedings since those dates. Both Copher and Holsten continue to pay property taxes on those properties to the municipality.[182]

(e) The Gremillion Lot

182. Gremillion owns one lot, B7, which was declared to be in the public interest on 1 December 2005. The judicial phase of the expropriation proceedings have commenced and the Respondent issued an act of dispossession on 13 March 2008. No judgment has been given valuing this property. Gremillion continues to pay property taxes on this lot to the municipality each year.[183]

(f) The Berkowitz Lots

183. Trevor, Aaron and Brett Berkowitz in aggregate own five lots: B1, B3, B5, B6, and B8. All five of these lots were declared to be in the public interest in December 2005. The Respondent issued an act of dispossession for each of these lots in March 2008. However, only two of these lots have reached a final judgment: Lots B3 and B8. The Respondent has not paid for either of those lots[184]

III. LEGAL BASIS FOR THE CLAIMS

A. Applicable Law

184. The only law applicable to this case is international law, including customary international law, general principles of international law and the international treaty pursuant to which the Claimants have brought their claims, the CAFTA.

185. Article 33(1) of the UNCITRAL Arbitration Rules provides that the Tribunal "shall apply the law designated by the parties as applicable to the substance of the dispute." CAFTA Article 10.22(1) provides: "the tribunal shall decide the issues in dispute in accordance with [CAFTA-DR] and applicable rules of international law." In this regard, the

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[181] Copher WS1 and Exhibits C-39, C-7, C-8 and C-9.

[182] Copher WS1 and Exhibits C-39, C-10 and C-11.

[183] Gremillion WS1 and Exhibit C-27 and C-50.

[184] Berkowitz WS1 and Exhibits C-23, C-24, C-25, C-26 and C-28.

"applicable rules of international law" should be construed as including: relevant norms drawn from customary international law and general principles of international law.

186. One such general principle is *res judicata*, which international jurists have long held to be a "well-established and generally recognized principal of law."[185] The doctrine of *res judicata* functions with preclusive effect upon Respondent in the instant case, *vis-à-vis Unglaube* v. *Costa Rica*. The *Unglaube* case involved claims that many of the same measures at issue in the instant case were inconsistent with the Respondent's obligations under the Costa Rica – Germany BIT, *viz.* to accord fair and equitable treatment and prompt, adequate and effective compensation for expropriation. In fact, both cases share the same Respondent, many of the same measures and two of the same treaty standards.

187. Respondent is therefore estopped from making any allegations of fact or law, in the instant case, that would be inconsistent with either the allegations it made in the *Unglaube* case or the factual findings made by the *Unglaube* Tribunal in respect of any contested issues of fact sharing such commonalities. Neither the Tribunal nor the Claimants are similarly constrained, however, because the Claimants were not parties to the *Unglaube* arbitration.[186] Only the Respondent is precluded from adopting new and inconsistent positions in the instant case, as a result of its participation in the *Unglaube* case.

188. The municipal laws of Costa Rica do not constitute "applicable law" in the instant case. The *Unglaube* Tribunal was required to find that the municipal laws of Costa Rica also constituted "applicable law," pursuant to Article 42(1) of the *ICSID Convention* and Article 10:3 of the Costa Rica – Germany BIT – neither of which apply in the instant case. Rather, Costa Rica's municipal legal order, as well as any measures it has adopted or maintained in relation to the issues in dispute, can only serve as evidence bearing on whether the Respondent has complied with its obligations under the CAFTA and/or customary international law.

B. The Tribunal Has Jurisdiction to Hear The Investors' Claims

189. This Tribunal has jurisdiction both *ratione personam* and *ratione temporis* to decide the Claimants' claims.

190. The Tribunal possesses jurisdiction *ratione personam* because all of the Claimants are nationals of the United States of America, thereby qualifying as investors of a party, as defined in CAFTA Article 10.28.

191. Each of the Claimants indirectly owns and controls assets, in the form of property rights in land, towards which he or she committed capital with an expectation of gain, consistent with the subparagraph (g) definition of "investment" under CAFTA Article

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[185] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13), citing: Factory at Chorzów (Ger. v. Pol.), Interpretation of Judgments Nos. 7 & 8, 1927 P.C.I.J. (ser. A) No. 13, at 27 (dissenting opinion of Judge Anzilotti).

[186] Moreover, as demonstrated by CAFTA Article 10.26:4, customarily an arbitral award should only be regarded as binding on the parties to the arbitration for which it has been issued.

10.28(h). The governmental measures described herein relate directly to these investments, consistent with Article 10.1 of the CAFTA. As such, the Tribunal possesses jurisdiction *ratione materiae* to adjudicate the Claimants' claims.

192. The CAFTA came into force, as between the United States and Costa Rica, on 1 January 2009. [187] As described further below, the Respondent has maintained measures tantamount to expropriation of most of the Claimants' investments, which began with a decision of the Constitutional Court, rendered on 23 May 2008 and crystalized with an of the Minister for MINAE on 19 March 2010, in which he ordered his staff to terminate all pending environmental viability permit applications, and never accept another, for lots deemed to inside of the BNMP's 125 Meter restricted zone.

193. The remaining investments were subjected to measures of direct expropriation, with the Respondent taking possession of certain of their lots between 12 March 2008 and 9 December 2008. In no case was adequate (or in most cases any) compensation provided on a prompt basis or otherwise without delay, as prescribed under CAFTA Article 10.7(2).

194. In respect of its treatment of most of the Claimants' respective investments, Respondent has acted in a manner inconsistent with its obligation under CAFTA Article 10.7(1), by means of a composite breach and, in any event, it has acted in a manner inconsistent with its obligation under Article 10.7(2)(a), by means of a continuing breach, which has continued since 1 January 2009.

195. Finally, with respect to those investments over which Respondent took possession after 1 January 2009, the Respondent has acted in a manner inconsistent with its obligations under sub-paragraphs (b) and (c) of CAFTA Article 10.7(2).

196. In addition, the Respondent's conduct, both with respect to the manner in which it has employed its municipal expropriation with respect to certain of the Claimants' investments, and the manner in which it has held all of their investments hostage to the caprice of political and bureaucratic infighting over the past five years, constitutes a breach of CAFTA Article 10.5. In this regard, the Respondent has engaged in a mixture of acts and omissions that, in the aggregate, have arbitrarily deprived the Claimants – as part of a larger class of landholders in Playa Ventanas and Playa Grande – of the use and enjoyment of their investments.

197. Given the above, it is manifest that the Tribunal possesses jurisdiction *ratione temporis* to adjudicate the Claimants' claims.

C. CAFTA Article 10.7

(a) Expropriation, Generally

198. CAFTA Article 10.7 provides, in relevant part:

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[187] Presidential Proclamation 8228 of March 28, 2008, to Modify the Harmonized Tariff Schedule of the United States and for Other Purposes, 73 Fed. Reg. 18139, 2 April 2008.

Article 10.7: Expropriation and Compensation

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

   (a) for a public purpose;

   (b) in a non-discriminatory manner;

   (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

   (d) in accordance with due process of law and Article 10.5.

2. Compensation shall:

   (a) be paid without delay;

   (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

   (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

   (d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

   (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

   (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

…

Note to Article 10.7

Article 10.7 shall be interpreted in accordance with Annexes 10-B and 10-C.

Annex 10-C Expropriation

The Parties confirm their shared understanding that:

1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

> 4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.
>
> (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

199. CAFTA Article 10.7(1) outlines the manner in which an expropriatory measure can be lawfully adopted. Measures that substantially interfere with foreign investments, whether on a *de jure* or *de facto* (i.e. direct or indirect) basis, must be adopted for a *bona fide* public purpose and in a manner that provides the affected foreign investor with prompt, adequate and effective compensation, and which is non-discriminatory and has been implemented in accordance with due process and the norms expressed in Article 10.5.

200. Much like direct expropriations and nationalisations, a measure constitutes an indirect taking or act tantamount to expropriation when it substantially interferes with the foreign investor's ability to derive the full economic benefits from (i.e. to "use and enjoy") its investment in the host State. As the PCIJ observed in the *Norwegian Shipowners Claims* case:

> It is not necessary to examine here whether the holding of the title was valid. It is sufficient to state that the United States, in fact, did take and hold the title, the property of the claimants; that they had the "*de facto*" possession, enjoyment and use, and that they acted as owners of the claimants' property after the formal taking, as notified by the Shipping Board to Dr. Nansen.[188]

(i) Expropriation Under Customary International Law

201. As confirmed by the Parties in paragraph 1 of Annex 10-C, Article 10.7(1) should be construed as a reflection of the customary international law minimum standard for State takings of property rights held by foreigners. Paragraph 2 of the Annex clarifies that a relationship of proximate cause must exist between the alleged measure and a tangible or intangible property right or property interest in an investment, which is gauged on the basis of evidence of interference.

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[188] *Norwegian Shipowners Claims (U.S.A. v. Norway)*, I (1922) R.I.A.A. 307 at 329.

202. In addition, as described below, paragraph 4 of the Annex clarifies what the Parties agreed were the characteristics of an indirect expropriation under customary international law, which they also indicated should be conducted, by focusing on the particular fact patterns at issue, on a case-by-case basis.

(ii) CAFTA-Specific Obligations Related to Expropriation

203. It is also important to note the issues to which Annex 10-C is not addressed, such as the other paragraphs of Article 10.7. In this manner, the Annex provides a clear indication of the limits of the parties' consensus on what constitutes customary international law on the issue of expropriation. Paragraph (1) represents the parties' consensus opinion on the content of the current state of customary international law. Paragraphs (2) to (5) do not. Rather, the obligations contained within these paragraphs constitute autonomous standards that must be considered part of the *lex specialis* of the CAFTA.

204. As such, the Respondent is not only required to conduct itself in a manner consistent with the customary international law norms on expropriation, as reflected in paragraph (1) of Article 10.7. It must also conduct itself in a manner consistent with the various obligations set out in paragraph (2) of the provision.

205. For example, the Respondent breaches sub-paragraph (a) of Article 10.7(2) when it maintains an expropriatory measure without honouring its obligation to pay the prescribed compensation "without delay." Even if it pays compensation without delay, the Respondent must ensure that what it pays is "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place," as per sub-paragraph (b) of the same provision. In the same manner, the Respondent must also ensure that the fair market value ("FMV") it is prepared to pay without delay must also not "reflect any change in value occurring because of the intended expropriation," as per sub-paragraph (c) of the provision.

(b) Cases of Direct Expropriation of the Claimants' Property Rights in Land

206. As indicated above, nine of the Claimants' lots have been subjected to direct expropriation, effected by the Respondent when it transferred title in each respective lot to itself, from an enterprise owned and controlled a Claimant. All such direct expropriations either took place as part of the ongoing exercise of the Respondent's municipal expropriation regime having reached the appropriate stage or as a result of a Claimant filing a waiver with the Court in order to participate in the instant arbitration.

207. Article 31 of the Respondent's Law on Expropriation authorizes the Respondent to apply to the court of first instance to order a change to be made to the land registry, and indicates that the expropriated party be afforded two-months to vacate, after which other provisions of the Law authorize the use of enforcement powers to take possession of the land and remove the [now former] landholder from the land at issue. Consistent with customary international law practice, it is at that point that the State takes possession of the land, thereby satisfying the customary requirements of a direct taking.

(c) Cases of Indirect Expropriation

208. As indicated in Paragraph 4(a) of Annex 10-C to the CAFTA, on rare occasions a governmental measure that substantially interferes with the exercise of property rights by a foreign investor in her investment will constitute an indirect expropriation under the terms of Article 10.7(1). The instant case represents just such an occasion. The issue for determination is at what point, along the string of measures adopted and/or maintained by the Respondent, did their collective impact so substantially interfere with the Claimants' investments as to rise to the level of a taking?

209. The story of the creation and subsequent expansion of the BNMP has been told in detail, above, and there is no need to repeat that story here. Once the Respondent decided to expand the park's boundaries to include all or part of the respective Claimants' lots and refused to allow development of those lots, it indirectly took what it had earlier directly taken from the owners of Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7 and B8.

210. When each Claimant purchased his/her/its lots, they purchased lots on which they expected to either build for their own use or develop for others homes consistent with the existing low-density, high end residential development already found in the area. Their beautiful beachfront properties bordered on the BNMP and they planned to co-exist peacefully with the existing park in a quiet residential community and have no negative impact on the turtles the park was ostensibly created to protect. These expectations were consistent with clear wording of the Park Law itself; the various agencies' understanding at the time that the Claimants' properties bordered on, but were not in, the Park; and the Respondent's both public and individual admissions that it was unable to pay to expropriate land to expand the boundaries of the Park.

211. Instead, by 2009, the Respondent, through various agencies, ministries and courts (but not the legislature), had passed a series of resolutions and made a number of decisions that without taking title to land resulted in total deprivation of the Claimants' rights to own and enjoy their property.

