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

Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsen, Brenda K. Copher, Ronald E. Copher, Brett Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion
Claimants,

v.

Republic of Costa Rica
Respondent.

ICSID Case No. UNCT/13/2

RESPONDENT'S POST-HEARING SUBMISSION

May 26, 2015

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I. INTRODUCTION

1. In its written submissions and at the hearing, Respondent explained that this case is about individuals and real estate developers who purchased land in Costa Rica that was part of a national park—the *Las Baulas* National Marine Park (the "Park")—created to protect the nesting habitat of the leatherback sea turtle, a critically endangered species. Claimants have asserted that they were not aware of their properties' protected status and that they thought Costa Rica would never expropriate their land. As the evidence on the record and testimony at the hearing demonstrated, Claimants' assertions are incorrect.

2. Claimants were well aware of the fact that the land they purchased fell within the boundaries of the Park: the 1991 Decree identified the boundaries of the Park as including a 125-meter strip of land inland from the high tide mark; the Park Law expanded those boundaries to include additional property, such as Playa Ventanas, and maintained the 125-meter boundary; several property owners were notified directly of the existence of the Park before they purchased their land; others bought their property after Costa Rica had already initiated expropriation procedures on nearby properties.

3. As became clear during the hearing, Claimants took a chance when they purchased their property. They were looking to buy low and sell high in order to capitalize on the growing real estate market at the time they invested. In reality, Claimants did not care if Costa Rica was going to expropriate their land; they were just hoping Costa Rica would not expropriate their land before they sold their property. Unfortunately for Claimants, they lost that gamble. But as discussed in Respondent's written submissions and at the hearing, Respondent has not breached any of its obligations under the Dominican Republic—Central America—United States Free Trade Agreement ("CAFTA") and, therefore, should not be held liable for Claimants' losses.

4. The hearing also highlighted the multiple problems in Claimants' case with respect to jurisdiction. First, Claimants admitted that the acts about which they complain occurred before CAFTA came into force—*i.e.*, before January 1, 2009. Second, Claimants admitted several times that they knew of the measures about which they are complaining in this arbitration well before the critical date for the statute of limitations—*i.e.*, on June 10, 2010, three years before Claimants filed their Notice of Arbitration.

5. In this Post-Hearing Submission, Respondent focuses on the Non-Disputing Party Submissions of the Republic of El Salvador and the United States of America, as requested by the Tribunal.[1] Both El Salvador's and the United States's Non-Disputing Party written submissions commented on the interpretation of Articles 10.1.3 (Scope and Coverage), 10.18 (Conditions and Limitations on Consent of

[1] Transcript of Hearing on Jurisdiction and Merits, April 20-24, 2015, English Version ("En. Transcr.") at 1281:20-1282:7 (Tribunal's Final Remarks).

Each Party), 10.5 (Minimum Standard of Treatment), and 10.7 (Expropriation and Compensation) of CAFTA. In addition, in its oral statement, El Salvador commented on the relevance of Chapter 17 of CAFTA (Environment) to investor-State disputes filed under Chapter 10. In this Post-Hearing Submission, Respondent highlights key arguments raised by El Salvador and the United States in their submissions and discusses how the Non-Disputing Party Submissions support Respondent's defenses in this case. In order to provide context for this analysis, Respondent provides at the beginning of its post-hearing submission a short summary of the facts of the case. Respondent does not attempt, however, to review the entirety of its defenses or all of the events of the hearing. Rather, Respondent relies on and incorporates by reference herein its prior written and oral submissions.

6. In Part II of this brief, Respondent summarizes the facts in the case. In Part III, Respondent addresses El Salvador's and the United States's comments on the scope and coverage of CAFTA under Article 10.1.3, and discusses their interpretation of the conditions and limitations on consent under Article 10.18. Part IV discusses their interpretation of the minimum standard of treatment under Article 10.5. Part V addresses their interpretation of the host State's obligations with respect to expropriation under Article 10.7. Finally, Part VI discusses the relevance of Chapter 17 to this case.

II. BRIEF SUMMARY OF THE FACTS

A. CLAIMANTS KNEW THE LAND THEY PURCHASED WAS WITHIN THE *LAS BAULAS* NATIONAL PARK AND, THEREFORE, WAS SUBJECT TO BEING EXPROPRIATED

7. The *Las Baulas* National Park was created in 1991 through Decree No. 20518-MINEREM ("1991 Decree") to protect the nesting sites of the leatherback sea turtles, a critically endangered species.[2] The Park was later confirmed through Law No. 7524 of 1995 ("Park Law").[3] The protected area includes a 125-meter strip of land that runs along the coast in Playa Ventanas and Playa Grande.

8. Claimants allege that the boundaries of the Park changed in 1995, because the 1995 Park Law contains language referring to the strip of land running "seaward" rather than "inland." But any controversy with respect to the boundaries of the Park was resolved by the *Procuraduría General de la República* ("*Procuraduría*") as early as February 2004. In an opinion issued on February 10, 2004, the *Procuraduría* interpreted Article 1 of the Park Law, and concluded that the only logical way of reading the Law was if the Park included a 125-meter strip running inland, rather than seawards.[4] Mr. Julio Jurado,

[2] *See* Executive Decree No. 20518-MINEREM, July 9, 1991, Preamble Nos. 1, 4, and 5 ("1991 Decree Creating the Park") [Exhibit C-1b].

[3] *See* Law Creating the *Las Baulas* National Park, Law No. 7524, July 10, 1995 [Exhibit C-1e].

[4] *See* Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, OJ-015-2004, February 10, 2004 ("*Procuraduría's* Legal Opinion No. OJ-015-2004") [Exhibit C-1t].

author of the opinion, confirmed this at the hearing.[5] For example, he explained that "the interpretation of the word 'seaward' created a contradiction with the coordinates, with the provisions of the article."[6] He also explained that if the 125-meter strip ran seawards, the 50 meter public zone (where the turtles nest) would have been left unprotected for environmental purposes.[7] Thus, understood in the context of the Law as a whole, it is clear that the "seaward" reference was a mistake. The *Procuraduría* confirmed its interpretation in a second opinion issued on December 23, 2005.[8] In addition, the Supreme Court of Costa Rica independently concluded that the Park included a 125-meter strip of land in two decisions issued in 2005 and 2008.[9]

9. Claimants purchased their properties between 2003 and 2007[10] knowing full well that the properties were located in the Park.[11] Claimants' own testimonies at the hearing demonstrate that this is true. For example, both Mr. Robert Reddy and Mr. Brett Berkowitz admitted that they had seen documents that indicated that the properties they were going to purchase were located inside the Park. They testified, however, that they chose to disregard that information and purchase the land anyway.[12] Claimants also admitted during the hearing that they were aware when they purchased their properties that the land was subject to being expropriated, because it was located inside the Park. For example, Mr. Berkowitz was asked during cross-examination: "Is it correct, Mr. Berkowitz, that the document reflecting that transaction provided that you, as the purchaser, would not have a claim against the seller in case the properties were expropriated in the future?" Mr. Berkowitz replied: "That is correct."[13]

[5] *See* En. Transcr. at 556:2-557:7 (Jurado).

