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

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

v.

Republic of Costa Rica
Respondent.

ICSID Case No. UNCT/13/2

RESPONDENT'S REPLY ON JURISDICTION AND REJOINDER ON THE MERITS

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I. INTRODUCTION

1. In its Counter-Memorial on the Merits and Memorial on Jurisdiction ("Counter-Memorial"), Respondent explained that this case is about a series of measures that the Republic of Costa Rica has taken to protect one of the most endangered species in the world – the leatherback sea turtle, or *tortuga baula*. Costa Rica's Pacific coast is one of the turtle's main nesting sites. In 1991, Costa Rica created a national park to protect the beaches and the turtle's nests from human encroachment and development, and the State has taken steps since that time to regulate the use of land in and around the *Las Baulas* National Park ("National Park" or "Park") to protect that environmentally fragile habitat. These measures include formal, compensated expropriation of private property located within the Park's boundaries and environmental guidelines to protect the area. All of these measures seek to achieve a balance between the need to protect the turtles and the property rights of landowners inside and around the Park.

2. Claimants were, or should have been, fully aware that the land they purchased (or beachfront portions of the land they purchased) that is the subject of this dispute was located inside the Park and that that land was subject to being expropriated by the State. The Decree that created the Park in 1991 – *i.e.*, Executive Decree (No. 20518) of June 1991 ("1991 Decree") – identified the Park as including a 125-meter strip of land running inland from the high tide line and announced that the government would be expropriating private property within that area to achieve the main goal of the Park – the protection of the leatherback sea turtle and its nesting habitat. In 1995, a law confirmed the creation of the Park as well as the government's intention to expropriate property that fell within the boundaries of the Park. Later, in 2004 the *Procuraduría General de la República* ("*Procuraduría*") confirmed that the Park's boundaries ran 125 meters inland from the high tide line. In addition, several other official government

policy documents – known to Claimants – show that Costa Rica consistently treated the Park as including a 125-meter strip of land from the high tide line and that land within the 125 meters would be expropriated.

3. Claimants argue that they had no idea of their properties' protected status and that, in any case, they thought that Costa Rica would never expropriate their properties, because Costa Rica had not yet initiated expropriation procedures at the time some of the Claimants purchased their properties. However, as Respondent will show in this submission, several of the Claimants were directly notified of the existence of the Park before they purchased their land; others bought their properties after Costa Rica had already initiated expropriation procedures of nearby properties that were similarly inside the 125-meter strip of land that constituted the Park. Additionally, Claimants cannot claim ignorance of the applicable law that affected their properties (namely, the 1991 Decree and the 1995 Law). Claimants took a chance when they bought their properties, presumably hoping that the State would not proceed to expropriate their land even though the law stated that it was subject to expropriation. Claimants lost that gamble. They cannot avoid the inescapable fact that the properties they purchased (or portions thereof) included land within the boundaries of the Park. As such, those properties (or portions thereof) were subject to, and eventually were going to be, expropriated.

4. Claimants now complain about Costa Rica's efforts to protect the nesting habitat of the leatherback turtles and to restrict development in the area. Claimants question the factual premise of the Park and the relevant laws – *i.e.*, that beachside development can adversely affect the turtles and their nesting sites – and they claim that Costa Rica is taking unreasonable measures to protect a critically endangered species. Claimants also complain about the expropriation procedures undertaken by Cost Rica, alleging that the procedures are in breach of

Costa Rica's international obligations under the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA").[1] None of these allegations is true, as Respondent will demonstrate in this Rejoinder. Nevertheless, Claimants come to this arbitration in the hopes of securing a windfall of some US $36.5 million (plus interest) in connection with Costa Rica's legitimate public purpose regulation to protect an endangered species.

5. Costa Rica has not breached any of its international obligations under CAFTA. To the extent Costa Rica has expropriated Claimants' properties (or portions thereof), such takings have not been uncompensated. Rather, Costa Rica has reasonably followed its domestic legal procedures to determine the fair market value of those properties and compensate Claimants accordingly. Costa Rica has already: (i) compensated Claimants in full (*i.e.*, principal and interest) for the expropriated portion of one property; (ii) paid the principal due on three more of Claimants' properties and will pay Claimants interest on those properties once the appropriate procedures are completed; and (iii) paid Claimants a provisional deposit of compensation on five other properties and will pay Claimants any outstanding difference, plus interest, after the expropriation process has concluded. For the remaining properties – *i.e.*, those properties that have not yet been expropriated – Costa Rica will compensate Claimants when the procedures to determine fair market value of those properties are finalized.

6. None of Costa Rica's other *bona fide* regulatory measures allegedly affecting Claimants' properties constitute expropriation or has in any way breached Costa Rica's obligations under the CAFTA. Rather, all of Costa Rica's actions constitute reasonable efforts by the State to carry out its right and responsibilities to protect Costa Rica's natural environment.

[1] *See* The Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA"), Chapter 10, January 1, 2009 [Exhibit C-1a].

7. In light of these facts, Claimants have presented no legitimate claims on the merits. However, the Tribunal need not get that far, because the claims asserted by Claimants fall outside the Tribunal's jurisdiction. First, this Tribunal does not have jurisdiction over Claimants' claims, because the alleged breaches occurred before CAFTA entered into force on January 1, 2009. Second, Claimants' claims are barred under CAFTA's three year statute of limitations. Claimants knew or should have known about the alleged breaches more than three years before they submitted their Notice of Arbitration.

8. Respondent's Counter-Memorial detailed in full the facts of this case and the significance (or lack thereof) of the events about which Claimants complain. Respondent will not reiterate that full history in this Reply on Jurisdiction and Rejoinder on the Merits ("Rejoinder"), but rather will focus on specific rebuttals to certain erroneous factual and legal arguments made by Claimants in their Reply on the Merits and Counter-Memorial on Jurisdiction ("Reply"). Respondent maintains and incorporates by reference the facts and arguments set forth in its Counter-Memorial and expressly does not waive or concede any issue not directly addressed once again in this submission.

9. Respondent's Rejoinder proceeds as follows: Part II rebuts Claimants' key factual assertions. Part III responds to Claimants' arguments concerning Respondent's objections to jurisdiction. Part IV addresses the legal arguments underlying Claimants' claims. Part V responds to Claimants' overstated damages claim for more than US $36 million (plus interest), and Part VI provides a brief conclusion.

II. FACTS

10. Claimants make three central factual allegations in their Reply: (i) that Costa Rica has acted inconsistently with respect to the protection of the leatherback sea turtles and the

boundaries of the *Las Baulas* National Park;[2] (ii) that Claimants had no reason to believe that their properties included land inside the *Las Baula* National Park, and thus that those portions of their properties would be expropriated;[3] and (iii) that Costa Rica has unreasonably delayed the expropriation process for such properties.[4] None of these assertions is correct.

