In the Matter of an Arbitration Proceeding Under Chapter 10 of the Dominican Republic–Central America–United States Free Trade Agreement and the UNCITRAL Arbitration Rules (2010)

SPENCE INTERNATIONAL INVESTMENTS, LLC, BERKOWITZ, ET AL

(CLAIMANTS)

v.

REPUBLIC OF COSTA RICA

(RESPONDENT)

(ICSID CASE NO. UNCT/13/2)

INTERIM AWARD **(CORRECTED)**

Sir Daniel Bethlehem, Presiding Arbitrator
Mr. Mark Kantor, Arbitrator
Dr. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal

Anneliese Fleckenstein

30 May 2017

Note on the Correction of the Interim Award

This Interim Award was originally issued to the Parties on 25 October 2016. It subsequently came to the Tribunal's attention that there had been developments in the Costa Rican proceedings in respect of Lot B1 that went to the factual predicate of the Tribunal's decision in respect of that Lot of which the Tribunal had been unaware.

Having regard to this error in the factual predicate of the Interim Award concerning Lot B1, the Tribunal concluded that it was necessary to correct the Interim Award. In doing so, it has also made some minor and non-consequential factual corrections to the Interim Award in respect of the Costa Rican proceedings concerning other Lots in issue in these proceedings that also occurred before the transmittal of the Interim Award to the Parties but of which the Tribunal only subsequently became aware.

These issues are addressed in the Tribunal's Procedural Order on Correction and Termination dated 30 May 2017.

In addition to the date of this corrected Interim Award, other corrections to the Interim Award transmitted on 25 October 2016 are made in **Courier script** in this Interim Award (Corrected).

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ABBREVIATIONS

1991 Park Decree	Executive Decree No 20518-MIRENEM of 5 June 1991, published in La Gaceta, No 129 on 9 July 1991
1995 Park Law	Law No 7524 of 7 July 1995, published in La Gaceta No 154 on 16 August 1995
Ayuda Memoria	MINAE Report of 16 July 2003 concerning the amendment of the 1995 Park Law.
CAFTA or the Agreement	Dominican Republic - Central America-United States Free Trade Agreement of 2004
Claimants	Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz, Brenda K. Copher, Ronald E. Copher, Glen Gremillion, Joseph M. Holsten and Bob F. Spence and Spence International Investments, LLC
Contraloría Compliance Chart	Controller General's Chart of MINAE and SINAC compliance with the Contraloría Report required actions of 27 November 2014
Contraloría Report	Controller General's Report of 26 February 2010: Assessment Report of How the National Conservation System (SINAC) and the Ministry of the Environment, Energy and Telecommunications (MINAET) Are Managing Las Baulas National Marine Park (PNMB) *Informe sobre la Evaluación de la Gestión del Sistema Nacional de Áreas de Conservación (SINAC) y del Ministerio del Ambiente, Energía y Telecomunicaciones (MINAET), en Relación con el Parque Nacional Marino Las Baulas (PNMB)*
Costa Rica or the Respondent	Government of the Republic of Costa Rica
Expropriation Law	Law No.7495 of 8 June 1995, as amended in 1998 and 2008
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes (also "the Centre")
IGN	National Geographic Institute *Instituto Geográfico Nacional*

IGN Letter	Letter dated 21 June 2004 from the Interim Head of the Department of Geodesy and Topography of the National Geographic Institute to the President of the Administrative Environmental Tribunal
ILC State Responsibility Articles	International Law Commission's Articles on State Responsibility
MINAE (MINAET after 2008)	Costa Rica's Ministry of the Environment, Energy, Mines and Telecommunications *Ministerio del Ambiente, Energía, Minas y Telecomunicaciones*
MIRENEM	Costa Rica's Ministry of Natural Resources, Energy and Mines *Ministerio de Industria, Energía y Minas en Ministerio de Recursos Naturales, Energía y Minas*
NAFTA	North America Free Trade Agreement
Notice of Arbitration	Notice of Arbitration and Statement of Claim dated 10 June 2013
Procuraduría Dictamen	Report of 23 December 2005 by the Attorney General regarding the Law 7524
Procuraduría Opinion	Report of 10 February 2004 by the Attorney General regarding the interpretation of Law 7524
SETENA	National Environmental Technical Secretariat *Secretaría Técnica Nacional Ambiental*
SETENA Suspension Resolution	SETENA's Resolution No 2238-2005-SETENA of 30 August 2005
SINAC	National Conservation System *Sistema Nacional de Áreas de Conservación*
the Park	Las Baulas National Park
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules as revised in 2010
Vienna Convention	Vienna Convention on the Law of Treaties of 1969

I. The Case in Outline

1. The case before the Tribunal concerns consolidated claims by eight individual claimants and one corporate claimant (together "the Claimants"), jointly represented, against the Government of the Republic of Costa Rica ("Costa Rica" or "the Respondent") in respect of alleged violations of Chapter Ten of the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA" or "the Agreement"). The individual claimants are Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz,[1] Brenda K. Copher, Ronald E. Copher,[2] Glen Gremillion, Joseph M. Holsten and Bob F. Spence. The corporate claimant is Spence International Investments, LLC ("Spence Co."), a company established under the laws of California, USA. Evidence was provided of the U.S. nationality of each of the Claimants and no point was taken challenging this evidence.

2. The claims allege the unlawful deprivation of the Claimants' residential real estate property investments in 26 plots of land adjacent to the Playa Grande and/or Playa Ventanas beaches in Santa Cruz, Guanacaste, along the Costa Rican Pacific coast. It is a matter of dispute whether the plots of land, at the time of their purchase, fell wholly or partially within the Las Baulas National Park ("the Park"), established to protect the leatherback sea turtle and other species and natural resources, and whether the Claimants were, or should have been, aware of the expropriatory consequences of property falling within the boundaries of the Park. It is not disputed that the claimed deprivations arise from the development of the Park. The Claimants do not dispute Costa Rica's sovereign right to expropriate land for a public purpose. They contend, however, first, that Costa Rica failed "to provide prompt and adequate compensation for its *de facto* and *de jure* takings", contrary to CAFTA Article 10.7.[3] Second, they contend that Costa Rica failed to provide "access to the necessary administrative and/or judicial means for the prompt review of its *de facto*

[1] In respect of their joint ownership of particular lots, Aaron C. Berkowitz and Trevor B. Berkowitz are referred to as "A&T Berkowitz".
[2] In respect of their joint ownership of particular lots, Brenda K. Copher and Ronald E. Copher are referred to as "B&R Copher" or "the Cophers".
[3] In the interests of economy of expression, the Tribunal sets out the provisions of the CAFTA material to its analysis in Section VIII of this Award, addressing the Tribunal's consideration of the issues.

expropriation of certain segments of the lots" in question, contrary to the minimum standard of treatment requirement of CAFTA Article 10.5.[4]

3. The properties in issue in the proceedings – originally 24 lots – were acquired by one or more claimants in the period 16 January 2003 to 27 February 2007.[5] One of the properties – Lot V61 – was subsequently subdivided into three, bringing the total number of lots in issue to 26. Each claimant made his/her/its investment indirectly through holding companies established under Costa Rican law.[6] No point was taken by the Respondent before the Tribunal on any issue concerning these holding companies, or that a named claimant was not the owner of a given property or otherwise entitled to bring a claim in respect of that property. But for arguments on jurisdiction, the Tribunal accordingly has no reason to take the view that any named claimant is not properly entitled *qua* owner to pursue the claim advanced in these proceedings. Save as is otherwise mentioned below, the Tribunal does not therefore take any point relating to entitlement by a claimant *qua* owner to bring the claim advanced in these proceedings.

4. The CAFTA requires that the Tribunal undertake a fact-specific, case-by-case inquiry into the issues presented by the Claimants. The Tribunal's consideration must therefore address the case of each of the 26 lots individually.

[4] Claims of breach of CAFTA Articles 10.3 and 10.4, set out in the Notice of Arbitration were subsequently withdrawn in the Memorial.

[5] There is inconsistency in the pleadings and documentation submitted to the Tribunal on the dates given for the purchase and registration, and in some case also of the name of the purchaser, of some of the properties in question. Where nothing material appears to turn on this, the Tribunal has adopted the information provided by the Claimants in their response of 22 December 2015 to post-hearing enquiries from the Tribunal. Where the variation in the information may be material, the issue is addressed in discussion.

[6] The properties in question were in some cases only a portion of a more extensive property portfolio purchased by a given claimant, on occasion at the same time and in the same transaction as the purchase of the properties in issue in these proceedings. A number of such properties were subsequently sold by the claimant in question or for some other reason are not part of the claims advanced in these proceedings. In some cases, the properties that are the subject of these proceedings have been sold or otherwise transferred between holding companies owned by a claimant or claimants in these proceedings. Extensive documentation relating to the various holding companies was submitted to the Tribunal, from which it is apparent that the web of holding and related companies was and is highly intricate and complex, including through companies that hold mortgage bonds in respect of the purchase of some of the properties in question. For ease of reference, and as no point was taken in the matter by the Respondent, reference in this Award to the named claimants only, not the holding companies. Reference to a named claimant should be taken to include reference to the appropriate Costa Rican subsidiary of that claimant in respect of any given property.

5. Original purchase and current ownership of the lots,[7] by date of first acquisition by a claimant, is given in **Table 1** below.

[7] For ease of reference, the lots in issue in these proceedings are addressed in this Award as B1, B3, etc. Much of the documentation provided by the Parties in respect of these properties, however, refers to the lots by their real-estate folio numbers. The real-estate folio number for each lot is as follows: **B1** – 130538 000; **B3** – 130540 000; **B5** – 130542 000; **B6** – 130543 000; **B8** – 130545 000; **V39** – 42348 000; **V40** – 42350 000; **V30** – 42330 000; **V31** – 42332 000; **V32** – 42334 000; **V33** – 42336 000; **B7** – 130544 000; **V38** – 42346 000; **A39** – 42348 000; **A40** – 42783 000; **C71** – 43073 000; **V61a** – 144808 000; **V61b** – 154432 000; **V61c** – 154433 000; **C96** – 43133 000; **V46** – 42362 001; **V47** – 42364 001; **SPG1** – 131865 000; **SPG2** – 131866 000; **SPG3** – 132952 000; **V59** – 89606 000.

Table 1 – Properties by Date of First Acquisition by a Claimant

Lot #	Date of Acquisition	Original Purchaser	Current Owner (Date of Acquisition)
B1	16 January 2003	Brett E. Berkowitz	A&T Berkowitz (11 January 2013)[8]
B3	16 January 2003	Brett E. Berkowitz	Brett E. Berkowitz
B5	16 January 2003	Brett E. Berkowitz	Brett E. Berkowitz
B6	16 January 2003	Brett E. Berkowitz	Brett E. Berkowitz
B7	16 January 2003	Brett E. Berkowitz	Glen Gremillion (3 March 2004)
B8	16 January 2003	Brett E. Berkowitz	A&T Berkowitz (11 January 2013)[9]
V39	15 August 2003	B&R Copher	B&R Copher
V40	15 August 2003	B&R Copher	B&R Copher
V30	19 August 2003	Bob F. Spence	Bob F. Spence
V31	19 August 2003	Bob F. Spence	Bob F. Spence
V32	19 August 2003	Bob F. Spence	Bob F. Spence
V33	19 August 2003	Bob F. Spence	Bob F. Spence
V38	3 October 2004	Ronald E. Copher	Ronald E. Copher
A39	27 January 2005	Spence Co.	Spence Co.
A40	27 January 2005	Spence Co.	Spence Co.
C71	4 February 2005	Spence Co.	Spence Co.[10]
V61[11]	4 February 2005	Spence Co.	Spence Co.
- V61a	31 March 2008	Spence Co.	Spence Co.
- V61b	31 March 2008	Spence Co.	Spence Co.
- V61c	31 March 2008	Spence Co.	Spence Co.
C96	28 June 2005	Spence Co.	Spence Co.
V46 }[12]	19 January 2006	R.Copher-Holsten	R.Copher-Holsten
V47 }	19 January 2006	R.Copher-Holsten	R.Copher-Holsten
SPG1	31 March 2006	Spence Co.	Spence Co.
SPG2	31 March 2006	Spence Co.	Spence Co.
SPG3	31 March 2006	Spence Co.	Spence Co.
V59	27 February 2007	Spence Co.	Spence Co.

[8] The documentation in the record in respect of Lot B1 indicates that Aaron Berkowitz became President of Aceituno Mar Vista Estates ("AMVE"; the B1 holding company as of the date of the claim), on 24 September 2010 and Trevor Berkowitz became Secretary of AMVE on 31 March 2011. A notarized certificate of joint ownership of AMVE by A&T Berkowitz records the date as 11 January 2013. Lot B1 was original purchased by Brett Berkowitz through Rancho Ecologico Law Baulas ("RELB") on 16 January 2003. It is not clear from the documentation (a) on what date Lot B1 was transferred from RELB to AMVE, and (b) on what date the shares in AMVE were transferred to A&T Berkowitz to make them joint owners of the lot. Brett Berkowitz's evidence to the Tribunal stated that the lot was "transferred … as a gift to my two adult sons." No documentation is provided recording the transfer of B1 from RELB to AMVE.

[9] The documentation in the record in respect of Lot B8 indicates that Trevor Berkowitz became President of Nispero Mar Vista Estates ("NMVE"; the B8 holding company as of the date of the claim), on 31 March 2013 and Aaron Berkowitz became Secretary of NMVE on the same date. A notarized certificate of joint ownership of NMVE by A&T Berkowitz records the date as 11 January 2013. Lot B8 was original purchased by Brett Berkowitz through Rancho Ecologico Law Baulas ("RELB") on 16 January 2003. Lot B8 was transferred from RELB to NMVE on 23 September 2003. It is not clear from the documentation on what date the shares in NMVE were transferred to A&T Berkowitz to make them joint owners of the lot. Brett Berkowitz's evidence to the Tribunal stated that the lot was "transferred … as a gift to my two adult sons."

[10] Lot C71 was acquired by Spence Co. on 4 February 2005. It was sold on 22 October 2007 to "GL". Ownership of the lot reverted to Spence Co. on 10 December 2012 when "GL" failed to meet payment commitments in respect of the purchase. No point was advanced by the Claimants that the date of reversion was material for purposes of these proceedings. The Tribunal, accordingly, has not taken any point going to the materiality or otherwise of the date of reversion.

[11] Lot V61 was acquired by Spence Co. on 4 February 2005. On 7 February 2006, Spence Co. sold the lot to "WUCL". In December 2006, while in the ownership of "WUCL", Lot V61 was subdivided into Lots V61a, V61b and V61c. On sale of the lot to "WUCL" on 7 February 2006, Spence Co. warranted that "WUCL" "will be able to get a building permit duly approved by the respective authorities". Pursuant to the sale contract, and the "non-delivery of the said building permits", ownership of the lots reverted to Spence Co. on 31 March 2008.

[12] From the documentation provided to the Tribunal, it appears that Ronald E. Copher, Brenda K. Copher, Joseph M. Holsten and Debra L. Romanello entered into a contract to acquire Lots V46 and V47 on 10 December 2004 but that a disagreement held up completion of the purchase/sale until 19 January 2006.

6. In their Memorial, the Claimants describe their claim in the following terms:

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

7. Costa Rica objects to the jurisdiction of the Tribunal on the grounds that the Claimants failed to initiate proceedings within the CAFTA's three-year limitation period under CAFTA Article 10.18.1 and/or that the alleged breaches occurred before the CAFTA entered into force between Costa Rica and the United States on 1 January 2009. No application for bifurcation was made and jurisdictional issues were pleaded alongside the merits.

8. On the merits, Costa Rica contends that the Claimants "were, or should have been, aware that their properties, or portions of them, were subject to expropriation, as provided by the law creating the Park" and that, to the extent that any property has been expropriated, "this has not been an uncompensated expropriation". Costa Rica, further, rejects the Claimants' contention that it "has not provided due process of law, much less in a manner that rises to the level of a breach of the [CAFTA's] fair and equitable treatment provision."

9. In its Counter-Memorial, the Respondent summarises its defence on the merits in the following terms:

> To the extent that Costa Rica has expropriated any property belonging to Claimants, this has not been an uncompensated expropriation. Costa Rica has followed its domestic legal procedures to determine the fair market value owed to Claimants. It has already compensated them for the total principal due for four of Claimants' properties, and it will pay Claimants interest and fees after the appropriate procedures are competed. For another five properties, Claimants have received a provisional deposit of compensation and will receive any outstanding difference, plus interest and fees, once the expropriation procedure is concluded.

> For a final category of properties, Costa Rica will compensate Claimants when the expropriation procedure to determine the fair market value owed to Claimants is finalised.
>
> None of Costa Rica's other *bona fide* regulatory measures affecting the portions of Claimants' properties in the Park have been expropriatory, or have in any way breached Respondent's obligations under the [CAFTA]. All of Costa Rica's actions represent reasonable efforts by the State to carry out its sovereign responsibility to protect the natural environment.

II. Relevant Procedural History

10. As required by CAFTA Article 10.16.2, the Claimants delivered to the Respondent notices of intent to submit their claims to arbitration on 9 October 2012. These took the form of two separate notices of intent, the first in the names of Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher and Ronald E. Copher, which was supplemented by a notice in respect of an additional parcel of land on 21 December 2012. The second notice of intent was in the names of Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz, and Glen Gremillion. Following discussions between the Claimants and the Respondent, the claims addressed in the two notices of intent were consolidated into a single Notice of Arbitration and Statement of Claim dated 10 June 2013 ("Notice of Arbitration"). In accordance with CAFTA Article 10.27 and Annex 10-G, the Notice of Arbitration was served on the Respondent with delivery to the Dirección de Aplicación de Acuerdos, Comerciales Internacionales, Ministerio de Comercio Exterior in San José.

11. In accordance with CAFTA Article 10.16.4, a claim shall be deemed submitted to arbitration when the Claimants' notice of arbitration and statement of claim, as referred to in the UNCITRAL Arbitration Rules, are received by the Respondent. No point having been taken on the date on which the claims were submitted to arbitration, the Tribunal deems the claims to have been submitted to arbitration on 10 June 2013.

12. In their Notice of Arbitration, the Claimants appointed Mr Mark Kantor, a U.S. national, as arbitrator. On 2 August 2013, the Respondent appointed Mr Raúl Emilio Vinuesa, a national of Argentina and Spain, as arbitrator.

13. On 16 October 2013, the Parties wrote jointly to the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") requesting that it act as administering authority for the proceedings and that the ICSID Secretary-General act as appointing authority with respect to the presiding arbitrator. ICSID indicated its agreement to act in this capacity by letter to the Parties of 17 October 2013.

14. On 20 November 2013, the ICSID Secretary-General informed the Parties of the appointment of Mr Daniel Bethlehem, a national of the United Kingdom, as presiding arbitrator. Ms Anneliese Fleckenstein, ICSID Legal Counsel, was designated Secretary of the Tribunal.[13]

15. The Tribunal held a procedural meeting with the Parties on 4 February 2014, following which, on 26 February 2014, it issued Procedural Order No.1.[14] This set out, *inter alia*, the pleading and hearing timetable of the case. The Parties duly submitted their pleadings in accordance with this timetable. A hearing on jurisdiction and merits took place in Washington D.C. on 20 – 24 April 2015.[15]

16. In accordance with CAFTA Article 10.20.2, non-disputing CAFTA parties were afforded an opportunity to make oral and written submissions regarding the interpretation of the CAFTA. El Salvador and the United States availed themselves of the opportunity to do so with El Salvador making both written and oral submissions and the United States making written submissions.

[13] In Anneliese Fleckenstein's temporary absence, Ms Giuliana Canè was designated interim Secretary to the Tribunal in the period 23 March 2015 to 31 July 2015.

[14] Pursuant to §10.1 of Procedural Order No.1, both English and Spanish are procedural languages of the arbitration. As a practical matter, the working language of the Tribunal was English. As regards original Spanish-language documentation submitted to the Tribunal, the Tribunal has relied on and adopted the English language translations submitted by the Parties that form part of the published record of the proceedings save in a small number of cases in which the Tribunal identified a specific concern with a given translation and, having informed the Parties and sought their views, adopted a translation that it considers better reflects the meaning of the original Spanish text. In no case has anything material turned on the revised translation. The translations provided by the Parties account for the occasional variation in English-language terms used across the documentation, although nothing material appears to turn on these slight variations in translation. For the avoidance of doubt, the Tribunal notes that, pursuant to §10.12 of Procedural Order No.1, the Tribunal is required to render its Award in English and Spanish simultaneously and that both language versions are equally authentic. In the event of a dispute about the meaning of the Award arising from a perceived difference between the two language versions of the Award, the English language version of the Award prevails.

[15] A list of those attending the hearing is given in Annex 1 hereto.

17. In the course of the proceedings, the Parties made a number of procedural applications and raised various objections. Insofar as any such matter was not the subject of a ruling by the Tribunal in the course of the proceedings, the Tribunal determines that it is not a matter that now requires a ruling by the Tribunal for purposes of the present Award.

18. At the close of the hearing, the Tribunal directed the Parties to file post-hearing submissions on the issues of law and interpretation that had been addressed in the submissions of the non-disputing parties. As directed by the Tribunal, the Parties submitted post-hearing submissions on 26 May 2015.[16]

19. In the course of its deliberations, the Tribunal identified a number of questions that it considered should be put to the Parties for response, which it did by letter dated 25 November 2015. The Parties submitted their responses to these questions, together with accompanying documentation, on 23 December 2015.

20. In accordance with the transparency requirements of CAFTA Article 10.21, the pleadings and documents of the Parties, hearing transcripts, and orders, awards and decisions of the Tribunal have been published on the ICSID website, save only as regards protected information designated by a Party, in this case concerning limited sensitive personal and commercial information. The hearing was webcast live.

21. Paragraph 25.1 of the Tribunal's Rules of Procedure provides *inter alia* that the Tribunal shall, at an appropriate point after the filing of any post-hearing memorials and evidence regarding the quantification of costs, declare the hearings closed. At the conclusion of the hearing on 24 April 2015, the presiding arbitrator indicated that the Tribunal was not at that stage declaring the hearings closed, noting that, if the Tribunal was with the Claimants on jurisdiction and any issue of liability, it would be likely to require additional evidence, and perhaps submissions, on damages.

22. Having regard to the publication of the extensive pleadings, evidence and other documentation of the Parties in this case, that the hearing was webcast live, and that the hearing

[16] The Tribunal afforded the Claimants an opportunity to file a brief addendum to its post-hearing submission on 26 June 2015.

transcripts are publicly available, the Tribunal considers that clarity and efficiency would be served by such brevity of recitation of the Parties' submissions in this Award as can be achieved consistently with the Tribunal's obligation to render a fully reasoned decision. Accordingly, this Award only addresses those issues and submissions of the Parties that the Tribunal consider to be determinative of its decision. For the avoidance of doubt, the Tribunal affirms that it has had careful and close regard to all the pleadings, evidence and other material submitted by the Parties in the proceedings.

23. The Tribunal makes this Interim Award in accordance with CAFTA Article 10.26. Such further procedure as may be appropriate is reserved for further decision by the Tribunal in due course.

III. Governing Law, Burden of Proof and Related Matters

24. These proceedings arise under CAFTA Chapter Ten, specifically Article 10.16.1(a)(i)(A), which provides that a claimant, acting on its own behalf, may submit to arbitration a claim that the respondent has breached an obligation under Section A of Chapter Ten and that the claimant has incurred loss or damage by reason of, or arising out of, that breach. Pursuant to Article 10.16.3(c), the Claimants submitted the claim under the UNCITRAL Arbitration Rules. Paragraph 1.1 of Procedural Order No.1 records that the proceedings are conducted in accordance with the UNCITRAL Arbitration Rules, as revised in 2010, except as modified by Section B Chapter Ten of the CAFTA.

25. Insofar as is material for present purposes, CAFTA Article 10.22.1 provides that the Tribunal shall decide the issues in dispute in accordance with the CAFTA and applicable rules of international law.[17] Annex 10-B addresses the CAFTA Parties shared understanding on customary international law. Other provisions of Section B of Chapter Ten of the CAFTA relevant to the proceedings address, *inter alia*, the conduct of the arbitration (Article 10.20), transparency of arbitral proceedings (Article 10.21), and awards (Article 10.26). Article 10.18.2 provides, *inter*

[17] CAFTA Article 1.2.2 additionally provides: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

alia, that no claim may be submitted to arbitration under Section B of Chapter Ten unless the claimant consents in writing to arbitration in accordance with the procedures set out in the CAFTA and that the Notice of Arbitration is accompanied by the claimant's written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16." This no-u-turn provision is subject to limited exception in Article 10.18.3. Annex 10-E contains a fork-in-the-road provision applicable to claims by U.S. investors. No point has been taken on this issue by the Respondent in these proceedings and the Tribunal proceeds on the basis no such issue arises.

26. The Claimants advance claims under Article 10.5 (Minimum Standard of Treatment), in respect of which Annex 10-B is relevant for purposes of interpretation, and Article 10.7 (Expropriation), in respect of which both Annex 10-B and Annex 10-C are relevant for purposes of interpretation. These provisions read, *inter alia*, as follows:

> **Article 10.5: Minimum Standard of Treatment**[1]
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

[1] Article 10.5 shall be interpreted in accordance with Annex 10-B.

Article 10.7: Expropriation and Compensation[3]

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
   (a) for a public purpose;
   (b) in a non-discriminatory manner;
   (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
   (d) in accordance with due process of law and Article 10.5.

2. Compensation shall:
   (a) be paid without delay;
   (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
   (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
   (d) be fully realizable and freely transferable.

[…]

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

Annex 10-B
Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex 10-C
Expropriation

The Parties confirm their shared understanding that:

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

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

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

4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:
   (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
   (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
   (iii) the character of the government action.

(b) Except in rare circumstances, 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.

27. The Respondent raises objections to jurisdiction under Article 10.1.3 and Article 10.18.1. These read as follows:

Article 10.1: Scope and Coverage

[…]

3. For greater certainty, this 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 the entry into force of this Agreement.

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.

28. Without prejudice to any question of their relevance or application in the circumstances of this case, other provisions of CAFTA Chapter Ten cited to the Tribunal include Article 10.2.1 (Relation to Other Chapters) and Article 10.11 (Environment). These read as follows:

> **Article 10.2: Relation to Other Chapters**
>
> 1. In the event of ay inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
>
> […]
>
> **Article 10.11: Environment**
>
> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

29. Article 27(1) of the UNCITRAL Arbitration Rules provides that each party shall have the burden of proving the facts relied upon to support its claim or defence. Article 27(4) of the Rules provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. These provisions apart, neither the CAFTA nor the UNCITRAL Arbitration Rules indicate other relevant rules of evidence or which party bears the burden of proof. Without prejudice to any given issue, the Tribunal considers that the accepted principle in international proceedings, at least at a level of generality, is that the burden rests in the first instance with the party advancing the proposition or adducing the evidence. A claimant ultimately cannot prevail without meeting a minimum standard of proof, even if the burden shifts to the Respondent at some point to establish that its conduct was permitted under the treaty or under international law more generally. Insofar as particular issues of burden of proof arise for the purposes of this Award, they are addressed below.

30. The Tribunal notes that an ICSID panel, in consolidated cases Nos. ARB/08/1 and ARB/09/20, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, handed down an Award on 16 May 2012 arising out of the claimants' allegations in that case that have a similar foundation to those advanced in the present case concerning the development of the Las Baulas National Park ("the *Unglaube* Award" or "the Unglaube case"). The Unglaube case was brought

under the Costa Rica – Germany BIT of 1994 and raised both preliminary and substantive issues distinct from those in the present case. While not in any way controlling of liability issues in these proceedings, having regard to the bearing that the Unglaube case narrative has on the present proceedings (as will be evident from what follows), the Tribunal has had regard to the discussion in the *Unglaube* Award of issues that overlap with the present case.

31. The Tribunal notes, as well, the ICSID panel Award in *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (Case No. ARB/96/1 of 17 February 2000; the "Santa Elena Award") concerning expropriation claims by U.S. shareholders of the claimant company in respect of property that was at the time adjacent to (and is now located in) the Santa Rosa National Park also in Costa Rica's Guanacaste Province.

IV. The Las Baulas National Park and Other Relevant Factual Background

A. The Las Baulas National Park

(i) Preliminary Observation

32. The development of the Las Baulas National Park is at the centre of the dispute between the Parties. The Parties dispute key aspects of the Park's expansion and what the Claimants knew or should have known about the expropriatory consequences of the Park's development for their properties. The Parties devote considerable space in their pleadings to competing narratives of the Park's development with the Claimant's alleging, *inter alia*, improper conduct on the part of senior Costa Rican officials as regards the expansion of the Park. As regards these allegations of improper conduct, the Tribunal finds that no credible evidence has been advanced in support of the allegations either in connection with the expansion of the Park or as regards conduct in respect of the Claimants and their properties more specifically. In any event, the Tribunal has not found it necessary to base any of its reasoning or conclusions on any issue that turns on the Claimants' improper conduct allegations.

(ii) The Creation of the Park

33. It is common ground between the Parties that the Park was created in 1991 to protect the leatherback sea turtle, which has critical nesting sites along the Costa Rican Guanacaste coast, as well as other species and natural resources. Executive Decree No.20518 of 5 June 1991 ("the 1991 Park Decree"),[18] issued by the Ministry of Natural Resources, Energy and Mines ("MIRENEM"), which entered into force on 9 July 1991, established the Park, *inter alia*, on the following terms:

> Article 1° - To create the National Marine Park Las Baulas de Guanacaste, which border shall be as follows, according to Villareal and Matapalo map sheets, 1:50.000 scale, of the National Geographic Institute. – From a point located in the southern end of Playa Ventanas, it follows a straight line N 45 x E, at a distance of 125 meters from ordinary high tide. The limit continues along an imaginary line parallel to the public zone and distant 75 meters from it towards the southeast until the point of the coordinates N 255,000 an E 355:050. – This national park shall also include the Ventanas estuary and its mangroves, the hill immediately behind Punta Ventanas, Punta Carbón, Isla Capitán, the public zone located between Punta Conejo and Punta Ventanas and territorial waters of Bahía Tamarindo, between Punta Conejo and the southern end of Playa Langosta until the line of the ordinary high tide.
>
> Article 2° - Playas Carbon and Ventanas, including a strip of land of 75 meters from the public zone, is declare[d] a protective zone denominated Las Baulas de Guanacaste. Every residential development and of any other type made in this zone shall be approved by the Ministry of Natural Resources, Energy and Mines.
>
> Article 3° - Within the delimitation of the National Park, the provisions and prohibitions set forth for national parks under Law N° 6084 of August 24th, 1977 shall rule and within delimitation of the protection zone provisions of law N° 7174 of June 28th, 1990 shall rule.
>
> Article 4° - The Executive Branch shall include in the Ordinary Budget for 1992, resources to purchase lands for this national park. For this purpose, bonds from paragraph 2), article 32 of Law N° 7216 of December 19th, 1990 may also be used.
>
> Article 5° - The declaration of national park shall be fully valid once the State purchases the private properties existing within these delimitations.
>
> Article 6° - In force from the time of its publication.

[18] Executive Decree Nº 20518-MIRENEM of 5 June 1991, published in La Gaceta, Nº 129 on 9 July 1991.

34. The reference, in Articles 1 and 2 of the 1991 Park Decree, to "the public zone" is a reference to a 50-metre strip of land running inland from the mean high tide along the entire Costa Rican coast that is by law inalienable or non-transferable.[19] The Parties have variously referred to this zone in their submissions to the Tribunal as the "public zone" or the "inalienable zone" or the "inalienable public zone".

35. The effect of the 1991 Park Decree was to create a national park running 125 metres inland from the mean high tide, to provide for MIRENEM approval of all residential development in certain areas, and to provide for the purchase of private property within the 125-metre area. It is uncontested that a series of land lots located inside the Park were available for private purchase.

36. The 1991 Park Decree was followed by Law No.7524, passed by the Costa Rican Legislative Assembly on 10 July 1995, which entered into force on 16 August 1995 ("the 1995 Park Law").[20] Articles 1 and 2 of the 1995 Park Law provide as follows:

> Article 1. – Creation and Boundaries
>
> The National Marine Park Las Baulas of Guanacaste is created, the boundaries of which, according to the cartographic sheets Villarreal and Matapalo scale 1:50.000 of the National Geographic Institute, will be the following:
>
> > starting from a point located on coordinates N 259.100 and E 332.000, continues through a straight line until it reaches an imaginary line parallel to the coast, one hundred and twenty-five meters from the ordinary high tide offshore. Along this imaginary line, the boundary continues with a southeast direction, until it ends at the point of coordinates N 255.000 and E 335.050.