[6] En. Transcr. at 577:1-3 (Jurado).

[7] *See* En. Transcr. at 577:7-578:5 (Jurado).

[8] *See* Binding Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, C-444-2005, December 23, 2005 ("*Procuraduría's* Binding Legal Opinión No. C-444-2005") [Exhibit C-1g].

[9] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution No. 2005-014289, October 19, 2005, 4 [Exhibit C-1v]; Supreme Court of Justice, First Chamber, File No.06-008369-0007-CO, Resolution No. 08-008713, May 23, 2008, 25-6 [Exhibit C-1h].

[10] *See* Respondent's Reply on Jurisdiction and Rejoinder on the Merits, December 22, 2014 ("Respondent's Rejoinder on the Merits"), para. 59 (Table).

[11] *See* En. Transcr. at 1153:21-1166:17 (Respondent's Closing).

[12] *See, e.g.*, En. Transcr. at 282:10-283:1, 288:10-289:1, 305:19-306:9, 318:22-319:18 (Reddy); En. Transcr. at 364:4-9, 382:15-383:2 (Berkowitz).

[13] En. Transcr. at 407:16-21 (Berkowitz).

B. RESPONDENT HAS PROVIDED OR IS IN THE PROCESS OF DETERMINING THE FAIR MARKET VALUE OF CLAIMANTS' PROPERTIES IN THE JUDICIAL STAGE AND HAS REASONABLY SUSPENDED EXPROPRIATION PROCEEDINGS FOR ALL OTHER PROPERTIES INSIDE THE PARK

10. Respondent initiated expropriation proceedings with respect to certain of Claimants' properties as early as December 2005, in accordance with Article 2 of the Park Law.[14] Claimants allege that the expropriation proceedings with respect to their properties have been long, Costa Rica has not paid compensation promptly, and the variations in property valuations have been arbitrary.[15] This is incorrect. Respondent's efforts to expropriate the 75 meter portion of Claimants' properties that are within the Park's boundaries have been fully lawful under international and municipal law.

11. Costa Rica's expropriation procedures are governed by the Expropriation Law of Costa Rica.[16] As Ms. Georgina Chaves, the *Procuradora* involved in handling judicial proceedings pertaining to the expropriation of certain of Claimants' properties, testified at the hearing, this process is designed to protect the landowner's right of due process at all times.[17] The expropriation procedure is divided into two stages: (i) an administrative stage in which the State issues an administrative valuation for the property; and (ii) a judicial stage which is initiated if the landowner objects to the administrative valuation.[18] The judicial stage of the expropriation procedure is used to determine the value of the property; it is not a dispute about the expropriation itself.

12. Costa Rica issued Declarations of Public Interest for eighteen of Claimants' properties between 2005 and 2007 (Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7, B8, V30, V31, V32, V33, V38, V39, V40, V46, and V47).[19] Nine of those properties (Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7, and B8) moved to the judicial stage of the expropriation procedures. For those properties, Decrees of Expropriation were issued between 2006 and 2008 and the Acts of Dispossession were issued in 2008.[20] Six of the properties at the judicial stage (Lots A40, SPG2, B3, B5, B6, and B8) have received a final judicial decision, of which two have received full compensation under Costa Rica's Expropriation Law (Lots A40 and SPG2). For the remaining four, the principal amount awarded (which includes the amount of the administrative

[14] *See* Respondent's Rejoinder on the Merits at Annex B.

[15] *See, e.g.*, Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, October 3, 2014, paras. 126-149.

[16] *See generally* Costa Rica's Expropriation Law, Law No. 7495, June 8, 1995 ("Costa Rica's Expropriation Law") [Exhibit C-1c].

[17] *See* En. Transcr. at 643:9-644:18 (Chaves).

[18] *See generally* Costa Rica's Expropriation Law [Exhibit C-1c]; *see also* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, July 15, 2014 ("Respondent's Counter-Memorial on the Merits"), paras. 65-74.

[19] *See* Respondent's Rejoinder on the Merits at Annex B.

[20] *See* Respondent's Rejoinder on the Merits at Annex B. The dates of the Decrees of Expropriation are in the Annex under the column "Referred to Judicial Stage."

valuation) has been made available for Claimants.[21] With respect to the other three properties in the judicial stage, two have been suspended because of this arbitration (Lots SPG1 and B1), and one is being appealed (Lot B7).[22] For all of the properties for which a final valuation has been made, the judges have decided the valuation of the property depending on the evidence presented and the arguments made by the parties.[23] There is nothing inherently arbitrary about this process.

13. For the remaining nine properties for which Cost Rica issued a Declaration of Public Interest (Lots V30, V31, V32, V33, V38, V39, V40, V46, and V47), expropriation procedures were suspended at the administrative stage.[24] Costa Rica suspended expropriation procedures at the administrative stage between 2008 and 2009 because of an audit by the *Contraloría General de la República* ("*Controlaría*") which resulted in a Report issued in February 2010.[25] The purpose of the suspension is to improve the State's expropriation procedures and safeguard the landowner's property rights as Respondent has explained in its written submissions.[26] The properties that were suspended at the administrative stage have not been expropriated, and, thus, Claimants may still use and enjoy those properties.

14. In addition, as Ms. Chaves clarified at the hearing, the Declarations of Public Interest issued on these nine properties in 2007, lost their effect in 2008. As Ms. Chaves explained, this is because if an Expropriation Decree has not been issued within a year of when a Declaration of Public Interest is registered, the declaration "expires as a matter of law."[27] Thus, the properties are in the same situation they were when they were purchased: inside the Park, with a possibility of being expropriated. The remaining eight properties (Lots A39, SPG3, C76, C91, V59, V61a, V61b, and V61c) for which no Declaration of Public Interest has been issued have also not been expropriated. Thus, they, too, are in the same situation as they were when they were purchased.

15. Claimants allege that Costa Rica suspended the administrative stage of the expropriation proceedings in order to avoid payment to Claimants. This is incorrect. Mr. Jurado has explained that Costa

[21] *See* Respondent's Rejoinder on the Merits at Annex B.

[22] *See* Claimants' Rejoinder on Jurisdiction, February 4, 2015 ("Claimants' Rejoinder on Jurisdiction"), Appendix 2.

[23] *See* Costa Rica's Expropriation Law at Art. 40 [Exhibit C-1c]; *see also*, *e.g.*, Lot A40 Appeal Judgment, July 21, 2011, pp. 3-6 [Exhibit C-16h]; Lot SPG2 First Instance Decision, February 29, 2012, pp. 3-17, 13-20 [Exhibit C-21g]; Lot B3, First Instance Decision, February 7, 2013, pp. 2-20 [Exhibit C-24g1]; Lot B6 First Instance Decision, July 30, 2014, pp. 3-48 [Exhibit C-26g]; Lot B8 Appeal Judgment, July 30, 2013, pp. 9-25 [Exhibit C-28h].