11. First, Costa Rica has acted consistently with respect to the protection of the leatherback sea turtles and the boundaries of the *Las Baulas* National Park from 1991 to today. As explained in Respondent's Counter-Memorial, the leatherback sea turtle is one of the most endangered species on Earth.[5] In particular, the leatherback population that lives in the Eastern Pacific Ocean has been identified as being critically endangered.[6] Costa Rica is home to some of the most important nesting sites of the leatherback sea turtles anywhere in the world. But those sites have experienced significant declines in the population of nesting leatherback turtles.[7] It was for this reason – that is, to protect the leatherback sea turtle – that the *Las Baulas* National Park was created in 1991. Since that time, the Park has included a 125-meter strip of land running inland from the mean high tide line along a portion of Costa Rica's coastline in order to protect from destruction the beaches where the turtles come each year to lay their eggs.[8]

12. Second, Claimants knew, or should have known, that the properties they were acquiring included land that lay inside the Park and, thus, was subject to being, and eventually

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[2] *See* Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, October 2, 2014 ("Claimants' Reply"), paras. 54-62, 68.

[3] *See* Claimants' Reply at paras. 73-103.

[4] *See* Claimants' Reply at paras. 126-149.

[5] *See* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, July 15, 2014 ("Respondent's Counter-Memorial"), paras. 11-18.

[6] *See* IUCN, 2014 Red List of Threatened Species, "Dermochelys coriacea (East Pacific Ocean subpopulation)," *available at* http://www.iucnredlist.org/details/46967807/0 (last visited December 1, 2014) ("IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback"), p.1 [Exhibit R-025].

[7] *See* Respondent's Counter-Memorial at paras. 16-18.

[8] *See* Respondent's Counter-Memorial at paras. 21-22.

would be, expropriated. The Park was established in 1991 by an Executive Decree. That Decree specifically identified the 125-meter portion of the coastline that fell within the scope of the Park.[9] In addition, Law No. 7524 enacted in 1995 ("*Las Baulas* National Park Law" or "1995 Park Law") set out in greater detail the objectives that had motivated the creation of the Park and included a provision that specifically authorized the State to acquire, either through direct purchase or expropriation, any private properties located within the boundaries of the Park.[10] Since the creation of the Park, it has been clear that the Park included a 125-meter strip of land along certain portions of Costa Rica's coastline. Given that both the Decree and the 1995 Law are public documents, Claimants knew, or should have known, the terms and boundaries of the Park at the time they acquired their properties.[11]

13. Claimants disingenuously assert that, because Costa Rica had not yet initiated any expropriations of land in the Park at the time certain of Claimants' properties were acquired, they had no reason to believe that their properties would be expropriated.[12] This is incorrect. The text of the 1995 Park Law is clear: the privately held land located within the Park boundaries will be expropriated in order to complete the Park's consolidation process.[13] Thus, long before Claimants acquired their properties at issue in this case, it was clear that the property located inside the boundaries of the National Park would be subject to expropriation by the State. Claimants may have (mistakenly) hoped that Costa Rica would change or fail to implement its

[9] *See* Executive Decree No. 20518-MIRENEM, July 9, 1991 ("Executive Decree No. 20518-MIRENEM") [Exhibit C-1b].

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

[11] *See* Expert Report of Aldo Milano, December 22, 2014 ("Milano Expert Report"), at paras. 19, 30-32 [Exhibit RWE-012].

[12] *See* Claimants' Reply at paras. 85-97.

[13] *See* Law Creating the *Las Baulas* National Park, Law No. 7524, July 10, 1995 ("*Las Baulas* National Park Law"), at Art. 2 [Exhibit C-1e].

laws, but they were undoubtedly on notice that, under the governing law, the portions of their properties lying inside the Park were expressly designated for expropriation.

14. Third, Costa Rica has indeed been expropriating property located within the Park and has done so in accordance with international and municipal law. Costa Rica has an expropriation system that has multiple safeguards that are designed to protect the landowners' property rights. Costa Rica has been undertaking the expropriation of properties in the Park in accordance with those laws and regulations. In accordance with this system, Claimants have been, are being, or will be accorded fair market value compensation once the expropriation procedures are concluded.

15. Each of these points is explained in greater detail in the Sections that follow.

A. THE LEATHERBACK SEA TURTLES (*LAS BAULAS*) AND THE *LAS BAULAS* NATIONAL PARK

16. Claimants allege that Respondent "paints a dire, but not entirely accurate, picture of the current and likely future of the Leatherback Turtle."[14] Claimants allege, in particular, that Costa Rica lacks support for its concerns about the potentially harmful impact of that coastal development on the leatherbacks and their nesting sites.[15] Claimants also allege that Costa Rica could have protected the leatherback sea turtles through different measures, other than creating the *Las Baulas* National Park.[16] Claimants' assertions are unfounded and/or misguided.

17. It is undisputed that the leatherback sea turtle in the East Pacific Ocean is critically endangered.[17] The global population of the leatherback sea turtle is divided among

[14] Claimants' Reply at para. 54.

[15] *See* Claimants' Reply at para. 55

[16] *See* Claimants' Reply at paras. 56-8.

[17] *See generally* IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback [Exhibit R-025]; *see also* Second Witness Statement of Rotney Piedra, December 22, 2014 ("Piedra Second Witness Statement,") para. 8 [Exhibit RWE-008].

seven subpopulations.[18] These subpopulations have been used as the unit of scientific assessment to determine the conservation status of the species.[19] One of these subpopulations is the leatherback turtles found in the East Pacific Ocean.[20] The main nesting sites of this subpopulation are in Mexico and Costa Rica.[21] Thus, it is this subpopulation of the leatherback sea turtle that is relevant to this case.

18. Claimants allege that "Respondent appears unaware that Leatherback populations in other parts of the world have actually held steady or risen for years . . ."[22] This statement is incorrect. Respondent is not unaware of the current situation of the leatherback sea turtle around the world. It is true that, for example, the leatherback subpopulation of the Northwestern Atlantic Ocean has been identified as being of less concern for conservation purposes than other subpopulations around the world.[23] But it is also true that out of the seven subpopulations of the leatherback sea turtle, four have been identified as recently as this year as being critically endangered, including the Eastern Pacific Ocean subpopulation that nests the *Las Baulas* National Park.[24]

19. Claimants apparently suggest that, because other leatherback populations are not quite as critically endangered as the Eastern Pacific Ocean subpopulation, it is inappropriate or unnecessary for Costa Rica (and other States) to take measures to try to prevent the extinction of

[18] *See* IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback, p. 6 [Exhibit R-025]; *see also* Piedra Second Witness Statement at para. 6 [Exhibit RWE-008].

[19] *See* IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback, p.6 [Exhibit R-025]; *see also* Piedra Second Witness Statement at para. 6 [Exhibit RWE-008].

[20] *See* IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback, p.6 [Exhibit R-025]; *see also* Piedra Second Witness Statement at para. 6 [Exhibit RWE-008].

[21] *See* Piedra Second Witness Statement at para. 7 [Exhibit RWE-008].

[22] Claimants' Reply at para. 54.

[23] *See generally* Wallace *et al*., *Global Conservation Priorities for Marine Turtles*, 6(9) PLOS ONE 6 (2011) [Exhibit R-084]; *see also* Piedra Second Witness Statement at para. 8 [Exhibit RWE-008].

[24] *See* Piedra Second Witness Statement at para. 8 [Exhibit RWE-008].

the Eastern Pacific Ocean subpopulation. Costa Rica disagrees. It believes that States have a solemn responsibility to protect endangered species (including subpopulations of such species) so that they do not, in fact, become extinct.