[19] As described by the Claimants, "an inalienable zone of public domain" was first created by 1961 legislation, subsequently amended, establishing Costa Rica's Institute of Land and Colonization ("ITCO"). This inalienable zone extended 200 metres from the median high tide line. By the Law on Tourist Development of 1970, and designations made thereunder by the Tourism Board of Costa Rica, Playa Grande and its environs were designated a "tourism area". This 1970 Law also entitled individuals to acquire freehold rights of private property in land located within a tourism area up to but not including the first 50 metres of inalienable public land, measured from the median high tide. It was on this basis, the Claimants contend, that the land bordering the 50-metre inalienable zone in Playa Ventanas and Playa Grande had been privately-titled property since the early 1970s.

As nothing material turns on this description by the Claimants for purposes of the Tribunal's analysis concerning the issues of which it is seised, the Tribunal has not considered it necessary to examine this aspect in close detail. The Tribunal notes, however, that the description of the legal framework relating to the ownership of private property in the Park given in the Contraloría Report (see paragraph 41(s) *infra*), and in particular at section 2.1.1 thereof, indicates a more complex legal framework than the Claimants' description suggests.

[20] Law Nº 7524 of 7 July 1995, published in La Gaceta Nº 154 on 16 August 1995.

> The Park will also cover the estuaries Tamarindo, Ventanas and San Francisco and their mangroves; the hill located immediately behind the Ventanas beach, the hill El Morro, the island Capitán, the island Verde, the public zone of fifty meters, measures from the ordinary high tide, between the point of San Francisco and the estuary San Francisco and the territorial waters of Tamarindo Bay, found between the point Conejo and the south end of Langosta beach, up to the ordinary high tide line.
>
> Article 2. – Expropriations
>
> In order to fulfil this Law, the competent institution will take the necessary steps to expropriate the totality or part of the properties found in the area delimited in the previous article.
>
> The private lots of land included in this delimitation will be susceptible of expropriation and will be considered part of the National Marine Park Las Baulas, until they are acquired by the State, through purchase, donation or expropriation; in the meantime the owners will enjoy the full exercise of the attributes of domain ownership.

37. The addition of the word "offshore" in the description of the boundary of the Park in Article 1 of the 1995 Park Law – viz.: "… until it reaches an imaginary line parallel to the coast, one hundred and twenty-five meters from the ordinary high tide **offshore** …" – has been relied upon by the Claimants to contend that the 1995 Park Law "was the result of a deliberate policy decision to create a marine park" rather than adoption of the boundary laid down by the 1991 Park Decree which created a national park extending 125 metres inland. The 1995 Park Law, the Claimant's argue, "thus appeared to remove the threat of potential, future expropriation from landholders in Playa Grande and Playa Ventanas". The Claimants further contend that the language employed by the 1995 Park Law to create a marine park was consistent with an objective of solving drafting difficulties in the 1991 Park Decree as well as in other proposed legislation concerning the Park. In the Claimants' contention, "[i]n 1995, the Government was obviously not prepared to maintain the boundary envisaged in the 1991 [Park] Decree because it was not prepared to expend the funds necessary to expropriate all of the privately held land required."

38. The Respondent describes the use of the word "offshore" in Article 1 of the 1995 Park Law as a "self-evident error" that was addressed and corrected by the Office of the Procuraduría General (Attorney General) through a constitutionally valid process of binding legal interpretation[21] that was endorsed by the Supreme Court. In the Respondent's view, the boundaries of the Park were

[21] Pursuant to Article 2, 3(b) and 4 of the Office of the Attorney General for the Republic Organic Law, No.6,815 of 27 September 1982.

clear, at the very least following the Procuraduría's binding interpretation of the 1995 Park Law issued on 23 December 2005 ("the Procuraduría *Dictamen*").

39. Without prejudice to the Tribunal's consideration that follows later in this Award on the geographical extent of the Park, or when the Claimants knew or should be deemed to have known of its extent, 17 of the 26 properties in issue lie wholly within the 125-metre zone, with nine properties lying partially within the zone to the extent of roughly 40–45% of the properties in question. The properties lying only partially within the 125-metre zone are the large B and SPG estate lots, purchased initially, respectively, by Brett Berkowitz, in respect of the B lots, and Spence Co., in respect of the SPG lots. The complete picture is given in **Table 2** below.

Table 2 – Proportion of Properties Within the 125-Metre Zone (by Date of Acquisition by Claimant/s)

Lot # (Claimant)	Date of Acquisition by Claimant/s	Area within the 125-metre zone
B1 (A&T Berkowitz)	16 January 2003	± 40% within the 125-metre zone
B3 (Berkowitz)	16 January 2003	± 45% within the 125-metre zone
B5 (Berkowitz)	16 January 2003	± 45% within the 125-metre zone
B6 (Berkowitz)	16 January 2003	± 45% within the 125-metre zone
B8 (A&T Berkowitz)	16 January 2003	± 45% within the 125-metre zone
V39 (B&R Copher)	15 August 2003	Wholly within the 125-metre zone
V40 (B&R Copher)	15 August 2003	Wholly within the 125-metre zone
V30 (Spence)	19 August 2003	Wholly within the 125-metre zone
V31 (Spence)	19 August 2003	Wholly within the 125-metre zone
V32 (Spence)	19 August 2003	Wholly within the 125-metre zone
V33 (Spence)	19 August 2003	Wholly within the 125-metre zone
B7 (Gremillion)	3 March 2004	± 45% within the 125-metre zone
V38 (R.Copher)	3 October 2004	Wholly within the 125-metre zone
A39 (Spence Co.)	27 January 2005	Wholly within the 125-metre zone
A40 (Spence Co.)	27 January 2005	Wholly within the 125-metre zone
C71 (Spence Co.)	4 February 2005	Wholly within the 125-metre zone
V61a (Spence Co.)	4 February 2005	Wholly within the 125-metre zone
V61b (Spence Co.)	4 February 2005	Wholly within the 125-metre zone
V61c (Spence Co.)	4 February 2005	Wholly within the 125-metre zone
C96 (Spence Co.)	28 June 2005	Wholly within the 125-metre zone
V46 (R.Copher-Holsten)	19 January 2006	Wholly within the 125-metre zone
V47 (R.Copher-Holsten)	19 January 2006	Wholly within the 125-metre zone
SPG1 (Spence Co.)	31 March 2006	± 40% within the 125-metre zone
SPG2 (Spence Co.)	31 March 2006	± 40% within the 125-metre zone
SPG3 (Spence Co.)	31 March 2006	± 40% within the 125-metre zone
V59 (Spence Co.)	27 February 2007	Wholly within the 125-metre zone

B. Developments Relevant to an Appreciation of the Boundaries of the Park and the Expropriation of Property Within the Park

40. In their submissions, the Parties drew attention to a very considerable number of post-1995 developments for purposes of supporting their conflicting contentions on the boundaries of the Park and when the Claimants could be said to have been on notice about the inclusion in the Park of all or parts of their properties in issue in this case. Amongst other developments, the "evidence" cited includes the practice of the Respondent, claimant engagement with the Respondent, governmental determinations and interpretations, and a large number of decisions of the Constitutional Court.

41. The Tribunal addresses these developments further below, both in its summary of the Parties' arguments and in its own consideration of the issues. Without prejudice to the weight to be attached to any given development (whether noted below or otherwise) for purposes of this case, a point to which the Tribunal returns later in this Award, the Tribunal notes the following developments that have a particular bearing on its consideration of the issues.

(a) In May 2003, it appears that the Ministry of the Environment and Energy ("MINAE", the successor ministry to the MIRENEM) issued a conservation order in respect of the Park to prevent the Santa Cruz Municipality from granting construction permits in the area of the Park. While the Order was not put into evidence before the Tribunal, its existence and purpose is addressed in evidence submitted by the Claimants in the proceedings.[22]

(b) On 5 May 2003, the MINAE sent an official notice to the Office of the Procuraduría General requesting its opinion on the correct interpretation of Article 1 of the 1995 Park Law, noting that the term "seaward" (variously also translated into English as "offshore" or "into the water") created confusion as to the true intent of the legislator.[23] In the notice,

[22] This order is referred to, for example, in DM-305-2005 of 28 February 2005, letter from MINAE Minister Carlos Manuel Rodriguez Enchadi to the Secretary General of SETENA (footnote 33 *infra*). The letter states that the order was addressed in a note to the President of the Municipal Board of Santa Cruz.
[23] DM-821-2003.

the MINAE stated that it understood the reference to "seaward" in Article 1 to be a mistake and that the correct term should be "inland.

(c) On 16 July 2003, the MINAE issued a report as part of the consideration then underway in the Legislative Assembly to amend the Park law.[24] This Report, entitled in Spanish "Ayuda Memoria" (or "Aide Memoire", in English), after noting the agenda of the Legislative Assembly, read as follows:

> It is also important to point out some issues of interest to 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 regulations.
> - Las Baulas National Marine Park in Guanacaste shall not be expanded to any area that has been previously declared an area of tourism interest.[25]
> - In the private area 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.
> - 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*, among others.
> - Finally, MINAE is interested in conducting a Discussion Forum about the substituting draft between officials of MINAE, Ecological Organisations, landowners in the zones, and the Municipality of Santa Cruz.

(d) On 5 November 2003, MINAE Resolution No.375 of 22 July 2003 was published declaring that the acquisition of property owned by Marion Unglaube was in the public interest.[26] This Resolution was later described by the MINAE Minister as the "formal start" of the "manifestation of the State's wish to expropriate the land inside the Las Baulas National Marine Park, through the first case. … That is, from that date the State had already stated its interest and wish to acquire the lands inside the national park, using suitable means."[27]

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[24] DM-1403-03. The version provided to the Tribunal is marked "Received" by the Legislative Assembly on 21 July 2003.
[25] See footnote 19 *supra*.
[26] MINE Resolution No.375 of 22 July 2003, published in La Gaceta No.213 of 5 November 2003.
[27] DM-305-2005 of 28 February 2005, letter from MINAE Minister to the Secretary General of SETENA. See paragraph 41(g) *infra*.

(e) On 10 February 2004, the Office of the Procuraduría General responded to the official notice from the MINAE of 5 May 2003 requesting an opinion on the correct interpretation of Article 1 of the 1995 Park Law ("Procuraduría Opinion").[28] In that Opinion, described as "a non-binding legal opinion", the Procuraduría concluded, inter alia, as follows:

> 4) There was a mistake in the wording of article 1 of the law creating the Las Baulas de Guanacaste national marine park, number 7524 dated 10 July, 1995, since it is not possible to draw the borders of the park if the imaginary line that moves in a straight line starting at coordinates N 259.100 and E 332.000 and ends at coordinates N 255.000 and E 335.050, according to the Matapalo and Villareal cartographic maps from the National Geographic Institute, were to run into the water, because the end point, according to the coordinates indicated, is located on land.
>
> 5) This error gives rise to a normative contradiction that could be resolved through judicial interpretation, because this concerns a contradictory provision that couldn't be applied in the way it was written. The location on land of the point defined by coordinates N 255.000 and E 335.050 excludes the sea route of the imaginary line referenced in article 1, such that either the expression "into the water"[29] does not apply, or other coordinates are set as the end point of this line.
>
> 6) Based upon a systematic interpretation and in the knowledge that the law's objective is to create the Las Baulas de Guanacaste marine park, the contradiction should be resolved by not using the expression "into the water", such that you understand that tracing an imaginary line that follows a straight line that starts at coordinates N 259.100 and E 322.000 and ends at coordinates N 255.000 and E 335.050, according to the Villareal and Matapalo cartographic maps from the National Geographic institute, runs along the ground for a distance of one hundred and twenty-five metres from the ordinary high tide.

(f) On 21 June 2004, the Interim Head of the Department of Geodesy and Topography wrote to the Director General of the National Geographic Institute ("IGN"), responding to Official Letter no.04-238 dated 11 June 2004 from the IGN which asked for a determination of whether certain properties were located within the Park.[30] The properties in question included Lots B1, B3, B6 and B7. The response read, *inter alia*, as follows:

---

[28] OJ-015-2004.
[29] This language corresponds to the word "offshore" used in the translation set out at paragraph 36 above.
[30] Official Letter No.040360 dated 21 June 2004.

> In order to reply objectively and be able to provide an accurate result, I took it upon myself to look for the necessary inputs, which were: Law no.7253,[31] which created Las Baulas National Marine Park of Guanacaste in the public registry study of each of the real-estate folios …
>
> In light of the above, pursuant to their geographic location, a fundamental element for determining the answer to the question at hand, as well as the study of the limits of Las Baulas Park at the time of its creation, one may conclude that the estates involved … **were located completely outside of said park**."

On the basis of this letter, the IGN Director-General wrote on the same day to the President of the Administrative Environmental Tribunal noting that the lots in question "are all outside of Las Baulas National Marine Park of Guanacaste" ("IGN Letter").[32]

(g) On 28 February 2005, the Minister of the Environment and Energy sent an official letter to the SETENA Secretary-General requiring the rejection of all development permit applications in respect of properties within the 125-metre zone and noting that this has been a requirement "for more than a year". The letter stated, *inter alia*, as follows:

> As you know, this Ministry is making its best efforts to achieve territorial consolidation of the Las Baulas de Guanacaste National Marine Park by acquiring privately owned land that is located inside the area that has been declared a national park. These lands basically comprise the 75-meter wide strip located behind the 50 meters of public zone.
>
> […]
>
> In fact, the MINAE has formally initiated expropriation proceedings inside the mentioned park …
>
> This formal start to which I refer is related to a manifestation of the State's wish to expropriate the land inside the Las Baulas National Marine Park, through the first case. That manifestation of will was dated November 5, 2003, at which time the ruling was published in which the acquisition of the property owned by Ms. Marion Edith Unglaube was declared to be in the public interest …

[31] The Tribunal notes that Law No.7253 is not the 1995 Park Law (which is Law No.7524). Law No.7253 is the "Law authorizing a 35% payment of the producers' debts under fiduciary control pursuant to the law for the promotion of agricultural and livestock production." (***Ley que Autoriza el Pago del Treinta y Cinco Por Ciento (35%) de las Deudas de los Productores de la Cartera Fideicometida de la Ley de Fomento a la Producción Agropecuaria)***

[32] Official Letter 04-248, 21 June 2004.

> Likewise, appraisals have already been requested for the properties located to the north of the park, and that are registered under the names of several companies that belong to Mr. Alejandro Berkowitz …
>
> On the other hand, there was another ministerial order seeking conservation inside the Park and related to the measures to prevent the Municipality of Santa Cruz from granting construction permits in the area declared as the Las Baulas Park, which were initiated in May 2003, according to a note sent to Ms. Dinia Villafuerte, President of the Municipal Board of Santa Cruz …
>
> […]
>
> Based on the foregoing, and considering that the principal task of that Secretary is to make an environmental assessment of any project that is submitted to it, any request for development inside the national park has had to be and must be rejected in any area declared as part of the Las Baulas National Marine Park, and I repeat that this is not based on this official communication, since for more than a year the State has had sufficient acts for this, of which copies have been sent to the Secretary.[33]

The Tribunal notes that this official letter was on the record before the *Unglaube* tribunal and referred to in its award of 16 May 2012.[34]

(h) On 9 March 2005, the Constitutional Court issued a decision requiring MINAE and its National Environmental Technical Secretariat ("SETENA")[35] to establish new guidelines for SETENA's consideration of development applications so as to ensure that there would be no damaging impact on the leatherback turtles and on the beaches on which they nested.[36]

(i) On 30 August 2005, in response to the Constitutional Court Order of 9 March 2005, SETENA adopted Resolution Nº 2238-2005-SETENA addressing "Projects Located in the Area of Las Baulas Marine National Park in Guanacaste" ("the SETENA Suspension Resolution").[37] This provided, *inter alia*, as follows:

[33] DM-305-2005, 28 February 2005.
[34] *Unglaube*, paragraph 30 *supra*, at paragraph 64.
[35] SETENA is a decentralised body of the MINAE whose responsibilities include the harmonization of environmental impacts and the analysis and management of environmental impact assessments.
[36] Exp. Nº 05-002756-0007-CO.
[37] The text of the Suspension Resolution submitted to the Tribunal by the Claimants is fax date stamped 1 September 2005.

WHEREAS

…

EIGHTH: That the Attorney General of the Republic, in its Note Nº OJ-015-2004, of February 10th of 2004, interprets the Law of Creation of this park, in the sense that it comprises not only the maritime zones, but also the 75 meters after the 50 meter public zone, as well as this same zone.

…

TENTH: That the Constitutional Court of the Supreme Court of Justice dictates the following order in the resolution of twenty hours and thirty two minutes of March 9th of 2005, notified on March 29th, corresponding to file Nº 05-002756-0007-CO: "To issue necessary guidelines and relevant orders, within the scope of its powers and authority, so that municipal permits and environmental viabilities that are granted, guarantee the non-involvement of the species known as Baulas (Leatherback), as well as the beaches where they nest."

…

TWELFTH: That the Tempisque Conservation Area and the Las Baulas Marine National Park of Guanacaste, by Note ACT-641-05-PNMB of August 19th of 2005, request that this Secretariat issue "a resolution where it says that no environmental liabilities are to be granted to projects located within the 75-meter strip of land of the Las Baulas Marine National Park until the Constitutional Court does not resolve the appeal." …

RECITALS

…

TENTH: That we now have to make an effort to identify the essential and inalienable core of the right to own private property regarding our case. After analysing all powers of the domain, and weighing them against each other, it is concluded that the basic core of property is the right to enjoy the elements of the object on which the property lies. In the case of real estate, the constitutive element of the object consists of the view of the current environment in the property under discussion. The basics of the property is to enjoy the view of the present ecosystems of the property, the recreation when observing its lawn and plants, as well as other natural elements that are found there, like trees or animals.

…

THEREFORE:
THE PLENARY COMMISSION RESOLVES:

…

FIRST: in virtue of everything that has been previously presented, particularly in the tenth recital, it is agreed to accept the request of the Tempisque Conservation Area, quoted in the twelfth recital, to suspend all procedures and environmental assessment to projects within the grounds of Las Baulas Marine National Park of Guanacaste. The extension of the Park is determined in the same way the Attorney General did in the Note quoted in the eighth recital. Therefore, this Park comprises the strip of land of seventy five meters after the fifty-meter public zone, for a total of one hundred and twenty-five meters. The suspended proceedings constitute both those that are under study, and those submitted in the future. The terms of the administrative procedures for environmental impact assessment are suspended. All of the above must be

> complied with, until the Constitutional Court decides or says otherwise on the file 05-002756-0007.
>
> **SECOND:** regarding those properties the expropriation of which is imminent, the administrative proceedings issued by the Minister of Environment and Energy quoted in recitals nine and eleven are respected, and the suspension of the environmental assessment is declared. In case no verification of the expropriation takes place within a year, it is understood that the precautionary measure by the Minister is exhausted under Article 4 of the Law of Expropriations. However, under the previously mentioned recitals, it is concluded that properties within the grounds of Las Baulas Marine National Park of Guanacaste do not have the right to develop works or activities in any way; so that, even if the injunction was exhausted, there is no environmental viability to be granted until the Constitutional Court rules on the matter.
> …

The Claimants aver, and the Respondent accepts, that the SETENA Suspension Resolution "was not referred to in a publicly available document until 2008". The Respondent observes, however, that "the Resolution was issued to implement Supreme Court orders, which were public decisions".

(j) On 19 October 2005, the Constitutional Court was seised of an application by a Belgian national challenging the constitutionality of the SETENA Suspension Resolution.[38] While the application was dismissed on grounds of inadmissibility, the Court, albeit in relatively opaque terms, confirmed the constitutionality of the SETENA Suspension Resolution, viz.: "[The SETENA Suspension Resolution] is duly founded upon article 4 of the Expropriations Law, in response to the greater interest of protecting the environment."[39] The Court also confirmed the 125-metre landward extent of the Park.

(k) On 23 December 2005, the Office of the Procuraduría General issued a *Dictamen*, referred to in paragraph 38 above, which constituted an authoritative and binding interpretation of Article 1 of the 1995 Park Law.[40] In the *Dictamen*, the Procuraduría noted and elaborated

[38] Exp: Nº 05-013125-007-CO; Res: Nº 2005-014289.
[39] The Claimants adopt this reading of the decision in question, viz.: "On 19 October 2005, the Constitutional Court confirmed that the general order was legitimate, explaining that it had been issued under the authority of Article 4 of the Law on Expropriation."
[40] C-444-205.

upon the analysis given in its Opinion of 10 February 2004 (referred to in subparagraph (e) above), reaching the following conclusion:

> Article 1 of Law no. 7524 of July 10, 1995, the law that created Las Baulas de Guanacaste Marine Park, should be interpreted so that it is understood that the drafting of the imaginary line that starts from a straight line, beginning at coordinates N 259.100 and E 322.000 and ending at coordinates N 255.000 and E 335.050, according to the Matapalo and Villareal map sheets of the National Geographic Institute, runs on land at a distance of 125 meters from the normal high tide."

(l) On 30 April 2008, the Constitutional Court gave a decision in a challenge brought by owners of property inside the 125-metre zone of the Park against MINAE, SETENA and others requesting an order "that they be restored to full enjoyment of their basic [property] rights", given the almost 10-year delay in the expropriation of their property as had been required by the 1995 Park Law. Rejecting the application for the relief requested, the Constitutional Court nonetheless observed that the delay in expropriating the property in question "is unjustified and harms the rights protected in articles 21 and 50 of the Constitution". The Court went on to order the MINAE Minister "to commence the expropriation proceedings immediately and speedily".[41]

In its recitation of proven facts important for its decision in the case, the Court noted, *inter alia*, that (i) the MINAE, in an official letter of 28 February 2005, had told SETENA not to authorise any negotiation for development inside the Park, and (ii) by a 2005 decision,[42] SETENA suspended the administrative environmental feasibility procedure. Rejecting the applicants' challenge of delay against SETENA in the case before it, the Court observed that both MINAE and SETENA "took the necessary steps in order not to authorise negotiation for development within the park in the future, and to suspend the processing of procedures set up with the aim of getting environmental feasibility within that zone."

(m) On 23 May 2008, the Constitutional Court issued a decision annulling, with retroactive effects, Santa Cruz Municipality zoning regulations that contemplated, and under which

[41] Exp: Nº 05-002756-0007-CO; Res: Nº 2008-007549.
[42] Decision Nº 647-2005-SETENA. This decision evidently preceded the SETENA Suspension Resolution of 30 August 2005.

had been permitted, construction development in the Park without environmental sustainability criteria and technical studies.[43] The decision addressed the geographic extent of the Park, including, *inter alia*, by reference to the 1991 Park Decree, the 1995 Park Law and the views of the Office of the Procuraduría General, consistent with its *Dictamen* of 23 December 2005, on the coordinates of the Park extending 75 metres beyond the 50-metre inalienable zone, i.e., 125 metres from the normal high tide, with the consequence that the impugned zoning regulations extended the municipality's jurisdiction "further than what is allowed". In this regard, the Court noted that the "confusion that is generated" by the use of the word "offshore" in the 1995 Park Law "is aggravated" by the zoning regulations in question. In its reasoning in support of the annulment of the zoning regulations, the Court implicitly endorses the conclusions of the Procuraduría *Dictamen*.

(n) On 27 May and 25 July 2008, the Constitutional Court issued two decisions in cases brought by Marion Unglaube (which followed earlier challenges by the same applicant), which were of wider importance for owners of property in the Park. In the first decision,[44] the Court granted the Unglaube appeal against MINAE "for having delayed more than 10 years in carrying out the procedures for expropriation of private properties located with the Las Baulas Marine National Park". The Court went on to order MINAE to "proceed with the expropriation of the private property if it considers it appropriate" in question "in a reasonable time period" or, if the financial resources to do so were not available, to "award the private owners the permits and authorisations so that they can effectively exercise their right to property insofar as they have the necessary environmental impact study and the environmental licences that discard the possibility of putting at risk the conservation of the species in danger of extinction." The Court, further, found against SETENA "for violation of the principle of timely and proper justice, due to the delays in resolving the recourses for revoking with appeals formulated against [the SETENA Suspension Resolution]."

In its second decision,[45] the Constitutional Court dismissed a challenge to the *vires* of the SETENA Suspension Resolution, observing that "the measure taken does not injure the

[43] Exp: Nº 06-008369-0007-CO; Res: Nº 2008-008713.
[44] Exp: Nº 06-003614-0007-CO; Res: Nº 2008-008770.
[45] Exp: Nº 06-014727-0007-CO; Res: Nº 2008-011675.

right to private property given that it is a precautionary measure adopted by reasoned decision, considered reasonable and proportional".

(o) On 16 December 2008,[46] in proceedings against SETENA concerning intended property developments inside the Park, the Constitutional Court annulled all development permits in respect of properties located inside the 125-metre zone, ordered the MINAE to continue immediately with the expropriation processes of such properties, and ordered that instructions be issued not to process any new development applications inside the Park. The Court also ordered, *inter alia*, that SETENA undertakes a study of the environmental effects of properties within a 500-metre buffer zone and whether properties in this zone should also be expropriated. This study was to be carried out within a timeframe of 6 months and all development permits for properties within the buffer zone, and the processing of all applications for such permits, were suspended until the study had been completed.

(p) On 11 February 2009, the SINAC issued Official Letter no. SINAC-SE-230 which, as described in the Contraloría Report (see paragraph 41(s) below), set out in writing technical criteria that had previously been given verbally to define the expropriation of properties in the Park. These criteria, as described in the Contraloría Report, were as follows:

> 1) The lands included in the open areas located in Grand South beach, the most import[ant] sector in terms of protecting the beach, because it is the site that has the greatest number of nesting records of the Baula leatherback sea turtles; 2) The sector consisting of Grande North beach, which has the highest concentration of houses, but where there are still lots without buildings; 3) The sector consisting of Ventanas beach, which has few houses and a smaller nesting site of Baula leatherback sea turtles, but with a growing amount of infrastructure; 4) The Verde Island sector, the second most important nesting beach for the sea turtles in the PNMB and regarding which there is no indication that real-estate development is forecast in the short term, or at least it has not been reported to the SINAC; 5) The sector consisting of El Morro and Ventanas hills, around which the expropriation process has been impeded because of a lack of clarity of its delimitation; and 6) Lots with houses that are park zones that were altered and have a high economic cost.[47]

[46] Exp: Nº 07-005611-0007-CO; Res: Nº 2008-018529.

[47] Contraloría Report (see paragraph 41(s) *infra*), at section 2.1.3. While Official Letter no. SINAC-SE-230 was not provided to

The properties that are the subject of these proceedings are located on the Playa Grande and Playa Ventanas beaches. While the Official Letter was not put into evidence before the Tribunal, its existence and content is addressed in evidence submitted by the Claimants in the proceedings.

(q) On 27 March 2009, the Constitutional Court declared inadmissible applications by a number of petitioners seeking clarification of its decisions of 27 May 2008 and 16 December 2008.[48]

(r) On 30 September 2009, the Secretary General of SETENA wrote to the Constitutional Court on the issue of the suspension of development permit applications within the 500-metre buffer zone, arising from Court's 16 December 2008 decision, noting the lifting of the suspension of such permit applications from that point.[49]

(s) On 26 February 2010, the Controller General of the Republic of Costa Rica published an *Assessment Report of How the National Conservation System (SINAC) and the Ministry of the Environment, Energy and Telecommunications (MINAET)*[50] *Are Managing Las Baulas National Marine Park (PNMB)* ("Contraloría Report").[51] The Report examined how SINAC and the MINAET had managed the Park in the period 1 January to 31 December 2008, along with the process of expropriating land located within the Park's limits. The Executive Summary of Report reads as follows:

> The purpose of this study was to evaluate the actions of the SINAC and the MINAET in managing and protecting the natural resources located in Las Baulas National Marine Park (PNMB), in accordance with applicable legal and technical regulations. The issue is highly relevant in light of the significance of the objectives of creating said park, which have sought to protect the most important nesting sites of the Baula leatherback sea turtle (*Dermochelys coracea*) in the eastern Pacific Ocean, which includes

the Tribunal as part of the documentary record in this case, the SINAC expropriation criteria were addressed in the witness evidence submitted by the Respondent by Rotney Piedra and Sabrina Loáciga Pérez, although each noting that the expropriation strategy "became official" in 2012.

[48] Exp: Nº 06-003614-0007-CO; Res: Nº 2009-005408.

[49] CP-253-2009-SETENA, 30 September 2009.

[50] MINAET is the name given to the MINAE from 2008.

[51] Report No. DFOE-PGAA-IF-3-2010.

the beaches of Ventanas, Grande, and Langosta in Tamarindo Bay, in the province of Guanacaste.

As a result of the study, weaknesses were determined in delimiting the park due to problems with the location of the milestones and the existence of sectors not geographically well defined in the laws that created it. Furthermore, inconsistencies were detected with respect to the process of expropriating lands, which may constitute part of the State's Natural Heritage (PNE), given that some of the parent estates that created the separations of those land were titled administratively by the former ITCO, when in reality regulations require a process of ownership reporting at the judicial level, where substantial weaknesses were found, such as: a lack of internal procedures and a specific strategy for expropriations; deficiencies in the registered plans; and problems with the identification, page-numbering and content of the respective files. In addition, technical weaknesses were also determined in the administrative appraisals, which had differences of up to 500% among the appraisal values prepared for the same lot or lands with similar conditions among two relatively short periods of time, as well as considerable differences between the administrative and judicial appraisals, for instance, with one lot appraised administratively at ₡20.6 million, and then valued in the judicial process eleven months later at ₡1264.2 million, that is, an increase in this period of 6,037%. In other words, a square meter went from approximately 7,200 colones to 442,000 colones; and this occurred without any reaction by the SINAC to this situation. In addition, a few lots were identified within the PNMB that either belonged to the municipality of Santa Cruz or continued to fall under that city's scope, which had not yet been transferred to the park's administration. Finally, several weaknesses were determined with respect to the park's administration and management, among others: a lack of regulation of public use; the omission of controls over access and entry fees to the park; the presence of domestic animals and exotic species; the absence of maritime surveillance and regulation of fishing; and the deterioration of the park's forested ecosystems.

To correct these deficiencies, the MINAET and the SINAC are being provided, among other things with an assessment of the status of the properties that were titled by the former ITCO in order to decide whether or not to file appropriate legal claims, and eventually recover the PNMB's lands; the correct delimitation of this park; transfer to the MINAET of municipal lands located within the park; reinforcements of personnel and resources assigned to guard and protect the park; along with an evaluation of the request for new administrative appraisals from the Office of Taxation, which, for its part, is being given a review of the guidelines to prepare appraisals, the inclusion in said guidelines of criteria to establish the correct use of hydrology and soil-use variable in the appraisals, and the establishment of supervisory levels of the work being done by the appraisal experts.

The Report noted a series of actions that were required of the MINAET, SINAC and the Director-General of Taxation arising out of the Report, including as regards expropriation procedures. Amongst the actions addressed to the MINAET was that consideration should

be given to whether to suspend all expropriation procedures that were currently in the administrative phase and to abstain from new expropriation processes with respect to properties in the Park. Amongst the actions addressed to the SINAC was the preparation and publication of a procedural manual addressing the expropriation of properties in protected areas.

(t) On 16 March 2010, the Director of the Office of Legal Counsel at the MINAET wrote to the MINAET Minister setting out a legal interpretation of what was required by SETENA in response, *inter alia*, to the Constitutional Court decision of 16 December 2008.[52] As regards the properties in the 500-metre buffer zone, the Legal Director's report concluded that SETENA should not continue with the suspension of procedures submitted for evaluation but should rather proceed with an assessment of all applications. As regards properties located within the Park, the Legal Director's report concluded that (a) no environmental feasibilities should be granted, and (b) SETENA must annul the environmental feasibilities that had already been granted.

On 19 March 2010, the MINAET Minister wrote to the SETENA Secretary General attaching and endorsing the Legal Director's report and ordering SETENA to adhere to the opinion given and terminate existing and decline future applications for environmental development permits.[53]

(u) On 27 November 2014, the Contraloría issued a Chart of MINAE and SINAC compliance with the Contraloría Report required actions ("Contraloría Compliance Chart").[54] Against the action, noted in paragraph 41(s) above, addressed to the MINAET that consideration should be given to whether to suspend all expropriation procedures that were currently in the administrative phase and to abstain from new expropriation processes with respect to properties in the Park, the Compliance Chart notes simply that this was "underway". Against the action addressed to the SINAC, concerning the preparation and publication of

[52] DAJ-701-2010.
[53] DM-363-2010.
[54] http://www.asamblea.go.cr/Informes_de_la_Contraloria/Informes%202010/b-%20informes_febrero_2010/DFOE-PGAA-IF-3-2010.pdf

a procedural manual addressing the expropriation of properties in protected areas, the Compliance Chart notes that this was fulfilled by publication on 3 April 2013 of the "Expropriation manual for the creation, consolidation or expansion of the boundaries of the Protected Wildlife Areas".

42. A timeline of the acquisition of the properties in question by the relevant claimant, relative to key regulatory and related developments noted above, is given in **Table 3** below.