[24] *See* Respondent's Rejoinder on the Merits at paras. 105-113, Annex B.

[25] *See* Sabrina Loáiciga First Witness Statement, July 14, 2014, paras. 18-20 ("Loáiciga First Witness Statement") [Exhibit RWE-003]; *see also* Sabrina Loáiciga Second Witness Statement, December 22, 2014, paras. 5-8 ("Loáiciga Second Witness Statement") [Exhibit RWE-009].

[26] *See* Respondent's Counter-Memorial on the Merits at paras. 85-87.

[27] En. Transcr. at 644:19-22 (Chaves); *see also* Costa Rica's Expropriation Law at Art. 20 [Exhibit C-1c].

Rica will reinitiate expropriation proceedings once it has fully complied with the *Contraloría's* recommendations and that it will promptly pay once the value of the properties is determined.[28]

16. In sum, in 2005 Costa Rica initiated expropriation proceedings with respect to Claimants' properties located inside the Park. Costa Rica has complied with its obligation to pay compensation when the expropriation procedures have been completed. For those properties where procedures have not been completed, Costa Rica will pay compensation once the procedure is terminated.

C. COSTA RICA ADOPTED ADDITIONAL MEASURES TO PROTECT THE ENVIRONMENTALLY FRAGILE AREA OF THE *LAS BAULAS* NATIONAL PARK

17. Costa Rica has adopted additional measures to protect the environmentally fragile area of the *Las Baulas* National Park. All of these measures, in addition to the expropriations, are reasonable and necessary for the protection of the area and the nesting sites of the leatherback sea turtles. Both experts on the conservation of sea turtles, Mr. Rotney Piedra and Mr. Kirt Rusenko, are in agreement.[29] For example, Mr. Rusenko admitted during the hearing that development should be strictly controlled within the 125-meter strip of land included inside the Park and even beyond the Park's boundaries.[30] As Mr. Piedra explained, "[I]t is essential to protect and conserve those 75 meters so as not to have an impact on the nesting habitat. If we have a nondeveloped area, I do not want to inject threats . . . [It] would be very sad to find out that, as human beings we're going to . . . add a threat, a risk, for a population that is in such [a] critically endangered [situation]."[31]

18. In addition, as early as 2005, even before some Claimants purchased their properties, Costa Rica started restricting development inside the Park. In August 2005, the National Environmental Technical Secretariat ("SETENA" in Spanish) issued Resolution No. 2238-2005 temporarily suspending the issuance of all environmental permits located inside the Park.[32] Without an environmental permit, no building permit may be issued for a particular piece of property. This suspension resulted from Supreme Court decisions and subsequent orders by the Ministry of Environment, Energy, Mines and Telecommunications ("MINAE" in Spanish). In December 2008, the Supreme Court issued Decision 2008-18529 in which it ordered SETENA to permanently suspend all environmental and building permits within the Park.[33]

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[28] *See* Julio Jurado Witness Statement, December 22, 2014, para. 15 [Exhibit RWE-006].

[29] *See* En. Transcr. at 547:20-548:13 (Piedra); En. Transcr. at 472:12-473:6 (Rusenko).

[30] *See* En. Transcr. at 472:5-473:6 (Rusenko).

[31] En. Transcr. at 547:22-548:13 (Piedra).

[32] *See* Resolution No. 2238-2005, August 30, 2005 [Exhibit C-1f].

[33] *See* Supreme Court of Costa Rica, Decision 2008-18529, December 16, 2008 [Exhibit C-1j].

19. These measures were reasonable, precautionary measures taken to prevent any deterioration of the Park's protected area. They were limited in scope and only affected the 125-meter strip of land located inside the Park.

III. THIS TRIBUNAL LACKS JURISDICTION TO HEAR THIS CASE

20. In Respondent's view, the Tribunal never needs to reach any of Claimants' allegations on liability or damages, because the Tribunal lacks jurisdiction to hear this case for two main reasons. First, the alleged breaches occurred before CAFTA entered into force on January 1, 2009. Second, Claimants failed to initiate this arbitration within the three-year statute of limitations period provided under CAFTA's Article 10.18.1. We discuss each basis below focusing, in particular, on arguments raised by El Salvador and the United States in their submissions.

A. CAFTA DOES NOT APPLY RETROACTIVELY (ARTICLE 10.1.3)

21. CAFTA Article 10.1.3 provides:

> For greater certainty, this Chapter [Ten] 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.

22. Both El Salvador and the United States interpret the language in Article 10.1.3 of CAFTA to mean that Chapter 10 of CAFTA does not apply retroactively. Both also agree that the language in Article 10.1.3 essentially tracks that in Article 28 of the Vienna Convention on the Law of Treaties ("Vienna Convention").[34] Article 28 of the Vienna Convention provides that "[u]nless 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."[35]

23. As explained by El Salvador, "[A] dispute that existed before CAFTA-DR entered into force, and that remains unresolved after CAFTA-DR entered into force, cannot give rise to a claim for a breach of the substantive provisions of CAFTA-DR."[36] Accordingly, the Tribunal's jurisdiction only covers acts or facts that occurred after CAFTA entered into force—*i.e.*, after January 1, 2009—that constitute breaches of Costa Rica's CAFTA obligations.

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[34] *See* United States's Non-Disputing Party Submission, April 17, 2015 ("U.S. Submission"), para. 2; El Salvador's Non-Disputing Party Submission, April 17, 2015 ("El Salvador's Submission"), para. 33.

[35] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 115 U.N.T.S. 331, Art. 28 [Exhibit RLA-001].

[36] El Salvador's Submission at para. 34.

24. In this arbitration, Claimants complain about alleged illegal expropriations or breaches of the minimum standard of treatment provision under CAFTA derived from actions that occurred before CAFTA came into force. First, with respect to the nine properties that are in the judicial stage of the expropriation proceedings and which Claimants allege have been directly expropriated, Claimants have relied on the date of the Act of Dispossession as the moment when expropriation occurred.[37] All of the Acts of Dispossession, however, occurred between March and December 2008.[38] Thus, they occurred before CAFTA entered into force.

25. Second, with respect to the remaining seventeen properties, which Claimants assert were indirectly expropriated, Claimants allege that they lost use and enjoyment of those properties when the State confirmed the boundaries of the Park and restricted development therein.[39] Costa Rica confirmed the boundaries of the Park several times, starting in February 2004 with the first opinion of the *Procuraduría*, and it definitely restricted development inside the Park on December 16, 2008 when the Costa Rican Supreme Court ordered the Administration to stop issuing environmental impact permits and revoked all existing environmental impact permits for properties located inside the Park.[40] Therefore, all of the acts about which Claimants complain occurred before CAFTA entered into force. Consequently, Claimants' claims of illegal expropriation and unfair and inequitable treatment that stem from those acts fall outside of the Tribunal's jurisdiction.