20. As stated in Respondent's Counter-Memorial, one of the major threats to the leatherback sea turtle is beachside development. Claimants assert that this proposition is "unsupported, and unsupportable."[25] It is not. There is abundant scientific evidence that unsustainable beachside development presents a serious threat to the efforts to protect the reproductive cycle of the leatherback turtle.[26] As the Park's Administrator and conservation biologist, Mr. Rotney Piedra Chacón, explains in his second witness statement, coastal development results in erosion of the beach and the invasion of exotic species that represent a threat to the adult turtles that lay eggs on the beach and to the newborn turtles after they hatch months later.[27] This is because to carry out construction in the area, developers destroy some of the vegetation that serves as a barrier protecting the beaches. In addition, coastal development affects the temperature of the sand which impacts the distribution of gender of the newborn turtles.[28] This is because if the temperature of the sand is too hot, there is a higher incidence of female turtles; but if the sand is too cold, there is a higher incidence of male turtles.[29] Artificial illumination from constructed properties and roads also affects the turtles. This is because

[25] Claimants' Reply at para. 55.

[26] *See e.g.* IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback [Exhibit R-025]; Wallace and Piedra, *Sea Turtles of the Eastern Pacific Advances in Research and Conservation: Reconciling Human Pressures and Conservation* 203(2012) [Exhibit C-115]; Humane Society International and International Fund for Animal Welfare, "Sea Turtles: A Struggle for Survival," pp. 4-6 [Exhibit R-087]; Letter from SINAC/Área de Conservacion Tempisque to Members of Congress, ACT-OR-DT-916, 28 July 2009 [Exhibit R-033] (identifying habitat threats); *see also* Piedra Second Witness Statement at para. 16 [Exhibit RWE-008].

[27] *See* Piedra Second Witness Statement at para. 16 [Exhibit RWE-008].

[28] Humane Society International and International Fund for Animal Welfare, "Sea Turtles: A Struggle for Survival," at p. 5 [Exhibit R-087].

[29] Humane Society International and International Fund for Animal Welfare, "Sea Turtles: A Struggle for Survival," at p. 5 [Exhibit R-087].

nesting occurs at night. Adult female turtles depend on the moonlight to guide them back to the ocean once they have deposited their eggs. Baby turtles are similarly affected by artificial light – they, too, depend on reflections on the water to guide them to the ocean. Because artificial light creates light on the beach other than light from the moon, the turtles become disoriented and no longer know the direction of the ocean.[30] All of these factors directly affect the reproductive cycle of the turtle. Ensuring safe reproduction of the turtles is a key element of protecting the survival of this critically endangered species. Thus, Claimants' suggestion that there is no logical connection between restricting beachside development and protecting the turtles' nesting cycle is without merit.[31]

21. Of course, there are other threats that have affected the leatherback sea turtle populations, including at other points in their life cycles. For example, the International Union for Conservation of Nature ("IUCN") has identified other threats to the species such as fisheries by-catch (*i.e.*, the incidental capture of non-target sea animals in commercial fishing), egg theft, pollution, and climate change.[32] Claimants suggest that Respondent's focus on the threats posed by beachside development ignores other threats to the turtles' survival and is therefore misguided.[33] Claimants also allege that Costa Rica has only recently focused on the impact of beachside development on the survival of the sea turtle population, as if to suggest that Costa Rica invented this concern for the sole purpose of its defense in this arbitration.[34] Both assertions are incorrect. Costa Rica certainly does not deny the existence of other threats to the leatherback sea turtle. In fact, it has worked hard to overcome those threats as well, in particular

[30] *See* Piedra Second Witness Statement at para. 16 [Exhibit RWE-008].

[31] *See* Claimants' Reply at para. 55.

[32] *See* IUCN, 2014 Red List of Threatened Species, East Pacific Population of the Leatherback, p. 8 [Exhibit R-025].

[33] *See* Claimants' Reply at paras. 55-60.

[34] *See* Claimants' Reply at para. 60.

the theft of eggs.[35] It is certainly not the case, however, that Costa Rica has changed its rhetorical focus to beachside development for the purposes of this arbitration. Unsustainable beachside development has been an expressly stated public policy concern at least since the creation of the Park in 1991. In fact, development is expressly referenced in the 1991 Decree.[36]

22. Claimants would have this Tribunal believe that the need to protect the turtles' nesting sites on an inland strip of 125 meters of beach and beachfront along the coastline is a "myth[]."[37] Specifically, Claimants allege that Respondent is "eager to propagate" a "myth[]" that "the nesting habitat of the Leatherback somehow extends beyond the 50-meter public zone (i.e. that any Leatherback could or would ever crawl up the sand berm, through the vegetation and into the forest)."[38] This statement is nonsensical. Respondent has never stated that the leatherbacks "crawl up the sand berm," nor that the leatherbacks have nesting sites inside the forest. That is not, and has never been, the explanation for the extent of the protected area.

23. Rather, the 125-meter strip of land is necessary to protect the reproductive process of the leatherbacks. This strip of land includes the beach, where the turtles do in fact lay their eggs. It also includes a small buffer zone—the sand berm at the edge of the beach, and a strip of vegetation that shields the berm and the beach—which serves as a sort of natural wall of protection for the turtles and their nesting sites on the beach from the adverse impacts of human activity.[39] As Mr. Piedra explains in his second witness statement, the 75-meter zone (in addition to the 50-meter public zone) serves a very important purpose. The vegetation in this

[35] *See* Piedra Second Witness Statement at para. 18 [Exhibit RWE-008].

[36] *See* Executive Decree No. 20518-MIRENEM at Clause 4 (stating that "if tourist infrastructure were developed in [the nesting] sites, waste, lighting, vehicle and outboard motor noise and other serious disruptions shall be produced and these would seriously affect the turtles") [Exhibit C-1b].

[37] Claimants' Reply at para. 61.

[38] Claimants' Reply at para. 61; *see also* Claimants' Reply at para. 177.

[39] *See* Piedra Second Witness Statement at para. 29 [Exhibit RWE-008].

area and the sand berms prevent erosion and maintain the darkness of the beach.[40] Without the 75-meter zone, the Park would not be accomplishing its main purpose.

24. In addition, Claimants' allegation is inconsistent with multiple assessments by Costa Rican authorities that any property development within that 75-meter zone was incompatible with protecting the turtles and their nesting habitat (*e.g.*, the assessments made by the Costa Rican legislature in providing for the expropriation of properties within the Park in the 1995 Law, and by the Ministry of Environment, Energy, Mines and Tourism ("MINAE" in Spanish) and the National Environmental Technical Secretariat ("SETENA" in Spanish) in suspending permitting for properties inside the Park in 2005).

25. Claimants would also have this Tribunal believe that "Respondent's measures have done nothing to help the leatherback turtle."[41] Claimants even assert that Respondent's measures were not necessary to achieve the protection of the turtles, because the leatherback population "was decimated during a period in which there was virtually no development."[42] Furthermore, they allege that Respondent's conservation objectives "could and would have been easily addressed through the adoption of appropriate building codes."[43] Claimants' efforts to divert the Tribunal's attention away from Costa Rica's environmental protection objectives are logical as a matter of litigation strategy, because Claimants seek to avoid the fact that their rights as foreign investors under CAFTA are not grants of immunity from *bona fide* governmental measures taken in the public interest and that their investments in Costa Rica (like all property in Costa Rica) are subject to the reasonable exercise of regulatory discretion of a sovereign state.