212. In summary:

(a) in 1995, the legislature passes the Park Law, which defines the boundary of the National park as 125 meters "*aguas adentro*" from the mean high tide line;

(b) in 2004 and 2005, the Attorney General issues twin opinions interpreting the Park Law to say the opposite of what its clear wording said. The boundary of the BNMP was said to include maritime areas, as well as 75 meters inland from the 50 meter inalienable zone. If it could survive a court challenge or corrective legislation, this interpretation would place the Claimants' lots either partially or entirely within the BNMP;

(c) On 30 August 2005, MINAE Resolution No. 2238-2005-SETENA is issued, which references the expropriation of the B lots and issues an order suspending environmental permits for properties located within the BNMP;

(d) On 8 and 9 October 2007, a series of resolutions declaring lots on Playa Ventanas to be in the public interest and referencing their expropriation:

(i) Resolution No. 33991-MINAE for lot V30;

(ii) Resolution No. 33989-MINAE for lot V31;

(iii) Resolution No. 33988-MINAE for lot V32;

(iv) Resolution No. 33987-MINAE for lot V33;

(v) Resolution No. 33994-MINAE for lot V38;

(vi) Resolution No. 33995-MINAE for lot V39;

(vii) Resolution No. 33999-MINAE for lot V40;

(viii) Resolution No. 34007-MINAE for lot V46;

(ix) Resolution No. 34006-MINAE for lot V47;

(e) On 30 April 2008, the Constitutional Court issues a decision that adopts the rationale found in the Attorney General's letters, thereby placing the Claimants' lots either partially or entirely within the BNMP. It also appears to order the immediate expropriation of all lots deemed to fall within the Park zone;

(f) On 27 May 2008, the Constitutional Court issues a decision instructing MINAE to either move forward with expropriation of private lands for the BNMP or move forward with a plan to allow them to be developed;

(g) On 18 December 2008, the Constitutional Court appears to order the immediate expropriation of all lots deemed to fall within the Park zone, prohibit SETENA from processing permit applications and order it to quash existing development permits for all properties located within the Park;

(h) On 28 February and 10 March 2009 the Minister of Environment and Energy issues letters, on behalf of SETENA and MINAE, respectively, asking the Court to clarify whether its 30 April 2008 judgment or its 16 December 2008 judgment reflect the Court's position on whether expropriations must take place immediately;

(i) On 27 March 2009, the Court denies the requests for clarification but, in so doing, it returns to the long-run status quo ante, in which it does not possess authority to direct MINAE when or how expropriations must be performed;

(j) On 19 March 2010, MINAE, through SETENA issues the order forbidding the granting of environmental feasibility permits within the expanded Park area

(a.k.a. the Park's restricted zone) and annuls environmental feasibility studies that had been granted for land located inside that same restricted zone.[189]

213. Although there were numerous draft bills introduced during that period to address the issues of the BNMP boundaries and the now impending expropriations, none were successful. Thus, commencing with the Constitutional Court's decision in May 2008 directing MINAE to expropriate the land and concluding with the Constitutional Court's clarification of 27 March 2009,[190] the Respondent completed the creeping expropriation of the rest of the Claimants' properties.

214. The Claimants do not say that the fixing of the BNMP's boundaries to include their property, in and of itself, interfered so substantially with the Claimants' rights in land as to rise to the level of a taking. In fact, both the 1991 Decree and the 1995 Law explicitly provided that any persons with land located within the boundaries of the BNMP would be entitled to continue enjoying all of their property rights in that land, until such time as the State moved to formally expropriate it. Until such time, privately held land would not constitute part of the BNMP, although it may have been located partially or wholly within the BNMP's boundaries.

215. Moreover, Costa Rica has a forty-year history of declaring national parks, but not expropriating the private land situated within their boundaries. Its Governments of the day also gave no indication, throughout, that any had either the intention or the wherewithal to proceed with a large-scale project of expropriations. Accordingly, the mere fact of the Park's boundaries being altered would not have been enough to result in substantial interference with the Claimants' rights in land. The strength of this conclusion is evidenced in the fact that current landowners with homes located inside of the expanded Park boundaries need only comply with minimally intrusive MINAE and SETENA regulations, primarily in the form of lighting restrictions, today.[191]

216. However, the Constitutional Court's final word on the topic - in 2009 - confirmed its position that the Park Law mandated expropriations of privately held land within the BNMP's expanded boundaries, but retreated from the position that it could dictate when or how such expropriations must take place. This result left the Claimants technically in possession of their property rights, but unsure as to whether, or to what extent, those rights could still be exercised.

217. Given the Constitutional Court's vacillation over the expropriation issue, one must look to measures adopted or maintained by the Respondent, which were related to the Claimants' ability to exercise their property rights within the BNMP's expanded boundaries or lack thereof. The issue remains at what point such measures substantially interfered with the Claimants' exercise of their rights on a permanent, rather than merely ephemeral or temporary nature.

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189 DAJ-701-2010, 6 March 2010

190 Exhibit C-1zi.

191 To be clear, existing homeowners have suffered a deprivation, because they would find it difficult, if not impossible to make any renovations or changes to existing structures, but it is unclear whether such interference has yet risen to the level of a taking.

218. Between 2005 and 2008, the issue of whether the Claimants could enjoy their rights fully was in considerable flux. In March and August 2005, MINAE officials took advantage of pending Court decisions as an excuse to temporarily suspend the processing or granting of environmental assessment permits.[192] That these measures were temporary is manifest in the language of the justifications that appear in their texts. Thus, even though it would turn out that SETENA officials never would engage in a *bona fide* assessment of any of the Claimants' lots, in August 2005 they could not claim that they had been the victims of a taking. Costa Rica's measures were clearly purported to be only of temporary effect.

219. Even with respect to the issue of regulatory assessments and approvals, the Constitutional Court's 2008 judgments were not models of clarity – at least not when read as a group. The decisions it issued in the spring and summer of 2008 left little doubt that the Court believed that SETENA retained the authority to regulate the use of private property within the expanded borders of the BNMP. Indeed, on 27 May 2008, the Court had directed MINAE and SETENA either to immediately expropriate privately held land located within the BNMP's expanded boundaries or to proceed with its processing of environmental viability assessment applications, approving permit requests on the basis of a policy that would not harm the nesting turtles.

220. As noted above, even by the end of year, on 16 December 2008, the Court had not issued its final word on the topic. Not only did both MINAE and SETENA require clarification from the Court about the meaning of its interpretation of the Park Law's provisions on expropriation. It would take until 19 March 2010 for Minister Jorge Rodriquez to finally issue the order to terminate any and all granted or outstanding environmental liability permits, thereby depriving a land holder of any benefit of his property rights. [193]

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[192] In some cases, like that of Brett Berkowitz's Lot B5, officials also appear to have engaged in a bureaucratic game of hide and seek, with Mr. Berkowitz cast to perennially play the role of seeker.

[193] Minister Jorge's order was the result of an iterative process of policy development, between SETENA and the Constitutional Court, arising from the Court's judgment dated 16 December 2008. In that judgment, the Court ordered SETENA to undertake a complete study on the impact that tourism and urban development would have on the Park and a new buffer zone of 500 m2. In addition, the Court required SETENA to determine what measures needed to be taken, including expropriation, to safeguard the nesting environment for the Leatherback turtles, including analysis of the impacts that noise, light, potable water and sewage could present, as well as the impact of the presence of humans, themselves. The Court ordered SETENA to provide its answer within six months. In compliance with that order, SETENA produced a draft study and appeared before the Constitutional Court on 1 October 2009, which issued its approval of the plan under decision no. 2009-019451.

After all remaining work was being completed on the draft management plan, on 15 March 2010, SETENA Secretary General Sonia Espinosa Valverde asked Jorge Rodriguez, under official letter SETENA SG-AJ-295-2010, to establish legal criteria to memorialize the agencies' official responses to the Court. In response to this request, a n internal legal opinion was prepared for Mr. Rodriguez, concerning Constitutional Court decision nos. 2008-018529 and 2009-019451, under official notice DAJ-701-2010 . Finally, though official notice DM-363-2010, on 19 March 2010 Mr. Rodriguez issued the following directions:

The "Complete Study of the Environmental Impact of Tourism and Urban Building and Development in the Buffer Zone of the Las Baulas National Marine Park, Guanacaste" should serve as a reference for the National Environmental Technical Secretariat, to assess environmental impact, in accordance with article 17 of the Environmental Law, for granting environmental feasibility studies within the zone.

The National Environmental Technical Secretariat should no longer suspend procedures submitted for evaluation within the buffer zone, however, it should proceed with evaluations in compliance with the Environmental Law and SETENA'S Executive Decrees, on each one of the procedures presented for the granting of environmental

221. Thus, the answer to the question of when the composite impact of Respondent's measure substantially deprived the Claimants of their use and enjoyment of their property rights and interests in their investments was on or about 19 March 2010, when MINAE officials ordered SETENA to terminate environmental assessments for lots, such as those of the Claimants, that fell within the redrawn boundaries of the BNMP.

(d) Manifest Delays in Providing Compensation for Both the Direct and Indirect Expropriations of the Claimants' Investments

222. Article 10.7(1)(c) provides that "prompt, adequate and effective compensation" must be paid to foreign investors in respect of any expropriation, direct or indirect. The same sub-paragraph adds that compliance with the language of this provision must also be in accordance with the terms of Article 10.7(2), of which sub-paragraph (a) specifies that compensation must be paid "without delay."

223. That "prompt" would be equated with the explicit notion of an act being taken "without delay" is consistent with the concept of expropriation long advocated by United States officials and authorities as representing customary international law. Such practice demonstrates how expropriation can only be regarded as lawful when, amongst compliance with other conditions, compensation is be paid ***immediately*** upon the adoption of an expropriatory measure.[194]

224. The term, "paid without delay" also appears in Part IV, Article 8 of the *World Bank Guidelines on the Treatment of Foreign Direct Investment*, which provides, in part, that "[c]ompensation will be deemed to be 'prompt' in normal circumstances if paid without delay."[195] Part I, Article 1(1) of those same Guidelines stipulate that its provisions are intended to apply "as a complement to applicable bilateral and multilateral treaties."[196]

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feasibility. Environmental feasibility shall not be granted within the Park's area. The National Environmental Technical Secretariat shall annul the environmental feasibility studies that have been granted within the Las Baulas National Marine Park.

194 Charles Cheney Hyde, "Compensation for Expropriation," 33 (1939) Am. J. Int'l. L. 1 at 11.

195 Article 8 of the *World Bank Guidelines* further provides:

In cases where the State faces exceptional circumstances, as reflected in an arrangement for the use of the resources of the International Monetary Fund or under similar objective circumstances of established foreign exchange stringencies, compensation in the currency designated under Section 7 above may be paid in instalments within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.

There is absolutely no indication, in the instant case, that the Respondent is suffering from a currency exchange crisis that would excuse its continuing failure to pay just compensation to the Claimants on a prompt basis. In any event, even if the Respondent could make such claims, it has failed to make arrangements to pay the necessary instalments to the Claimants and its five-year window for paying all compensation owing will expire before the evidentiary hearing will even take place.

196 At the very least, given how the Parties to the CAFTA are also members of the World Bank, it appears that they intended a "special meaning" for the term "paid without delay," consistent with Article 31(4) of the *Vienna Convention on the Law of Treaties*. The Parties should be understood as having expected the same construction of the term, as it appears in Part IV, Article 8 of the *World Bank Guidelines on the Treatment of Foreign Direct Investment*, as it has been used in CAFTA Article 10.7.

225. Bin Cheng once explained how "the qualifications 'prompt and effective' as applied to compensation fall in fact within the rubric of 'just' or 'fair" [on the basis that] compensation which is long delayed or nominal can hardly be described as just or fair."[197] More recently, other commentators have observed that to fulfill the promptness requirement, ***a host State must have already paid just compensation by the time the taking has ripened***, or at least to have made meaningful progress towards a determination of the amount of compensation to be paid for each expropriated investment, so long as an appropriate rate of interest will be paid to compensate for any delay.[198]

226. Other commentators have observed how the U.S. practice, of requiring compensation for expropriation to be "paid without delay," mirrors the same approach it has taken with respect to treaty provisions concerning the transfer of funds out of the host State by foreign investors. In this regard, it has been stated that, while U.S. treaty provisions may permit some allowance for delay, they do so "only as it relates to the formalities necessary to transfer funds," and no more.[199] Of course it was the U.S. model that served as the basis for the Parties' negotiations on Chapter 10 of the CAFTA.

227. There is no evidence to suggest that the Parties contemplated anything different about the promptness requirement for the CAFTA, not as a matter of customary international law and not even in terms of the autonomous provisions of sub-paragraphs (2) to (5) of Article 10.7. The Parties made allowances for excusable delay in an annex or note, so delay cannot be justified on the basis of host State excuses such as having insufficient

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[197] Bin Cheng, "The Rationale for Compensation for Expropriation," 44 (1958) Trans. Grotius Soc. 267 at 290.