26. The Tribunal would only have jurisdiction if there were an independent breach by Costa Rica that occurred after CAFTA came into force. As clarified by the United States:

> A host State's conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist "conduct of the State after that date which is itself a breach."[41]

27. In this case, there has been no independent alleged breach that occurred after CAFTA entered into force. Claimants allege that Respondent has breached its obligations under CAFTA by not paying Claimants prompt and adequate compensation and otherwise treating them unfairly and inequitably by the following allegedly arbitrary government actions: (1) the valuations of the properties by independent appraisers; (2) the judicial decisions on the valuations of the properties; (3) the partial expropriations of

[37] *See* Claimants' Memorial on the Merits, April 25, 2014 ("Claimants' Memorial on the Merits"), para. 207. Respondent notes that when Claimants realized that these dates were problematic for their arguments on jurisdiction, they started relying on the date of transfer of title as the date of direct expropriation. *See* Claimants' Rejoinder on Jurisdiction at paras. 4 and 153.

[38] *See* Respondent's Rejoinder on the Merits at Annex B.

[39] *See* Claimants' Memorial on the Merits at paras. 208-211.

[40] *See Procuraduría's* Legal Opinion No. OJ-015-2004 [Exhibit C-1t]; *Procuraduría's* Binding Legal Opinión No. C-444-2005 [Exhibit C-1g]; Supreme Court of Costa Rica, Decision 2008-18529, December 16, 2008 [Exhibit C-1j].

[41] U.S. Submission at para. 3 (*citing Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 ("*Mondev*"), para. 70 [Exhibit RLA-018]) (emphasis added).

properties with respect to the portions of properties that lie within the boundaries of the Park; and (4) the temporary suspension of the expropriation process for properties not yet in the judicial stage.[42]

28. Most of these acts occurred before CAFTA entered into force. But to the extent they did not, they represent the lingering effects of completed acts—that is, the acts of alleged direct and indirect expropriation. According to the International Law Commission's Articles on State Responsibility ("ILC Articles"), "[T]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."[43] The ILC Articles determine that a direct expropriation is by nature a completed act.[44] That act, according to Claimants' own account, occurred in 2008, before CAFTA entered into force. The ILC Articles also state that an indirect expropriation may be a completed act depending on the primary obligation and the circumstances of a given case.[45] As discussed in Respondent's Rejoinder, an examination of the prevailing jurisprudence and the facts of this case make it clear that the alleged wrongful indirect expropriation in this case is an act that was completed. That act occurred in December 2008, before CAFTA entered into force.[46]

29. Significantly, none of the acts that took place after CAFTA entered into force and about which Claimants complain is a breach in and of itself of CAFTA's obligations. The foundation of Claimants' complaints is the alleged expropriation of their properties which, as just discussed, was complete before CAFTA entered into force. Delayed payment, seemingly inadequate payment, stalled judicial procedures—these are purported harms (or lingering effects) stemming from a completed act of alleged expropriation. The decision of the tribunal in the recent *Clayton* case supports this analysis, as Respondent explained in its opening.[47] The *Clayton* tribunal held that "an act can be complete even if it has continuing ongoing effects."[48] Thus, "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."[49] In other words, according to the *Clayton* tribunal, although an act may have "ongoing impacts" that are felt after the

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[42] *See, e.g.*, Claimants' Memorial on the Merits at paras. 278-298; Claimants' Reply on the Merits at paras. 285-286.

[43] International Law Commission's Articles on State Responsibility, 2001 (excerpts) ("ILC Articles"), Art. 14(1) [Exhibit RLA-005]. At the hearing, the President of the Tribunal asked Respondent whether there were any updates to the ILC Articles from 2001 to the present. *See* En. Transcr. at 1212:10-14 (President Bethlehem). To Respondent's knowledge, the only ILC Articles that have been published are those from 2001. The Articles were adopted by the Commission at its fifty-third session in 2001. *See* International Law Commission, Fifty-third session *available at* http://legal.un.org/ilc/sessions/53/53sess htm (last visited May 13, 2015).

[44] ILC Articles at Art. 14, commentary 4 [Exhibit RLA-005]; Schwebel Expert Opinion at para. 30 [Exhibit RWE-013].

[45] ILC Articles at Art. 14, commentary 4 [Exhibit RLA-005].

[46] *See* Schwebel Expert Opinion at para. 29 [Exhibit RWE-013]; Respondent's Rejoinder at paras. 155-160 (*citing Mondev* [Exhibit RLA-018]).

[47] *See* En. Transcr. at 128:7-130:6 (Respondent's Opening).

[48] *William Ralph Clayton et. al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015 ("*Clayton*"), para. 268 *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf (last visited May 15, 2015).

[49] *Clayton* at para. 268.

completion of that event, those are not "ongoing acts" and do not transform a completed measure into a measure of a continuing nature.[50]

30. At the hearing, the President of the Tribunal asked Respondent whether the Tribunal would have jurisdiction if Respondent had initially promised Claimants before the Treaty entered into force that it would pay them prompt, adequate, and effective compensation for their property, but then after the Treaty entered into force failed to do so.[51] The answer is no. This is because the promise to compensate Claimants would have been made at a time when the Treaty was not in force. As such, the only obligation Respondent might have had to fulfill that promise would have been under Costa Rican law. But this Tribunal does not have jurisdiction to hear disputes concerning Respondent's actions under Costa Rican law; instead, this Tribunal is obligated to hear disputes concerning Respondent's conduct under the Treaty. In such a situation, therefore, the Tribunal would not have jurisdiction to hear the dispute.

31. In sum, the Tribunal lacks jurisdiction in this case because all of the alleged breaches either occurred before CAFTA entered into force or are lingering effects of acts that occurred before CAFTA entered into force. Claimants' claims are thus time-barred.

B. A CAFTA CLAIM MUST BE MADE WITHIN THREE YEARS OF THE DATE A CLAIMANT FIRST ACQUIRED OR SHOULD HAVE FIRST ACQUIRED KNOWLEDGE OF A BREACH AND RESULTING DAMAGES (ARTICLE 10.18 OF CAFTA)

32. The second ground on which the Tribunal lacks jurisdiction is that Claimants failed to initiate this arbitration within the three-year statute of limitations period provided under CAFTA's Article 10.18. Article 10.18.1 provides that "[n]o claim may be submitted to arbitration . . . if more than three years have elapsed from the date the claimant <u>first acquired, or should have first acquired</u>, knowledge of the breach alleged under Article 10.16.1 . . . and knowledge that the claimant . . . has incurred loss or damage."[52]

33. El Salvador and the United States interpret Article 10.18.1 as requiring that the three-year statute of limitations starts running as of a particular date—that is, when a claimant first acquired, or should have first acquired, knowledge of the alleged breach and damage.[53] Costa Rica fully agrees with El Salvador's and the United States's interpretation.