[40] *See* Piedra Second Witness Statement at para. 29 [Exhibit RWE-008].

[41] Claimants' Reply at para. 180.

[42] Claimants' Reply at para. 62.

[43] Claimants' Reply at para. 56.

26. But contrary to Claimants' assertions, the creation of the Park does have a legitimate environmental purpose – that is, to protect the leatherback sea turtles from extinction – and that purpose is supported by multiple studies identifying the reasons for the decline of the leatherback sea turtle globally.[44] Thus, Respondent's actions are indisputably tied to a specific public purpose, and Respondent had rational bases for selecting the measures it selected in pursuit of that public purpose. Claimants would like the Tribunal to pay no heed to the rationale for the creation of the *Las Baulas* National Park, because, for example, they cannot plausibly argue that the Park extends only seaward and not inland (as discussed in greater detail below) unless they ignore the fact that a principal motivation for the creation of the Park as far back as 1991 was to protect the turtles' nests, which are on land.[45]

27. Likewise, an understanding of the turtles' biology and ecology—such as the fact that turtles nest above the high tide line, have long development periods, have low survival rates from egg to breeding-age maturity, and are susceptible to noise, lights and pollution[46]—helps to explain, *inter alia*, the importance of protecting nesting sites, the concerns about human development adjacent to the nesting areas, and the long-term nature of Costa Rica's protection efforts. One need not be a biologist to understand the fallacy of Claimants' statement that Respondent's measures have done nothing to help the turtles, which they base on the fact that

[44] *See e.g.* Wallace *et al*., *Global Conservation Priorities for Marine Turtles*, 6(9) PLOS ONE (2011) [Exhibit R-084]; IUCN 2014 Red List of Threatened Species, East Pacific Population of the Leatherback [Exhibit R-025].

[45] *See* Executive Decree No. 20518-MIRENEM, Preamble at clauses. 1, 4, 5[Exhibit C-1b]; *see also* CR Supreme Court, Constitutional Chamber, Res. No. 07-10578, File No. 06-014770-0007-CO, 25 July 2007, VI [Exhibit C-1zc] (*"The Decree [Executive Decree No. 20518-MIRENEM] provides the importance of creating a special regime of protection in Playa Grande, Playa Langosta and neighbouring areas for the protection of the beaches, located within the territorial limits of the Park, which are within the three most important nesting areas of the leatherback turtles."*).

[46] *See* Humane Society International and International Fund for Animal Welfare, "Sea Turtles: A Struggle for Survival", pp. 4-5 [Exhibit R- 087]; IUCN 2010 Red List of Threatened Species "Demochelys coriacea," *available at* http://www.iucnredlist.org/apps/redlist/details/6494 (as accessed August 16, 2010) [Exhibit R-024]; IUCN 2014 Red List of Threatened Species, East Pacific Population of the Leatherback [Exhibit R-025]; Letter from SINAC to Members of Congress, ACT-OR-DT-916, July 28, 2009 [Exhibit R-033] (identifying habitat threats).

turtle populations have continued to decline even in the absence of extensive beachside development. Turtles spend more than 12 years at sea reaching maturity before returning to nest on the beach where they were spawned.[47] As a result, there is considerable time-lag between nesting site protection efforts and the population's condition (which Claimants happily ignore). It is practically self-evident that a decline in current nesting rates will have much more to do with conditions on the beaches decades earlier (or conditions at sea during those decades), than with conditions on the beaches during the immediately preceding years. As the Park's Administrator, Mr. Piedra, confirms in his second witness statement, the results of "it will take years to see the results of conservation efforts [to protect] because once the turtles are born they take 12-30 years to reach sexual maturity."[48]

28. More fundamentally, it is not for Claimants (or, with respect, this Tribunal) to substitute their unscientific judgments of what is, or is not, appropriate to achieve the objective of protecting the turtle population and habitats. Respondent provided information on the turtles' ecology in its Counter-Memorial in order to aid the Tribunal in understanding the rationale for and the public interest inherent in Costa Rica's actions. But the record in this proceeding is in no way an adequate basis for assessing the scientific underpinnings of the State's environmental policies. Moreover, even if Claimants had grounds to question the scientific bases for Costa Rica's turtle protection policy choices (which they do not), this proceeding is not an appropriate forum to second-guess the Costa Rican government's legislative and regulatory judgments. Costa Rica's actions have been reasonably taken in the exercise of the State's discretion and authority to decide what measures are appropriate in order to carry out its environmental protection responsibilities. Claimants might have preferred the State to make different policy

[47] *See* Piedra Second Witness Statement at para. 30 [Exhibit RWE-008].

[48] Piedra Second Witness Statement at para. 30 [Exhibit RWE-008].

choices, but there is no question that Costa Rica's measures to protect turtle nesting sites have rational bases and are within a reasonable range of choices for the State's sea turtle conservation efforts.

B. THE *LAS BAULAS* NATIONAL PARK INCLUDES A 125-METER STRIP OF LAND ON WHERE CLAIMANTS' PROPERTIES ARE LOCATED

1. Since 1991 the Park Has Included a 125-Meter Strip of Land

29. Claimants' claims rest heavily on the (incorrect) proposition that at the time they acquired their properties, the Park did not include a 125-meter strip of land which would be expropriated.[49] In their Reply, Claimants allege that the National Park has changed boundaries several times.[50] Claimants' assertions are without merit.

30. *The 1991 Decree*: The boundaries of the *Las Baulas* National Park were initially established by the 1991 Decree.[51] In addition to its clear geographical delimitations, the Decree specifically mentioned the beach of Playa Grande as one of the most important nesting sites in the world for the leatherback turtles.[52] The Decree clearly specified that the area protected by the Decree included a strip of land extending 125 meters inland from the mean high tide line of the Playa Grande and Playa Ventanas beaches: "From a point located in the southern end of Playa Ventanas [that is, the northern end of Playa Grande], 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

[49] *See* Claimants' Reply at para. 193.

[50] *See* Claimants' Reply at paras. 63-103.

[51] *See* Executive Decree No. 20518-MIRENEM [Exhibit C-1b].

[52] *See* Executive Decree No. 20518-MIRENEM, Preamble at clauses. 1, 4, 5 [Exhibit C-1b]; *see also* CR Supreme Court, Constitutional Chamber, Res. No. 07-10578, File No. 06-014770-0007-CO, 25 July 2007, VI [Exhibit C-1zc] ("*The Decree [Executive Decree No. 20518-MIRENEM] provides the importance of creating a special regime of protection in Playa Grande, Playa Langosta and neighbouring areas for the protection of the beaches, located within the territorial limits of the Park, which are within the three most important nesting areas of the leatherback turtles.*").

the coordinates N 255,000 and E 335,050 [which are inland coordinates]. . . Playas Carbon y Ventanas, including a strip of land of 75 meters from the public zone, is declared a protective zone. . . ."[53] The coordinates described above are shown on the map below identified with the green and purple dots.

