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' REPLY ON THE MERITS AND COUNTER-MEMORIAL ON JURISDICTION

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I. INTRODUCTION

1. Costa Rica has breached and continues to breach international law. It has taken Claimants' property rights without paying prompt or adequate compensation. Its expropriation process suffers from interminable delays and valuation inconsistency, with much of the former being the product of host State design. Nonetheless, Costa Rica stands before the Tribunal, asking the arbitrators to say that it owes nothing whatsoever to any of Claimants under the THE CAFTA[1]. This position should be rejected both because it is contrary to international law and unfair to Claimants.

2. What amount of compensation does Costa Rica owe to each Claimant, for directly expropriating or substantially interfering with (i.e. indirectly expropriating) it property rights in land, which it now considers to be inside the *Parque Nacional Marino las Baulas* ("PNMB")? It is not complex. This claim is not about competing political values or moral principles. This is ultimately a dispute over how much compensation is required to make Claimants whole.

3. Costa Rica says this case is all about its sovereign authority to adopt measures to protect the environment generally, and the endangered Leatherback turtle in particular. This assertion is untrue. Claimants do not begrudge Respondent its sovereign right to designate a national park nor to change its mind about that park's boundaries. They would note that the manner in which Costa Rica has gone about it in this case has been rather unorthodox, to say the least. Be that as it may, Claimants just wish to finally be paid their rightful compensation, and they will be on their way.

4. When they made their initial investments, Claimants were not alone in believing that their lots could be developed in a way that respected and protected the annual nesting practices of the Leatherback turtle on the nearby beach. Costa Rica believed it, too. In 1995, Costa Rica established a "marine" park, designed to protect the beaches on which turtles nested every winter, as well as the interior waters ("*aguas adentros*") through which each Leatherback made its approach.

5. The titled property in which Claimants were interested did not form part of the PNMB, and they expected to pursue low-density, environmentally responsible developments on it. The Park Law said as much. The legislators who proposed and passed the Park Law said it too. The Municipality of Santa Cruz, responsible for zoning and building permits, said it. Between 2003 and 2009, three different Environment Ministers said it too, including Carlos Manuel Rodríguez, who made those assurances directly to Mr. Berkowitz in May 2003. He also communicated them to the President of Costa Rica's Congressional Committee on the Environment, at the beginning of 2003, and to officials from the Park and the Leatherback Trust in the middle of 2003.[2] That was the

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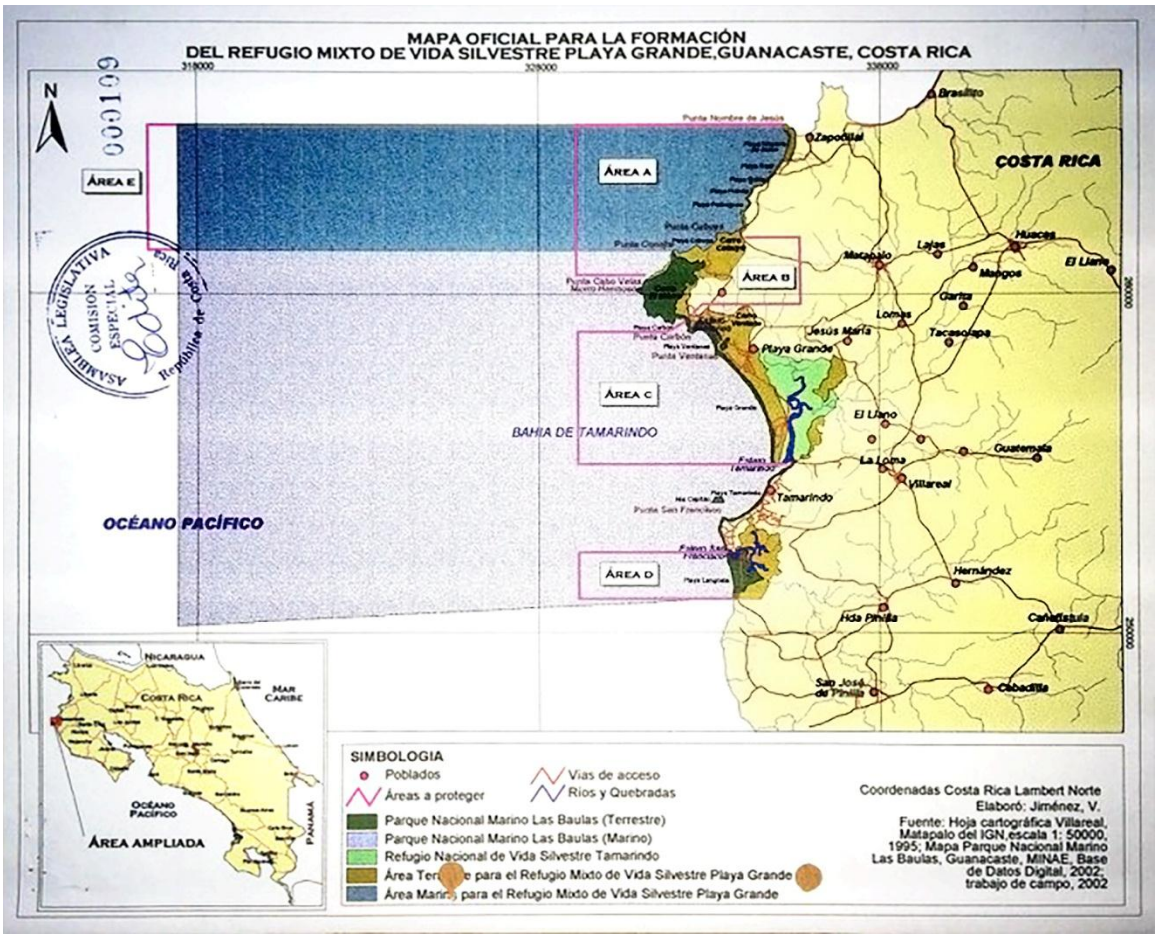
[1] Defined in Claimants' Memorial on the Merits. All capitalized terms used herein have the same definition as in the Claimant's Memorial on the Merits. See List of Selected Defined Terms appended to this Reply.

[2] See Figure 1, below. Map appended to Exhibit C-113, 20 February 2003 Letter from CM Rodríguez to Congressional Committee. Also see section III:B: Respondent's Challenge to the Legitimacy of Claimant's Expectations, below.

state of affairs at the time investments were established, and it was on this basis that Claimants made their respective investments in Costa Rica.

Figure 1: Official PNMB Map 2003



6. Costa Rica has now decided that Claimants' properties should form part of the Park. Instead of providing Claimants with fair compensation for the expropriation and/or extinguishment of their property rights, Costa Rica would prefer to rewrite its legislative history. Respondent would have the Tribunal suppose that the affected land had been located inside the boundaries of the PNMB since 1995. The record definitively proves otherwise.

7. In their Memorial on the Merits, Claimants recounted the history of the creation of today's PNMB in great detail. With their Reply, Claimants provide further evidence, which confirms how Respondent, itself, did not consider the land in which Claimants' lots can be found to form part of the PNMB when Claimants established their investments in Costa Rica.

8. Costa Rica attempts to paint Claimants as either reckless, high-density developers or unscrupulous land speculators, if not both. They warn the Tribunal against granting any damages award, lest they reap windfall profits at the expense of the environment. The

only way the Tribunal could come to such a conclusion would be to ignore the evidence on the record. Costa Rica paints a mythical picture, in which it stands firm against uncaring northern developers. The real story is not fanciful but it is also not uncommon. It is the story of individuals who each invested abroad – doing so in good faith, in reliance on the local laws and with the legitimate expectation that they would be able to develop land acquired for fair value – only to find their investments stranded by a host State that is not in any rush to compensate them for the takings.

9. Costa Rica touts its compliance with international environmental obligations, but it must also comply with its obligations towards U.S. investors, especially in cases – such as this – when compliance is readily achievable without conflict. Claimants made every effort to address environmental protection and remediation issues with Costa Rican officials, but Respondent ultimately decided to choose large-scale expropriation over facilitating responsible development. Claimants have also tried many ways to resolve this dispute with Costa Rica without having to resort to international arbitration, to no avail.

10. Respondent's municipal system has not been able to provide prompt and adequate compensation for these takings, and Respondent has even admitted to having delayed moving forward with any more direct expropriations for the past six years. It also offers no concrete signs that the delays are almost over. Thus, the Tribunal has become Claimants' last resort. They need the Tribunal to determine the fair market value of the rights of which they have been deprived.

11. In this Reply on the Merits and Counter-Memorial on Jurisdiction, Claimants will address the issues raised in Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits ("Respondent's Counter-Memorial"), primarily in sequential order. Claimants will first address the issues on the merits and then turn to the jurisdictional objections raised by Respondent.

12. Together with this Reply, Claimants are submitting the following statements upon which it relies:

    (a) the Second Witness Statement of Brett E. Berkowitz ("Berkowitz WS2");

    (b) the Second Witness Statement of Robert Reddy ("Reddy WS2");

    (c) the Second Witness Statement of Dr. Kirt Rusenko ("Rusenko WS2");

    (d) the Expert Witness Statement of Lic. Miguel Ruiz Herrera ("Ruiz ER1");

    (e) the Expert Witness Statement of Lic. Federico Peralta Bedoya ("Peralta ER1"); and

    (f) the Reply Expert Report of FTI Consulting ("FTI ER2").

II. RESPONDENT'S ADMISSION OF NEW GROUNDS FOR CLAIMANTS' CLAIMS

13. Respondent asserts an essentially unfettered right to delay the launch or progression of formal expropriation proceedings for every affected lot.[3] Until Respondent deigns to proceed, it expects each affected Claimant to accept that it will be unable to exercise its property rights in any meaningful way while continuing to require the owner to pay taxes.

14. Respondent premises its alleged authority on two measures: (1) a prioritization system (with no apparent schedule) for the expropriation of all lots lying within the PNMB's expanded boundaries[4]; and (2) a self-imposed moratorium on issuing any new expropriation decrees, styled as an interim "stay" of the process. Respondent tells us that this "stay" was adopted in the expectation that its comptroller general's office (the *Contraloría*) would request it while its investigation of SINAC's management of maritime areas, including expropriations in the PNMB was underway.[5]

15. Allegedly, SINAC (the parks management agency) subsequently decided that it would extend its interim stay until such time as it could complete its "implementation" of the *Contraloría*'s 2010 report.[6] Respondent has not identified precisely when that might be. Ironically, the most prominent reason cited by the *Contraloría* for its conducting the audit was the universal complaint that MINAE/SINAC[7] had taken far too long to execute the expropriations.[8]

16. Respondent first disclosed the existence of these two measures to Claimants on 16 July 2014, with the delivery of its Counter-Memorial. Apparently the temporary stay policy has been in place since an undetermined point in 2008 or 2009, whereas the apparent prioritization policy was allegedly made "official" in 2012.[9]

17. It appears that Respondent disclosed the existence of these two measures in response to Claimants' allegation that Respondent was arbitrarily holding back on the execution of all remaining expropriations, likely so as to avoid having to pay the compensation that would be ordered in respect of each (even merely paying the below-market prices coming out of its own expropriation regime). Presumably, Respondent intends for these two programs to demonstrate that it has not been acting arbitrarily.

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3 Respondent's Counter-Memorial, paras. 78-80, 87-91, 95.

4 Loáiciga WS1, para. 10.

5 Loáiciga refers to the prioritizations measure as having been "made official in 2012". With respect to the other delaying measure, she indicates that a decision to "stay" the process of expropriations was taken by SINAC officials on some unspecified date after meetings that were held around "mid-2008," in the expectation that the *Contraloría* General would request SINAC to do so while it investigated complaints about the process. The witness admits that she cannot speak directly to whether or why the "stay" remains in place, pending "implementation" because she is no longer employed by the agency (paras. 17-22).

6 *Ibid.*

7 Previously defined in Claimants' Memorial on the Merits.

8 Exhibit C-1zk, para. 2.2.

9 Loáiciga WS1, para. 10.

18. Even assuming that both of these measures were adopted in good faith, and not for an improper purpose, they remain examples of arbitrary conduct on Respondent's part. This is because Respondent does not enjoy the discretion to delay its payment of compensation under Article 10.7(2)(a). As a matter of fact, it does not even possess the authority to adopt either policy of delay under municipal law.[10] When a host State conducts itself in a manner that is *ultra vires* its municipal legal authority, or otherwise exercises its ostensible or purported authority for an improper purpose, such conduct constitutes an arbitrary exercise of sovereign authority (i.e. an abuse of right), contrary to the customary international law minimum standard of treatment.[11]

19. Here it is patent that the reason for Costa Rica's new measures was, and remains, delay. Delay is necessary because the Government has declared so many national parks, over the last 40 years, without budgeting for the costs of expropriation in order to "consolidate" them.[12] Over the past few years, Respondent has made no secret of the fact that it has not budgeted for these expropriations (or it has not budgeted enough, by a significant multiple). On 7 September 2008, Respondent stated that the Government was facing an unfunded liability of $150 million for compensation owed to private landholders for park consolidation. This figure, however, did not include PNMB compensation, which Respondent estimated would cost in the range of $500 million.[13] That is why, up until the last presidential election, Respondent was working hard to adopt a measure that would save it from having to expropriate Claimants' lots.

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[10] Ruiz ER1, paras.16-18.

[11] Todd Weiler & Ian Laird, "Standards of Treatment" in: The Oxford Handbook of International Investment Law, Peter T Muchlinski, Federico Ortino & Christoph Schreuer, eds. (OUP: Oxford, 2008) at 286-287; *Deutsche Bank AG v Sri Lanka*, Final Award, ICSID Case No ARB/09/02, 31 October 2012, paras. 471 & 490 [where the Respondent claimed that its officials did not act for an improper purpose but the tribunal disagreed, and found a breach of the fair and equitable treatment standard, based upon a decision made by an official, directed to an outcome that would prejudice claimant/investor, for which the official did not have authority]; *Glamis Gold Ltd v United States*, Award, NAFTA/UNCITRAL Tribunal, 14 May 2009, para. 595 [which demonstrates the opinion of the U.S.A. that the NAFTA Article 1105 fair and equitable treatment standard is breached by decisions made by a governmental authority for an improper purpose]; *Azurix Corporation v Argentina*, Award, ICSID Case No ARB/01/12, 23 June 2006, paras. 386 & 393 [where the claimant agreed: "whether an action is or not arbitrary in its ordinary meaning should meet four tests: it should be taken by the proper authority, for the proper purpose, because of relevant circumstances and should not be patently unreasonable" and the Tribunal implicitly adopted elements of this test in finding that a breach of the "arbitrary or discriminatory" standard was met]; and *Al-Bahloul v Tajikistan*, Partial Award on Jurisdiction and Liability, SCC Case No 064/2008, 2 September 2009, para. 221 [citing the following additional examples: *Saluka v Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, para. 307; see also C. McLachlan, L. Shore and M. Weiniger, "International Investment Arbitration: Substantive Principles" (Oxford University Press: 2007), para. 7.124; *PSEG Global Inc. et al v Republic of Turkey*, ICSID Case No. ARB/02/5, Award of January 19, 2007, para. 247; *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/03, Award of April 30, 2004, para. 138; *Pope & Talbot v Canada*, Award on Damages of May 31, 2002, para. 68; and *Tecmed v Mexico*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154.

[12] In this case, "consolidate" is rather more like a euphemism, because the PNMB does not come into existence, formally, until expropriations have been completed. See: Ruiz ER1, paras. 7-9. Alternatively, at the very least, the actual PNMB resembles a half-finished jigsaw puzzle, given how much of it is composed of privately held land.

[13] Exhibit C-112b.

20. It was accordingly puzzling to read the transcript of a recent interview with the new Director General of SINAC, in which he stated that his agency's number one priority was to move forward with more park consolidations nationwide. Claimants have been unable to locate any evidence suggesting that Costa Rica has massively realigned its budgeting priorities, or that it has recently experienced any sort of revenue "windfall" (quite the reverse). Indeed, Mr. Jurado's agency has been operating in violation of one of Costa Rica's fundamental laws, the Organic Environmental Law, throughout its existence:

> Article 36. – Requirements for creating new areas. To create wildlife areas owned by the government, whatever management category may be established, the following should be fulfilled in advance:
> …
> Minimum financing to acquire, protect and manage the land.[14]

21. Given the above, the only other avenues open to SINAC, to press forward with park consolidations would be unorthodox.[15] The new Director General of SINAC is Lic. Julio Jurado, the author of the 2004 and 2005 opinion letters that have played a prominent role in Respondent's defence.[16] Mr. Jurado was also on the board of directors of CEDARENA, one of the NGOs most active in utilizing Costa Rica's judicial processes to force the Government's hand on expansion and consolidation, for the PNMB. Given Mr. Jurado's central role in Respondent's defence, one would have expected him to have submitted a witness statement in these proceedings.

22. In this regard, Claimants also note how Respondent has not even provided an estimate of how much more of a delay it expects to impose upon its PNMB expropriation "process." The only statement that Respondent has made, in recent years, which sheds some light on its possible timeline for completion of park consolidation nationwide was made by then-Deputy Minister of Environment, Jorge Rodríguez, on 7 September 2008. Mr. Rodríguez, whose next position was that of Minister of Environment, was quoted by the national newspaper as estimating that it would require approximately "250 years" for Costa Rica to catch up on its expropriation backlog.[17]

23. Claimants further note Respondent's assertion that title to the majority of the lots at issue in this arbitration still remains formally in the hands of individual Claimants, and that this

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[14] Law No. 7554, 4 October 1995.Exhibit C-1q.

[15] For example State agencies, such as the Comptroller General, could research and identify ancient flaws in land titles. At best, the court proceedings that would follow would permit the State to annul titles rather than purchase them. At worst, the ensuing court proceedings would provide SINAC with a potential grace period of a few more years. Another option would be to impose new land use regulations, under the guise of environmental policy, which could impede use of the targeted land.

The orthodox means of enacting such policies would be by means of legislation or generally applicable presidential decree.

[16] See section IV.C, below.

[17] Loaiza, Vanessa. 2008. "MINAE incapaz de comprar terrenos de parque Baulas," En: La Nación, 7 de setiembre, 2008. Exhibit C-112a.

[formal] state of affairs would remain until expropriation decrees (and concomitant acts of dispossession) are filed for each lot.[18]

24. In addition, Claimants note how Respondent maintains that it is strictly bound to comply with an order, issued by the Constitutional Court on 16 December 2008, mandating that all privately held land situated within the [expanded] boundaries of the PNMB must be expropriated immediately.[19] Claimants submit that this is an incorrect construction of the Executive's authority under Costa Rican law.[20] Nevertheless, in the alternative, Respondent's claim can be construed as an admission that it was bound, by an obligation *ergo omnes*, to "immediately" expropriate all remaining lots in the [expanded] PMNB.[21] Of course, Respondent has also admitted that it has adopted two measures to delay expropriations (on a priority basis, in one case, and across the board, in the other). Claimants also note that there are many lots in the [expanded] PNMB that have not even received notices of public interest yet.

25. In summary, then:

(a) Respondent has admitted that Claimants still hold formal, legal title to most of the lots at issue in the dispute;

(b) Respondent has admitted that the Costa Rican State has conclusively and irrevocably decided to "***immediately***" expropriate all of the lots at issue in the arbitration (other than those that have already received notice of a declaration of expropriation);

(c) Respondent has admitted that, except for this handful of lots, for which expropriation decrees have been issued, Respondent has elected to delay proceeding with any more expropriations, in compliance with the terms of two new measures, previously unknown to Claimants;

(d) Respondent has not paid adequate compensation (which would reflect the fair market value of each investment in the moments prior to the first-known event of its taking) in respect of any of the lots at issue in this proceeding;

(e) Respondent has publicly admitted that it has never budgeted for the payment of adequate compensation to Claimants;[22]

(f) To refute the conclusion that it has been delaying formal expropriation proceedings to avoid having to pay compensation for which it has not budgeted, Respondent has disclosed the existence of two, heretofore unknown, measures;

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18 Respondent's Counter-Memorial, paras. 93, 190.

19 Respondent's Counter-Memorial, paras. 51, 135.

20 Ruiz ER1, paras. 18-20.

21 Exhibit C-1h.

22 Exhibit C-112a. Vanessa Loaiza, "MINAE incapaz de comprar terrenos de parque Baulas" La Nación, 7 September 2008.

(g) Although both measures afford Respondent some ostensible explanation for a portion of the delay, together these measures do not provide a credible basis to explain all of the delay that has transpired thus far, and the untold amount of delay that would have lay ahead (had Claimants not sought compensation under the THE CAFTA);

(h) In choosing to delay all expropriations, regardless of the ostensible reason, Respondent is acting contrary both to the applicable municipal expropriation rules as well as the explicit terms of a Constitutional Court order dated 16 December 2008, which Respondent claims it has no choice but to obey;

(i) Respondent is prohibited from delaying the payment of compensation under THE CAFTA Article 10.7(2)(a);

(j) Respondent is prohibited from arbitrarily adopting or maintaining measures that cause loss or damage to the investments of THE CAFTA investors; and

(k) Claimants were only notified of the existence of both measures on 16 July 2014.

26. In light of the above facts (either admitted by Respondent or already proved by Claimants), it is submitted that – with its adoption of the two, aforementioned measures – Respondent has breached Articles 10.5(2) and 10.7(2)(a) of the THE CAFTA.

27. In the alternative, Claimants hereby serve motion to amend their Statements of Claim, so as to incorporate paragraphs 13 to 26 of this Memorial into each of them, respectively. The Tribunal possesses authority to grant Claimants' motion under Article 22 of the 2010 UNCITRAL Arbitration Rules. Respondent cannot claim that it would be prejudiced by such amendment, because it failed to inform Claimants that the measures even existed until 16 July 2014.

III. REPLY MEMORIAL – ISSUES OF FACT

28. Faced with a daunting case, Costa Rica has responded with a submission that attempts to obscure the issue at hand. In service of this approach, Respondent has erected a straw man to serve as the Claimants in proverbial effigy. Claimants stand by the facts stated in their Memorial on the Merits, which demonstrate how Respondent's conduct has resulted in breaches of various THE CAFTA provisions.[23] The focus of this Reply Memorial will be on refuting Respondent's misleading allegations.

29. Respondent's attempt to change the focus of this arbitration begins with the first sentence of the first paragraph of the Counter-Memorial, wherein Respondent proclaims: "This dispute is about the sovereign right of a state to protect the natural environment within its borders." Nothing could be further from the truth.

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[23] Please note the following *erratum* in respect of Claimants' Memorial on the Merits:
Page 68, sub-paragraph 212(g) – "On 18 December 2008…" should read: "On 16 December 2008…"
Page 68, sub-paragraph 212(h) – "… 30 April 2008…" should read: "…27 May 2008…"

30. None of the Claimants dispute Costa Rica's authority to establish the PNMB, or its sovereign right to expropriate land for a non-discriminatory public purpose. Nor does any Claimant second-guess the putative public policy goal of saving the Eastern Pacific sub-species of Leatherback Turtle from extinction.

31. Instead of acknowledging the parties' common ground, Respondent has fashioned for itself a straw claimant whose arguments appear much easier for it to answer. As such, Respondent finds itself making the following statement on the second page of its Counter-Memorial:

> Nevertheless, Claimants now object to the State's efforts to expropriate or regulate the portions of their properties that are inside the Park, claiming that, in fact, the Park does not include any land at all, let alone their properties—even though there are binding interpretations under Costa Rican law to the contrary. Claimants also object to the expropriation procedures undertaken by the Costa Rican government, alleging that the procedures are arbitrary and in violation of Claimants' legitimate expectations as investors. In addition, Claimants contend that the regulatory measures taken to protect the area within the Park are arbitrary and constitute indirect expropriations. None of these contentions is true, as Respondent will demonstrate in this Counter-Memorial. But Claimants come to this arbitration in the hopes of securing a US $36.5 million windfall for Costa Rica's legitimate public purpose regulation of their properties.
>
> [Emphasis added]

32. Respondent has misstated Claimants' case. None of the contentions underlined in the paragraph above are true. First, Claimants have not objected to Respondent's efforts to expropriate their investments.[24] Claimants have objected to Respondent's failure to expropriate their investments in a manner consistent with both its municipal and international obligations.

33. Nor have Claimants ever objected to *bona fide* regulation of their lots. That is why many of them spent so much time and effort attempting to work with Respondent to design a regulatory plan that would prevent the kind of unabated commercial development that Respondent allowed across the estuary, in Tamarindo, just south of Playa Grande.[25]

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[24] While certain of the Claimants objected to the manner in which the expropriation was being carried out in the local proceedings, there are no claims in this arbitration related to the purpose of the taking.

[25] Further, and in any event, Costa Rican law actually provided that there would be no "land use restrictions related to the protection of the [future] park." See: Exhibit C-1q, Article 37(3) of the Organic Environmental Law, Law No. 7554, 4 October 1995:

> Private lands taken in accordance with the provision in this Article, because they are located in national parks, biological reserves, wildlife refuges, forest reserves and protection zones, will be covered within the state protection areas **only once it has been paid for and expropriated legally**, unless the owner voluntarily submits to the Forestry System… [**Emphasis added**]

And Article 2 of: Law on the Creation of National Marine Park Las Baulas de Guanacaste ["1995 PNMB Law"], Law No. 7524, 5 July 1995 [Exhibit C-1e]:

> The private lands included within this delimitation will be susceptible to expropriation and will be considered as part of the Las Baulas Marine National Park, until they are acquired by the

34. The tenor of Respondent's Counter-Memorial disregards Claimants' circumstances. Claimants were given no choice but to bring their claims to a THE CAFTA tribunal. Each individual Claimant has slowly come to the painful realization that Costa Rica no longer has any intention of providing them with prompt, adequate and effective compensation through operation of its municipal expropriation regime. As Respondent emphasizes that it is a small State, lacking in material resources, let there be no doubt that – as far as this arbitration is concerned – Respondent is in a far better financial position than any or all Claimants.

35. It is accordingly inapt for Respondent to aver that Claimants have come to this arbitration seeking some sort of "windfall." If that were true, Claimants would have done just as well as to try their luck with Costa Rica's courts, as they would have saved themselves the extraordinary costs inherent in taking any State to international arbitration. Respondent ought to be reminded that – before they could elevate their claims to the international level, Claimants had to waive their rights to compensation under Costa Rican law, pursuant to THE CAFTA Article 10.18(2)(b)(i).

36. Also found in the above-quoted paragraph is the baseless accusation that Claimants believe "the Park does not include any land at all, let alone their properties." As set out further below, Claimants' position remains that there is most certainly a land component to the park proposed in the unadulterated text of the 1995 PNMB Law. It was just not originally supposed to include their land. The land actually included in the boundaries of the proposed park included both Cerro el Moro and Isla Verde (although Respondent eventually determined that Isla Verde was not, in fact, an island), as well as the first 50 meters from median high tide.

37. More to the point, however, Claimants are not disputing Respondent's position that – as of the date they commenced their respective claims – the land in which each had invested a decade ago is now officially [and determinatively] considered to lie within the boundaries of the PNMB. The only relevant point of contention between the parties is precisely *when* this state of affairs came to be.

38. Finally, Claimants have not argued: "that the measures taken to protect the area within the Park are arbitrary and constitute indirect expropriation," again as alleged in paragraph 4 of Respondent's Counter-Memorial. It has never been Claimants' position that, in order to prove their claims for indirect expropriation, they must prove that the measures at issue were "arbitrary" (either in adoption or in application). The measure of any indirect expropriation lies in the level of interference involved (arbitrary or otherwise).

39. Moreover, in making this allegation, Respondent has accorded to itself far too much credit for behaving as a unitary actor. The allegation implies that Respondent made a single decision (or a consistent set of decisions) to impose measures that would affect Claimants' investments, to which Claimants have objected. In fact, it was not until 2010 that one could even speak of the Costa Rican State as having a consistent or unitary position on the issues that have given rise to the dispute.