34. As explained by the United States in its submission:

> Article 10.18.1 refers to knowledge of the alleged breach and loss <u>first acquired</u> as of a particular "date." Such knowledge cannot be acquired at multiple points in time or on a recurring basis. . . . Article 10.18.1 expressly

[50] *Clayton* at para. 269.

[51] *See* En. Transcr. at 1208:18-22 to 1211:12 (President Bethlehem).

[52] *See* CAFTA at Art. 10.18.1 (emphasis added) [Exhibit C-1a].

[53] *See* U.S. Submission at paras. 5-7; El Salvador's Submission at para. 31.

> requires a claimant to submit a claim to arbitration within three years of the date on which the claimant "first acquired" (or should have first acquired) knowledge of breach and loss.[54]

35. In other words, CAFTA considers a specific point in time to determine the statute of limitations. That specific point in time is when a claimant first acquires knowledge of the alleged breach and loss. As further explained by the United States, "[A]n investor cannot evade the limitations period by basing its claim on 'the most recent transgression in [a series of similar and related actions].'"[55] Therefore, any continuing effect does not renew the limitations period. According to the United States, "[O]nce a claimant first acquires (or should have acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, does not renew the limitations period under Article 10.18.1."[56] El Salvador agrees and goes as far as to say that the continuing effect of the breach is irrelevant: "Because the requirement refers to 'the date on which the claimant first acquired, or should have first acquired, knowledge of a breach', it is irrelevant whether the measure is characterized as an act having a continuing character."[57]

36. The United States relies on the *Grand River v. United States* decision in support of its interpretation of Article 10.18.1.[58] The *Grand River* tribunal clarified that the limitation period is "clear and rigid" and is not subject to any "suspension, prolongation or other qualification."[59] The *Grand River* tribunal also stated that the limitation period would be ineffective if a tribunal is allowed to look at the most recent transgression in a series of similar and related actions by a State.[60]

37. Knowledge of the breach does not require knowledge of the breach of a particular CAFTA provision in a legal sense. As explained by El Salvador:

> Article 10.18.1 refers to knowledge of a "breach alleged under [CAFTA] Article 10.16.1" and knowledge of resulting harm as the triggering event for the three-year statute of limitations to begin to run. However, it is not necessary for the investor to know that there has been a breach of a certain provision of CAFTA-DR Section A . . . in the legal sense. It is sufficient if the investor is aware, or should be aware, of the existence of a measure that harms it and that is later alleged to constitute the breach under CAFTA-DR Article 10.16.1.[61]

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[54] U.S. Submission at paras. 5-6 (emphasis added).

[55] U.S. Submission at para. 7.

[56] U.S. Submission at para. 7.

[57] El Salvador's Submission at para. 31.

[58] *See* U.S. Submission at paras. 4 (fn. 5) and 7.

[59] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 ("*Grand River*"), paras. 29, 81 (submitted with Claimants' Legal Authorities).

[60] *Grand River* at para. 81 (submitted with Claimants' Legal Authorities).

[61] El Salvador's Submission at para. 29 (emphasis added).

38. Knowledge of loss also does not require knowledge of the exact amount of damage. Citing *Grand River*, El Salvador explains that "[w]hile knowledge of loss or damages is required, it is not necessary to have knowledge of the precise amount of the loss or damage. The only requirement in Article 10.18(1) is knowledge that there has been some loss or damages as a result of the offending measure."[62] The United States is in accord: "As other NAFTA tribunals have held, knowledge of loss or damages incurred does not require knowledge of the full or precise extent of loss or damage."[63]

39. Claimants filed their Notice of Arbitration on June 10, 2013. Thus, the critical date regarding CAFTA's statute of limitations is June 10, 2010, three years prior to that date. As Respondent has demonstrated in its written submissions and, critically, at the hearing, Claimants first acquired, or should have first acquired, knowledge of the acts they allege breached Costa Rica's treaty obligations and the harms resulting therefrom well before June 10, 2010.[64]

40. With respect to the nine properties that are currently in the judicial stage of the expropriation proceedings, Claimants knew as early as 2005 that expropriation procedures had started on their properties. In 2005, Respondent issued the first Declarations of Public Interest with respect to Claimants' properties,[65] initiating expropriation procedures for those properties. Those properties received administrative valuations in 2006-2007.[66] As Claimants objected to those valuations at that time, Claimants knew then that they did not agree with the amount of compensation awarded.[67] In addition, in March and December 2008 Claimants learned that these properties had been dispossessed.[68]

41. With respect to the other seventeen properties, Claimants knew as early as 2005 that development would be restricted on properties inside the Park. In 2005, SETENA temporarily suspended

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[62] El Salvador's Submission at para. 30 (*citing Grand River* at para. 77 (stating that "[a] party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time") (submitted with Claimants' Legal Authorities)).

[63] U.S. Submission at para. 9 (citing *Clayton* at para. 275 (finding that "[t]he plain language of Article 1116(2) does not require full or precise knowledge of loss or damage. It might be that some qualification can be read into the plain language, such as a requirement that the loss be material. To require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue") and *Grand River* at para. 78 (finding that "the Tribunal's views parallel those of the NAFTA Tribunal in *Mondev*. The claimant there also faced difficulties arising from the time limitations of Articles 1116(2) and 1117(2). The claimant sought to surmount these with the argument that it could have certain knowledge that it had incurred injury from events prior to the limitations period only after it knew the outcome of subsequent litigation that stood to quantify the extent of the loss. The Tribunal did not agree, finding that 'a Claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damages is still unclear'") (submitted with Claimants' Legal Authorities)).

[64] *See* Respondent's Counter-Memorial on the Merits at para. 122; Respondent's Rejoinder on the Merits at para. 146; En. Transcr. at 131:18-137:3 (Respondent's Opening); En. Transcr. at 1169: 9-1176:22 (Respondent's Closing).

[65] *See* Respondent's Rejoinder on the Merits at Annex B.

[66] *See* Respondent's Rejoinder on the Merits at Annex B.

[67] *See* Respondent's Rejoinder on the Merits at Annex B; *see also* Costa Rica's Expropriation Law at Art. 28 [Exhibit C-1c].