[198] N. Stephan Kinsella & Noah D. Rubins, International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide (Oxford, OUP, 2005) at 178, citing: Brice M. Clagett, Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts, in Private Investors Abroad § §12.01[1] (Southwestern Legal Foundation ed., 1989). But see: Samuel K.B. Asante, "International Law and Foreign Investment: A Reappraisal," 37 (1988) International & Comparative Law Quarterly 588 at 596, who appeared willing to accord some small degree of leeway to host States concerning the immediacy of the requirement to pay compensation for expropriation:

> A further requirement is that the compensation be prompt and effective. Prompt means that compensation must be paid with reasonable promptness, that is to say, as soon as is reasonable under the circumstances in the light of prescribed international standards of justice.

[199] Steven Jarreau, "Anatomy of a BIT: The United States: Honduras Bilateral Investment Treaty," 35 (2004) University of Miami Inter-American Law Review 429 at 477:

> The BIT permits the allowance of delay, but only as it relates to the formalities necessary to transfer funds. Balance of payment circumstances may impede a Party's ability to transfer a large sum of currency, particularly foreign currency, out of the host country. Nevertheless, these circumstances are not a treaty-acceptable basis to delay payment of compensation. The of The United States - Honduras treaty, unlike British investment treaties, does not provide for the payment of compensation in installments. The Protocol of the United States - Egypt investment treaty offers insight, from the American perspective, into what is considered a permissible delay. The investment agreement that the United States negotiated with Egypt specifies that 'the term 'prompt' does not necessarily mean instantaneous. The intent is that the Party diligently and expeditiously carry out necessary formalities.'
>
> German investment treaty practice incorporates the identical phrase employed in the United States - Honduras BIT, 'without delay,' and declares that the taking state will be in compliance with its treaty obligation if payment is 'effected within such period as is normally required for the completion of transfer formalities.' German investment treaties further provide that the applicable period 'shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.'

resources to provide compensation right away, or being short-staffed, or be overwhelmed by the work that will inevitably flow from a large number of simultaneous takings. The same holds true in international investment law generally. For example, in *Bernardus Henricus Funnekotter et al v Zimbabwe*, an ICSID tribunal completely rejected the respondent's excuse that delays in the payment of compensation for expropriated farm lands, of as long as five years, had been due to a lack of qualified independent appraisers.[200]

228. As noted above, the Article 10.7(2)(a) obligation to provide compensation "without delay" is rooted in U.S. State practice, which is now widely regarded as representing the customary international law. As United States Secretary of State Cordell once famously observed: "[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement."[201]

229. That the requirement to provide compensation in a prompt manner constitutes, in and of itself, a discrete international law obligation – that is coincident to the host State's decision to impose measures of, or tantamount to, expropriation – can be seen in Secretary Hull's correspondence with his Mexican counterpart, as they attempted to resolve a dispute over the latter's wide-scale expropriations of U.S. assets:

> In tendering the proposal so made, is the Government of Mexico prepared to agree that no further taking will take place without payment? Can it hold out any reasonable measures of certainty that a determination of the value of the properties affected and of the manner of payment for them can be had within a brief period of time? Pending the reaching of an agreement between the commissioners on all of these points, will the Government of Mexico set aside sufficient cash in order to assure prompt payment in accordance with the terms of an agreement so reached? Is the Government of Mexico prepared to offer satisfactory commitments on these two points?[202]

230. Today, the Claimants stand in Secretary Hull's place, asking similar questions of the Respondent. Why did the Respondent not "set aside sufficient cash in order to assure prompt payment…" for each of them, and for all of their lots, when Carlos Manuel Rodríguez implemented his agenda for expanding the BNMP in 2005? Why has it not devoted more resources to the administration of its municipal expropriation regime, including sufficient funds to satisfy awards for fair market value consistent with

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[200] *Bernardus Henricus Funnekotter et al v Zimbabwe*, Award, ICSID Case No ARB/05/6, 15 April 2009 ¶¶ 75 & 101. In a similar vein, the Tribunal in *CMS v. Argentina*, 44 I.L.M. 1205 (2005), ¶ 107, similarly rejected the respondent's argument that its measure, which the Tribunal concluded had substantially interfered with the claimant's investment, was only temporary. In rejecting the claim, which would have undermined the expropriation finding on the basis of its not having permanent effect, the Tribunal observed:

More than five years [had elapsed] since the adoption of the first measures in 2000. Delays can be explained with reference to the above-mentioned crisis. However, if delays exceed a reasonable period of time the assumption that they might become permanent features of the governing regime gains in likelihood."

[201] Note From the Secretary of State to the Ambassador of Mexico, 2 (1940) Dep't. State Bull. 380.

[202] Charles Cheney Hyde, "Confiscatory Expropriation," 32 (1938) Am. J. Int'l. L. 759 at 764, n. 38, citing a diplomatic note dated 22 August 1938.

international standards? Why has it neglected to even initiate the process of expropriation for the majority of the Claimants' lots?

231. It would surely be difficult to conceive of a more cumbersome or deliberative process of creeping expropriation than the one eventually observed by the Respondent. From the earliest days of Carlos Manuel Rodríguez's tenure as Minister of the Environment and Energy, in 2004; to the Constitutional Court's 2008 string of decisions upholding one of the most unorthodox means of expanding a national park imaginable; and up until the order issued on 19 March 2010, which finally abolished any opportunity for the Claimants to freely exercise their property rights – as the Park Law actually provides, until formal expropriations has been completed – the Claimants have been waiting.

232. Even if the Tribunal were to conclude that the Claimants suffered a sufficient degree of deprivation earlier than 1 January 2009, the result would be the same. Every day that goes by without the Claimants receiving compensation in accordance with the customary and autonomous expropriation obligations contained within CAFTA Article 10.7 is another day on which the Respondent has breached its continuing obligation to effectuate prompt payment to them. The continuing

233. Again, recalling the words of Secretary Hull, even today, can the Respondent yet "hold out any reasonable measures of certainty that a determination of the value of the properties affected and of the manner of payment for them can be had within a brief period of time?" The circumstances of this case unfortunately indicate that the answer appears to be a resounding "no."

(e) Compensation for Unlawful Expropriation

234. As with the obligation to provide compensation "without delay," the obligation to provide compensation consistent with the FMV of the investment immediately before the expropriation took place is ongoing. It continues unless and until the Respondent either provides full restitution of the affected property rights or complies with the obligation by paying the appropriate level of compensation.

235. Both failures – i.e. the ongoing delay and the ongoing failure to provide proper compensation – constitute a continuing breach of Costa Rica's Article 10.7(2) obligations. They have constituted continuing breaches from 1 January 2009, for any cases in which title was transferred before the treaty came into force. For all other cases, the continuing breach commenced from the earlier of the day the title was transferred, after 1 January 2009, or 19 March 2010, the day after which the Claimants' ability to exercise their property rights was extinguished by order of MINAE's Minister Jorge Rodriguez.

236. As indicated in Article 14(3) of the ILC's Draft Rules on State Responsibility, the continuing failure of a State to bring itself into conformity with any of the international law obligations it has undertaken constitutes a *delict* under customary international law. It is evident that the CAFTA Parties were mindful of this customary norm in that, when drafting Article 10.7(1), they chose to ensure that the scope of Chapter 10 extended not

only to measures "***adopted***" by a Party relating to investors or their investments, but also to measures "***maintained***" by Parties to the same effect.[203]

237. In the same vein, customary international law recognizes how both the omission to provide compensation without delay, and the omission to provide the proper amount of compensation, for a measure that substantially deprived a foreign investor of the use and enjoyment of its property rights, constitute illegal conduct. This was the case for the customary international law right of a State to engage in a lawful expropriation within its territory, and it remains the case for the application of the typical expropriation standard found in most investment protection treaties. As Mann observed:

> The first question is whether [an investment protection treaty's expropriation] provision invalidates expropriation altogether or permits it on the terms defined by the treaty or at least invalidates it in the event of the terms not being observed. It is submitted that the last-mentioned interpretation is the correct one. It accords with customary international law in general, for the taking of property for private use without the payment of compensation is illegal. Moreover, the breach of an express treaty obligation itself constitutes an illegal act, i.e. an act without legal validity.[204]

238. For Dolzer & Schreuer, some uncertainty has remained with respect to the most appropriate consequences in respect of an illegal expropriation. They disagree with an approach that would treat lawful and unlawful takings identically, preferring, instead, to treat illegal expropriations as falling "under the rules of State responsibility… In the case of an illegal act [or omission] the damages should, as far as possible, restore the situation that would have existed had the illegal act not been committed. By contrast, compensation for a lawful expropriation should [only] represent the market value at the time of the taking."[205]

239. For his part, Bin Cheng explained that the consequences of any unlawful expropriation should be based upon "the principle of integral reparation for an international illegal act [the] fullest exposition of [which] is to be found in the [now famous] judgment of the Permanent Court of International Justice in the *Chorzów Factory* Case." Cheng marked how, in the *Chorzów Factory* case, the PCIJ "… made it quite clear that it would be both erroneous and unjust if the financial results of unlawful expropriation and unlawful dispossession were indistinguishable."[206] He continued:

> If the principle of integral reparation is accepted, then in any case of illegal taking of private property, the first duty is not compensation but 'restitution in kind,' whereas, if the expropriation is lawful, a State is never under a duty to [restore] the property expropriated, unless the expropriation was originally merely for the user of the property and the public need for the property has

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[203] See, e.g. LG&E v. Argentina.

[204] F.A. Mann, Further Studies in International Law (Oxford: Clarendon Press, 1990) at 241.

[205] Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law, 2nd ed. (Oxford, OUP, 2012) at 100.

[206] Bin Cheng, "The Rationale for Compensation for Expropriation," 44 (1958) Trans. Grotius Soc. 267 at 289 & 290.

> ceased to exist…[207]

240. Only when it becomes either impossible or impracticable to effect restitution in kind is the obligation transformed into one to pay the property's value "at the time of the indemnification."[208] He continued:

> But in the case of an illegal dispossession, a State's obligation is not merely to restitution in kind, or, if this is not possible, to pay the value of the property wrongly seized. The Permanent Court of International Justice held in the *Chorzów Factory* Case (Merits) (1928):
>
> > To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as a result of the seizure.
>
> This means that, in the case of an illegal taking of private property, the victim would be entitled not only to the *damnum emergens* as represented by the value of the assets wrongly seized, but also any *lucrum cessans* which can be reasonably established as would have meanwhile accused to the victim if his property had not been seized in the first instances. This is the logical consequence of a wrongful dispossession of property.[209]

The logic of Bin Cheng's analysis is also reflected in the CAFTA text, which provides, at Article 10.26(1)(b), that, although a tribunal may render an award specifying restitution of property, such award "must also provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution."

241. The Respondent's consistent failure to comply with its obligations under CAFTA Article 10.7(2) has had the effect of rendering all of the expropriations at issue – both direct and indirect – unlawful. This distinction is important because it dictates the appropriate valuation date for each expropriated lot. Although it may well be that the same date serves best for cases of both lawful and unlawful expropriation, in the latter a tribunal must be prepared to consider dates later in time, as well, to ensure that full restitution value is accorded to each deprived investor.

(f) Timing in Respect of Valuation Dates

242. In fixing the appropriate valuation date, the Tribunal is not limited to dates that proceed from 1 January 2009, the day upon which the CAFTA came into force as between the U.S. and Costa Rica. Rather, the Tribunal must take into account all relevant evidence in order to determine the most appropriate valuation date. Other tribunals have considered evidence that predated the coming into force of an international obligation as relevant to their findings of fact – so long as that, in so doing, they have not allowed an act or fact

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[207] Bin Cheng, "The Rationale for Compensation for Expropriation," 44 (1958) Trans. Grotius Soc. 267 at 289 & 291.

[208] Bin Cheng, "The Rationale for Compensation for Expropriation," 44 (1958) Trans. Grotius Soc. 267 at 289 & 292.

[209] Bin Cheng, "The Rationale for Compensation for Expropriation," 44 (1958) Trans. Grotius Soc. 267 at 289 & 292.

that existed before the treaty came into force to contaminate its determination as to whether the host State is responsible for conduct inconsistent with its obligations under that.

243. For example, in determining whether the Respondent is responsible for failing to provide compensation to the Claimants "without delay," as required under CAFTA Article 10.7(2), the Tribunal could only 'start counting' as of 1 January 2009. Before that date, Costa Rica was under no obligation to pay compensation without delay. It could have taken as long as it liked (absent a means for the Claimants to enforce their customary international law rights to prompt payment of compensation).