Table 3 – Property Acquisition Timeline Relative to Regulatory Developments (By Date of Acquisition by Claimant/s)

Lot # (Claimant)	Date of Acquisition by Claimant/s
---------- **1991 Park Decree (9 July 1991)** ----------	
---------- **1995 Park Law (16 August 1995)** ----------	
B1 (A&T Berkowitz)	16 January 2003
B3 (Berkowitz)	16 January 2003
B5 (Berkowitz)	16 January 2003
B6 (Berkowitz)	16 January 2003
B8 (A&T Berkowitz)	16 January 2003
---------- **MIRENEM conservation order preventing construction permits (May 2003)** ----------	
---------- **MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003)** ---	
---------- **Ayuda Memoria (16 July 2003)** ----------	
V39 (B&R Copher)	15 August 2003
V40 (B&R Copher)	15 August 2003
V30 (Spence)	19 August 2003
V31 (Spence)	19 August 2003
V32 (Spence)	19 August 2003
V33 (Spence)	19 August 2003
---------- **MINAE Resolution re Unglaube declaration of public interest (5 November 2003)** ------	
---------- **Procuraduría Opinion (10 February 2004)** ----------	
B7 (Gremillion)	3 March 2004
---------- **IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004)** ----------	
V38 (R.Copher)	3 October 2004
A39 (Spence Co.)	27 January 2005
A40 (Spence Co.)	27 January 2005
C71 (Spence Co.)	4 February 2005
V61a (Spence Co.)	4 February 2005
V61b (Spence Co.)	4 February 2005
V61c (Spence Co.)	4 February 2005
---------- **MINAE letter to SETENA prohibiting development permits (28 February 2005)** --------	
---------- **SETENA suspension of environmental feasibility procedures (± 10 March 2005)**[55] -------	
C96 (Spence Co.)	28 June 2005
---------- **SETENA Suspension Resolution (30 August 2005)** ----------	
---------- **CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005)** ----------	
---------- **Procuraduría *Dictamen* (23 December 2005)** ----------	
V46 (R.Copher-Holsten)	19 January 2006
V47 (R.Copher-Holsten)	19 January 2006
SPG1 (Spence Co.)	31 March 2006
SPG2 (Spence Co.)	31 March 2006
SPG3 (Spence Co.)	31 March 2006
V59 (Spence Co.)	27 February 2007
---------- **CC decision ordering immediate commencement of expropriations (30 April 2008)** -----	
---------- **CC decision annulling zoning regulations (23 May 2008)** ----------	
---------- **CC Unglaube decision ordering expropriation or development approval (27 May 2008)**	
---------- **CC decision annulling development permits (16 December 2008)** ----------	
---------- **SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009)** ----------	

[55] The date in 2005 of this development is unclear but, from the description available on the documents on the record, this appears to have occurred sometime before the SETENA Suspension Resolution of 30 August 2005. The *Unglaube* Award, at paragraph 67, notes that, on 10 March 2005, the MINAE directed SETENA to cease processing environmental permits for projects on land partly within the Park.

C. The Law Relevant to Expropriations of Property in the Public Interest

43. Article 45 of the Costa Rican Constitution provides, *inter alia*: "Property is inviolable; no person may be deprived of his property except for a legally proven public interest, and upon prior compensation in accordance with the law." Article 41 of the Constitution provides: "Everyone shall be entitled to receive reparation for injury or damage caused to themselves or to their property or moral interests, through recourse to the laws. Justice shall be prompt, effective, not denied, and in strict accordance with the laws."

44. The expropriation of property in the public interest in Costa Rica is governed by Law No.7495 of 8 June 1995, as amended in 1998 and 2008 ("Expropriation Law"). Article 1 provides that it "regulates expropriations that are mandatory due to legally proven public interest" and for "the payment of an indemnity that represents the fair price for what is expropriated." Article 4 provides for "precautionary measures" to prevent alteration of the conditions of property that is intended for expropriation, such measures being permitted for a period up to one year and subject to the payment of indemnification for damages caused. Article 17 deals with "partial expropriations", providing, *inter alia*: "When dealing with a partial expropriation of a property and the part that is not expropriated is found to be inadequate for use or for rational exploitation, the expropriated party can demand that the totality of the land be expropriated." The provision goes on to lay down different approaches in the case of partially expropriated urban and rural property.

45. There follows in the Law detailed provisions addressing two expropriation phases, an administrative phase, addressed in Chapter II, and a judicial phase, addressed in Chapter III. The administrative phase is a necessary precursor to the judicial phase but the judicial phase does not follow the administrative automatically but only takes place in the event, for present purposes, that the expropriated party disagrees with fair price appraisal determined in the administrative phase.[56]

[56] As per Article 28(a) of Expropriation Law.

46. The administrative phase includes the following key elements:

(a) There must be a **declaration of public interest**, notified to the interested party or their legal representative and published in the official gazette.[57] Provision is also made for generic declarations of public interest, in the case of more than one property.[58] The declaration of public interest must be accompanied by a "provisional annotation" recording the stated public purpose.[59] This "provisional annotation", and therefore also the declaration of public interest, will expire and will be automatically cancelled if a "definitive annotation" is not submitted within a year.[60]

(b) A relevant government agency, by default the General tax Authority, is then required to carry out an **administrative appraisal**, which must be concluded in a maximum period of two months from the receipt of the request to undertake the appraisal.[61] The Law indicates a detailed list of criteria to be taken into account for purposes of the determination of the fair price.[62] The appraisal must determine the value of the expropriated property at the date of the appraisal report, including any damages that may have been caused by any unreasonable limitations suffered in consequence of any precautionary measures.[63] The appraisal must be notified, *inter alia*, to the owner, including with a notification of a period, not less than eight working days, with which to indicate acceptance or rejection of the appraisal price.[64] If the appraisal price is accepted, that is the end of the matter. If the owner rejects the appraisal, the matter moves into the judicial phase, which is triggered by the responsible government agency issuing a **decree of expropriation** and initiating a special process for expropriation before a competent court within six months of the owner's rejection of the administrative appraisal.[65]

[57] Article 18.
[58] Article 19.
[59] Article 28.
[60] Article 20.
[61] Article 21.
[62] Article 22.
[63] Article 24.
[64] Article 25.
[65] Article 29.

(c) The concluding provision of the administrative part provides, *inter alia*, that "[a]t any stage of the proceedings, the parties can submit their differences to arbitrage, in conformity with legal regulations and the instruments currently in force in international law. … When resorting to arbitrage mechanisms stipulated in international instruments currently in force in Costa Rica, the process is subject to the regulations contained therein."[66]

47. The object of the judicial phase is to review the administrative appraisal "in order to establish the final amount of the indemnity".[67] The process laid down, however, is not a review of the administrative appraisal in the traditional sense of an assessment of the administrative process and price arrived at but rather a fresh procedure to determine the fair price. The judicial phase includes the following key elements:

(a) Following the **decree of expropriation**, an **initial resolution** is issued by the court requiring the owner (or tenant) to vacate the property within a period of two months of the deposit of the amount of the administrative appraisal, unless the judge determines that the amount does not correspond to the principle of a fair price. The initial resolution also appoints an appraisal specialist to undertake a fresh valuation.[68] The person so appointed, from a list maintained by the Supreme Court, has a period of eight working days to accept the appointment. If the appointment is rejected, an alternative will be appointed.[69]

(b) The appraisal specialist so appointed has a "non-extendable period of one month" to submit his or her **specialist report**. The same criteria as were required for purposes of the administrative appraisal are to be followed, the objective being "to review the administrative appraisal". If the appraisal specialist disagrees with the administrative appraisal, the report must contain a detailed explanation of the reasons for the variance, as well as an estimate of the value of the property.[70]

[66] Article 27.
[67] Article 30.
[68] Article 31.
[69] Article 35.
[70] Article 36.

(c) In the event of a divergence of valuations, either party, or the judge *suo motu*, may appoint a third appraisal specialist, who is required to work to the same criteria and timeline.[71]

(d) A **hearing** on the specialist report is then required within 10 workings day, with a further five working days thereafter allowed for adjustments to the report.[72]

(e) A **judicial decision** is required within 15 days after any adjustments have been made to the specialist report. The judge is constrained by the requirement that "[i]n no case shall the amount of the indemnity exceed the highest sum estimated in the appraisals".[73]

(f) There follows the possibility of an **appeals process**, which must be requested within five working days from the date of notification of the judicial decision.[74] The parties are thereafter given a further 5 working days to submit arguments.[75] The appellate court is thereafter required to give its decision with a further 15 working days.[76]

(g) Subject to other formalities that are not relevant for present purposes, **payment** of the price determined by this process "will be made immediately".[77] The amount of the payment includes interest from the moment of dispossession until the payment is made.[78]

(h) Following final determination of the payment due on the expropriation, and on a petition to do so, the court will pass the file to the State Notary to affect the registration of the property in favour of the State by the creation of an additional title and the cancellation of all other interests in the property.[79]

[71] Article 38.
[72] Article 40.
[73] Article 40.
[74] Article 41.
[75] Article 43.
[76] Article 44.
[77] Article 47.
[78] Article 11.
[79] Article 49.

48. Without prejudice to any issue going to the fairness and reliability of the expropriation process, the maximum cumulative timeline envisaged in the Expropriation Law from the date of a declaration of public interest to the end of an appellate process is 13 to 14 months. The various stages and timelines are given in **Table 4** below.

Table 4 – Expropriation Timeline Pursuant to Law No.7495

Required Conduct	Timeline
Declaration of public interest (valid for 1 year)	--
Administrative appraisal	2 months from receipt of request
Owner to indicate agreement or rejection of appraisal	Not less than 8 working days
Expropriation Decree and initiation of judicial process	Within 6 months of appraisal rejection
Second appraisal specialist to be appointed	[No time limit given]
Second appraisal report to be issued	Within 1 month
Third appraisal specialist to be appointed	[No time limit given]
Third appraisal report to be issued	Within 1 month
Hearing on report and adjustments	Within 15 working days
Judicial decision	Within 15 working days
Appeals process	Within 25 working days
Payment	Immediately

V. The Claimants' Liability and Damages Case and Relief Sought

49. In the Claimants' words, "[a]t root, this case is about the Respondent's failure to provide prompt and adequate compensation for its *de facto* and *de jure* takings of valuable residential real estate". With greater elaboration and particularity, the Claimants state their case as follows:

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

50. The Claimants' pleadings are detailed and complex. The Tribunal reiterates its observation made in opening that it summarises herein only those issues and submissions of the Parties that it considers to be determinative of its decision and necessary for purposes of a fully reasoned award. The Tribunal has, however, given considered attention to all of the Claimants' extensive pleadings, evidence and other documentation submitted in support of their case.

A. The Claimants' Liability Case on Expropriation

(i) Overview

51. The Claimants advance both direct and indirect expropriation claims. There is no dispute that certain of the Claimants' properties, or the portions of land of those properties that lie within the 125-metre zone, have been directly expropriated. In a number of cases, the judicial phase of the expropriation process has been completed. In some cases, title has already been transferred to the State. In four cases, payments have been made (available) to the dispossessed owners. The expropriation issue in these cases is the Respondent's compliance with the requirements of CAFTA Article 10.7, notably, non-discrimination, [80] promptness, the adequacy of the compensation offered, and due process.[81]

52. In respect of the Claimants' indirect expropriation claims, while the case has been advanced in both general terms and on a property-specific basis, the pleadings address aspects of the property-specific claims in broad-brush terms that leave the precise nature of the claims in respect of certain properties somewhat unclear. The allegations of indirect expropriation concern, potentially, properties falling into four distinct categories, namely (a) properties in respect of which there has been no declaration of public interest, (b) properties in respect of which there was a declaration of public interest but where the administrative phase has long since lapsed and has not so far been renewed, (c) the portions of land falling outside the 125-metre zone but in respect of which the portions of land lying inside the 125-metre zone have been directly expropriated, and (d) the delays and substantive shortcomings of the expropriation proceedings that resulted in the

[80] It is not evident that the Claimants maintain the discrimination argument initially advanced in their Notice of Arbitration. At that point, the Claimants allegations included breaches of CAFTA Article 10.3 (National Treatment) and Article 10.4 (Most-Favored-Nation Treatment) and in this context alleged differential treatment. The Article 10.3 and 10.4 claims were withdrawn in the Claimants' Memorial. While the Claimants do not advance a particularised claim of discrimination in that or subsequent pleadings, they do contend, *inter alia*, that "[t]he first handful [of public interest declaration] notices appears to have been sent to foreigners who had effectively brought themselves to the attention of SETENA/MINAE officials by applying for development permits." The Respondent, in the hearing, rejected any claim that it had acted in a discriminatory manner, noting that "Claimants have not submitted any evidence in support of this statement." Insofar as any allegation of discrimination subsists, which the Tribunal does not understand to be the case, the Tribunal finds that it fails at the threshold of burden of proof, given the absence of particularisation and development in the Claimants' pleadings.

[81] The Claimants' due process argument, which has a peg in CAFTA Article 10.7.1(d), has essentially been advanced as part of their minimum standard of treatment argument under CAFTA Article 10.5. Insofar as may be material to the Tribunal's decision, due process issues will be addressed in the context of the Tribunal's consideration of the Claimants' Article 10.5 case.

direct expropriation of particular properties, or parts thereof. The issue in the indirect expropriation claims is the Respondent's compliance with CAFTA Article 10.7, notably, non-discrimination,[82] promptness, the absence of any compensation offer, and due process.[83]

53. Declarations of public interest have been made in respect of 18 of the Claimants 26 lots. No declaration of public interest has been made in the case of the following eight lots:

Table 5 – No Declaration of Public Interest (8 Lots)

Lot #	Proportion within 125-metre zone
A39 (B&R Copher)	Wholly within the 125-metre zone
C71 (Spence Co.)	Wholly within the 125-metre zone
V61a (Spence Co.)	Wholly within the 125-metre zone
V61b (Spence Co.)	Wholly within the 125-metre zone
V61c (Spence Co.)	Wholly within the 125-metre zone
C96 (Spence Co.)	Wholly within the 125-metre zone
SPG3 (Spence Co.)	± 40% with the 125-metre zone
V59 (Spence Co.)	Wholly within the 125-metre zone

54. Of the 18 lots in respect of which declarations of public interest have been made, nine lots have not moved beyond now long-lapsed administrative phase proceedings, objections to the administrative appraisals in each case having been made in the case of eight lots on 21 January 2009 and the ninth lot on 2 April 2009. As the Expropriation Law requires that a decree of expropriation must be issued within six months of an objection to the administrative appraisal, these nine lots have not been the subject of any direct expropriation process in the almost 4½ years before the present proceedings were commenced on 10 June 2013, with no change in status in the further 3 year period since then, i.e., a total of 7½ years. The nine lots in question are the following:

Table 6 – Lapsed Administrative Processes (9 Lots)

Lot #	Proportion within the 125-metre zone
V39 (B&R Copher)	Wholly within the 125-metre zone
V40 (B&R Copher)	Wholly within the 125-metre zone
V30 (Spence)	Wholly within the 125-metre zone
V31 (Spence)	Wholly within the 125-metre zone
V32 (Spence)	Wholly within the 125-metre zone
V33 (Spence)	Wholly within the 125-metre zone
V38 (R.Copher)	Wholly within the 125-metre zone
V46 (R.Copher-Holsten)	Wholly within the 125-metre zone
V47 (R.Copher-Holsten)	Wholly within the 125-metre zone

[82] See footnote 80 *supra*.
[83] See footnote 81 *supra*. The Claimants' minimum standard of treatment argument under CAFTA Article 10.5 is addressed at paragraphs 84 *et seq.*, *infra*.

55. The remaining nine lots have been the subject of direct expropriations, although, in the case of eight of these lots, only that portion of the property located within the 125-metre zone of the Park has been directly expropriated. The Claimants' direct expropriation allegations concern the following lots:

Table 7 – Direct Expropriation Claims (9 Lots)

Lot #	Declaration of Public Interest	Proportion within the 125-metre zone
B1 (A&T Berkowitz)	1 December 2005	± 40% within the 125-metre zone
B3 (Berkowitz)	1 December 2005	± 45% within the 125-metre zone
B5 (Berkowitz)	1 December 2005	± 45% within the 125-metre zone
B6 (Berkowitz)	1 December 2005	± 45% within the 125-metre zone
B8 (A&T Berkowitz)	1 December 2005	± 45% within the 125-metre zone
B7 (Gremillion)	1 December 2005	± 45% within the 125-metre zone
A40 (Spence Co.)	30 March 2006	Wholly within the 125-metre zone
SPG1 (Spence Co.)	17 April 2007	± 40% within the 125-metre zone
SPG2 (Spence Co.)	17 April 2007	± 40% within the 125-metre zone

56. Of these lots in respect of which a direct expropriation claim is made, only Lot A40, located wholly within the 125-metre zone, has been expropriated in its entirety.

57. At the core of the Claimants' case in respect of both direct and indirect expropriation are three broad, at times discrete and times interlinking, themes of argument: (a) that the Claimants did not know, at the time of their purchase of the properties in question, that the properties were inside the boundaries of the Park ("knowledge argument"); (b) in any event, that, the 1995 Park Law provided that, prior to expropriation, property owners would continue to enjoy full rights of ownership, and that the denial of these rights amounts to a breach of the expropriation requirements of the CAFTA ("full rights argument"); and (c) that the Respondent had an obligation to expropriate immediately, or at least within a timely manner, and that the delays in the expropriation process both denied the owners their rights and denuded the properties of their value, and continue to do so with regard to the properties that are the subject of the indirect expropriation claims, amounting to a breach of the expropriation requirements of the CAFTA ("immediate expropriation argument"). Whether or not expressly in legitimate expectation terms, contentions going to the expectations of the Claimants run through each of these themes and across them.

58. While these themes of argument are advanced principally with regard to the Claimants' contentions on liability, they also go to issues of jurisdiction, as is addressed further below.

59. The Claimants' "knowledge argument" hinges on four elements, broadly described: first, that the "offshore" language in Article 1 of the 1995 Park Law[84] was understood by the Claimants as creating a marine park rather than a park that extended 125 metres from the ordinary high tide, with the consequence that, when the Claimants each came to buy their properties, they believed that the property in question fell outside the area of the Park. Second, the Claimants rely on the conduct of the Respondent, including by representation and practice, in the period between 1995 and their purchases of property, as confirming their understanding of the marine park nature of the Park and that their properties were not included in the Park. Third, the Claimants cite the due diligence enquiries that were undertaken before purchase. Fourth, the Claimants argue that the conduct of the Respondent subsequent to their purchases reinforces the conclusion that the Claimants could not have had the requisite knowledge at the time of the purchases.

60. Amongst the conduct relied upon by the Claimants generally, and notably by the Berkowitz claimants, are the views said to have been expressed by the Minister of the Environment, Carlos Manuel Rodriguez Echandi, in a meeting with Brett Berkowitz and Mr Berkowitz's attorney, Alejandro Montealegre Isern, in early 2003. This meeting is described by Mr Berkowitz, in his First Witness Statement submitted to the Tribunal, in the following terms (set out in detail, given the importance of the issue in these proceedings):

> 9. As a key factor in making the decision to go through with the purchase of the property, in early 2003 I met with the then Minister of the Environment, Carlos Manuel Rodriguez Echandi, in his office in San José. I met with Mr. Rodriguez in the presence of my attorney, Alejandro Montealegre Isern in order to go straight to the source, the highest-ranking official for affairs of the environment.
>
> 10. During the meeting I explained to the Minister that I intended to invest a large share of my life's savings in property in Costa Rica. I was relying on what was the legislation in force at the time, the 1995 Park Law. However, in order to go forward with the final terms of the purchase of the investment and be prudent about my decision, I needed to confirm what I understood the administration's policy was with respect to the conflict created by the contradictory legislation: the 1991 Decree and the 1995

[84] See paragraphs 36-37 *supra*.

Park Law, concerning the Park's boundaries and its regulation with respect to privately owned land. My questions for the Minister were two. First, I wanted to know whether the Costa Rican Government was intending to expropriate the privately held properties bordering the Park. Second, if not, what was the Government's position in reference to the use of the private property which bordered the Baulas National Marine Park. The Minister's reply was that the Government did not intend to expropriate the land in question, they did not have the funds for it, and the Government and his Ministry did not intend to prevent development of the private property bordering the public zone (50 meter line of the mean high tide) but rather wanted to have whatever development confirmed to the parameters of maximal mitigation of light emission as was and is practised in many other areas of the world where there are turtle nesting grounds which border development along the nesting beach. I was favourably impressed by what the Minister said and that that this was a positive meeting.

11. The Minister confirmed my understanding by stating that the administration's policy was not to expropriate private property that was "adjacent" to the park nor were they intending to prevent the development of those privately held properties "adjacent" to the park. Furthermore, he confirmed that his administration did not support the expansion of the Park beyond the boundaries established by the 1995 Park Law. He added that the privately held properties could be developed as long as the proposed developments were low density and followed the appropriate mitigation practices that were required for building near turtle nesting beaches. In summary, the Minister confirmed my understanding.

12. After impressing once again upon the Minister the fact that a good part of my life's savings were going to be devoted to this project, I asked him for something in writing that I would be able to base my final decision whether or not to move forward with the execution of the main purchase contract. He informed me that a directive would be forthcoming from his Ministry as to his administration's position in writing on the rights of the private lands bordering the park immediately following an upcoming meeting which he had planned with all the heads of department and parks together with the members of various non-governmental organisations who were also requesting his administration's position be clearly stated un reference to the Baulas Marine Park.

13. Within several weeks of my meeting with Mr Rodriguez, true to his word, he held a meeting on the 18th of June 2003, where various government officials and representatives from NGO's gathered to discuss the preparation of a project to modify the Bill to Extend and Consolidate the National marine Park Las Baulas de Guanacaste *Proyecto de Ley de Ampliación y Consolidación del Parque Nacional Marino Las Baulas de Guanacaste)* which had been represented before the Legislative Assembly. The minutes of the meeting, signed by Minister Rodriguez, had answers to all of the questions I posed during my private meeting with him. Among the statements, it was clearly stated that the [] Pacheco/Rodriguez administration were not going to pursue the expropriation of the privately held properties (which had fallen into a storm of controversy as to whether or not they were inside or outside the boundaries of the Park as defined by the July 10, 1995 Park Law 7524. Additionally, it was clearly stated

> that those very same privately-held properties should submit themselves to a 'voluntary regimen of low density and low light emanation development". …

61. Without prejudice to any issue of whether the terms of the "minutes of the meeting" to which Mr Berkowitz refers accurately conforms to the description of it given in the Witness Statement, the document in question is the Ayuda Memoria of 16 July 2003, noted in paragraph 41(c) above.

62. In addition to the Ministerial comment recalled by Mr Berkowitz, and the Ayuda Memoria, the Claimants rely on other conduct by the Respondent, or by sub-central governmental bodies, as confirmatory of their understanding that their properties were not included in the Park at the time of their purchase. This includes conduct such as the absence of stamps on land registry documents indicating that the property in question was within the Park, land registry stamps indicating that the property in question was outside the Park, the IGN Letter, the Santa Cruz Municipality zoning regulations, and the absence of boundary fencing and other boundary markers.

63. The Claimants also aver that they undertook due diligence enquiries through local real estate agents and attorneys, as well as by reviewing land registry documents, property surveys, the IGN Letter, and other materials. They further aver that the high prices paid for the lots affirm that they (and by implication the market) were unaware that the properties were within the Park.

64. The Claimants' "full rights argument" rests on the express terms of the 1995 Park Law which, in Article 2, under the heading "Expropriation", provides as follows:

> In order to fulfil this Law, the competent institution will take the necessary steps to expropriate the totality or part of the properties found in the area delimited in the previous article.
>
> The private lots of land included in this delimitation will be susceptible of expropriation and will be considered part of the National Marine Park Las Baulas, until they are acquired by the State, through purchase, donation or expropriation; **in the meantime the owners will enjoy the full exercise of the attributes of domain or ownership.**[85]

[85] Emphasis added.

65. In the Claimant's contention, the refusal to permit the development of the properties amounts to a denial of the rights of ownership, which constitutes the indirect expropriation of the properties in question.

66. The Claimants' immediate expropriation argument invokes the decision of the Constitutional Court of 16 December 2008 which annulled "[a]ll the environmental viabilities awarded in properties located inside the National Marine Park Las Baulas" and went on to order the MINAE "to continue immediately with the expropriation process of such properties".[86] This decision followed an earlier decision by the Court on 27 May 2008 on a petition by Marion Unglaube in which the Court granted the appeal against the MINAE on grounds of the more than 10 years delay in carrying out the expropriation of Mrs Unglaube's property.[87] The Court went on, in that case, *inter alia*, to order the MINAE to proceed with the expropriation "in a reasonable time period". An earlier decision of the Constitutional Court of 30 April 2008 is also relevant to this argument.[88] In the Claimants' contention, the delays in the expropriation process since the 16 December 2008 decision, coupled with the freeze on the development of the properties, has denied the Claimants their rights of ownership and has denuded the properties of their value in breach of CAFTA Article 10.7 requirements.

67. Running through and across each of these themes, the Claimants contend that they had an expectation of an entitlement to develop and use their properties and, at the very least, of a timely expropriation process should any property have been the subject of a declaration of public interest.

68. Against this background, it is useful to set out some further detail about the Claimants' direct and indirect expropriation claims.

(ii) The Claimants Direct Expropriation Claims

69. In their Memorial, the Claimants assert that "nine of the Claimants' lots have been subjected to direct expropriation, effected by the Respondent when it transferred title in each

[86] See paragraph 41(o) *supra*.
[87] See paragraph 41(n) *supra*.
[88] See paragraph 41(l) *supra*.

respective lot to itself, from an enterprise owned and controlled [by] a Claimant. All such direct expropriations either took place as part of the on-going exercise of the Respondent's municipal expropriation regime having reached the appropriate stage or as a result of a Claimant filing a waiver with the Court in order to participate in the instant arbitration."

70. The nine lots that the Claimants contend have been subjected to direct expropriation are those lots in respect of which the Respondent has issued what the Claimants describe as an "act of dispossession". The lots in question, with the dates of dispossession given by the Claimants (with which the Respondent agrees), are the following:

Table 8 – Direct Expropriation Claims Dispossession Dates (9 Lots)

Lot #	Dispossession Date	Proportion dispossessed
B1 (A&T Berkowitz)	12 March 2008	± 40%
B3 (Berkowitz)	13 March 2008	± 45%
B5 (Berkowitz)	13 March 2008	± 45%
B6 (Berkowitz)	13 March 2008	± 45%
B8 (A&T Berkowitz)	12 March 2008	± 45%
B7 (Gremillion)	11 September 2008	± 45%
A40 (Spence Co.)	14 March 2008	Entire lot
SPG1 (Spence Co.)	9 December 2008	± 40%
SPG2 (Spence Co.)	9 December 2008	± 40%

71. The dispossession relates to those portions of each lot that fall within the 125-metre zone of the Park.

72. In the hearing, the Claimants noted that "today Respondent has only directly taken 3 out of the 28 [sic] Claimants' Lots". The Tribunal understands this to mean that the Respondent had by that date only taken physical possession of three of the lots, notwithstanding the acts of dispossession in respect of nine lots. The Claimants' fact and acts of dispossession contentions not having been contested by the Respondent, the Tribunal proceeds on the basis that the Claimants have as a factual matter been dispossessed of the portions of land of the nine properties in question that lie within the 125-metre zone.

73. As this is relevant to the Tribunal's assessment that follows, the various developments in the expropriation process in respect of each of the nine lots that is the subject of a claim of direct

expropriation, mapped against key developments in the regulatory timeline noted in **Table 3** above, as well as key CAFTA dates, are as follows:

Table 9 – Lot B1 (A&T Berkowitz): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

Purchased by Brett E. Berkowitz (16 January 2003)[89]
------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
------------ IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004) --
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
Declaration of Public Interest (1 December 2005)
------------ Procuraduría *Dictamen* (23 December 2005) --
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 November 2006)
Decree of Expropriation (27 November 2006)
Initiation of Judicial Proceedings (1 December 2006)
Dispossession Date (12 March 2008)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
------------ CC decision annulling development permits (16 December 2008) -------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
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Commencement of Arbitration Proceedings (10 June 2013)
Proceedings Suspended (31 July 2013)[90]
Judgement Ordering the State to Increase Payment to Owner (10 June 2016)[91]
Resolution Ordering Payment of Difference between Administrative Valuation and Revised Payment due (26 September 2016)[92]
Payment of Principal (N/A)
Payment of Administrative Appraisal (N/A)
Payment of Interest and Costs (N/A)

[89] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 22 September 2003. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 16 January 2003. For purposes of this table, the Tribunal has adopted the 16 January 2003 purchase date, taking the Claimants' case at its highest. The Tribunal notes, however, the developments in May and July 2003 recorded in the table, predating the purchase date initially provided, and their potential relevance for an assessment of the purchaser's knowledge or constructive knowledge of the limitations on the use, and risk of expropriation, of the property in question.
[90] A judicial decision lifting the suspension of proceedings was issued on 4 January 2016.
[91] The State appealed this Judgement on 11 July 2016.
[92] The Court revoked this Resolution on 19 December 2016 in light of a pending appeal to the Resolution by the Prosecutor's Office.

Table 10 – Lot B3 (Berkowitz): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

Purchased by Brett E. Berkowitz (16 January 2003)[93]
---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
Declaration of Public Interest (1 December 2005)
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 November 2006)
Decree of Expropriation (27 November 2006)
Initiation of Judicial Proceedings (1 December 2006)
Dispossession Date (13 March 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
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Judgment (7 February 2013)
Appeal Withdrawn (14 February 2013)
Commencement of Arbitration Proceedings (10 June 2013)
Payment of Principal (14 August 2014)
Payment of Administrative Appraisal (16 December 2014)
Payment of Interest and Costs (20 July 2016)

[93] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 22 September 2003. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 16 January 2003. For purposes of this table, the Tribunal has adopted the 16 January 2003 purchase date, taking the Claimants' case at its highest. The Tribunal notes, however, the developments in May and July 2003 recorded in the table, predating the purchase date initially provided, and their potential relevance for an assessment of the purchaser's knowledge or constructive knowledge of the limitations on the use, and risk of expropriation, of the property in question.

Table 11 – Lot B5 (Berkowitz): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

Purchased by Brett E. Berkowitz (16 January 2003)[94]
---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
Declaration of Public Interest (1 December 2005)
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 November 2006)
Decree of Expropriation (27 November 2006)
Initiation of Judicial Proceedings (1 December 2006)
Dispossession Date (13 March 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
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Commencement of Arbitration Proceedings (10 June 2013)
Judgment (11 March 2015)
Payment of Principal (N/A)
Payment of Administrative Appraisal (27 May 2015)
Transfer of Title (15 July 2015)
Request by Owner for Payment of Sum Identified in the 11 March 2015 Judgment (19 July 2016)
Approval of 19 July 2016 Request (27 July 2016)
Payment of Interest and Costs (N/A)

[94] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 24 September 2003. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 16 January 2003. For purposes of this table, the Tribunal has adopted the 16 January 2003 purchase date, taking the Claimants' case at its highest. The Tribunal notes, however, the developments in May and July 2003 recorded in the table, predating the purchase date initially provided, and their potential relevance for an assessment of the purchaser's knowledge or constructive knowledge of the limitations on the use, and risk of expropriation, of the property in question.

Table 12 – Lot B6 (Berkowitz): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

Purchased by Brett E. Berkowitz (16 January 2003)[95]
---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
Declaration of Public Interest (1 December 2005)
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 November 2006)
Decree of Expropriation (27 November 2006)
Initiation of Judicial Proceedings (29 November 2006)
Dispossession Date (13 March 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
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Commencement of Arbitration Proceedings (10 June 2013)
Judgment (30 July 2014)
Appeal Judgment (28 April 2015)
Payment of Principal (N/A)
Payment of Administrative Appraisal (N/A)
Payment of Interest and Costs (N/A)

[95] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 24 September 2003. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 16 January 2003. For purposes of this table, the Tribunal has adopted the 16 January 2003 purchase date, taking the Claimants' case at its highest. The Tribunal notes, however, the developments in May and July 2003 recorded in the table, predating the purchase date initially provided, and their potential relevance for an assessment of the purchaser's knowledge or constructive knowledge of the limitations on the use, and risk of expropriation, of the property in question.

Table 13 – Lot B8 (A&T Berkowitz): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

Purchased by Brett E. Berkowitz (16 January 2003)[96]
---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
Declaration of Public Interest (1 December 2005)
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 November 2006)
Decree of Expropriation (27 November 2006)
Initiation of Judicial Proceedings (1 December 2006)
Dispossession Date (12 March 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
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Judgment (31 May 2012)
Commencement of Arbitration Proceedings (10 June 2013)
Appeal Judgment (30 July 2013)
Annulment of 30 July 2014 Appeal Judgment (30 July 2015)
Payment of Administrative Appraisal (22 January 2016)[97]
Judgment Ordering Payment of Interest to Owner (29 August 2016)
Payment of Principal (N/A)
Payment of Interest and Costs (N/A)

[96] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 21 September 2003. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 16 January 2003. For purposes of this table, the Tribunal has adopted the 16 January 2003 purchase date, taking the Claimants' case at its highest. The Tribunal notes, however, the developments in May and July 2003 recorded in the table, predating the purchase date initially provided, and their potential relevance for an assessment of the purchaser's knowledge or constructive knowledge of the limitations on the use, and risk of expropriation, of the property in question.