[68] *See* Respondent's Rejoinder on the Merits at Annex B.

issuing environmental permits for properties located inside the Park.[69] In December 2008, this suspension became permanent as ordered by the Supreme Court.[70] Claimants have admitted on numerous occasions that they knew of these restrictions since 2005 and 2008, respectively.[71]

42. Finally, Claimants allege that they did not know that expropriation procedures had been suspended at the administrative stage. They allege, in particular, that it was because of this arbitration that they learned about the suspension that resulted from the 2010 *Contraloría* Report.[72] However, as Respondent demonstrated at the hearing, Claimants should have known that the expropriation proceedings at the administrative stage had been suspended at the latest by October 2009. This is because under Costa Rica's Expropriation Law, the *Procuraduría's* office has six months from the date a land owner has objected to the administrative valuation to initiate judicial proceedings.[73] For Claimants' properties that received an administrative valuation about which Claimants filed an objection in January 2009 and April 2009, no such judicial proceedings had been initiated within the sixth-month period thereafter—*i.e.*, by July 2009 and October 2009. Thus, Claimants must have known at that time that their properties were no longer in the process of being expropriated.

43. To avoid their statute of limitations problem, Claimants have to persuade this Tribunal that they had no knowledge about any of the above-mentioned measures or acts until after June 2010. As discussed above, however, there is ample evidence on the record that Claimants acquired such knowledge well in advance of that date. Even if there were no such evidence, the measures are public measures and, therefore, Claimants could have and should have known about them.

44. Claimants also first knew or should have known of the alleged breaches of the fair and equitable treatment provision of CAFTA more than three years before they filed their Notice of Arbitration. Claimants allege that Respondent has treated them unfairly and inequitably in violation of CAFTA Article 10.5 by conspiring to deny them payment and to delay the expropriation process it started years ago. But these are the same harms they claim as a result of the violation of the expropriation provision. As we just discussed, Claimants were well aware of those harms more than three years before they submitted their claims to arbitration. Therefore, their claims regarding fair and equitable treatment are equally time-barred.

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[69] *See* Resolution No. 2238-2005, August 30, 2005, para. 11 [Exhibit C-1f].

[70] *See* Supreme Court of Costa Rica, Decision 2008-18529, December 16, 2008 [Exhibit C-1j].

[71] *See, e.g.*, Claimants' Notice of Arbitration, June 10, 2013, para. 65; Claimants' Memorial on the Merits at paras. 173, 175; Brett Berkowitz First Witness Statement, April 25, 2014, paras. 20, 46; Robert Reddy Third Witness Statement, February 4, 2015, para. 11; Ronald Copher First Witness Statement, April 25, 2014, para. 22; En. Transcr. at 295:2-7 (Reddy); En. Transcr. at 438:1-439:6 (Berkowitz).

[72] *See* Claimants' Reply on the Merits at para. 136.

[73] *See* Costa Rica's Expropriation Law at Art. 29 [Exhibit C-1c].

IV. THE MINIMUM STANDARD OF TREATMENT PROVISION REQUIRES PARTIES TO ACT IN ACCORDANCE WITH CUSTOMARY INTERNATIONAL LAW (ARTICLE 10.5 OF CAFTA)

45. In its written submissions and at the hearing, Respondent demonstrated that even if, notwithstanding evidence to the contrary, the Tribunal were to find that it has jurisdiction to hear this case, Costa Rica has fully complied with its obligations under Article 10.5 of CAFTA. Article 10.5 of CAFTA requires that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment. . . ."[74]

46. Both the United States and El Salvador advocate similar interpretations of CAFTA's Article 10.5. El Salvador and the United States clarify that it was the "express intent [of the State parties] to establish the customary international law minimum standard of treatment as the applicable standard in CAFTA-DR Article 10.5."[75] The United States explains that "[t]he minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law."[76] And, according to El Salvador, "The minimum standard of treatment must be an objective concept to evaluate the treatment a State accords to an investor, not a concept that can vary depending on the investor's subjective understanding about the treatment it expects to receive."[77] Therefore, Cost Rica is only obligated to afford investors the minimum standard of treatment as it has crystallized into customary international law through general and consistent State practice and *opinio juris*.[78]

47. The claimant has the burden of proving whether a particular element of the minimum standard of treatment has crystallized as a rule of customary international law.[79] In this case, Claimants have not proven that the minimum standard of treatment under customary international includes either of the main claims on which they rely for their minimum standard of treatment claim—*i.e.*, legitimate expectations or arbitrary actions.

48. First, the minimum standard of treatment does not include protection of legitimate expectations as an element of fair and equitable treatment that must be accorded to the investor under CAFTA. According to the United States, "[E]xpectations [developed by an investor] impose no obligations on the State under the minimum standard of treatment."[80] El Salvador agrees. In fact, according to El Salvador, "[T]he majority of CAFTA-DR Parties have previously declared that the minimum standard of

[74] CAFTA at Art. 10.5(1) [Exhibit C-1a].

[75] U.S. Submission at para. 12; *see also* El Salvador's Submission at para. 4.

[76] U.S. Submission at para. 12.

[77] El Salvador's Submission at para. 8.

[78] *See* El Salvador's Submission at paras. 3-6; *see also* U.S. Submission at paras. 15-16.

[79] *See* El Salvador's Submission at para. 7; *see also* U.S. Submission at para. 21.

[80] U.S. Submission at para. 18.

treatment does not include the protection of investors' expectations."[81] Cases in which CAFTA parties have made such declarations include *Teco Guatemala Holdings*, *Grand River*, and *Glamis Gold*.[82]

49. Costa Rica agrees with El Salvador and the United States: the minimum standard of treatment does not include an obligation not to frustrate an investor's legitimate expectations. However, even if the Tribunal were to find that Claimants' alleged legitimate expectations were protected, it became evident during the hearing that Claimants could not have legitimately expected that their land was outside the Park or that it would not be expropriated.[83] Instead, Claimants hoped that they could quickly sell any land they purchased so that they were not left holding title to the land if and when the government expropriated their property. Claimants took a gamble. Unfortunately for them, they lost that bet. But that does not mean that Costa Rica is obligated under CAFTA to pay for Claimants' losses.

50. Second, the minimum standard of treatment under CAFTA does not prohibit conduct that is merely arbitrary. According to El Salvador, in order for conduct of a State to breach Article 10.5 of CAFTA, the conduct of a State must rise to the level of "manifest arbitrariness."[84] El Salvador cites to non-disputing party submissions of the Dominican Republic, Honduras, and the United States in the *Teco Holdings* case in support of its interpretation.[85] In this case, there is nothing in Costa Rica's expropriation procedures that rises to the level of manifest arbitrariness. First, Costa Rica's decision to expropriate and limit development of properties inside the Park, including Claimants' properties, was reasonable in accordance with Costa Rica's policy to protect the nesting sites of the leatherback sea turtles. Second, landowner's due process rights are respected at all stages of the expropriation process. Importantly, property owners receive multiple opportunities to submit evidence to a dispute settlement body to determine the fair market value of their property. Third, there is nothing arbitrary about the variations in the valuations of Claimants' properties. To the contrary, these variations show that Claimants have had the opportunity to object to the valuations presented by the State and to submit different evidence to the Courts for their independent assessment of the value of the property.

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[81] El Salvador's Submission at para. 9 (citing *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submissions of El Salvador, Oct. 5, 2012, paras. 13-14; the Dominican Republic, Oct. 5, 2012, para. 10; Honduras, Nov. 15, 2012, paras. 9-10; and the United States of America, Nov. 23, 2012, para. 6).