244. In other words, the Claimants were not yet in a position to complain about Costa Rica's lack of prompt compensation for expropriating any of their investments until 1 January 2009, as that was the first day upon which the Respondent became obliged to pay compensation for its takings "without delay." CAFTA Article 10.1(3) and Article 28 of the *Vienna Convention on the Law of Treaties* protected the Respondent from being held responsible for such conduct, in respect of any "acts or facts" pre-dating the coming-into-force of its Article 10.7(2) obligations.

245. In contrast, it would be entirely appropriate for the Tribunal to consider evidence of acts or facts predating 1 January 2009, if such information would assist the Tribunal in making a more accurate determination of the amount of compensation required to make a Claimant whole (*restitutio in integrum*). The instant case is of a kind that requires such an approach, lest the Respondent enjoy unjust enrichment, from having been able to acquire the investments for less than their fair value.

246. Both under customary international law and the CAFTA, the choice of valuation date is dictated by the mutually overlapping goals of ensuring that the amount of compensation accords with applicable international standards (including the stipulation that it reflect "fair market value") and that the Respondent does not benefit from its wrongful conduct in having reduced the fair market value of the expropriated investment through acts or omissions that presaged the taking. The CAFTA Parties reinforced their intent to adhere to this norm by adding sub-paragraph (c) to Article 10.7(2), which provides that compensation shall: "… not reflect any change in value occurring because the intended expropriation had become known earlier."

247. Paragraph 4(a) of Annex 10-C recalls that any determination of indirect expropriation requires a case-by- case, fact-based inquiry. This is particularly true for creeping expropriations, where there is much less direct correlation between the expropriation date and the valuation date. The expropriation date is established by determining the point at which a composite series of measures rises to a level of interference/deprivation that would be akin to a taking. The valuation date must be chosen with care to avoid having any potential change in value brought about by possible awareness of the intended expropriation.

248. As noted above, in cases of unlawful expropriation, tribunals are traditionally seen as enjoying the discretion to select the valuation date most likely to ensure that the expropriated investor receives compensation that reflects a position of *restitutio in*

integrum. As a matter of simple logic, all creeping expropriations are *per se* unlawful, because they result in substantial deprivation, which is akin to a taking, but are not accompanied by the payment of compensation. Accordingly, the most appropriate valuation date to choose is the one that ensures the greatest valuation for the expropriated investment.

249. In the instant case, the most appropriate valuation date for the creeping expropriation claims is 24 May 2008, the day upon which the Constitutional Court annulled the zoning regulations issued by the Town of Santa Cruz to permit construction in Playa Grande and its immediate environs. From the perspective of a prospective purchaser, this was the date upon which the only governmental institution in Costa Rica with a direct interest in providing for the welfare of the people who live near Playa Grande was stripped of its long-standing constitutional authority to regulate development in the area. Authority over the area was bestowed, instead, upon SETENA.

250. Had the Constitutional Court not repeatedly flip-flopped so much – on the issue of whether it was both empowered and inclined to prescribe the circumstances under which MINAE could exercise the authority to expropriate, from 30 April 2008 to 27 March 2009 – one might have chosen the 30 April 2008 as the appropriate date for valuation. Decisions issued by the Constitutional Court on 27 March and 30 April 2008 both indicated that the Court was interpreting Article 1 of the Park Law in a manner consistent with the proponents of BNMP expansion, and in the latter case it went so far as to compel the immediate expropriation of all privately held land within the new BNMP boundaries.

251. However, as described above, the Court did not provide the kind of consistency on this issue upon which prudent investment decisions could be made (or changed). In addition, in both 2008 and 2009, bills that would have returned the BNMP to its original boundaries were under serious consideration before the Legislature. It was when the Court stripped Santa Cruz of its rule-making authority, in favour of rulemaking by SETENA – which had been led by a politician who was outwardly hostile to any development within the 125 meter zone – that prospects would have looked sufficiently grim as to have depressed the value of the Claimants' investments in Playa Grande and Playa Ventanas.

252. If the direct expropriation of the Claimants' lots had been executed in a lawful manner, which did not occur, the appropriate valuation date would be the date upon which the Respondent issued its decree of expropriation. Normally, one might choose an earlier date, the issuance of a notice of public interest, but the circumstances of this case suggest otherwise. The Park Law serves as a general decree of public interest, conjoined with the prospect of future expropriation.[210] Individual notices would accordingly be a somewhat superfluous indicia of likelihood of imminent expropriation – because every lot located within the zone of a declared national park could arguably have been considered the potential prospect of future expropriation proceedings, at least on the face of the expanded Park Law.

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[210] Exhibit C-1c, the Expropriation Law, Article 19.

253. The question accordingly becomes: when did the lot become legally recognized as being located within that zone? As explained above, it was not until 30 April 2008 that the Constitutional Court sanctioned the back door BNMP expansion orchestrated by Messer's Boza and Rodriguez. Hence, it would be on that date that one might expect constructive notice of potential expropriation to exist. However, as also explained above, there are an untold number of persons with private landholdings located in national parks scattered across the country, who have had no indication, sometimes for decades, that expropriation is imminent. Given these very peculiar circumstances, it would seem more appropriate to pinpoint individual decrees of expropriation – issued with respect to a particular lot – as a strong indication to a potential purchaser that it might not be a profitable, long-term investment.

254. There are only a handful of examples in which a Claimant's lot became the subject of an expropriation decree before 30 April 2008. In any event, as none of these direct expropriations resulted in the payment of compensation prescribed under the CAFTA and international law, or has yet to be paid in full, each is another example of an unlawful taking. As such, the Tribunal enjoys greater discretion to choose the most appropriate valuation date.

D. CAFTA Article 10.5

255. CAFTA Article 10.5 provides, in relevant part:

> **Article 10.5: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> > "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.
>
> …
>
> Note to Article 10.5:
>
> Article 10.5 shall be interpreted in accordance with Annex 10-B.
>
> **Annex 10-B**
>
> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary

> international law principles that protect the economic rights and interests of aliens.

256. The manifestly arbitrary manner in which Costa Rica has carried out its piecemeal program of expropriation, since 1 January 2009, also supports a finding that the Respondent has breached its obligations under the fair and equitable treatment standard of CAFTA Article 10.5. As confirmed in the text of Article 10.7(1)(d), these two standards overlap in application, such that establishing liability under one obligation will typically result in establishing liability under the other. The primary difference between Articles 10.5(1) and 10.7(1) is that the former contemplates State responsibility for any degree of interference [although practical considerations would prevent a claim from being pursued for merely *de minimus* interference in most cases]. In contrast, Article 10.7 imposes a higher burden on claimants to establish sufficient evidence of "substantial interference" with [or substantial deprivation of] an investment.

(a) Legitimate Expectations

257. Construing and applying the customary international law standard of 'fair and equitable treatment,' as defined in the CAFTA – is significantly contextual endeavour,[211] which requires due respect to be paid to the right of a sovereign State to regulate in what it sincerely thinks is in the best interests of its citizens,[212] as balanced against application of the general principle of international law: good faith.[213]

258. The standard should not be construed as static, nor is it necessary to provide any evidence of egregious or bad faith conduct required to establish that there has been non-compliance with the standard. As the Tribunal in *Mondev* v. *U.S.A.* observed:

> [Since the opening decades of the 20th century] … both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.
>
> … the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties

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211 *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002), at para. 118.

212 See, e.g.: *Eastern Sugar BV* v *Czech Republic*, Partial Award, SCC 088/2004 (27 March 2007), at para's 272-274: "A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency; a degree of trial and error; a modicum of human imperfection must be over-stepped before a party may complain of a violation of a BIT."

213 *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para's. 155-158 & 254.

> and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments.[214]

259. And as the Tribunal in *MCI Power v. Ecuador* observed about a similar minimum standard provision found in the U.S. – Ecuador BIT:

> The Tribunal notes that fair and equitable treatment conventionally obliges States parties to the BIT to respect the standards of treatment required by international law. The international law mentioned in Article II of the BIT refers to customary international law, i.e., the repeated, general, and constant practice of States, which they observe because they are aware that it is obligatory. Fair and equitable treatment, then, is an expression of a legal rule. Inequitable or unfair treatment, like arbitrary treatment, can be reasonably recognized by the Tribunal as an act contrary to law.[215]

260. The Article 10.5 standard of fair and equitable treatment is both informed by, and required under, customary international law. It is a general standard manifested in many ways, as the context dictates. As summarized by the Tribunal in *Waste Management II*:

> The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[216]

261. Much of the protection afforded to investors under the 'fair and equitable treatment' standard is fundamentally based upon the general international law principle of good faith, which ultimately requires host States to treat foreign investments in a manner that "will not affect the basic expectations that were taken into account by foreign investor to make the investment."[217]As stated in this oft-cited passage from the award in *Tecmed* v.

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214 *Mondev International Ltd* v *United States*, Award, ICSID Case No ARB(AF)/99/2 (11 October 2002), at para's. 116 and 125.

215 *MCI Power Group LC and New Turbine Inc. v Ecuador*, Award, ICSID Case No ARB/03/6 (31 July 2007), at para. 369; citing *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 102.

216 *Waste Management, Inc.* v *Mexico*, Award, ICSID Case No ARB(AF)/00/3 (30 April 2004), at para. 98.

217 *Sempra Energy International* v *Argentina*, Award and partial dissenting opinion, ICSID Case No ARB/02/16 (28 September 2007), at para. 298; citing *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 254.

Mexico, the customary international law standard of fair and equitable treatment requires a State:

> … to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[218]

262. The pervasive role of good faith in international investment law can be seen in the earliest ICSID awards. For example, the Tribunal in *AMCO Asia* v. *Indonesia* cited the doctrine of acquired rights,[219] to explain how – once admitted into the Host State – the claimant/investor was entitled "to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law."[220] Investors are entitled to reasonably rely upon promises made by a State, both implicit and explicit. The less ambiguous the promise, the more reasonable the expectation.[221] The more specific the promise, the more reasonable the expectation.[222]

263. Investors enjoy protection for their legitimate expectations about future State conduct by performing a reasoned and prudent assessment of "the state of the law and the totality of the business environment" at the time its investment decision was made.[223] Absent other

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218 *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 154; approved in: *MTD Equity Sdn Bhd and MTD Chile SA v Chile, Award*, ICSID Case No ARB/01/7, (25 May 2004), at para's. 114-115.

219 AMCO Asia v. Indonesia, 24 ILM 1985 at 1022 at 1034-35, 1 ICSID Reports, 377 at 490 & 493; citing: *German interests in Polish Upper Silesia* (Merits), P.C.I.J., 25 May 1926, Series A, No. 7 (1926) at 22 and 44; *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 ILR 117 (1958), at 168, 205; *Starret Housing Corp. v. Islamic Republic of Iran*, 4 (1984) Iran-US Cl. Trib. Rep. 122, 156-57 (1983); and *Award in the Shufeldt Claim*, 24 July 1930, UNRIAA, Vol. II, XXVII, at 1081, 1097. See, also: *the Sapphire Award* (1963) 35 ILR 136 at 181.

220 AMCO, at 1035.

221 *International Thunderbird Gaming Corp. v. United Mexican States*, Award, UNCITRAL Arbitration (26 January 2006), at para's. 241-243.

222 *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi* v *Turkey*, Award, ICSID Case No ARB/02/5 (19 January 2007), at para's 241-243.

223 *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi* v *Turkey*, Award, ICSID Case No

applicable international obligations, no investor may reasonably expect that the circumstances prevailing at the time its original investment was made will remain totally unchanged. On the other hand, however, foreign investors are entitled to expect the host State will always comport itself in a fair and equitable, instead of acting in an arbitrary, discriminatory or non-transparent manner.

264. In other words, legitimate expectations can be reasonably founded upon a host State's obligation to provide a transparent and predictable business and regulatory climate:

> This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.[224]

265. When considering specific legal regimes of application, tribunals will often look for the telltale signs of arbitrariness [whether as exercised by an individual or as manifested in a poorly functioning decision-making system]. One such example is the so-called "roller coaster effect" – in which the only constant factor may be one of regulatory change. Regardless of whether the problem has been deliberately contrived or arises from negligence or incompetence does not matter. An investor is entitled to a reasonable level of regime stability and/or certainty, under the customary international law standard of fair and equitable treatment.[225] As demonstrated in *CME* v. Czech Republic: "the evisceration of the arrangements in reliance upon which the foreign investor was induced to invest" constitutes a breach of the fair and equitable treatment obligation and the principle of good faith under customary international law. And as Professor Wälde observed in *Thunderbird* v. *Mexico*:

> Investors need to rely on the stability, clarity and predictability of the government's regulatory and administrative messages as they appear to the investor when conveyed – and without escape from such commitments by ambiguity and obfuscation inserted into the commitment identified subsequently and with hindsight. This applies not less, but more with respect to smaller, entrepreneurial investors who tend to be inexperienced but provide the entrepreneurial impetus for increased trade in services and investment which NAFTA aims to encourage. Taking into account the nature of the investor is not formulation of a different standard, but of adjusting the application of the standard to the particular facts of a specific situation.