State, through purchase, donations or expropriations; **in the meantime the owners will enjoy the full exercise of the attributes of dominion**. [**Emphasis added**]

40. At the national level, Respondent's disposition towards the fate of Claimants' investments changed with the political winds. During his tenure as Minister (2002-2005), Carlos Manuel Rodríguez appears to have led the drive towards extending the PNMB's boundaries, and halting any kind of development within the annexed area.[26] By contrast, under his next two successors, Roberto Dobles (2006-2009) and Jorge Rodríguez Quirós (2009-2010), MINAE sponsored two bills in Congress designed to return the PNMB boundary line to the 1995 *status quo ante*,[27] in addition to establishing a regulatory plan that would have permitted Claimants to proceed with their original plans for low-density, minimum impact, high end, single family homes.[28]

41. By way of additional example, it was at the very same time as Carlos Manuel Rodríguez sought a plausible legal basis for extending the PNMB's boundaries (i.e. in a manner that avoided having to ask Congress to amend the 1995 Law), that the Municipal Government of Santa Cruz was exercising its legislative authority to establish model zoning rules similar in object and design to the rules that Messer's. Dobles and Rodríguez later attempted to shepherd through Congress in 2008 and 2009.[29]

42. In addition, the Municipality of Santa Cruz continued processing and granting applications for construction permits at Playa Grande [within the area that is today considered inside the PNMB] throughout Mr. Carlos Manuel Rodríguez's tenure as Minister of Environment and Energy.[30] This local government is every bit as much a representation of Respondent as any department of national government or court.[31] When publishing its zoning bylaws, it also explicitly asserted its primary, constitutional jurisdiction to regulate within the area of land in which Claimants' lots belong – in juxtaposition to what it saw as the limited regulatory authority of the national

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[26] Lest we forget, it was Mr. Rodríguez who, shortly after stepping down as Minister, was honored with a substantial monetary prize from [his future employer], Conservation International, in part for the leading role he played in "expanding" the PNMB.

[27] Exhibits C-1za and C-1zj.

[28] Compromiso con il Parc Las Baulas http://wvw nacion.com/ln_ee/2009/diciembre/03/opinion2181264 html.

[29] Exhibit C-112.

[30] Exhibits C-92, C-93, C-94, C-95.

[31] This was apparently not the first time that Respondent has sent mixed messages to the same foreign investor. In fact, one U.S. diplomat contemporaneously observed:

> ¶24. The Costa Rican regulatory environment can pose significant barriers to successful investment in Costa Rica. One common problem is that municipal government and central government institutions at times disagree in their treatment of specific projects, leaving the investor in limbo. Even when dealing only with central government institutions, an investor may follow the technical advice of one institution only to find himself accused of illegal behavior by another institution. Several large investors have faced the related problem that the central government's approach towards a specific project has changed significantly over the years, stranding the investor. Though the law protects land owners against squatters, in practice illegal occupancy of property looms as a threat to investors through coercion and/or illegal changes of ownership on property titles.
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> United States Government, State Department, Embassy San Jose (Costa Rica), "Costa Rica: National Trade Estimate," Cable ID No. 09SANJOSE954, 15 December 2009; available at: http://wikileaks.org/cable/2009/12/09SANJOSE1140.html, last accessed 25 September 2014

government. It only stopped processing construction permits shortly before the Constitutional Court ruled, on 23 May 2008, that its jurisdiction had been trumped, after all.[32]

43. Respondent's contradictory behaviour was also evident in 2008-2009. It was during this period that Respondent's judicial branch [in the form of its Constitutional Court, the *Sala IV*] decided a number of cases that had the effect of redrawing the boundaries of the PNMB. It was also during this period, however, that MINAE – led by Messer's. Dobles and Jorge Rodríguez – worked hard to undo the legal mess made of the PNMB file during Carlos Manuel Rodríguez's tenure. Ultimately, the decisions of the Constitutional Court prevailed over the conventional legislative agenda pursued by Messer's. Dobles and Jorge Rodríguez, both of whom had retired from public service by the middle of 2010.

44. Since the spring of 2010, however, Respondent has maintained a single and unswerving position about the future of Claimants' land: it states, unequivocally, that Claimants' lots will all eventually be acquired for "consolidation" into the PNMB. Unfortunately, even though it has already been four years since Respondent finally consolidated its position on the subject, it still has no idea when the compensation it owes to Claimants will finally be paid to them, in full.

45. Respondent needs to be reminded that, unlike States and multinational corporations, Claimants are mortals. For Messer's. Berkowitz, Holsten, Spence, Gremillion and the Cophers, Respondent's intransigence has been particularly galling. They had planned to build their retirement homes at Playa Grande and purchased their properties some ten years ago.[33] Not only have they had to accept that those plans will never see fruition; they have also been held hostage to the caprice of Respondent's municipal expropriation regime. This is a regime that even Respondent admits was operating so poorly that, in 2008, the *Contraloría* was brought in to investigate. By the end of 2008, the investigation was wrapped up, and by the beginning of 2010 a draft report had been provided to MINAE.[34]

46. Since that time, Respondent has demonstrated nothing less than contempt for the interests of people like the individual claimants. How else should one describe a state of affairs in which a host State claims that it is still observing a "stay" of all expropriation activities until it has completed "implementing" the findings of a report that it has possessed for almost five years? Without the Tribunal's assistance, every additional year that passes would be yet another in which these individuals would be deprived of their savings, and the ability to build their retirement homes somewhere else.

47. Each individual Claimant made his or her investment in Playa Grande specifically because the location afforded its landholders with a unique opportunity to exercise freehold property rights in land located near a pristine, tropical white sand beach[35] that –

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[32] Exhibit C-92.

[33] Spence WS1, para. 12; Berkowitz WS1, para. 20. Gremillion WS1, para. 9; Copher WS1, para. 6.

[34] Exhibit C-1zk; Loáiciga Pérez Pérez WS1, para. 20.

[35] Reddy WS1, para. 6; Berkowitz WS1, para. 15; Gremillion WS1, para. 10; Copher WS1, para. 7.

for a few months each year – played host to the amazing Leatherback turtle. Not only did each Claimant know where the park was, each looked upon the opportunity to become neighbours of the PNMB and its exotic, chelonian guests.

48. Starting in 1995, with the establishment of an international airport in Liberia and passage of the 1995 Park Law, Respondent originally welcomed and encouraged investments in elite, and environmentally sustainable, real estate on its Pacific coast. It was not until 2004, as it turns out, that certain factions within the national Government apparently became intent on permanently prohibiting any form of development from taking place on the land that had been, and was about to be, acquired by individual Claimants. These officials did not choose the transparent route available for them to potentially achieve these goals, that route being proposing amendments to the 1995 PNMB Law and speaking to them in a Congressional debate.

49. Instead, these officials, opted for an oblique route to achieve their ends. It involved procuring a novel interpretation of the existing statute from Julio Jurado in the Attorney General's Office, Respondent's current SINAC Director General. It is not known whether these individuals gave any serious thought to how the State would actually pay for the land that this new interpretation would cause to be expropriated. From Claimants' perspective, it does not really matter. What matters is that they have not received prompt, adequate and effective compensation yet, almost five years from the date upon which these goals were met.

50. Claimants each made it investments in good faith, relying upon the state of the law as they found it, and unaware of the moves under foot in San Jose that would ultimately lead to the taking of their investments.[36] Even after Claimants became aware that certain of their lots had become the subject of a declaration of public interest (i.e. the end of 2005 for the Berkowitz Claimants, mid-2006 for the Spence Claimants, and the end of 2007 for Messrs. Spence and Holsten and the Cophers), there was no reason to assume that the decision was irreversible. Certain Claimants responded to these events by redoubling their efforts to demonstrate to administrative officials that they were not just prepared, but eager, to reach consensus upon a set of rules that would restrict development to exactly the kind of high-value, low-volume, single family homes they had envisaged.[37] Still others were willing to receive immediate payment for the surrender of their planned retirement homes, so long as they would promptly receive fair market value compensation in return.[38]

51. Still others reached out to senior politicians, to find common ground at that level.[39] Oscar Arias had been returned to the Presidency in 2006 and he appeared to have a more balanced view of the issue than had his immediate predecessor. Moreover, it was no secret that the Government was simply not in a position to justify allocating the funds necessary to carry out all of the expropriations that would be necessitated if his

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[36] Reddy WS1, paras. 5-6; Berkowitz WS2, paras. 10-15.

[37] Berkowitz WS2, para. 23.

[38] Berkowitz WS1, para. 46; Copher WS1, para. 26; Gremillion WS1, para. 23.

[39] Berkowitz WS1, paras. 9-13.

Government were to maintain the previous Government's apparent PNMB policy. Unsurprisingly, then, between 2007 and 2010 Respondent and various Claimants worked closely together to forge a suitable development plan for the area where their lots were located, which would only permit the development of low-density, low-impact, high-quality single-family dwellings.[40]

52. Claimants and Respondent did achieve consensus, which took the form of legislation that was sponsored by MINAE in Congress. The Arias Administration very nearly succeeded in shepherding draft legislation through Congress too, although it ultimately failed to marshal a floor vote on the measure before its term expired in 2010.[41]

53. Almost five years later, Claimants no longer entertain any serious hope for any kind of reasonable accommodation to be reached between themselves and Respondent. Indeed, Respondent rejected Claimants' offer of settlement, made in 2013, out of hand. At this point, Claimants just want to be paid fair market value for their investments, without any more delay. In reply, Respondent has now argued – quite incredibly – that it is not under any obligation to pay anything to them. On the one hand, it says that Claimants took too long to file their claims under the THE CAFTA, so they are not entitled to any compensation. On the other hand, Respondent somehow also maintains that Claimants must be patient, and wait until Costa Rica is good and ready to proceed with additional expropriations.

A. The Leatherback Turtle: Facts and Fiction

54. Respondent paints a dire, but not entirely accurate, picture of the current and likely future fate of the Leatherback Turtle.[42] Although Respondent appears unaware that Leatherback populations in other parts of the world have actually held steady or risen for years,[43] what is true is that the Eastern Pacific Leatherback population was decimated over a decade ago, with the crash almost completed by around the same time that the 1995 PNMB Law was adopted.[44]

55. However, Respondent makes the following unsupported, and unsupportable, claim: "One of the main reasons for the leatherback turtle's decimation is beachside development." Respondent then adds: "It is critical to protect the nesting sites of the turtle to give the species any chance of survival." [45] There are many aspects of this claim that are troubling, starting with the fact that the second sentence does not follow, logically, upon the first. There is no evidence whatsoever on the record that anything proposed by Claimants would have – in any way – threatened Leatherback nesting sites.

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40 Berkowitz WS2, para. 26.

41 Exhibit C-112.

42 Respondent's Counter-Memorial at paras. 10-17.

43 Sebastian Troëng, Didiher Chacón and Belinda Dick, "Possible decline in leatherback turtle Dermochelys coriacea nesting along the coast of Caribbean Central America," 38 (2004) Oryx 395 at 395 & 400-401.

44 Laura Sarti Martínez, Ana R. Barragán, Débora García Muñoz, Ninel García, Patricia Huerta & Francisco Vargas, "Conservation and Biology of the Leatherback Turtle in the Mexican Pacific," 6 (2007) Chelonian Conservation and Biology 70 at 75-76.

45 Respondent's Counter-Memorial at para. 18.

56. In addition, it is not at all clear just what sort of "development" Respondent believes to be risky, or on what grounds it would hold that view. The other potential risks, which Respondent implies must come with any sort of "development" (e.g. pollution, erosion, noise, compaction of sand, domestic animals) could and would have been easily addressed through the adoption of appropriate building codes.

57. As Respondent admitted in 2009: "The main problem affecting the Leatherback does not occur on land, but in the sea."[46] There simply is no credible, science-based evidence to support the contention that the kind of development planned by Claimants for their investments could have been responsible for the kind of decline that actually did occur without it. Indeed, the consensus view of scientists who have authored studies involving the Leatherbacks of Playa Grande[47] is that the population was most likely decimated by a combination of distant, commercial [deep sea] fisheries by-catch and artisanal [near-shore] fishing, including the lead researchers from the Leatherback Trust.[48]

58. Although fisheries would appear to be the most likely original cause for the population crash in Playa Grande, as it had been across the eastern Pacific, egg collection began to be cited as another potentially important factor.[49] The egg collection idea appears to have won particular favour with certain researchers working at Playa Grande, such as PNMB Director, Rotney Piedra, who has actually identified egg collection as the "primary driver

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[46] Exhibit C-112d.

[47] Hirth, H. & Ogren, L., "Some aspects of the ecology of the leatherback turtle Dermochelys coriacea at Laguna Jalova, Costa Rica," 56 (1987) NOAA Technical Report at 1–14; M.L. Sarti, S. A. Eckert, N. Garcia & A. R. Barragan, "Decline of the world's largest nesting assemblage of leatherback turtles," 74 (1996) Marine Turtle Newsletter at 2-5; Eckert, S.A. & Sarti M., L., "Distant fisheries implicated in the loss of the World's largest leatherback nesting population," 78 (1997) Marine Turtle Newsletter at 2–7; and; H. Gjertsen, D. Squires, P.H. Dutton & T. Eguchi, "Cost- Effectiveness of alternative conservation strategies with application to the pacific leatherback turtle," 28 (2014) Conservation Biology 140-149.

[48] See, e.g.: James R. Spotila, Richard D. Reina, Anthony C. Steyermark, Pamela T. Plotkin, Frank V. Paladino, "Pacific leatherback turtles face extinction: Fisheries can help avert the alarming decline in population of these ancient reptiles," 405 (2000) NATURE 529-530:

> The situation at Playa Grande is reflected at many other Pacific nesting beaches. The large Mexican nesting colony declined exponentially from 70,000 in 1982 to under 1,000 by 19949 and to fewer than 250 in 1998–99 (S. Eckert, unpublished results). The annual mortality between 1984 and 1996 was 22.7% (ref. 9). Conservative estimates are that longline and gill-net fisheries killed at least 1,500 female leatherbacks per year in the Pacific during the 1990s1,10. These included Asian trawl, longline and drift-net, Central and South American longline and gill-net, and Hawaiian longline fisheries. With a population of about 6,500 adult females1, this corresponds to a 23% annual mortality, or 33% if most leatherbacks captured came from the East Pacific population of 4,600 animals1. Most of the mortality at Playa Grande was probably caused by fisheries. Leatherbacks normally live at least 30 years and reach maturity at 5–14 years11. A long-lived species like this cannot withstand such high rates of anthropogenic mortality… We believe that fishing practices in the Pacific must be changed to save marine biodiversity.

[49] Santidrian Tomillo & Maria del Pilar, "Factors affecting population dynamics of eastern Pacific leatherback turtles (Dermochelys coriacea)," Drexel University, ProQuest, UMI Dissertations Publishing, 2007 at 10-11. "We considered levels of poaching to be 90% until 1990-1991 (Steyermark et al. 1996; Spotila & Paladino 2004), 50% in 1990-1991, 25% in 1991-1992 and 1992-1993 and 0-2% from 1993-1994 to present-season. "

for overall population decline,"[50] albeit without sufficient quantitative data to prove it,[51] and whilst simultaneously acknowledging how the 90% decline at Playa Grande, measured between the mid 1970s and mid 1990s, mirrored "the region wide precipitous decline of eastern Pacific Leatherbacks."[52]

59. In his witness statement, Mr. Piedra maintains his belief that "theft of eggs" was "the main one" (i.e. cause for population decline) at his beach,[53] albeit while acknowledging that "collateral fishing has also been indicated."[54] He does not explain whether he thinks it a mere coincidence that – across the region – the very same declines occurred, even in places where egg harvest was non-existent, such as in Costa Rica's Santa Rosa National Park, located approximately 80 kilometers north along the coast from Playa Grande.[55]

60. More recently LBT affiliated scientists, including Mr. Piedra,[56] have shifted their rhetorical focus to "development" as the primary threat to reviving decimated Leatherback populations. For example, in one recent article, on Leatherback nesting choices, an arbitrary and gratuitous link to "development" has been made in the

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[50] Bryan P. Wallace & Rotney Piedra Chacon, "Leatherbacks in the Balance: Reconciling Human Pressures and Conservation Efforts in Pacific Costa Rica,' in: Sea Turtles of the Eastern Pacific, Jeffrey A. Seminoff & Bryan P. Wallace, eds., (Tucson: U. Arizona Press, 2012) 193 at 198-199.

As the example of Playa Grande's leatherbacks demonstrates, unchecked, comprehensive, unsustainable egg harvest eventually results in declines in numbers of nesting female sea turtles." Also commonly referred to as the egg harvest, by other scientists not affiliated with the Leatherback Trust, it appears that from this point forward LBT affiliated scientists would refer to the practice as "poaching" – even when describing the harvest in historical terms (i.e. before it was regulated in any way).

[51] Although egg collection likely was a factor in the decline, a paucity of data was available to prove it. Estimates were based upon early accounts and anecdotal information. Laura Sarti Martínez, Ana R. Barragán, Débora García Muñoz, Ninel García, Patricia Huerta, and Francisco Vargas, "Conservation and Biology of the Leatherback Turtle in the Mexican Pacific," 6 (2007) Chelonian Conservation and Biology, 70 at 76.

[52] Bryan P. Wallace & Rotney Piedra Chacon, "Leatherbacks in the Balance: Reconciling Human Pressures and Conservation Efforts in Pacific Costa Rica,' in: Sea Turtles of the Eastern Pacific, Jeffrey A. Seminoff & Bryan P. Wallace, eds., (Tucson: U. Arizona Press, 2012) 193 at 194.

[53] In a recent paper, Mr. Piedra proudly proclaimed egg harvesting as having been "eradicated through comprehensive protection of nesting females and their eggs and hatchlings by integrated efforts of park rangers, scientists, local communities, and volunteers." No doubt there is truth in that claim, but one still wonders why "poaching" was the primary culprit at Playa Grande, but not in Mexiquillo, Mexico – which has much larger beaches and where larger populations have had better transportation access for a longer time? Even within Mexico, differences in the level of conservation programme did not appear to have any impact on that shared decline.

Laura Sarti Martínez, Ana R. Barragán, Débora García Muñoz, Ninel García, Patricia Huerta & Francisco Vargas, "Conservation and Biology of the Leatherback Turtle in the Mexican Pacific," 6 (2007) Chelonian Conservation and Biology 70 at 76-77 and 70 - 71. See, also: Bryan P. Wallace, Tale of Two Beaches, unpublished, 25 November 2009, available at: <http://bryanwallace.wordpress.com/2009/11/25/tale-of-two-beaches-2/>, last visited 10 September 2014.

[54] Piedra WS1, para. 13.

[55] Dana L. Drake, Jocelyn E. Behm, Meghan A. Hagerty, Philippe A. Mayor, Seth Goldenberg and James R. Spotila, "Marine Turtle Nesting Activity at Playa Naranjo, Santa Rosa National Park, Costa Rica, for the 1998-1999 Season", 4 (2003) Chelonian Conversation and Biology at 675-678

[56] Piedra WS1, para. 14.

conclusion, seemingly utterly divorced from the logic of the paper itself.[57] The concluding paragraph contained a startling non sequitur linking a turtle's bad nesting choices with "development." Mr. Piedra picked up on this theory in his witness statement, although, as explained by Dr. Rusenko, there is no reasonable basis for such conclusions.[58]

61. In this regard, one of the myths that Respondent appears most eager to propagate is that the nesting habitat of the Leatherback somehow extends beyond the 50-meter public zone (i.e. that any Leatherback could or would ever crawl up the sand berm, through the vegetation and into the forest). As indicated in the attached news report, which includes an interview with a park official, any such notion is preposterous.[59]

62. Respondent caps off this section of its Counter-Memorial with its most outrageous claim: *viz.* that the goal of protecting the Leatherback would have failed if the boundary line actually prescribed in the 1995 PNMB Law had been used.[60] However, the Leatherback turtle population at Playa Grande was decimated during a period in which there was virtually no development.

B. Respondent's Challenge to the Legitimacy of Claimant's Expectations

63. As mentioned above, Respondent falsely claims that Claimants believe the PNMB does not include any "land" area.[61] This is an odd allegation to make, in light of the express language of Article 1 of the 1995 Law. The land-based portions of the PNMB were intended by Congress to include: the first 50 metres of beach, as measured from the median high tide mark; the small mountain located at the north end of the PNMB, known as Cerro el Moro; and a portion of the mainland incorrectly identified in the 1995 PNMB Law (and colloquially known) as: Isla Verde.

64. Respondent also suggests that Claimants' interpretation of the 1995 Law was obviously flawed because it contains an expropriation provision, Article 2.[62] Respondent's logic

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57 Frank V. Paladino, "Are Leatherbacks Doomed to Extinction?" unpublished article, undated, available at: <http://users.ipfw.edu/paladino/>, last viewed on 10 September 2014.

58 Rusenko WS2, para. 9.

59 Exhibit C-111: Irene Rodríguez, Interview with Carlos Diaz, Ranger, PNMB, Las Noticias, Channel 11, 16 January 2006.

> Rodríguez: But if the park is marine, why to take so much of land?
>
> Diaz: That question I cannot response with the respect that you deserve… The Park's position is that lights can affect spawning and cause death, but the regulatory plan already in place in the area does not permit very bright lights and requires a curtain of trees at least 35 meters in height.
>
> Rodríguez: This graphic shows that the spawning area is not related to the protection zone, much less the properties.
>
> Diaz: There is no interference with spawning. Hardly one leatherback turtle is going - for example - to nest in a part of the forest. They will not come to up to the 75 meters already available, to come to spawn.

60 Respondent's Counter-Memorial, para. 26.

61 Respondent's Counter-Memorial, para. 4.

62 Respondent's Counter-Memorial, paras. 25 and 26 (point 3).

appears to be that – unless the area where Claimants' lots are located was regarded as being part of the proposed park – there would have been no reason for that expropriation provision. In this regard, Claimants submit that it is Respondent that apparently has not realized that Article 1 of the 1995 Park Law has always explicitly referred to land that would need to be expropriated: Cerro El Moro (owned by Amanda Tierra S.A.) and Isla Verde (owned by Hacienda Pinilla).

65. Respondent asserts that it was so manifest that the boundaries of the PNMB were firmly fixed by the 1991 Presidential Decree, that the terms used to describe the PNMB's boundaries in Article 1 of the 1995 Law ***must*** have been a mistake.[63] In point of fact, the big mistake made with respect to the boundaries of the PNMB took place in 1991, not 1995. As reported by one of the PNMB's and LBT's largest boosters, Marie Teressa Koberg, President Calderón Fournier – the man who executed the 1991 Park Decree – told her that his officials had deceived him about the boundaries of the PNMB. The deceit consisted in their omitting to inform him that the Decree he was about to issue was drafted so as to include areas of land already privately owned and being developed.

66. As soon as he came to the conclusion that he had been deceived, for all practical purposes President Calderón repudiated the 1991 PNMB Decree. Accordingly, it appears that no meaningful steps were taken to act upon it, during the remainder of his tenure,[64] Koberg described what she believed to have happened next as follows:

> After 1993 the Parque Nacional Marino Las Baulas de Guanacaste remained institutionally abandoned to its fate and hotels and residences were built on its territory, as identified in the decree and the Act creating the National Park, but not expropriated, without any resistance from Governments. This changed in 2005 when don Mario Boza, scientists James Spotila and Frank Paladino and the Lady Clara Padilla, managed to consolidate, thanks to the research of the internationally acclaimed Spotila and Paladino and the significant financial resources made available through the Leatherback Trust. With these in hand, President Pacheco de la Espriella and his Minister Rodríguez Echandi, initiated the territorial consolidation of the Leatherback Park.[65]

67. The crux of Respondent's legitimate expectations case is that the PNMB has always had the same boundaries and everybody knew it. Equally important is the addendum: that Respondent has observed a consistent policy concerning the boundaries of the PNMB since 1991 (i.e. that the official position has always been that Claimants' lots were always within its boundaries).[66] It is likely that Respondent has advanced this allegation in the hope of undercutting the quality of Claimants' legitimate expectations about whether and how they could exercise their respective property rights in the future. The incredulousness in Respondent's storyline is belied by Ms. Koberg's report on what

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63 Respondent's Counter-Memorial, paras. 21 to 24

64 When the 1991 PNMB Decree was issued, Hernán Bravo was the Environment Minister, Mario Boza was his Vice Minister and Carlos Manuel Rodríguez was serving as an Advisor to the Minister.

65 Although it would appear that Ms. Koberg lacked sufficient legal knowledge to properly characterize what happened next, there is no reason to doubt her recollection of the role President Fournier did (or did not) play in establishment of the PNMB. Exhibit C-114.

66 Respondent's Counter-Memorial commencing, para. 27.

President Calderón thought and did (or, more appropriately, did not do) after signing the 1991 PNMB Decree.

68. There are many other grounds to question the veracity of Respondent's claim to consistency. The most obvious rejoinder could be phrased in the form of a proposition: if Respondent really had been consistent, throughout the years since 1991, there would have been no need for anyone at MINAE to have ever consulted a lawyer from the Office of the Procuraduría about re-interpreting Article 1 of the 1995 PNMB Law. It is also likely that at least a portion of the large number of cases considered by the Constitutional Court on the PNMB, would have never been commenced. In addition, the Municipality of Santa Cruz[67] would not have kept issuing construction permits for lots in the area until as late as 2008.[68] Similarly, Respondent's own witness, Lic. Solano, would not have admitted, in her witness statement, that, in her opinion, the language used in Article 2 of the 1995 Park Law was ambiguous.[69]

69. Further, if Respondent had really been consistent about the boundaries of the PNMB since 1991, one would have never seen Respondent's witness, the then-future-Director of the PNMB, Mr. Rotney Piedra, appearing in a publicly-funded television documentary about the PNMB, in which he explained:

> It is important to remember ***that it is a marine park***. When we speak of a marine park, we mean that there is a 50-meter length of beach that is commonly known as "the public zone," which makes up the terrestrial part of the park, plus the mangrove compound and then 12 nautical miles of ocean…[70]

70. Mr. Piedra also contradicts his employer's claim to consistency in a book on Leatherbacks, to which he contributed a co-authored chapter on Playa Grande. He mentions a failed bid for the development of an inappropriately large condominium development on land that is now held by the Berkowitz Claimants, who acquired it from the author of the unsuccessful bid. This is the same development that is mentioned in his witness statement. Mr. Piedra explained:

> [In] 2002, an environmental impact statement was sought by an enormous development project proposing to build 186 condominium residences in the middle of Playa Grande, also the principal nesting hotspot for leatherbacks in the park, as part of its requirements to obtain building permits from the Costa Rican government. This proposal, with its potentially disastrous results for leatherbacks

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[67] In its Counter-Memorial, Respondent seems somewhat reluctant to acknowledge that the Municipal Government of Santa Cruz actually forms part of the Costa Rican State. Obviously it is no less a part of the host State than SINAC, Congress, MINAE or the Constitutional Court. All of these bodies constitute the "Respondent."

[68] Exhibits C-92, C-93, C-94 and C-95. Also see Appendix 1 to this Reply Memorial.

[69] Witness Statement of Gloria Solano Martinez, para. 5. Exhibit RWE-001.

> At a minimum, it must be admitted that the Law had an internal contradiction that gave rise to ambiguity, which needed to be clarified by the competent authority.

[70] Hector Duran, "Parque Nacional Marino Baulas" [episode], in: Relatos del Viento: Una historia bien contada sobre los Pargues Nacionales de Costa Rica [series], produced in February 2000, first aired on 17 July 2001. Exhibit C-87.

> and their nesting habitat, was rejected because of strong opposition from local communities, park rangers, scientists, and conservationists. This episode served as a wake-up call for several groups involved in conservation at PNMB, including the PNMB administration, community groups, scientists, and nongovernmental organizations.[71]

71. What appears to be lost on Mr. Piedra and Respondent, is that – if it were true that Respondent had always considered the area in which Claimants' lots were located as part of the PNMB, there would have been nothing to worry about. If, on the other hand, Respondent (in the form of SETENA) was actually accepting requests for, and conducting, environmental viability assessments for the development of lots located where Claimants' lots can be found, one could understand their concern. Of course, Mr. Berkowitz eschewed the very thought of a large scale development on the land he purchased. The point is that if the land he purchased was really already part of the PNMB, Mr. Berkowitz would not have bought it and Mr. Piedra would, again, have had nothing to worry about. Instead, a short time after the large condominium proposal was rejected, the Leatherback Trust commissioned work on a draft bill that would assuage their fears once and for all.

72. Another example of the implausibility of Respondent's proposition can be seen in the story of the draft legislation that the Leatherback Trust commissioned and caused to be introduced in Congress on 16 October 2002: Project of Law No. 14.989, entitled "Enlargement, consolidation and development of the National Marine Park Las Baulas de Guanacaste".[72] Drafted by the Tropical Science Center for the Leatherback Trust,[73] it would have expanded the boundaries delimited in the 1995 PNMB Law to an extent even greater than the area in which Claimants' lots are located. The bill's authors explained why they believed the bill was necessary in the following hyperbolic terms:

> Nowadays, the wetlands of the National Marine Park Las Baulas are surrounded by human activities that threaten the natural equilibrium of the species that live in the mangroves. Along the limits of the mentioned mangroves we can observe: an intensive use of the land for fishing and agricultural activities, clear cutting of mangrove trees, constructions of private homes a few meters from the mangrove ecosystem and from the actual limit of the protected areas, drainage and drought of the mangrove ecosystem, intensive use of water sources, final drainage of used water from houses and tourism infrastructures and an accelerated tourism and urban development in its area of hydrologic influence.
>
> **Legal aspects**
>
> 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,

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71 Bryan P. Wallace & Rotney Piedra Chacon, "Leatherbacks in the Balance: Reconciling Human Pressures and Conservation Efforts in Pacific Costa Rica, in: SeaTurtles of the Eastern Pacific, Jeffrey A. Seminoff & Bryan P. Wallace, eds., (Tucson: U. Arizona Press, 2012) 193 at 204-205. Exhibit C-115.