[82] *See* El Salvador's Submission at paras. 9-11 (citing the non-disputing party submissions of El Salvador, the Dominican Republic, Honduras, the United States, and the disputing party submission (Guatemala) in *Teco Holdings* and disputing party submissions in *Grand River* (the United States) and *Glamis Gold* (the United States)). Respondent clarifies that even though *Grand River* and *Glamis Gold* were NAFTA cases, the United States's submissions in those cases are relevant in this case because CAFTA's language in Article 10.5 is similar to the minimum standard of treatment provision in NAFTA.

[83] *See* En. Transcr. at 1153:21-1166:17 (Respondent's Closing).

[84] El Salvador's Submission at para. 13.

[85] *See* El Salvador's Submission at para. 13 (citing to the non-disputing party submissions of the Dominican Republic, Oct. 5, 2012, paras. 6-9; Honduras, Nov. 15, 2012, para. 9, and the United States, November 23, 2012, para. 6).

51. Finally, there is nothing "manifestly arbitrary" about Costa Rica's decision to suspend administrative expropriation proceedings for properties inside the Park. Costa Rica suspended the expropriations in order to improve the expropriation system, protect landowner's rights, and avoid any inefficiencies in the expropriation process. In addition, with respect to the properties that are not in the judicial stage of the expropriation proceedings, Claimants continue to have property rights with respect to their lots. Thus, these lots are in the exact same situation they were in when Claimants bought them: they are located inside the Park and are subject to being expropriated. Therefore, Respondent has not breached any of its obligations under Article 10.5 of CAFTA.

52. Claimants also allege that in the course of this arbitration, they learned of a new measure adopted by Costa Rica that constituted a breach of CAFTA's provisions. This so-called new measure is the temporary suspension of the expropriation procedures adopted by the National System of Conservation Areas ("SINAC" in Spanish) in order to implement the *Contraloría's* recommendations.[86] As mentioned above, these recommendations seek to improve the expropriation procedures related to the *Las Baulas* National Park and guarantee landowner's property rights. In their Rejoinder on Jurisdiction, Claimants allege—for the first time in these proceedings—that the suspension was adopted to further delay payment of compensation to Claimants and that the delay in payment constitutes a constructive denial of justice.[87]

53. While both El Salvador and the United States agree that denial of justice falls within the scope of the fair and equitable treatment provision under CAFTA,[88] the standard that is applicable to a denial of justice claim is a high one. According to the United States, a denial of justice arises when "a State's judiciary administers justice to aliens in a 'notoriously unjust' or 'egregious' manner 'which offends a sense of judicial propriety.'"[89] Claimants are unable to point to any evidence on the record which would support such a finding with respect to the treatment of Claimants' expropriation claims at issue in these proceedings.

54. In any case, as Respondent explained at the hearing, Claimants' denial of justice claims are untimely. First, Claimants cannot raise a claim in the middle of an arbitration proceeding if they did not include it in their Notice of Arbitration.[90] Nor may they raise arguments on the merits of this new claim in a

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[86] *See* Loáiciga First Witness Statement at paras. 18-20 [Exhibit RWE-003]; *see also* Loáiciga Second Witness Statement at paras. 5-8 [Exhibit RWE-009].

[87] *See* Claimants' Rejoinder on Jurisdiction at para. 101.

[88] *See* El Salvador's Submission at paras. 16-21; U.S. Submission at para. 13.

[89] U.S. Submission at para. 13 (citing Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44, 60 (2005); *B.E. Chattin (U.S.A.) v. United Mexican States*, 4 R. Int'l Arb. Awards 282, 286-87 (July 23, 1927), *reprinted in* 22 AM. J. INT'L L. 667, 672 (1928); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 132).

[90] *See* En. Transcr. at 150:22-151:15 (Respondent's Opening); *see also generally* Claimants' Notice of Arbitration at paras. 97-100.

Rejoinder on Jurisdiction.[91] Respondent has not been given an opportunity to properly respond to the claim. Thus, the claim should be excluded from this arbitration. Second, this is not a new measure. With respect to the alleged delay of payment of the indirect expropriations, this corresponds to the lingering effects of a measure that was adopted before CAFTA came into force. Before January 1, 2009, Costa Rica had no international obligation to pay prompt, adequate, and effective compensation under CAFTA.

V. EXPROPRIATION AND COMPENSATION (ARTICLE 10.7 OF CAFTA)

55. Article 10.7.1 of CAFTA provides that an expropriation must be carried out in compliance with four requirements: (i) the expropriation must be made for a public purpose; (ii) it must be made in a non-discriminatory manner; (iii) the government must provide prompt, adequate and effective compensation; and (iv) it must be done in accordance with due process of law.[92] Article 10.7.2 further provides 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; (iii) not reflect any change in value occurring because the intended expropriation had become known earlier; and (iv) be fully realizable and freely transferable.[93] Both the United States and El Salvador have cited these obligations in their submissions.[94]

56. As Respondent has explained in its written submissions and at the hearing, Costa Rica has not breached any of these obligations. First, expropriations were done for a public purpose: to protect the nesting sites of the leatherback sea turtle. Second, expropriations were done in a non-discriminatory manner. In fact, Claimants have not alleged any discrimination in this case. Third, Costa Rica has complied with its obligations to provide prompt, adequate and effective compensation. Fourth, ample due process has been given to landowners.[95]

57. With respect to the element of compensation, Costa Rica has a process for determining the amount owed to the landowner. Once an expropriation process is initiated, the State issues an administrative valuation of the property, which, if it is accepted by the landowner, will be deposited immediately in his favor. If, however, the landowner objects to the valuation, there is a process to determine the fair value of the property. While this process is ongoing, the State deposits the amount of the administrative valuation in the court's account, which may be withdrawn by the landowner at any time.[96] Thus, even before the State

[91] *See* En. Transcr. at 150:22-151:15 (Respondent's Opening); *see also generally* Claimants' Rejoinder on Jurisdiction at paras. 87-102.

[92] *See* CAFTA at Art. 10.7.1 [Exhibit C-1a].

[93] *See* CAFTA at Art. 10.7.2 [Exhibit C-1a].

[94] *See* U.S. Submission at para. 25; El Salvador's Submission at para. 22.

[95] *See* Respondent's Counter-Memorial on the Merits at paras. 171-192; Respondent's Rejoinder on the Merits at paras. 178-203; En. Transcr. at 155:6-168:16 (Respondent's Opening); En. Transcr. at 1196:17-1218:6 (Respondent's Closing).

[96] *See* Georgina Chaves Witness Statement, December 22, 2014, para. 4 [Exhibit RWE-10]; *see also* Respondent's Counter-Memorial at para. 71.

has actually taken title to the property, the landowner has received compensation for his property. Costa Rica applied this process to Claimants' property that has been directly expropriated. Thus, prompt, adequate and effective compensation has been paid with respect to those properties.