[97] The decision ordering the payment of the administrative appraisal was taken on 22 January 2016. Payment was made on 16 May 2016.

Table 14 – Lot B7 (Gremillion): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

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---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
Purchased by Glen Gremillion (3 March 2004)[98]
---------- IGN Letter re Lots B1, B3, B6 and B7 (21 June 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
Declaration of Public Interest (1 December 2005)
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 November 2006)
Decree of Expropriation (27 November 2006)
Initiation of Judicial Proceedings (29 November 2006)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Dispossession Date (11 September 2008)
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)
Judgment (30 January 2015)
Appeal Judgment (29 May 2015)
Payment of Administrative Appraisal (12 August 2015)
Payment of Principal (6 October 2015)[99]
Judgment fixing interest and legal fees (4 May 2016)
Payment of Interest and Costs (N/A)

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[98] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 21 April 2004. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 3 March 2004. For purposes of this table, the Tribunal has adopted the 3 March 2004 purchase date, taking the Claimants' case at its highest.
[99] By a decision of 21 January 2016, the Administrative and Civil Tax Court ordered the payment of the principal amount.

Table 15 – Lot A40 (Spence Co.): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

---

---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
Purchased by Spence Co. (27 January 2005)[100]
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Declaration of Public Interest (30 March 2006)
Administrative Appraisal (22 September 2006)
Objection to Administrative Appraisal (15 February 2007)
Decree of Expropriation (12 April 2007)
Initiation of Judicial Proceedings (17 April 2007)
Dispossession Date (14 March 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Judgment (24 December 2010)
Appeal Judgment (21 July 2011)
Payment of Principal (15 February 2012)
Payment of Administrative Appraisal (13 December 2012)
Commencement of Arbitration Proceedings (10 June 2013)
Payment of Interest and Costs (N/A)

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[100] In their Notice of Arbitration, Memorial and certification documentation, the Claimants give the purchase date for this property as 22 February 2005. In their 22 December 2015 response to post-hearing questions from the Tribunal, the Claimants revise the purchase date to 27 January 2005. For purposes of this table, the Tribunal has adopted the 27 January 2005 purchase date, taking the Claimants' case at its highest.

Table 16 – Lot SPG1 (Spence Co.): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

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---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Registered by Spence Co. (31 March 2006)[101]
Declaration of Public Interest (17 April 2007)
Administrative Appraisal (22 June 2007)
Objection to Administrative Appraisal (4 September 2007)
Decree of Expropriation (11 March 2008)
Initiation of Judicial Proceedings (11 April 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Dispossession Date (9 December 2008)
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Judgment (26 February 2013)
Commencement of Arbitration Proceedings (10 June 2013)
Judicial Proceedings Suspended (31 July 2013)
Payment of Principal (N/A)
Payment of Administrative Appraisal (14 February 2013)
Payment of Interest and Costs (N/A)
Suspension Lifted, 26 February 2013 Judgment Annulled and Remanded (17 September 2015)

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[101] In their Notice of Arbitration, Memorial, certification documentation and post-hearing answers to the Tribunal's questions, the Claimants give the registration date for this property as 2 November 2007. There is no reference to a purchase date.

Table 17 – Lot SPG2 (Spence Co.): Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

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---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Registration by Spence Co. (31 March 2006)[102]
Declaration of Public Interest (17 April 2007)
Administrative Appraisal (21 June 2007)
Objection to Administrative Appraisal (4 September 2007)
Decree of Expropriation (11 March 2008)
Initiation of Judicial Proceedings (11 April 2008)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Dispossession Date (9 December 2008)
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Judgment (29 February 2012)
Appeal Judgment (14 December 2012)
Commencement of Arbitration Proceedings (10 June 2013)
Payment of Principal (11 July 2014)
Payment of Administrative Appraisal (11 July 2014)
Payment of Interest and Costs (2 December 2014)
Transfer of Title (14 May 2015)

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[102] In their Notice of Arbitration, Memorial, certification documentation and post-hearing answers to the Tribunal's questions, the Claimants give the registration date for this property as 2 November 2007. There is no reference to a purchase date.

(iii) The Claimants Indirect Expropriation Claims

74. The Claimants' indirect expropriation claims are not particularised at a level of fine detail, being addressed rather in broad-brush terms.[103] At their highest, these claims cover all of the Claimants' properties, going to delay, absence of compensation and due process allegations in respect of the eight properties for which there has been no declaration of public interest, the nine properties in respect of which the declarations of public interest have lapsed, the portions of land lying outside the 125-metre zone of the nine properties that have been the subject of acts of dispossession in respect of those areas within the 125-metre zone, and the process shortcomings of the nine direct expropriation proceedings.

75. The indirect expropriation claims are summarised in the Claimants' Notice of Arbitration of 10 June 2013, *inter alia*, in the following terms:

> With respect to all of the Claimants' beachfront land holdings, as recorded in detail above, it is apparent that the Respondent has utterly failed to provide the Claimants either with an effective right to the prompt review of the expropriation of their lands or with prompt payment for having engaged in these takings, as required under Article 10.7 of the CAFTA and the various obligations undertaken by the Respondent towards investors and investments of third countries, as noted in the preceding paragraphs.
>
> This is particularly the case with respect to the lots owned indirectly by Spence, the Cophers and Holsten, which were declared of public interest even before the Court had rendered its first decision in May 2008. …
>
> The same failings apply in respect of the Claimants' lots that have still not seen even the commencement of an official expropriation process, or have proceeded little further, despite the fact that over four years have passed since the Court directed Government officials to immediately carry out expropriations of land affected by its final determination of the boundaries of the Park, or alternatively to permit environmentally responsible development to proceed. …
>
> In the handful of cases where the Government has begun to at least putatively honour its obligation – to provide prompt access to an institutional mechanism for determination of their expropriation claims or the prompt payment of adequate compensation – the pace has been lethargic. …

[103] See paragraph 52 *supra*.

> This is particularly the case with respect to the eastern-most portions of the Berkowitz Claimants' lots, each of which has been arbitrarily excluded from the official expropriation process – no doubt as a cost-saving expedient. As of 1 January 2009, the Government was compelled, under its CAFTA obligations, to provide prompt compensation for each entire lot, which it has manifestly failed to do.
>
> [As of 1 January 2009] … the Respondent became obligated under the CAFTA: (1) to provide the Claimants with prompt access to a fair and effective municipal expropriation process; and (2) to provide the Claimants with prompt payment of adequate and effective compensation for its expropriation of their lands.
>
> [The Claimants] … have land that they cannot develop or sell for a fair price and the Government is doing little or nothing about it …

76. For purposes of this Award, the Tribunal takes the Claimants' indirect expropriation allegations at their most extensive.

77. As this will also be relevant to the Tribunal's assessment to follow, the various developments in the expropriation process in respect of all of the lots that are not the subject of a direct expropriation claim, mapped against key developments in the regulatory timeline noted in **Table 3** above, as well as key CAFTA dates, are as follows:

Table 18 – Lot V39 (B&R Copher): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

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---------- MIRENEM conservation order preventing construction permits (May 2003) ----------
---------- MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
---------- Ayuda Memoria (16 July 2003) ----------
Purchased by B&R Copher (15 August 2003)
---------- MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ----------
---------- Procuraduría Opinion (10 February 2004) ----------
---------- MINAE letter to SETENA prohibiting development permits (28 February 2005) ----------
---------- SETENA suspension of environmental feasibility procedures (± 10 March 2005) ----------
---------- SETENA Suspension Resolution (30 August 2005) ----------
---------- CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ----------
---------- Procuraduría *Dictamen* (23 December 2005) ----------
Declaration of Public Interest (9 October 2007)
---------- CC decision ordering immediate commencement of expropriations (30 April 2008) ----------
---------- CC decision annulling zoning regulations (23 May 2008) ----------
---------- CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (17 September 2008)
---------- CC decision annulling development permits (16 December 2008) ----------
---------- SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ----------
---------- SETENA lifting of suspension of buffer zone applications (30 September 2009) ----------
---------- Contraloría Report (27 February 2010) ----------
---------- MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ----------
≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 19 – Lot V40 (B&R Copher): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) --
Purchased by B&R Copher (15 August 2003)
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
------------ Procuraduría *Dictamen* (23 December 2005) ---
Declaration of Public Interest (9 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (18 September 2008)
------------ CC decision annulling development permits (16 December 2008) -------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 20 – Lot V30 (Spence): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------

------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------

------------ Ayuda Memoria (16 July 2003) --

Purchased by Bob F. Spence (19 August 2003)

------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------

------------ Procuraduría Opinion (10 February 2004) ---

------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------

------------ SETENA suspension of environmental feasibility procedures (+ 10 March 2005) --------------

------------ SETENA Suspension Resolution (30 August 2005) --

------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---

------------ Procuraduría *Dictamen* (23 December 2005) --

Declaration of Public Interest (9 October 2007)

------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------

------------ CC decision annulling zoning regulations (23 May 2008) ---

------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------

Administrative Appraisal (18 September 2008)

------------ CC decision annulling development permits (16 December 2008) -------------------------------

------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --

------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------

------------ Contraloría Report (27 February 2010) --

------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --

≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈

Objection to Administrative Appraisal (21 January 2009)

÷÷÷÷÷÷÷ 10 June 2010 ÷÷

Commencement of Arbitration Proceedings (10 June 2013)

Table 21 – Lot V31 (Spence): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) --
Purchased by Bob F. Spence (19 August 2003)
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) ---
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
------------ Procuraduría *Dictamen* (23 December 2005) ---
Declaration of Public Interest (8 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (18 September 2008)
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
≈≈≈≈≈≈≈ CAFTA Entry into Force between Costa Rica and the United States (1 January 2009) ≈≈≈≈≈
Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ CAFTA Limitation Period Timeline (10 June 2010) ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 22 – Lot V32 (Spence): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
Purchased by Bob F. Spence (19 August 2003)
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
------------ Procuraduría *Dictamen* (23 December 2005) ---
Declaration of Public Interest (9 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (18 September 2008)
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --
≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 23 – Lot V33 (Spence): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
Purchased by Bob F. Spence (19 August 2003)
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---
------------ Procuraduría *Dictamen* (23 December 2005) ---
Declaration of Public Interest (9 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (18 September 2008)
------------ CC decision annulling development permits (16 December 2008) -------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --
≈≈≈≈≈≈≈ CAFTA Entry into Force between Costa Rica and the United States (1 January 2009) ≈≈≈≈≈
Objection to Administrative Appraisal (2 April 2009)
÷÷÷÷÷÷÷ CAFTA Limitation Period Timeline (10 June 2010) ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 24 – Lot V38 (R.Copher): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) --
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------
------------ Procuraduría Opinion (10 February 2004) ---
Purchased by R. Copher (3 October 2004)
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---
------------ Procuraduría *Dictamen* (23 December 2005) --
Declaration of Public Interest (9 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) --
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (17 September 2008)
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) --
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
≈≈≈≈≈≈≈ CAFTA Entry into Force between Costa Rica and the United States (1 January 2009) ≈≈≈≈≈
Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ CAFTA Limitation Period Timeline (10 June 2010) ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 25 – Lot A39 (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------

------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------

------------ Ayuda Memoria (16 July 2003) --

------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------

------------ Procuraduría Opinion (10 February 2004) ---

Purchased by Spence Co. (27 January 2005)

------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------

------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------

------------ SETENA Suspension Resolution (30 August 2005) --

------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---

------------ Procuraduría *Dictamen* (23 December 2005) --

------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------

------------ CC decision annulling zoning regulations (23 May 2008) ---

------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------

------------ CC decision annulling development permits (16 December 2008) --------------------------------

------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---

------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------

------------ Contraloría Report (27 February 2010) ---

------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---

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Commencement of Arbitration Proceedings (10 June 2013)

Table 26 – Lot C71 (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
Purchased by Spence Co. (4 February 2005)
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (+ 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
------------ Procuraduría *Dictamen* (23 December 2005) ---
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
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Commencement of Arbitration Proceedings (10 June 2013)

Table 27 – Lot V61a (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) --
Purchased by Spence Co. (4 February 2005)
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---
------------ Procuraduría *Dictamen* (23 December 2005) ---
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) --
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --
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Commencement of Arbitration Proceedings (10 June 2013)

Table 28 – Lot V61b (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------

------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------

------------ Ayuda Memoria (16 July 2003) --

------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------

------------ Procuraduría Opinion (10 February 2004) --

Purchased by Spence Co. (4 February 2005)

------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------

------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------

------------ SETENA Suspension Resolution (30 August 2005) ---

------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---

------------ Procuraduría *Dictamen* (23 December 2005) --

------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------

------------ CC decision annulling zoning regulations (23 May 2008) ---

------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------

------------ CC decision annulling development permits (16 December 2008) -------------------------------

------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---

------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------

------------ Contraloría Report (27 February 2010) ---

------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --

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Commencement of Arbitration Proceedings (10 June 2013)

Table 29 – Lot V61c (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------

------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------

------------ Ayuda Memoria (16 July 2003) --

------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------

------------ Procuraduría Opinion (10 February 2004) --

Purchased by Spence Co. (4 February 2005)

------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------

------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------

------------ SETENA Suspension Resolution (30 August 2005) --

------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---

------------ Procuraduría *Dictamen* (23 December 2005) ---

------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------

------------ CC decision annulling zoning regulations (23 May 2008) ---

------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------

------------ CC decision annulling development permits (16 December 2008) --------------------------------

------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---

------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------

------------ Contraloría Report (27 February 2010) ---

------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---

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Commencement of Arbitration Proceedings (10 June 2013)

Table 30 – Lot C96 (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) --
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) --
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
Purchased by Spence Co. (28 June 2005)
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
------------ Procuraduría *Dictamen* (23 December 2005) --
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) --
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
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Commencement of Arbitration Proceedings (10 June 2013)

Table 31 – Lot V46 (R.Copher-Holsten): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) --
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------
------------ Procuraduría Opinion (10 February 2004) --
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) ---
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---
------------ Procuraduría *Dictamen* (23 December 2005) --
Purchased by R. Copher-Holsten (19 January 2006)
Declaration of Public Interest (9 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (17 September 2008)
------------ CC decision annulling development permits (16 December 2008) -------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) --
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --
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Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ CAFTA Limitation Period Timeline (10 June 2010) ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 32 – Lot V47 (R.Copher-Holsten): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------
------------ Procuraduría Opinion (10 February 2004) --
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---
------------ Procuraduría *Dictamen* (23 December 2005) ---
Purchased by R. Copher-Holsten (19 January 2006)
Declaration of Public Interest (9 October 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
Administrative Appraisal (17 September 2008)
------------ CC decision annulling development permits (16 December 2008) -------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) ---
≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
Objection to Administrative Appraisal (21 January 2009)
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

Table 33 – Lot SPG3 (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------

------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------

------------ Ayuda Memoria (16 July 2003) --

------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) -----------

------------ Procuraduría Opinion (10 February 2004) ---

------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------

------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------

------------ SETENA Suspension Resolution (30 August 2005) --

------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) ---

------------ Procuraduría *Dictamen* (23 December 2005) ---

Purchased by Spence Co. (31 March 2006)

------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------

------------ CC decision annulling zoning regulations (23 May 2008) ---

------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------

------------ CC decision annulling development permits (16 December 2008) --------------------------------

------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) ---

------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------

------------ Contraloría Report (27 February 2010) --

------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --

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÷÷÷÷÷÷÷ CAFTA Limitation Period Timeline (10 June 2010) ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷

Commencement of Arbitration Proceedings (10 June 2013)

Table 34 – Lot V59 (Spence Co.): Indirect Expropriation Timeline Relative to Key Regulatory Developments and CAFTA Dates

------------ MIRENEM conservation order preventing construction permits (May 2003) -------------------
------------ MIRENEM request to Procuraduría for an opinion on 125-metre zone (5 May 2003) ---------
------------ Ayuda Memoria (16 July 2003) ---
------------ MINAE Resolution re Unglaube declaration of public interest (5 November 2003) ------------
------------ Procuraduría Opinion (10 February 2004) ---
------------ MINAE letter to SETENA prohibiting development permits (28 February 2005) --------------
------------ SETENA suspension of environmental feasibility procedures (± 10 March 2005) --------------
------------ SETENA Suspension Resolution (30 August 2005) --
------------ CC affirmation of SETENA Suspension Resolution and 125-metre landward extent of Park (19 October 2005) --
------------ Procuraduría *Dictamen* (23 December 2005) ---
Purchased by Spence Co. (27 February 2007)
------------ CC decision ordering immediate commencement of expropriations (30 April 2008) -----------
------------ CC decision annulling zoning regulations (23 May 2008) ---
------------ CC Unglaube decision ordering expropriation or development approval (27 May 2008) ------
------------ CC decision annulling development permits (16 December 2008) --------------------------------
------------ SINAC Official Letter setting out technical criteria defining the expropriation of properties in the Park (11 February 2009) --
------------ SETENA lifting of suspension of buffer zone applications (30 September 2009) ---------------
------------ Contraloría Report (27 February 2010) ---
------------ MINAET instruction to SETENA to annul Park permits pursuant to CC 16 December 2008 decision (19 March 2010) --
≈≈≈≈≈≈≈ *CAFTA Entry into Force between Costa Rica and the United States (1 January 2009)* ≈≈≈≈≈
÷÷÷÷÷÷÷ *CAFTA Limitation Period Timeline (10 June 2010)* ÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷÷
Commencement of Arbitration Proceedings (10 June 2013)

(iv) The Claimants' Liability Submissions on Expropriation

78. Against this background, the Claimants' factual submissions, heavily compressed, are essentially threefold: first, procedural delay, namely, that the Respondent has palpably failed to observe the timelines required by the Expropriation Law, as well as the Constitutional Court's injunction to promptness, with the Claimants being subjected to extensive delays and uncertainties, lasting many years, both leading up to declarations of public interest in respect of their properties and in the subsequent expropriation proceedings. In the case of the 17 properties that are not at present (and, in the case of eight of these, have never been) the subject of declarations of public interest, the Claimants assert that they are in a state of legal limbo awaiting legislatively mandated and judicially compelled expeditious expropriation proceedings but with no foreseeable process or payment date in sight.

79. In this regard, the Claimants allege that the decision by SINAC to suspend the initiation of any new expropriation procedures in 2008-2009 in order to comply with the anticipated findings and recommendations of the Contraloría Report, eventually issued in February 2010, constitutes a new measure of delay of which they only became aware on 15 July 2014 with the filing of the Respondent's Counter-Memorial.

80. Second, distinct from any issue of procedural delay, the Claimants' allege that the Respondent's practice in the conduct of the expropriation process is capricious, irrational and unpredictable, fundamentally skewed in the State's favour, and has led to wildly varying and uneven, and hence unreliable, valuation results. On valuation, the Claimants contend that the process is subject to "the free-for-all methodology espoused in the Law on Expropriation" and point to wide divergences between the administrative appraisal and the judicial appraisal valuations (where such appraisals have been forthcoming), and also with what they consider to be the fair market value of their properties. They also point to the 26 February 2010 Contraloría Report's conclusion of a 6,037% divergence between the administrative appraisal and the judicial appraisal in one case which it examined.[104]

81. Third, insofar as this is distinct from wider questions of procedural delay, the Claimants contend that there have been manifest delays in the payment of compensation.

82. The Claimants' legal submissions on the issue of expropriation, equally compressed, may be summarised as follows:[105]

(a) The 1995 Park Law serves as a general declaration of public interest in respect of all properties within the Park.

[104] See paragraph 41(s) *supra*.
[105] The text of the CAFTA provisions noted below, insofar as they are relevant to the Tribunal's considerations, are set out in Section VIII of this Award *infra*.

(b) The Expropriation Law gives rise to a legitimate expectation on the part of the Claimants as to the likely timing of the process in the event that a claimant's lot becomes the subject of a declaration of public interest, decree of expropriation or act of dispossession.[106]

(c) CAFTA Article 10.7.1 and 10.7.2 contain discreet, if closely related, obligations, the Respondent's compliance with each of which must be assessed. Thus, distinct from the requirement to pay "prompt, adequate and effective compensation" in Article 10.7.1(c), the Claimants assert a separate obligation on the Respondent to pay compensation "without delay" that is "equivalent to the fair market value" of the properties in question pursuant to Article 10.7.2(a) and (b). In this regard, the Claimants submit that CAFTA Annex 10-C addresses the interpretation of Article 10.7.1 only and not the other paragraphs of Article 10.7. The Tribunal understands this duo of arguments to be a submission, notably, that the Annex 10-C, paragraph 4(b) presumption against non-discriminatory regulatory actions constituting indirect expropriations does not apply to the compensation requirements of Article 10.7.2. The Claimants nonetheless allege that both their direct and their indirect expropriation claims come within the scope of Article 10.7.1.

(d) The claimed manifest delays in the payment of compensation is in breach of both Article 10.7.1(c) and, whether separately or together, Article 10.7.2(a).

(e) The failure to pay compensation promptly is a continuing breach of the Respondent's obligations under Article 10.7, straddling the CAFTA's entry into force between Costa Rica and the United States on 1 January 2009.

(f) Likewise, the failure to pay adequate compensation consistent with fair market value is a continuing breach of Article 10.7.2, straddling the CAFTA's entry into force between Costa Rica and the United States on 1 January 2009.

[106] The legitimate expectations argument is developed as part of the Claimants contentions on CAFTA Article 10.5 but is a thread that runs through the Claimants' case more generally.

83. Addressing the application of CAFTA Chapter 17 on the Environment, the Claimants observe that, until its closing submissions in the hearing, the Respondent had made no allegation or suggestion that there is any inconsistency between Chapters Ten and Seventeen of the CAFTA, much less any argument submitted as to the extent of any such inconsistency: "In short, there is no reason whatsoever for the Tribunal to review and interpret Chapter 17 in resolving this dispute." Addressing the Respondent's arguments in the hearing that CAFTA Article 17.2 allowed Costa Rica a measure of discretion in implementing its environmental laws, including as regards measures of expropriation, the Claimants' contend, *inter alia*, that "[r]econfiguring Article 17.2.1(b) for use as a shield against State responsibility arising from the arbitrary adoption or maintenance of expropriatory measures … would undermine the purpose and meaning of Chapter 10 and the CAFTA itself".

B. The Claimants' Liability Case on Minimum Standard of Treatment

84. Against the preceding background, the Claimants liability case on allegations of breach of the minimum standard of treatment requirements of CAFTA Article 10.5 can be addressed succinctly.

85. The Claimants' factual allegations are captured by the following extract from their Notice of Arbitration:

> By its various acts and omissions, the Respondent has conducted its expropriation process in an arbitrary manner, thereby failing to accord administrative due process to the Claimants. One example of treatment inconsistent with the fair and equitable treatment standard recalled in Article 10.5 includes launching the municipal expropriation process in respect of only some of the Claimants' beachfront lots, but then arbitrarily refraining from following through on continuing with the process for certain lots, thereby stranding the Claimants in a legal limbo, in which they cannot enjoy the use of their investments, whilst also seeing no prospect of receiving even a determination of compensation for such deprivation.
>
> Other examples of the Respondent's failure to accord fair and equitable treatment, in failing to maintain an effective compensation process for its expropriation of the Claimants' lands, include the failure to base compensation decisions on the proper dimensions of various individual lots, either by basing specific valuation on incorrect land surveys or by arbitrarily excluding portions of lots from a determination of compensation. Most recently, the Respondent has in some cases indicated that the value of certain lots was zero, on the capricious basis that the only alternative use if the land – today – would be as part of a larger

> conservation area. The very fact that similar lots are still receiving valuations above zero demonstrates the caprice of such decisions. Such decisions are also manifestly inconsistent with customary international law, because they require one to adopt a temporally absurd valuation analysis, in which the act of expropriation itself [negatively] impacts upon the compensation to be paid.

86. The Claimants' legal submissions on its allegations of breach of CAFTA Article 10.5 rested on two pegs: first, legitimate expectations; second, manifest arbitrariness in the operation of a foreign investment regime; both concepts resting on the principle of good faith in international law. Addressing both concepts under the heading of "fair and equitable treatment" ("FET"), the Claimants assert that FET "has a definite meaning, which is bound up in the operation of a rule of law for the international protection of foreign investment." Conduct cited by the Claimants in support of their allegation of the Respondent's failure to accord them fair and equitable treatment include: inexplicable variations in valuations of the same land; sweeping variations in approaches to the judicial phase; the failure to expropriate the entire lot, which the Claimants contend is required by both international law and the Expropriation Law; and abandoning, but not formally concluding, intended expropriations so as to avoid making deposit payments. The Claimants draw support for some or all of these allegations, *inter alia*, from the Contraloría Report.[107]

87. The Claimants' case on legitimate expectations cites a number of investment awards as well as reports and commentaries in support of the broad proposition that the FET standard "should not be construed as static, nor is it necessary to provide any evidence of egregious or bad faith conduct required [sic] to establish that there has been non-compliance with the standard." In the Claimants' contention, the FET standard is fundamentally based on the general international law principle of good faith and must be construed as such. Amongst the awards to which the Tribunal is referred in support of the proposition, and on legitimate expectations more generally, are *AMCO Asia v. Indonesia* (1984),[108] *Mondev v. U.S.* (2002),[109] *Tecmed v. Mexico* (2003),[110] *Waste Management v. Mexico (II)* (2004),[111] *MTD v. Chile* (2004),[112] *Thunderbird v. Mexico* (2006),[113]

[107] See paragraph 41(s) *supra*.
[108] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award of 20 November 1984.
[109] *Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002.
[110] *Técnicas Medioambientales, TECMED S.A. v. United Mexican States*, ICSID Case No. ARB/AF/00/2, Award of 29 May 2003.
[111] *Waste Management, Inc. v. United Mexican States (Number 2)*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004.
[112] *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004.
[113] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Award of 26 January 2006.

PSEG Global v. Turkey (2007),[114] and *MCI Power v. Ecuador* (2007).[115]

88. Eliding legitimate expectations and arbitrariness, the Claimants contend that "legitimate expectations can be reasonably founded upon a host State's obligation to provide a transparent and predictable business and regulatory climate" and that for purposes of making such an assessment, "tribunals will often look for the tell tale signs of arbitrariness". In support of these contentions, the Claimants refer the Tribunal to awards such as *CME v. Czech Republic* (2001)[116] and *Thunderbird v. Mexico* (2006).[117] On arbitrariness more generally, the Claimants contend that "noncompliance with the fair and equitable treatment standard can be evidenced in examples of manifest arbitrariness in the operation of a municipal regime relating to the investment of foreign investors". The Tribunal is referred, *inter alia*, to the awards in *CMS Gas v. Argentina* (2007), *MTD v. Chile* (2004) and *Saluka v. Czech Republic* (2006) in support of the proposition. Defining arbitrariness, the Claimants refer to the well-known and often cited dictum of the International Court of Justice in the *ELSI* case that "arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law."[118]

89. Summing up their case on CAFTA Article 10.5, the Claimants state in their Memorial as follows:

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

[114] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007).
[115] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award of 11 October 2002.
[116] *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL Partial Award, 13 September 2001.
[117] Footnote 113 *supra*.
[118] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989,* p. 15, at paragraph 18.

90. Addressing the Respondent's contention that the minimum standard of treatment under customary international law is that set out by the tribunal in *Neer v. Mexico*[119] as subsequently evolved through cases such as *Glamis Gold v. United States* (2009)[120] and *Merrill & Ring v. Canada* (2010),[121] the Claimants, in their Reply, cite at length to the *Merrill & Ring* award, contending that it "buttresses Claimants' contention that the customary international law fair and equitable treatment standard can be breached [as defined in the CAFTA] can be breached by Government behaviour that is akin to the proverbial roller coaster ride … [and that] Claimants in this case have supplied the Tribunal with an abundance of evidence outlining the vacillations of the various official entities of Costa Rican government that, together, comprise 'the Respondent'."

91. Also in their Reply, the Claimants, referencing what they say are disclosures of which they first became aware with the filing of the Respondent's Counter-Memorial on 15 July 2014, allege that the Respondent's system of prioritisation in respect of the order and timing of expropriations of properties within the Park, as well as the moratorium on expropriations put in place by SINAC in 2008-2009 in prospect of the Contraloría Report, amounted to arbitrary conduct. In their Rejoinder on Jurisdiction, the last written pleading of the Parties, the Claimants develop this argument, for the first time alleging a "constructive denial of justice" in consequence of the SINAC suspension decision/s. The Claimants also asserted a bare bones denial of justice contention in the hearing, both in respect of the delay they allege in respect of the payment of compensation and in respect of the claimed inadequacy of the Respondent's expropriatory regime more generally, which the Claimants alleged "amounts to a de facto denial of justice under the FET standard".

C. The Claimants' Damages Case

92. This Interim Award addresses issues of jurisdiction and liability. As anticipated at the close of the hearing,[122] insofar as the Tribunal finds that it does have jurisdiction on certain matters and the Respondent has a liability case to answer, the Tribunal will require additional evidence and submissions on the question of damages.

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[119] *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Award of 15 October 1926; RIAA, Volume IV, p.60.
[120] *Glamis Gold, Ltd. V. United States of America*, UNCITRAL (NAFTA) Award of 8 June 2009.
[121] *Merrill & Ring v. Government of Canada*, UNCITRAL (NAFTA) Award of 31 March 2010.
[122] See paragraph 21 *supra*.

93. Given this, there is no need for the Tribunal to summarise the Claimants' submissions on damages and the accompanying very extensive valuation evidence in this Award save insofar as this may be necessary for purposes of any further phase of proceedings.

94. The Claimants claim an amount in damages of ₡18,780,543,990, equivalent to US$36,543,000, on the basis of a 28 May 2008 exchange rate, this being the Claimants asserted "appropriate valuation date for the creeping expropriation claims". The amounts claimed are itemised in the Claimants' pleadings and evidenced on a property-by-property basis.

95. Added to this sum, the Claimants also seek pre-award interest in the amount of ₡12,147,713,918 for the period 1 January 2009 to 1 November 2015. The Claimants also claim as damages all of the arbitration costs in the proceedings.

96. Relevant for purposes of the present phase of the proceedings are the following elements of the Claimants damages case:

(a) The Claimants contend that the conduct of the Respondent constitutes unlawful conduct under international law and as such the Claimants are entitled to receive compensation on the basis of the *restitutio integrum* principle.

(b) This, the Claimants contend, means more than just a fair market value award but also compensation for incidental amounts incurred by each claimant in the maintenance and protection of their investment, as well as compensation for consequential damages.

(c) As regards those properties in respect of which a decree of expropriation was issued, the Claimants contend that the valuation date should be taken as the date of the individual decree of expropriation in respect of a given property. The dates of the various decrees of expropriation are as follows:

Table 35 – Decree of Expropriation Date by Lot (9 Lots)

Lot #	Date of Decree of Expropriation
B1 (A&T Berkowitz)	27 November 2006
B3 (Berkowitz)	27 November 2006
B5 (Berkowitz)	27 November 2006
B6 (Berkowitz)	27 November 2006
B8 (A&T Berkowitz)	27 November 2006
B7 (Gremillion)	27 November 2006
A40 (Spence Co.)	12 April 2007
SPG1 (Spence Co.)	11 March 2008
SPG2 (Spence Co.)	11 March 2008

(d) As regards the indirect expropriation claims, the Claimants contend that 24 May 2008 is the most appropriate valuation date, the reason given for this being that this was the date on which the Constitutional Court annulled the Santa Cruz Municipality zoning regulations.[123]

(e) Addressing the fair market value standard of compensation in CAFTA Article 10.7.2(b), the Claimants cite authority in support of the contention that it should be the price at which the property would change hands between a hypothetical willing buyer and willing seller in an open and unrestricted market, taking account of other relevant factors pertinent to the specific circumstances of each case. The Claimants further contend that, in the case of unlawful expropriations, the prevailing view is that the valuation date should be the date of the arbitral award.

(f) On the issue of the methodology used to determine fair market value, the Claimants contend that the appropriate approach is the market-based approach which, for real estate, "is implemented through the adoption of a comparable sales methodology, with adjustments made, as necessary, to take into account unique characteristics of either the land under valuation or the selected comparators." Addressing the Expert Report of Michael P. Hedden, the Claimants' valuation expert, the Claimants note as follows:

> As indicated in Mr. Hedden's Expert Report, a comparable sales approach was adopted in the instant case, which required him to analyse each lot's respective market

[123] See paragraph 41(m) *supra*. The date of the Constitutional Court decision in question was 23 May 2008.

value, based on process paid in actual market transactions involving lots which have been put to a highest and best use similar to that of the Claimant's lot. He identified value and price trends by reviewing arm's-length transactions between willing and knowledgeable buyers and sellers, and then making any necessary adjustments to ensure fidelity to a like for like principle.