ARB/02/5 (19 January 2007), at para. 255; citing *Saluka Investments BV* v *Czech Republic*, Partial Award, UNCITRAL Arbitration (17 March 2006), at para. 305.

224 1999 UNCTAD Report on Fair and Equitable Treatment, at pp. 59-60 (see; also: the 2004 UNCTAD Report on Transparency, at p. 71).

225 *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi* v *Turkey*, Award, ICSID Case No ARB/02/5 (19 January 2007), at para's. 248-250. See, also: *Eureko BV* v *Poland*, Partial Award, UNCITRAL Arbitration (19 August 2005), at para's. 235 and 242.

> … under developed systems of administrative law, a citizen – even more so an investor - should be protected against unexpected and detrimental changes of policy if the investor has carried out significant investment with a reasonable, public-authority initiated assurance in the stability of such policy.... Such protection is, however, not un-conditional and ever-lasting. It leads to a balancing process between the needs for flexible public policy and the legitimate reliance on in particular investment-backed expectations... The "fair and equitable standard" can not be derived from subjective personal or cultural sentiments; it must be anchored in objective rules and principles reflecting, in an authoritative and universal or at least widespread way, the contemporary attitude of modern national and international economic law. The wide acceptance of the "legitimate expectations" principle therefore supports the concept that it is indeed part of "fair and equitable treatment" as owed by governments to foreign investors under modern investment treaties and under Art. 1105 of the NAFTA.[226]

266. In summary, when a foreign investor is making key decisions in respect of the establishment or operation of its investment in the territory of the Host State, it is entitled – under the customary international law standard of fair and equitable treatment – to enjoy stability and predictability in the regulatory environment in which such decisions were made.[227] The investor is not entitled to expect that things will never change, but it is entitled to expect none of the changes, nor the process by which changes are made, will be arbitrary, discriminatory or non-transparent, as required under international law.

(b) Arbitrariness

267. Noncompliance with the fair and equitable treatment standard can be evidenced in examples of manifest arbitrariness in the operation of a municipal regime relating to the investments of foreign investors.

268. The Tribunal in *CMS Gas Transmission v. Argentina* observed how "[any] measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.[228]Similarly, in both the *MTD* v. *Chile* and *LG&E v. Argentina* cases, the fair and equitable standard was construed as requiring host States to act in an "… even handed and just manner, conducive to fostering the promotion of foreign investment."[229] Similarly, in *Saluka v. Czech Republic*, the Tribunal described the close-knit relationship between the concepts of arbitrariness and discrimination as follows:

> A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency,

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[226] *International Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion, UNCITRAL/NAFTA (26 January 2006), at para's 5 & 8.

[227] *CMS Gas Transmission Company* v *Argentina*, Award, ICSID Case No ARB/01/8 (12 May 2005), para's. 274-277; and *CMS Gas Transmission Company* v *Argentina*, Annulment Decision, ICSID Case No ARB/01/8 (25 September 2007), at para. 89.

[228] CMS Gas Transmission Company v Argentina, Decision on application for annulment, ICSID Case No ARB/01/8, IIC 303 (2007), despatched 25th September 2007, ICSID, at para. 290.

[229] MTD – Chile, at para. 113; cited by LGE at para. 126.

> transparency, even- handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[230]

269. Fairness and arbitrariness are mutually exclusive concepts. A fair decision is one that is well reasoned, made in an unbiased manner and appears objectively just to parties affected by it. An arbitrary decision is one that is unreasonable; made capriciously; or improperly, with intent to injure. It is not possible for an arbitrary decision to be properly characterised as fair or equitable. Similarly, the terms equitable and discriminatory bear mutually exclusive meanings. While an arbitrary decision may be discriminatory, it need not be discriminatory to be judged arbitrary. For the purposes of international investment law, the pertinent question is whether the discriminatory or arbitrary character of the conduct is manifest in its application. An intentionally discriminatory decision, on the other hand, must always be arbitrary, by definition.

270. It was once observed that the term "arbitrary" connotes "not so much something opposed to a rule of law, as something opposed to the rule of law."[231] Just as arbitrariness is the antithesis of fairness, it is also fundamentally opposed to the rule of law. The rule of law is comprised of certain fundamental tenets, including the propositions that rule-making will proceed on a transparent basis; that rules will be applied consistently; that the consequences of legal conduct will be predictable, that equality before the law, and the absence of arbitrary power, shall be guaranteed, that that effective and impartial means exist for the construction and enforcement of the law.[232]

271. In safeguarding the rule of law, one's focus should be on how rules ascribe boundaries to the discretion accorded to public officials in the performance of their duties. Successful maintenance of the rule of law is borne out in welfare-enhancing social, economic and political stability. Deficiencies in adopting or maintaining the rule of law are manifested in arbitrary reasons, systems and results. As Krygier noted:

> [T]he law in general does not take you by surprise or keep you guessing, when it is accessible to you as is the thought that you might use it, when legal institutions are relatively independent of other significant social actors but not of legal doctrine, and when the powerful forces in society, including the government, are required to act, and come in significant measure to think, within the law; when

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230 Saluka, at para. 307.

231 *ELSI Case* at 1142. See, also: Noble Ventures Incorporated v Romania, Award, ICSID Case No ARB/01/11, IIC 179 (2005), 5th October 2005, despatched 12th October 2005, ICSID, at para. 176; Pope & Talbot Incorporated v Canada, Award in Respect of Damages, IIC 195 (2002), (2002) 41 ILM 1347, (2005) 7 ICSID Rep 148, 31st May 2002, Ad Hoc Tr (UNCITRAL), at para. 63; and Mondev International Limited v United States, Award, ICSID Case No ARB(AF)/99/2, (2004) 6 ICSID Rep 192, IIC 173 (2002), (2003) 42 ILM 85, (2004) 125 ILR 110, (2003) 15(3) World Trade and Arb Mat 273 , despatched 11th October 2002, ICSID, at para. 127.

232 Arthur Watts, *The Importance of International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers ed. 2000); cited by: Spencer Zifcak, *Globalizing the Rule of Law: Rethinking Values and Reforming Institutions*, *in* GLOBALISATION AND THE RULE OF LAW 15, (Spencer Zifcak ed. 2012).

> the limits of what we imagine our options to be are set in significant part by the law and where these limits are widely taken seriously – when the law has integrity and it matters what the law allows and what it forbids.[233]

272. The international rule of law does not constrain governmental authority in the same way that municipal law constrains the freedoms of individuals, but rather in the way that supervening forms of municipal law constrain a lawmaker or bureaucrat in the exercise of his/her discretion. In this regard:

> Governments are bound in the international arena, as in any arena, to show themselves devoted to the principle of legality in all of their dealings. They are not to think in terms of a sphere of executive discretion where they can act unconstrained and lawlessly.[234]

273. The rule of international law – which forms the baseline object and purpose of all international investment protection instruments – works when it is applied on a universal basis to all branches of government. Consonant with the customary international law rules on State responsibility, international investment protection treaties such as the CAFTA are intended to mutually constrain the exercise of sovereign authority for the benefit of all foreign investors, imposing norms that are fixed and known beforehand, and not varied for the sake of expediency. "The important point is that all coercive action of government must be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible."[235]

274. In short, as Schwarzenberger once observed:

> Arbitrariness in any form is – or ought to be – abhorrent to *homo juridicus*. His whole professional outlook is dominated by the attitude that, in the eyes of the law, equal situations require equal remedies.[236]

(c) The Claimants' Right to Fair and Equitable Treatment

275. Thus, the concepts of legitimate expectations and the prohibition against arbitrariness are really just two sides of the same coin, struck in the forge of the general international law principle of good faith. This doctrinal coda can be called the rule of law for the international protection of foreign investment. Pursuant to it, an investor is legitimately entitled to expect that her investments will benefit from a stable and predictable business and regulatory climate. While an investment protection treaty should never be confused

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[233] David Kinley, *The Universalizing of Human Rights and Economic Globalization: What Roles for the Rule of Law?* 7 UCLA J. INT'L. & FOR. AFF, 239, 247 (2002); citing: Martin Krygier, *The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law*, *in* OUT OF AND INTO AUTHORITARIAN LAW (András Sajó ed. 2003).

[234] Jeremy Waldron, *THE RULE OF INTERNATIONAL LAW*, 30 HARVARD JOURNAL OF LAW AND PUBLIC POLICY, 25-26 (2006).

[235] See Friedrich A. von Hayek, The Constitution of Liberty, vol. XVII (Chicago: U. Chicago Press, 2011), at 331-332.

[236] Schwarzenberger (1971) at pp. 100-101.

with a general policy of insurance against business risks, or even against most political risks, nor should it be mistaken for being little more than a hortatory instrument of economic diplomacy.

276. In other words, fair and equitable treatment has a definite meaning, which is bound up in the operation of a rule of law for the international protection of foreign investment. This rule of law is not made from whole cloth, but is instead based upon the general international law principle of good faith and myriad examples of State responsibility for the treatment of aliens, and later foreign investors, under both customary and conventional law (where the latter is normally styled by the parties as being a reflection of the former).

277. There are many ways in which the Respondent's municipal expropriation regime has not measured up to what is expected of it under international law. The easiest way to demonstrate its failings is to provide examples of just how arbitrary the regime has been in practice. Such arbitrariness serves as evidence of the Respondent's failure to accord fair and equitable treatment to the Claimants, because it is manifest – in the face of such arbitrariness – that their legitimate expectations as foreign investors have not been satisfied. The Respondent vouchsafed those expectations towards the Claimants when it agreed with the United States to allow the CAFTA to come into force, as between them, on 1 January 2009.

(i) Inexplicable Variations in Valuation of the Same Land

278. A number of the Claimants' lots were valued numerous times during the judicial phase of the expropriation process. In many instances, these valuations, for the same land varied widely. Two examples of this are the valuations for Lots B5 and B8. For Lot B5 the values ranged from ¢20,728,656.00 to ¢2,404,292,850.00. For Lot B8, the values ranged from ¢20,382,552.00 to ¢1,177,658,560.00 before being finally valued at ¢495,409,250.00. This judgment was later corrected to a value of ¢20,382,552.00. Finally came the appeal (i.e. the judgment of second instance), which essentially reinstated the amount that had been determined with the judgment of first instance: ¢326,078,386.35.

279. Such variability between values – which are all supposed to be based, at least in part, on the same statutory criteria – demonstrates how there was virtually no way for the Claimants to predict, with any certainty, what valuation might be provided at any step of the process.

(ii) Sweeping Variations in Approaches to the Judicial Phase

280. This was a system in which there could be no certainty or predictability of outcomes. As noted above, different specialists adopted radically different approaches to their valuations, with some actually concluding that the expropriated lots were worth ***nothing*** because they were allegedly located within a national park! Various judges appeared to possess differing tolerance for specialists providing their own professional opinions, as opposed to performing a *de facto* critique of the administrative appraisal. Different judges also appeared to hold markedly different opinions about the temporal issues applicable in

any valuation. Not only did their opinions differ as between themselves but also in relation to the Law on Expropriation, which also accorded incredibly broad discretion to judges in some respects, such as the admission of post-hoc evidence of value, while forcing them to hue closer to the administrative appraisal and specialist reports in other respects – which some seemed to take far more seriously than others.

(iii) Not Expropriating the Entire Lot as Required

281. One of the consistent examples of wilful arbitrariness was the Respondent's practice of severing the estate lots, claiming to respect the Claimants' private property rights by ***only*** expropriating the portions that were located inside the expanded boundaries of the Park, before next attempting to take advantage of this self-created opportunity by arguing, in the expropriation process, that the property taken was worth very little because it did not have access to roads. Of course the only reason that these lots did not possess access to roads is that the expropriation severed the lot from its road access.[237]

282. In this regard, the Respondent is also acting in a manner contrary to its own statute:

> **Article 17.**
>
> **Partial expropriations.**
>
> When dealing with a partial expropriation of a property and the part that is not expropriated is found to be inadequate for use or for rational exploitation, the expropriated party can demand that the totality of the land be expropriated.

283. The taking of part of the Claimants' lots greatly affected the value of the remaining lot. The approach of the appraisers in the expropriation process was varied, in that not all appraisers assessed severance damages, as is required by proper appraisal practice. Although the Claimants' damages claim does not include the value of the entire lot, these damages can be determined from a review of the FTI Report, as it values each of the severed properties before and after taking. It should be noted that the Berkowitz lots, in particular, could not be used at all – because the zoning rules applicable to them require that lots be of a certain size, and that size is greater than any of the remaining pieces will be.