[53] *See* Executive Decree No. 20518-MIRENEM, Arts. 1, 2 [Exhibit C-1b].

Figure 1. Extract of Cartographic Sheets of the Matapalo and Villareal of the National Geographic Institute Scale (1:50.00). Green and purple dots identify the starting and ending points of the 125 meter strip of land included in the Park, as indicated in the 1991 Decree. The red and purple points identify the starting and ending points of the 125 meter strip of land included in the Park, as indicated in the 1995 Park Law.[54]

31. The delimitation of the Park in 1991 was not a mistake. Claimants allege that even in 1991, Respondent had no intention of creating a 125-meter strip of land within the Park.[55] Claimants cite to a statement made by Ms. Maria Teresa Koberg, one of the main promoters of the creation of the Park in 1991, in an article that she wrote in 2001. In the article, Ms. Koberg says that President Calderón (President of Costa Rica at the time the 1991 Park

[54] *See* Annex A.

[55] *See* Claimants' Reply at para. 65.

Decree was issued) stated: "María Teresa, I have been deceived. The land in the national park has already been developed."[56] Claimants read this statement (which they label an admission) as suggesting that President Calderón was deceived in some manner about the boundaries of the Park. Even setting aside the absence of any actual evidence of deception, it is clear that Claimants' reading unnaturally twists the statement in question. A far more natural reading is that the alleged statement refers to the fact that some of the land that had been declared as Park land had already been urbanized.[57] In any case, whatever the truth may be, nothing in Ms. Koberg's article changes the fact that, on its face, the 1991 Decree covered a 125 meter strip of land that included portions of the properties that Claimants later acquired.

32. *The 1995 Law*: On July 10, 1995, the Costa Rican Congress passed the *Las Baulas* National Park Law, which set out in greater detail the means to achieve the Park's environmental objectives and its boundaries.[58] In essence, the Law made the provisions of the 1991 Decree law. Claimants focus in their Reply on the language in the Park Law that mistakenly describes the Park as extending 125 meters "seaward," which they use to claim that Costa Rica has taken inconsistent positions about what land is included within the Park's boundaries.[59] There is no merit to Claimants' assertions.

33. Respondent has never denied that, in stating the boundaries of the Park, Article 1, paragraph 2 of the 1995 Park Law erroneously referred to the 125 meter zone as extending "seaward," instead of inland, from the high tide mark. Claimants clarify in their Reply that they do not claim that the 1995 Park Law created an exclusively maritime park, because they

[56] Maria Teresa Koberg, "Mr. Abel Pacheco 'Father of the turtles'," Semanario Universidad, February 24, 2010, 1 [Exhibit C-114]; *see also* Claimants' Reply at para. 65.

[57] *See* Maria Teresa Koberg, "Mr. Abel Pacheco 'Father of the turtles,'" Semanario Universidad, February 24, 2010 at 1 [Exhibit C-114].

[58] *See Las Baulas* National Park Law at Art. 1 [Exhibit C-1e].

[59] *See* Claimants' Reply at paras. 63-83.

acknowledge that a different paragraph in Article 1 includes other areas of land within the Park's boundaries (*e.g.*, Cerro el Morro, Isla Verde).[60] But they continue to insist that the Park includes no land at all on Playa Grande or Playa Ventanas (where Claimants' properties are located)—despite the fact that that interpretation would place all of the turtle nests on these beaches outside the very Park that was created to protect them.

34. Respondent established in its Counter-Memorial that (i) the 1995 Park Law's textual error was clearly that—an error; and (ii) Costa Rica's authorities have consistently conducted themselves on the understanding that the Park extends inland and that 75 meters of Claimants' properties are inside the Park. Moreover, as will be discussed next, as a legal matter, definitive and binding interpretations were issued—and validated by the Supreme Court of Costa Rica—to confirm that the Park's boundaries lie on land on Playa Grande and its neighboring beaches.[61]

2. The *Procuraduría* Confirmed that the Park Includes a 125-Meter Strip of Land

35. In 2004, the *Procuraduría*, Costa Rica's legal advisory body and its legal representative in judicial proceedings, issued two legal opinions regarding the 1995 Park Law, both of which confirmed that the Park includes a 125-meter strip of land. In their Reply, Claimants allege that Respondent takes an "infeasible proposition with respect to the allegedly binding character of a letter written by a *Procuraduría* staff attorney . . . in February 2004."[62] Claimants also allege that the *Procuraduría*'s opinion issued in February 2004 was rendered in breach of Costa Rican law.[63] In addition, Claimants make unsupported allegations regarding the

[60] *See* Claimants' Reply at para. 63.

[61] *See* Respondent's Counter-Memorial at paras. 19-40.

[62] Claimants' Reply at para. 98.

[63] *See* Claimants' Reply at paras. 100-103.

independence of the *Procurador* who issued the two legal opinions in 2004 and 2005, Mr. Julio Jurado.[64] Finally, Claimants allege that the *Procuraduría's* two opinions were not made public and, therefore, were not known to Claimants at the time they were issued.[65] Claimants' allegations are without merit. We describe briefly below the *Procuraduría's* opinions, their content, their legality, and the public nature of the documents.

36. The *Procuraduría* issued two legal opinions with the same conclusion: Article 1 of the Park Law included within the Park a 125-meter strip of land that runs along Costa Rica's Northwest coast.[66] The first legal opinion (*opinión*) was issued on February 10, 2004.[67] This *opinión* was issued in response to a request sent by the then-Minister of Environment Carlos Rodriguez in May 2003.[68] In this *opinión*, the *Procuraduría* concluded that the Park includes a 125-meter strip of land extending inland from the high tide line.[69] Contrary to Claimants' allegations,[70] Respondent has never suggested that this document was binding. Even so, the *opinión* does have persuasive value as it is an opinion of the *Procuraduría* on a significant topic of concern to the State.[71]

37. According to Costa Rican law, the *Procuraduría* issues binding legal opinions when the request for an opinion has been submitted together with a study performed by the legal

[64] *See* Claimants' Reply at para. 102.

[65] See Claimants' Reply at para. 103.

[66] *See* Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, OJ-015-2004, February 10, 2004 ("*Procuraduría's* Legal Opinion No. OJ-015-2004") [Exhibit C-1t]; Binding Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, C-444-2005, December 23, 2005 ("*Procuraduría's* Binding Legal Opinión No. C-444-2005") [Exhibit C-1g].

[67] *See Procuraduría's* Legal Opinion No. OJ-015-2004 [Exhibit C-1t].

[68] *See Procuraduría's* Legal Opinion No. OJ-015-2004 at 1 [Exhibit C-1t].

[69] *See Procuraduría's* Legal Opinion No. OJ-015-2004 at 19-21 [Exhibit C-1t]; *see also* Respondent's Counter-Memorial at paras. 32-33.

[70] *See* Claimants' Reply at paras. 98-99.