D. The Claimants' Prayer for Relief

97. In the prayer for relief in their Memorial, the Claimants request an award:

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

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

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

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

(e) awarding the Claimants their costs and expenses of this proceeding, including attorney's 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.

VI. The Respondent's Objections to Jurisdiction, Answer on Liability and Damages, and Prayer for Relief

98. Having set out above in some detail the factual background concerning the Las Baulas National Park, regulatory and other developments concerning the Park, Costa Rica's Expropriation Law, and the status and circumstances of the properties in issue in these proceedings, the Respondent's arguments can be addressed with reasonable brevity. Even-handedness does not require that parity of space be devoted to the Tribunal's exposition of the Parties' arguments.

A. Preliminary Issues

99. Before setting out the Respondent's objections to jurisdiction, it is convenient to note a number of preliminary issues that have a bearing on the Respondent's contentions on both jurisdiction and liability.

100. First, the Respondent contends that the Claimants knew or should have known, at the time of purchase of the properties in question, that the properties were within the Park and that they were therefore subject to being expropriated. In support of this contention, the Respondent notes that the 1991 Park Decree described the boundaries of the Park in terms that included a 125-metre strip of land running inland from high tide and announced that the government would be expropriating private property within that area. The Respondent notes, further, that the 1995 Park Law confirmed the creation of the Park as well as the government's intention to expropriate property that fell within the Park's boundaries. The Respondent draws attention to the Procuraduría Opinion of 10 February 2004 and the Procuraduría Dictamen of 23 December 2005, which provided authoritative clarification that the Park's extended 125 metres inland. The Respondent notes further that the 125-metre landward zone of the Park was confirmed by Constitutional Court decisions on 19 October 2005 and 3 May 2008. The Respondent additionally draws attention to a number of the key developments noted in paragraph 41 above that affirm the appreciation that the Park extended 125-metres inland.

101. The Respondent also contends that "the record is replete with government documents subsequent to 1995 stating that Claimants' properties lie within the boundaries of *Las Baulas* National Park". The Respondent notes that "several of the land registry drawings that Claimants themselves have placed on the record show that post-1995 (and before the Claimants acquired the properties) their properties are inside the Park." In support of this contention, the Respondent cites to land registry drawings on the record for Lots B1, B3, B5, B6, B7, B8, V61a, V61b, V61c, SPG1, SPG2, SPG3 and V59, as well as to other property-specific land registry documents that make clear reference to the Park and leave little room for doubt that the property in question fell within the Park's boundaries.

102. The Respondent disputes the Claimants' interpretation of the Ayuda Memoria and takes issue with the Mr Berkowitz's claim of assurance from the Minister of the Environment about the boundaries of the Park, noting, through a Witness Statement from Mr Rotney Piedra, the Administrator of the Las Baulas National Park, that the MINAE officials' meeting to which the Ayuda Memoria refers was a meeting to discuss draft legislation that was concerned with the possibility of extending the Park's boundaries beyond 125 metres, and that there was no doubt within the MINAE at the time about the 125-metre landward extent of the Park's boundaries.

103. In the Respondent's contention, the Claimants gambled when they bought their properties, "hoping that the State would not proceed to expropriate their land even though the law stated that it was subject to expropriation."

104. Second, the Respondent contends that all of the material regulatory and other developments concerning the Park were publicly available and known at the time of their occurrence or shortly thereafter, if not otherwise directly notified to the Claimants or otherwise known to them. This applies to the Procuraduría Opinion and *Dictamen*, the relevant Constitutional Court decisions, as well as to the key decrees and resolutions concerning the expropriation of properties in the Park.

105. Third, the Respondent contends that, due to limited water resources in the area of the Claimants' properties, the Claimants "knew or should have known that their ability to develop their land was uncertain or restricted, even apart from the measures specifically protecting the turtles." The Respondent further contends that, as of January 2009, the 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".

106. Fourth, the Respondent notes that several of the lots that are the subject of the claim fall only partially within the boundaries of the Park. This applies to the estate lots owned by Brett Berkowitz (Lots B3, B5 and B6), A&T Berkowitz (Lots B1 and B8), Glen Gremillion (Lot B7), and Spence Co. (SPG1, SPG2 and SPG3).[124] In respect of these lots, the Respondent notes that "it

[124] See Table 2, at paragraph 39, *supra*.

is only a very small fraction of each lot that is subject to expropriation. Most of those properties – *i.e.,* the portions that fall outside the boundaries of the Park – currently remain and will remain in Claimants' possession for their full use and enjoyment within the bounds of Costa Rican law."

107. Fifth, the Respondent avers that "[t]here is no question that Costa Rica will compensate Claimants for the property that it is expropriating. The State's administrative and judicial expropriation procedures provide for as many as three separate, independent expert appraisals of the value of the properties (plus whatever evidence Claimants might additionally submit including additional appraisals if they so wish). On that basis, there will be a final determination of the amount owed for each property."

108. Sixth, addressing the relevance of CAFTA Chapter 17 on the Environment, the Respondent submits that the CAFTA allows State parties 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.

> In this arbitration, Claimants have complained about choices Respondent has made regarding which properties to expropriate first and which to expropriate later. There have also been allegations that Respondent has not proceeded quickly enough with the expropriation of property located within the Park due to lack of funds. Although Claimants have failed to prove that Respondent has delayed its expropriation proceedings due to 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.

B. The Respondent's Objections to Jurisdiction

109. The Respondent advances two jurisdictional objections. The first is that the Claimants failed to commence arbitration proceedings within the "statute of limitation period", i.e., the three-year limitation period laid down by CAFTA Article 10.18.1 ("limitation period objection"). This provides that a claim may not be submitted to arbitration "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 … has incurred loss or damage." The second objection is that the breaches of which the Claimants complain occurred

before the CAFTA entered into force between Costa Rica and the United States on 1 January 2009 ("entry into force objection"). In this regard, CAFTA Article 10.1.3 provides that "this 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." In support of its submissions on jurisdiction, the Respondent submitted an Expert Opinion by Judge Stephen M. Schwebel.

110. In respect of the **limitation period objection**, the Respondent notes that the express language of CAFTA Article 10.18.1 – "or should have first acquired" – indicates clearly that constructive knowledge is sufficient: "subjective proof is not required if it is objectively reasonable that the claimant acquired knowledge of the alleged breach and has incurred loss [or] damage." The "critical date", as regards the Claimants' knowledge or constructive knowledge is 10 June 2010, three years prior to the filing of the Claimants' Notice of Arbitration on 10 June 2013. Thus, the Respondent contends, knowledge or constructive knowledge by the Claimants of any of the alleged breaches before this critical date would time-bar the claims.

111. The Respondent also emphasises that the threshold requirement in Article 10.18.1 is when the Claimants first acquired, or should first have acquired, knowledge and that subsequent acts that may also have served to put the Claimants on notice do not renew the limitation period.

112. Interpreting the Article 10.18.1 requirement for knowledge that the claimant has suffered loss or damage, the Respondent observes that knowledge of loss does not require knowledge of the exact amount of damage. In respect of both the direct and indirect expropriation claims, the Respondent contends that the Claimants knew, in some cases, as early as 2005 and in no case later than December 2008, of the dispossession or restrictions on their properties.

113. The Respondent contends that the Claimants "knew about the measures they now challenge more than three years before the submitted their Notice of Arbitration" on 10 June 2013. Addressing both the Claimants' expropriation and minimum standard of treatment allegations, the Respondent notes a series of regulatory and other developments affirming the 125-metre landward dimension of the Park, the annulment and suspension of development permits within the Park zone, and expropriatory initiatives concerning properties within the Park that occurred in the period prior

to 10 June 2010. In the Respondent's contention, the Claimants "knew or should have known of all of these events when they actually occurred which, in every case, was more than three years before the Claimants filed their Notice of Arbitration". The Respondent also points to an array of observations by the Claimants in their pleadings that indicate that the Claimants "were expressly aware of what they allege were illegal expropriations of their properties, for which they now claim compensation in this arbitration".

114. In this regard, the Respondent highlights a passage from the Claimants' Memorial in which the Claimants state:

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

115. The Respondent observes that the Claimants refer to this 19 March 2010 date on numerous occasions and point out that "the date on which Claimants allege that Costa Rica's actions culminated in the deprivation of the use and enjoyment of their properties was in March 2010 – three months *outside* of the statute of limitations for their June 2013 claims." In the same vein, the Respondent draws attention to other dates, even earlier than March 2010, on which the Claimants allege that the Respondent breached its CAFTA obligations. The Claimants apprehension of breach prior to 10 June 2010 in respect of their claims of expropriation are, the Respondent contends, also a bar to the Claimants' minimum standard of treatment claims.

116. The Respondent's **entry into force objection** rests on the same broad premise, viz.: "Because there can be no breach of CAFTA prior to its entry into force, and the alleged breaching acts occurred before that date, Claimants' claims fall outside the Tribunal's jurisdiction." This argument is developed by reference to Article 28 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), Article 13 of the International Law Commission's Articles on State Responsibility ("ILC State Responsibility Articles"), and CAFTA Article 10.1.3.

117. Addressing the acts about which the Claimants complain, the Respondent contends that, as regards the nine properties in the judicial stage of the expropriation procedures, the Claimants point to the act of dispossession as the moment of direct expropriation. As regards the 17 properties in respect of which the Claimants advanced a claim of indirect expropriation, the Respondent contends that the Claimants allege that they lost the use and enjoyment of their properties through the combination of the State's confirmation of the boundaries of the Park and the State's restriction of development within the Park. In every case, the Respondent submits, the acts in question occurred before the CAFTA's entry into force.

118. While denying that the Claimants' properties have been illegally expropriated, the Respondent notes that SETENA halted the processing of environmental permits for properties inside the Park in compliance with the Constitutional Court decision of 16 December 2008. It follows, in the Respondent's contention, that "if the Tribunal were to accept Claimants' allegation that their properties were indirectly expropriated because they could not have obtained environmental assessment permits for the portions of their properties inside the Park, the Tribunal should also find that the date when the Claimants suffered that alleged deprivation was on December 16, 2008, rather than in March 2010, as Claimants allege. Because December 16, 2008 pre-dates CAFTA's entry into force, Claimants' claims fall outside the scope of the Tribunal's jurisdiction." The 19 March 2010 date relied upon by the Claimants is the date that the MINAET gave instructions to SETENA to annul development permits for properties within the Park.

119. As regards the claims of direct expropriation, the Respondent notes again that the Claimants assert that the issuance of the acts of dispossession in respect of each property is the point at which "the State takes possession of the land, thereby satisfying the customary requirements of a direct taking". As set out in **Table 8**, at paragraph 70 above, the date of dispossession alleged by the Claimants in the case of each of the nine properties that are the subject of their direct expropriation claims pre-dates the CAFTA's entry into force on 1 January 2009. The Tribunal notes here for completeness that the Claimants submit that the appropriate *valuation date* in respect of each of these properties is the date of the decree of expropriation. As set out in **Table 35**, at paragraph 96(c) above, the date of the decree of expropriation in the case of each of the properties in question is even earlier that the dates of the acts of dispossession.

120. Addressing the Claimants' arguments on arbitrariness, but in terms that form a broader theme of the Respondent reply to the Claimants reliance on post-1 January 2009 developments, the Respondent contends that, to the extent that there were any developments after 1 January 2009, they were either "lingering effects" of completed acts that took place before 1 January 2009 or "were not independent acts that constituted breaches of CAFTA in and of themselves". As will be apparent from the Tribunal's discussion of the issues that follows below, the "lingering effects / dependent acts" argument by the Respondent goes to the heart of the jurisdictional dispute between the Parties. Amongst the acts that the Respondent describes as dependent are judicial phase court decisions in respect of a number of the properties in question. The Respondent says further that "[d]elayed payment, seemingly inadequate payment, stalled judicial procedures – these are purported harms (or lingering effects) stemming from a completed act of alleged expropriation" that are "merely derivative of [the Claimants'] expropriation claims."

121. Addressing the Claimants' argument that they could not have known that they had suffered damage until after the final quantum of compensation had been determined in the judicial phase, the Respondent contends that it would follow from this that, in cases in which a final determination of compensation has not yet been made, "there has not yet been a breach of CAFTA that warrants any such compensation". On this reading, those of the Claimants' claims that are not out of time are premature. This would apply to those properties in respect of which there had been an act of dispossession but not a final decision on fair market value. The Respondent additionally submits that, in respect of Claimants allegations of delay in the payment of compensation, knowledge (or constructive knowledge) of the delay would certainly have accrued more than three years before the filing of the Notice of Arbitration.

122. Addressing the Claimants argument that the Respondent's conduct constitutes a continuing breach of the CAFTA, or amounts to a composite act (or series of composite acts, in respect of each individual property), that straddles the CAFTA's entry into force on 1 January 2009, the Respondent contends that this "does not place the expropriation after CAFTA's entry into force because the culmination of those acts occurred before January 1, 2009". In this regard, the Respondent cites to Article 15(1) of the ILC State Responsibility Articles as well as arbitral

jurisprudence. Addressing the Claimants' assertion that the Respondent's failures both to pay compensation promptly and to pay adequate compensation are what causes the alleged expropriations to "continue", the Respondent contends that the argument is without merit:

> If the alleged breach of expropriation occurs before there is an obligation under CAFTA to provide "prompt, adequate and effective compensation," then there can be no continuing obligation to provide that compensation, the failure of which could constitute a breach. …
>
> Prior to January 1, 2009, Costa Rica had no treaty obligation not to expropriate Claimants' property without paying prompt, adequate and effective compensation. Thus, even if Costa Rica expropriated Claimants' properties before January 1, 2009, it had no treaty obligation to pay compensation then. That obligation cannot arise after CAFTA's entry into force with respect to property expropriated prior to that date, because there can be no continuance of an obligation that never existed. In other words, an uncompensated expropriation that occurred before CAFTA entered into force is not a breach of CAFTA. Since all of the alleged illegal expropriations occurred at the latest by some point in 2008 – before there was any obligation under CAFTA – there can be no continuing breach of those obligations today.

123. Finally, addressing the Claimants' argument that it would be inequitable and prejudicial to deny the Claimants' relief on the basis of a delay of only three months, the Respondent asserts that the Article 10.18.1 three-year limitation period "is not merely an estimate … if [an investor brought a] claim one day after the statute of limitations expired, it would be time-barred."[125]

C. The Respondent's Answer on Liability and Damages

(i) The Respondent's Liability Submissions on Expropriation

124. The Respondent states that, since 2003, it has been endeavouring to carry out the expropriations required by Article 2 of the 1995 Park Law, proceeding on a priority basis in a reasonable and predictable manner based on the location of the lots in the Park and the concentration of turtles. With respect to the Claimants' properties, however, the endeavour has proceeded in fits and starts, blocked by the Claimants' legal challenges.

[125] The Claimants invocation of a period of three months rests on the contention that the critical date is assessed to be 19 March 2010, the date of the MINAET instruction to SETENA to annul all development permits pursuant to the 16 December 2008 Constitutional Court decision.

125. The Respondent's account of the present status of the Claimants' lots accords with that given by the Claimants. With regard to properties for which there has been no declaration of public interest, the Respondent contends that the landowner "has the right to fully enjoy and make use of its property, subject to all applicable laws … there has been no deprivation of any property right for which compensation must be paid". It notes that SINAC suspended new expropriation procedures in 2008-2009 in response to the commencement of the study by the Contraloría that eventually led to the publication of the Contraloría Report on 27 February 2010, which made recommendations to improve expropriation procedures which the government has since been working to implement.

126. With regard to properties in respect of which there has been a declaration of public interest, the landowner will not have been deprived of any of their property rights, such a deprivation only occurring if an act of dispossession is issued, which can only occur during the judicial phase and only after funds in the amount of the administrative appraisal have been deposited into "a sort of escrow account".

127. With regard to the properties that are in the judicial phase of proceedings, the Respondent notes that final decisions on fair market value have been made in the case of four of the nine lots (B3, B8, A40 and SPG2) with the judicial process for determining the fair market value for the remaining five lots still on-going. Judicial proceedings were suspended in the case of Lots B1[126] and SPG1, at the Claimants' request, for purposes of the present arbitral proceedings. In the case of Lots B5,[127] B6 and B7, a final decision has still to be rendered.

128. On the issue of the valuation of the properties, the Respondent submits that the fact that all or portions of the Claimants' properties are inside the Park needs to be considered as part of the valuation process as the Claimants knew, or should have known, that the properties were inside the Park "and the purchase price would have reflected that fact."

[126] As indicated in Table 9, this suspension was lifted and subsequent developments on quantum of compensation have occurred.
[127] As indicated in Table 11, on 19 July 2016 the owner of lot B5 requested the payment of the sum identified in the 11 March 2015 judgment, which was approved on 27 July 2016.

129. Responding to the Claimants' allegations of delay, the Respondent contends that in many cases this is due to the conduct the Claimants in opposing the expropriation proceedings but that, in any event, the delays are to Costa Rica's credit as the courts and administrative bodies have ensured due process and respect for the Claimants' substantive rights.

130. On the issue of the payment of compensation, the Respondent notes that, for every lot in respect of which an act of dispossession has been issued, Costa Rica has made available to the Claimants the amount of the administrative appraisal.

131. The Respondent's additional submissions of fact include, *inter alia*, the following:

(a) The Claimants' reliance on the absence of any annotation in land registry drawings for Lots V40, V30, V31, V32, V33, V37,[128] V38, A39, A40, C71, V61 (before it was sub-divided), V46 and V47 – i.e., in respect of 14 of the Claimants' 26 lots – showing that the properties in question fell within the Park is neither surprising nor material as, *inter alia*, all of the drawings were registered before the lots were included in the Park. The responsibility of updating land registry drawings rests with the owner of the property, not with the State. In fact, land registry drawings for Playa Ventanas that were registered after the area was incorporated into the Park do show that the properties fall inside the Park. This applies in the case of lots V61a, V61b, V61c and V59.

(b) A Resolution of June 2003 issued by the MINAE approving certain activity by Brett Berkowitz in respect of Lots B1, B3 and B6 clearly describes the 125-metre zone landward dimension of the Park.[129]

(c) The IGN Letter of June 2004, referred to at paragraph 41(f) above, came after Mr Berkowitz's purchase of the lots in question and cannot therefore be taken to have had any bearing on his decision to purchase the lots 18 months previously.

[128] The Respondent's reference to Lot V37 appears to be in error, or at least erroneous, as Lot V37 is not part of the present proceedings. It is probably to be read as a reference to Lot V39.
[129] Resolution No.067 ACT-067-2003-IF.

132. The Respondent's arguments of law on expropriation may be summarised as follows:

(a) With respect to the nine properties for which acts of dispossession have been issued, Costa Rica's actions are fully consistent with CAFTA Article 10.7, being for a public purpose, non-discriminatory and in accordance with due process, and in respect of which prompt, adequate and effective compensation has either been paid or is in the process of being paid.

(b) That the expropriation of properties in the Park serves a public purpose is uncontested. There is no evidence whatever that Costa Rica has acted in a discriminatory manner. Costa Rica has more than satisfied its obligation to provide for appropriate procedures and due process.

(c) On the issue of prompt, adequate and effective compensation, the Respondent notes that there is no issue as to the effectiveness of the compensation in this case. On the issue of the adequacy of compensation, the Respondent submits that the Costa Rican legal regime provides a rigorous mechanism for the determination and provision of fair compensation. An appellate process is available to appeal the initial valuation amount. Interest and costs are also paid.

(d) On the issue of the promptness of compensation payments, the Respondent contends that its expropriation process satisfies the "without delay" requirement of the CAFTA:

> Claimants already have access to the full amounts of the administrative appraisals but they wanted more. Thus, they objected to those valuations, which transferred their cases to the judicial stage. At the end of the judicial proceedings they will likely receive a higher amount for their properties plus interest. Therefore, there has been no delay. Claimants were paid before the judicial stage and will probably be paid more at the end. But if Claimants complain that the judicial proceedings of the expropriation process have taken longer than expected, any delay has been the result of their own acts or omissions.

(e) Reflecting the language of paragraph 4(b) of CAFTA Annex 10-C, the Respondent contends that, with respect to the properties that have not been directly expropriated, Costa

Rica's acts constitutes legitimate, non-discriminatory regulatory actions to protect the environment and, as such, do not amount to indirect expropriations under the CAFTA.

(f) As regards such properties, Costa Rica's actions are in any event consistent with the CAFTA. As and when these properties become subject to expropriation, "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."

(ii) The Respondent's Liability Submissions on Minimum Standard of Treatment

133. Addressing the Claimants' minimum standard of treatment argument, the Respondent first addresses the content of the fair and equitable treatment ("FET") standard in CAFTA Article 10.5. Citing the award in *S.D. Myers* (2000),[130] the Respondent submits that "any assessment of allegedly unfair and inequitable treatment 'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.'"

134. On the law, the Respondent contends that the FET standard under customary international law does not encompass protections for expectations of legal stability. Tracing the minimum standard of treatment under customary international law back to the *Neer* claim,[131] the Respondent recalls that the tribunal there stated that, in order to amount to a violation of the minimum standard of treatment requirement under customary international law, the conduct in question "should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency." The Respondent acknowledges, however, that this standard has evolved over time.

[130] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award of 13 November 2000, at paragraph 263.
[131] Footnote 119 *supra*.

135. Addressing the evolution of the *Neer* standard, and noting that NAFTA Article 1105 "uses an almost identical standard of treatment" to that in CAFTA Article 10.5, the Respondent refers the Tribunal to the NAFTA awards in *Glamis Gold* (2009),[132] *Merrill & Ring* (2010)[133] and other cases which address the minimum standard of treatment under customary international law. Citing to *Glamis Gold* (2009), the Respondent contends that it "provides a clear articulation of the current state of the minimum standard of fair and equitable treatment under customary international law". As stated in *Glamis Gold*, to violate the customary international law minimum standard of treatment, the offending measure attributable to the State "must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards".[134]

136. The Respondent also notes the *Glamis Gold* conclusion that a violation of the minimum standard of treatment requirement "based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[135] Citing, *inter alia*, to *Merrill & Ring* (2010) and *ADF Group Inc. v. United States* (2003),[136] the Respondent contends that tribunals "have also interpreted the minimum standard to exclude protection of an investor's legitimate expectations when there has been no explicit government action inducing the investor to invest." In the Respondent's contention, the minimum standard of treatment under customary international law "does not include an obligation not to frustrate an investor's legitimate expectations, such as expectations of legal stability absent express government inducement of such expectations." In this regard, the Respondent submits that it never purposely or specifically prompted the Claimants to purchase their properties in the Park and that there is no evidence of any contract-like relationship between the Claimants and the Respondent that encouraged the Claimants' decision to buy land in Costa Rica. Citing, *inter alia*, to the award in *Saluka Investments B.V. v. Czech Republic*,[137] the Respondent further contends that "[a]n

[132] Footnote 119 *supra*.
[133] Footnote 120 *supra*.
[134] *Glamis Gold*, footnote 120 *supra*, at paragraph 616.
[135] *Glamis Gold*, footnote 120 *supra*, at paragraph 766.
[136] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003.
[137] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

investor's expectations are not legitimate if they are predicated on a belief that the State will not regulate the investment, or that a regulatory regime will not change over time."

137. On the Claimants' factual allegations, the Respondent contends that, even were the Tribunal to decide that CAFTA Article 10.5 imputed an obligation on the State not to contravene an investor's legitimate expectations, Costa Rica has not contravened the Claimants' legitimate expectations of legal stability in this case. Rather, according to Respondent, it has acted in a consistent and reasonable manner, and has complied fully with CAFTA Article 10.5. Disputing the Claimants' reliance on the *ELSI* case on the question of arbitrariness, the Respondent cites to that judgment in support of the contention that any allegation of arbitrariness must meet a very high standard that is antithetical to the rule of law as a whole – "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety".[138] In the Respondent's contention, "[t]here is nothing in the actions that Claimants identify that comes even close to meeting that very high standard."

138. On the contrary, in the Respondent's contention, at the point at which each property was purchased, the claimant/s could not have had a legitimate expectation that they had a right to develop the property. "Claimants were never promised any unfettered right to develop their properties." The Claimants knew that they had acquired land inside the Park, and thus "they could not have legitimately expected that Costa Rica would not adopt measures to restrict development of a protected area." Moreover, the Respondent contends, its approach to the expropriation of the Claimants' properties "has been reasonable and justified every step of the way."

139. The Respondent further contends that the partial expropriation of Lots B1, B3, B5, B6, B7, B8, SPG1 and SPG2 does not constitute arbitrary conduct. Only a portion of each lot is within the Park and it is only in respect of this portion that the State has pursued expropriation. The exact dimensions of the portion that is being expropriated is based on the coordinates of the Park as laid down in the Park law. This exemplifies a reasonable approach that is mindful of private property rights.

[138] *ELSI*, footnote 118 *supra*, at paragraph 128.

140. Nor is the suspension of expropriation proceedings in respect of nine of the lots arbitrary. The expropriation process has been temporarily suspended to allow Costa Rica to work diligently to improve its expropriation system in line with the recommendations in the Contraloría Report.

141. Addressing the Claimants' denial of justice allegations, the Respondent makes four points: (i) the claim is untimely, having been raised for the first time in the Claimants' Rejoinder on Jurisdiction, and is therefore outside the Tribunal's jurisdiction; (ii) the measures on which the claim is pegged are not new measures about which the Claimants learned only with the filing of the Respondent's Counter-Memorial; (iii) the claim is in any event entirely unsubstantiated; and (iii) the claim is nothing but the lingering effect of the alleged expropriation.

(iii) The Respondent's Submissions on Damages

142. On the issue of damages, insofar as is material for purposes of the present Award, the Respondent's submissions may be summarised as follows:

(a) The Claimants' claim for damages are grossly overstated, both on methodological grounds and because they ignore relevant indicators of market value.

(b) Relying on the Expert Report of Mr Brent C. Kaczmarek, the Respondent contends that the proper valuations of the properties in the light of the circumstances of this case are either (i) the purchase price of the properties, if based on a reliable estimate of the properties' value,[139] or (ii) the amounts of the administrative appraisals adjusted downwards to account for any information known to a potential buyer immediately before the alleged date of expropriation.

(c) The Claimants' valuations, in the Respondent's contention, are based on a but-for scenario that ignores the location of the Claimants' properties within the Las Baulas National Park. The fact that properties within the Park are subject to restrictions and eventual expropriation is material to their valuation.

[139] Plus interest, as referred to in sub-paragraph (f) below.

(d) The Claimants' valuations are also unreliable because of technical, methodological flaws, with the Claimants' Expert Report being "riddled with conflicts when compared with Claimants' witness statements and their Memorial". The Claimants' valuation expert, the Respondent contends:

> uses appraisals that are entirely inconsistent with the trend of the real estate market in Costa Rica at the time he is valuing the properties. He values Claimants' properties using sales transaction data from distant points in time that involve properties so dissimilar to Claimants' that it requires unreasonable adjustments in order to compare them. He fabricates severance damages for those lots that are only partially located within the Park by attributing the value of ocean front views to Claimants' properties where there are no clear views or access to the beach. … [He] neglect[s] to subtract the amounts that Claimants have already received from Costa Rica in compensation for their properties.
> …
> [He overlooks] the limited ability to obtain permits for development on Claimants' properties – a factor that would significant affect fair market values.

(e) The Respondent contends further that the Claimants have "cherry-picked" the 27 May 2008 valuation date in an attempt to maximize the value of their properties, but, if this is the date of the expropriation, "Claimants claims are outside of CAFTA's statute of limitations and the expropriation pre-dates CAFTA's entry into force".

(f) On the issue of interest, the Respondent contends that the Claimants fail to apply a commercially reasonable rate of interest based on the currency in which the fair market value of damages is denominated, as required under the CAFTA. In the Respondent's submission, a methodologically sound interest calculation would arrive at an amount that is 22% less than the amount submitted by the Claimants.

(iv) The Respondent's Prayer for Relief

143. In its prayer for relief in its Counter-Memorial, the Respondent requests:

> a) that the Tribunal dismiss Claimants' claims for lack of jurisdiction; or

b) in the event that the Tribunal finds jurisdiction, that the Tribunal dismiss Claimants' claims for lack of merit.

Respondent also respectfully requests an award of its costs, including counsel's fees that have been incurred in the proceedings.

VII. The Claimants' Answer on Jurisdiction

A. In General

144. In its essence, the Claimants arguments in response to the Respondent's jurisdictional objections are twofold, both separately and cumulatively: first, that relevant conduct of the Respondent took place after the CAFTA's entry into force on 1 January 2009 and within the three-year limitation period from 10 June 2010; second, that the Respondent's breaches are continuing breaches that straddle both the entry into force of the CAFTA as well as the 10 June 2010 critical limitation period date. Consistently with these themes, which go both to the Respondent's limitation period objection and its entry into force objection, the Claimants largely run their response to the two jurisdictional objections together. In support of their submissions on jurisdiction, the Claimants submitted an Expert Opinion by Professor Emeritus Maurice Mendelson QC.

145. At the core of the difference between the Claimants and the Respondent on the issue of jurisdiction is the nature and scope of CAFTA Article 10.7.2(a), which provides that compensation shall be paid without delay.

> The Respondent implicitly treats this provision as being part and parcel of the customary international law standard for expropriation, which it claims to have been memorialised in Article 10.7 as a whole. The Claimants submit that Article 10.7(2) reflects additional, ongoing obligations, separate and distinct from the customary international law standard for expropriation, which is only memorialised in the first paragraph of Article 10.7.

146. Hinged on this interpretation, the Claimants allege discrete, self-standing violations of the CAFTA by the Respondent in the period after 10 June 2010 arising from the delay in the payment of compensation equivalent to the fair market value of their properties. Whether or not the expropriations that they allege constitute breaches of Article 10.7.1, concerning the conditions for

lawful expropriations, the Respondent's conduct is alleged to constitute an actionable breach of Article 10.7.2, concerning the payment of compensation. Without prejudice to their claims under Article 10.7.1, the Claimants contend that it is manifest that the delays in the payment of compensation as required by Article 10.7.2 are delays that can be traced to post-10 June 2010, i.e., conduct after 10 June 2010, and/or are delays that amount to a continuing violation that straddles 10 June 2010 and/or are delays that form part of a composite act, an actionable component of which take place after 10 June 2010.

147. Addressing the **entry into force objection**, although in terms that sound more generally, the Claimants identify four categories of acts and omissions of the Respondent after the CAFTA's entry into force that have severely impaired the Claimants use and enjoyment of their properties: (a) acts directly expropriating the Claimants' properties; (b) the uncompensated creeping expropriation of all of the Claimants' properties; (c) the continuing delay in the payment of appropriate compensation; and (d) the suspension of certain expropriation proceedings that has affected the properties impacted. In the Claimants' contention, each of these classes of acts or omissions was inconsistent with specific CAFTA provisions at the time that they occurred and each measure has remained inconsistent with the same CAFTA provisions over time. "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 [CAFTA Article 10.7.2] obligations." The Claimants emphasise that the delays experienced by each claimant remains on-going.

148. Addressing the **limitation period objection**, the Claimants observe as follows:

> 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.

149. The Claimants also stress that Article 10.18.1 addresses the issue of a claimant's knowledge of an alleged <u>breach</u>, not knowledge of the existence of a <u>measure</u>. While the Claimants

may have had knowledge of the existence of a measure before the limitation period, this is not the same as saying that they had, or should have had, knowledge of the occurrence of a breach. The Claimants also contend that the language of CAFTA Article 10.1.1, which addresses "measures adopted **or maintained** by a Party" (emphasis added) makes it clear that pre-CAFTA entry into force measures may trigger CAFTA obligations.

150. The Claimants submit that not more than three years have elapsed since any of the Claimants first knew or ought first to have known of the respective breaches and losses caused by the conduct of which they complain. They contend, further, that the burden of proof rests with the Respondent to show that any individual claimant has failed to meet the requirements of the limitation period.

B. Jurisdiction in Respect of Specific Allegations of Breach

151. In their oral submissions, the Claimants developed their response on jurisdiction beyond the contentions in their written pleadings and urged the Tribunal to have regard to their last submission rather than their first submission on this issue. In their Rejoinder on Jurisdiction, the Claimants identified five alleged breaches going to questions with which, in the Claimants' contention, the Tribunal is faced for purposes of deciding on issues of jurisdiction.[140] In its oral submissions,[141] this list was expanded to seven alleged breaches, as follows:

(a) Failure to provide prompt compensation for expropriation, as required under customary international law and provided under CAFTA Article 10.7.1.

(b) Failure to provide adequate compensation for expropriation under the customary standard recalled under CAFTA Article 10.7.1.

[140] The alleged breaches were addressed by way of flow charts with the following headings: A. Endemic Delays in Providing Compensation for Expropriation [Article 10.5(1) and/or 10.7(2)(a)]; B. Failure to Pay Fair market Value for Past Expropriations [Articles 10.7(1) and 10.7(2)(b) & (c)]; C. New Measures That Have Further Delayed Payment of Compensation [Articles 10.7(2)(a) and/or 10.5(1)]; D. Arbitrariness of Municipal Expropriation Regime [Article 10.5(1)]; and E. Frustration of Legitimate Expectations [Article 10.5(1)].