284. In addition, the depth of the property taken varied from lot to lot - despite the fact that the expanded park boundary was said to be 75 meters from the inalienable zone. Instead, the Respondent sometimes took as little as 66 meters and in some cases up to 73 meters and only valued this smaller portion of the lot taken.[238] In some cases, the narrower strip taken actually appears to bisect the Claimant's remaining lot - leaving a strip of land between the lot and the beach. The Claimants claim for the entire 75 meter strip that should have been taken by the Respondent.

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[237] See, for example, C-28g.

[238] See FTI Report.

(iv) Abandoning, but Not Formally Concluding, Intended Expropriations so as to Avoid Making Deposit Payments

285. Another example of the arbitrary manner in which the Respondent has treated the Claimants concerns nine lots,[239] which all received decrees of public interest on 9 October 2007, followed by administrative appraisals on 17-18 September 2008. The claimants objected to all of the administrative appraisals, which ranged between $372/m^2$ and $407/m^2$, on 21 January 2009.[240]

286. Article 29 of the Law on Expropriation provides: "The Public Administration shall initiate a special process of expropriation before the competent court within six months after the opposition of the owner to the administrative appraisal." In flagrant violation of this mandatory obligation, to proceed to the judicial phase when a Claimant objects to the administrative appraisal, the Respondent ***has done nothing for over five years***. In fact, it has been six years since the Respondent elected to launch its process of expropriation with respect to any of the Claimants' other lots.

287. It is not difficult to infer the reason for the Respondent's sudden aversion to expropriation at Playa Grande. In 2006-2007, when the first seven lots the Respondent subjected to the expropriation process received woefully inadequate administrative appraisals of between $14/m^2$ and $54/m^2$. Then came these nine additional and far higher appraisals. The result was so chastening that, not only has the Respondent violated its own law, in not proceeding with the judicial phase as it must; it has also apparently determined to delay and avoid the risk that the next administrative appraisals would be too rich for their budget too.

288. In the meantime, the Claimants' lots have sat, with their property rights definitively frozen since 2010 (following the series of Constitutional Court judgments, and subsequent SETENA rulemaking, described above). The Claimants have not even been paid the amounts that the Respondent's own appraiser stated they were worth. On this point, the provisions of the Law on Expropriation are ambiguous:

> **Article 31.**
>
> **Initial resolution, selection of the appraisal specialist and possession of the property.**
>
> Upon receipt of the request by the Administration, the Court for Administrative Disputes shall cause a formal annotation to be made in the public registry, registering transfer of possession in the land and property rights listed for expropriation.
>
> …
>
> Upon registration of the dispute, the expropriated party shall have a period of two months to evacuate the premises, if and when the Administration has deposited the amount of the administrative appraisal. The judge is authorized to stay the order for evacuation of the premises if, in his opinion, the amount of the appraisal

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239 V30, V31, V32, V33, V38, V39, V40, V46 & V47.

240 Except for Lot V33, for which an objection was filed on 2 April 2009.

> does not correspond to the principle of fair price, according to the precedents for similar cases.
>
> **Article 34.**
>
> **Withdrawal of the payment of the administrative appraisal.**
>
> The expropriated party may withdraw from the court's custody the amount deposited for the administrative appraisal, without prejudice to its rights in the process. In ordering the payment, the judge should take provisions to cancel the liens, annotations or exactions required under Article 12.
>
> **Article 11.**
>
> **Interest**
>
> The administration shall be required to provide interest to the person expropriated, at the official going rate, from the moment of dispossession of the good and until paid in cash. When there is a deposit of the administrative appraisal, the interest will be calculated on the difference between this and the fair price.

289. The language of the excerpted text, above, suggests that the Respondent may possess some discretion as to whether it shall deposit the amount specified in an administrative appraisal, but a closer examination suggests not. It appears that the only time when the Respondent may refrain from making the deposit is where it chooses, as a matter of public welfare, to permit the occupant of a structure located on the land to be expropriated to continue dwelling there until the judicial process of valuation is complete. This is because initiation of the judicial phase triggers an automatic process by which possession of the land, and all property rights held therein, are formally transferred to the State. The same provision, Article 31, binds the initiation of the judicial phase – which lies solely as the Respondent's responsibility – with a two-month notice period, after which expropriated land must be vacated. Thus, the discretion accorded to the Respondent with respect to depositing the amount stipulated in the administrative appraisal is only to be exercised in cases in which somebody actually lives on the land at issue – which is not the case here.

290. If the Respondent complied with its own statutory responsibilities, it would have been compelled to launch the judicial phase, in respect of the nine aforementioned lots, within six months of the Claimants' rejection of the administrative appraisals. By automatic operation of Article 31, title in the Claimants' lots would be transferred to the State. As none of the claimants obviously resides in/on these lots, there is nothing to vacate. Accordingly, there is no reason for the Respondent to be allowed to withhold the deposits it must make, in the amount provided in each respective administrative appraisal. This is why Article 34, unlike Articles 11 or 31, does not refer to the deposit of funds in connection with the administrative appraisals as optional or conditional. Rather, it is presumed that such funds exist, and the party being subjected to the expropriation is entitled to receive them on demand, and without prejudice to a final determination of the just price to be paid for the expropriated land.

291. If the duty to deposit funds equal to the amount stipulated in an administrative appraisal were not mandatory, Article 34 would be rendered inutile. While the Claimants need not

make any representations as to whether such a result would be acceptable under Respondent's legal system, it is clear that it would not be satisfactory under the regime of international law applicable to these lots. If the Respondent is not obligated to pay those deposits as soon as it initiates the judicial phase, the result would be an automatic deprivation of the Claimants' rights in land, without any payment of compensation – even the amount that the Respondent would claim to be fair. Title would pass and – if the timelines set out in the Law on Expropriation were to be believed, it would be over a year before compensation would be paid. Given the Respondent's real-life track record, the waiting time would be years longer. Such a proposition – that title could be forcibly transferred without the payment of even partial compensation in the intervening period of dispute over the final price to be paid – would be manifestly inconsistent with the Respondent's obligations under international law, and CAFTA Article 10.17.

292. Of course, in these nine cases we have the worst of both worlds. Afraid of being compelled to make the required deposits, the Respondent has chosen the path of least resistance – i.e. violating one of the time requirements found in its Law on Expropriation instead of violating the requirement to make the deposits, to which a party subjected to an expropriation is entitled whilst the judicial phase proceeds. It is also important to note that the Respondent would have been forced to make its decision – about which of the provisions of the Law on Expropriation it wished to violate – in 2009, after the CAFTA came into force. This is because the Claimants only lodged their objections to the administrative appraisals in 2009.

(v) Summary

293. The litany of examples found immediately above, as well as in the stunning number of doctrinal improprieties found in the handful of expropriation cases that are still slowly wending their way through the Respondent's expropriation regime, described above, tell the story of nothing less than an expropriation regime that has fallen completely off the rails. What cases the Respondent chooses to bother pursuing through it have witnessed stunningly arbitrary outcomes, systemic flaws in the criteria prescribed for valuation (especially in respect of temporal considerations), as well as a level of procedural lethargy that renders the Respondent's expropriation regime unreliable for any domestic or foreign investor to even consider counting upon.

294. Is it any wonder that the Respondent, itself, has been avoiding use of its own system since the Claimants triggered its deposit obligations, by refusing to accept administrative appraisals that would effectively pay them 50 cents on the dollar, back in 2009? Given the country's forty-year addiction to the accolades that come from announcing new parks, without having any serious budgetary plan to pay private rights holders to legitimately establish them, is it surprising that over 50% of BNMP today remains in private hands (and, pursuant to the Park Law, not even actually part of the BNMP today)?

295. This is, after all, a country in which the Comptroller General's Office, the Attorney General's Office, and the entire bench of its Constitutional Court, have all somehow chosen wilful blindness over the legislative record, so as to propagate a fairy tale in which a statutory term can be treated as a typographical error, rather than what it really was: the explicit result of deliberative legislative attention. It is a country whose elites tell

themselves that they are safeguarding the welfare of giant sea turtles by prohibiting the construction of tightly controlled, high-end residences in a forest that is both out of site and completely out of reach of those turtles – essentially by maintaining their ignorance of the fact that the "beach" where these turtles nest does not extend more than 50 meters from the median high tide line.

296. And it is a country in which a small group of ageing, foreign scientists – who still share close ties to the former government officials who are largely responsible for this mess – try to assure themselves that – just because there were over 1500 turtles when they arrived twenty years ago, but now there are barely five dozen remaining – does not mean that it was all in vain. Nobody in San Jose seems to have noticed that natives from the area remain as poor as ever, that the lights of nearby Tamarindo shine as brightly as ever, and that most of the Leatherbacks appear to be gone forever – all without the time, effort and money dedicated to expanding and maintaining the boundaries of the BNMP from 2004 to the present having made any difference whatsoever.

297. CAFTA Chapter 10 does not prohibit horrendous policy choices, such as allowing unelected mandarins to pursue a long-term program of establishing a growing "network" of national parks without giving much thought to the debts such a program might generate, or has already generated. The Chapter does, however, contain provisions that should give policy-makers pause, to consider whether their decisions, today, could unreasonably and/or unnecessarily interfere with the property rights of investors tomorrow. Maybe, upon reflection, these policy makers would recognize that foreigners, who already possess vested rights and interests in land, could become engaged proponents of shared conservation goals in relation to it

298. Taken together, the litany of arbitrary and unjust results suffered by the Claimants in relation to the Respondent's dysfunctional expropriation regime represent the kind of unfair and inequitable treatment that breaches CAFTA Article 10.5. The arbitrariness that is manifest in its operation cannot help but have a corrosive impact upon the climate for foreign investment in Costa Rica. It stands opposed to the rule of international law, and thus in opposition to the legitimate expectations that CAFTA nationals are legitimately entitled to enjoy when investing in the territory of another CAFTA Party.

E. Treatment No Less Favourable

299. The Claimants hereby withdraw their claims under Articles 10.3 & 10.4 of the CAFTA.

F. Damages, Valuation and Interest

(i) The Standard to Determine Fair Market Value

300. Under customary international law, as set forth in the seminal *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.[241]

301. The *Chorzów Factory* standard is widely recognized as the prevailing standard for compensation for breaches of international obligations.[242] It has also been codified in Article 36 of the Articles on Responsibility of States for Internationally Wrongful Acts, pursuant to which, when restitution in kind is not possible:

> [The] state responsible for an internationally wrongful act is under an obligation to compensate for the damages caused thereby . . . . The compensation shall cover *any financially assessable damage* including loss of profits insofar as it is established.[243]

302. International investment tribunals are unanimous that an award of damages in the amount of the full fair market value of the investment is appropriate in all circumstances, including expropriation, "when interference with property rights has led to a loss equivalent to the total loss of investment."[244]

303. The customary international law standard is not limited to reparation for unlawful expropriations, but rather applies to *all* illegal acts, including a host State's breach of other treaty obligations. The *Lemire* tribunal, assessing the compensation owed to the claimant to redress the host State's violation of the U.S.-Ukraine Treaty's fair and equitable treatment provision, held that:

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241 *Case Concerning the Factory at Chorzów* (Germany v. Poland), Judgment of 13 Sept. 1928, P.C.I.J. Ser. A., No. 17, at 47 (emphasis added). Of course, in determining the genuine value of the investment affected under Article 6(c), this standard also needs to be taken into consideration.

242 See, e.g.: *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* ("*Occidental II*"), Final Award, ¶ 792 (ICSID, 5 October 2012) ("The starting point is the principle of 'full reparation', expressed by the Permanent Court of International Justice in the *Chorzów Factory* case . . . ."); *ADC*, ¶ 493 (reviewing numerous decisions and concluding that "there can be no doubt about the present vitality of the Chorzów Factory principle, its full current vigour having been repeatedly attested to by the International Court of Justice"); *S.D. Myers, Inc. v. Government of Canada*, Partial Award (UNCITRAL, 13 November 2000), ¶ 311; *Vivendi III* Award, ¶ 8.2.4–8.2.5; CLA-__ [62], *Siemens*, ¶ 351; *CMS*, ¶ 400; *Amoco International Finance Corporation v. Government of Islamic Republic of Iran*, Award No. 310-56-3, Award, ¶ 191 (Iran-U.S. Cl. Trib., 17 July 1987).

243 ILC Articles on State Responsibility, Art. 36(1).

244 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, Award (ICSID, 25 July 2007), ¶ 35 ("[Fair market value] is appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment."). See also: *CMS*, ¶ 410 (noting that the standard of fair market value is the appropriate standard in cases of expropriation and possibly of other breaches resulting in long-term loss); *Vivendi III* Award, ¶ 8.2.8 ("[T]he level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same state measures infringed both relevant Articles of the BIT and that these measures emasculated the Concession Agreement, rendering it valueless.").