[71] *See* Witness Statement of Julio Jurado, December 22, 2014 ("Jurado Witness Statement") at para. 8 [RWE-006].

department of the public entity submitting the request.[72] Minister Rodriguez inadvertently omitted such a study in his request submitted to the *Procuraduría* in 2003.[73] For this reason, as was the practice of the *Procuraduría* at that time, the *Procuraduría* responded to MINAE's inquiry, but at the same time clarified that the *opinión* was not a binding interpretation.[74] Nevertheless, because the *Procuraduría* considered the matter of great importance, it responded substantively to the inquiry.[75]

38. The second legal opinion (*dictamen*) regarding Article 1 of the Park Law was issued on December 23, 2005. The *dictamen* confirmed the *Procuraduría*'s interpretation of the 1995 Park Law that had been articulated in the February 2004 *opinión*.[76] The *dictamen* interpretation came about because, in September 2005, MINAE's legal department issued an opinion in which it concluded that Article 1 of the Park Law contained a mistake when it referred to the 125-meter strip of protected area as seaward.[77] Based on this opinion, MINAE requested that the *Procuraduría* issue a *dictamen* regarding its interpretation of the 1995 Park Law.[78] The *Procuraduría* did so in the December 2005 *dictamen*, agreeing with MINAE's interpretation of the 1995 Park Law as extending the Park's boundaries 125 meters inland.

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[72] *See* Organic Law of the Office of the *Procuraduría* of the Republic, Law No. 6815, September 27, 1982 ("Organic Law of the Office of the *Procuraduría* of the Republic"), Art. 4 [Exhibit C-1o].

[73] *See Procuraduría's* Legal Opinion No. OJ-015-2004 [Exhibit C-1t]; *see also* Letter from MINAE to *Procuraduría* attaching legal study, February 24, 2004 [Exhibit R-095].

[74] *See Procuraduría's* Legal Opinion No. OJ-015-2004 at 1 [Exhibit C-1t]; *see also* Second Witness Statement of Gloria Solano Martinez, December 22, 2014 ("Solano Second Witness Statement") at para. 6 [RWE-007]; Jurado Witness Statement at para. 8 [Exhibit RWE-006].

[75] *See Procuraduría's* Legal Opinion No. OJ-015-2004 at 1 [Exhibit C-1t]; *see also* Letter from Procuraduría to MINAE Attaching Legal Study, March 4, 2004 [Exhibit R-096].

[76] *See Procuraduría's* Binding Legal Opinión No. C-444-2005 [Exhibit C-1g]; *see also* Respondent's Counter-Memorial at para. 34.

[77] *See* Request from MINAE to *Procuraduría* on interpretation on Law creating the *Las Baulas National Park*, attaching study from legal department, DM-1725-05, October 19, 2005 at 1 [Exhibit R-094]; *see also Procuraduría's* Binding Legal Opinión No. C-444-2005 [Exhibit C-1g].

[78] *See Procuraduría's* Binding Legal Opinión No. C-444-2005 at 1 [Exhibit C-1g].

39. In contrast to the first opinion issued by the *Procuraduría* in February 2004, this opinion was (and is still) binding.[79] As provided under Costa Rican law, the *Procuraduría* is deemed to be part of Costa Rica's administrative jurisprudence.[80] As such, a *Procuraduría's dictamen* is a document that is generally applicable to all and is a legally binding interpretation of a particular law – in this case, Article 1 of the 1995 Park Law.[81]

40. Claimants' allegation that the legal opinions were not public and were not notified to Claimants is both incorrect and misleading. While it is true that Costa Rican law does not require that the *Procuraduría* notify third parties about the interpretative opinions it issues, as explained below, these interpretations were available to the public at the time they were issued. In addition, as explained by Ms. Gloria Solano, an attorney currently working at the *Procuraduría* as a *Procuradora*, and Mr. Jurado, former *Procurador* and author of the two *Procuraduría* opinions discussed in this case, in their witness statements, the *Procuraduría* publishes all of its opinions, binding and non-binding, in the National System of Valid Legislation within the Costa Rican System of Legal Information's website ("SCIJ" in Spanish).[82] This system has been in place since 1997.[83] Thus, at minimum, the two opinions were available on the SCIJ website for all interested parties to review. In addition, the February 2004 *opinión*

[79] *See* Organic Law of the Office of the *Procuraduría* of the Republic, Art. 2 [Exhibit C-1o].

[80] *See* Organic Law of the Office of the *Procuraduría* of the Republic, Art. 2 [Exhibit C-1o].

[81] *See* General Law of Public Administration, Law No. 6227, April 28, 1978, Art. 7 [Exhibit R-089]; *see also* Solano Second Witness Statement at para. 6 [Exhibit RWE-007].

[82] *See* Jurado Witness Statement at para. 10 [Exhibit RWE-006].

[83] *See* Law the Modifies the Organic Law of the *Procuraduría* (Creating the National System for Valid Legislation), Law No. 7666, April 14, 1997, Art. 3 [Exhibit R-098]; *see also See* Jurado Witness Statement at para. 10 [Exhibit RWE-006].

was made public when the *Procuraduría* sent a letter to Congress that same month explaining the results of its interpretation.[84]

41. Claimants' allegation that the *Procuraduría*'s legal opinions are "highly dubious, as authoritative legal instruments"[85] is also incorrect. As previously explained, both opinions were issued in accordance with Costa Rican Law. In particular, the *Procuraduría* issues opinions based on technical legal analyses in accordance with the laws of interpretation in the Costa Rican legal system.[86] Thus, contrary to Claimants' allegations, the opinions are, in fact, authoritative legal interpretations. Importantly, Costa Rican courts have confirmed the legality of these opinions.[87]

42. Claimants' allegations regarding the *Procuraduría*'s independence when issuing these opinions are also without support. Claimants assert that it is "puzzling that Mr. Jurado [the author of the two opinions] apparently did not elect to recuse himself from working on the file, given his political affiliations."[88] In particular, Claimants allege that Mr. Jurado was a member of the board of a local environmental non-governmental organization ("NGO"), Center of Environmental and Natural Resources Law ("CEDARENA" in Spanish), which promotes sustainable environmental policies in Costa Rica.[89] According to Claimants, CEDARENA played an active role in trying to expand the boundaries of the *Las Baulas* National Park.[90]

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[84] *See Procuraduría's* Letter to Congress Regarding Legal Opinion on the *Las Baulas* National Park Law, OJ-17-2004, February 12, 2004 [Exhibit R-044].

[85] Claimants' Reply at para. 103.

[86] *See* Organic Law of the Office of the *Procuraduría* of the Republic, Art. 4 [Exhibit C-1o]; *see also* Solano Second Witness Statement at para. 12, [Exhibit RWE-007]; Jurado Witness Statement at para. 10 [Exhibit RWE-006]; Milano Expert Report, at paras. 21-29 [Exhibit RWE-012].

[87] *See e.g.* Supreme Court of Justice, First Division, Res. 01254-F-S1-2012, October 4, 2012 [Exhibit R-170].

[88] Claimants' Reply at para. 102.

[89] *See* Jurado Witness Statement at para. 11 [Exhibit RWE-006].

[90] *See* Claimants' Reply at para. 102.