72 http://playagrandeinfo.org/docs/Project_of_Law_esp.pdf.

73 http://playagrandeinfo.org/docs/Project_of_Law_eng.pdf.

> 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.[74] [**Emphasis added]**

73. It is not this bill, however, which indicates inconsistency. It lies in what the Government did, when invited by the President of the Congressional Special Congressional Committee on the Environment to opine upon the bill, on the record. Costa Rica's Minister of the Environment, Carlos Manuel Rodríguez, replied as follows:

> In response to the consultation sent to this Ministry by the Commission over which you preside, I am writing to inform you of our response regarding Bill of Law No. 14,989, called "Expansion, Consolidation and Development of the Las Baulas National Marine Park of Guanacaste".
>
> We would first like to state that this Ministry is fully in agreement with the project's statement of reasons, and we are aware of the seriousness of the turtles' situation, in particular in the eastern Pacific, and the enormous importance of both Grande and Langosta beaches, which are part of the park, for protecting these animals.
>
> For these reasons, we look very favourably on this bill of law, and we only wish to propose a few changes to the wording of the text in order to better guarantee the rights of both domestic citizens and foreigners who own properties within the limits of the new refuge.
>
> The main change that we wish to propose, Mr. President, is in the management category for the proposed expansion, such that, rather than a national park, it be a "mixed wildlife refuge", in accordance with section B of Article 82 of the Wildlife Conservation Act. We believe that in this way, the leatherback turtle and all the other species of turtles that nest on these beaches would be best protected, an issue on which we broadly agree, given that it would avoid expropriation of the properties that are already there. **Only in the event of the owners not accepting the management plan prepared by MINAE would it be necessary to purchase a few lots, when we have budgeted and international funds.**
>
> Hereafter, we present a few specific comments on each of the chapters:
>
> 1. A new description of the borders established in Chapter 1 needs to be provided, which in its current wording includes the areas of the current Las Baulas National Park and the current Tamarindo Wildlife Refuge. This new description would refer exclusively to the area corresponding to the proposed expansion, which would be called the Playa Grande Mixed Wildlife Refuge. Attachment No. 1 includes the new description of borders, with the corresponding map.
>
> 2. Since **no expropriation will need to be done**, we propose that Chapter II - Expropriations, be eliminated.

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[74] *Ibid*, at p. 8.

3. The part on Financing, which is set out in Chapter III, seems very convenient to us, due to the fact that in this way we would be able to develop all the installations that the park and the refuge require, to establish an endowment, and to ensure good protection of the beaches and the marine section that would be part of the park and the new refuge. Where it says Las Baulas National Marine Park in this chapter, it would need to be replaced by Las Baulas National Marine Park of Guanacaste and Playa Grande Mixed Wildlife Refuge, given that these articles would apply to both the current park and to the new refuge.

4. It likewise seems very convenient to us to create a trust, which is described in Chapters IV and V. We are satisfied with the existence of the Manuel Antonio National Park trust, which is why we would like this mechanism to be applied to the park and the refuge as well, establishing in this law the elements set out in Article 14 of the Financial Management Act of the Republic and Public Budgeting. As in the preceding case, in the articles of these two chapters, where it says Las Baulas National Marine Park, it should be replaced by Las Baulas National Marine Park of Guanacaste and the Playa Grande Mixed Wildlife Refuge.

5. We are also in full agreement with the content set out in Chapter VI, because it is a way of involving society in the management and development of this protected area. As in the cases above, National Park shall be replaced by National Park and Mixed Refuge.

6. Chapter VII would also remain the same, because the management plans apply to both the parks and the refuges. The only thing necessary would be for this chapter's title to become: The Management Plan of Las Baulas National Marine Park of Guanacaste and the Playa Grande Mixed Wildlife Refuge.

7. The limitations established in Chapter VIII are very important for preventing the impact of light on the newborns, which is why it seems very necessary to us to leave them as written.

8. Although it is unrelated to the park/refuge, Chapter IX is very important for filling in the existing gaps regarding the sanctions in our legislation about wildlife. We therefore suggest leaving this chapter as it is written.[75]

[Emphasis added]

74. This official statement of the Minister's position is starkly at odds with Respondent's claim that Mr. Rodríguez never provided any assurances to Claimant B. Berkowitz during their meeting.[76] In fact, he appears to have been saying the same things to very different people. If there were any doubt about the Government's intentions for the PNMB at that

[75] Exhibit C-113.

[76] Berkowitz WS1, para. 13; Berkowitz WS2, para. 17.

time, the map and coordinates found that were appended to the Minister's letter seal them.[77]

75. The map speaks for itself, and it spoke for Respondent in 2003. The Government's official position on the Leatherback Trust's proposed PNMB expansion legislation was that it needed major changes. Rather than expanding the PNMB, the Respondent sought to have it reduced instead.[78] With respect to the most contentious area of proposed expansion – the beachfront lots – Minister Rodríguez was only prepared to designate it as a protected zone, meaning that the lots would remain open to just the kind of development that Claimants planned. As indicated in Mr. Rodríguez's letter, the Government was also crystal clear as to why it made these recommendations: it did not want to be forced to expropriate expensive real estate from wealthy domestic and foreign investors instead.

76. As a matter of fact, Mr. Carlos Rodríguez's proposal was very similar to the legislation that would be supported by one of his successors, Jorge Rodríguez (first as Deputy Minister and then as Minister) from 2008 to 2010.[79] Both envisioned the land boundary of the PNMB including only the constitutional public zone i.e. the first 50 meters from median high tide) and both would have imposed stringent standards on development in areas adjacent to the PNMB (such as the areas in which Claimants' lots are located). Indeed, when Jorge Rodríguez was Minister of the Environment, Respondent's position was unequivocally inconsistent with the posture it has adopted in the arbitration, and the Minister's Office was "driving"[80] the following reforms:

> Another mistake that Mr. Jiménez makes concerns MINAET's alleged obligation to prevent development in land bordering the park, given that from the start, the law stipulated that the park consisted of 12 meters "into the water" and the 50 inalienable meters were, as such, protected as a refuge. [Moreover…] The authority to grant building permits and relevant licenses came from the Municipality of Santa Cruz [… not MINAET]. In 2005, the Public Prosecutor's Office established that these 125 meters were "into the land", in private property areas, which led to the conflict that we now have.[81]

77. Moreover, Mr. Carlos Rodríguez's February 2003 letter, and its attachment, was entirely consistent with the contents of the minutes of meeting held in June 2003, which were executed by him. This was the meeting that he had told Mr. Berkowitz that he would be

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[77] See Figure 1, Claimants' Reply, para. 5, above. Also see Exhibit C-113, p. 10.

[78] Claimant say "park reduction" because the amendments proposed by the Minister would have freed much of Cerro el Moro and all of Isla Verde from park designation [i.e. potential, future expropriation], by including these areas within the same refuge zone that he intended for the areas in which Claimants' lots are located.

[79] Exhibits C-1za and C-1zj.

[80] Interview with Jorge Rodríguez, MINAET Minister, El Pais, 9 November 2009; see, also: Michelle M. Soto, Bill that Degraded the Leatherback National Park Shelved, La Nacion, 21 June 2013, http://www.nacion.com/vivir/ambiente/Archivo-proyecto_de_ley-Parque_Nacional_Las_Baulas_0_1349065085.html

[81] Exhibit C-112f.

calling[82] (between officials from MINAE, PNMB officials and representatives of the Leatherback Trust). Those minutes provided:

> The topic of this work session was the preparation of an amendment to the Bill on the Expansion and Consolidation of Las Baulas National Marine Park in Guanacaste, submitted to the Legislative Assembly.
>
> To submit the substituting draft, the Legislative Assembly granted a 30-calendar day term.
>
> The agenda of the meeting included the following:
>
> - The MINAE does not agree with the bill as it was submitted, particularly the proposal to expand the Las Baulas National Marine Park in Guanacaste.
>
> - A substituting draft shall be submitted to the Legislative Assembly; therefore, an extension was requested, (expiring in the first week of August 2003).
>
> - Las Baulas National Marine Park in Guanacaste shall not include Cerro El Morro and Playa Tamarindo because they are not significant turtle nesting areas and the willingness of the owner of Cerro El Morro to submit to a private conservation regime.
>
> - The conservation and protection efforts shall be focused on Playa Grande where we shall try to promote low-density development.
>
> It is also important to point out some issues of interest for the Ministry of the Environment and Energy:
>
> - The MINAE does not encourage the expansion of this National Park up to 1000 meters from the public zone because there is a lack of financial resources to purchase lands, and we believe that we shall be able to achieve the same conservation goal by guaranteeing an orderly infrastructure development and soil use based on planning and organization.
>
> - Las Baulas National Marine Park in Guanacaste <u>shall not be expanded to any area that has been previously declared an area of tourism interest.</u>
>
> - <u>In the private areas declared as a National Park in 1991 and 1995, we would like to promote a voluntary conservation regime, instead of resorting to the respective expropriations</u>.
>
> - <u>Any development in Playa Grande shall meet the criteria that shall be defined as: low density, proper use and management of lighting, "green curtain" use and implementation</u>, among others.

[82] Berkowitz WS2, para. 18; Exhibit C-53.

- Finally, MINAE is interested in conducting a Discussion Forum about the substituting draft among the officials of MINAE, Ecologist Organizations, landowners in the zone, and the Municipality of Santa Cruz.

[Emphasis added]

78. Mr. Piedra, Respondent's witness and the PNMB's long serving Manager, has confirmed that he was present at that meeting. He claims: "Mr. Berkowitz seems to be confused about the scope of the meeting…"[83] Mr. Piedra also says that the meeting was only about a piece of legislation that would have expanded the boundaries of the PNMB even further. He has also assured the Tribunal that "the boundaries of the park are the same ones it has had since its creation in 1991/1995."

79. Sadly, however, only two of these statements are true: (a) as Mr. Piedra's name appears on the attendance list, he was likely present; and (b) the legislation under discussion was the one drafted for the Leatherback Trust, and which had been presented to Congress, and subsequently withdrawn so that MINAE could recommend changes to its text. The rest appear to be falsehoods (unintended or otherwise). This is the only conclusion that can be drawn from a comparison of Piedra's recollections to either the contents of Mr. Carlos Rodríguez's above quoted letter, or the contents of the May 2003 minutes of the MINAE/LBT meeting. Given the above, Claimants submit that Mr. Piedra appears to be the one who is confused about the scope, and even the substance, of the meetings that took place in 2003.

80. It is true that the bill prepared for the Leatherback Trust, and submitted to Congress by Representative María Lourdes Ocampo, called for an even larger expansion of the PNMB. However, as both the letter and minutes demonstrate – that was not a proposal that MINAE could countenance. In fact, it is now quite apparent that the Environment Minister did not want to expand the boundaries at all.[84] The minutes, alone, are determinative on this point. First, they state flatly that the boundary "shall not be expanded to any area that has been previously declared an area of tourism interest." Claimants' land received that designation nearly forty years ago.

81. Second, the minutes state that MINAE sought to "promote a voluntary conservation regime, instead of resorting to the respective expropriations." Apparently Mr. Piedra believes that this was only a reference to a greater expansion, beyond 125 meters. The problem with his postulation, however, is that the minutes delineate where this "voluntary conservation regime" would have applied: "In the private areas declared as a National Park in 1991 and 1995."

82. If one claims that the boundary was always 125 meters, the claim is covered by the reference to "1991." If one states that the boundary was changed to 50 meters in 1995, and then changed back in 2008 by the Constitutional Court, that claim is also covered by

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[83] Piedra WS1, para. 38; Berkowitz WS2, para. 6.

[84] In this regard, Mr. Berkowitz's witness statement becomes the corroborating evidence (rather than the other way around).

the reference to "1995." Thus we can say with confidence that, in either case, MINAE simply did not want to expropriate anybody's land, in 2003 (or from 2008 to 2010, for that matter). It simply did not have the budget for it. Instead, MINAE was willing to permit exactly the sort of development Claimants were planning in the area in which their lots are found today.

83. The foregoing analysis demonstrates that focusing on the boundary question has been of no avail to Respondent. It is quite clear now that Costa Rican officials did not believe that Claimants' lots were located in an area that was considered part of the PNMB from 1995 until the Constitutional Court's re-reconstruction of Article 1 of the 1995 PNMB Law in 2008. More to the point, however, answering the boundary question would not serve as a suitable proxy for gaging Claimants' entitlement to hold legitimate expectations with respect to the use of their property rights in land anyway.

84. Instead, the relevant question is: at the time that each Claimant established it investment, did it have reason to think either that:

(a) The Government had no plans to expropriate all of the privately held land found within the boundaries of the PNMB (whether as set out in the 1995 PNMB Decree or the 1995 PNMB Law), as reflected in its known behaviour since 1991 (as well as in most of Costa Rica's other national parks); or

(b) In the event that Respondent might, some day, come into some money, and decide to spend it on finally "consolidating" its national parks, that Respondent would commence expropriations on a reasonable and expeditious basis, promptly leading to fair and final result in each case. In this context, "fair" means what Respondent's statutes and international law both say: prompt, adequate and effective compensation.

85. It is apparent that Respondent has never been prepared to engage in a mass expropriation of lots, consistent with international norms, because it has never been able to budget for it. Between 2008 and 2010, Respondent frequently admitted that it did not want to expropriate private landholders in what became the expanded boundaries of the PNMB. Its Environment Minster would explain to reporters and legislators that his department was struggling with an unfunded liability of approximately $150 million for expropriations of privately held land in Respondent's many national parks, not including PNMB.[85] Thanks a spate of Constitutional Court's decisions on the PNMB's boundaries

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[85] Exhibit C-112d.

See, also: C-112b, Vanessa Loaiza, "State will take 75 years to pay land of national parks; MINAE invests only $2 million annually in cancel private farms; Greatest debts are in new parks," La Nación, 7 September 2009:

The $150 million debt [not including the estimated $500 million for PNMB expropriations] represents the full budget of the Ministry of environment for five consecutive years. With that money, almost 20,000 social housing bonds could deliver. Deputy Minister Rodríguez recognizes that the State has no capacity to pay so much money in a short time, first because the MINAE has a budget very low and, then, because there is no push from the Ministry of finance. However, the most affected by the delay in payment of the land are the owners of farms. Regardless of age who take the State to pay them, they may not never exploit their farm, selling wood,

in 2008, Respondent estimated that its unfunded liability for park expropriations would grow by $300 million to $500 million. As Minister Jorge Rodrigues explained:

> [A reader of the newspaper in which the Minister's letter appeared] asks why, for 18 years, the State has not been able to expropriate and pay for lands that have been decreed as being in a national park. He tells me that this is how it is done in the United States. However, he forgets that our country does not have the income of that nation, and that unfortunately, despite the government's best intentions, the prices of real estate have exploded extravagantly, especially with respect to coastal areas. The fact is that the system of protected areas in this country has already collapsed and in order to continue with their conservation, an urgent, realistic review is required.[86]

86. This is why Respondent's Executive Branch tried so hard to legislatively reverse the 2008 Court decisions that had both: (a) expanded the PNMB's boundaries and (b) waxed and waned with respect to whether the Executive possessed discretion to decide when to and how to expropriate – which, in Costa Rica, has come to include an indefinite time horizon as well.[87] In the meantime, Respondent's Executive branch dragged its feet on putative compliance with the Constitutional Court's decision of 16 December 2008.

87. Instead of expropriation, Respondent repeatedly appeared ready to designate the area in which Claimants' lots could be found as a protected wildlife refuge area. Such designation would have permitted Claimants to return to their respective development projects, subject to their compliance with strict preventative and mitigating regulation. This was no surprise to many Claimants, because some were involved in developing a suitable regulatory plan and others were involved in communications with the Arias Administration.[88]

88. Indeed, the seemingly never-ending delays associated with the final fate of approximately 120 lots, located inside the expanded boundaries of the PNMB, provide a clear signal that Respondent still does not possess the desire and/or the ability to address either the decades-long backup in expropriations for even older national parks on its books, much less the comparatively shorter, but much more expensive, backlog for PNMB lots. But for a string of decisions in 2008, and the political pressure that activists (who were also responsible for the Court's decisions) have managed to maintain on Congress and the current Administration, neither Respondent nor Claimants would likely be in arbitration today.

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ask for a housing voucher or develop a real estate project. According to Rodríguez, already on several occasions the Sala IV has ruled in favour of private owners, but compliance is based on available resources. Even so, the affected could accuse the State of contempt to a resolution of the Sala IV. Luis Diego Marín, of the environmentalist organization Preserve Planet, argues that this is not a recent problem. "This is a never ending issue, it is a debt that has been accumulated, is full of interests. "Won't you blame this Government, because it has been a hot potato of at least the last five administrations"

86 Exhibit C-112f.

87 See Ruiz ER1, paras. 18-20.

88 See Reddy WS1.

89. Respondent denies that its politicians have a problem, with announcing national parks with little concern for whether their establishment will require expropriations, and with no apparent concern as to how it could fund them. The evidence says it does. In justifying his personal opposition to Respondent's legislative attempts to permit restricted development within the 50 to 125 meter zone, PNMB's General Manager, Mr. Piedra, has observed that it "…would drastically jeopardize the sanctity of PNMB … and could inadvertently and wrongly set a dangerous precedent for diminishing protected status of other national parks in Costa Rica, especially in other situations where private in-holdings within park boundaries have yet to be compensated"[89] [emphasis added].

90. In a similar vein, one staff member at the U.S. Embassy in San Jose had the following observations to share about this phenomenon in 2010:

> Expropriation of private land by the government without prompt or adequate compensation has hurt some Costa Rican and foreign investors. These incidents usually involve land expropriated to create national parks, indigenous reserves, or agricultural projects for poor farmers. One long-standing case required over fourteen years to wind its way through the Costa Rican court system, only to conclude without providing compensation to the U.S. citizen landowner. **Another case involving titled beach land subject to an expropriation order for a national park has highlighted conflicting decisions between different government entities and the pitfalls experienced when the government lacks the funds to pay for land that it is required by law to protect**.[90]
>
> **[Emphasis added]**

91. Respondent also avers, in the alternative, that December 16, 2008 was the last possible date upon which Claimants could have entertained the notion that their individual lots might not be expropriated. It was on that date that the Constitutional Court rendered the decision in which it ordered MINAE to immediately proceed with expropriations. The decision read, in relevant part:

> It is not in vain that article 2 of the Law for the Creation of the National Marine Park Las Baulas, no. 7524 of July 10th of 1995, obligates the State to process the expropriations of the lands located inside the Park, since it is in the public interest that these land lots be under state protection… [On] April 30th of 2008 this Court resolved to order this Ministry to proceed immediately and quickly with the expropriation proceedings, to the effect of not continuing to produce greater environmental damages. The above evidences the great lack of coordination there is in the Ministry of Environment and Energy itself, since on the one hand the mandate is clear to expropriate the properties located in the Park and on the other hand, SETENA awards or initiates the proceedings for environmental viability to certain projects located there. Certainly the error has

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[89] Exhibit C-115: Bryan P. Wallace & Rotney Piedra Chacon, "Leatherbacks in the Balance: Reconciling Human Pressures and Conservation Efforts in Pacific Costa Rica,' in: Sea Turtles of the Eastern Pacific, Jeffrey A. Seminoff & Bryan P. Wallace, eds., (Tucson: U. Arizona Press, 2012) 193 at 217.

[90] United States Government, State Department, Embassy San Jose (Costa Rica), "2010 Investment Climate Statement: Costa Rica," Cable ID No. 10SANJOSE90, 19 January 2010, para. 4; available at: http://wikileaks.org/cable/2010/01/10SANJOSE90 html

> been of the state for having taken so long in the expropriating proceedings and for not taking the precautionary measures to the effect of performing an integral assessment of the area in the light of the constructive processes to be authorized.[91]
>
> The recourse is admitted, and therefore: a) All the environmental viabilities awarded in properties located inside the National Marine Park Las Baulas are annulled and the Ministry of Environment and Energy is ordered to continue immediately with the expropriation processes of such properties. b) Orders SONIA ESPINOZA VALVERDE, in her condition as Secretary General of the National Environmental Technical Secretariat, or whoever occupies this position to issue instructions within the context of her competence so as to not process new viabilities inside the park….[92]

92. Perhaps the most significant problem with this theory is that Respondent has already informed the Tribunal that it decided to suspend all further expropriations for PNMB in 2008, in anticipation of a request from the Contraloría General to do so (which apparently never came). Respondent's witness, Lic. Solano, has proffered a statement indicating that this suspension is still in effect.[93]

93. It is accordingly difficult to reconcile Respondent's claim – that it has prudently suspended expropriations in the PNMB area, pending full "implementation" of the Contraloría General's 2010 report – with its claim that Respondent is strictly bound to comply with orders of the Constitutional Court, unless Respondent holds a starkly different conception of "immediately" than most.

94. In addition, Respondent did not act as though it was compelled to issue a raft of expropriation decrees before Christmas, 2008. To begin, the Court's reasons for decision were only made public on January 14, 2009.[94] Little more than a week later, on January 23, MINAE petitioned the Court for a clarification of its December 16 decision, given its apparent contradiction with the decision it had issued on May 27, 2008, which had been based upon the same extended boundary theory. As Respondent informed the ICSID Tribunal in *Unglaube* v. *Costa Rica* – coincidentally, also on January 23 – the Court:

> … ordered the Minister of the Environment to carry out the expropriation, if deemed appropriate, pursuant to the Las Baulas National Park Law and within a reasonable period of time. The Court also added that, if the State did not have the budgetary means to expropriate, it must grant the permits and authorizations that would allow Claimant to make full use and enjoyment of her property, provided that she obtains the requisite environmental impact assessment and can establish

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91 Exhibit C-1j at 20.

92 Exhibit C-1j at 21.

93 In this regard, it is interesting to note how, at the bottom of almost every Constitutional Court decision, related to the PNMB, in which a government agency has been ordered to take steps to comply with some legislative or constitutional norm, the Court includes a few lines reminding the official in charge of that agency, and all of those to whom she delegates her authority to act, that severe criminal penalties may be applied in the event of failure to do so.

94 Ávalos, Ángela. "Sala IV suspende viabilidad ambiental y permisos de construcción dentro del Parque Marino Las Baulas," La Nación, 14 Janaury 2009.

> that she is entitled to environmental permits as necessary to guarantee the wellbeing of the Leatherback turtle.

95. As noted in Claimants' Memorial on the Merits, the Court replied two months later,[95] with a short decision rendered on 27 March 2009. It addressed the concern raised as follows:

> The extemporaneous motions filed by the Minister of the Environment and Mines on 23 January 2009; and by the Secretary General of the National Environmental Technical Secretariat, on 13 March, 2009. Both the Minister of the Environment and Energy as well as the Secretary General of the National Environmental Technical Secretariat charge that it is impossible to fulfill the order made by this Court in judgment number 8770-08 at 10:36 on 27 May 2008, since it is a contradiction of the decision made in ruling 2008-018529 at 8:58 am on 16 December, 2008. The motions presented at this time by the respondent authorities - apart from being extemporaneous according to what is set forth in article 12 of the law governing this jurisdiction - also do not constitute a motion for clarification and amendment of the judgment dictated on this docket, rather an examination of an alleged conflict that arises through the other judgment dictated by this Court. In fact, after reading the judgment it asks to clarify, the Court reminds the respondent authorities that its actions should at all times be governed by constitutional principles, which includes the jurisprudence provided by this Court, the effect *erga omnes* of which is one of obligatory acceptance and enactment. But it is not their place to indicate when to expropriate, nor how to go about it, as that is the responsibility of the respondent administration, to determine what rule shall apply to the expropriation procedure, which is a legal matter, and should be discussed before the appropriate administration, and should the case be, before the corresponding trial court judge. As a result, the actions as presented are hereby declared inadmissible.[96]

96. Through its invocation of the term "constitutional principles," the Court was implicitly recalling three congruous norms: respect for separation of powers, respect for legal security and respect for the binding nature of its decisions as jurisprudence. By expressly stating that it could not [or, reading through the lines in this instance, did not mean to] direct MINAE as to precisely when or how it should exercise the authority to expropriate, the Court was safeguarding all three norms. As a function of the *ergo omnes* principle, which renders prior decisions of the Constitutional Court immutable, the earlier of the Court's decisions, dated 27 May 2008, remained in full force and effect. Necessarily, the one portion of the decision, dated 16 December 2008, in which the chamber purported to revoke the Executive's discretion to choose how and when to expropriate under law, was effectively annulled.

97. Thus, the Court's decision of 27 March 2009 had the practical and logical effect of expunging the word "immediately" from the charging section of the decision dated 16 December 2008. Given how senior MINAE and SINAC officials have apparently managed to avoid jail over the past six years – in spite of the fact that they deliberately

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95 Paras. 158-165.

96 Res. Nº 2009-005408, 27 March 2009; Exhibit C-1zi.

established a policy that has allegedly delayed any action on any PNMB expropriation, which would stand in direct contravention of the Court's injunction to expropriate "immediately" – it would appear that Respondent exaggerates when it claims that it bears the most strict and solemn duty to obey the Court's decision of 16 December 2008.

98. Respondent also asserts an equally infeasible proposition with respect to the allegedly binding character of a letter written by a *Procuraduría* staff attorney, named Julio Jurado, to the then-Minister of Environment, Mr. Carlos Rodríguez, in February 2004. Respondent avers that the existence of this letter proves that Claimants should have known that they had been, or were in the process of, investing in land located in a national park – with its desired inference being that one would not be able to exercise any rights in that land as a result. There are many weaknesses in this argument, the first of which is that this letter was never notified to any Claimant in respect of it specific investments.

99. In addition, its author explicitly cautioned that his letter carries no binding authority. Accordingly, it is nonsense for Respondent to suggest that his second letter, sent one and a half years later, merely "confirmed" the first.

100. The letter was unorthodox for a number of reasons, beginning with the fact that it apparently did not contain an original opinion from Mr. Jurado. Rather, as he indicated on the first page of his letter, it was Mr. Carlos Rodríguez who had allegedly forwarded the opinion to him for consultation. Given that the *Procuraduría*'s role, in this context, was supposed to involve providing an opinion in response to a question from the Ministry, in relation to the legal opinion it had already obtained from its own lawyers. In other words, the *Procuraduría* was supposed to operate as a quality check, or purveyor of second opinions. As Mr. Carlos Rodríguez refrained from attaching an opinion prepared by MINAE's Legal Department to his request, Mr. Jurado should have simply sent it back, with a request for proper protocols to be observed.