58. Claimants have also alleged that all of the properties that are not currently in the judicial stage of the expropriation proceedings have been indirectly expropriated. Costa Rica's measures do not constitute an indirect expropriation. Annex 10-C of CAFTA provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions . . . to protect . . . the environment, do not constitute indirect expropriations."[97] In its submission, El Salvador clarifies that a "claimant [has] the burden to rebut the strong presumption created in CAFTA-DR that a State's non-discriminatory regulatory measures designed to protect the environment do not constitute an indirect expropriation."[98] In this case, Claimants have failed to prove that the creation of the Park, and the regulatory measures adopted to protect the Park, fall within the "rare circumstances" exception.

59. In sum, Costa Rica has fully complied with its obligations under Article 10.7 of CAFTA.

VI. CAFTA DOES NOT PROHIBIT A STATE PARTY FROM ADOPTING, MAINTAINING, OR ENFORCING MEASURES RELATED TO THE PROTECTION OF THE ENVIRONMENT (CHAPTER 17 OF CAFTA)

60. In its oral submission, El Salvador referred to the relevance of Chapter 17 of CAFTA to this arbitration.[99] According to El Salvador, CAFTA gives particular priority to the protection of the environment and policies adopted by governments to protect the environment. As El Salvador's representative, Mr. Parada, explained at the hearing,

> With regard to the environmental protection, as I mentioned, this is the first CAFTA arbitration that reaches the merits that deals with environmental protection. Now, we're here under Chapter 10 of CAFTA, but Chapter 10 cannot be read in isolation from the rest of the Treaty. And it is important to note that there's an entire chapter, Chapter 17 in CAFTA, that deals with environmental protection. . . . So, this priority that CAFTA gives to the environment also applies to Chapter 10, the investment chapter. For example, Article 10.11 clarifies that Chapter 10 does not in any way prevent a CAFTA Party from adopting, maintaining, or enforcing measures related to the protection of the environment.[100]

61. Costa Rica agrees. Looking specifically at the language in Chapter 17, it is clear not only that Chapter 17 prioritizes measures adopted to protect the environment, but also that it allows State parties to CAFTA a measure of discretion in implementing their environmental laws. For example, Article 17.2.1(a)

[97] CAFTA at Annex 10-C [Exhibit C-1a].

[98] El Salvador's Submission at para. 24.

[99] En. Transcr. at 232:6-233:3 (Parada).

[100] En. Transcr. at 232:6-233:9 (Parada).

provides that "[a] Party shall not fail to effectively enforce its environmental laws."[101] But, according to Article 17.2.1(b), a State party to CAFTA is allowed some discretion in implementing its environmental laws. This is true, in particular, with respect to how a party makes decisions regarding the allocation of resources to enforce any such provisions. According to Article 17.2.1(b), "The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities."[102] Thus, CAFTA allows State parties, such as Costa Rica, a measure of discretion in implementing environmental laws, including a measure of discretion in terms of how to carry out expropriation, taking into account the resources of a particular State.

62. The language of Article 17.2 is consistent with the intent of the drafters of CAFTA. In particular, during the fourth round of negotiations, the United States proposed comprehensive text for an environmental chapter.[103] Specifically, the United States proposed that the text of the environmental chapter include elements that would grant each State discretion in the development and application of their environmental laws:

> Each Party has the right to establish its own levels of protection and priority over the development of the environment, modifying them according to its own laws and environmental policies. High levels of environmental protection should be established and Parties must commit to improve them. . . . Also, it is important to strengthen the ability of the Parties to protect the environment and to promote sustainable development.[104]

In light of the negotiating history of CAFTA, there is no question that the language of Chapter 17 should be interpreted to allow States ample discretion not only to institute strong environmental regulations, but also to enforce them in the manner they determine to be most appropriate to their development.

63. In this arbitration, Claimants have complained about choices Respondent has made regarding which properties to expropriate first and which to expropriate later.[105] There have also been allegations that Respondent has not proceeded quickly enough with the expropriation of property located

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[101] CAFTA at Art. 17.2.1(a) *available at* https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file9_3937.pdf.

[102] *See* CAFTA at Art. 17.2.1(b) *available at* https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file9_3937.pdf.

[103] The environmental chapter was first proposed by the United States during the second round of negotiations. *See* Second round of negotiation of CAFTA *available at* http://www.sice.oas.org/TPD/USA_CAFTA/Negotiations/Ronda2inf_s.asp.

[104] Fourth round of negotiations of DR-CAFTA, p. 19 *available at* http://www.sice.oas.org/TPD/USA_CAFTA/Negotiations/Ronda4inf_s.pdf. The original Spanish text reads: "Se reconoce el derecho de cada Parte de establecer sus propios niveles de protección y prioridades de desarrollo ambiental, modificándolas según sus propias leyes y políticas ambientales. Estas deben establecer altos niveles de protección ambiental y comprometerse a mejorarlas. . . . Asimismo, se establece la importancia de fortalecer la capacidad de las Partes de proteger el ambiente y promover el desarrollo sostenible."

[105] *See, e.g.*, Claimants' Reply on the Merits at para. 129.

within the Park due to lack of funds.[106] Although Claimants have failed to prove that Respondent has delayed its expropriation proceedings due to a lack of funds, even if it had done so, CAFTA provides a certain level of discretion in implementing its environmental laws to which Respondent is entitled under CAFTA.

64. In addition, Art. 17.2.2 provides that the promotion of trade and investment should not weaken or reduce protections afforded under domestic environmental law:

> The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[107]

65. Therefore, each party shall strive to ensure that it does not waive or otherwise derogate from its domestic environmental laws in a manner that reduces the protections provided therein in order to encourage the establishment, acquisition, expansion, or retention of an investment. Thus, for example, Respondent cannot weaken its environmental laws in order to encourage Claimants to expand or retain their investments. Costa Rica has created a system that balances these two interests: it has adopted measures that it believes it needs in order to protect the leatherback sea turtles, while respecting property rights of landowners inside the Park by providing such owners the means to recover the fair value of their investment.

VII. CONCLUSION

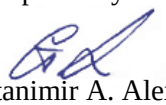
66. For all of the foregoing reasons, and those presented in Respondent's pleadings and at the hearing, Respondent respectfully requests that:

(i) the Tribunal dismiss Claimants' claims for lack of jurisdiction; or

(ii) in the event that the Tribunal were to find jurisdiction, dismiss Claimants' claims for lack of merit.

Respondent also respectfully requests an award of its costs, including attorneys fees, that have been incurred in these proceedings.

Respectfully submitted,



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Counsel for Respondent

[106] *See, e.g.*, Claimants' Reply on the Merits at para. 85.

[107] CAFTA at Art. 17.2.2 *available at* https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file9_3937.pdf.