43. Claimants' allegations are both unsupported and untrue. First, Mr. Jurado was not, as Claimants allege, a member of the CEDARENA board at the time he issued the first opinion.[91] Thus, there was clearly no conflict of interest with respect to the first opinion.[92] Mr. Jurado was a member of the CEDARENA board from November 2005 to October 2008.[93] At the time Mr. Jurado was drafting the second opinion, CEDARENA was not undertaking any projects with respect to the *Las Baulas* National Park.[94] Thus, there was no conflict of interest with respect to the second opinion either. In addition, Mr. Jurado was elected as member of the CEDARENA board because of his academic affiliations.[95] Since 2004, Mr. Jurado has been the Director of a Master in Laws program in Environmental Law at the University of Costa Rica.[96] In any case, the opinions were not issued solely by Mr. Jurado. Although he authored the two documents, the 2005 *dictamen* was approved by the *Procurador General*, and the 2004 *opinión* was approved by the Deputy *Procurador General* prior to their issuance. Claimants have made no suggestion that those officials were suspect in any way.[97] In addition, as explained by Ms. Solano and Mr. Jurado, the two opinions were based on a technical legal interpretation of the law.[98] In sum, the opinions reflected the technical legal views of the Office of the *Procurador*; they were not personal opinions of Mr. Jurado. As such, there can be no issue of bias.[99]

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[91] *See* Jurado Witness Statement at para. 12 [Exhibit RWE-006].

[92] *See* Jurado Witness Statement at para. 12 [Exhibit RWE-006].

[93] *See* Jurado Witness Statement at para. 12 [Exhibit RWE-006].

[94] *See* Jurado Witness Statement at para. 14 [Exhibit RWE-006].

[95] *See* Jurado Witness Statement at para. 12 [Exhibit RWE-006].

[96] *See* Jurado Witness Statement at para. 12 [Exhibit RWE-006].

[97] *See Procuraduría's* Binding Legal Opinión No. C-444-2005 [Exhibit C-1g]; *see also Procuraduría's* Legal Opinion No. OJ-015-2004 [Exhibit C-1t].

[98] *See* Solano Second Witness Statement at para. 12 [Exhibit RWE-007]; Jurado Witness Statement at para. 10 [Exhibit RWE-006].

[99] *See* Jurado Witness Statement at paras. 10-11 [Exhibit RWE-006].

44. In conclusion, there is nothing irregular or improper about the *Procuraduría's* legal opinions. In February 2004 and then again in December 2005, the *Procuraduría* clarified any doubts that could have existed regarding the boundaries of the Park based on the 1995 Park Law. These clarifications were public, generally applicable, and (in the case of the *dictamen*) legally binding. Thus, Claimants could have and should have known about them.

3. The Constitutional Chamber of the Supreme Court Found that the Park Includes a 125-Meter Strip of Land

45. In turn, the Constitutional Chamber of Costa Rica's Supreme Court supported the *Procuraduría*'s interpretation of the Park Law and of the boundaries of the Park. In two separate decisions, one in 2005 and another in 2008, the Supreme Court described the Park as including a 125-meter strip of land which includes the 50 meter public zone.[100] Importantly, the Court specifically rejected an interpretation of the Park Law according to which the Park would not include this 125-meter strip of land.[101] Respondent explained these decisions in detail in its Counter-Memorial.[102]

46. In response, Claimants contend that the Supreme Court did not explicitly rely on the *Procuraduría's* interpretation of the 1995 Park Law in either decision.[103] While this is true, it is completely irrelevant. The issue is not whether the Supreme Court relied on the *Procuraduría's* opinions to find that the limits of the Park included a 125-meter strip of land. Rather, the point is that the Supreme Court—the highest legal authority in Costa Rica—reached the same conclusion as the *Procuraduría* with respect to the limits of the Park. The two

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

[101] *See* Supreme Court of Justice, First Chamber, File No.06-008369-0007-CO, Resolution No. 08-008713, May 23, 2008, at 25-6 [Exhibit C-1h].

[102] *See* Respondent's Counter-Memorial at paras. 36-40.

[103] *See* Claimants' Reply at para. 103 n. 100.

Supreme Court decisions represent further examples of the consistent understanding of the State regarding the boundaries of the Park: the Park includes – and has included since the Park's creation in 1991 – a 125-meter strip of land along the Northwest coast of Costa Rica.

4. The Constitutional Chamber of the Supreme Court Has Ordered MINAE to Take Necessary Measures to Protect the Area of *Las Baulas* National Park

47. Since the creation of the Park in 1991, Costa Rica has recognized that the area within the Park is environmentally fragile and that it needs to be protected in order to conserve the different habitats and species in the area – in particular, the nesting sites of the leatherback sea turtle.[104] As discussed by Mr. Piedra, Costa Rica has taken a variety of actions to protect the Park area in addition to the expropriation of lands inside the Park (*e.g.*, the State has launched programs to prevent the theft of eggs, drafted detailed guidelines to visit the area of the park, and drafted a management program for the Park).[105]

48. In addition to the actions taken by the executive branch, the Supreme Court of Costa Rica has issued several decisions ordering MINAE to take measures necessary to protect land within the Park. Respondent discussed the Supreme Court's decisions in detail in its Counter-Memorial and will not repeat those descriptions here.[106] All of the actions taken by Costa Rica are consistent with the goal of the Park itself – that is, to protect the leatherback sea turtle from extinction. Below Respondent responds to specific allegations made by Claimants in their Reply concerning these decisions.

49. In a December 16, 2008 decision, the Supreme Court ordered MINAE to proceed immediately with the expropriation of private properties within the Park and ordered the

[104] *See* Executive Decree No. 20518-MIRENEM, Preamble at clauses 1, 4, 5, 6 [Exhibit C-1b].

[105] *See* Witness Statement of Rotney Piedra, June 19, 2014 ("Piedra First Witness Statement"), paras. 39-43 [Exhibit RWE-002].

[106] *See* Respondent's Counter-Memorial at paras. 41-53.

suspension of all environmental and building permits within the Park area.[107] The Administration has complied with this order – it is in the process of expropriating privately-held land inside the Park and the competent authorities have suspended the issuance of environmental and building permits inside the Park.[108]

50. In hopes of creating an impression of inconsistency within the government, Claimants allege that MINAE failed to comply with the Supreme Court's December 2008 decision, because it did not proceed "immediately" with the expropriations when the decision was issued.[109] Claimants' allegation is incorrect. Since the issuance of the Supreme Court's decision, Costa Rica has continued to expropriate properties within the Park subject to its conservation priorities and at a reasonable pace. As the Court explained, and as Claimants appear to admit,[110] the Court did not have the authority to demand that the Administration carry out the expropriations in a particular manner. Instead, the Court merely required that the Administration carry out the expropriations.[111] As Costa Rica is, in fact, in the process of expropriating in-Park properties, it is complying with the Court's order.

51. Claimants contend that, because Respondent states that in 2009 it suspended all administrative expropriation procedures at the direction of the *Contraloría*, Respondent was in breach of the Supreme Court's order to expropriate "immediately."[112] Claimants, however, omit the fact that the suspension was only partial. Expropriation proceedings that had reached the

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[107] *See* Supreme Court of Justice, First Chamber, File No.07-005611-0007-CO, Resolution No.2008-0018529, December 16, 2008, 21-23 [Exhibit C-1j].