[141] The Claimants' arguments were developed by reference to slides displayed in the hearing the detail of which is not fully apparent from either the audio recording or manuscript transcript of the hearing that is publicly available.

(c) Failure to provide adequate compensation for expropriation under CAFTA Article 10.7.2(b).

(d) Delaying the payment of adequate and effective compensation, contrary to CAFTA Article 10.7.2(a).

(e) Adopting measures that have indefinitely delayed the process for payment of adequate compensation, contrary to CAFTA Article 10.5.1.

(f) Maintaining a municipal expropriation process that has systematically produced arbitrary, unfair and inequitable results, and which also constitute a *de facto* denial of justice, contrary to CAFTA Article 10.5.1.

(g) Detrimental reliance upon legitimate expectations, reasonably held by the Claimants about the host State's treatment of their investment, evidencing a denial of minimum standard of treatment, contrary to CAFTA Article 10.5.1.

152. Going to issues of jurisdiction, in respect of these alleged breaches, the Claimants made, *inter alia*, the following submissions on the correct approach that they contend should be adopted:

(i) The date of the breach is the date upon which an investor knew, or should have known, that an expropriation occurred without the payment of prompt, adequate and effective compensation, which must be provided "without delay".

(ii) As expropriation occurs under Costa Rican law when title passes, the date of the breach in respect of the alleged direct expropriations occurred in each case after 10 June 2010.

(iii) In the case of the alleged indirect expropriations, the date of the breach must be taken as the date of the last of the measures that cumulatively contributed to the permanent and substantial interference of the Claimants' property rights.

(iv) The MINAET instruction to SETENA of 19 March 2010 constitutes the last in a line of measures contributing to the permanent and substantial deprivation of the Claimant's property rights. Because Costa Rica has not since provided prompt, adequate and effective compensation for such deprivation, it has acted inconsistently with Article 10.7.1.

(v) Ascertaining the exact date upon which such breaches occurred is not simple "but less than three months stands between 19 March 2010 and 10 June 2010, the cut-off date".

(vi) The Respondent failed to meet its evidentiary burden to show how or why a reasonable investor could or should have known on 19 March 2010, rather than at some point after 10 June 2010, that the Respondent would not be honouring its promise to pay prompt, adequate ad effective compensation.

(vii) CAFTA Article 10.7.2 creates discrete, self-standing and actionable obligations. The date of breach of Article 10.7.2(a) is the date upon which a claimant knew or should have known that Costa Rica had unreasonably delayed the payment of adequate compensation equivalent to the fair market value of the property. The Respondent has not adduced evidence to show that the Claimants should have known about this before 10 June 2010.

(viii) The Claimants first learned of SETENA's 2008-2009 suspension of all expropriation proceedings on the filing of the Respondent's Counter-Memorial on 15 July 2014. This indefinite delay in the expropriation process, contrary to Article 10.5.1, occurred after 10 June 2010.

(ix) None of the conduct identified by the Claimants that demonstrate the systemic shortcomings of Costa Rica's expropriation regime occurred before 10 June 2010. Costa Rica is responsible for the shortcomings of its expropriation adjudicatory process.

(x) For purposes of establishing jurisdiction *ratione temporis*, a breach arises on the date that a claimant concludes, or should have concluded, that they have been denied fair and

equitable treatment, as demonstrated by the frustration of their legitimate expectations of the conduct of the State.

(xi) The Respondent's expropriation regime, as well as other conduct by the Respondent, gave rise to legitimate expectations on the part of the Claimants the breach of which constitutes a denial of fair and equitable treatment.

(xii) The Respondent has the burden of proving that the Claimants knew or should have known that the conduct of the Respondent frustrated their legitimate expectations before 10 June 2010.

VIII. Non-Disputing Party Submissions

153. CAFTA Article 10.20.2 provides that a non-disputing Party to CAFTA may make oral and written submissions to the tribunal regarding the interpretation of the CAFTA. Both El Salvador and the United States availed themselves of the opportunity to do so. In doing so, as is correct and proper, neither Party expressed any position on the application of the laws to the facts of the case.

A. El Salvador

154. El Salvador made both written and oral submissions to the Tribunal regarding the interpretation of CAFTA Articles 10.1, 10.5, 10.7 and 10.18. On Article 10.1.3, El Salvador observed that the clause tracked the language of Article 28 of the Vienna Convention on the Law of Treaties and noted that CAFTA parties' consent to arbitration does not extend to arbitration with respect to measures adopted or any act or fact that took place before the CAFTA entered into force.

155. On Article 10.18, El Salvador observed that CAFTA does not require an investor to act immediately but that the three-year time limit includes the time that the parties to the dispute may be engaged in consultations or negotiations, as well as in conciliation or mediation procedures. This leaves a window of 2½ years for an investor to initiate arbitration under the CAFTA. Addressing the terms of Article 10.18.1, El Salvador observes that it is not necessary for an

investor to know that there has been a breach in a legal sense, it being sufficient that the investor is, or is deemed to be, aware of the existence of a measure that causes them harm that is later alleged to be a breach of CAFTA. Nor is it necessary that an investor have knowledge of the precise amount of loss or damage. El Salvador also observes that it is irrelevant that a measure is characterised as having a continuing character, the critical issue being the date on which the investor first acquired, or must be deemed to have first acquired, knowledge of the alleged breach and loss.

156. On Article 10.5, El Salvador observes, *inter alia*, that the minimum standard of treatment requirement does not include the protection of the legitimate expectations of an investor. This follows from the focus of Article 10.5.1, which concerns the conduct of the State. The standard requires an objective evaluation of the treatment that a State accords to an investor, not a subject evaluation contingent on the understanding of the investor. El Salvador notes that it is not alone, amongst the CAFTA States Parties, to take such a view, citing to CAFTA non-disputing Party submissions made by El Salvador, the Dominican Republic, Honduras and the United States in the *TECO v. Guatemala* arbitration.[142] El Salvador goes on to note that only State actions of an extreme nature can violate the Article 10.5.1, such conduct having to rise to the level of manifest arbitrariness, utter lack of due process, blatant unfairness, evident discrimination, or egregious denial of justice. The burden of proof rests on a claimant alleging a breach of Article 10.5, including as regards the existence of a fair and equitable standard as a matter of customary international law, and, in the determination of these issues, a high measure of deference must be afforded to a State's right to regulate matters within its borders.

157. On Article 10.7, El Salvador observes that, in the case of claims of indirect expropriation, a claimant would have the burden of rebutting the strong presumption created by CAFTA Annex 10-C that a State's non-discriminatory regulatory measures designed to protect the environment do not constitute an indirect expropriation.

B. United States

[142] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23.

158. The United States made written submissions to the Tribunal concerning the interpretation of CAFTA Articles 10.1.3, 10.5, 10.7 and 10.18. On Article 10.1.3, the United States observes that, while a host State's conduct prior to the entry into force of the CAFTA may be relevant in determining whether the State subsequently breached its obligations, there must exist conduct of the State after that date which is itself a breach. The mere fact that earlier conduct has gone unaddressed does not justify the application of the CAFTA retroactively.

159. On Article 10.18.1, the United States observes that this turns on the date on which knowledge of the alleged breach was first acquired and that, as knowledge cannot be acquired at multiple points in time or on a recurring basis, a continuing course of conduct cannot renew the limitation period. Only a legally distinct injury can give rise to a new limitation period. The 10.18.1 limitation period cannot be evaded by basing a claim on the most recent transgression in a series of similar and related conduct by a respondent State. The burden is on a claimant to show that the requisite knowledge was first acquired within the limitation period.

160. On Article 10.5, the United States observes that customary international law has only established a minimum standard of treatment in a few areas. One such area concerns the obligation to provide fair and equitable treatment, which includes, for example, a denial of justice, which could arise, illustratively, when a State's judiciary administers justice to aliens in a notoriously unjust or egregious manner that offends a sense of judicial propriety. The United States further observes that neither the concepts of good faith nor of legitimate expectations are components of fair and equitable treatment under customary international law that gives rise to an independent host State obligation. An investor's expectations about a particular regime do not preclude a State from taking future regulatory action. The burden is on a claimant to establish the existence and applicability of a minimum standard of treatment requirement that meets the test of customary international law.

161. On Article 10.7, the United States observes that a breach of any condition of Article 10.7.1 requires compensation in accordance with Article 10.7.2. Where, at the time of an expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. Where a State fails to determine or pay compensation

subsequently, a breach of the compensation obligation may occur later. Under international law, where an act is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. The burden is on a claimant to show that the government measure in issue destroyed all, or virtually all, of the economic value of its investment or interfered with it to such a similar extent and so restrictively so as to support a conclusion that it had been taken. It also requires an assessment of the extent to which the conduct interferes with reasonable expectations, as well as the character of the governmental action. Annex 10-C, paragraph 4(b) is not an exception but is rather intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

IX. Considerations of the Tribunal

A. Preliminary Observations

162. The Claimants face formidable jurisdictional hurdles. On the face of it, the conduct of which they complain has deep roots in the period before the CAFTA entered into force between Costa Rica and the United States on 1 January 2009. Article 10.1.3 makes it clear that a cause of action under the CAFTA cannot arise in relation to any act or fact that took place or any situation that ceased to exist before the CAFTA entered into force. The limitation period of Article 10.18.1, which would exclude any claim in respect of which a claimant first acquired, or is deemed to have first acquired, knowledge of the alleged breach and loss before 10 June 2010, presents an equally daunting challenge.

163. Although these provisions address separate issues and turn on different considerations, their temporal overlap in the circumstances of this case, given the proximity of the CAFTA's entry into force and the operative limitation period date, permits the ready identification of 10 June 2010 as the "critical limitation date"[143] for purposes of a first assessment of whether the Claimants' case

[143] Differences in terminology notwithstanding, this is the same approach as was adopted by the tribunal in *Corona Materials, LLC v. Dominican Republic,* ICSID Case No. ARB(AF)14/3, Award of 31 May 2016. In that case, the tribunal, adopting the language of the parties, used the term "critical date" to describe "the earliest possible date on which the Claimant would have obtained knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant's claims to have been submitted within the time limit for the purposes of Article 10.18.1" and that "[t]hat date is three years before the Claimant submitted a claim to arbitration under Section 10 of DR-CAFTA." (At paragraphs 196–199)

is properly justiciable under the CAFTA.[144] If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010. If they can establish this, a further jurisdictional question arises, namely, whether, in the circumstances of each claim presented, that post-critical limitation date cause of action can be sufficiently detached from acts or facts that pre-date the CAFTA's entry into force on 1 January 2009 so as to be independently justiciable, even if it may be appropriate still to have regard to pre-1 January 2009 conduct and developments for purposes of determining whether there was a subsequent breach of a CAFTA obligation.

164. The Claimants seek to get around these difficulties by contending, as they must, that they each only acquired knowledge of the breaches and losses that they allege after 10 June 2010. To sustain these contentions, they aver that they were not aware, when each property was purchased, that that property fell within the boundaries of the Las Baulas National Park, whether wholly or partially. This is not necessarily a make-or-break contention, as it may (as a matter of hypothesis) be possible to sustain a claim of a post-10 June 2010 cause of action, given the right circumstances, but the Claimants case is more difficult if it is shown that they were aware, or should have been aware, from the point at which they purchased their properties of the real prospect of the expropriation of those properties.

165. Engaging with the jurisdictional challenges more directly, the Claimants contend, first, that there is indeed conduct on the part of the Respondent to which they can point after 10 June 2010 that crystallised their knowledge of the breaches and losses that they allege, and therefore of their claims. Although it is not put in quite these terms, the Claimants contend in the alternative that the alleged breaches and losses constitute continuing conduct that is sufficiently material to make it independently justiciable, even if it has its roots in pre-10 June 2010 developments. The Claimants also describe the conduct of the Respondent of which they complain in slightly different

[144] The Tribunal uses the term "justiciable" in this Award as shorthand to address the question of whether the Tribunal is competent in respect a given claim, having regard to the jurisdiction requirements of CAFTA Articles 10.1.3 and 10.18.1.

terms, as a "composite" act, a legally material component of which took place after 10 June 2010. The Claimants' case on these aspects draws support from analysis set out in the Expert Opinion provided by Professor Mendelson. In broad terms, the Claimants' key allegations, in an endeavour to address the jurisdictional challenges, are continuing delay in the payment of compensation and continuing denial of fair and equitable treatment, in respect of both of which they point to material post-10 June 2010 conduct by the Respondent.

166. The jurisdictional aspects of this case are heavily fact-specific. Although interpretations of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact. The Tribunal thus cautions any reading of this Award that would give it wider "precedential" effects.

167. The Tribunal has been referred to a good deal of jurisprudence in support of the claims of each Party, notably, on time-bar issues, to the awards in *Mondev v. United States* (2002),[145] *Feldman v. Mexico* (2002),[146] *Grand River v. United States* (2006),[147] *UPS v. Canada* (2007),[148] and *Clayton v. Canada* (2015),[149] as well as to other cases, including those addressed in the Expert Opinions of Judge Schwebel and Professor Mendelson. The Tribunal has had careful regard to the reasoning in these cases while noting that they each turn on their facts. Consistent with its responsibilities to decide the issues in dispute in accordance with the CAFTA and applicable rules of international law, the Tribunal has also had regard to the CAFTA tribunal award in *Corona Materials*,[150] handed down on 31 May 2016 as the Tribunal was finalising this Award, as well as to other decisions and awards of international courts and tribunals the reasoning of which has a bearing on the issues of which the Tribunal is seised.

168. The Tribunal has given special attention to the *Unglaube* and *Santa Elena* awards. Although neither case gave rise to jurisdictional issues that have a bearing on these proceedings,

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[145] *Mondev,* footnote 109 *supra*.
[146] *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002; also Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000.
[147] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction of 20 July 2006.
[148] *United Parcel Services of America Inc v. Government of Canada*, Award on the Merits of 11 June 2007.
[149] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015.
[150] *Corona Materials* (2016), at footnote 143 *supra*.

the Tribunal has found elements in the reasoning of each on the merits to be germane to the jurisdictional issues of this case. As both awards concerned the conduct of Costa Rica in respect of expropriation claims, and the *Unglaube* case has a similar (though not the same) narrative to the present case, the Tribunal considers that they properly carry a different weight.

169. As the issue of the Claimants knowledge that their properties fell within the boundaries of the Park has been at the core of their arguments, it is with this that the Tribunal starts.

B. The Claimants' Knowledge of Whether their Properties Fell Within the Boundaries of the Park and the Relevance Thereof

(i) The Claimants Knowledge of Whether their Properties Fell Within the Boundaries of the Park

170. The Claimants deny that, at the time of purchase of their properties, they knew that the properties in question fell within the boundaries of the Park, whether wholly or partially. As the Tribunal is not in a position to make a conclusive assessment of what each claimant did in fact know, it will not dwell on the question of the Claimants *actual* knowledge but will focus rather on the issue of their *constructive*, or deemed, knowledge, i.e., what, as an objective matter, having regard to all the circumstances, the Tribunal considers that the Claimants *ought to have known*. A constructive knowledge test follows from the language of CAFTA Article 10.18.1, viz.: "from the date on which the claimant first acquired, *or should have first acquired*, knowledge" (emphasis added).

171. For the reasons that follow, the Tribunal does not consider that it can reasonably be said that each claimant ought not properly to have known, at the time of purchase of each of their properties, that the properties in question fell wholly or partially within the boundaries of the Las Baulas National Park. A reasonable property investor, faced with the information described below, ought at the very least to have concluded that it was highly likely that the properties in question fell within the Park. This should at the very least have led to due diligence enquiries. Having had careful regard to the evidence before it going to such enquiries as were made, evidence that did not go beyond testimony of the Claimants themselves, the Tribunal is unable to conclude that the enquiries made and the advice sought were adequate and sufficient to found a case of ignorance

on the part of the Claimants that the properties in question fell within the Park. The Tribunal accordingly finds that each claimant is deemed to have known at time of purchase that the property in question fell wholly or partially within the boundaries of the Park.

172. The Park was established by the 1991 Park Decree, which created both the Park and a protective zone extending 125 metres from the ordinary high tide the areas of which covered the land on which the Claimants' properties are situated. The Decree provided for the purchase of the properties within the Park.

173. The 1991 Park Decree was supplemented by the 1995 Park Law, the geographical coordinates indicated therein including the area of the Claimants' properties. The 1995 Park Law provided expressly for the expropriation of properties within the Park.

174. A good deal has been made in these proceedings of the use of the word "offshore" (variously translated into English also as "seaward" and "into the water") in Article 1 of the 1995 Park Law and the extent to which the Claimants can rely on the confusion caused by this language to maintain the assertion that they believed that the Law created a marine park and that the properties they purchased were therefore outside the Park. In the light of the Procuraduría Opinion of 10 February 2004 and Procuraduría *Dictamen* of 23 December 2005, the Tribunal does not consider that it would have been reasonable for any prudent property investor in the area thereafter not to have been aware that the Park coordinates extended 125 metres inland from the ordinary high tide. The Tribunal accepts that, as a matter of Costa Rican law, the Procuraduría was competent to give an authoritative interpretation of the 1995 Park Law and that both its 10 February 2004 Opinion and its 23 December *Dictamen* were made public at the time such that any proper due diligence enquiry by any potential property investor should and would have picked up these documents.

175. The question in issue, however, at least with respect to some of the Claimants and some of their property purchases, concerns the Claimants' knowledge in the period prior to the Procuraduría Opinion on 10 February 2004.

176. As an initial observation, the Tribunal considers that the 1995 Park Law, taken together with the 1991 Park Decree, and the explicit language in the 1995 Park Law requiring the expropriation of properties within the Park, should at the very least have given rise to an appreciation on the part of any prudent potential property investor that it was highly likely that properties within a 125-metre landward zone of the ordinary high tide fell within the boundaries of the Park and that there was therefore a real prospect that the properties would be expropriated in due course.

177. This appreciation would have been augmented by knowledge of the May 2003 MINAE conservation order to prevent the Santa Cruz Municipality from granting construction permits in the area of the Park, were the fact of this order to have been known to property agents, lawyers and others advising on property purchases in Santa Cruz at the time.[151] As no evidence was adduced before the Tribunal of such knowledge of this order at the time, the Tribunal discounts this element in its assessment of the Claimants' deemed knowledge. Subject to an important caveat, this goes also for the 5 May 2003 official notice from the MINAE to the Office of the Procuraduría General requesting an opinion on the correct interpretation of Article 1 of the 1995 Park Law and expressing the view that the word "seaward" was a mistake and that it should properly have been "landward".[152] The caveat is that the appreciation described in paragraph 176 above, flowing from a reading of the 1995 Park Law alongside the 1991 Park Decree, should at the very least have caused a proper due diligence enquiry to have been made about MINAE policy or, indeed, of the MINAE itself, directly, as appears to have been common in Costa Rica, by or on behalf of a prudent potential property investor about the proper limits of the Park.

178. This indeed is what Brett Berkowitz did, in his meeting with the Minister of the Environment, Carlos Manuel Rodriguez Echandi, in early 2003, described in paragraph 60 above. The other Claimants appear not to have made any such enquiry, ultimately to the discredit of the due diligence enquiries that must properly be expected of any prudent potential property investor, and in particular of a foreign investor, whether corporate or individual, who is contemplating the purchase of property for investment purposes. Mr Berkowitz, to his credit, did undertake such

[151] See paragraph 41(a) *supra*.
[152] See paragraph 41(b) *supra*.

enquiries. For the reasons given below, however, the Tribunal does not consider that these avail his position.

179. Before elaborating on property-specific knowledge, including of Mr Berkowitz, the Tribunal also draws attention to the 5 November 2003 publication of the 22 July 2003 MINAE Resolution declaring the acquisition of Marion Unglaube's property to be in the public interest, subsequently described as the formal start of the expropriation process of properties within the Park. Notwithstanding any issue surrounding the contested status of this Resolution, the Tribunal considers that the fact of this Resolution, and its publication, must be taken to have put potential, and sitting, property investors on notice that the MINAE considered properties within a 125-metre landward zone to lie within the boundaries of the Park and thus to be subject to a legislative requirement on the State to expropriate in the public interest.

180. Turning from circumstances pointing generically to deemed knowledge to property-specific knowledge, in its mid-deliberation enquiries to the Parties[153] the Tribunal requested, *inter alia*, that the Parties provide all the purchase records for each of the 26 lots that are the subject of the claim. Amongst the documents that were produced by both Parties at that point was the National Real Estate Registry Deed executed on 16 January 2003 in respect of the sale and purchase of 24 lots by Rancho Ecológico Las Baulas, Sociedad Anónima, acting through its President, Mr Brett Berkowitz, these lots including Lots B1, B3, B5, B6, B7 and B8. Amongst its other provisions, the Deed states as follows:

> The undersigned Notary notes the following: a) I hereby certify that the segregated lots have had their corresponding plans duly registered with the National Registry, and they all have the respective stamp of validation from the Santa Cruz Municipal Government. Equally, I certify that all of the plans have the respective stamp of validation from the Ministry of the Environment and Energy, indicating that lots nine through twenty-four, inclusive, are located outside any WILDLIFE AREA that is administered by such Ministry and legally established, **and in respect of lots one through eight, both inclusive, are located within the LAS BAULAS NATIONAL MARINE PARK as follows: with respect to lots one and two, approximately forty percent of each is within the park, and, with respect to lots three, four, five, six, seven and eight, approximately forty-five percent of each is within the park.** All which I certify to, for it has been presented before me. … FURTHER WITHOUT THE REGISTRY TAKING NOTE. **The parties appearing herein do agree the**

[153] See paragraph 19 *supra*.

> **following: One: That they are aware of the eventual effects to which lots one through eight, inclusive, are subject by virtue of the existence of Las Baulas Marine Park that is adjacent to such lots and that may come to affect them, and including, to be the object of an eventual total or partial expropriation by the State. That in this sense, the buyer declares itself aware of such circumstances and waives the right to claim in the future a latent defect for this reason.** …[154]

181. This Deed is devastating and, in the Tribunal's conclusion, fatal to Brett Berkowitz's assertion that he was unaware that Lots B3, B5 and B6, which are the properties in respect of which he claims, were not partially within the Park at the time of his purchase of the lots. This is notwithstanding other developments to which the Tribunal refers below. The Tribunal considers that this Deed is equally devastating and fatal to the assertions by Aaron and Trevor Berkowitz that they were unaware that Lots B1 and B8, in respect of which they claim, fell partially within the Park. Although it might have been put to the Tribunal that the claims by Aaron and Trevor Berkowitz should not be afflicted by the knowledge of their father, Brett Berkowitz, when first acquiring the lots, no such argument was advanced. In any event, the Tribunal considers that no such argument would be sustainable given that Aaron and Trevor Berkowitz became owners of Lots B1 and B8 by what appears to the Tribunal to have been a simple share transfer to each of 50% of the nominal shares of Aceituno Mar Vista Estates (the holding company in respect of the B1 claim) and of Níspero Mar Vista Estates (the holding company in respect of the B8 claim), both transfers being recorded in a notarised certificate of joint ownership dated 11 January 2013. There is nothing in the record before the Tribunal that suggests that these changes in the ownership of Lots B1 and B8 followed arm's length commercial transactions for value which might conceivably have been said to have cleansed the knowledge attributed to Brett Berkowitz as a result of the 16 January 2003 Deed. On the contrary, in his evidence to the Tribunal, Brett Berkowitz stated that he "transferred Lots B1 and B8 as a gift to my two adult sons …".[155] In any event, even had such an argument been made and supported by evidence, the Tribunal considers that there would have been a strong presumption, in the circumstances of an intra-family transaction such as this, that the sons could not be said to have acquired the properties free from their father's knowledge of the restrictions to which the properties were subject. Absent

[154] Bold highlighting by the Tribunal. The Tribunal notes that the Respondent applied at a late stage, on two separate occasions, to submit this document into the record, eventually withdrawing those applications in the face of objection by the Claimants who had not, at those points, located the document and had not been supplied with a copy by the Respondent. The Tribunal attaches no significance to the Claimants' objections to those applications.
[155] Emphasis added.

compelling evidence to the contrary, such a conclusion would risk opening the door to property "sales" that had as their object the cleansing of the knowledge of the original purchaser of defects or restrictions in the original title.

182. The position is more complicated in the case of Mr Gremillion, who brings the claim in respect of Lot B7, having purchased the property from Brett Berkowitz on 3 March 2004. In his Witness Statement, Mr Gremillion avers that he met Mr Berkowitz for the first time when negotiating the purchase of his lot, paying US$425,000 for the property. There is no suggestion that Mr Gremillion was anything other than an arm's length purchaser. The question is therefore whether he should be deemed to have purchased Lot B7 subject to the knowledge recorded on the Deed notarising Mr Berkowitz's purchase 15 months earlier.

183. Mr Gremillion's Witness Statement says in part as follows:

> 5. In 2003, I learned from my friend and real estate agent in Costa Rica, Joan Demyen, that there were a few inexpensive properties for sale in south Playa Grande. I knew this area well, as I used to surf there when in Guanacaste. The Las Baulas Marine Park is signed at the beach entrance to Playa Grande. Although I knew the park was there, there were a number of residential properties and small hotels on Playa Grande, many of which appeared to have been recently built.
>
> 6. I heard from Joan that the developer, Brett Berkowitz, was selling a few of his beachfront lots at a low price in order to raise the necessary funds to develop the infrastructure (electrical and sewer) for the remainder of his project. The price was so good that I decided to buy the lot on Playa Grande in his development.
>
> 7. On 3 March 2004, I purchased the lot through a company established under the laws of Costa Rica, Vacation Rentals, S.A., which I own and control. Vacation Rentals, S.A. purchased 100% of the shares of Jocote Mar Vista Estates, S.A., a company established under the laws of Costa Rica, which was the registered owner of Lot B7. I paid $425,000 US for the lot.

184. A number of points emerge from these passages that are germane to the Tribunal's consideration. First, Mr Gremillion knew the area, and the Las Baulas National Park, and was informed of the availability of a number of inexpensive properties to purchase by a real estate agent familiar with the area. Second, it was evidently striking both to Mr Gremillion and to the estate agent in question that Mr Berkowitz was selling Lot B7 at a low price. Mr Gremillion was

evidently persuaded to purchase the lot because he apprehended that he was getting a bargain. Both of these considerations suggest that Mr Gremillion was likely to have been aware of the risk that the lot fell, at least partially, within the Park.

185. Third, Mr Gremillion attests that he purchased the lot through Vacation Rentals, S.A., which acquired the shares of Jocote Mar Vista Estates, S.A. From the papers provided to the Tribunal, Jocote Mar Vista Estates acquired Lot B7 from Rancho Ecológico Las Baulas, Brett Berkowitz's original purchase company, on 6 September 2003 for the relatively nominal price of ₡500,000. The Deed of transaction notes Brett Berkowitz to be the president of Jocote Mar Vista Estates with an unlimited power of attorney. It is apparent, therefore, that the 6 September 2003 "sale" of Lot B7 from Rancho Ecológico Las Baulas to Jocote Mar Vista Estates was essentially a transfer of the property from one holding company owned by Brett Berkowitz to another holding company owned by Brett Berkowitz for a nominal amount. Significantly, the notations recorded on the 6 September 2003 Deed of sale/purchase do not include any reference to the Las Baulas National Park, whether along the lines of the notation set out in the original transaction Deed, extracted at paragraph 180 above, or otherwise. The Tribunal has no information on the record on whether a purchaser, such as Mr Gremillion, would or should have had access to the transfer Deed of the transaction predating the Deed from which he was taking ownership, given that the Deed in question was registered in the "Real-Estate Registry".

186. In the light of this factor, the question arises as to whether Mr Gremillion should be deemed to have purchased Lot B7 subject to the knowledge that it was located partially inside the Park. The Tribunal considers that, whatever the position as regards the circumstances described in the immediately preceding paragraphs, Mr Gremillion must be deemed to have acquired such knowledge at the point of purchase, for the following reasons. First, from his Witness Statement, it is by no means apparent that Mr Gremillion is himself claiming ignorance that Lot B7 was located partially within the Park. His stated objective in purchasing the property was to build a vacation and eventually retirement home for himself. This is not inconsistent with an appreciation that the property was within the Park but subject to a latitude for development.

187. Second, an examination of the National Registry documents submitted by the Claimants in respect of Lot B7 show MINAE-stamped annotations on the accompanying drawings that state clearly that approximately 45% of the lot falls within the Park. These stamped annotations carry various September 2002 dates. Third, the Tribunal notes Mr Gremillion's familiarity with the area and the fact of the Las Baulas National Park, and his informed appreciation that the lot was being sold for a low price. Fourth, the Tribunal repeats its consideration stated at paragraph 176 above, namely, that the 1995 Park Law, taken together with the 1991 Park Decree, should have given rise to an appreciation on Mr Gremillion's part that it was highly likely that Lot B7 was located wholly or partially within the Park and was therefore at risk of expropriation. Finally, the Tribunal considers that the fact of the MINAE Unglaube property expropriation resolution and the Procuraduría Opinion, both of which preceded Mr Gremillion's purchase of Lot B7, as indicated in **Table 14** on page 53 above, require a conclusion that Mr Gremillion must be deemed to have known that the lot fell wholly or partially within the Park at the point at which he purchased it on 3 March 2004.

188. Before leaving the B lots, mention must be made both of the Ayuda Memoria of 16 July 2003[156] and of the IGN Letter of 21 June 2004 by the Interim Head of the Department of Geodesy and Topography of the National Geographic Institute that concludes that the properties in question were outside the Park.[157]

189. The Ayuda Memoria is principally relevant to a consideration of the knowledge of the claimants making purchases in August 2003, as it comes after the Berkowitz Lot B purchases in January 2003 but before the MINAE Unglaube expropriation resolution of November 2003 and the Procuraduría Opinion of February 2004. It is accordingly addressed further at paragraph 200 below in the context of the discussion about the purchase of Lots V39 and V40 by Brenda and Ronald Copher and Lots V30, V31, V32 and V33 by Bob Spence.

190. As regards the IGN Letter, there is no doubt that this is anomalous. The Tribunal does not, however, accord the Letter dispositive weight in the assessment of Mr Berkowitz or Mr

[156] See paragraph 41(c) *supra*.
[157] See paragraph 41(f) *supra*.

Gremillion's knowledge for three reasons. First, it post-dated the acquisition of the lots in question by the Claimants. Second, the Letter is at odds with a number of other authoritative indicators that, in the Tribunal's view, take precedence. Third, it is unclear that the Letter should be regarded as reliable. While its author describes the methodology that he employed in reaching his conclusions, he identifies as a "necessary input" "Law no.7253, which created Las Baulas National Marine Park".[158] As the law that created the Park was Law no.7524, this point of discordance, whether a mere typographical error or not, calls into question the reliability of the Letter.

191. Moving beyond the B lots, it will be apparent from **Table 3** at paragraph 42 above that 14 of the remaining 20 lots were purchased after publication of the MINAE expropriation resolution in respect of Marion Unglaube's property on 5 November 2003 and the Procuraduría Opinion of 10 February 2004.[159] This concerns the following lots: V38, A39, A40, C71, V61a, V61b, V61c, C96, V46, V47, SPG1, SPG2, SPG3 and V59. Analysis of these lots puts them into three categories. The first category is those properties purchased between 3 October 2004 and 4 February 2005, i.e., after the MINAE Unglaube resolution and the Procuraduría Opinion but before other administrative developments. This concerns Lots V38, A39, A40, C71, V61a, V61b and V61c. The second category is those properties purchased in 2006 and 2007, i.e., after the SETENA Suspension Resolution of 30 August 2005, the Constitutional Court judgment of 19 October 2005 affirming the SETENA Suspension Resolution, and the Procuraduría *Dictamen* of 23 December 2005, as well as other developments in February–March 2005. This concerns Lots V46, V47, SPG1, SPG2, SPG3 and V59. The third category comprises Lot C96, which was purchased on 28 June 2005, i.e., before the administrative developments of 30 August to 23 December 2005 just mentioned but after not only the MINAE Unglaube resolution and the Procuraduría Opinion but also after the MINAE letter to SETENA prohibiting development permits in February 2005 and the SETENA suspension of environmental feasibility procedures in March 2005.

192. As regards the first category of properties, and indeed the second and third categories as well, the publication of both the MINAE Unglaube resolution and the Procuraduría Opinion, evidently discoverable by a reasonable due diligence enquiry, would, in the Tribunal's estimation,

[158] See footnote 31 *supra.*
[159] This excludes Mr Gremillion's purchase of Lot B7 from Brett Berkowitz on 3 March 2004, already addressed above.

have alerted a prudent potential purchaser to the fact that the properties in question fell within the Park to the extent of those portions of the properties falling within the 125-metre landward zone from the ordinary high tide. The Tribunal accordingly concludes that an inference of constructive knowledge on the part of these purchasers that the properties they were purchasing fell at least partially within the Park is warranted.