> [The fair-and-equitable treatment provision] of the [Treaty] does not provide any rule regarding the appropriate redress in cases of violation . . . . The failure of Article II.3 of the Treaty to specify the relief which an aggrieved investor can seek does not imply that a violation of the FET standard may be left without redress: a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained. The *quaestio vexata* is how this economic harm is to be measured.

304. It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the [Treaty].[245]

305. In other words, the purpose of an award of damages is the same no matter which of the Treaty provisions Respondent is found to have violated: to place Claimant in the same pecuniary position in which it would have been if Respondent had not violated the Treaty.[246] Accordingly, several tribunals have awarded damages to compensate investors for losses caused by breaches of the duty to provide fair and equitable treatment and other treaty obligations, even where they retained nominal control of the enterprises or sustained losses in an amount less than the full value of their investments.[247]

306. Fair market value has been defined as "the price at which property would change hands between a hypothetical willing and able buyer and an [sic] hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market."[248] Similarly, the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment define fair market value as:

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[245] *Joseph Charles Lemire & Others v. Ukraine*, Award, ¶¶ 147, 149 (ICSID, 28 March 2011). See also: *Fuchs*, ¶ 532 ("The Georgia / Israel Treaty is silent on the standard of compensation applicable to breach of [the fair-and-equitable treatment provision]. However, Article 36 of the ILC Articles on State Responsibility . . . provides that a 'state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution' and that such compensation 'shall cover any financially assessable damage, including loss of profits insofar as it is established.'").

[246] *Ibid*.; *Siemens*, ¶ 351; *Vivendi III* Award, ¶ 8.2.4.

[247] See, e.g.: *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, Case No. ARB/01/3, Award, ¶¶ 243–244, 264–268, 359–363, 384–386, 450 (ICSID, 22 May 2007) (awarding US$ 106.2 million for breach of fair and equitable treatment; applying fair market value approach because "the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line."); *Azurix Corp. v. Argentine Republic*, Case No. ARB/01/12, Award, ¶¶ 319–322, 442 (ICSID, 14 July 2006) (no expropriation because Claimant "did not lose the attributes of ownership," but award of fair market value of $165,240,753 for Respondent's "fail[ure] to accord fair and equitable treatment to [Claimant's] investment" and other treaty violations); *CMS*, ¶¶ 263–264, 273–281, 409–411, 468 (Tribunal found no expropriation because Claimant still had "full ownership and control of the investment," but awarded US$ 113.2 million for "damages or compensation relating to fair and equitable treatment"); *Occidental II*, ¶ 707 ("Having found earlier in this Award that the Claimants' investment in Ecuador has not been accorded fair and equitable treatment by the Respondent and has been expropriated by the issuance of the *Caducidad* Decree, the Tribunal will now determine, as mandated by Article III of the Treaty, the fair market value of this investment.").

[248] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine*

> … an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.[249]

307. Determination of the fair market value does not take into account "the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value,"[250] and any preceding actions or threats by the State that had the same effect.[251] The State therefore cannot benefit from its own wrongful conduct.

308. Fair market value is assessed on the basis of the valuation date, which varies depending on whether the claimant alleges a lawful expropriation or unlawful expropriation or other treaty breach. In the former case, treaties often expressly stipulate that the proper valuation date is "just prior to" or "at the moment of" expropriation; in the latter case, treaties are unlikely to specify the appropriate valuation date, leading tribunals to apply customary international law.[252] In such circumstances, the prevailing view among tribunals today is that customary international law mandates use of the date of the arbitral award, if any, as the proper valuation date.[253] The rationale for this view lies in the fact that customary international law requires that an award of damages put the Claimant in

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Republic, Award, ¶ 361 (ICSID, 22 May 2007). See, also: *National Grid*, ¶ 263 n.99 ("Fair market value has been defined as: 'the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.'") (citation omitted); *CMS*, ¶ 402 (same); *Occidental II*, ¶ 707 (same).

249 World Bank Development Committee, Guidelines on the Treatment of Foreign Direct Investment, Guideline IV.5 (1992).

250 *American International Group, Inc. and The Islamic Republic of Iran*, Award No. 93-2-3, Award, at 107 (4 Iran-U.S. Cl. Trib., 19 Dec. 1983).

251 *SEDCO v. National Iranian Oil Company*, Award No. 309-129-3, Award, ¶ 31 (Iran-U.S. Cl. Trib., 24 October 1985) (holding that the tribunal "must not consider as an element of value the taking itself, nor events preceding the taking calculated to diminish the value of the property"); *see also Phillips Petroleum Co. Iran and the Islamic Republic of Iran*, Award No. 425-39-2, Award, ¶ 135 (21 Iran-U.S. Cl. Trib., 29 June 1989) ("[I]t is well established that the Tribunal must exclude from its calculation of compensation any diminution of value resulting from the taking of the Claimant's property or from any prior threats or actions by the Respondents related thereto."); *Amoco*, ¶ 248 ("[I]t has always been recognized that the effects of the prospect of expropriation on the market price of expropriated assets must be eliminated for the purpose of evaluating the compensation to be paid."); *Compañia del Desarollo de Santa Elena, S.A. v. Republic of Costa Rica*, Final Award, ¶¶ 83–84 (ICSID, 17 February 2000) (determining the date of expropriation for valuation is important because "[t]here is no evidence that its value at that date was adversely affected by any prior belief or knowledge that it was about to be expropriated").

252 *Siemens*, ¶¶ 352, 360 (applying customary international law standard to compensate claimant for Argentina's unlawful expropriation, where applicable treaty addressed only the standard applicable to cases of lawful expropriation).

253 *ADC*, ¶ 497 (noting that various courts have applied the standard in *Chorzów Factory* to "compensate the expropriated party the higher value the property enjoyed at the moment of the Court's judgment rather than the considerably lesser value it had had at the earlier date of dispossession"); *Siemens*, ¶ 360 ("The Tribunal has to apply customary international law. Accordingly, the value of the investment to be compensated is the value it has now, as of the date of this Award. . . .").

the same position as if the expropriation or other wrongful conduct had not been committed.[254] In the case of unlawful expropriations, making the Claimant whole may and often does require valuation of the expropriated asset as of the date of the award.[255]

(ii) The Comparative Sales Methodology Determines Fair Market Value

309. The value of an asset cannot be divorced from the circumstances of its use. As demonstrated in cases such as *Siag & Vecchi v. Egypt* and *Santa Elana* v. *Costa Rica*,[256] ascertaining the value of commercial real estate typically involves determining the highest and best use of the land at issue, in light of its physical characteristics and the legal rights of use associated with it.

310. The most reasonable means of assessment for determining fair market value for real estate assets involves an analysis of any arm's-length transactions in the relevant market involving either the asset itself or comparable assets. As a general rule, one cannot assess the fair market value of any asset without taking into account its highest and best use, which involves appraising both the practical and the legal limits of such use. To determine whether assets are truly comparable, it is necessary to examine the highest and best use of the land at issue.

311. From the mid-19th to the early 20th centuries, mixed claims tribunals commonly awarded what today would be known as fair market value for unlawful deprivations of property, based upon the highest commercial use to which that property could be, or had been, put.[257] As a matter of elementary deduction, these arbitral awards all demonstrated that determining the value of commercial property in land, it is necessary to determine what its highest and best use would have been as at the time of taking. More recently, in the *Santa Elena* v. *Costa Rica* case, the principle of highest and best use was applied to determine the value of land expropriated by the Host State. Whereas the Respondent argued, in that case, that the land's highest and best use was agricultural, the claimant succeeded in demonstrating that its highest and best use was, in fact, touristic.

312. There are three generally accepted approaches to determining the fair market value of an asset: the income based approach, the market based approach and the asset-based approach. Although in some cases multiple approaches are suitable,[258] in others one

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254 See, e.g.: *Unglaube and Unglaube v. Republic of Costa Rica*, Award, ¶ 308 (ICSID, May 16, 2012) (noting the aim of tribunals applying the *Chorzów Factory* standard is to "find the way that would be appropriate in the specific circumstances to place the injured party in the same position, so far as possible, as if the illegal act had not occurred").

255 *Ibid*. ¶ 307.

256 *Compañía del Desarrollo de Santa Elena SA* v *Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000), (2000) 439 ILM 1317, dispatched 17th February 2000, ICSID, at para. 70; and *Waguih Elie George Siag and Clorinda Vecchi* v *Egypt*, Award, ICSID Case No ARB/05/15; IIC 374 (2009), at para's. 574 & 580.

257 See, e.g.: *Smith (U.S.)* v. *Mexico* April 11, 1893 Moore's Arb. 3374; *Monnot (U.S.)* v. *Venezuela*, February 7, 1903, RIAA vol. IX 232 at 233; *Barque Jones (U.S.)* v. *Great Britain*, Feb. 8, 1853, Moore's Arb. 3049; *Cheek (U.S.)* v. *Siam*, July 6, 1897, Moore's Arb. 1899 & 5086; and *Hammond (U.S.)* v. *Mexico*, April 11, 1839, Moore's Arb. 3241.

258 See, e.g.: *Teco Guatemala Holdings LLC v Guatemala*, Award, ICSID Case No ARB/10/17, 18 December 2013, at para. 338.

approach stands out. Any analysis of the correct approach in a given case will necessarily be context-specific.

313. In this case, the appropriate approach is obvious: the market-based approach.[259] As a general rule, "Cost and Income Capitalization Approaches are typically not applicable in the valuation of vacant land"[260] An income-based approach is unsuitable because the land at issue was not the basis of an instrument of income generation, such as a hotel, a parking lot or a power plant. The asset- or cost-based approach is unsuitable because it is based upon ascertaining the book value of an asset, rather than on a contemporaneous, analysis that would be more likely to produce a more accurate result.[261]

314. For real estate, the market-based approach is implemented through the adoption of a comparable sales methodology, with adjustments made, as necessary, to take into account unique characteristics of either the land under valuation or the selected comparators. This was the approach preferred by the Tribunal in *Siag & Vecchi* v. *Egypt,* which involved the direct expropriation of a large tract of land located adjacent to the Gulf of Aqaba, a highly desirable resort destination on the east coast of the Sinai Peninsula. When the expropriation was executed, the investor had only just begun the construction of a small casino-hotel resort and condominiums. Although the claimant put forward a comparable sales valuation, a residual land valuation and a discounted cash flow valuation, it was the comparable sales valuation that was primarily relied upon by the Tribunal in issuing its award.[262]

315. As indicated in Mr. Hedden's Expert Report, a comparable sales approach was adopted in the instant case, which required him to analyze each lot's respective market value, based on prices paid in actual market transactions involving lots which have been put to a highest and best use similar to that of the Claimant's lot. He identified value and price trends by reviewing arm's-length transactions between willing and knowledgeable buyers and sellers, and then making any necessary adjustments to ensure fidelity to a like for like principle.

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[259] In contrast, the valuation criteria prescribed for use under Article 22 of the Law on Expropriation appears to have been geared towards producing an adjusted book value, or at least the criteria of a more descriptive character have been put towards that end by many of the regime's appraisers and adjudicators.

[260] FTI Report, at 21.

[261] M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 7-9.

[262] *Waguih Elie George Siag and Clorinda Vecchi* v *Egypt*, Award, ICSID Case No ARB/05/15; IIC 374 (2009), at para 548. Another example can be found in the *Al-Bahloul v Tajikistan* Award, in which that tribunal also expressed its preference for a comparable sales approach, with respect to damages allegedly suffered as a result of the unlawful cancellation hydrocarbon exploration licenses by the host State. Although liability under a BIT was confirmed, because the claimant only sought damages on the basis of an unduly speculative income-based approach, the claim had to be dismissed. In the Tribunal's view, the claimant should have used a comparable sales method – to place a value on his hybrid property rights in land. However, as he claimed it was unable to do so, his claim failed. See: *Al-Bahloul v Tajikistan*, Final Award, SCC Case No 064/2008, 8 June 2010.

(iii) Full Reparation for Unlawful State Conduct

316. As described above, the Respondent's acts and omissions constitute breaches of Article 10.7(1), for direct and indirect takings within the payment of prompt, adequate and effective compensation; Article 10.7(2), for failure to make payment without delay and by either not offering compensation or offering insubstantial compensation inconsistent with its obligations under Article 10.7(2); and Article 10.5(1), by maintaining an expropriation regime that is wholly incapable of living up to international standards and, as such, dis not comport with the legitimate expectations of the Claimants as CAFTA investors.