101. As Mr. Jurado, himself, noted, not only was Mr. Carlos Rodríguez' request unaccompanied by an opinion from MINAE's legal department, it was apparently provided to Mr. Jurado, by Mr. Carlos Rodríguez, as a *fait accompli*. Why did the Minister not simply commission a legal opinion from his own department first, before contacting the *Procuraduría*'s Office? Perhaps he did not receive, or did not expect to receive, the answer he desired from his own lawyers. Or perhaps the opinion that Mr. Carlos Rodríguez forwarded to Mr. Jurado many months earlier, was actually the very same opinion that had been prepared by/for Mr. Boza at the same time?[97] As set out in

[97] It is not at all clear why Mr. Carlos Rodríguez appears to have been maintaining two very different positions on the PNMB at this time. On the one hand, in his meetings with the public [e.g. May 2003, with Mr. Berkowitz and later, in July 2003, with Leatherback Trust officials], as well as in his public correspondence with a Congressman, Mr. Rodríguez articulated a position on behalf of MINAE that would have permitted controlled development, in the 50 to 125 meter zone, and would have avoidedpotential, future expropriation costs by not altering the boundaries of the PNMB. On the other hand, while apparently cutting his own departmental lawyers out of the loop, he appears to have sent a pre-baked opinion to Mr. Jurado, whom he knew from their work for the same environmental NGO [cite para 143 of Claimants' Memorial on the Merits], at the same time that Mr. Boza had planned to meet Mr. Jurado's boss to pitch his idea for enlarging the PNMB by means of creative

Claimants' Memorial on the Merits, it had been Mr. Boza's plan to meet with the Attorney General in May 2003, to pitch a plan for a new interpretation of the 1995 PNMB Law, in order to "… provide Las Baulas Park with an additional 75 meter-continental strip from the high tide line."[98]

102. In any event, Mr. Jurado noted this irregularity in his letter to Mr. Rodríguez, but what he should have done was to immediately contact the Minister and inform him that he could not provide him with any advice until after he the Minister had first consulted his own lawyers. Moreover, it is puzzling that Mr. Jurado apparently did not elect to recuse himself from working on the file, given his political affiliations. At relatively the same time Mr. Jurado must have been considering the opinion sent to him by Mr. Rodríguez, Mr. Rodríguez resigned his seat on the board of a local environmental NGO, CEDARENA, which Mr. Jurado appears to have immediately occupied himself. This is concerning because CEDARENA played an active role in the litigation pursued by activists, at the Constitutional Court, to support the evacuation and expansion of the PNMB.[99]

103. As Claimants' expert on the laws of Costa Rica, Miguel Ruiz Herrera, explains in his report, Mr. Jurado's opinion letters appear to have been highly dubious, as authoritative legal instruments. More to the point, however, neither letter was made public at the time, much less directly notified to a Claimant. Moreover, there was good reason to believe that the novel theory they contained would not stand up before the Costa Rican court.[100]

C. The Limited Capacity and Extreme Fragility of Respondent's Water Arguments

104. Respondent claims that Claimants should have known that "their ability to develop their land was uncertain or restricted" due to limits on water availability.[101] Respondent's focus on water availability and vulnerability is a red herring. At the time Claimants purchased their land, there were no prohibitions on water use or development based on water issues. Further, even today, Claimants would be able to get SENARA's clearance for a building permit to construct residential homes on their lots.

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interpretation. With such opposing acts, it is small wonder that things eventually did not work out well for any of the parties.

98 Cite 2004 planning report excerpt, which can be found at para. 74 of our Memorial on the Merits.

99 http://translate.google.com/translate?hl=en&sl=es&u=http://www.cedarena.org/&prev=/search%3Fq%3Dcedarena%2Bcosta%2Brica%26safe%3Dactive%26rls%3Dcom.microsoft:en-ca%26biw%3D1280%26bih%3D968

http://www.pretoma.org/downloads/pdf/plasbaulas-english.pdf

http://www.pretoma.org/downloads/pdf/plasbaulas-nota-aida.pdf

http://www.pretoma.org/costa-rica-suspends-development-projects-at-leatherback-national-park/

100 Contrary to what both parties have previously written, in their respective memorials, the Constitutional Court did not explicitly rely upon the Jurado opinions to underpin its re-interpretation of the 1995 PMNB Law. Rather, the Court decided [as it turns out, incorrectly, on an evidentiary basis] that the 1995 Law could not change the boundaries established in the 1991 Decree without technical studies having been carried out in advance, as required by the Organic Law of the Environment.

101 Respondent's Counter-Memorial, paras. 54-55.

105. To support its claim that Claimants should have known that development of the land was restricted, Respondent relies on a 2003 internal hydrology study performed for SENARA.[102] Claimants say that they were not aware of the 2003 SENARA study[103] - it was a scientific study that did not affect the ability to obtain certifications of availability of water in order to obtain building permits.

106. In any event, contrary to what Respondent suggests, the 2003 SENARA study concluded that the Huacas-Tamarindo aquifer recharges at a rate that exceeds extraction.[104] It went on to suggest that in light of the growth in tourism, the various stakeholders (the tourism agency, AyA, MINAE, etc.) should be informed of the pressure on the water system and encouraged to manage the resource so that the aquifer will not be over-exploited.[105]

107. The water system in Playa Grande is managed by a local water board known as an ASADA, to which authority has been delegated by the Costa Rican Institute of Water Supply and Sewage (known by the Spanish acronym "AyA"). The local ASADA owns the aqueduct system that supplies well water to the users within its area, which includes Playa Ventanas and Playa Grande.[106] The aqueduct system in Playa Grande is well maintained and is funded by developers and end users who pay for water usage as measured by a water meter.[107] The water supply in Playa Grande is monitored and the ASADA manages this supply. As part of the building permit process in Playa Grande for individual residential homes, the Municipality of Santa Cruz requires that a water availability letter be presented.[108] It is the ASADA that is responsible for issuing these letters.[109] For larger projects, the ASADA in Playa Grande previously used a system known as the "*tasa urbanistica*" whereby a developer would pay an amount to the ASADA in exchange for future access to water for each of the individual building sites in the project.[110] The funds generated by the "*tasa urbanistica"* were used to upgrade and improve the aqueduct system for the benefit of all users in the area.[111]

108. At the time that Mr. Berkowitz made his investment, the "*tasa urbanistica"* system was in place. In preparation for the development of his lots and, in particular, in collecting the necessary documentation to obtain a building permit on lot B5, which was to be the site of his family home, Mr. Berkowitz sought and received an assurance from the ASADA that water would be available for the future B lots (as well as other lots not

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102 Exhibit R-46.

103 Reddy WS2, para. 23; Berkowitz WS2, para. 38.

104 Exhibit R-46, p. 34, para. 4. Also see Peralta ER1. Future studies also confirmed this conclusion.

105 Exhibit R-46, p. 36, para. 1.

106 Exhibit C-89: letter from D. Corredor, President of Playa Grande ASADA.

107 *Ibid.*

108 Reddy WS2, para. 24.

109 Exhibit C-89.

110 Exhibit C-89.

111 Exhibit C-89.

included in the claim).[112] Thus, it is clear that the 2003 SENARA study had no bearing on whether it would be possible to develop property in Playa Grande.

109. Respondent also relies on SENARA's 2005 restriction on digging new wells in the lower areas of the aquifer as support for its contention that Claimants should have known that they would not be able to develop their lots because of water scarcity. Although there was a restriction on digging new wells in Playa Grande (in particular on lots close to the beach), this did not mean that there was no water available for development. Those seeking to build new homes were simply required to apply to the ASADA, which managed the overall water supply from the existing wells, to confirm the availability of water for the proposed construction.[113] Such letters have been granted by the ASADA in Playa Grande and Playa Ventanas without issue for years. A water availability letter is granted to anyone within the water aqueduct district who complies with a short list of prerequisites, including providing the legal status of the entity owning the land, a current survey plan, and a diagram of the future construction for which the letter is being granted.[114]

110. Further, according to official documentation from the ASADA, controlled and supervised by AyA, there is currently sufficient water and hydraulic infrastructure to supply the current and future demand in Playa Grande for the next 20 years.[115]

111. At the time of all the land purchases (as well as now), water availability did not prevent new developments in Playa Grande and Playa Ventanas from accessing water and approval for water access was regularly granted.

112. Respondent also alleges that Claimants could not legitimately have expected to build on their lots because the aquifer in the area had been designated as being of "extreme" vulnerability to contamination. The issue of aquifer vulnerability is also irrelevant to this arbitration. Respondent relies on a January 2009 SENARA study of the vulnerability of the Huacas-Tamarindo aquifer regarding the possible contamination of the water supply, a December 2008 Huacas-Tamarindo vulnerability map, and a water vulnerability matrix. As a starting point, these documents all post-date the investments made by Claimants so it is difficult to conceive of how they should have known about them before making their investments.

113. Respondent also says that "as of January 2009, Claimants were on notice that any attempted development of their properties would be constrained or even prohibited due to lack of water access and risk of contamination". The access to water issue has already been discussed. The risk of contamination issue is also not an insurmountable impediment to development in Playa Grande.

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[112] Berkowitz WS2, para. 42; Exhibit C-80, C-89. Mr. Berkowitz spent a considerable sum on the *tasa urbanistica*, which constitutes a further investment in all of the B lots.

[113] Exhibit C-89.

[114] Exhibit C-89.

[115] See Peralta ER1, para. 3(i); Exhibit C-103.

114. Respondent overstates the limitations that the water vulnerability map and matrix placed on the possibility of development in Playa Grande.

115. As can be seen from these documents, SENARA has been studying the water supply and taking steps to manage potential risks to that supply to ensure access to safe water in Costa Rica. First, Costa Rica prepared a series of maps that indicate the intrinsic vulnerability level of particular areas based on a method known as the G.O.D. method,[116] which is known to be useful for mapping large areas.[117] A matrix was then created that indicated parameters for development for each vulnerability level, which ranged from "extreme" to "negligible".[118] For areas designated as "extreme", the matrix indicated that no development should be permitted.[119] This matrix has been very controversial and harshly criticized.[120] As a result, SENARA has been seeking an alternative guideline for these issues and has also created a practical work-around to the problem that it created when it included a blanket prohibition on development in "extreme" areas and used a mapping method that resulted in all coastal areas being designated as "extreme".[121] The result of this work-around is that development can, in fact, occur in coastal areas, including Playa Grande.

116. As just noted, the map indicates a blanket water vulnerability level in Playa Grande and Playa Ventanas as "extreme". However, where there is a desire to develop lots located in an "extreme" zone, SENARA allows developers to conduct individual piezometer studies on their lots to determine the actual vulnerability at that site.[122] If the result of the site-specific piezometer study indicates that the actual vulnerability level is anything other than "extreme" vulnerability, then a building permit can be issued for that lot. These studies are costly, but a number of owners in Playa Grande have had them conducted in order to be able to apply for building permits.[123] The results of these individual studies have indicated a "high" level of vulnerability,[124] which means that pursuant to the matrix, residential development (and even small hotels) could be developed on those lots.[125]

117. In order to eliminate any doubt as to whether the fragility of the aquifer would prevent development of the B lots and SPG lots, Claimants commissioned a specific hydrogeological study for these lots.[126] In addition to the vulnerability of the aquifer, a

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116 Exhibit R-58,

117 Peralta ER1, para. 13.

118 Exhibit R-47.

119 Exhibit R-47.

120 Peralta ER1, para. 3(ii).

121 Peralta ER1, para. 14.

122 Peralta ER1, para. 19.

123 Berkowitz WS2, para. 36.

124 Exhibits C-85, C-84. These lots both neighbour the B lots in south Playa Grande. See Berkowitz WS2, paras. 45-46.

125 Peralta ER1, para2. 22-23; Exhibits C-85, C-84.

126 Exhibit C-86. Claimants only commissioned studies on the lots in south Playa Grande that were partially taken, as it would hypothetically still be possible for them to develop the remainder of those properties. The lots in

specific contaminant transit test was conducted to determine the level of risk of a residential development contaminating the beach or the turtles' nesting sites.[127] The result of the study was that, like the neighbouring properties, the vulnerability level of the aquifer at those sites was "high". According to the matrix, Claimants would be able to develop those lots for residential homes, as long as certain restrictions are respected. The particular restrictions - minimum lot size, density, lot coverage by buildings and a properly designed sewage system - were all consistent with the development plans for the B lots and SPG lots that pre-dated these restrictions.[128]

D. Building Permits Were Being Issued in Playa Grande

118. At the time Claimants purchased their properties, Claimants reasonably believed that they could obtain construction permits on their lots and conducted their due diligence in this regard. The requirements to obtain construction permits have, with one exception, remained constant since Claimants made their investments. Although there are a number of technical requirements,[129] the key items to ensure when purchasing a lot for building are that the lot is a registered, legal building lot; that there is water available; and that the lot will pass any necessary feasibility studies.[130] Claimants ensured that each of these key items could be satisfied with respect to the lots.

119. Claimants each took a number of steps toward the goal of developing their lots, including drawing up building plans,[131] ensuring water availability,[132] reviewing zoning;[133] obtaining permits to clear trees to create infrastructure;[134] ordering environmental impact assessments;[135] building roads;[136] subdividing lots;[137] etc. Each of Claimants intended to build or develop their lots.[138] Building permits were being processed and issued in Playa Grande from about 1991 to 2008.[139] The government was the one issuing the building permits and the one passing zoning regulations for the area.[140] It would stand to reason that the issuance of building permits indicated that it was possible to comply with all of the underlying requirements, including water availability and environmental assessments.

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north Playa Grande and Playa Ventanas are today entirely within the Park, so the outcome of such studies is irrelevant to the possibility of future development.

127 C-85; Peralta ER1, para. 20.

128 Berkowitz WS2, para. 26; Reddy WS1, para. 25.

129 Exhibit C-91.

130 Reddy WS2, para. 20.

131 Copher WS1, para. 11; Berkowitz WS2, para. 25; Gremillion WS1, para. 9.

132 Berkowitz WS2, para. 42; Exhibit C-80.

133 Berkowitz WS1, para. 1; Berkowitz WS2, para. 25.

134 Berkowitz WS1, para. 27.

135 Berkowitz WS2, para. 25.

136 Reddy WS1, para. 13.

137 Reddy WS1, para. 23.

138 Spence WS1, para. 15; Copher WS1, para. 18; Reddy WS1, para. 25; Gremillion WS1, para. 9; Berkowitz WS1, para. 7.

139 Exhibit C-92, C-95.

140 Exhibits C-1zo; FTI ER1, Exhibit FTI-38.

120. A review of the registry documents confirms that Claimants' lots were registered and many of them on their face indicated that they were "*para construir*" or building lots.[141] In addition, contrary to what Respondent suggests, none of the catastro plans in the National Registry at the time of purchase indicated that any of Claimants' lots were part of the PNMB pursuant to the 1995 Park Law.

121. A careful review of the catastro plans that were filed in the registry at the time of Claimants' purchases indicates that none of those plans indicated that any of the lots were within the PNMB pursuant to the 1995 Park Law even when those plans post-dated that law. It is not until Respondent began expropriating properties that catastro plans began to bear stamps indicating that they were within the PNMB pursuant to the 1995 Park Law.

122. In particular, of the thirteen lots located in Playa Ventanas, only one had catastro plans that indicated that it was in the PNMB. The registry map for lot V59 had a stamp dated 1996 that referred to the PNMB and said that the property was within the PNMB pursuant to the 1991 Decree.[142] Of the remaining Playa Ventanas lots, four had no stamps at all[143] and eight had stamps indicating the properties were outside the PNMB.[144] Similarly, for the four lots located in North Playa Grande, the registry drawings did not indicate that the lots were within the PNMB.[145]

123. For the large lots located in South Playa Grande, each bore a stamp that indicated that a portion of the lot was located within the PNMB pursuant to the 1991 Decree (but not the 1995 Park Law).[146]

124. Contrary to what Respondent says in its Counter-Memorial, water was and is available in Playa Grande and water availability was not an impediment to development. This will be discussed further, below.[147]

125. Even today, Claimants would be able to satisfy the requirements for a building permit in Playa Grande. The requirement to comply with the vulnerability matrix can be met by performing a site-specific study that confirms that the particular site is not of extreme vulnerability.[148]

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141 Reddy WS2, para. 12.

142 Exhibit C-12a at pp. 3-4.

143 Spence lots V30, V31, V32 and V33, see Reddy WS2, para. 10 and Exhibits C-3a, C-4a, C-5a, and C-6a.

144 V38, V39, V40 and V46 and V47. See the lot maps at Exhibits C-7a, C-8a, C-9a, C-10a, and C-11a. Also see Exhibit C-99 for V61 catastro map at time of purchase. This lot was subsequently subdivided and is now three lots, all of which are included in the claim. The post-subdivision catastro maps dated 2006 indicate that those properties are now within the PNMB pursuant to the 1995 Park Law.

145 Reddy WS2, paras. 14 - 15; Exhibits C-16a; C-17a, C-18a and C-19a.

146 For the SPG lots see Exhibits C-20a, C-21a and C-22a and for the B lots see Exhibits C- 23a; C-24a; C-25a; C-26a; C-27a; and C-28a. Also see Berkowitz WS2, para. 12 and Reddy WS2, para. 16.

147 See III.C, above..

148 See Peralta ER1.

E. The Delay in the Conduct of the Direct Expropriations is to Respondent's Account

126. Respondent falsely alleges that it has been prepared to move quickly, but that it has been "blocked" by Claimants' own legal challenges to the expropriation proceedings in the Costa Rican courts.[149] If Respondent provided the proper value in the first place, there would be no reason for this proceeding to begin with. Claimants haven't "challenged" the expropriations in the courts; they have exercised the limited legal options available to them within their due process rights. In fact, Respondent has not provided any evidence demonstrating that Claimants have caused any delay.

127. Respondent claims that over 100 affected lots are within the boundaries of the PNMB and that in no more than 60 cases it has commenced the expropriation process.[150] It is unclear what Respondent means by "commenced" in this context. Respondent has not provided any explanation for why 40 lots are not being expropriated. Further, Respondent has not provided any details as to how far along in the expropriation process the other lots are. Respondent has also not specified what percentage of the 60 lots allegedly moving through the expropriation process are owned by Costa Rican nationals.

128. Respondent explains the various steps in its expropriation process and suggests that its "legal regime governing the expropriation of land in the public interest is fully consistent with the requirements of Article 10.7 of Chapter 10 of THE CAFTA at issue in this case."[151] It also claims that its expropriation process is rational and predictable because it "has undertaken to expropriate properties located within the PNMB based on a priority basis."[152] Respondent explains that "[s]ince 2003 [it] has endeavored to carry out Article 2 of the [Park Law] by formally expropriating the 75-meter strip of land inside the Park." It then points to a 2012 joint MINAE and SINAC proposal for the expropriation of properties to demonstrate this point.[153] Respondent believes that taking nine years to devise a proposal for the orderly conduct of the mass expropriations that they say were intended by the 1995 PNMB Law (passed 17 years before the proposal) meets its international obligations.

129. Further, this rationalization of the priorities for expropriation was not a public document. Respondent's disclosure of this measure took place on 16 July 2014, with the delivery of Respondent's Counter-Memorial. In any event, if one reviews the priority sequence identified in this proposal and summarized by Respondent[154] against the expropriation of Claimants' lots, it is clear that this alleged plan was not consistently applied.

130. Respondent identifies the following priority areas: South Playa Grande, North Playa Grande, Playa Ventanas, Isla Verde and, finally, Cerro el Morro and Cerro Ventanas.[155]

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149 Respondent's Counter-Memorial, paras. 62, 95.

150 Respondent's Counter-Memorial, para. 63.

151 Respondent's Counter-Memorial, paras. 65 to 74, quotation from para. 74.

152 Respondent's Counter-Memorial, para. 76.

153 Respondent's Counter-Memorial, para. 78, citing Exhibit R-10.

154 Respondent's Counter-Memorial, para. 79.

155 Respondent's Counter-Memorial, para. 79.

Of Claimants' lots, 9 are in South Playa Grande, 4 are in North Playa Grande and 13 are in Playa Ventanas. Of the 9 lots in South Playa Grande, Respondent has commenced expropriation proceedings on 8 of those lots.[156] Of the 4 lots in North Playa Grande, Respondent has commenced expropriation proceedings on only one of those lots. Of the 13 lots in Playa Ventanas, Respondent has commenced expropriation proceedings on 9 of those lots. If Respondent had been applying its self-declared priority system, one would have expected it to have expropriated all of Claimants' properties (and all other properties) in South Playa Grande first, before moving on to expropriate the properties in North Playa Grande and, only once those lots had been expropriated, completing the process in Playa Ventanas.

131. As to how long Claimants can expect to wait for their remaining properties to be noticed for expropriation is anybody's guess. Respondent assures the Tribunal that "it is a priority for the government to begin the expropriation procedure for properties in these areas but, for reasons discussed below, it has not yet commenced that process with respect to these properties."[157] Respondent then goes on to explain how, in 2008, the *Contraloría* informed MINAE that it would review its management of maritime areas, including the PNMB and the implementation of Costa Rica's expropriation procedures.[158]

132. The *Contraloría* report[159] was eventually issued in February 2010. Respondent admits that the *Contraloría* report was issued without a formalized priority system. Respondent further admits that SINAC did not have an expropriation manual and that they were instructed to write one by the *Contraloría.*[160] The *Contraloría's* report was conducted in 2009, and it covered active expropriation files for the year 2008. The *Contraloría* was of the opinion that:

> **2.1.3 Lack of a strategy to expropriate the lands that comprise the PNMB**
>
> The study was able to determine that the MINAET had 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. Despite all that, according to indications from the SINAC, said properties were included in the proceeding in question, abiding by technical criteria that in the past were verbally given and were later reflected in Official Letter no. SINAC-SE-230 dated February 11, 2009.

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156 It should be noted that it is SPG3, the largest lot owned by one of the Claimants in these proceedings, that has yet to be expropriated.

157 Respondent's Counter-Memorial, para. 83.

158 Respondent's Counter-Memorial, para. 86.

159 Exhibit C-1zk.

160 Respondent's Counter-Memorial, para. 88.

Respondent is being disingenuous in referring to this state of affairs as simply not having "finalized" a plan; there was *no* plan for the expropriations.

133. Respondent states that SINAC officials in receipt of the report decided to extend the unilateral suspension they had imposed upon themselves, in the expectation that the Contraloría's Office would have directed them to do it anyway. Accordingly, any lots in receipt of a Decree of Public Interest would not proceed any further, and lots without such a decree would not move at all. Respondent's witness says that this suspension, already in its 6th year, will continue until they have "had the opportunity to comply with all of the Contraloría's recommendations".[161] Respondent has not provided any evidence of this measure and has not explained on what authority the measure was adopted.vu

134. If one reviews the list of conclusions set out in the *Controlaria*'s report and summarized by Respondent, two of the six recommendations would have a manifestly negative impact on valuation of land within the expanded PNMB.

(a) The first of these relates to "a possible defect in the legal titles held by certain owners within the Park's boundaries." [162] Respondent has not raised this issue with respect to any of Claimants' lots, but Claimants understand that Respondent has undertaken an exercise to review the titles registered for all land within the maritime zone, whenever it was first registered as privately held. Respondent is seeking to retroactively annul the titles that were registered on the basis of a new legal theory that it plans to apply to a registration process in effect some 40 years ago. Claimants understand the purpose of this exercise to allow Respondent to avoid paying any compensation for any lots whose registration could be annulled using its new legal theory.[163]

(b) The second recommendation that relates to valuation concerns the administrative appraisals. The *Controlaría*'s stated concern was that "valuations of the land made by administrative appraisers may be higher than actual fair market value of the land in the market." [164] Elsewhere in its Counter-Memorial, Respondent acknowledges that in many cases the result of the judicial process has been a higher valuation for lots than had been established in the administrative appraisal.[165]

(c) Respondent also praises its administrative appraisal process for providing Claimants with the assurance of knowing that – at least the courts should not be able to award any less. It would appear that the *Controlaría* believes this floor value is too high. These machinations are most likely a symptom of the discomfort felt by Respondent became when the last administrative appraisals

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161 Respondent's Counter-Memorial, paras. 65-74, quotation from para. 89.

162 Respondent's Counter-Memorial, para. 88.

163 Ruiz ER1, pp. 17-18.

164 Respondent's Counter-Memorial, para. 88.

165 Respondent's Counter-Memorial, Annex B.

received for lots in Playa Ventanas returned with values in excess of $370 per square meter.

135. Whether it was "reasonable" for Respondent to maintain its internal moratorium without waiting to be asked by the *Contraloría* is not relevant. That is an issue to be determined within the context of a discussion about public administration Costa Rica. The relevant question, for which Respondent has provided no answer, is whether its conduct is reasonable with regard to its obligation to expropriate promptly, and to provide compensation without delay.

136. As noted above, Respondent's submission was the first notification it provided to Claimants that the PNMB expropriation process had even been suspended. The alleged decision to suspend the process was taken at least six years ago. An advanced copy of the report was provided to MINAE and SINAC in January 2010. It is now 2014 and Respondent has yet to resume the expropriation process. It has not even indicated when it expects to finish "implementation" of the *Contraloría*'s report. It appears nonetheless that, whenever that date comes, Claimants could have looked forward to an "improved" expropriation process, which would most assuredly result in even lower valuations of their lots.

Status of Claimants' Lots

137. With respect to all of the lots which have received declarations of public interest, but no more, Claimants say that Respondent has failed to provide prompt or adequate payment. In its Counter-Memorial, Respondent attempts to shift the responsibility for this delay on to Claimants. This cannot be countenanced.

138. It is important to note that Claimant is not generally complaining about the timing of the internal deposit of the administrative appraisal, but is rather complaining about how long the process takes to be paid the funds once they have been requested. In certain cases, Claimants have not immediately requested the administrative appraisals because they wanted to preserve the right to object to the expropriations themselves.

139. Respondent argues that it has made the amount of the administrative appraisal available and waiting for Claimants to collect and that this constitutes "preliminary" compensation to the property owner while the process is being concluded. [166] The assertion that in all cases the administrative appraisals are available and waiting for Claimants to collect is inaccurate. In at least one instance, the court has acknowledged that it is unclear whether the administrative appraisal was ever deposited. [167] In most cases, Respondent relies on court judgments initiating the judicial phase of the expropriations as evidence that the administrative appraisals were deposited years ago.[168]

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166 Respondent's Counter-Memorial, paras. 100,109.

167 Exhibit C-24i.

168 Respondent's Counter-Memorial, Annex A, footnote 5.

140. There are two interesting points that arise from Respondent's suggestion that the administrative appraisals were all paid years ago and were simply awaiting Claimants' withdrawal.

141. First, for the lots in Playa Ventanas where Respondent unilaterally suspended the expropriation process before proceeding to the judicial phase, those administrative appraisal amounts were never deposited and were not available to Claimants. Respondent says that had Claimant accepted the amount of the administrative appraisals, rather than oppose them, those funds would have been paid out. Of course, had the administrative appraisals represented fair market value, not only would Claimants have not opposed them, they would not have had any need to commence this arbitration.

142. Second, the timing of the internal deposit of the administrative appraisals for the B lots is puzzling. Respondent says that it deposited the amount of the administrative appraisal for the B lots a full four months before the appraiser inspected the properties and prepared the administrative appraisals. The administrative appraisals were determined on 22 September 2006, yet the funds were deposited four months prior on 11 May 2006.[169] This sequence of events is astonishing to say the least. If the administrative appraisals were prepared by independent appraisers who determined fair market value, how could Respondent know what the amount of these appraisals would be before they were conducted? A review of these particular administrative appraisals is also instructive. This batch of administrative appraisals was the lowest received by Claimants. The appraiser also stated that these properties had always been in the PNMB, which we know is the position that the government was taking after it commenced these expropriation proceedings, but not before.[170]

143. Respondent argues that payment has been made for all four lots, A40, SPG2, B3 and B8, for which final decisions have been issued.[171] In fact, to date, the administrative appraisals have only been paid to Claimants for lots A40, SPG2 and SPG1[172] and the principal payments (the difference between the administrative appraisals and the judgment) have only been paid to Claimants for lots A40, SPG2 and B3.[173]

144. With respect to payment for the lots where a final decision has been made on the amount of compensation, Respondent suggests that it has made payments for the entire principal amounts due for each property. [174]

145. When Respondent says "payment" they are in fact referring to the deposit of the principal to the court account, not payment to Claimants. Respondent fails to mention that its

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169 Respondent's Counter-Memorial, Annex A.

170 Of course, exercising authority granted under municipal law for an improper purpose, much less in order to disadvantage a foreign investor, constitutes an abuse of rights contrary to the customary international law minimum standard of treatment.

171 Respondent's Counter-Memorial, para 98.

172 Reddy WS2, para. 52; Exhibits C-16i, C-20i and C-21i. Also see Appendix 2 to this Reply Memorial, which sets out the current status of the lots.

173 Reddy WS2, para. 53, 55; Berkowitz WS2, paras. 54-55, 58, 59; Exhibits C-16i, C-21i, C-24i.

174 Respondent's Counter-Memorial, para 109.

internal deposit of funds is only the first step. A lengthy process is required after the funds are deposited, before Claimants are able to withdraw those funds and receive their payment.