193. This conclusion is reinforced with regard to the properties in the second and third categories, which were purchased after a series of other developments, all of which would have added to the appreciation that the properties in question fell within the Park, either wholly or partially.[160] The inference of constructive knowledge in respect of these purchasers and these properties is therefore strengthened. For the avoidance of doubt, in reaching this conclusion, the Tribunal has had the closest regard to the Witness Statements of those responsible for the purchase of the properties in question.

194. This leaves six remaining properties for consideration, Lots V39 and V40, purchased by Brenda and Ronald Copher, and Lots V30, V31, V32 and V33, purchased by Bob Spence, in each case in the period 15-19 August 2003.

195. Evaluating constructive knowledge in the case of these claimants and properties is less certain than in the case of the other claimants and properties. Ultimately, however, the Tribunal considers, and so finds, that Bob Spence and Brenda and Ronald Copher must also be deemed to have known at the time of purchase that the properties they were purchasing fell within the boundaries of the Park and were therefore at risk of expropriation as required by the 1995 Park Law. The reasons for this conclusion are as follows.

196. As emerges from their Witness Statements, Ronald Copher and Bob Spence are friends and business colleagues. Bob Spence is a professional real estate developer, holding sizeable

[160] In a number of cases, National Registry and sale/purchase transaction documents contain annotations that record that the lot in question is located wholly or partially within the Park. Such documentation is evident, *inter alia*, for lots C71, SPG1, SPG2, SPG3 and V59. The Tribunal has, however, been cautious about affording weight to land registry drawings, whether these indicate or do not indicate that a lot lies within the Park, as, relying on the Respondent's submissions, it appears that responsibility for land registry drawings rests with the owner of the property rather than with the State. Out-dated drawings, or drawings that may not for other reasons reflect the location of the property vis-à-vis the Park, are of little reliable evidential value.

property investments in both the United States and Costa Rica, in part through Spence Co., a company of which Bob Spence is Manager. The Cophers and Mr Spence visited Costa Rica together at some point in early-mid-2003, meeting with Mr Copher's real estate agent, Pennye Wheeler, for purposes of viewing a number of lots that were for sale. The Cophers purchased Lots V39 and V40 shortly thereafter. Mr Spence bought five lots in his own name at the time, subsequently selling one of the lots, leaving him with Lots V30, V31, V32 and V33, which form one contiguous tract of land on which he planned to build a personal residence. In his Witness Statement, Mr Spence avers that "[a]ll four of these lots lay entirely within a distance of 125 meters from the mean high tide point east of the Pacific Ocean". In his Witness Statement, Mr Copher uses slightly more qualified language, viz: "I understand that all three of these lots are located entirely within a distance of 125 meters from the mean high tide point east of the Pacific Ocean."

197. Mr Spence makes no claim, in his Witness Statement, going to his knowledge at this point about the status of the properties he purchased. Mr Copher says in his Witness Statement "I had been told that the Park went out to sea and not inland. The documents in the national land title registry showed that my properties had been certified as being outside the Park. I had been told by local counsel that I could rely on the national registry documents, as they were official."

198. Based on the evidence presented by the claimants, the position is uncertain. A finding of *constructive* knowledge, however, turns on what Mr Spence and the Cophers must be deemed reasonably to have known in August 2003, not on what they aver that they were told or on what they are silent.

199. Given that Mr Spence is a professional real estate developer, that he and the Cophers are friends and business colleagues, that they visited Costa Rica together to explore property purchases, that they did so with the assistance of a real estate agent and obtained other professional assistance in respect of their purchases, the Tribunal considers that, at the very least, Mr Spence and the Cophers would and should have been aware that it was highly likely that the properties they purchased fell within the boundaries of the Las Baulas National Park and were therefore at risk of expropriation in due course.

200. Comment is also required here on the Ayuda Memoria of 16 July 2003,[161] coming in the period immediately prior to the August 2003 purchases by Mr Spence and the Cophers. Although the Ayuda Memoria may be relevant in the Claimants' purchase narrative more generally, the Tribunal considers that it supports a finding of constructive knowledge on the part of Mr Spence and the Cophers as it is plain in its expression of preference for a voluntary conservation regime rather than expropriations. It follows necessarily that the premise on which the Ayuda Memoria was based was that the Park extended 125-metres landward, not seawards.

201. Having regard to these considerations, in the Tribunal's estimation, reasonable and experienced property investors ought at the very least to have concluded that it was highly likely that the properties in question fell within the Park. This should at the very least have led to due diligence enquiries. Having had careful regard to the witness statements presented to the Tribunal, and also that the evidence presented did not go beyond testimony of the claimants themselves, the Tribunal is unable to conclude that the enquiries made and the advice sought were adequate and sufficient to rebut an otherwise reasonable inference of knowledge on the part of Mr Spence and the Cophers that the properties they purchased fell within the Park.

202. Based on the preceding, the Tribunal finds that Mr Spence and the Cophers must be deemed to have known, at the time of their purchase of the lots in question, that Lots V39, V40, V30, V31, V32 and V33 fell within the boundaries of the Las Baulas National Park.

203. As this is an on balance judgement, the Tribunal adds here for completeness that, for reasons that follow below, the finding just expressed is not dispositive of the Claimants' jurisdictional claims in respect of the properties in questions. That falls to be determined by reference to the requirements of CAFTA Article 10.18.1 and 10.1.3.

(ii) The Relevance of the Claimants' Constructive Knowledge

204. The Tribunal's finding that the Claimants must be deemed to have known that the properties they purchased fell within the boundaries of the Park, at least partially, goes to questions

[161] See paragraph 41(c) *supra*.

of jurisdiction, liability and damages. While it is not finally determinative of any issue, it is a finding that the Claimants were on notice, at the point at which they purchased their properties of the real prospect of the expropriation of those properties. This is particularly the case in respect of the purchases that took place after March 2005, from which point the Tribunal considers that the likelihood, as opposed to only the risk, of expropriation became evident. The expropriation trajectory became clearer still with the SETENA Suspension Resolution of 30 August 2005, the Constitutional Court's affirmation of the Resolution on 9 October 2005, and the Procuraduría *Dictamen* of 23 December 2005.

205. While the Claimants' knowledge at the time of purchase may be material for purposes of any assessment of the value of the properties in question, it is not ultimately determinative either of issues of jurisdiction or of liability. On questions of jurisdiction, it is to the interpretation of CAFTA Articles 10.18.1 and 10.1.3, and their application in the circumstances of this case, that the Tribunal now turns.

C. The Interpretation of CAFTA Articles 10.18.1 and 10.1.3

206. CAFTA Article 10.22.1 provides that the Tribunal shall decide the issues in dispute in accordance with the CAFTA and applicable rules of international law. CAFTA Article 1.2.2 provides that the CAFTA shall be interpreted and applied in accordance with the objectives of the Agreement and applicable rules of international law. The applicable rules of international law relevant to the interpretation of treaties are those rules of customary international law that are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Without prejudice to the relevance and application of any other parts of Articles 31 and 32, the Tribunal highlights for present purposes Article 31(1) of the Vienna Convention, which provides as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Having regard to this rule, as well as the other provisions of Articles 31 and 32, the Tribunal turns now to the interpretation of CAFTA Articles 10.18.1 and 10.1.3.

(i) The Interpretation of Article 10.18.1

207. The starting point of any interpretative exercise must be the words of the text that requires interpretation. Article 10.18.1 provides that no claim may be submitted to arbitration "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 … and knowledge that the claimant … has incurred loss or damage". This provision mirrors that found in Articles 1116(2) and 1117(2) of the North America Free Trade Agreement ("NAFTA").[162] The principal question that arises with respect to interpretation of Article 10.18.1 in the circumstances of this case is the meaning of the phrase "from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged".

208. The first enquiry for purposes of Article 10.18.1 concerns *the date* on which the claimant *first* acquired knowledge of the breach that is alleged. The linkage between the date and the claimant's first acquisition of knowledge requires the identification of a date certain on which knowledge was first acquired. While it is possible to conceive of a claim in which a sequence of temporally closely linked events warrants a conclusion that the claimant first acquired knowledge *on or about* a given date, a plain reading of the text of the provision, legal certainty and the object and purpose of the limitation clause, all require the identification of a specific date on which the claimant must have been said to have acquired knowledge of the breach. In this regard, the Tribunal disagrees with the analysis in the *UPS* Award that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly".[163] While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come

[162] NAFTA Articles 1116(2) and 1117(2) are cast in largely the same terms, the former addressing claims by an investor on its own behalf, the latter addressing claims by an investor on behalf of an enterprise. Article 1116(2) reads: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."
[163] *UPS*, footnote 148 *supra*, at paragraph 28.

within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.

209. As the language of Article 10.18.1 makes plain, the requirement of *knowledge* on the part of a claimant is a requirement of actual knowledge or of constructive knowledge. As the actual knowledge of a claimant will often be difficult to determine, tribunals are frequently called upon to consider what a claimant must be deemed to have known. The "should have first acquired knowledge" test in Article 10.18.1 is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known. In this regard, the Tribunal agrees with the analysis by the tribunal in *Grand River* on this issue, viz: "'Constructive knowledge' of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of 'constructive notice.' This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further enquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge."[164]

210. On the issue of first knowledge of the *breach*, if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period. The Tribunal notes that this was the approach adopted by the *Mondev* tribunal,[165] with which it is happy to agree. This does not preclude, as the *Clayton* tribunal noted, the possibility that a series of related events, each giving rise to a self-standing cause of action, may be separated into distinct components, some time-barred, some eligible for consideration on the merits.[166] It does mean, though, that for a "component" of a dispute to be justiciable in the face of a time-bar limitation clause, that component must be separately actionable, i.e., it must constitute a cause of action, a claim, in its own right.

[164] *Grand River*, footnote 147 *supra*, at paragraph 59.
[165] *Mondev*, footnote 109 supra, at paragraph 70.
[166] *Clayton*, footnote 149 *supra*, at paragraph 266.

211. For purposes of Article 10.18.1, the relevant date is when the claimant first acquired knowledge not simply of the breach but also that they incurred *loss or damage* as a result thereof. The Tribunal agrees with the observation of the tribunal in *Corona Materials* that "knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach *and* knowledge of loss or damage."[167] While the text of Article 10.18.1 does not state in terms that the loss or damage in question must be as a consequence of the breach that is alleged, the Tribunal considers that this necessarily follows. It is a trite observation that a tribunal established under Chapter Ten of the CAFTA does not have competence to award monetary damages other than in respect of a breach that comes within its jurisdiction. It follows that the apprehension of loss or damage required by Article 10.18.1 concerns loss or damage that is incurred as a result of an alleged breach that falls within the tribunal's jurisdiction. This point has a wider relevance as the converse necessarily follows, namely, that a tribunal does not have competence to award damages arising from a breach in respect of which it does not have jurisdiction. This is relevant in time-bar circumstances in which a series of associated actions may be divided up into those that meet the time-bar requirement, and are thus justiciable, and those that do not meet the time bar requirement, and are thus not justiciable. In such cases, the Tribunal considers that its jurisdiction to award damages will be necessarily linked to and constrained by the breach of which it is seised and over which it has jurisdiction.

212. The Tribunal notes seemingly different appreciations on this issue by the *Feldman* and *Mondev* tribunals,[168] although principally on the issue on non-retroactivity rather than time-bar limitation under the NAFTA, and also *obiter* by the *UPS* tribunal.[169] As regards its own jurisdiction under CAFTA Article 10.18.1, the Tribunal considers that a breach of which it is seised under this Article will necessarily confine the damages that may be awarded to what is due in consequence of that particular breach. This is not to preclude appropriate regard being had to pre-limitation period conduct for purposes of an assessment of both liability and damages. It is to preclude, however, in this Tribunal's estimation, that damages may properly be awarded other than for a breach that comes within the Tribunal's jurisdiction.

[167] *Corona Materials*, footnote 143 *supra*, at paragraph 194.
[168] *Feldman,* footnote 146 *supra*, at Interim Award, paragraph 62; *Mondev*, footnote 109 *supra*, at paragraph 69.
[169] *UPS*, footnote 148 *supra*, at paragraph 30.

213. On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in *Mondev, Grand River*, *Clayton* and *Corona Materials* that the limitation clause does not require full or precise knowledge of the loss or damage.[170] Indeed, in the Tribunal's view, the Article 10.18.1 requirement, *inter alia*, to point to the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.

(ii) The interpretation of Article 10.1.3

214. The Tribunal turns now to consider the interpretation of Article 10.1.3. This provides that Chapter Ten of the CAFTA "does not bind any Party in relation to any act or fact that took place or to any situation that ceased to exist before the date of entry into force of this Agreement." Unlike the three-year limitation clause, this provision does not find a counterpart in the NAFTA, although the principle underlying it has been addressed by NAFTA Chapter Eleven tribunals by reference to customary international law.

215. It is uncontroversial that Article 10.1.3 restates the general rule of customary international law reflected in Article 28 of the Vienna Convention on the Law of Treaties. The general principle of non-retroactivity is not controversial even if elements of interpretation of the rule give rise to debate.

216. The Tribunal notes that Article 10.1.3 applies to CAFTA States Parties, not to parties to a dispute. Pursuant to CAFTA Article 2.1 (General Definitions), the term "Party", as used in the CAFTA, "means any State for which this Agreement is in force". For present purposes, therefore, Article 10.1.3 goes to the obligations of Costa Rica not to the obligations, or rights, of the Claimants. The question principally in issue for present purposes is the interpretation and

[170] *Mondev*, footnote 109 *supra*, at paragraph 87; *Grand River*, footnote 147 *supra*, at paragraph 78; *Clayton*, footnote 149 *supra*, at paragraph 275; *Corona Materials*, footnote 143 *supra*, at paragraph 194.

application of the phrase "does not bind any Party in relation to any act or fact that took place … before the date of entry into force of this Agreement". There is no dispute that Costa Rica cannot be bound by acts or facts that took place before 1 January 2009. The issue is rather the effect of this language on the Tribunal's competence to have regard to acts or facts that took place prior to 1 January 2009. This goes, in the present case, to contentions that invoke and rely upon pre-entry into force conduct for purposes of establishing liability and resting on a methodology that adopts pre-1 January 2009 valuation dates for purposes of calculating damages.

217. In common with the approach taken in a NAFTA context by the tribunals in *Mondev*,[171] *Grand River*[172] and *Clayton*,[173] the Tribunal considers that CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach of a justiciable obligation. In this regard, however, the Tribunal emphasises, reflecting its analysis above on the question of breach under Article 10.18.1, that pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot therefore, in the Tribunal's estimation, constitute a cause of action.[174] Such conduct may constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc. Pre-entry into force conduct cannot be relied upon, however, to found liability in-and-of-itself in circumstances in which liability could not properly rest on the post-entry into force breach that has been alleged and on which the Tribunal's jurisdiction was founded. Any other approach would effectively denude Article 10.1.3 of its purpose and undermine the fundamental principle of effectiveness in treaty interpretation, rooted in good faith, that is expressed in the Latin maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void).

[171] *Mondev*, footnote 109 *supra*, at paragraph 70.
[172] *Grand River*, footnote 147 *supra*, at paragraph 86.
[173] *Clayton*, footnote 149 *supra*, at paragraph 282.
[174] The Tribunal takes the same view with respect to pre-entry into force omissions, which the Tribunal considers are encompassed by the phrase "acts and facts", an omission being a failure to act.

218. There remains the question of whether pre-entry into force acts and facts can be relied upon for purposes of determining damages. As with the preceding analysis, the Tribunal considers that it may properly have regard to pre-entry into force acts and facts for purposes of assessing whether damages are due and perhaps also such issues as the form that a damages award should take, for example, to ensure that a damages award would be effective. In keeping with its analysis above on the issue of breach,[175] however, the Tribunal considers that its jurisdiction to award damages will be necessarily linked to and constrained by the breach of which it is seised and over which it has jurisdiction. In this respect, the Tribunal agrees with the *obiter* comment of the tribunal in *UPS* (even if not with the premise from which it flowed concerning the effect of continuing conduct on limitation periods), namely, that "[i]t is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2)."[176]

219. A final observation is necessary, flowing from the circumstances of the present case and the temporal proximity of the CAFTA's entry into force between Costa Rica and the United States on 1 January 2009 and the Article 10.18.1 critical limitation date of 10 June 2010.

220. A putative claimant cannot acquire knowledge of an alleged breach of a treaty until that treaty enters into force. While the date of the entry into force of a treaty may be, and usually is, known some time in advance of the actual entry into force date, a breach of treaty can only arise once the treaty in question has the force of law. A putative U.S. claimant against Costa Rica could not therefore acquire knowledge, whether actual or constructive, of a breach of the CAFTA until 1 January 2009, at the earliest. Before this date, there was no operable CAFTA obligation to breach.

221. This has a number of consequences relevant to the present case. First, it excludes the possibility of a sustainable claim resting on an alleged breach of the CAFTA before 1 January 2009. It is axiomatic that the Claimants could not have brought the claims that they now allege

[175] See paragraph 210 *supra*.
[176] *UPS*, footnote 148 *supra*, at paragraph 30.

before 1 January 2009. If there is to be a sustainable claim, it must be founded on an alleged breach and consequential loss or damage after 1 January 2009. As noted in the discussion above, the Tribunal considers that, to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period.

222. Second, the 1 January 2009 entry into force date has implications for the operation of the later-in-time 10 June 2010 critical limitation date. Even in circumstances in which a claimant will be able to point to a post-10 June 2010 cause of action, it will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable, even if it may be appropriate to have regard to pre-1 January 2009 conduct for purposes of determining whether there was a subsequent post-entry into force breach. In the Tribunal's view, the customary international law rule on the non-retroactivity of treaties, affirmed "for greater certainty" in CAFTA Article 10.1.3, is ultimately controlling of the Tribunal's jurisdiction and the justiciability of the dispute. An alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time. The Tribunal may have regard to pre-entry into force acts and facts for evidential and similar purposes, as discussed above. Such acts and facts cannot, however, form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach. To be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be *independently* actionable. In this regard, the Tribunal recalls and agrees with the observations of the *Mondev* tribunal that "[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility."[177]

223. This aspect assumes particular importance in circumstances in which, in this case, the Claimants allege acts and facts going to both their Article 10.5 and Article 10.7 claims that both

[177] *Mondev*, footnote 109 *supra*, at paragraph 70.

predate and post-date the entry into force and critical limitation dates that are controlling of the Tribunal's jurisdiction. It is to these issues that the Tribunal now turns.

D. The Application of CAFTA Articles 10.18.1 and 10.1.3 to the Circumstances of this Case

224. Against the background of the preceding discussion, the Tribunal turns to the critical questions of jurisdiction in this case, namely, the application of CAFTA Articles 10.18.1 and 10.1.3 to the circumstances of this case.

(i) Preliminary Observations

225. As a preliminary matter, the Tribunal notes that an assessment of whether jurisdiction exists in respect of a given dispute is required of all tribunals, whether a party raises the issue or not. It is not in the systemic interests of the effective administration of international justice for a tribunal to adjudicate on matters over which it does not have jurisdiction, whether the parties would wish this to be the case or not. This appreciation does not turn only on issues of consent, although this may be important. It also turns importantly on *ratione materiae*, *ratione temporis* and *ratione personae* considerations, and is a feature of most courts and tribunals, including in the domestic sphere.

226. The relevance of this appreciation for present purposes is that, in determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case and the respondent formulated its reply. In an adversarial system, such as operates in investor-State arbitration proceedings, it is the litigation imperative of counsel for each side to formulate their case in the strongest, most uncompromising terms. Their task is not to shine a light on truth. It is to shine a light on the issues, leaving the tribunal to discern the reality of the case.

227. With this in mind, it is important, for purposes of its jurisdictional assessment, that the Tribunal identifies what it understands to be the essence of the Claimants' case. It is to this that the Tribunal now turns.

(ii) The Essence of the Claimants' Case

228. As recounted in the opening parts of this Award addressing the Parties' arguments, in his submissions on jurisdiction at the hearing, counsel for the Claimants urged the Tribunal to have regard to the Claimants' last pleading on the subject. Indeed, the Claimants' oral submissions on jurisdiction went beyond their written submissions, developing a seven-point matrix of alleged breaches, all of which hinged, in the Claimants' contention, on post-10 June 2010 conduct that the Claimants asserted was actionable.[178] This matrix built on an appendix to the Claimants' Rejoinder on Jurisdiction that set out a series of syllogistic questions for the Tribunal's assistance, although only in respect of five scenarios, that, with their yes-no answers, drew the Tribunal to arrive at a conclusion that the Tribunal had jurisdiction in respect of each scenario.

229. Although more complex and nuanced, the essence of the Claimants' jurisdictional arguments as there set out is that the Respondent failed to provide prompt and adequate compensation, contrary to CAFTA Article 10.7 (invoking sub-paragraphs 1(c), 2(a) and 2(b) of Article 10.7), and denied the Claimants a fair expropriation process including, but not limited to, by an indefinite delay in the process of payment of adequate compensation. This is a compressed summary of an already summary argument that will be seen in greater detail in the Claimants' pleadings.

230. In their Notice of Arbitration, the Claimants put the matter more directly, viz: "[a]t root, this case is about the Respondent's failure to provide prompt and adequate compensation for its *de facto* and *de jure* takings of valuable residential real estate."[179]

231. Mindful, no doubt, of the challenges of CAFTA Articles 10.18.1 and 10.1.3, the Claimants' merits case is cast carefully in continuing breaches / composite act terms, asserting that the fact that the underlying expropriations commenced before 1 January 2009 is not relevant to the question of whether the compensation eventually determined was consistent with the Respondent's CAFTA obligations. The Claimants nonetheless distinguish between the alleged direct

[178] See paragraphs 151–152 *supra.*
[179] See paragraph 49 *supra.*

expropriations in respect of nine properties and the alleged indirect expropriations in respect of the remaining 17 properties, the portions of the directly expropriated properties lying outside the 125-metre zone, and the expropriation process in respect of the direct expropriations.

232. As regards their minimum standard of treatment claim, the Claimants' case focuses both on alleged *process* failures, such as inexplicable variations in valuations of the same land and sweeping variations in approaches to the judicial phase, and what are described as the arbitrary and unjust *results* suffered by the Claimants in relation to the Respondent's expropriation regime. There is accordingly some intersection between the Article 10.5 claims and those under Article 10.7, unsurprisingly, given the terms of Article 10.7.1(d), which incorporates accord with Article 10.5 into the standard required for a lawful expropriation.

233. In reply, the Respondent acknowledges, as it must, that there has both been post-1 January 2009 conduct and post-10 June 2010 conduct. The Respondent describes this conduct, however, as the lingering effects of pre-1 January 2009 acts or as dependent acts that did not in-and-of-themselves constitute independent breaches of the CAFTA. The Respondent in any event asserts that the Claimants knew or must be deemed to have acquired knowledge of the breaches that they allege before 10 June 2010. As regards the allegations of direct expropriation, the Respondent contends that, on the Claimants' own analysis, the properties (or portions of them) were taken before 1 January 2009. As regards the allegations of indirect expropriation, the Respondent contends that, in these cases as well, the acts complained of took place before 1 January 2009.

234. On the Claimants' minimum standard of treatment argument, the Respondent's case is essentially that customary international law does not encompass protections for legitimate expectations absent express government inducement, that in any event Costa Rica has acted in a consistent and reasonable manner, i.e., its conduct has not been arbitrary, and that its approach to the expropriation of the Claimants' properties has been reasonable and justified in every way. The Respondent accordingly contests both the Claimants' Article 10.5 process and results allegations.

235. For purposes of its assessment of jurisdiction, the Tribunal considers that the Claimants' case has essentially four broad components: (a) allegations of unlawful expropriation; (b)

allegations of a failure to pay compensation promptly; (c) allegations of a failure to pay adequate compensation; and (d) allegations of minimum standard of treatment and due process violations in respect of the expropriation process. Running through each of these claims is the contention that the expropriation process was (and is) slow, arbitrary and opaque, and contrary to the Claimants' legitimate expectations, such that the Claimants' knowledge of the breaches that they now allege cannot be tied to pre-1 January 2009 regulatory developments of which they only subsequently became aware.

236. The Tribunal approaches the question of its jurisdiction under CAFTA Articles 10.18.1 and 10.1.3 with this appreciation of the essential character of the Claimants' claims in mind.

(iii) The Requirements of Articles 10.18.1 and 10.1.3

237. Following from the discussion above about the interpretation of Articles 10.18.1 and 10.1.3, the Tribunal highlights two questions the answers to which will be determinative of the Tribunal's assessment of its jurisdiction in this case. The issues must be addressed on a claimant-by-claimant and property-by-property basis.

(a) As regards the application of Article 10.18.1: Is there evidence to support a finding in respect of each claimant, in respect of each property, that they first acquired, or must be deemed to have first acquired, knowledge of an alleged independently actionable breach, and of consequential losses therefrom, in respect of a given property only after 10 June 2010?

(b) As regards the application of Article 10.1.3: In the event that an alleged independently actionable breach post-10 June 2010 is identified, can that alleged breach be evaluated on the merits without requiring a finding going to the lawfulness of pre-1 January 2009 conduct?

238. Subject to the answers to these questions, other questions may follow. The relevant analytical framework is that described in paragraphs 206–223 above.

(iv) Does the Tribunal Have Jurisdiction in Respect of the Claimants' Alleged Breaches?

(a) Preliminary observations

239. Two preliminary observations are warranted. First, the Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.[180]

240. Second, as this has general relevance for what follows, it is convenient to record at the outset the Tribunal's conclusion that neither the fact nor the content of the Contraloría Report, or the recommendations therein and the actions thereon, are of themselves capable of constituting an actionable breach on behalf of the Claimants in the circumstances of this case as presented to the Tribunal. The Tribunal accepts that the Contraloría Report is evidence going to the character of the Respondent's expropriation regime, and that it is relevant as such, and that it may accordingly be relevant to an assessment of liability and damages. It is not, however, a post-entry into force act or fact addressed to the Claimants on which they can rely to found a cause of action. Rather, the Contraloría Report is a compilation of acts and steps taken or to be taken by the Government. It does not contain orders or other regulatory measures imposing legal consequences on the Claimants. Nor, in the Tribunal's view, does it go to the issue of when the Claimants must be deemed to have acquired knowledge of the breaches and losses that they allege.

(b) Jurisdiction as regards claims concerning properties for which there have been no declarations of public interest

[180] The Tribunal takes this to be an uncontroversial statement of accepted principles of law, as reflected, for example, in *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, *inter alia*, at paragraphs 2.8–2.15.

241. Turning to the question of the Tribunal's jurisdiction, it is convenient to start with the Claimants' allegations of indirect expropriation and minimum standard of treatment and due process violations concerning properties for which there has been no declaration of public interest.

242. **Table 5**, at paragraph 53 above, identifies the eight properties for which there has been no declaration of public interest. More complete information in respect of each is given at **Tables 25 to 30, 33 and 34** following paragraph 77 above, as follows:

Table 36 – No Declaration of Public Interest (8 Lots)

Lot #	Analytical Table
A39 (B&R Copher)	Table 25
C71 (Spence Co.)	Table 26
V61a (Spence Co.)	Table 27
V61b (Spence Co.)	Table 28
V61c (Spence Co.)	Table 29
C96 (Spence Co.)	Table 30
SPG3 (Spence Co.)	Table 33
V59 (Spence Co.)	Table 34

243. As the analytical tables in respect of each of these lots make clear, there has been no direct expropriatory action by the Respondent in respect of any of these lots since their purchase by the respective claimant/s. This, of course, goes precisely to the Claimants' allegations of breach in these cases, namely, that it is breach contingent on delay, on a failure to act, on an omission by the Respondent.

244. There is, however, extensive general expropriatory regulatory conduct of the Respondent in the period following the purchase of each property, conduct on which the Claimants rely to support their claims, conduct which in every instance precedes the 10 June 2010 critical limitation date as well as the 1 January 2009 date of entry into force of the CAFTA.

245. In the face of this extensive pre-1 January 2009, pre-10 June 2010 conduct, the Tribunal considers that Claimants have failed to show, *manifestly* – in respect of allegations of indirect expropriation, denial of a fair expropriation process, failure to pay compensation promptly, and failure to pay adequate compensation – that they first acquired, or must be deemed to have first acquired, knowledge of the breaches and losses that they now allege only after 10 June 2010. The

appreciations that lie at the core of every allegation that the Claimants advance can be traced back to pre-10 June 2010 conduct, and indeed to pre-1 January 2009 conduct, by the Respondent. The claims thus fall at the first acquisition of knowledge requirement of Article 10.18.1.

246. The Tribunal considers, additionally, that the Claimants have failed to show, again *manifestly*, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted. The Tribunal further considers that the Claimants have failed to show that, even were the Tribunal to accept the existence of an actionable breach post-10 June 2010, that that breach could properly be evaluated on the merits without requiring a finding going to the lawfulness of pre-1 January 2009 conduct.

247. The Tribunal accordingly concludes, and so finds, that it has no jurisdiction to entertain the Claimants claims in respect of Lots A39, C71, C96, V59, V61a, V61b, V61c and SPG3.

(c) Jurisdiction as regards claims concerning properties for which declarations of public interest have lapsed

248. The Tribunal turns next to consider the claims of indirect expropriation and minimum standard of treatment and due process violations concerning the nine properties in respect of which the declarations of public interest have lapsed. **Table 6**, at paragraph 54 above, identifies these nine properties, with more complete information in respect of each given at **Tables 18 to 24, 31 and 32** following paragraph 77 above, as follows:

Table 37 – Lapsed Administrative Processes (9 Lots)

Lot #	Analytical Table
V39 (B&R Copher)	Table 18
V40 (B&R Copher)	Table 19
V30 (Spence)	Table 20
V31 (Spence)	Table 21
V32 (Spence)	Table 22
V33 (Spence)	Table 23
V38 (R.Copher)	Table 24
V46 (R.Copher-Holsten)	Table 31
V47 (R.Copher-Holsten)	Table 32

249. As emerges from the analytical tables in respect of these lots, the issue in respect of these lots appears to be a little less straightforward. In each case, there is conduct, although by the particular claimant rather than by the Respondent, in the period after the CAFTA's entry into force. In each case, this takes the form of the claimant's objection to the administrative appraisal; in eight cases, on 21 January 2009, in the ninth case on 2 April 2009. In the case of each of these lots, there was a declaration of public interest in early October 2007, followed by an administrative appraisal in mid-September 2008. In each case, however, there has been no justiciable or legally cognisable conduct in the record by the Respondent after 1 January 2009.

250. The first question in respect of these lots is whether the Claimants' objections to the administrative appraisals in January and April 2009 are sufficient without more to bring these claims within the limitation period. The Tribunal is clear that they are not. It is not simply that this is conduct by the Claimants, which cannot of itself found a claim. It is that this conduct in any event pre-dates the critical limitation date of 10 June 2010. More particularly, the Tribunal considers that this conduct by each given Claimant in-and-of-itself indicates knowledge by that Claimant of a core breach that is now alleged, namely, the alleged failure to pay adequate compensation.

251. The question that follows is whether this assessment changes in the face of the Claimants' wider allegations in respect of allegations of indirect expropriation, denial of a fair expropriation process, failure to pay compensation promptly, and failure to pay adequate compensation, whether these are cast in terms of post-limitation period conduct by the Respondent or in terms of continuing violations.

252. The Tribunal does not consider that, however these allegations are cast, they meet the requirement to show an independently actionable breach in the period after 10 June 2010 in respect of which the Claimants first acquired the requisite knowledge of breach and consequential loss only after this critical limitation date. Even more so than in the case of the lots in respect of which there has been no declaration of public interest, the appreciations that lie at the core of the allegations in respect of the lots that were the subject of now lapsed declarations of public interest are firmly rooted in pre-10 June 2010 and pre-1 January 2009 conduct. The claims thus fall at the

first acquisition of knowledge requirement of Article 10.18.1. In the Tribunal's assessment, the Claimants have failed to show that the breaches that they allege are independently actionable, separable from the pre-entry into force conduct in which they are deeply rooted. The Tribunal also considers that the Claimants have failed to show that, even were the Tribunal to accept the existence of an actionable post-10 June 2010 breach, that that breach could properly be evaluated on the merits without requiring a finding going to the lawfulness of pre-1 January 2009 conduct.

253. The Tribunal accordingly concludes, and so finds, that it has no jurisdiction to entertain the Claimants claims in respect of Lots V30, V31, V32, V33, V38, V39, V40, V46 and V47.