317. In as much as the foregoing failings are inconsistent with the Respondent's obligations under the CAFTA, they also constitute unlawful conduct under international law. As such, the Claimants are entitled to receive compensation on the basis of the *restitutio integrum* principle. Being placed back into the position one would have occupied, but for the breach, means more than just being awarded the fair market value of one's investments as of the most opportune moment thereby benefitting the victim and ensuring that preventing the Respondent from enjoying any unjust enrichment with respect to the expropriated land. It includes more.[263]

318. First, it involves receiving compensation for any incidental amounts paid in relation to maintaining one's interests in, or fighting for, one's investment. Examples include land taxes paid on lands that have been expropriated after 1 January 2009 (*de facto* or *de jure*) and all fees paid, and disbursements incurred, to obtain permits for land that can now never be developed. It also involves receiving compensation for any incidental expenses incurred as a result of, or in order to contest, the new measure. One cannot "wipe out all of the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed, if these sums are not included in an award of damages. As Dolzer and Schreuer have observed:

> Under this principle, damages for a violation of international law have to reflect the damage actually suffered by the victim. In other words, the victim's actual situation has to be compared with the one that would have prevailed had the act not been committed. Therefore, punitive or moral damages will not usually be granted.

319. This subjective method includes any consequential damage but also incidental benefits arising as a consequence of the illegal act. According to the Tribunal in *Petrobart v Kyrgyz Republic*:

> in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.[264]

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[263] Sergey Ripinsky, Damages in International Investment Law (London: British Institute of International and Comparative Law, 2008) at 88.

[264] Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law, vol. 2 (Oxford: OUP, 2012) at 295, citing: *Petrobart v Kyrgyz Republic*, Award, 29 March 2005, VIII.7, in Stockholm Int'l Arb Rev 2005:3,

320. As such, there should be no debate as to whether the Tribunal must award arbitration costs, counsel's fees and disbursements to the Claimants at the end of these proceedings. But for the Respondent's unlawful conduct, such costs would never have been incurred. In this regard, the *restitutio integrum* principle has even been recognized by none other than some of the courts responsible for the Respondent's expropriation regime. In numerous cases, Costa Rican judges have ordered that the costs incurred by the expropriated landholder, in perusing her claim, must be compensated where the sum awarded through the judicial phase is greater than that provided through the original, administrative appraisal. Such judgments were rendered on the simple logic that – had the Respondent offered the correct amount in the first place; there would have been no recourse to the judicial phase.[265]

321. Finally, in order to meet the standard of *restitutio integrum*, the Tribunal should exercise its discretion to select an effective date of valuation, for each of the Claimants' lots, that ensures that they each occupy the place they would have occupied but for the Respondent's continuing unlawful conduct.[266] Because the harm is ongoing, the Tribunal may choose any date along a spectrum from the day that the serious probability of expropriation became clear to the Claimants (i.e. May 24th, 2008) until the date upon which the award is issued.

(iv) Interest

322. The principle of full reparation also requires that the Claimants be awarded interest at a rate that fully compensates for the delay in receiving the fair market value of each of their investments. Accordingly, Article 38(1) of the Draft Articles on State Responsibility provides that "[i]nterest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."[267] Interest accrues from the date of the illegal act until full and final payment of the award.[268]

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45 at 84. See also *MTD v Chile*, Award, 25 May 2004, para 238

265 Cite examples from memorial files C-16h (Appeal Decision), C-20g (First Instance Court) and C-28 (Appeal Decision at 9)

266 See, e.g.: *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases Nos., ARB/05/18 and ARB/07/15), Award, 3 March 2010; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V (064/2008)), Partial Award on Jurisdiction and Liability, 2 September 2009.

267 Draft Articles, Art. 38(1).See also LG&E, ¶ 55 ("[I]nterest is part of the 'full' reparation to which the Claimants are entitled to assure that they are made whole."); Siemens, ¶ 396 ("[I]n determining the applicable interest rate, the guiding principle is to ensure 'full reparation for the injury suffered as a result of the internationally wrongful act'"); Middle East Cement Shipping, ¶ 175.

268 *Id*., Art. 38(2) ("Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."); LG&E, ¶ 55 (explaining that "interest recognizes the fact that, between the date of the illegal act and the date of actual payment, the injured party cannot use or invest the amounts of money due").See also Middle East Cement Shipping, ¶¶ 174-175; SPP v. Egypt, ¶ 235 ("The prevailing jurisprudence in international arbitrations is to the effect that interest runs until the date of effective payment, and this conclusion is supported by doctrinal opinion.").

323. The payment of an appropriate rate of interest thus keeps Claimants whole because the award must reflect the forgone value of not having access to the funds represented in the damages due, for the period between State responsibility and actual payment of a damages award. To be clear, however, the Claimants are not seeking the payment of interest, in respect of any of their investments, prior to the day upon which the CAFTA came into force as between the United States and Costa Rica. [269]

324. Absent this temporal restriction, the Tribunal should have chosen 24 May 2008, the valuation date, as the date from which interest would run. May 24th represents the first date upon which the probability of imminent and serious depravation of the Claimants' property rights became substantial. Choosing the valuation date would have recognized how the Constitutional Court's striking down of Santa Clara's zooming regulation constituted the first in a composite series of acts that resulted in the creeping/indirect expropriation of the Claimants' lands.

325. Nevertheless, when this creeping expropriation commenced, the Respondent was not yet under a CAFTA duty to refrain from engaging in such conduct. It was only bound by its customary international law obligations, for which the Claimants lacked access to a remedy. As such, the first day upon which the Tribunal should apply an interest rate to its award is 1 January 2009, rather than 24 May 2008.

326. Article 10.7 provides that the rate of interest to be applied to a damages award is one that would be "commercially reasonable" in the circumstances. Given the fixed territorial nature of the investments, and the demonstrated commitment of the Claimants to this type of investment in Costa Rica, it is submitted that the only "commercially reasonable" rate in the circumstances would be a compounded rate referenced to an official Costa Rican interest rate source.

327. The appropriate rate of compounded interest to be applied from 1 January 2009 must also be determined on the basis of the specific circumstances of the case. The Claimants invested in Costa Rica, and used Costa Rican currency to manage their investments. Aside from Mr. Gremillion, the Cophers and the Holstens, all of the Claimants have maintained going concerns involving other real estate investments previously made in Guanacaste. The direct owners of the lots are all enterprises, established under the laws of Costa Rica.

328. Had the Claimants' investments never been expropriated, they would have had to maintain and operate them within the territory of Costa Rica – owing to their very nature

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[269] See: D.P. O'Connell, International Law, 2nd ed., vol. II (London: Stevenson & Sons, 1970) at 1122. (The only consistent date for the commencement of interest is the actual date when the obligation to indemnify arose. Hence the dies a quo is the date of the wrong and not the date of the compromise or the judgment), citing: *Spanish Zone of Morocco (G.B. Spain)*, U.N. Rep. vol. II at 615 (1925); *Rasel-Karaber-Rzini Claim*, at p. 664 (1925); *Shufeldt Claim (US., Guatemala)*, p. 1079 (1930); *National Paper & Tyre Co. (US.) v. United Mexican States*, Vol. IV, p. 327 (1928): *George W. Cook (U.S.) v United Mexican States*, p. 66 1 (1930); *Henry James Bethune (G.B.) v. U.S.*, vol. VI, p. 32 (1914); *Administrative Decision No. III of the United States - German Mixed Claims Commission*, vol. VII, p. 64 (1923); *Friefe Claim*, I.L.R., vol. 26, p. 352. "If under the governing law no wrong has been committed until a demand for payment has been refused the relevant date is the date of refusal" *Stevenson Case (G.B., Venezuela*), U.N. Rep., Vol. IX, p. 494 at p. 510 (1904).

as real estate assets.[270] In addition, had the Respondent pursued the lawful expropriation of all of these investments, it would have been compelled to pay the Claimants' enterprises using Costa Rican currency and with a Costa Rican compound interest rate attached, running from the date upon which title was transferred to the State. In this regard, paragraph 1163 of the Civil Code of Costa Rica stipulates that the appropriate rate of interest to attach to a compensatory award would be the rate paid on certificates of deposit by the National Bank of Costa Rica.

329. For all of the above reasons, the Claimants request that the award be denominated in Colons and that the aforementioned interest rate be applied as of 1 January 2009.

[270] In the same manner, the Claimants note how Article 27 of the Law on Expropriation provides, in part:

At any stage in the proceedings, the parties can submit their differences to arbitrage, in conformity with legal regulations and the instruments currently in force in international law.

This provision, which is open to Costa Ricans and other foreign nationals, alike, permits the parties involved in an a dispute over the State's expropriation of an asset to submit it to arbitration, which must be governed by the laws of Costa Rica. If the arbitration is governed under the laws of Costa Rica, the applicable interest rate will be based upon an official Costa Rican reference point. As the participants in such an arbitration are comparable, in like circumstances, with the Claimants, the Claimants are entitled to enjoy the rate of interest made available to their comparators, if it would result in a higher overall award of damages. Such entitlement is enjoyed under the treatment-no-less –favourable standards of the CAFTA: Article 10.3 and 10.4, both of which were originally plead in the Claimants' respective notices of arbitration.

G. Amounts Owing to Claimants

330. For the reasons set out above and as demonstrated by the FTI Damages Report, the Claimants claim the following amount with respect to each lot included in the claim:

Amounts Claimed by Lot			
Exchange rate	513.93		
		USD	CRC
B Spence	V30	$ 649,000	333,540,570
	V31	$ 676,000	347,416,680
	V32	$ 688,000	353,583,840
	V33	$ 735,000	377,738,550
R & B Copher	V38	$ 867,000	445,577,310
	V39	$ 814,000	418,339,020
	V40	$ 690,000	354,611,700
R Copher & J Holsten	V46	$ 753,000	386,989,290
	V47	$ 929,000	477,440,970
Spence Co.	V59	$ 718,000	369,001,740
	V61a	$ 2,222,000	1,141,952,460
	V61b	$ 748,000	384,419,640
	V61c	$ 763,000	392,128,590
	A39	$ 537,000	275,980,410
	A40	$ 532,000	273,410,760
	C71	$ 231,000	118,717,830
	C96	$ 1,343,000	690,207,990
	SPG1	$ 2,046,000	1,051,500,780
	SPG2	$ 2,250,000	1,156,342,500
	SPG3	$ 4,176,000	2,146,171,680
T & A Berkowitz	B1	$ 2,558,000	1,314,632,940
B Berkowitz	B3	$ 2,476,000	1,272,490,680
B Berkowitz	B5	$ 1,995,000	1,025,290,350
B Berkowitz	B6	$ 1,991,000	1,023,234,630
G Gremillion	B7	$ 2,579,000	1,325,425,470
T & A Berkowitz	B8	$ 2,577,000	1,324,397,610
Total		$ 36,543,000	18,780,543,990

331. The Claimants have converted the US dollar amounts set out in the FTI Expert Report to CRC at the rate of 513.93 CRC to the US dollar, which was the exchange rate on 28 May 2008.[271] Thus, in aggregate, the Claimants' claim totals CRC 18,780,543,990.

[271] www.oanda.com

332. In addition, the Claimants claim pre-award interest. The interest owing on the amounts claimed at the Costa Rican Central Bank rates, compounded semi-annually, from 1 January 2009 until 1 November 2015 (estimated date of the Award) is ₡12,147,713,918.[272]

333. Further, the Claimants claim as damages all of the arbitration costs in these proceedings, including the cost of legal representation. Details of such damages to be provided at an appropriate stage of the proceedings.

IV. PRAYER FOR RELIEF

334. The Claimants respectfully request an award:

(a) declaring that the Republic of Costa Rica has violated its obligations under the Treaty, by taking the measures described in this Memorial against the investments of the Claimants;

(b) awarding the Claimants compensation for all damages and losses suffered as a result of the conduct of Costa Rica, on the basis of full reparation, in an amount to be determined as of the date of the award (currently calculated to be ₡18,780,543,990 million);

(c) awarding the Claimants pre- and post-award interest on all sums awarded, in an amount based upon a commercially reasonable rate for Costa Rican colons, such as the Costa Rican Central Bank rate;

(d) awarding the Claimants any amount required to pay any applicable tax in order to maintain the integrity of the award;

(e) awarding the Claimants their costs and expenses of this proceeding, including attorneys' fees, in an amount to be determined in the course of this proceeding by such means as the Tribunal may direct; and

(f) ordering such other and further relief as may be just and appropriate in the circumstances.

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[272] See Appendix 1 to the Claimants' Memorial on the Merits for further details of the calculation. For the purposes of this calculation, the interest rate to 1 November 2015 has been assumed to remain constant. The Claimants would be pleased to update this calculation at an appropriate stage in the proceedings in order to take into account the actual interest rates going forward.

Dr. Todd Weiler
#19 – 2014 Valleyrun Blvd.
London, Ontario N6G 5N8
Canada

Fasken Martineau DuMoulin LLP
2900-550 Burrard Street
Vancouver, BC V6C 0A3
Canada

Lic. Vianney Saborío Hernández
Barrio Maynard #56
San Rafael, Escazú
San José, Costa Rica