146. If one reviews the process undertaken to retrieve the funds deposited for Lot B3, it is clear that the depositing of the money by Respondent does not result in Claimants receiving payment promptly and without delay:

(a) On February 7, 2013 final judgment was made.[175] On 11 September 2013, the difference between the administrative appraisal and the judgment was deposited into the court account- this is what Respondent refers to as "payment". [176]

(b) Nine months later, on 12 June 2014, the court ordered that the money be withdrawn. [177]

(c) Immediately following that court order, on 16 June 2014 the attorney for Mr. Berkowitz called the court and requested that the money be paid out. On 18 June 2014, a representative attended the court to speak with Judge Oriana Vila Hilaron, who informed him that it would take 24 hours. In fact, the money was not paid out in 24 hours; the attorney had to follow up at the court more than 20 times before the funds were actually made available. [178]

(d) On 13 August 2014, just shy of one year after the funds were deposited, and approximately one and a half years after the date of judgment, Mr. Berkowitz was finally able to withdraw the difference between the administrative appraisal and the judgment.[179] To date the amount of the administrative appraisal and interest remain outstanding.[180]

147. Similarly, for Lot A40, Claimants faced similar challenges in retrieving the funds, after Respondent deposited the difference between the administrative appraisal and the judgment. It took approximately one year after the funds were deposited to retrieve the full amount of the deposit. [181]

148. As to payment of interest and fees, Respondent assures the Tribunal that any delay in the payment of interest is due solely to Claimants failure to request such payment, and cannot be attributed to Respondent at all.[182] Once again, this assertion fails to provide a complete picture; Claimants have faced slow and frustrating processes with respect to payments of interest. The request for interest has been requested by Claimants for lots

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175 Exhibit C-24g.

176 Exhibit R-41.

177 Exhibit C-24i-1.

178 Berkowitz WS2, paras. 54-55.

179 Note that this was paid after the filing Respodent's Counter-Memorial.

180 *Ibid.*

181 Reddy WS2, para. 52; Exhibit C-16i.

182 Respondent's Counter-Memorial, para 109.

A40, SPG2, B3 and B8.[183] There has been no payment of interest on any of these properties.[184]

149. In addition to lengthy delays and frustrating processes, interest is paid only to the date of judgment; Claimants do not receive any compensation for the lengthy time period between the date of the judgment and that date at which interest payments are finally received.[185] Also, Respondent has appealed the decision on interest and costs on lot B8, further delaying the payment of these funds owed to Claimants.[186]

F. The Real Estate Market on the Gold Coast was Hot into 2007

150. Contrary to what Respondent and its valuation expert suggest in the Counter-Memorial, the real estate market in Playa Grande was a rising market. It also had no direct link to the U.S. housing market. Claimants' beachfront lots were extremely valuable and Respondent knew it.

151. In *El Pais*, 9 November 2009, Jorge Rodríguez, the then MINAE Minister suggested that the 75 meter strip should be converted into a wildlife refuge in order to avoid costly expropriations of beachfront property:

> If we could convert a portion of the land that is now a national park into a wildlife refuge, we could avoid paying between $300 and $500 million are in the hands of private owners.[187]

152. In 2008, when Respondent amended the 1995 Park Law by means of juridical interpretation, it caused approximately five kilometers of mostly privately-owned beachfront property to be considered as part of the PNMB. The Government's contemporaneous assessment of how its treasury would be encumbered by this change was realistic. This calculation reflects an approximate valuation of $760 to $1280 per square meter for the properties involved.[188] This amount was consistent with the list prices for beachfront properties at the time and actual sales for similar properties.

153. Respondent's expert also tried to support Respondent's position in this arbitration that the value of Claimants' properties in 2008 should be some low value allegedly because the real estate market in Costa Rica for secondary beachfront residences should be judged by the Case-Shiller Index, which reports trends for the U.S. housing market. FTI explains that real estate markets are local in nature and lays bare this unfounded and illogical premise put forward by Mr. Kaczmarek.[189]

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183 Exhibits B-16j, C-21j, C-24j, C-28j.

184 Reddy WS2, para. 54; Berkowitz WS2, para. 55, 60.

185 Reddy WS2, para. 48.

186 Berkowitz WS2, para. 59; Exhibit C-28j.

187 Exhibit C-112d

188 5,200 meters of beachfront x 75 m = 390,000 square meters.

189 FTI ER2, Section 2.

154. The Case Shiller Home Price Index is an extremely broad measure encompassing already built houses located primarily on non-beachfront properties in a different country that is thousands of miles away from Costa Rica. By contrast, the local Guanacaste market was comparatively very small, based on lot sales instead of built houses, and in this case consisted exclusively of only rare privately titled beachfront properties. This market was designated by MSNBC to be the hottest real estate market in the entire world in 2007. Accordingly, the Case Shiller index cannot possibly accurately be extrapolated to the explosive demand and price increases in this fast-growing small market.

155. In addition, the buyers for Claimants' properties were not the typical buyers described in Mr. Kaczmarek's report. At least half of the actual buyers of these lots were wealthy individuals who did not require financing in order to make their purchases.[190] This is not to say that the market did not cool off for a period, but the connection that Respondent would like to make - that the real estate market in Playa Grande is exactly correlated to the Case-Shiller Index - is inappropriate and not supported by the evidence.

IV. REPLY MEMORIAL – ISSUES OF LAW AND APPLICATION TO FACTS

156. In order to resolve the parties' dispute two significant, methodological distinctions must be made. First, although the plural term, "Claimants" is often used, Claimants have also taken pains to remind Respondent that they are not a monolithic group. Rather, they are individuals who only find themselves in a group because they have all suffered damages from being trapped in Respondent's interminable expropriation "process," and because they share the same counsel.[191]

157. This distinction is significant because Respondent omits to make it, both with respect to issues of merits and jurisdiction, including what each may or ought to have known at various times. In omitting to make the distinction, by treat Claimants as a monolith instead, Respondent fails to make its case with respect to any given Claimant.

158. The second distinction is closely related. In its argumentation, Respondent has not addressed itself to the nature of Claimants' investments and its interference with them. To a certain extent, Respondent's omission is the natural result of an inopportunely drafted THE CAFTA provision. Article 10.28 provides that "investment" includes: "other tangible or intangible, moveable or immovable property, and related property rights, such as leases, mortgages, liens and pledges." With this definition, the THE CAFTA Parties have confused property, as a legal right, with the colloquial practice of using the term, "property" to describe the object to which such right relates.

159. Used properly, the term "property" connotes a legal relationship, as between the holder of a "property right" and its object (typically land or a thing), held in relation to another person, or as against all other persons. As such, it is not possible for property to be "moveable or immovable." Rather, one holds property in moveable or immovable objects (typically things and land, respectively). Moreover, properly construed, property can only

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[190] Reddy WS2, para. 49; Berkowitz WS2, para. 48.

[191] In this regard, Claimants recall that they only agreed to have their claims treated together for the sake of convenience of the parties and the Tribunal.

be held in something tangible, and thus property is always, itself, intangible.[192] Leases, mortgages and pledges are a class of contract right, which can generate a corresponding property right (such as a bailment, for example, in a rental car, or a leasehold interest in land). In this regard, the Parties' reference to "Intellectual property rights," in subsection (f), is a proper illustration of the concept. If the provision had read "intellectual property," it would have suffered from the same looseness in terminology as subsection (h).

160. This distinction matters because, in order to properly conceive of whether or how a measure impacts upon the "investment of an investor of another party," one must first properly conceive of that investment. A host State does not "expropriate" an investor's land, *per se*. Rather, it engages in conduct that results in substantial interference with the investor's ability to use and enjoy it land. Such "ability" is facilitated, and constrained by the type of property [right] held in that land. Substantial interference includes anything from an executive decree formerly revoking the investor's "title" to a putative tax or regulatory measure that renders investor's municipal rights in [i.e. held in relation to] it investment [here: land].

A. THE CAFTA Article 10.7

161. Expropriation of what? Investment means a bundle of rights enjoyed by an investor in relation to land… including property rights, and permits too … all connected to use (and legitimate expectations thereof)

162. Respondent admits that it is in the process of expropriating all of Claimants' investments, and it insists that "there is no question that Costa Rica will compensate Claimants for the [rights to] property that it is expropriating."[193] Respondent also admits:

> 163. Article 10.7(1) of THE CAFTA requires that an expropriation (i) be for a public purpose; (ii) be conducted in a non-discriminatory manner; (iii) on payment of prompt, adequate, and effective compensation; and (iv) in accordance with due process of law and Article 10.5 (minimum standard of treatment). **It further requires** in Article 10.7(2) that compensation (i) be paid without delay; (ii) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (iii) not reflect any change in value occurring because the intended expropriation had become known earlier; and (iv) be fully realizable and freely transferable.
>
> [**Emphasis added**]

163. With respect to expropriations that eventually progressed to the judicial phase, Respondent submits that there is "no evidence whatsoever that Costa Rica has acted in a discriminatory manner in executing its expropriation procedures." This statement is inaccurate. When Respondent first began expropriations, it targeted two foreigners: the

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[192] Todd Weiler, The Interpretation of International Investment Law (Netherlands: Martinus Nijhoff, 2013), at 106-109, citing: Bruce Welling, Property in Things: In the Common Law System (Australia: Scribblers, 1996) at 30-34 & 40-44.

[193] Respondent's Counter-Memorial, para 161.

German investor, Marion Unglaube, and the U.S. investor, Brett Berkowitz. The one thing that these investors had in common, and different from any other land holder, is that they communicated directly with the Office of the Environment Minister. Having both made themselves known to MINAE, they were the first ones to be targeted.

164. The discrimination demonstrated against Mr. Berkowitz was particularly egregious in that the only reason he became known to the Minister is that he insisted upon receiving personal confirmation from Carlos Manuel Rodríguez that he ***could*** proceed without fear of seeing his investments expropriated soon thereafter.

165. Respondent states that it "has either paid prompt, adequate and effective compensation or it is in the process of doing so."[194] This is a host State that swears it was planning to expropriate the area where Claimants' lots are located since 1991 and that it has been resolute in such intention ever since. Although the evidence makes a mockery of that claim, if it were true, or at least if Respondent honestly believed as much, how on earth could it actually state that it is still in the process of providing "***prompt***, adequate and effective" compensation for its takings?

166. Respondent's answer to Claimants' complaint that compensation has not been paid to any of them "without delay" is equally outrageous. First, Respondent admits[195] that its obligation to provide "prompt adequate and effective compensation" for expropriation, and its obligation to provide such compensation "without delay" are independent from each other. In other words, both must be satisfied. Whereas Respondent's answer to the "promptness" obligation is to make brave claims about the quality of its expropriation process, its answer to the "without delay" obligation is to blame Claimants for not taking the low (and, in some cases, obscenely low) amounts offered through administrative appraisal.

167. In other words, Respondent offers up its system as proof that it meets the promptness test (presumably in every case), but - if an investor seeks to vindicate one's rights by utilizing the protections allegedly offered by the system, it has surrendered it right to demand that compensation be paid without delay. Of course, neither answer is acceptable. Respondent cannot make reference to the alleged quality of its expropriation process, generally, to answer specific questions as to whether it did so promptly in each case before the Tribunal. Similarly, it cannot merely claim that the process would occasion no delay, as long as the expropriated party didn't exercise its rights. If this is the only argument Respondent can muster, it could at least apply it to each Claimant, rather than to just some Claimants.[196]

168. With respect to the issue of legitimate / reasonable expectations, Respondent states: "Claimants did not have any promise from the Costa Rican government that they would be allowed to develop their properties without being subject to expropriation proceedings or to future environmental and land use regulations." On this point the parties appear to

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194 Respondent's Counter-Memorial, Heading c, page 81.

195 Respondent's Counter-Memorial, see excerpt above, as well as para 171.

196 Respondent's Counter-Memorial, para 172.

be in partial agreement. In the case of Mr. Berkowitz and, by extension, those to whom he subsequently transferred title (i.e. Mr. Gremillion and the other Berkowitz Claimants), there was an explicit promise, from Carlos Manuel Rodríguez, that their land would not be expropriated.

169. Mr. Piedra's feeble attempt to contradict Mr. Berkowitz's testimony is belied by the contemporaneous, documentary evidence. The original, color version of the map that was attached to Rodríguez's letter to the President of the Congressional Committee on Environment leaves no more room for subterfuge.

170. The promise upon which the remaining Claimants relied was contained in Article 2 of the 1995 Park Law and in the Law on Expropriation. It was a promise that, should the Government choose to expropriate their investments, they would receive the "prompt, adequate and effective compensation," as mentioned in THE CAFTA Article 10.7(1), and that such compensation would, in any event, be paid "without delay," as mentioned in Article 10.7(2).

171. Similarly, and contrary to Respondent's allegation, all Claimants expected to be subjected to environmental and land use regulations. In fact, they were counting on it. They had no desire to build another Tamarindo. They looked forward to having good regulations in place, because they would both provide legal certainty and protect their investments.[197] Claimants had good reason to hold these expectations, given how certain of them had gone to the trouble of coaxing a neutral and independent expert, Dr. Rusenko, to fly down twice, to assist them – as well as PNMB officials and other interested parties – in developing such regulations. They also had good reason to hold such expectations because, between 2008 and 2010, Respondent (i.e. the Office of the President and MINAE) was working with them to put legislation in place to ensure just such a result.

172. Respondent cannot recalibrate Claimants' legitimate expectations by fiat. If it has any more evidence, other than Mr. Piedra's personal recollection, to support its allegations about the kind of expectations Claimants actually held, Respondent should provide it to the Tribunal.

173. Respondent's derisive argumentation continues with its boasts about what will happen to Claimants' lots "in the administrative stage" just "[as] soon as the government completes this improvement process."[198] The ongoing improvement process is Respondent's description of the past four years, since the Comptroller General issued its 2010 report, in which the most notable observations were: (1) that the government has been far too generous with respect to its administrative appraisals;[199] (2) when valuing lots, officials and judges should rely more heavily on post facto observations (such as the contrived

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[197] Contrary to what Respondent, and its witness, Mr. Piedra, appear to believe, wealthy and famous individuals, such as Mr. Berkowitz's clientele, would have had no interest in living cheek by jowl in a 164 unit condominium complex. Tight environmental and land use restrictions would have guaranteed a higher degree of exclusivity for the area.

[198] Respondent's Counter-Memorial, para 181.

[199] Exhibit C-1zk.

designation given to the area concerning water resources or the postulation that the highest and best use of each lot would be as conservation land [as the are now located inside a park, after all]);[200] and (3) that no compensation at all would be owing if a number of the land holders' titles could be retroactively annulled.[201]

174. Of course, Respondent has not even bothered to explain anything more about its alleged "improvement process" apart from the fact that one apparently exists, and that it is supposedly connected to the Comptroller General's report. It nevertheless concludes: "Hence, there is no question that Claimants will receive prompt, adequate, and effective compensation once properties in the administrative stage complete their progress through the judicial stage of the expropriation procedure." Respondent just cannot say exactly when.

175. Respondent also attempts to style its continuing delay, with respect to lots that have not yet received an expropriation decree, as "due process"! It says it would be "non-sensical"[202] for Claimants to argue that declaring public interest in each lot, imposing an absolute prohibition on development, and then walking away for an unspecified number of years, constitutes indirect expropriation. While Claimants salute Respondent for having the temerity to convert its failure to provide compensation "without delay" into alleged success in according due process, they submit that the preferred approach would be to consider such delay to constitute a breach of Article 10.7(2).

176. Respondent's attempt to shelter under the environmental protection provisions of Annex 10-C are premised on the - now thoroughly discredited - claim that: (1) "Claimants' properties… have always been within the Park's boundaries" and (2) Respondent's permanent moratorium on the permits required for development "was an action taken by Costa Rica to protect the nesting grounds of the leatherback turtle." *A contrario*, if Claimants' lots were not "always in the park," then Respondent's moratorium could not be conceived as protecting the nesting grounds, at least in so far as their lots were concerned. Since it is beyond doubt that Claimants' lots were not "always" considered to be "in the park," Respondent's argument fails.

177. In any event, the evidence, to be found in statements by Claimants and Dr. Rusenko, in cartographic and photographic form, and even in video clips featuring two different park officials, lays bare the bizarre notion that a giant Leatherback Turtle could somehow manage to surmount a wide berm, and dig its nest in the underbrush, with a high canopy of trees above. After all, it was Respondent that - after reflecting upon the astronomical costs of expropriating this land **and** the manifest lack of necessity for it, pursued legislation to ensure that the area would **not** be considered part of the PNMB, in the years 2003, 2008, 2009 and 2010.

178. With respect to Annex 10-C, it would appear that Respondent is proposing an interpretation that is neither supported on the face of the treaty's text, nor reflective of the

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200 Exhibit C-1zk.

201 Exhibit C-1zk.

202 Respondent's Counter-Memorial, para 184.

treaty's object and purpose in regard to the protection and promotion of foreign investment. Respondent's position, implicit in its argumentation, is that Article 4(b) should essentially be construed as akin to a self-judging exemption. From Respondent's perspective, just so long as the measure is related to an environmentalist goal, and applied towards that end, the host State should not be held to account for the harm that it causes.[203] The relevant treaty text provides:

> 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, nondiscriminatory 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.

179. It should be apparent that sub-paragraph (b) is not the general exemption clause Respondent would like it to be. Rather, the two sub-paragraphs combine to provide the interpreter with general information about what usually would, or would not, constitute an indirect investment. They are neither sequential nor ranked in order of importance. They just provide guidance as to what to expect in normal circumstances. That is why sub-paragraph (b) commences with the phrase "Except in rare circumstances."[204]

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[203] Respondent's Counter-Memorial, para 187-188.

[204] In this regard, it would be useful to recall that, in gauging the relative rarity of measures that constitute indirect expropriation, the appropriate sample is not limited to examples from other dispute settlement cases, but rather to the panoply of measures that are applied in the normal course of business and regulation worldwide, without any need for international dispute settlement. While trite, Claimants nevertheless note that international dispute settlement, logically, is a rare event in the regular course of life for most investors and regulators. Hence, it

180. The relative impact of the measure(s) at issue is: a total loss. The extent to which Respondent's conduct interferes with distinct, reasonable investment-backed expectations is similarly simple. The character of Respondent's conduct has been alternately maddening and abominable. Although the measures were ostensibly adopted and applied for the environmental objective of saving the Leatherback turtle from extinction, the truth is that there is no evidence – save for the odd, self-serving, and logically unsustainable, protestations of a tiny group of professionals who personally benefit from the PNMB – that Respondent's measures have done anything to help the Leatherback turtle. Moreover, as described above, Respondent has utterly failed to rebut the fact of Claimants' manifestly reasonable reliance on the promises of Costa Rican law and Costa Rica's politicians.

181. Moreover, and in the alternative, should the Tribunal find that the combination of Respondent's (1) having subjected all remaining lots to declarations of public interest seven years ago; and (2) having placed a permanent moratorium on permitting in 2010, is negated by the application of Article 4(b) of Annex 10-C, claimants observe that one of Respondent's two newly disclosed delay measures (i.e. its never-ending "improvement" of the expropriation process, which has now been effective for over 4 years) cannot possibly be justified on an environmental basis. Truth be told, Respondent's new delay measure is not dissimilar from the same dissembling conduct one might expect of the typical recalcitrant debtor. Ostensibly, it has wasted four more years of Claimants' time in order to "improve" its expropriation process, which is an administrative exercise that has nothing to do with saving turtles.

182. Finally, Claimants take note of Respondent's request, that if it finds any of Claimants' lots to have been indirectly expropriated, in addition to condemning Respondent to paying compensation, the Tribunal should also instruct Claimants to surrender title to those same lots, "just as it would have done had the property been expropriated *de jure*." Claimants have no objection, in principle to this request, subject to one *caveat*. A group of lots have had (or will have) beach-facing portions taken from them. One of them, SPG3, has yet to be made the subject of an expropriation decree, even though it is supposed to be in the highest priority location on the beach (as per Respondent's newly disclosed prioritization measure). Whether title to the remnant portions of lots (which are found to have been indirectly expropriated) are also to be surrendered may depend upon the approach the Tribunal adopts in calculating damages.

B. THE CAFTA Article 10.5

183. It is ironic that Respondent has accused Claimants of "trying to paint with a broad brush"[205] in respect of their claims under Article 10.5. After all, Respondent has not even bothered to answer the claims of each Claimant, in light of different circumstances of timing, event and/or experience. Nevertheless, in answering like with perceived like, Respondent bases the entirety of its Article 10.5 on the following premise:

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should not surprise that what may be "rare" in the broader scope of things will not necessarily be rare in the place where disputes are resolved.

[205] Respondent's Counter-Memorial, para. 193.

> Here again, Claimants try to paint with a broad brush, pointing to legislative and judicial actions of the Costa Rican government and suggesting that Costa Rica has acted unfairly and inequitably toward all of their investments. But when the allegations are examined more closely and carefully, the weaknesses in Claimants' arguments come into focus. Their own role in making risky investments is exposed, for example, as is the fact that Claimants awkwardly predicate a number of their complaints on the fact that Costa Rica's institutions have acted exactly in line with the government's stated intentions-even though Claimants were betting that they would not.
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> This is not unfair or inequitable treatment. This is the operation of a state whose institutions act with abundant regard for procedure, due process, and individual rights, and who is engaging with its subjects (like Claimants) simultaneously on many issues through many institutions.[206]

184. As with Article 10.7, with Article 10.5 Respondent has again lead on the manifestly flawed premise that "Costa Rica's institutional have acted exactly in line with the governments stated intentions." First, one must ask: which government would that be? Respondent's position appears to have swung violently depending upon the person placed in charge of MINAE [with the exception of Carlos Manuel Rodríguez, who apparently adopted one position in public (in favour of respecting Claimants' property rights) and another in secret (collaborating with Messer's. Boza and Jurado to jeopardize them)]. Similarly, one could ask: which Constitutional Court would that be, given how it appeared to wax and wane between divesting and re-investing the Executive with discretion as to how and when [which, in Costa Rica, really seems to mean "if ever"] to expropriate.

185. With respect to Respondent's alleged "abundant regard for procedure, due process, and individual rights," Claimants remind Respondent its waxing and waning, and its interminable delays, which constitute a fundamental disrespect for the rights of each Claimant, cannot be alchemized into "due process" simply by repeating one's hope often enough for it to stick.

186. Respondent's recitation of the applicable law includes some fundamental errors. For example, it confuses the concept of a "minimum" standard of treatment with a minimal standard of treatment.[207] It is not the treatment that is evaluated as surpassing or failing to reach some immutable minimum standard, but rather a description of the absolute - as opposed to comparative - nature of the standard.

187. Next, Respondent bizarrely claims that the customary international law minimum standard of treatment of aliens was "set out by the tribunal in *Neer v Mexico*."[208] The *Neer* claim was decided by on the basis of a 2-1 majority of one of the chambers of the Mexican-U.S. Claims Commission, not a tribunal. The *Neer* claim did not involve interpretation of the fair and equitable treatment standard because that standard did not come into existence, within the context of investment protection treaties until after the

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[206] Respondent's Counter-Memorial, paras. 93-94.

[207] Respondent's Counter-Memorial, para 196.

[208] Respondent's Counter-Memorial, para 197.

Second World War. It would have been more accurate had Respondent claimed that the rules conceived to decide the *Neer* case resembled the customary international law minimum standard of protection and security, that would be of no avail to Respondent because there are no allegations that Costa Rica has failed to arrest and convict assailants who would have murdered their respective spouses kitty-corner to a police station. Those, after all, are the facts of the *Neer* case.[209]

188. If Respondent merely intends to refer to the majority decision of the chamber that considered Mrs. Neer's sad tale as a means of establishing the need for a very high level of deference to be shown to the host State, one need only ask: why the *Neer* case? Why not use any number of 90-year old cases for that purpose? In this regard, Claimants refer to an extended quotation from the award rendered in *Merrill & Ring*,[210] upon which Respondent also relies:

> 201 . The approach of the *Neer Commission* and of other tribunals which dealt with due process may best be described as the first track of the evolution of the so-called minimum standard of treatment. In fact, as international law matured and began to focus on the rights of individuals, the minimum standard became a part of the international law of human rights, applicable to aliens and nationals alike.[129] This evolution led to major international conventions on human rights as well as to the development of rules of customary law in this field. A second track, which shall be discussed below, is also discernable in so far it concerns business, trade and investment.
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> 202 . The early work of the International Law Commission on the principles of international law governing state responsibility was well aware of the evolution that characterized customary law in this matter, [130] gradually evidenced by the increasing obsolescence of the traditional (first track) standard of minimum treatment in the light of different and more recent standards. [131] Similarly, the Asian African Legal Consultative Committee concluded in 1961 that the "minimum standard of treatment" had become outmoded and that, in the context of human rights, what now mattered was "fair treatment" to nationals and foreigners alike. [132]
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> 203 . The work of highly qualified writers and associated codification efforts also patently reflected the evolution that was taking place. Although issues concerning the minimum standard of treatment (particularly regarding questions of due process) were prominent in the first decades of last century, particularly in Borchard, [133] the early approach was subject to criticism in the work of the International Law Commission on State Responsibility in the late 1950's and early 1960's. Thereafter it has been scarcely mentioned in the principal works concerning the codification of the law of state responsibility, particularly the draft articles prepared by Baxter and Sohn [134] and, more recently, the Commentary on the Articles on State Responsibility approved by the United Nations General Assembly on the basis of the draft of the International Law Commission. [135]

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[209] See Todd Weiler, The Interpretation of International Investment Law (Netherlands: Martinus Nijhoff, 2013) at pp. 321-332 & 241-250.

[210] *Merrill & Ring Forestry LP v Canada*, Award, NAFTA/UNCITRAL Tribunal, 31 March 2010,

204 . This development was indicative of the fact that state practice was increasingly seen as being inconsistent with the first track concept of an "international minimum standard". State practice was even less supportive of the standard referred to in the *Neer* case. And in the absence of a widespread and consistent state practice in support of a rule of customary international law there is no *opinio juris* either. No general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process.

205 . As foreshadowed above, just as there was a first track concerning the evolution of the minimum standard of treatment of aliens in the limited context indicated, there was also a second track that concerned specifically the treatment of aliens in relation to business, trade and investments. This other standard, which was much more liberal, is evidenced by the tendency of states to support the claims of their citizens in the ambit of diplomatic protection with an open mind, and without requiring a showing of "outrageous" treatment before doing so. Parallel to the development of this second track, diplomatic protection gradually gave way to specialized regimes for the protection of foreign investments and other matters. [136]

206 . The digest of cases concerning state responsibility in respect of acts of legislative, administrative and other state organs, published by the United Nations Secretariat in 1964 unequivocally illustrates a new liberal approach. [137] Indeed, a host of successful claims were made without conceptual restrictions dealing with interference with and annulment of private rights, [138] the breach of concession contracts by the state, [139] acquired rights under the law in force at the time of the investment, [140] the entitlement to money wrongfully withheld, [141] the entitlement to the value of money orders, [142] and the refusal to grant an export permit. [143] In many instances, it was the commissions, courts or tribunals that had to make a determination on the applicable legal principles. This is another good reason why judicial decisions, as a subsidiary means for the determination of the rules of law, are not lightly to be dismissed.

207 . The trend towards liberalization of the standard applicable to the treatment of business, trade and investments continued unabated over several decades and has yet not stopped. The examination of claims brought by many governments for settlement by agreement is also illustrative of such open-minded standard, including all kinds of property, rights and interests. [144] The Iran-United States Claims Tribunal has also significantly contributed to this trend. [145]

[Footnotes reproduced] [211]

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[211] Footnotes as cited in case:

129 International Law Association, Final Report of the International Committee on Diplomatic Protection of Persons and Property, Toronto, 2006.

130 Yearbook of the International Law Commission, 1961 II, 46; F. V. Garcia-Amador: The Changing Law of International Claims, Vol. II, 1984, 784.

131 Garcia-Amador, see supra note 130, at 750.

132 Report of the Fourth Session of the Asian African Legal Consultative Committee, Yearbook of the ILC 1961 II, 78, at 82.

189. As a matter of fact, it was odd that Respondent has relied upon the award in *Merrill & Ring* for the proposition that it "interpreted the minimum standard to exclude the protection of an investor's legitimate expectations when there has been no explicit government action inducing the investor to invest." The three paragraphs cited by Respondent appear below, in addition to another paragraph, which appears to have escaped Respondent's attention, so its text has been underlined for convenience's sake:

> 213. In conclusion, the Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.
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> 232. The stability of the legal environment is also an issue to be considered in respect of fair and equitable treatment. State practice and jurisprudence have consistently supported such a requirement in order to avoid sudden and arbitrary alterations of the legal framework governing the investment. In this case, if stability were to be measured in the context of the framework existing when the investment was made in 1906, important alterations have indeed taken place. Yet,

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133 E. Borchard: The Diplomatic Protection of Citizens Abroad, 1915; A. Roth: The Minimum Standard of International Law Applied to Aliens, 1949.

134 Louis B. Sohn and R. R. Baxter: "Draft Convention on the International Responsibility of States for Injuries to Aliens", 1961, in F. V. Garcia-Amador, Louis B. Sohn and R. R. Baxter: Recent Codification of the Law of State Responsibility for Injuries to Aliens, 1974, at 156.

135 James Crawford: The International Law Commission's Articles on State Responsibility, Introduction, Texts and Commentary, 2002.