(d) Jurisdiction as regards claims concerning properties at least a portion of which are alleged to have been directly expropriated

254. The Tribunal turns now to the remaining nine lots in respect of which the Claimants allege (a) direct expropriation, in respect of those portions of the lots that lie within the 125-metre Park zone, (b) indirect expropriation, in respect of the portions of each lot that lie outside the 125-metre Park zone, and (c) minimum standard of treatment and due process violations in respect of the expropriation process. **Table 7**, at paragraph 55 above, identifies the nine properties in question, with more complete information in respect of each given at **Tables 9 to 17** following paragraph 73 above, as follows:

Table 38 – Direct Expropriation Claims (9 Lots)

Lot #	Analytical Table
B1 (A&T Berkowitz)	Table 9
B3 (Berkowitz)	Table 10
B5 (Berkowitz)	Table 11
B6 (Berkowitz)	Table 12
B8 (A&T Berkowitz)	Table 13
B7 (Gremillion)	Table 14
A40 (Spence Co.)	Table 15
SPG1 (Spence Co.)	Table 16
SPG2 (Spence Co.)	Table 17

255. The claims in respect of these lots pose analytical difficulties as in each case the properties have been the subject of declarations of public interest, decrees of expropriation and acts of dispossession, although in every case this conduct has preceded the entry into force of the CAFTA.

The last in the sequence of these administrative measures, the act of dispossession, took place in mid-March 2008, in the case of six of the lots, in mid-September 2008, in the case of one of the lots, and in early December 2008, in the case of the remaining two lots. There have, however, also been judicial phase decisions in respect of a number of these lots, decisions that in some cases were made in the period between the Article 10.18.1 critical limitation date of 10 June 2010 and the commencement of proceedings on 10 June 2013. The question that arises in such cases is whether a judgment on compensation that is alleged, by its terms, to breach CAFTA Article 10.5 and/or Article 10.7 can constitute an independently actionable breach for limitation purposes. In the event that such a judgment is capable of constituting a self-standing cause of action, a further question arises in respect of a number of the claims and properties, namely, whether a claimant can rely on a cause of action that post-dates the commencement of proceedings in circumstances in which there is no pre-commencement of proceedings cause of action.

256. There is, additionally, the issue of the effect of the expropriation process on that portion of each lot, outside the 125-metre Park zone, that was not the subject of a declaration of public interest, decree of expropriation and act of dispossession. Although no issue arises of the adequacy of compensation available in respect of these portions of each property – as no compensation was assessed or offered – there is a question of whether the administrative measures in respect of the portions of property within the 125-metre zone can amount to actionable indirect expropriation, contrary to CAFTA Article 10.7, and/or a breach of the minimum standard of treatment requirement, contrary to Article 10.5, in respect of the relevant portion of property outside the 125-metre zone. If so, the question is then whether such conduct is justiciable before the Tribunal, having regard to the Article 10.18.1 and Article 10.1.3 jurisdictional requirements.

257. Starting with the issue of the direct expropriation allegations in respect of these properties, the first issue relevant to an assessment of jurisdiction is the date on which the direct expropriation of the portions of each lot lying within the 125-metre Park zone took place.

258. The dispossession dates in respect of each of these lots is given in **Table 8** above, following paragraph 70. As noted above, the acts of dispossession in respect of each of these properties took place in 2008.

259. For purposes of their valuation claims, the Claimants have asserted that the date of the decree of expropriation is the relevant date. The date of the decrees of expropriation in respect of each of these properties is given in **Table 35** above, following paragraph 96(c). In six cases, the decrees of expropriation were issued in late November 2006. In one case, the decree of expropriation was issued in mid-April 2007. In the remaining two cases, the decrees of expropriation were issued in mid-March 2008.

260. In the *Santa Elena* case, the tribunal was faced with the question of the date at which the property in question had to be valued. In the course of its analysis, the *Santa Elena* tribunal observed as follows:

> What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property. A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.[181]

261. Although this observation was made in the course of discussion about the appropriate date of valuation, the present Tribunal considers it to be an accurate statement of the law on the issue of the date of expropriation.

262. Equally germane for present purposes, the *Santa Elena* tribunal went on as follows:

> Although the expropriation by the decree of 5 May 1978 was only the first step in a process of transferring the Property to the Government, it cannot reasonably be maintained, as the Claimant seeks to do, that this Decree expressed no more than an "intention" to expropriate or that, in 1978, the Government merely "sought to expropriate". In the circumstances of this case, the taking of the Property occurred as of 5 May 1978, the date of the 1978 Decree.
>
> As of that date, the practical and economic use of the Property by the Claimant was irretrievably lost, notwithstanding that [the Claimant] remained in possession of the Property. As of 5 May 1978, Claimant's ownership of Santa Elena was effectively blighted or sterilised because the Property could not, thereafter, be used for the development purposes for which

[181] *Santa Elena*, paragraph 31 *supra*, at paragraph 76.

> it was originally acquired (and which, at the time, were not excluded) nor did it possess any significant resale value.[182]

263. The Tribunal considers that this assessment also is an accurate statement of the law, and is directly germane to the present case. The Tribunal notes, additionally, that this analysis by the *Santa Elena* tribunal was adopted by the tribunal in the *Unglaube* case,[183] although the tribunal in *Unglaube*, in the circumstances of that case, ultimately settled on the date of the MINAE declaration of public interest in November 2003 as the "without doubt" date of the taking of the Unglaube's properties.[184]

264. The Tribunal concludes that the direct expropriation of Lots A40, B1, B3, B5, B6, B7, B8, SPG1 and SPG2 occurred without doubt *no later than* the date of the decree of expropriation in respect of each lot. Indeed, a strong case can be made that it occurred on the date of the declaration of public interest, as it would have been at this earlier point in time that, adopting the language of the tribunal in *Santa Elena*, the practical and economic use of the properties was irretrievably lost, notwithstanding that the Claimants remained in possession of the properties. As of the date of the declarations of public interest, the Claimants' ownership of their properties was effectively blighted or sterilised because the properties could not thereafter be used for development purposes, nor did they possess any significant resale value.[185]

265. The Claimants had actual knowledge, and if, for any reason they did not have actual knowledge, the Tribunal deems them to have had constructive knowledge, of the direct expropriations of their properties without doubt no later than the dates of the decrees of expropriation in respect of each property. Indeed, as noted above, the Tribunal considers that there is a strong case in favour of a finding that the date of expropriation was in each case the dates of the declarations of public interest.

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[182] *Santa Elena*, paragraph 31 *supra*, at paragraphs 80–81.
[183] *Unglaube*, paragraph 30 *supra*, at paragraphs 217–220.
[184] *Unglaube*, paragraph 30 *supra*, at paragraph 220. The Tribunal notes that the circumstances of the Unglaube case differed in an important respect from the circumstances in the present case in that the Unglaubes purchased their properties some years before the Las Baulas National Park was created by the 1991 Park Decree.
[185] As there is no need, for purposes of this Award, for the Tribunal to make a definitive finding of the date of expropriation of each property beyond what has just been said, the Tribunal does not do so.

266. The consequences of this finding, which the Tribunal considers follows from uncontroversial principles of law, are significant for the Claimants' jurisdictional case. As **Table 7**, at paragraph 55 above, notes, in the case of six of the properties under consideration, the declarations of public interest were issued on 1 December 2005; in a seventh, it was issued on 30 March 2006; and in the two remaining cases, it was issued on 17 April 2007; i.e., between more than 1½ years to 3½ years before the CAFTA entered into force and between more than 6½ years to 8½ years before the Claimants commenced these arbitration proceedings on 10 June 2013, subject to the three-year limitation constraints of Article 10.18.1.

267. The bottom line, for jurisdictional purposes, is not altered if the dates of the decrees of expropriation are adopted for purposes of the analysis. As **Table 35**, at paragraph 96(c) above, records, and as noted in paragraph 259 above, the decrees of expropriation were issued in six cases in late November 2006, in a seventh case in mid-April 2007, and in the remaining two cases in mid-March 2008. This timeline precedes the CAFTA's entry into force by between 9 months to 2 years and precedes the commencement of proceedings by between 5½ years to 6½ years, subject to the three-year limitation constraints of Article 10.18.1.

268. Two concluding points should be added. First, distinct from the application of Article 10.1.3, the Tribunal notes that the Claimants could not have had a CAFTA claim before the CAFTA entered into force on 1 January 2009. Even assuming, therefore, *arguendo*, that this was the date on which the Claimants first acquired, or should be deemed to have first acquired, knowledge of the CAFTA breaches and losses that they allege, given that the claims arise out of settled conduct by the Respondent before 1 January 2009, the limitation period could not have run beyond 1 January 2012, i.e., three years from the date of the CAFTA's entry into force. This is still almost 1½ years before the Claimants commenced proceedings.

269. Second, with one possible exception, addressed further below, the Claimants' allegations, in all of their various permutations contained in the Claimants' seven-point matrix of alleged breaches and elsewhere,[186] are all so deeply rooted in pre-entry into force conduct as not to be meaningfully separable from that conduct. While the Tribunal is not drawn to the Respondent's

[186] See paragraph 228 *supra*.

"lingering effects" characterisation of such acts, as the notion of lingering effects suggests *de minimis* conduct, which the Tribunal considers understates their importance and consequence, the Tribunal agrees that the post-entry into force and post-critical limitation date conduct by the Respondent of which the Claimants complain is "dependent" conduct, or, in the Respondent's words, is not independent of the pre-1 January 2009 and pre-10 June 2010 conduct in respect of the properties in question. The one possible exception to this conclusion is in respect of the Claimants' allegations of breaches under Article 10.5 on the determination of the quantum of compensation (being distinct and potentially separable from the allegation of expropriation more generally, of failure to pay compensation promptly,[187] and of a denial of a fair expropriation process). This issue is addressed below in the context of the Tribunal's discussion of the Claimants' minimum standard of treatment and due process claims.

270. As follows from the preceding assessment, the Tribunal concludes, and so finds, that it has no jurisdiction to entertain the Claimants' *direct* expropriation claims in respect of Lots A40, B1, B3, B5, B6, B7, B8, SPG1 and SPG2. Additionally, the Tribunal concludes, and so finds, that, with one possible exception addressed below, it has no jurisdiction to entertain any claim by the Claimants in respect of any alleged post-entry into force and post-critical limitation date conduct of the Respondent, such conduct not being separable from the measures of direct expropriation and not amounting to an independently actionable breach for Articles 10.1.3 and 10.18.1 purposes.

271. The question that follows is whether, notwithstanding the Tribunal's conclusion just noted, the Claimants' allegations of *indirect* expropriation in respect of the portions of each lot that lie outside the 125-metre Park zone constitute an independently actionable breach for purposes of Article 10.1.3 and Article 10.18.1. In the Tribunal's conclusion, they do not. Insofar as any issue of indirect expropriation arises in respect of these properties, this is inseparable from the alleged direct expropriation measures that the Tribunal has concluded are not justiciable. The relevant acts and facts took place before the entry into force of the CAFTA on 1 January 2009. Nor, for the same reasons, can the alleged indirect expropriation amount to a self-standing cause of action for purposes of Article 10.18.1. The Tribunal notes additionally, as regards these indirect

[187] For the avoidance of doubt, the Tribunal considers that the Claimants' delay / promptness allegations in respect of the payment of compensation cannot be separated from the Respondent's alleged pre-entry into force and pre-limitation period conduct. It is therefore "dependent" conduct, as described above and is not justiciable in the present proceedings.

expropriation claims, that they give rise to significant burden of proof issues, which fall to the Claimants to address. The Tribunal does not consider that they have adequately done so. While the present enquiry is focused on issues of jurisdiction, the Tribunal notes the exacting requirements in respect of claims of indirect expropriation set out in paragraph 4 of Annex 10-C of the CAFTA, including that the fact of an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred. The Tribunal does not consider that the Claimants have satisfied the burden upon them in respect of these claims.

272. The Tribunal accordingly concludes, and so finds, that it has no jurisdiction to entertain the Claimants' *indirect* expropriation claims in respect of Lots B1, B3, B5, B6, B7, B8, SPG1 and SPG2.[188]

273. As addressed above (see paragraphs 228 to 235), the essence of the Claimants' case is that the Respondent failed to provide prompt and adequate compensation and denied the Claimants a fair expropriation process. The Claimants do not contest Costa Rica's right to expropriate and are not seeking either the return of their properties or an order that would permit them to develop their properties. As the Claimants' various Witness Statements make clear, the principal focus of the Claimants' objection is the valuation that has been accorded to their properties.

274. Each of the properties here in issue is in the judicial phase of the expropriation process, which commenced following the decree of expropriation. In the case of five of the properties, judicial decisions addressing the quantum of compensation were handed down in the period 24 December 2010 to 29 February 2013, i.e., after the 10 June 2010 critical limitation date and before the Claimants commenced these proceedings on 10 June 2013. As will be seen from **Tables 9 to 17** above, this relates to Lots B3, B8, A40, SPG1 and SPG2. In the case of the remaining four properties, there were no judicial decisions in the period in question. In the case of Lots B1, B5, B6 and B7, judgments addressing the quantum of compensation were handed down *after* the present arbitration was commenced. For reasons that will become apparent, the Tribunal proceeds in its consideration of these issues by reference to the three property groupings just noted.

[188] As Lot A40 lies wholly within the 125-metre Park zone, the issue of indirect expropriation here addressed does not apply.

275. Starting with Lots B3, B8, A40, SPG1 and SPG2, while the quantum of compensation judgments in respect of these properties are not in each case (necessarily) the last word in the process, the Tribunal notes that the CAFTA does not require the exhaustion of local remedies. Moreover, the Claimants' allegations are that the Respondent's expropriation process is fundamentally flawed, arbitrary and unfair, resulting in wildly fluctuating valuation assessments and other significant shortcomings. The Claimants case on this aspect draws weighty support from the Contraloría Report, the Executive Summary of which is set out at paragraph 41(s) above.

276. The question is whether a court judgment can of itself constitute a breach of the CAFTA and amount to a self-standing cause of action, including for entry into force and limitation period purposes. The Tribunal considers that it can; that a judgment has the potential to be an independently actionable breach, a distinct and legally significant event that is capable of founding a claim in its own right that is separable from the act of expropriation that it addresses. As a matter of hypothesis, in the present case, it is perfectly possible for the Tribunal to address the adequacy of the judicial determination of compensation by the Respondent's courts in respect of a given lot without becoming drawn into an adjudication of the legality of pre-limitation period or pre-entry into force conduct. While, as addressed in paragraphs 217–218 above, the Tribunal may properly have regard to pre-entry into force and limitation period conduct for purposes of determining whether there was a subsequent breach of a justiciable obligation, that is where it would stop. In these circumstances, the alleged independently actionable breach would be the judicial decision on quantum, not the pre-limitation period or pre-entry into force conduct that began the process that led to the judicial decision.

277. The Tribunal notes that this approach accords with that adopted by the *Mondev* tribunal, which accepted, for jurisdictional purposes,[189] just such a contention in respect of post-NAFTA entry into force judicial conduct of the Massachusetts courts in respect of their dealings with Lafayette Place Associates ("LPA"), a limited partnership owned by the claimant (Mondev). As the *Mondev* tribunal noted, the relevant question is whether a court decision is itself inconsistent with (in that case) the NAFTA.

[189] *Mondev*, footnote 109 *supra*, at paragraphs 66, 70, 73, 75 and 92.

278. The question that follows is with regard to what alleged breach/es of the CAFTA does the issue of the adequacy of the judicial determination raise for consideration. The Claimants' submissions advance three bases of claim in respect of this matter, namely, that the inadequacy of the compensation on offer constitutes a violation of Article 10.7.1(c) and/or a violation of Article 10.7.2(b) and/or a violation of Article 10.5.1, whether read together with Article 10.7.1(d) or separately.

279. For present purposes, it is unnecessary for the Tribunal to express a view on the Claimants' contention that Article 10.7.2 constitutes a distinct and separately actionable obligation, separate from Article 10.7.1(c). In the light of the Tribunal's conclusions that follow in respect of the Claimants' Article 10.7 allegations, nothing turns on this argument for purposes of these proceedings.

280. In the Tribunal's view, the Claimants' adequacy of compensation allegations are not justiciable in the present proceedings by reference to either Article 10.7.1(c) or Article 10.7.2(b). To adopt such an approach would amount to an assumption of jurisdiction over the Claimants' expropriation claims more widely. As the Tribunal has already concluded, these claims are barred by the terms of both Article 10.1.3 and Article 10.18.1. Insofar as there may be a justiciable claim before the Tribunal, it cannot therefore be about the lawfulness of the alleged expropriatory conduct by reference to Article 10.7.

281. This leaves only the Claimants' minimum standard of treatment allegations in respect of these properties.

282. The Tribunal considers that an allegation by the Claimants of the inadequacy of compensation offered or paid may, depending on the circumstances, engage minimum standard of treatment issues. Annex 10-B of the CAFTA affirms that the customary international law minimum standard of treatment in Article 10.5 "refers to all customary international law principles that protect the economic rights and interests of aliens." On the content of the minimum standard of treatment, having regard to the submissions of the Parties, the Tribunal agrees with the analysis,

albeit in a NAFTA context, of the tribunal in *Glamis Gold*,[190] to the effect that a violation of the customary international law minimum standard of treatment requires an act that is sufficiently egregious and shocking so as to fall below accepted international standards.[191] The Tribunal agrees, as well, that such conduct includes, *inter alia*, insofar as may be relevant for present purposes, manifest arbitrariness and blatant unfairness. For the avoidance of doubt, as these elements were addressed in the *Glamis Gold* award, the Tribunal considers that, on any measure, the circumstances of the present case do not engage issues of a gross denial of justice, bad faith, a complete lack of due process, evident discrimination, a manifest lack of reasons, or other similar conduct that forms part of the customary international law minimum standard of treatment requirement.

283. The Tribunal agrees, also, with the view expressed by the tribunal in *Mondev* that "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[192] Save insofar as the conduct of a State is such as to induce the investment in question (which is not the case here), the Tribunal also considers that there is insufficient support for the proposition that the minimum standard of treatment includes stand-alone protection of the expectations of the investor. Certainly, the Claimants had not made a sufficient case to this effect in the present proceedings.

284. The Tribunal notes that the assessment that the challenged court decisions, in the circumstances of this case, properly engage Article 10.5 issues and not Article 10.7 issues accords with the approach in *Mondev*, the tribunal there concluding, in the face of similar time bar considerations, that NAFTA Article 1105(1) was engaged while NAFTA Article 1110 was not.[193]

285. Given the jurisdictional findings in this Award, whether the Claimants are in a position to sustain a claim on the merits that the relevant compensation judgments of the Costa Rican courts in respect of the properties in question breach Article 10.5 remains to be determined. This issue is addressed further in paragraphs 305–307 below.

[190] *Glamis Gold*, footnote 120 *supra*.
[191] *Glamis Gold*, footnote 120 *supra*, at paragraphs 616 and 627.
[192] *Mondev*, footnote 109 *supra*, at paragraph 118.
[193] *Mondev*, footnote 109 *supra*, at paragraphs 75 and 97.

286. Reflecting the preceding, the Tribunal concludes, and so finds, that it has jurisdiction over the Claimants' allegations that, by reference to the relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or to blatant unfairness contrary to CAFTA Article 10.5.

287. This leaves four remaining properties for consideration, Lots B1, B5, B6 and B7.

288. As regards Lot B1, a judgment was handed down on 10 June 2016, three years after these proceedings were commenced. As indicated in **Table 9**, this judgment was appealed by the State on 11 July 2016 and there have been subsequent developments. This information concerning the Costa Rican proceedings in respect of Lot B1 was only drawn to the Tribunal's attention after the uncorrected version of this Interim Award had been transmitted to the Parties on 25 October 2016.

289. As with Lot B1, judgments addressing the quantum of compensation were handed down *after* the present arbitration was commenced in the case of Lots B5, B6 and B7. In the case of Lot B5, a judgment was handed down on 11 March 2015, almost two years after these proceedings were commenced. As will be evident from **Table 11**, there have also been developments subsequent to the judgment. In the case of Lot B6, a judgment was handed down on 30 July 2014, more than a year after these proceedings were commenced. As indicated on **Table 12**, an appeal judgment was handed down on 28 April 2015. In the case of Lot B7, a judgment was handed down on 30 July 2014, more than a year after these proceedings were commenced. As indicated on **Table 14**, an appeal judgment was handed down on 29 May 2015. There have also been subsequent development in respect of this property.

290. The question is whether a judgment on quantum coming more than a year after CAFTA arbitration proceedings were commenced can found the jurisdiction of the Tribunal in circumstances in which the claim in question would otherwise be time barred by operation of

Article 10.1.3 and/or Article 10.18.1. The question, in other words, is whether the Claimants must establish that the Tribunal had jurisdiction in respect of their claims at the point at which the proceedings were instituted or whether a jurisdictional shortcoming is capable of being cured by subsequent developments.

291. This issue was not addressed in the Parties' submissions. The closest the Parties came to it was a single sentence contention by the Respondent that the claims were either out of time or premature.

292. In the circumstances, a question on which the Tribunal has deliberated is whether it can properly decide the matter in the absence of submissions by the Parties.

293. There are duelling considerations on this issue. In the particular circumstances of this case, however, in which this Award is an interim award which, absent a settlement, will in any event require further submissions by the Parties, the Tribunal has concluded that it would be neither oppressive to the Parties nor inconsistent with the arbitral function to afford the Parties an opportunity to address this issue. The Tribunal accordingly defers comment both on the issue of principle (i.e., whether it is necessary to afford the Parties an opportunity to be heard on this point) and on the issue of substance to a later date.

294. The Tribunal accordingly concludes and so finds that, in the particular circumstances of this case, the Parties should be afforded an opportunity to present their views on the issue of whether the Tribunal has jurisdiction to entertain the Claimants' allegations of a breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts *rendered after 10 June 2013* in respect of Lots B1, B5, B6 and B7.

295. The Tribunal reserves decision on the procedure applicable to these further submissions to a Procedural Order to be made in due course after affording the Parties an opportunity to be heard on the matter.

(v) Concluding Observations and Summary of the Tribunal's Findings on Jurisdiction

296. Three concluding observations on the question of jurisdiction are warranted. First, as a preliminary matter, it is appropriate to reinforce a point already made. As will be apparent from the summary of the Parties' submissions and evidence given above, the contentions of the Parties were detailed, complex and often interwoven with one another. For the avoidance of doubt, insofar as the Tribunal has not explicitly addressed herein each and every contention made by each Party, it should not be understood that the point was overlooked. On the contrary, the Tribunal has had careful and close regard to all of the Parties' pleadings, evidence and other documents submitted in this case. To the extent that any point has not been expressly addressed in this Award it is for reason of judicial economy and an appreciation that an assessment of the point in question was not necessary for purposes of the Tribunal's decision rendered herein.

297. Second, comment is required on two arguments advanced by the Claimants almost in passing. The first argument was that, if the Claimants missed the limitation period deadline of 10 June 2010 they only did so by three months, the Claimants having identified the MINAET instructions to SETENA of 19 March 2009 as the last in the line of measures that contributed to the permanent and substantial deprivation of the Claimants' property rights. Given this *de minimis* period, and that international law eschews undue formalism, the Claimants contend that the Tribunal should overlook the missing of the deadline.

298. The Tribunal cannot accept this, *inter alia*, for four reasons. First, the relevant question is not whether the MINAET was the last line of measures affecting the Claimants' property rights but rather when did the Claimants first acquire knowledge of the breach. The Claimants' argument would turn the limitation clause on its head and the proposed approach cannot therefore be accepted. Second, in any event, as the Tribunal has observed in its preceding discussion, the alleged conduct on which the Claimants found the claims is deeply and inseparably rooted in the Respondent's pre-CAFTA entry into force conduct. The fact of the MINAET instructions of 19 March 2009 do not alter this assessment. Third, whatever else may be their effect, the MINAET instructions do not, in the Tribunal's estimation, constitute a new independently actionable breach separable from the conduct that preceded it of which the Claimants were aware. Fourth, while international law may eschew undue formalism, giving effect to a limitation clause is not undue formalism; it is what is required by way of the proper interpretation and application of the treaty.

The Tribunal agrees with the Respondent that the three-year limitation period "is not an estimate".[194]

299. The second passing contention, in similar vein, was that the Claimants first learned of SETENA's 2008–2009 suspension of all expropriation proceedings when this was disclosed in the Respondent's Counter-Memorial on 15 July 2014. This contention does not alter the Tribunal's assessment and conclusion, *inter alia*, for the reason that affording to the Claimants' recently derived knowledge the weight that they propose would again turn the limitation clause on its head. The relevant question is the date on which the Claimants first acquired or are deemed to have first acquired knowledge of the breach and loss that they allege. While the Claimants may have first acquired knowledge of the SETENA suspensions in July 2014, the Tribunal has concluded, and underlines that conclusion, that the Claimants must be deemed to have first acquired knowledge of the breaches that form the essence of their claims a good deal earlier, before both the 10 June 2010 critical date and the 1 January 2009 CAFTA entry into force date. As with the MINAET instructions just addressed, knowledge of the SETENA 2008–2009 suspensions does not generate a new independently actionable breach separable from the conduct that preceded it of which the Claimants were aware.

300. Third, it warrants emphasis that the Tribunal, in this Award, is principally addressing questions that go to its jurisdiction and the justiciability of the Claimants' case under the CAFTA. It is not addressing the merits of the Claimants' allegations. It emphasises this point for two reasons. In the first place, the Tribunal's finding that it does not have jurisdiction over a large part of the Claimants' case should not be taken as sanguine endorsement of the delays that have self-evidently beset Costa Rica's expropriation process. The criticisms of this process in the Contraloría Report are withering. The Claimants have for the most part fallen at the jurisdictional hurdles. This should not, however, leave the Respondent with any sense that the Tribunal would not have subjected the Respondent's conduct to the most intense and critical scrutiny had the jurisdictional bars not applied.

[194] See paragraph 123 *supra.*

301. In similar vein, though, and (on the basis of the papers before the Tribunal) excluding Mr Gremillion from the comment that follows, the Tribunal observes that the maximalist case advanced by the Claimants fails in many respects to comport with the reality disclosed by the evidence. The denial of *ab initio* knowledge that the purchased properties were within the Park, and therefore at risk of expropriation, notwithstanding the express terms in Deeds of sale/purchase, as well as a prudential due diligence appreciation of the risks of what, in most cases, were investment transactions, raises serious questions going to the Claimants' liability and damages claims.

302. The further reason for emphasising the jurisdictional character of the present Award is for purposes of making an avowedly *obiter* comment that will bind neither Party nor any tribunal that may come to address these issues in the future. For purposes of bringing their claim, the Claimants, as was required of them under CAFTA Article 10.18.2, made written no-u-turn waivers with respect to "any measure alleged to constitute a breach". Given the findings of the Tribunal on questions of jurisdiction in this Award, the Tribunal considers that the question of to what measures the Article 10.18.2 waiver refers remains open.

303. By way of summary of the Tribunal's findings on jurisdiction:

(a) The Tribunal finds that it has no jurisdiction to entertain the Claimants' claims in respect of Lots A39, C71, C96, SPG3, V30, V31, V32, V33, V38, V39, V40, V46, V47, V59, V61a, V61b and V61c.

(b) The Tribunal finds that it has no jurisdiction to entertain the Claimants' claims in respect of Lots A40, B3, B8, SPG1 and SPG2 save in respect of the Claimants' allegations that, by reference to relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or blatant unfairness contrary to CAFTA Article 10.5.

(c) The Tribunal finds that the Parties should be afforded an opportunity to be heard on the question of whether the Tribunal has jurisdiction to entertain the Claimants' allegations of

breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts rendered after 10 June 2013 in respect of Lots B1, B5, B6 and B7.

E. Consequential Issues of Liability and Damages

304. The preceding discussion addresses issues of jurisdiction only. Although it summarises the arguments of the Parties on the issues of liability and damages, it reaches no view on their submissions.

305. This Award does, however, have important implications for the Parties' arguments on liability and damages. In the first place, the Tribunal's decision on the scope of its jurisdiction has the effect of fusing together the issues of liability and valuation. The Respondent will not be liable if the Tribunal concludes in due course that the property valuations adopted by the Costa Rican courts in respect of the directly expropriated portions of Lots A40, B3, B8, SPG1 and SPG2 were not manifestly arbitrary, blatantly unfair or were otherwise in breach of the minimum standard of treatment requirements of Article 10.5.

306. This being the case, and recalling the Tribunal's observation at the close of the hearing that, if the Tribunal was with the Claimants on any issue of jurisdiction, it would be likely to require additional evidence, and perhaps submissions, on damages, the Tribunal has concluded that, on the basis of the Parties' submissions and the evidential record in the case to this point, it is not in a position to reach a considered conclusion on either liability or damages in respect of the claims over which it has jurisdiction. The reasons for this go to the assumptions provided by each Party to its Expert on compensation issues and the methodology adopted by these Experts in the extensive reports submitted alongside the Parties' pleadings. This is not to express a view on the reliability of either Expert Report on compensation but simply to observe that a number of the Tribunal's findings in this Award are likely to be material to a revised valuation assessment. These findings include, but are not necessarily limited to, the following:

(a) Brett Berkowitz, as the claimant in respect of Lot B3, Aaron and Trevor Berkowitz, as the claimants in respect of Lot B8, and Spence Co., as the claimant in respect of Lots A40, SPG1 and SPG2, are deemed to have known, at the date of purchase of these properties,

that the portion of these lots that has subsequently been directly expropriated fell within the boundaries of the Las Baulas National Park.

(b) These Claimants, accordingly, are deemed to have known, at the time of their purchase of the lots in question, that the portions of the lots that were subsequently directly expropriated were at risk of expropriation.

(c) As follows from the discussion and conclusions in paragraphs 211 and 218 above, the Tribunal's jurisdiction to award damages is linked to and constrained by the specific alleged actionable breach of which it is seised and over which it has jurisdiction. Conversely, the Tribunal does not have jurisdiction to award damages in respect of conduct that, even if closely associated with the actionable conduct over which it has jurisdiction, does not itself gives rise to a self-standing justiciable cause of action.

(d) Without prejudice to the preceding point, in line with the Tribunal's conclusions in paragraph 217 above, regard may properly be had to pre-CAFTA entry into force and pre-limitation period acts and facts for purposes of determining whether there was a post-entry into force breach of a justiciable obligation.

(e) Subject to the Tribunal's conclusions in paragraphs 211 and 218, and without prejudice to its conclusions in paragraph 217 above, regard should be had for valuation purposes to the conclusions expressed in paragraphs 264–265 above on the date of the direct expropriation of the portions of the lots in issues in the claims over which the Tribunal has found jurisdiction.

307. In the light of this Award and the immediately preceding observations, and having regard to Articles 17(1) and 24 of the UNCITRAL Arbitration Rules, the Tribunal, after affording the Parties and opportunity to present their views, will determine an appropriate procedure to address the issues that remain outstanding in this case.

X. Decision

308. For the foregoing reasons, having carefully considered all of the arguments and evidence presented by the Parties in the written and oral pleadings and accompanying documents, the Tribunal unanimously decides:

1. The Tribunal finds that it has no jurisdiction to entertain the Claimants' claims in respect of Lots A39, C71, C96, SPG3, V30, V31, V32, V33, V38, V39, V40, V46, V47, V59, V61a, V61b and V61c.

2. The Tribunal finds that it has no jurisdiction to entertain the Claimants' claims in respect of Lots A40, B3, B8, SPG1 and SPG2 save in respect of the Claimants' allegations that, by reference to relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or blatant unfairness contrary to CAFTA Article 10.5.

3. The Tribunal finds that the Parties should be afforded an opportunity to be heard on the question of whether the Tribunal has jurisdiction to entertain the Claimants' allegations of breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts rendered after 10 June 2013 in respect of Lots B1, B5, B6 and B7.

4. The procedure applicable to further proceedings is reserved for further decision by the Tribunal in due course, following consultation with the Parties.

5. The Claimants and the Respondent shall each bear their own costs, including counsel's fees and expenses, and shall bear equally half of the fees and expenses of the Tribunal and the Secretariat, in respect of the proceedings to date, without prejudice to the possibility of a different apportionment of costs, fees and expenses in respect of any future phase of these proceedings.

Done on `30 May 2017` in Washington D.C. in English and Spanish, both versions being equally authentic.

[signed]

Mr Mark Kantor

Arbitrator

[signed]

Professor Raúl E. Vinuesa

Arbitrator

[signed]

Sir Daniel Bethlehem QC

Presiding Arbitrator

ANNEX 1

COUNSEL AND REPRESENTATIVES OF THE PARTIES

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Lic. Vianney Saborío Hernández	Hulbert Volio
Mr. Brett Berkowitz	Claimant
Mr. Robert Reddy	Claimant
Mr. Ronald Copher	Claimant
Mr. Bob Spence	Claimant
Ms. Marsha Spence	
Mr. Joshua Copher	

REPRESENTING RESPONDENT:

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Ms. María Carolina Durán	Sidley Austin LLP
Ms. Courtney Hikawa	Sidley Austin LLP
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Ms. Karima Sauma	Ministerio de Comercio Exterior de Costa Rica
Ms. Andrea Zumbado	Ministerio de Comercio Exterior de Costa Rica
Ms. Georgina Chaves	Witness
Mr. Julio Jurado	Witness
Mr. Rotney Piedra	Witness
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