136 International Law Commission, Draft Articles on Diplomatic Protection, 2006, Article 17.

137 Digest of the decisions of international tribunals relating to State Responsibility, prepared by the Secretariat, Yearbook of the International Law Commission, 1964, Vol. II, 132.

138 Case Concerning Certain German Interests in Polish Upper Silesia (Merits), PCIJ, 1926, Series A. No.7, at 19, Digest cit., No. 26; German Settlers in Poland, PCIJ, 1923, Series B., No. 6, pp. 19–20, 35–38, Digest cit., No. 27.

139 Aboilard Case, 1925, (Haiti, France), Reports of International Arbitral Awards, Vol. XI, 71, at 79–81, Digest cit., No. 28.

140 Robert E. Brown Case, 1923, (United Kingdom, United States), Reports of International Arbitral Awards, Vol. VI, 120, at 129–130, Digest cit., No. 32.

141 George W. Cook Case, 1927, (Mexico, United States), Reports of International Arbitral Awards, Vol. IV, 213, at 214–215, Digest cit., No. 36.

142 Hopkins Case, 1926, (Mexico, United States), Reports of International Arbitral Awards, Vol. IV, 41, at 46–47, Digest cit., No. 43.

143 Lalanne and Ledoux Case, 1902, (France, Venezuela), Reports of International Arbitral Awards, Vol. X, 17, at 18, Digest cit., No. 47.

144 Burns H. Weston et al. (eds.): International Claims: Their Settlement by Lump Sum Agreements, 1975–1995, 1999, at 67–75.

145 Richard B. Lillich and Daniel B. Magraw (eds.): The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility, 1998.

> that would be a significantly exaggerated approach. A number of the changes that have intervened were well justified in the light of emergency war measures. The continuation of these measures under different modalities, but with the same objective, cannot in a contemporary perspective be considered an abrupt change of the legal environment. To the extent that it was adverse, it has been continuously and stably adverse. As such, the stability is not an issue in itself in this case.
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> 233. The Investor raises the violation of its legitimate expectations as another issue. While it is clear that no representations have been made by Canada to induce the Investor to make a particular decision or to engage in conduct that is later frustrated, any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives. Emergency measures or regulations addressed to social well-being are evidently within the normal functions of a government and it is not legitimate for an investor to expect to be exempt from them. Yet, regulations, which end-up creating benefits for a certain industry, to the detriment of an investor, might be incompatible with what that investor might reasonably expect from a government.
>
> 242. Finally, the Tribunal comes to the Investor's case based on the question of legitimate expectations. Faced with a complete absence of evidence of any representation by Canada to the Investor which might be said to have induced or even encouraged its investment, if it were necessary to reach a decision on the question, the Tribunal would be likely to conclude, as with all the other arguments considered in relation to a scenario two threshold, that Canada had not contravened the provisions of Article 1105(1). But, for reasons explained below, the Tribunal puts aside a definitive conclusion on the alleged contravention by Canada of Article 1105(1) as interpreted by the FTC Notes of July 31, 2001.

190. The first reaction to Respondent, in this regard, should be sufficient in and of itself. In the case of the Berkowitz Claimants, there was indeed a personal assurance provided by the Minister of Environment & Energy in 2003, upon which they relied in establishing their investments. It therefore passes strange that Respondent would seek to highlight this point. The next reaction would be that it appears the Tribunal in *Merrill & Ring* did not actually come to the conclusions attributed to it. Instead, the Tribunal quite rightly observed that stability of the legal environment is relevant in the application of a fair and equitable treatment standard, and that "State practice and jurisprudence have consistently supported such a requirement in order to avoid sudden and arbitrary alterations of the legal framework governing the investment."[212]

191. The thoughtful reasoning of the *Merrill & Ring* Tribunal buttresses Claimants' contention that the customary international law fair and equitable treatment standard [as defined in the THE CAFTA] can be breached by Government behaviour that is akin to the proverbial roller coaster ride. Unlike the claimant in that case, Claimants in this case have supplied the Tribunal with an abundance of evidence outlining the vacillations of the

[212] *Merrill & Ring*, para. 232.

various official entities of Costa Rican government that, together, comprise "the Respondent."

192. Again, it is truly puzzling the degree to which Respondent has premised so much of its defence on a factual proposition that has been proved for the outright fiction that it could only be. For example, Respondent argues, in the alternative, that if the Tribunal concludes that the standard contained in Article 10.5 can be applied to the facts of this case: "Claimants start from the faulty premise that the boundaries of the Las Baulas National Park have been changed to include their properties, thus interfering with an alleged prior expectation that their properties were outside the Park, free from the prospect of expropriation and eligible for development."

193. Yes, Claimants did indeed rely upon that very premise, because it was not a faulty premise, but rather the truth. They knew what the 1995 PNMB Law provided: that Article 1 excluded their land from the territory to be expropriated [and, yes, there was land named in the provision that would, presumably, be expropriated];[213] and that Article 2 provided both that landholders in the park would be able to make full use of their property rights unless and until expropriation came and that, if it did, they would receive prompt, adequate and effective compensation for their investments, vouchsafed by the Expropriation Law as being equivalent to fair market value as of the time of taking.

194. With respect to the wild variation in valuations accorded to lots subjected to the formal expropriation process, and myriad examples of reasoning that does not comport with international valuation principles, Respondent remarkably replies: "However, Costa Rican law ensures that the final valuation of an expropriated property is fair and that the expropriated party has ample opportunity to plead and, if necessary, appeal its case. Costa Rica's expropriation system is designed to effectuate this fairness"[214] - as if merely saying it could make it so. The sad truth is that Claimants' experience with Costa Rica's expropriation process is not nearly as unusual as they, or Respondent, would have hoped. One of the leading legal authorities on the law of expropriation in Costa Rica has been appalled and chagrined upon examining the evidence, about which Respondent reassures: 'all is fine, nothing to see here, folks.'

195. Also tucked into Respondent's argumentation on Article 10.5, appears the following stray jurisdictional argument: "Given the number of opportunities that the Costa Rican legal system affords a landowner to present evidence and to appeal decisions on valuations in both the administrative and judicial stages, Claimants should not be allowed to use this Tribunal as a court of appeals….Claimants should not be allowed to ask this Tribunal to engage in yet another de novo review of the outcome of a legal system that already provides them ample avenues to obtain fair valuations of their properties."[215] The appearance of this argument, while irrelevant to the Tribunal's consideration of the merits of Claimants' Article 10.5 claim, may shed some light on why Respondent does not seem

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[213] Although, for reasons unknown to Claimants and unrevealed by Respondent, the owners of the massive Cerro el Moro and substantial Isla Verde have not so much as received a single declaration of public interest for one lot, to date.

[214] Respondent's Counter-Memorial, para 216.

[215] Respondent's Counter-Memorial, para 217.

fully aware that Claimants executed waivers, prior to proceeding with their claims in this forum. Costa Rica was not forced to conclude the THE CAFTA, so there is no reason why it should begrudge foreign nationals who exercise their rights under it.

196. Finally, Respondent concludes with its defence concerning Claimants' allegation that Respondent had arbitrarily frozen its expropriations without reason.[216] As noted early in this Memorial, absent any explanation from Costa Rican authorities, Claimants postulated that the reason they had not seen nor heard anything for the past six years was that Respondent was frightened by relative size of the administrative valuations issued for the last batch of lots for which declarations of public interest had been sought. It turns out that Respondent had actually conceived of a new measure, which admittedly provides a somewhat implausible alternative to Claimants' best guess (or the other option: utter caprice).

197. It was surprising, therefore, when Claimants noticed that Respondent framed its defence of this particular portion of the ongoing delay (that, if their other claims were to be believed, would stretch back to 1991) as though Claimants had actually been aware of, and were therefore complaining about, their 'just wait for the Contraloría' / 'Report Implementation' / 'Process Improvement' measure. It would accordingly appear that there is no need for Claimants to seek leave to amend their Statements of Claim but, out of an abundance of caution, Claimants will maintain the motion, in the alternative.

C. Where is Mr. Jurado's Witness Statement?

198. In its last paragraph of argumentation, Respondent relies upon the evidence of its witness, Ms. Loáiciga, for the proposition that "SINAC heeded the Contraloría's recommendations and suspended proceedings."[217] Ms. Loáiciga's evidence, however, was that "it became evident that the Contraloría would recommend a stay of proceedings in its final report in order to improve the expropriation process and protect owners' interests. Therefore, for the purpose of allowing for improvement of the expropriation process, SINAC decided to stay expropriation proceedings that were in process at the administrative stage. In addition and for the same reason, SINAC decided not to initiate new expropriation proceedings until the tasks recommended by the Contraloría were concluded."[218]

199. It is a small detail, likely of no significance. Whether the new measure was imposed by SINAC, acting alone, or acting at the behest of the Contraloría is of no great import. Nevertheless, it calls to mind Claimants' puzzlement at Respondent's choice of Ms. Loáiciga as a witness in this case. After all, she does not work at SINAC anymore; she is employed at Respondent's Industrial Property Registry.[219] She mentions that she used to be employed in MINAE, at least during June of 2004; however, her responsibilities within that Ministry were limited to Human Resources. She was present at SINAC, as a

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[216] Respondent's Counter-Memorial, paras 219-220.

[217] Respondent's Counter-Memorial, para 220.

[218] Loáiciga WS1, para 19.

[219] Loáiciga WS1, paras 1-2.

Legal Coordinator, from July 2006 to May 2010. As such, she remained employed at SINAC when the Contraloría's report was issued (in February 2010). Though, in her administrative capacity at SINAC, one supposes she would have had familiarity with its expropriation activities during her tenure (2006-2010), in her witness statement, Ms. Loáiciga discusses events that both pre- and post-dated her time at the agency.[220]

200. Respondent has relied on Ms. Loáiciga for much more than it would appear her first hand experience permits her to possess with the issues canvassed in her witness statement. For example, does she remain the best witness Respondent has to offer to discuss the "functions of the national conservation areas system" four years after having left SINAC?[221] Ms. Loáiciga was also the person upon whom Respondent relied in explaining much about the expropriation process generally, and how it applied to Claimants in particular.[222] The weight of such reliance was no small matter, given the paucity of documentary evidence supplied by Respondent (for which, instead, it has relied heavily on Ms. Loáiciga).

201. By contrast, Respondent's choice of Ms. Martínez, to explain the functions of the Office of the Procuraduría, seems more *apropos* based on her experience in the Procuraduria since 2006. Although she has no first hand experience to share concerning the circumstances of how Mr. Jurado came to be the one responsible for answering these letters, whether he consulted with an ethics review counselor within the Procuraduría before proceeding, what he told his superiors about this work, or his personal interests in it, before it was sent out on Procuraduría letterhead.

202. At least, however, Ms. Martínez was able to act as a non-expert, but clearly knowledgeable, witness on some aspects of the legal issues that were canvassed by the Constitutional Court in relation to the LMNB.

203. What Claimants do not understand, is why Respondent did not provide the Tribunal with a witness statement by Mr. Jurado in this arbitration since Mr. Jurado remains in the service of Respondent as the Director General: Sistema Nacional de área de Conservación (SINAC). It is difficult to imagine somebody more capable of providing the background information provided by Ms. Loáiciga than the Director General of SINAC.

204. Mr. Jurado remains in Respondent's employ, so he is obviously available to give evidence to the Tribunal. Not only can he marshal SINAC's resources to provide missing documentary evidence; he also can share his insights from years of experience serving as a Member of the Board of one of the NGOs that has been most active in lawsuits designed to expand the PNMB.

205. In addition, Mr. Jurado could obviously bring his first hand knowledge to bear concerning the many questions that have been raised, and left unanswered by Respondent, concerning the details of his issuance of the two opinion letters upon which

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220 Loáiciga WS1, paras 8-10.

221 Loáiciga WS1, paras 4-7.

222 Loáiciga WS1, paras 11-23.

so much of Respondent's case rides. Claimants would therefore encourage Respondent to invite Mr. Jurado to provide a witness statement for the Tribunal's consideration.

206. If it turns out, however, that Respondent choses not to provide Mr. Jurado's first-hand evidence to the Tribunal, and to submit to Claimants' cross-examination under oath, Claimants hereby notify Respondent that they will be seeking adverse inferences based upon any such unavailability.

D. Respondent's Expert Report Should be Struck

207. Respondent submits the expert report of Brent C. Kaczmarek of Navigant Consulting, Inc. (the "Kaczmarek Report") in support of its argument that Claimants have "grossly overstated" the value for the expropriated properties.[223] The Kaczmarek Report purportedly replies to the real estate valuation report of Mr. Hedden of FTI Consulting submitted with Claimants' Memorial on the Merits (the "FTI Report"). However, the vast majority of the Kaczmarek Report consists not of a valuation analysis, but of legal argument. Mr. Kaczmarek is not qualified to respond to the real estate valuation as he is not a qualified real estate valuation expert. The Kaczmarek Report is of no use to the Tribunal in determining the value of the properties taken by Respondent.

208. Claimants object to the Kaczmarek Report for a number of reasons.

209. First, Mr. Kaczmarek does not possess special knowledge or expertise beyond that of the Tribunal with regard to the real estate market in Costa Rica, real estate valuation, the history of the BNMP, Claimants' level of knowledge at the time of purchase, or the other areas with respect to which he provides opinion (and makes findings of fact and argument). Mr. Kaczmarek's credentials regarding residential real estate valuation are limited to Costa Rica's previous international arbitration with the Unglaubes. In some instances, Mr. Kaczmarek even purports to draw legal conclusions.[224] Mr. Kaczmarek's report is beyond the scope of his expertise and is, therefore, unreliable and does not aid the Tribunal.

210. Second, Mr. Kaczmarek's report is unnecessary. Two of the main questions that the report addresses are the general history of the BNMP and Claimants' knowledge at the time that they purchased their lots. These issues of fact, to the extent relevant, are for the Tribunal to determine. It is inappropriate for an expert report to make conclusions of fact and law regarding the central issues at hand, especially if that is the main purpose of the expert's report, which is the case here.[225] Further, in a number of instances the conclusions are based upon unattributed hearsay which makes their reliability even more circumspect.[226]

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223 Respondent's Counter-Memorial, paras. 223-224.

224 See for example Mr. Kaczmarek's Report at paras. 20, 169.

225 See for example, Mr. Kaczmarek's Report at paras. 89, 65-67, 74, 75, 79, 81-82, 85.

226 See for example Mr. Kaczmarek's Report at paras. 17, 20, 29, 46, 70, 116, 162.

211. Third, Mr. Kaczmarek's report is rife with argument, is highly speculative and lacks objectivity and impartiality.[227] Instead of providing an independent valuation to assist the Tribunal, Mr. Kaczmarek has taken the role of advocate for Respondent by arguing on behalf of Respondent with regard to such issues as whether Claimants used due diligence in purchasing their lots and whether Claimants knew of certain limitations with respect to those properties.[228] Further, Mr. Kaczmarek selectively refers to the evidence in the record to support his argument that Claimants either did not perform adequate due diligence or were speculative investors who were indifferent to the allegedly obvious risks he associates with Claimants' investments based on the "fact" that Claimants' properties were always within the PNMB.

212. One example of this is found in Table 5 at page 27, where Mr. Kaczmarek presents a chart setting out a "Timeline of Claimant's Purchases and Respondent's Actions" apparently to support his argument that "Claimants appear to have been speculating". Instead of determining what information was publicly available at the time Claimants made their investments, Mr. Kaczmarek selects the most convenient dates in the record draws inaccurate inferences and instates the facts in an attempt to prove his theory. The result is a misleading and unhelpful summary of events. By way of example:

(a) He says that the Unglaube property was declared in the public interest on 22 July 2003, but does not note that that declaration was not published and therefore could not have been "known" before November of that year,[229] which would have placed that event after the purchases of the Copher, Berkowitz and Spence lots (even when using as he did the dates those purchases were recorded in the National Registry rather than the purchase dates reported by each of those Claimants in their witness statements).

(b) He also misleadingly refers to the *Procuraduria's* interpretation of the Park Law as the "Attorney General Decree Establishing BNMP Boundaries 125 m inland". This interpretation was neither prepared by the Attorney General nor did it constitute a Decree of any sort. It was an internal opinion provided by an attorney working in the office of the *Procuraduria* to the Minister of Environment and a Congresswoman. It was not published nor publicly known at the time.

(c) In recording the purchase date of lot C71, he again chooses the date the transaction was registered (actually the date the property was sold by Spence Co. to a third party buyer) instead of choosing the date reported by Mr. Reddy in his

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227 See for example, Mr. Kaczmarek's Report at paras. 10-12, 17, 81-82, 85, 89, 94, 117, 162, 163.

228 See again, Mr. Kacmarek's Report at para. 89.

229 For the avoidance of doubt, the evidence demonstrates Claimants were unaware of the declaration of public interest issued in respect of the Unglaube property at the time. See Berkowitz WS2, para. 20 and Reddy WS2, para. 37. The B lots, Copher lots (V39 and V40) and Spence lots had all already been purchased before this date. In any event, knowledge (either actual or imputed) that some other person's property was declared to be in the public interest even for the stated purpose of the PNMB would not have been an indication that Claimants' properties were within the PNMB. The boundaries as defined by the 1995 Law did include private property that would be subject to expropriation.

witness statement despite the fact that he quotes from that very witness statement in the previous section of the report.

213. Further, nowhere does Mr. Kaczmarek state the assumptions upon which he is basing his opinion and, therefore, the Tribunal has no basis to determine the weight to give to any relevant and necessary inference that he makes (of which Claimants contend, he makes none). It is difficult, if not impossible to ascertain what, if any, facts or assumptions Mr. Kaczmarek relies upon in drawing inferences.[230]

214. Finally, Mr. Kaczmarek points out that the "DR-THE CAFTA defines that 'fair market value' should be the standard of value that is applied in the case of expropriation."[231] He acknowledges that "FTI's definition of 'market value' comports with the generally accepted definition of fair market value."[232] However, he then goes on to suggest to the Tribunal an "alternative valuation approach" that has nothing to do with the treaty standard advocating instead that "the proper approach to determine the compensation owed to Claimants is a refund of their purchase price"[233] or, alternatively, "the administrative appraisal values prepared by Respondent."[234] In discussing such an alternative approach, he also fails to refer to the treaty standard for the timing of the calculation of fair market value, i.e. the value is to be determined at a date that precedes Respondent's measures leading to expropriation.

215. In essence, Mr. Kaczmarek's report acts as a secondary Respondent Counter-Memorial, taking on the entirety of Respondent's submissions (and more) and attempting to argue those allegations of fact by way of "expert opinion" and by drawing conclusions of fact. The report does not provide adequate bases for its conclusions and opinions and does not state the assumptions or evidence it uses to come to those conclusions and opinions. The report goes well beyond Mr. Kaczmarek's expertise and directly to the ultimate issues that the Tribunal must, and is able without Mr. Kaczmarek's assistance to, decide.

216. The issues with the Kaczmarek Report permeate the entire report, such that it is impossible to extricate the offending sections from the remainder of the report. As such, Claimants submit that Mr. Kaczmarek's report should be excluded from the record or, in the alternative, given no weight in the Tribunal's assessment of the evidence.

E. The Proper Measure of Compensation for Expropriation under the THE CAFTA is Fair Market Value Immediately Before the Expropriation Took Place

217. Claimants' primary case is that Respondent has directly and/or indirectly expropriated their property rights and has failed to provide prompt and just compensation. Respondent's substantial interference with these rights has been an ongoing project (albeit unevenly pursued) for over a decade. Unending delay has resulted, both as a

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230 See for example Mr. Kacmarek's Report at paras. 27-29.

231 Kaczmarek Report, note 32.

232 *Ibid.*

233 Kaczmarek Report, para. 165.

234 Kaczmarek Report, para. 167.

natural consequence of Respondent's uneven behaviour and deliberately - apparently since some point in 2008 or 2009.

218. Respondent submits that it has paid without delay, because it made "provisional" payments equivalent to the amount of the administrative appraisal available to Claimants when it initiated the judicial proceedings and took possession of Claimants' properties.[235] Respondent suggests that Claimants will receive "compensation in the form of interest for delyas in Costa Rica's carrying out of the judicial stage of the expropriation."[236]

219. For the nine lots that have not yet proceeded to the judicial phase, Respondent claims it has no obligation to pay without delay (or at all) because Claimants still have full enjoyment of their property (despite the fact that the lots have been noticed for expropriation and cannot build upon their lots because of a moratorium on building permits passed by Respondent).[237] Respondent's position is similar for the remaining eight lots - it has no obligation to pay without delay (or at all) because it has not commenced expropriation proceedings against those lots. Interestingly, Respondent's position in this respect is at odds with an order of its own Constitutional Court, which required it to pay costs and damages due to the owner for failing to expropriate the property within the PNMB within a reasonable period of time.[238]

220. Respondent agrees that the proper measure of compensation is fair market value immediately before the taking, but alleges that Claimants and their expert have not actually calculated fair market value.[239] Respondent goes on to argue that "actual" fair market value should take into account "the location of Claimants' properties within a national park",[240] and "the limited ability to obtain permits for development on Claimants' properties" alleging that these were "facts" that Claimants knew or should have known when they purchased their properties.[241]

221. In its submissions on compensation, Respondent does not address at all the THE CAFTA requirement that compensation "not reflect any value occurring because the intended expropration had become known earlier". Respondent's submissions imply that it can pass as many measures as it likes short of a decree of expropriation, as long as those measures are related to the environment, even to the point of entirely taking all property rights without any liability whatsoever.

222. The requirement that compensation be fully realizable and freely transferable has not, to date, been an issue in this case.

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235 Respondent's Counter-Memorial, para. 161 referring to the 9 lots for which a Decree of Expropriation has been issued.

236 Respondent's Counter-Memorial, para. 221.

237 Respondent's Counter-Memorial, para. 162.

238 Exhibit C-1h, page 11 of the May 27, 2008 Constitutional Court judgment (Resolution No. 2008-008770).

239 Respondent's Counter-Memorial, paras. 226 - 228.

240 Respondent's Counter-Memorial, para. 228.

241 Respondent's Counter-Memorial, para. 230.

223. With respect to the date of expropriation and date of valuation, Respondent argues that Claimants have "ignore[d] THE CAFTA's instruction about the date on which the expropriated investment should be valued" because "the expropriated investment is to be valued 'immediately before the expropriation took place'."[242] Respondent then criticizes Claimants for selecting May 2008 as the valuation date accusing Claimants of having "cherry-picked" the date to maximize the value of their properties.[243] Respondent goes on to suggest that if May 2008 is the correct valuation date, then that date should also be considered the date of expropriation for purposes of the Tribunal's jurisdiction.[244]

224. Respondent's arguments as to the determination of compensation is based on a selective reading of the Treaty and does not accord with international law. The entire purpose of the Treaty in general and the expropriation provisions in particular is to ensure that investments are not held hostage by the state. The compensation provisions require the prompt return of the fair market value of the investment taken. This allows the investor to invest funds elsewhere productively.

225. Customary international law protects investors from states using their regulatory powers in such a way as to deprive investors of their investments without proper compensation. This principle of customary international law has been adopted by Respondent in the THE CAFTA. The THE CAFTA recognizes a balance between a state's legitimate need to regulate and an investor's property rights. The state cannot legally expropriate an investor's property unless certain conditions have been fulfilled: the taking must be carried out in a non-discriminatory manner, it must be for a public purpose and prompt, adequate and effective compensation must be paid. Of course, the decision to expropriate and how that expropriation is carried out is entirely within the control of the state.

226. The THE CAFTA also sets out the measure of compensation that must be paid - "fair market value immediately before the expropriation took place". Fair market value is an objective measure. In cases of expropriation, the measure of compensation does not depend upon timing of the particular investor's investment. It also does not depend on who the investor was at the moment of expropriation or the investor's knowledge at the time it made its investment. This is because the timing of the expropriation is entirely within the control of the state. The temporal direction in the THE CAFTA "immediately before the expropriation took place" is to prevent the state from benefitting from its own expropriatory acts, which necessarily decrease the fair market value of the investment. Allowing a state to rely on the fact of the expropriation in order to reduce the amount of compensation owing to the investor would be unfair; the state would receive a windfall at the expense of the investor who but for the act of the state would still have its property rights and be able to sell them at fair market value. It would also be unfair for the state to potentially owe a different amount of compensation based on the identity of the investor or the timing of the investment. The THE CAFTA precludes such an outcome.

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242 Respondent's Counter-Memorial, para. 231.

243 Respondent's Counter-Memorial, para. 231.

244 Respondent's Counter-Memorial, para. 232.

227. The date of expropriation is a question of fact for the Tribunal to determine. The Tribunal reviews the evidence, the measures taken by the state and determines the date on which the investment was expropriated. The acts of the investor and the identity of the investor have no place in this analysis, since the investor has no role in the decision to expropriate.

228. Article 10.7 (2) of the THE CAFTA provides further direction as to the valuation date. It provides that "compensation shall not reflect any change in value occurring because the intended expropriation had become known earlier." Respondent cannot use the impending expropriation to create a cloud to depress the fair market value that it must pay. This provision is to protect an investor from a state that tries to benefit from its own expropriation scheme by signalling to the market that an impending expropriation is coming.

229. Contrary to what is suggested by Respondent's arguments, the date of expropriation does not necessarily correspond to the date of breach of the THE CAFTA. These dates would coincide if, for example, the expropriation was alleged to be unlawful because it had been carried out in a discriminatory manner and it was done in such a way as to allow the investor to determine such discrimination at the time of the taking. However, in this case, Claimants say that it was not the expropriation itself, but the failure to pay adequate compensation promptly that resulted in a breach of the treaty. That breach cannot be known until the final determination of the amount of compensation has been made. The date of expropriation also does not necessarily correspond to the valuation date, as the Tribunal must ensure that Respondent does not profit from its own measures.

230. Claimants submit that the effect of the May 2008 Constitutional Court judgment was to expropriate all of the lots in the sense that Claimants' property rights were taken and the fair market value affected from that point in time forward. The fair market value for the property should be determined as of that time, which is the valuation analysis that has been performed by FTI. FTI has determined the value that a willing buyer would have paid to a willing seller for those properties in that location as of that date. FTI analyzed the real estate market in Playa Grande, Costa Rica at the relevant time and determined the value of those lots. FTI considered the ability to get building permits and the legal uses for the lots. This is the correct approach despite Respondent's protestations. Specific issues with respect to the determination of fair market value will be discussed below.

231. With respect to interest, Respondent agrees that the six-month bank deposit rate in colons is an appropriate rate of interest on any amounts awarded.[245] Respondent takes issue with Claimants' claim for compound interest suggesting that in applying an interest rate that equates to the Costa Rican legal interest rate means that interest should be calculated on a simple basis.

232. The rate of interest is a legal issue for the Tribunal to determine. Respondent provides absolutely no authority for its position that the selection of the Costa Rican bank interest rate necessarily implies that simple interest should be awarded "under THE CAFTA".[246]

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[245] Respondent's Counter-Memorial, paras. 233-234.

[246] Respondent's Counter-Memorial, para. 234.

233. Claimants submit that an award of interest is required in order to fully compensate them for their loss. The interest, as awarded by Costa Rica in the municipal system, does not achieve this goal. Interest is only payable from the date of dispossession to the date of final judgment. As discussed and illustrated in Appendix 2 to this Reply, Respondent's system allows for significant delays after the date of final judgment. In addition, no interest is paid on the amount of the administrative appraisal even though it can take many months for the administrative appraisal to be paid to the owner. In any event, whether the Costa Rican judicial system applies simple or compound interest is not relevant to the determination of interest owing to Claimants in this arbitration. The Tribunal must determine the rate of interest that will adequately compensate Claimants for their loss, which in this case is related primarily to Respondent's delay in providing adequate compensation for the expropriation.

F. Calculation of Damages

234. Respondent has unlawfully expropriated Claimants' lots and unlawfully delayed meeting its obligation to pay compensation for them. The measure of damages for these unlawful acts should restore Claimants to the position that they would have been in but for the breach of THE CAFTA. In this case, the damages include four components: the fair market value for the properties, interest on those valuations from the date that the THE CAFTA came into force until the date of this award, the costs that Claimants have incurred in pursuing this arbitration in order to receive the compensation that should have been paid to them promptly and without unnecessary cost or delay and post-judgment interest on the amount awarded by this Tribunal.

235. Claimants do not seek double recovery for any of the funds that will have been paid out by Respondent through the municipal expropriation proceedings. Any amounts actually paid to Claimants should be offset against the final compensation awarded by the Tribunal. Claimants emphasize this point, as Respondent indicates in its submission that it has "paid" certain amounts to Claimants when it has merely transferred those funds from one internal government account to another. Claimants do not consider amounts to be paid until they are actually received by Claimants. As discussed above, the payment system has a number of shortcomings and the final amount awarded should reflect only amounts that Claimants actually received. Claimants consider this approach to be particularly apt because Respondent's courts have reacted inconsistently to the waivers filed in order to pursue arbitration. A number of those proceedings have been suspended[247] and Claimants consider all of their claims to now be before this Tribunal. Some of the proceedings are ongoing, as it is Respondent that drives that process.

236. At the time of filing Claimants' Memorial on the Merits, the amount of the difference between the administrative appraisal and the final judgment had been paid and received on only one of the 26 lots included in the claim. Since that filing, additional such payments have been received.[248] To date, no payments of interest or costs in the

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[247] Exhibits R-38, R-36.

[248] Respondent says that Claimants have received CRC 1,425,782,097.35 for nine of their properties. This may be the amount that Respondent transferred from one department to another, but it is not the amount received by

municipal proceedings have been received by any Claimants. The payments received to date are set out in the final column of Appendix 2 to this Reply Memorial. This amount will have to be updated as payments continue to trickle their way through the municipal court system.

Fair Market Value

237. Claimants claim fair market value for their properties as of the valuation date of May 2008. The determination of fair market value has been performed by Mr. Hedden, a real estate valuation expert, who determined the value of the properties as taken by Respondent. FTI's valuation is based on the the relevant market at the relevant time and takes into account all of the relevant circumstances, which it independently verified. Claimants rely on this valuation of the subject properties.

238. Respondent criticizes the valuation performed by FTI, but does not provide an alternative fair market valuation for the properties.[249] Respondent's position that FTI's valuation is not "actual" fair market value on the basis that FTI ignored allegedly relevant circumstances, including events that post-dated the valuation date and the subjective knowledge of Claimants is absurd.

239. According to Respondent, "actual" fair market value (whatever that standard is) requires the consideration of the location of Claimants' properties within a national park, which are allegedly subject to restrictions and eventual expropriations, all of which was allegedly known to Claimants.[250] Whether or not Claimants' properties were within a national park at the time of initial investment is a factual matter for the Tribunal to determine based on the evidence. FTI's valuation (properly) assumes that the properties were not within the park. Had the valuation been based on the assumption that the properties were within the PNMB, it would not accurately reflect fair market value uninfluenced by Respondent's expropriatory measures. It is Claimants' position that the evidence is very clear in this respect. Respondent did not consider Claimants' properties to form part of PNMB until some point in time after Claimants' investments. Respondent cannot redraw the boundaries of the PNMB to include Claimants' lots and then rely on the negative effect that this would have on their value when it expropriates them for being within that park.

240. With respect to the ability to obtain permits to develop Claimants' properties, Respondent says that FTI failed to consider this "factor that would significantly affect fair market values."[251] This alleged relevant factor is one entirely invented by Respondent in this arbitration, despite the fact that it (embodied as the Municipality of Santa Cruz) processed and issued building permits within what Respondent now says is the PNMB at least until 2008. Obtaining these permits was a multi-step process, including governmental sign-off on all of the issues that Respondent now says would be

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Claimants. The amounts received by Claimants are set out in Appendix 2 to this Reply Memorial and total CRC 996,899,820 to date.

249 Kaczmarek Report.

250 Respondent's Counter-Memorial, para. 228.

251 Respondent's Counter-Memorial, para. 230.

impediments to obtaining building permits. Before the Municipality would issue a building permit, it required confirmation of water availability from the ASADA, an environmental impact assessment approved by SENARA, building plans that had been checked by an engineer and that conformed with the zoning requirements and a number of other formal requirements. Claimants were actively involved in this process, understood what was required and were taking the necessary steps to obtain permits. And Respondent was issuing permits at the time. How can Respondent seriously maintain the position that "actual" fair market value requires the assumption of the opposite of what was actually happening in the market at the time? Any issues with the issuance of building permits were ones created by Respondent and cannot be the basis for a lower valuation.

241. Mr. Kaczmarek's criticisms of the FTI report (to the extent they relate to valuation issues) are addressed by FTI in its reply report. In response to these criticisms, FTI further explains its valuation methodology and addresses the points raised in the Kaczmarek Report. FTI's valuation of the subject properties remains unchanged.

242. Respondent, based on the Kaczmarek Report, does propose two alternative valuation methods, which it says would be "proper…in light of the circumstances of this case":

> (i) the purchase price that Claimants paid for each of their lots (but only if "reliable evidence that demonstrated that the price was based on reasonable assessments of the properties' values) or (ii) the amounts of the administrative appraisals conducted by independent appraisers, adjusted downward to account for any information known to a potential buyer immediately before the alleged date of expropriation that could adversely affect the value of the properties at issue.[252]

243. Respondent fails to explain how either of these valuation methods would provide fair market value immediately before the expropriation. They do <u>not</u> and as such are not permissible methods of valuation under THE CAFTA.

244. The suggestion that purchase prices be used is a cost-based approach that does not even take into account actual costs. After Claimants made their purchases, they continued to invest in the properties to develop them. Costs were incurred for environmental assessments,[253] building plans,[254] future water meters,[255] infrastructure development,[256] and in maintenance of the lots. Further, Claimants have continued to pay taxes on these properties.[257]

245. The idea that the Tribunal should adopt the amount of the administrative appraisals adjusted downward is similarly unsupported. Claimants objected to each and every one

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[252] Respondent's Counter-Memorial, para. 224.

[253] Reddy WS1, para. 28; Berkowitz WS2, para. 25.

[254] Gremillion WS1, para. 9, Copher WS1, para. 11, Berkowitz WS1, para. 25.

[255] Berkowitz WS2, para. 42; Exhibits C-89, C-80.

[256] Reddy WS1, para. 13-14.

[257] Spence WS1, para. 21; Copher WS1, para. 24; Gremillion WS1, para. 15.

of the administrative appraisals offered as they did not consider them to represent fair market value. In most cases to date, after the judicial phase of proceedings, the valuation for the properties has exceeded the amount of the administrative appraisal - sometimes by a factor of ten. Respondent says that its municipal system resulted in fair market value being provided. How can it now maintain that the administrative appraisals, which were augmented by the courts after hearing more evidence, represent fair market value? For the B lots, the independent appraisers who performed the appraisals months after Respondent deposited the amount of the appraisal[258] and conveniently reached the same valuation.

246. The alternative valuation approaches advocated by Respondent are not only not consistent with the valuation standard set out in THE CAFTA, they are nonsensical.

247. In addition, with respect to SPG1 and SPG2, Respondent has failed to expropriate the entire portion of Spence Co.'s lots that are within the PNMB. Respondent has stranded a 9 meter wide strip of land titled to Spence Co. between what is now the PNMB and the beach.[259] Claimants identified this issue in the Memorial on the Merits and seek the fair market value of this property (based on the valuation performed by FTI) in addition to what has been taken. In its Counter-Memorial at footnote 108, Respondent states that "[t]here is no justification for awarding Claimants damages based on an amount of land that has not been expropriated." Respondent has directly expropriated a portion of these lots and provided no justification for having taken some, but not all of the lots that are said to be within the PNMB. Respondent has made clear that it intends to expropriate all of the property within the PNMB. It would be entirely unfair to require Spence Co. to wait indefinitely for new expropriation proceedings to be commenced for the expropriation of the lots that Respondent failed to properly expropriate in the first place. This Tribunal should compensate Spence Co. for this taking.[260]

Interest

248. It has been almost six years since THE CAFTA came into force between the parties. Every day since 1 January 2009, Claimants have not been able to develop or sell their property for a fair price. It is therefore Claimants' position that damages should include not only the fair-market value of the expropriated investments at an appropriate valuation date, but also interest at Costa Rican central bank rates compounded semi-annually. Respondent agrees to this rate, but disagrees that it should be compounded.

249. THE CAFTA provides that compensation for *lawful* expropriations shall be paid without delay, be equivalent to fair market value of the expropriated investment immediately before the expropriation took place, not reflect any change in value occurring because the intended expropriation had become known earlier, and be fully realizable and freely transferable.

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[258] See Respondent's Annex A to Respondent's Counter-Memorial and the exhibits referenced there.

[259] Reddy WS2, para. 58; Exhibits C-20a, C-21a, C-98.

[260] Of course, if compensation is paid, Spence Co. would transfer title to the state for the affected property.

250. However, a distinction needs to be made between the standard of compensation for lawful expropriations and unlawful expropriations. In the case at hand, Respondent has engaged in *unlawful* expropriation. The standard for unlawful expropriations ought to be compensation for lost profits in cases of unlawful takings. Such fair market value shall be expressed in a freely convertible currency on the basis of the market rate of exchange existing for that currency on the valuation date. Compensation shall also include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.

251. Damages for a treaty violation are not necessarily focused on an assessment of market value; they are focused on the particular injury caused by the unlawful act. While there are many cases in which a reasonable measure of loss suffered is the fair market value of the subject property, there are also cases in which awarding the fair market value of the subject property alone does not compensate for the loss.[261]

252. The *Chorzów Factory* [262] case has been relied upon for the proposition that there are different standards of compensation for lawful and unlawful expropriation, with the latter resulting in higher damages. The distinction appears between compensating direct loss and consequential losses, including loss of future profits. The case provides that "reparation must, as far as possible, wipe out all 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."

253. A number of awards dealing with unlawful expropriation refer to *Chorzów Factory* in the context of profit-generating enterprises. The distinction between lawful and unlawful compensation is confirmed in *ADC v. Hungary*[263], where tribunals recognized that unlawful expropriations are regulated by customary international law pursuant to the *Chorzow Factory* case.

254. In expropriation cases, interest rates are not defined and are determined on a case-by-case analysis, however the rate should reflect as much as possible the economic reality. In this case, Respondent agrees that the appropriate rate of interest are those set by the Banco Nacional de Costa Rica, as set out in Appendix 1 to Claimants' Memorial on the Merits. Respondent disagrees with Claimants' claim that interest should be calculated on a semi-annual compounding basis. [264]

255. Thus the issue for the Tribunal is whether compound interest is necessary to fully compensate Claimants for their losses. Claimants submit that it is. In a case such as this when the gravamen of the breach is a delay in the payment of adequate compensation, interest is an important feature in compensating the loss suffered.

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[261] Mark Kantor, *Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence*, (The Alphen aan den Rijn: Kluwer Law International, 2008) at 54.

[262] The *Factory at Chorzów (Germany v. Poland)*, (Claim for Indemnity) (The Merits), Judgment of 13 September 1928, PCIJ, Ser. A., No. 17, 1928, p. 47.

[263] *ADC Affiliate Limited and ADC & ADMC Management Limited*, ICSID Case No. ARB/03/16, Award, October 2, 2006.

[264] Respondent's Counter-Memorial, para. 234.

256. Because of the delay caused by Respondent's expropriation process, Claimants have been prevented from reinvesting their funds in other productive uses. Instead, Respondent has forced Claimants to lend it those funds - with no return at all in the case of 17 lots where Costa Rica says that no interest is yet payable.

257. The Kaczmarek Report suggests that a simple rate of interest is appropriate because, in Costa Rica, court awarded amounts are subject to simple interest.[265]

258. While that may be the case, the same is not true of international arbitration awards. A number of Tribunals have agreed that compound interest is appropriate to compensate investors in investment disputes.[266]

259. Compound interest in ICSID jurisprudence is justified as part of the integral compensation owed to the claimant as a result of its lost investments[267] because it reflects the reality of financial transactions and best approximates the value lost by an investor[268].

260. In *Wena Hotels Ltd v Arab Republic of Egypt*[269], the tribunal explained why this rule has become so widespread in matters involving investment arbitrations:

> This tribunal believes that an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations…If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.

261. In *Compañia del Desarrollo de Santa Elena, SA v The Republic of Costa Rica*[270] the tribunal explained that in disputes involving investment or property-type disputes, compound interest is wholly appropriate.

262. In *Tecnicas Medioambiantatles v Mexico* (2003 ICSID), the tribunal indicated that the application of compound interest is justified as part of the integral compensation owed to the claimant as a result of the loss of its investment.

263. In *Oko Pankki Oyj v Estonia* (2007 ICSID), the tribunal stated that justice requires that the wrongdoer who has deliberately failed to pay compensation should pay interest over

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265 Kaczmarek Report, para. 169.

266 See, for example, *TECO Guatemala Holdings, LLC v Republic of Guatemala* (2012, ICSID Case No. ARB/10/23); *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georiga* (2010, ICSID Case Nos. ARB/05/18 and ARB/07/15; *Cargill, Incorporated v United Mexican States* (2009, ICSIC Case No. ARB(AF)/05/2).

267 *Compañia del Deasarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000; *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. Arb(AF)/00/2, Award of 29 May 2003.

268 *Azurix Corp v Argetnine Republic*, ICSID Case No. ARB/87/3, Award of 27 June 1990.

269 *Wena Hotels Limited v Arab Republic of Eg*ypt, ICSID Case No. ARB/98/4, Award, 8 December 2000.

270 *Compañia del Deasarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000.

the period during which the compensation was withheld. Compound interest under international law represents a form of "*jurisdprudence constante*" in ICSID awards.

264. Customary international law, as reflected in the ILC Articles, indicates that the interest rate should be set to achieve the result of full reparation.[271] The tribunal in *Unglaube v Costa Rica*[272] found that inappropriate delays in the compensation element of expropriation should result in an interest rate based approximately on the amount that the claimant would have been in the position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country.

265. In order to be made whole, compound interest should be awarded on Claimants' property value because of the extensive period of time during which they have not had use of the money. Awarding simple interest is inappropriate under expropriation circumstances since the rate of interest should be based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Awarding simple interest ignores the fact that Claimants could have invested the interest received each year during the period in question in safe securities, which in turn would have generated additional interest.

Costs

266. If Respondent's municipal expropriation system resulted in fair market value being paid promptly, there would have been no need for Claimants to have commenced this arbitration. Respondent's failure to provide either prompt or adequate compensation has required Claimants to incur significant and unnecessary costs in order to bring this arbitration. As a result, Claimants claim the costs of the arbitration, including attorney's fees and arbitration costs. The amount of these losses will be quantified at an appropriate stage of the proceedings.

Post-Award Interest

267. Just as interest is required to make Claimants whole for the period of time leading up to the award, post-award interest is required in order to ensure that Claimants are compensated for any further delays in payment of the award by Respondent.

V. MEMORIAL ON JURISDICTION

268. Respondent deploys a straw-man approach in outlining its arguments on jurisdiction. Rather than addressing the measures actually at issue in the case, it has recast them, so as to achieve a better fit with its jurisdictional arguments. In addition, Respondent has chosen to reformulate the individual allegations of breach made by each Claimant, rather than addressing the claims that have actually been made.

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[271] ILC Articles on Responsibility of States for Internationally Wrongful Acts, Art. 38(1).

[272] *Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award of May 16, 2012.

269. Respondent's straw-man claimant is a monolithic entity, rather than a group of individual claimants. It has only a singular case of expropriation to make, even though it is manifestly out of time to pursue it. The real story, as Claimants have set out in the Memorial and in this submission, is very different. Nevertheless, in order to animate its straw man, Respondent overlooks the underlying facts of each case. Such sleight of hand is exemplified in the allegations set out in paragraph 117 of Respondent's Memorial on Jurisdiction.

270. Respondent's delicately crafted characterization – of a single, expropriatory measure which constituted a lone breach – is clearly intended to excuse it from any responsibility, both on the ground that its unlawful conduct allegedly transpired long before it was obligated to treat US investors fairly and on the basis that Claimants allegedly failed to complain early enough to hold Respondent to account. It does so in spite of the fact that its failure to compensate them for the abridgement of their property rights remains ongoing today.

271. Respondent mischaracterizes the actual facts of this case by ignoring the express terms of both the 1991 Decree and the 1995 Law, in claiming that a "park" has actually existed since 1991. It does so in spite of the explicit provisions of both instruments, to the effect that a park would only come into existence **after** title to lands designated as falling within its boundaries had been acquired by the State.[273]

272. As a matter of fact, legal title to much of the land located within the redrawn boundaries of the PNMB – and virtually all of the land located within the boundary line actually established in the 1995 law (i.e. the privately held Cerro El Morro) – remains in private hands today.

273. Jumping quickly to 2004, Respondent next attempts to backdate the timing of the Attorney General's opinion, which was not issued until 2005, at MINAE's request. As described at paragraphs 145 to 149 of Claimants' Memorial, the Attorney General was placed in the embarrassing position of having to issue the same opinion twice because his first attempt, in 2004, was not legally binding upon anybody. When it was issued at MINAE's request, in 2005, it became binding on MINAE officials. Nevertheless, at paragraph 117 Respondent claims that "the" Attorney General's opinion was issued in 2004 and only "confirmed" in 2005.

274. Continuing in the same paragraph, Respondent next claims that its Constitutional Court[274] "acknowledged the boundaries of the Park" in 2005 and that, "in late 2008, [the Court] again confirmed [those] boundaries." It fails to address the awkward fact that rulings issued by the Court between 2005 and 2008 – concerning the vital question of whether the Government had the option to permit development on a sustainable basis, as opposed

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273 Exhibit C-1b. 1991 Decree, Article 5. Exhibit C-1e. 1995 Law, Article 2.

274 The Constitutional Court is the fourth of chambers of Costa Rica's "Supreme Court of Justice." Chambers 1 through 3 are cassation courts, which handle appeals for various areas of Costa Rican law. Respondent thus engages in a certain degree of rhetorical flourish when it refers to its Constitutional Court (aka "*Sala IV*") as "**the** Supreme Court" – as though it were something more akin to the supreme courts of the United Kingdom or the United States, in and of itself, which it is not.

to mandatory dispossession of all landholders – were so inconsistent that both MINAE and SETENA felt compelled to petition the Court for an explanation in 2009.[275]

275. Paragraph 117 also omits any mention of the fact that, even in 2006 and 2007, Respondent was actually still issuing municipal construction permits for beachfront land located within the expanded boundaries of what it now says is a park.[276]

276. Claimants will not answer the case Respondent has made against its own straw man. Instead they will demonstrate why their claims have been made in a timely manner, consistent with Articles 10.16 and 10.18 of the THE CAFTA, which provide, in relevant part:

> Article 10.16: Submission of a Claim to Arbitration
> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
> (i) that the respondent has breached
> (A) an obligation under Section A,
> (B) an investment authorization, or
> (C) an investment agreement;
> and
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach
>
> Article 10.18: Conditions and Limitations on Consent of Each Party
> 1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

277. Respondent has not made its case out against any individual Claimant. It treats these individuals, some of whom were complete strangers to each other in 2009, as though they shared one mind and one global investment. The language of Articles 10.16 and 10.18 are unequivocal in this regard, however. They refer to individual claimants, not groups of them.

278. In order to rely upon the limitation set out in Article 10.18, Respondent must provide evidence demonstrating how – for each Claimant – that it acquired, or should have acquired particular knowledge on a date more than three years from the date its claim was submitted to arbitration. Not only must Respondent produce evidence concerning the subjective knowledge of each Claimant, it must approach the objective issue of whether an individual claimant should have possessed such knowledge from within the circumstances of its particular case.

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[275] Claimants' Memorial on the Merits, para 165.

[276] Claimants' Memorial on the Merits, para 150.

279. By way of example, Messer's Holsten and Gremillion have never met. They made their investments at different times and in different locations, and each man acquired his respective interest in some of the land at issue in this arbitration from a different party, on his own set of conditions. Even if Respondent chose to ignore the subjective issue of when either of these Claimants first acquired knowledge of the breaches he alleged – as well as when he first realized that the governmental conduct underlying the alleged breach had caused him to incur loss or damages – Respondent must still take the particular circumstances of each claimant into account when arguing the objective issue of when he ought to have acquired the particular knowledge at issue.

280. Another fundamental flaw in Respondent's argument on jurisdiction is that it appears to have confused the word "measure" for the word "breach" in Article 10.18. Respondent appears to have directed its argumentation to the issue of when Claimants, as a unitary entity, ought to have possessed knowledge of the **measures** it summarized in paragraph 117 of its Memorial on Jurisdiction. Respondent never addresses itself to the questions actually posed by Article 10.18, which concern knowledge of the specific **breaches** made by a claimant.

281. By way of example, a measure might exist for many years, never causing any loss or damage to an investor, until such time as it is used in a manner that causes such harm to occur. Since it was not the measure, in and of itself, that caused loss or damage, it does not matter when the investor knew, or ought to have known, about its existence. What matters is when the investor learned, or ought to have learned, that the measure had been used in such a way that it: (1) constituted or led to a particular treaty breach, and (2) caused loss or damage to the investor. Respondent has not performed this analysis for any of Claimants in respect of any of the specific breaches each has alleged.

282. Further, Respondent has also carefully avoided acknowledging how THE CAFTA Article 10.1(1) extends the scope and coverage of the Chapter to any "measures **adopted or maintained** by a Party relating to … investors of another Party [and] covered investments…" [emphasis added]. These terms show how the THE CAFTA Parties cannot be excused from their Chapter 10 obligations, simply because an offending measure was adopted before the Agreement came into force. If they did, there would be no reason for Article 10.13, which provides each Party with a time-limited opportunity to reserve specific, pre-existing measures from coverage under certain Chapter 10 provisions.

283. Respondent has certainly not claimed that it took a reservation under Article 10.13 with respect to any of the measures at issue in this case. Indeed, Article 10.13 does not even countenance the Parties taking reservations for non-conforming measures that would be inconsistent with either Article 10.5 or Article 10.7. Any measures "maintained" by a Party – over a period during which the Agreement came into force – became subject to the Parties' obligations under Articles 10.5 and 10.7 from that moment forward.

284. Such conclusion is unaffected by the language of Article 10.1(3), which provides: "[the] Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement." This is because the fact of such measure's existence becomes relevant, and applicable, from

the moment the Agreement comes into force. The language of paragraph (3) was obviously intended to safeguard against claims being made in relation to measures that were adopted by a Party before the Agreement came into force, but not maintained thereafter.

285. As described in Claimants' Memorial,[277] Respondent has engaged in numerous acts and omissions that have severely impaired Claimants' respective use and enjoyment of their individual investments. Such conduct can be classified as constituting four types of measure:[278]

(a) Since the THE CAFTA came into force as between the USA and Costa Rica, and in no cases earlier than such date, Respondent has engaged in the direct expropriation of certain of Claimants' investments, and in every such case the operation of Respondent's municipal expropriation law has resulted both in interminable delays and – in the few cases where compensation has actually been determined – offers of compensation that have not reflected the fair market value of the investments taken. These offers of final compensation were inadequate both because the decision-makers took account of events that had transpired after the expropriation occurred and because their conclusions reflected changes in value that occurred because the intended expropriation had been known earlier.

(b) Respondent engaged in an uncompensated, creeping expropriation of all of Claimants' investments, the composite elements of which appear to have commenced around 2004 and culminated in Mr. Rodríguez's decision, of 19 March 2010, to permanently suspend all permitting, and revoke any permits previously granted, for investments in the relevant area;

(c) Respondent has been delaying payment of appropriate compensation to each and every Claimant, in each case of expropriation (direct and indirect). Regardless of whether one determines that the obligation to provide compensation arose before or after the THE CAFTA came into force, the fact remains that – to this day – Respondent persists in such delay for all but a few affected investments; and

(d) Respondent has taken its apparent policy of delay even further in some cases, with MINAE/SINAC officials exercising discretion accorded to them under Costa Rica's expropriation law to indefinitely stall certain proceedings. As described in paragraphs 89-104 of the Memorial, in 64 cases officials from Respondent's Tax Authority rendered administrative appraisals containing amounts that were many times higher than previous ones (although still insufficient by international standards), even though the land at issue was substantially similar to previous cases. In order for a governmental entity to proceed with an expropriation, the Law on Expropriation requires it to deposit an amount of funds into an escrow account maintained by the court that is equivalent to the amount specified in the administrative appraisal. In order to avoid having to deposit the sums required of

[277] Claimants' Memorial on the Merits, paras 52-117.

[278] As per THE CAFTA Article 2.1, "measure includes any law, regulation, procedure, requirement, or practice."

it under its own municipal expropriation statute, Respondent has studiously refrained from taking the next step in its expropriation process.

Failing to take this next step – *viz.* proceeding from the administrative appraisal phase to the judicial appraisal phase – has effectively suspended proceedings for each affected investment. The affected Claimants have not received any indication as to when, if ever, adequate compensation will be forthcoming for the affected investments, which have been rendered virtually unsalable because each now bears a "public use" designation.

286. Each of these four measures was inconsistent with specific THE CAFTA provisions at the time it was adopted and each measure remains inconsistent with the same THE CAFTA provisions, as it has been maintained. In particular:

(a) Owing to defects seemingly inherent in Respondent's municipal expropriation regime, for the few cases[279] in which a final determination of compensation has been rendered, the amount has not been equivalent to the fair market value of an investment ("as of the moment immediately before the expropriation commenced"). Moreover, in each of these cases the reasons issued for such determination have revealed that the compensation amount determined actually reflected changes in value owing to prior knowledge of Respondent's intent to expropriate the investment.

In each such case of direct expropriation, the compensation offered has been inconsistent with Respondent's obligations under THE CAFTA Article 10.7(2)(b) and (c).[280] Moreover, in none of these cases was notification of a final determination provided to a Claimant before June 2010.[281]

(b) Creeping expropriations occur through the imposition of a series of acts or omissions that, together, comprise a measure tantamount to expropriation. Respondent's creeping expropriation of Claimants' investments did not crystalize until 2010. As a matter of customary international law, creeping expropriations are *per se* unlawful because they are never accompanied by the prompt payment of adequate and effective compensation.[282] THE CAFTA Article 10.7(1)(d) specifies that expropriations must be adopted or maintained in accordance with the customary international law minimum standard of treatment, which is encapsulated in Article 10.5. Respondent's creeping expropriation of each

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279 Exhibit C-16h. Lot A40 Appeal Judgment, July 21, 2011. Exhibit C-21h. Lot SPG2 Appeal Judgment, December 14, 2012. Exhibit C-24g1. Lot B3 Judgment. Exhibit C-28h. Lot B8 Appeal Documents.

280 For the avoidance of doubt, Claimants do not argue that any of these acts of direct expropriation was per se unlawful. Each measure became unlawful because none were accompanied by compensation that was consistent with the specific terms set out in sub-paragraph (2)(b) and (2)(c) of Article 10.7.

281 As described at paras. 267-274 of the Memorial, the arbitrariness of this process also renders it inconsistent with Respondent's obligation to accord fair and equitable treatment under Article 10.5.

282 For the same reason, creeping expropriations are also inconsistent with the express terms of THE CAFTA Article 10.7(1)(d): upon the payment of "prompt, adequate and effective compensation."

investment made by each Claimant thus constitutes a breach of THE CAFTA Article 10.7(1)(d).

(c) Respondent has been delaying payment of the compensation it owes to each Claimant, for each stranded or taken investment, for many years, contrary to THE CAFTA Article 10.7(2)(a), which provides that compensation must be paid "without delay." "Delay," of course, is a temporal phenomenon. It denotes a state of affairs that continues as long as the impediment it describes continues. In every single case before this Tribunal, the delay continues – whether because no offer of compensation for the investment has yet to be offered, the investment has been caught up in Respondent's interminable expropriation process, or the outcome of the process has been woefully inadequate.

(d) Respondent's decision to refrain from proceeding with the expropriation processes, which it started years ago for each targeted investment, also constitutes an abuse of rights that is contrary to the customary international law minimum standard of treatment of aliens recalled in Article 10.5. The use and enjoyment of each of the subject investments has been substantially impaired by Respondent's adoption of a ploy that was patently designed to delay payment for its own benefit, and therefore to the detriment of the affected Claimants.

287. Respondent essentially makes two arguments to challenge the Tribunal's jurisdiction to hear the respective claims of each Claimant, both of which concern issues of *jurisdiction ratione temporis*. Between pages 64 and 76, Respondent argues that the measures, which constitute breaches of the THE CAFTA, occurred before the THE CAFTA came into force, on 1 January 2009. From pages 56 to 63, it also argues that – in any event – Claimants, as a group, submitted their claims too late.

288. Focusing on each type measure, and the related breach, Claimants will first demonstrate why none of their claims is time-barred on the basis that either the alleged breaches took place before the THE CAFTA came into force. Afterwards, they will further demonstrate why none of their claims is time-barred on the basis that any of Claimants knew, or ought to have known, about the specific breaches each respectively alleged, or that any of Claimants knew, or ought to have known, that it had incurred loss or damage, arising from the conduct that it alleged to have constituted a THE CAFTA breach.

A. Respondent Adopted and/or Maintained the Measures That Have Given Rise to Each Breach After the THE CAFTA Came Into Force

289. As noted above, Respondent has attempted to recast Claimants' allegations as though they concerned two global measures: the direct expropriation of a series of investments and the indirect expropriation of a series of investments. It has one basic answer to its repackaged versions of the claims of its monolithic Claimant group: both kinds of expropriation occurred before 1 January 2009.

290. The primary problem with this argument, apart from the fundamental flaws in Respondent's argumentation noted above, is that it does not reflect reality. First, with respect to the direct expropriations, the affected Claimants have argued that the

compensation offered to them does not conform to sub-paragraphs (b) and (c) of Article 10.7(2). The "measures" at issue for each of these claims were composed of decisions made by Costa Rican officials, concerning the appropriate value of compensation for their expropriation, **after** 1 January 2009. For none of the lots was a valuation decision (even at first instance) provided by the Costa Rican courts before 2010. The earliest appeal judgments indicating the final word on valuations were not until July 2011.[283]

291. The fact that the underlying expropriations commenced before 1 January 2009 is simply not relevant to the question of whether the compensation eventually determined, through Respondent's municipal expropriation regime, was actually consistent with the aforementioned obligations.

292. With respect to the creeping expropriations, Respondent has been reduced to recasting the obvious import of the evidentiary record in order to support its position. It alternatively claims that the taking was effected when the Attorney General issued his opinion, or at least at some point before 2009 – based upon one or another of the decisions issued by the Constitutional Court between 2005 and 2008.

293. Again, this is where cold reality intervenes. Any argument that an opinion issued in 2004 or 2005, whether by the Attorney General or by the Constitutional Court, conclusively ended any debate about the so-called park's boundaries is belied by the fact that Respondent itself continued to issue municipal construction permits for lots located within those expanded boundaries in both 2006 and 2007.

294. More importantly, Respondent's focus on the date upon which the alleged park's expanded boundary lines were definitely determined misses the point of Claimants' creeping expropriation claims entirely. Article 2 of the 1995 Park Law explicitly provided that landholders within the future park would be entitled to the full exercise of their property rights until such time as their land was expropriated. As explained at paragraphs 152 to 166 of Claimants' Memorial, given how the Constitutional Court habitually vacillated between mandating expropriation and leaving the decision as to whether to permit development within the new park's borders to MINAE – as well as how attempts to pass legislation to reinstate the boundary stipulated in the 1995 Park Law almost came to fruition during the same period – it is manifest that the only measure that could crystalize the creeping expropriation started in 2004 would be a final decision by MINAE to permanently terminate the permitting process and to revoke all existing permits. This event took place in 2010, after the THE CAFTA had come into force.

295. Indeed, it could certainly be argued that Mr. Rodríguez's order of 19 March 2010, in and of itself, constituted a measure tantamount to expropriation of all of the investments at issue in this arbitration. In this regard it would be useful to recall that, as drafted, the 1995 Park Law would have only required Respondent to expropriate the very large investment of a single landholder: *viz.* the owner of the landmass which still today comprises the whole of Cerro El Morro. It would have been very easy for that lone landholder to regard the 1995 Park Law as a discriminatory measure of expropriation, and to have immediately sought compensation for its adoption. To guard against this

[283] See Appendix 2 to Claimants' Reply.

potential liability, the 1995 Law was not only drafted using the fiction that it applied to all landholders [plural], Article 2 was also included, to prevent the Law from being classified, either by the Constitutional Court or an international tribunal, as having strictly mandating expropriation, with no other option.[284]

296. In as much as Mr. Rodríguez's 2010 order essentially constituted a *de facto* abridgement of Article 2 of the 1995 Law, it will have constituted as much an indirect measure of expropriation for the owner of Cerro El Morro as it did for all of the landholders whose investments had been included within the expanded park boundaries by the Constitutional Court. Because the Court ultimately left the question as a matter for MINAE to decide, however,[285] it took Mr. Rodríguez's decision to seal the fate of each Claimant's investment as much as it also automatically sealed that of Cerro El Morro for its owner too. Before Mr. Rodríguez issued his order, Article 2 of the 1995 Park Law putatively protected both the owner of Cerro El Morro and Claimants from expropriation. Immediately thereafter, the die was cast.

297. The delays experienced by every single Claimant, in respect of every single investment remain ongoing, even for the few cases in which a final determination on compensation under Respondent's municipal expropriation statute has been made, remain. Whether by incompetence or, more likely, by deliberate design, these delays have been maintained by Respondent since 2008, for the direct expropriations that attracted administrative appraisals high enough for Respondent to indefinitely stall the expropriation process, and since 2010, with respect to all indirect expropriations.

298. As noted above, "delay" is not a static concept. It necessarily exists for a period of time, rather than for a moment. In the instant cases, Respondent's delay continues today, more than five years since the THE CAFTA came into force, and more than four years since the MINAE decision that constituted the indirect expropriation of every single one of Claimants' investments not already subjected to the legal phase of Respondent's municipal takings regime (i.e. after dispossession and deposit of an amount equivalent to the administrative appraisal) by that time.

299. As informed by the text of Article 10.1, Article 10.7(2)(a) applies whenever an expropriation has occurred – through the adoption of a measure or measures – but compensation has been delayed –through the adoption and maintenance of a measure. Respondent has engaged in a practice of delaying payment for its direct and indirect expropriations. Because it has continued to maintain this practice to the present day, even if such practice was adopted before the THE CAFTA came into force, the result would be the same. Rather than referring to the delays at issue as having been in existence for more than five years, one need only observe each delay is between four and five years of age instead.

300. Indeed, Respondent has much as admitted that it has maintained a measure that has resulted in the ever-mounting delays. At pages 44 to 50 of Respondent's Memorial, it

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[284] Exhibit C-1zc.

[285] See: January 2009 decision, at para. 164 of Claimants' Memorial; see, also: 30 April 2008 decision, at para. 157 of Claimants' Memorial.

claims that the delays are a result of a deliberate decision, on the part of its officials, to freeze the expropriation process, ostensibly in order to "fix" it. In this regard, Respondent freely admits that the current delay is at least least 9 years old.[286] What it fails to do is explain how any "delay" – which was manifestly contrary to the explicit language of THE CAFTA Article 10.17(2)(a) from the day it came into force, and remains so – can be justified in light of what appears to be a *prima facie* breach.

B. Not More than Three Years Has Elapsed Since Any of Claimants First Knew, or Ought to Have Known of the Respective Breaches or the Loss or Damage Caused by the Conduct That Constituted Them

301. Respondent claims that Claimants have waited too long to bring their claims - that the THE CAFTA requires them to make their claim within three years of having learned of the breach. Coupled with Respondent's [disputed] proposition that expropriation happens at only one point in time – i.e. when the State takes title to a property – it follows that it is Respondent's position that every time it expropriates a property and waits at least three years to make payment, it has no liability to a claimant under the THE CAFTA. That interpretation cannot possibly be correct.

302. As noted above, Respondent bears the burden of proof to establish that any individual Claimant has failed to pursue his claim in a manner consistent with Articles 10.16 and 10.18 of the THE CAFTA. It has entirely failed to meet its burden, given how it has not made any effort to even distinguish as between the relevant circumstances affecting each Claimant, within the context of its particular claim or claims. Be that as it may, it is patent that none of Claimants has failed to launch his claim soon enough to satisfy both provisions.

303. With respect to the manner in which Respondent has failed to offer, much less pay, an amount of compensation – for its direct expropriations of certain of Claimants' investments – that passes muster under subparagraph 1(c) [concerning adequacy and efficacy of compensation] or subparagraphs (2)(b) or 2(c) of THE CAFTA Article 10.7. Investors cannot possibly determine whether non-compliance even exists until after it has been presented with a final decision from the municipal expropriation process. In other words, until a landholder has been provided with notice of the final amount under the municipal regime, it cannot determine whether it has received fair market value for being compelled to surrender it property rights in a given piece of land.

304. Respondent's attempt to join the question of its compliance with these particular provisions with the overall question of whether an expropriation began less than three years before the claims were submitted to arbitration cannot be taken seriously. If it were, Respondent would be under no obligation to <u>ever</u> finish the expropriations it started before the Agreement came into force. Such reasoning makes a mockery of the detailed provisions of paragraph (2) of Article 10.7. Indeed, if Respondent's arguments on this point were correct, there would be no reason for paragraph (2) to exist. The first paragraph of Article 10.7 would more than suffice.

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[286] Respondent's Counter-Memorial, para 81.

305. With respect to Respondent's indirect expropriation of every one of Claimants' investments not already otherwise seized pursuant to its municipal expropriation process, Claimants first observe that if Respondent's argument is to be taken seriously, the complaint is that each Claimant ought to have known to bring its claim three months earlier than each was eventually pursued.

306. Is there any objective reason as to why a claimant – occupying the same position as any of the actual Claimants – might not have known better than to bring his claim three months sooner? It is submitted that the answer lies in Respondent's own submissions. At paragraphs 65 to 74 and 161 to 192 of its Counter-Memorial, Respondent has boasted to the Tribunal that its municipal expropriation process, used in conjunction with its 1995 Park Law, is perfectly capable of delivering compensation to any affected investor that is consistent with its obligations under Article 10.7 of the THE CAFTA. Surely Respondent would therefore be the first to agree that it would have been reasonable for an investor to decide that it had not incurred any loss or damage flowing directly from Mr. Rodríguez's March 2010 decision.

307. From an objective standpoint, if Respondent seriously expects the Tribunal to trust in its assurances that the processes it has had in place to conduct expropriations within the [expanded] boundaries of the [future] PNMB fully satisfy its obligations under THE CAFTA Article 10.7, it cannot turn around and claim that it was unreasonable for any of the Claimants to have failed to submit their claims by 19 March 2013. If Respondent's assurances are to be given any credence whatsoever, one must also assume – for the sake of logical consistency – that it would also have been reasonable for each Claimant to have believed, even as late as 19 March 2013, that a satisfying compensation cheque from the Government of Costa Rica would be arriving promptly. Hence, in light of Respondent's own position, it cannot be said that any of the Claimants ought to have known that they had incurred loss or damage three months sooner than they apparently did.

308. Unless Respondent can produce evidence establishing that one or more of the Claimants actually knew **both** that Mr. Rodríguez's cancelation of MINAE's permitting process, in March 2010, constituted a breach of THE CAFTA Article 10.7(1) **and** that it had incurred loss or damage as a result – a full three months sooner than could be established on the basis of the delivery of the Notices of Intent – its jurisdictional motion concerning all cases of creeping expropriation must fail.

309. Not unlike a denial of justice case based upon the allegation of delay, an expropriation case based upon an allegation of delay that is inconsistent with a Party's promise to provide compensation "without delay," under THE CAFTA Article 10.7(2)(a) constitutes an ongoing breach. Such breach is renewed every day that the delay continues. Practically speaking, it must necessarily lie for the claimant to decide when enough is enough: that the delay she has experienced constitutes a breach of the provision, and that she has incurred loss or damage thereby.

310. Alternatively, from an objective standpoint, can it truly be gainsaid that each Claimant should have known that a breach of THE CAFTA Article 10.7(2)(a) had occurred, and that it had incurred loss or damage as a result, three months earlier than the Notice of

Intent indicates that each did?[287] Claimants submit that it would be both inequitable and prejudicial should they be denied relief on the basis of three months worth of extra patience.

C. Relevance and Limited Applicability of the ILC Articles on State Responsibility

311. Article 55 of the International Law Commission's Articles on State Responsibility ["ILC Articles"] provides that they "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[288] THE CAFTA Article 10.22, which establishes the governing law for the arbitration, constitutes a *lex specialis* clause for the purposes of ILC Article 55. Paragraph (1) stipulates: "the tribunal shall decide the issues in dispute in accordance with [the THE CAFTA] and applicable rules of international law."

312. Whether, and to what extent, the ILC Articles actually apply to the Tribunal's resolution of the parties' investment dispute must accordingly be governed by the following considerations:

> These treaties create mechanisms for non-State actors to invoke the international responsibility of contracting States that transcends the traditional dichotomy between public and private international law. The secondary obligations generated by the implementation of state responsibility in these cases are different in their legal character from secondary obligations that arise on the inter-state plane
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> …
>
> In relation to the investor/state sphere, a breach of a treaty standard by the host state certainly creates new obligations upon that state. These new obligations do not, however, correspond to new rights of the national state of the investor because the injury is caused exclusively to the investor. This is so because the contracting states to investment treaties have opted out of the inter-state secondary rules of international responsibility in relation to a limited group of wrongs causing damage to a particular sphere of private interests…
>
> The status of the investor's new right [which vests directly in the investor upon the breach of an investment treaty], is not equivalent to the new rights and obligations [that] come into existence upon a breach of an international obligation within a bilateral relationship between states. Unlike in the traditional domains of public international law, the obligations created in special regimes involving non-State actors, such as the investor/State sphere of the ICSID

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[287] To be sure, given how Respondent has argued that Claimants have allegedly run out of time to submit their claims to arbitration, it logically follows that Respondent must consider that any claimant forced to wait a day longer than three years, for his payment of compensation for expropriation [whether direct or indirect], has become the victim of a breach of Article 10.7(2)(a) of the THE CAFTA. In other words, Respondent's jurisdictional argument constitutes an admission that any investors forced to wait longer than three years for compensation has seen his payment "delayed," in breach of THE CAFTA Article 10.7(2)(a).

[288] Exhibit RLA-005. James Crawford, The International Law Commission's Articles on State Responsibility.

> Convention, 'are not simply based on the separation of States, and consequently not focused on the anti-parallel exercise of sovereignty by interference of one State in the Sovereignty of another State.' [289]

313. Thus, although certain of the ILC Articles may constitute "applicable rules of international law," for the purposes of THE CAFTA Article 10.22(1), they are clearly subsidiary in application to the express terms of the Agreement.[290] As such, although they may provide guidance to the Tribunal, they cannot form the starting point for its analysis.

314. The manner in which Respondent has sought recourse to the ILC Articles is inconsistent with the approach dictated by ILC Article 55. Moreover, Respondent's approach is based upon an unspoken assumption that all of the Claimants' individual claims can be distilled into a simple case of expropriation governed under customary international law. As dictated by Article 10.22(1) of the THE CAFTA and 55 of the ILC Articles, however, Respondent's attempts to convert the claims against it cannot constitute an accurate characterization of the respective investment disputes that each Claimant has submitted to this Tribunal.

315. Perhaps the most brazen example of Respondent's attempted misconstruction of the law applicable to this case is its citation of ILC Article 13, which represents an expression of the principle of contemporaneity as it has been applied within the context of disputes between States governed by the rules of customary international law. As demonstrated by the types of disputes used as examples throughout the Commentary attached to ILC Article 13, this provision has little to say with respect to the Tribunal's construction of the specific THE CAFTA provisions for which Claimants have alleged breach.[291]

316. To be sure, the ILC devoted roughly as much effort, over many years, to the consideration of customary international law norms application in treaty interpretation, including the role of the principle of contemporaneity in such interpretation. Just as the ILC Articles were prepared to address the customary law of state responsibility, a different ILC committee drafted the VCLT to address the customary law of treaty interpretation.

317. In this regard, VCLT Article 2 provides: "contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force." In addition, the VCLT also provides:

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[289] Z. Douglas, The International Law of Investment Claims (Oxford: OUP, 2009) at 94-95.

[290] Moreover, the ILC Articles cannot constitutes "relevant rules of international law applicable in relations between the parties," as per Article 31(3)(c) of the Vienna Convention on the Law of Treaties ["VCLT"] because both the VCLT and the ILC Articles were intended to express customary international norms governing relations between ***parties*** to a treaty, which no investor/claimant can ever be. See Exhibit RLA-001. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, ("VCLT"), Article 31(3)(c)

[291] Exhibit RLA-005. James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2002), p. 131, Article 13.

> **Article 18 – Obligation not to defeat the object and purpose of a treaty prior to its entry into force**
> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty
>
> when:
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
>
> **Article 28 – Non-retroactivity of treaties**
> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[292]

318. This is not to say that ILC Article 13 or, more precisely, portions of its Commentary, cannot provide any guidance to the Tribunal. To the contrary, the following excerpt from the Commentary to Article 13 demonstrates why Respondent's repeated attempts to gloss over the free-standing obligation it owes to each Claimant, pursuant to THE CAFTA Article 10.7(2)(a), to provide compensation for an expropriation "without delay" must be rejected:

> The basic principle stated in article 13 is thus well-established. One possible qualification concern the progressive interpretation of obligations, by a majority of the Court in the *Namibia (South West Africa)* advisory opinion. But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in some cases but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the [sic.] intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried **without undue delay,** periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to entry into force of the obligation.
>
> [**Emphasis** added][293]

319. Respondent has already confirmed its understanding that Article 10.1(3), the text of which mirrors that of VCLT Article 28, represents the confirmation of "this general rule" (although it would have been more accurate for it to have referred to such language as an

[292]Exhibit RLA-001. VCLT, Articles 18 and 28.

[293]Exhibit RLA-005. James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2002), p. 134, Article 13, Commentary 9 (citations omitted).

expression of the general international law principle of contemporaneity, or its derivative, the intertemporal principle, instead). It also seeks assistance from the terms of ILC Article 13 in relation to it. The only problem, for Respondent, is that the explanation provided in the Commentary, above, contradicts its argument in relation to the instant case.

320. Perhaps if the case against Respondent were merely a single damages claim (made by a single group of investors and involving a single investment) for its failure to honour the customary international law rule requiring it to provide "prompt, adequate and effective compensation" for expropriation, it might at least have a case – at least with respect to the handful of direct expropriations in which title was transferred before 1 January 2009. Instead, it faces a claim that it failed to provide compensation "without delay" pursuant to THE CAFTA Article 10.7(2)(a). Just as in the example provided above, in the Commentary to ILC Article 13, the matching language of THE CAFTA Article 10.1(3) and VCLT Article 28 should not be construed so as to preclude the Tribunal's consideration of the events that precipitated Respondent's obligation under THE CAFTA Article 10.7(2)(a). Rather, the fact that an expropriation took place, which triggered the obligation to provide compensation "without delay," is both relevant and admissible – regardless of whether such act transpired before the Agreement came into force – just so long as, by the time the claim was submitted to arbitration, the Agreement had come into force and Respondent had still failed to take the steps necessary to end the "delay" underlying the treaty breach.

321. ILC Articles 14 and 15 might provide the Tribunal with some guidance, but not for the reasons suggested by Respondent.[294] As noted above, the first step must be to acknowledge that the ILC Articles are not binding on the Tribunal.

322. As Claimants have already demonstrated, above, the scope of THE CAFTA Chapter 10 extends both to measures adopted by a Party and to measures maintained by a Party. The context within which the Article 10.1 references to adopting and maintaining measures must be construed includes other provisions of the Chapter, including Article 10.13, which demonstrates that the Parties knew that measures adopted before the Agreement came into force, if maintained thereafter, could breach substantive obligations contained within the Chapter. Claimants also recalled how the THE CAFTA definition of "measure" is exceedingly broad, extending from laws and regulations all the way to mere procedures, requirements or practices adopted by officials of the host State. Thus, any practice or procedure adopted by Costa Rican officials, including the implementation of a decision not to more aggressively pursue uncompleted expropriations or to make compensation payments without delay, could constitute a measure adopted and/or maintained in breach of certain of Respondent's THE CAFTA obligations.

323. Any guidance sought from ILC Articles 14 and 15 must not lead the Tribunal to diminish the import of these THE CAFTA provisions, which take precedence over them pursuant to ILC Article 55.

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[294] Respondent's Counter-Memorial, paras 146-149.

324. Article 14 can obviously be construed in a manner consonant with Claimants' claims that Respondent has failed, and continues to fail, to meet its Article 10.7(2)(a) obligation to pay compensation for any type of expropriation "without delay." Respondent answers this argument by ignoring it, choosing instead to treat the expropriations of each individual investment as though they were governed exclusively under customary international law rules instead. In this regard it argues that the act of expropriation represents a single and conclusive moment in time, and that any failure, on its part, to promptly pay adequate and effective compensation in relation to such expropriation merely constitutes part of the consequences attendant upon it.[295]

325. Accordingly, Respondent claims that it was not under a continuing obligation with respect to its expropriation of Claimants' investments, and it points to ILC Article 14 for the construct of the one-time act with ongoing consequences, as juxtaposed against continuing obligations to do, or refrain from doing, something in a manner inconsistent with an ongoing obligation. It might also have cited directly from the Commentary to ILC Article 14, which provides, in part:

326. Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case… The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, 'creeping' or disguised occupation, however, may well be different. Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequences that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.[296]

327. Of course the reason why Respondent did not cite the one paragraph from the Commentary to Article 14 that was directly on point is because the paragraph contains much with which to refute its position entirely. Indeed, the single portion of the paragraph that could be construed in Respondent's favour, can only be connected to Respondent's taking of the handful of lots, for which title passed prior to 1 January 2009. It would appear that, when an investment has been subjected to a formal expropriation process, customary international law would normally treat the act of expropriation as being of a non-continuing character. On the other hand, Article 14 also specifies that any determining of whether a wrongful act has been completed or possesses a continuing character <u>will depend both on the primary obligation and the circumstances of the given case</u>.

328. Here each claimant whose investment has been subjected to the legal phase of Respondent's municipal expropriation process – which necessarily entails the formal divestment of its property rights in favour of the host State – has claimed violations of sub-paragraphs (a), (b) and (c) of Article 10.7(2), as opposed to merely claiming that

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295 Respondent's Counter-Memorial, paras 148-149.

296 Exhibit RLA-005. James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2002), p. 134, Article 14, Commentary 4 (citations omitted).

Respondent violated paragraph (1) of the same provision, which reflects the applicable standard under customary international law. As already noted, Respondent's argumentation on *jurisdiction ratione temporis* thus misses the point entirely, and cannot be saved by recourse to a construct borrowed from ILC Article 14 pertaining to expropriations under customary international law.

329. The same passage from the Commentary to Article 14 is also devastating for Respondent's attack on each Claimant's allegation that its investments have been subjected to an indirect taking – regardless of whether the Tribunal construes Minister Rodríguez's decision to permanently shut down all MINAE permitting on 19 March 2010 as a singular act of indirect expropriation or as having represented the last, culminating, step in a process of creeping expropriation. As demonstrated in other tribunal decisions,[297] only direct expropriations have typically been regarded as having a completed character, whereas indirect expropriations have been regarded as having an ongoing character.

330. Nothing more needs to be said about the relationship between ILC Articles 14 or 15 to Claimants claims of Respondent's ongoing delay, contrary to Articles 10.5 and 10.7(2)(a) of the THE CAFTA, as in both cases it is manifest that the practice of delay being observed by Respondent is of a continuing character. Indeed, the manner in which Respondent has perennially delayed paying any of the Claimants the compensation due to them, itself, constitutes a "practice" of a "composite" nature, because it has been manifested in Respondent's concerted delay of dozens of similar cases. As such, the language of ILC Article 15 also supports Claimants' position that their claims were submitted on a timely basis.[298]

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[297] Direct Expropriation: Sempra v Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007, para 280; Enron v Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, para 243, (with both decisions stating the following: "there can be a direct form of expropriation if at least some essential component of the property right has not been transferred to a different beneficiary, in particular the State"). Indirect expropriation: Generation Ukraine v Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003, at paras 20.22, 20.26 ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates he situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property… A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is inconsistent with the relevant international standard of protection against expropriation"); Siemens v Argentina, ICSID Case No. ARB/02/8, Award, 6 February 2007, at para 263 ("By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have a perceptible effect but are part of the process that led to the break"). See also YL Fortier & SL Drymer, "Indirect Expropriation in the Law of International Investment: I Know it When I See It, or Caveat Investor" (2004) 19:1 ICSID Rev 293, at 294 (defined indirect expropriation as a "process [that] does not involve a single instance of an outright taking, nonetheless has the effect, often degree-by-degree, of depriving an owner of fundamental rights of property").

[298] See Note (5) of the Commentary to ILC Article 15, which cites, with approval, the reasons for decision by the European Court of Human Rights in *Ireland* v. *United Kingdom*, E.C.H.R. Series A, No. 25 (1978) at para 34, which reads, in part: "A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated

331. That leaves only the Claimants' claims, made in the second alternative,[299] concerning the creeping expropriation of their respective investments, which began with a plan hatched amongst a cabal of senior government officials and former colleagues in the environmental movement who were motivated by a shared, personal interest in: (1) expanding the boundaries of the Park envisaged in the 1995 Law; and (2) the mandatory expropriation of all landholders save for the Leatherback Trust, with which some were closely connected. The first manifestation of the creeping expropriation was the Attorney General's failed attempt to issue a binding opinion retroactively amending the 1995 Law.

332. Other elements of this composite measure, which breached Respondent's obligation under Article 10.7(1), included a number of sometimes-contradictory decisions of the Constitutional Court, along with a handful of MINAE and SETENA decisions taken purportedly to implement them. As with the characterization of Respondent's indirect expropriation of Claimants' investments as a measure of continuing character consonant with ILC Article 14, the same MINAE decision of 19 March 2010 also represented the culminating measure of the creeping expropriation as a composite measure, consonant with ILC Article 15.

333. Respondent does not dispute Claimants' characterization of its creeping expropriation of their respective investments as a "composite measure" or "measures having a composite, expropriatory effect." It merely disputes the factual allegations underlying the composite measure as described by Claimants. As such, Respondent's objection goes to admissibility rather than jurisdiction but, in any event, it fails when confronted with reality. Respondent rejects what it refers to as the mere "formalization" of MINAE's blanket refusal to permit any further development under any condition, which it admits took place on 19 March 2010, as the final element of the composite measure. Instead, it insists – conveniently enough – that the final element of the composite measure was a decision of the Supreme Court handed down roughly two weeks before the THE CAFTA came into force, on 16 December 2008.

334. As demonstrated at paragraphs 152 to 166 of Claimants' Memorial, the suitability of Respondent's candidate measure is belied by the fact that its two premiere environmental authorities both petitioned the Supreme Court – in 2009 – for a decision that could reconcile the import of its decision of 16 December 2008 – in which it countenanced no option but expropriation – and that of its decision of 27 May 2008 – in which it stated that both expropriation and development were possible under the 1995 Park Law. The Court provided both agencies with what must have been greeted as an unsatisfactory 'non-answer' on 27 March 2009, which appears to have led, eventually, to Minister

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incidents or exceptions but to a pattern or system…" Exhibit RLA-005. James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2002), p. 141, Article 15, Commentary 5.

299 Claimants' primary position, with respect to the indirect expropriation claims, is that the MINAE decision of 19 March 2010, in and of itself, constitutes a measure of expropriation that occurred after the THE CAFTA had come into force as between the USA and Costa Rica. Claimants' first alternative position is that the same MINAE decision represented the culmination of a process of creeping expropriation that began with the Attorney General's unsuccessful attempt to issue a binding measure redrawing the boundaries set out in the 1995 Law. The process itself was of a continuing character, consistent with ILC Article 14.

Rodríguez's final decision on the matter [in which he backed the 'expropriation only' option], made on 19 March 2010.

335. It simply defies credulity for Respondent to allege that a decision of the Constitutional Court, issued just before the THE CAFTA came into force, represented the last piece of the composite measure that fundamentally impaired every Claimant's remaining investment. Indeed, given the political environment surrounding the boundary issue – in which two bills that would have quashed attempts to expand legislators seriously entertained the future park's boundaries between 2008 and 2010.[300] It was not until the very end of President Arias' second term, in May 2010, that the fate of the second of these bills was effectively decided.[301] As such, it would not have been at all unreasonable for investors to believe that even MINAE's March 2010 decision would not be the last word.

336. In retrospect – and in light of the positions Respondent has advanced, not only in this arbitration but also in the meeting held in San Jose by the parties in 2012, pursuant to THE CAFTA Article 10.15 – it is now clear that this decision represented the last step in Respondent's uncompensated, creeping expropriation of all of their investments within the expanded boundaries of what appears to have become the *de facto* PNMB.[302]

VI. PRAYER FOR RELIEF

337. Claimants respectfully request an award:

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

(b) awarding 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);

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

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[300] Claimants' Memorial on the Merits, para 177.

[301] Cite media story on the bill almost appearing on the floor of Congress for a vote just before President Arias' term expired.

[302] Claimants make this caveat, about the current status of "the Park" because the provisions of the 1995 Law – which mandated the expropriation of all privately held land within its boundaries before the park would come into existence – have never been amended or withdrawn.

(e) awarding 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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