[108] *See e.g.* List of Actions by SETENA Resulting from Decision No. 2008-01859 of December 16, 2007, February 20, 2009 [Exhibit R-035].

[109] *See* Claimants' Reply at paras. 92-3, 97.

[110] *See* Claimants' Reply at para. 95.

[111] *See* Supreme Court of Justice, Resolution No. 2009-005408, March 27, 2009, III [Exhibit C-1zi].

[112] *See* Claimants' Reply at paras.92, 97.

judicial stage have all continued. In those proceedings, Respondent has been paying fair market value compensation for expropriated properties. It was only the administrative expropriation proceedings for properties that have not yet reached the judicial stage that were suspended in order to comply with the 2010 *Contraloría* report. As Respondent explained in its Counter-Memorial, it will continue with the expropriations once it completes the actions recommended by the *Contraloría*.[113]

52. In an effort to point to allegedly expropriatory measures adopted after CAFTA entered into force on January 1, 2009 (in the hopes of avoiding Respondent's jurisdictional challenges discussed below), Claimants also point out that the December 2008 Court decision was only made public in January 2009, suggesting that the decision may not have had force until that time.[114] Claimants' assertion is incorrect. According to Respondent's expert on Costa Rican law, Mr. Milano, decisions of the Supreme Court have effect from the date of their issuance[115] – in this case, from December 16, 2008. In addition, Mr. Milano also explains that the dispositive portion of the decision is made available to the public the day after each decision has been issued.[116] He further explains, that in this case, the parties were likely directly notified of the dispositive portion of the decision the day of or the day after the decision was taken. Thus, any resulting restrictions on Claimants' ability to develop their properties occurred as of that date.

[113] *See* Respondent's Counter-Memorial at para. 91.

[114] *See* Claimants' Reply at paras. 94.

[115] *See* Milano Expert Report at para. 54 [Exhibit RWE-012].

[116] *See* Milano Expert Report at para. 51 [Exhibit RWE-012].

C. AT THE TIME THEY PURCHASED THEIR PROPERTIES, CLAIMANTS KNEW OR SHOULD HAVE KNOWN THAT THE LAND THEY PURCHASED (OR PORTIONS THEREOF) WAS WITHIN THE PARK AND, THUS, WAS SUBJECT TO BEING EXPROPRIATED

53. Claimants knew or should have known that the land they purchased in Costa Rica (or portions thereof) fell within the boundaries of the National Park. As such, their land was subject to being expropriated. In their Reply, Claimants deny any such knowledge.[117] Whether or not they had actual knowledge, however, Claimants cannot hide behind or base their claims on ignorance of the law. Any reasonable due diligence would have revealed the location of the Park and the fact that land within its boundaries was subject to expropriation.

1. Claimants Knew or Should Have Known When They Purchased their Land that It Was Located in the National Park

54. Claimants knew or should have known that, since at least 1991, the Park included a portion of land that ran along the Northwest coast of Costa Rica and that the properties that they purchased (or portions thereof) were inside the Park. As previously demonstrated in Section II.B, there is no question that the Park has always included a 125-meter strip of land along the Northwest coast of Costa Rica. To reiterate, in 1991 Costa Rica issued a Decree creating the *Las Baulas* National Park, which included a 125 meter strip of land that ran along the coastline from the high tide line. Then, in 1995 Costa Rica issued a law confirming the creation of the Park. In this law, there was an obvious mistake which declared the 125 meter strip as going seawards, instead of inland. It was an obvious mistake because: (i) the coordinates indicating where such strip ended were inland – not on the sea; (ii) the law provided that the State would expropriate land that fell within the Park boundaries; and (iii) the seawards reference was contrary to the main purpose of the Park – the protection of the nesting sites of the turtles

[117] *See* Claimants' Reply at paras. 63-103.

which are inland. All of Claimants' properties were acquired after the creation of the Park in 1991 and its further specification in 1995.

55. Moreover, in 2004 and 2005 the *Procuraduría* confirmed that the Park included a 125 meter strip of land. The *Procuraduría* found that the seaward reference in the 1995 Park Law was a clear contradiction to the purpose of the Park and to the entire text of the law, as previously explained. Fifteen of the properties at issue in this case were acquired after the *Procuraduría* issued its 2004 opinion, which confirmed that the Park included a 125-meter strip of land.[118] Respondent explained in Section II.B.2 above that this opinion was made public and represented the government's understanding of the 1995 Park Law.[119] Thus, it is absolutely clear that when Claimants purchased these properties, they knew or should have known that the properties they acquired were inside the Park.

56. Moreover, there is evidence of Claimants' direct knowledge of the Park's boundaries even before 2004, principally in the form of notations or stamps on the properties' land registry maps. Ten out of the twenty-six properties' land registry drawings issued between 1996 and 2003 (*i.e.*, before Claimants purchased them) indicate that they include land within the boundaries of the Park. This is true for Lots V59, SPG1, SPG2, SPG3, B1, B3, B5, B6, B7, and B8.[120] Claimants allege that these drawings do not show that the Park extended inland after 1995, because the stamps certifying that the property is inside the Park only refer to the 1991 Decree, and not the 1995 Law.[121] Claimants' assertion is incorrect. The stamp did not need to

[118] Lots A39, A40, SPG1, SPG2, SPG3, B7, V38, V46, V47, V59, V61a, V61b, V61c, C71,and C96 were all acquired after February 2004. *See* Claimants' Memorial on the Merits, April 25, 2014 ("Claimants' Memorial on the Merits"), paras. 23-47.

[119] *See* paras. 36-40 *above*.

[120] *See* Respondent's Counter-Memorial at para. 28.

[121] *See* Witness Statement of Robert Reddy, October 2, 2014 (Reddy Second Witness Statement"), para. 8; Witness Statement of Brett Berkowitz, October 2, 2014 ("Berkowitz Second Witness Statement"), para. 12.

mention the 1995 Law because since 1991 Costa Rica has understood that the Park includes a 125-meter strip of land from the high tide line. In addition, Claimants' case is significantly undermined by the fact that the drawings indicating land inside the Park were all issued subsequent to the enactment of the 1995 Park Law.[122] If the 1995 Law had in fact created a 125-meter strip that extended seawards, as Claimants allege, all of these stamps would have certified that the property fell outside the Park. They did not.

57. Claimants assert that other land registry drawings (*i.e.*, for Lot Nos. V30, V31, V32, V33, V37, V38, V40, V46, V47, V61 (before it was subdivided), A39, A40, and C71) fail to show that the property fell within the Park. Claimants omit to mention that none of these drawings should have shown that the properties were inside the Park.[123] This is for two reasons. First, most of these properties are located in Playa Ventanas,[124] which between 1991 and 1995 did not have the status of a National Park.[125] Rather, it had been designated as a protected area. Second, all of these drawings were registered before the Lots were included in the Park (for Playa Ventanas before 1995, and for Playa Grande before 1991).[126] According to Costa Rican

[122] *See* Lot V59: Land Registry Drawing, January 8, 2013 [Exhibit C-12a]; Lot SPG1: Land Registry Drawing, January 8, 2013 [Exhibit C-20a]; Lot SPG2: Land Registry Drawing, January 8, 2013 [Exhibit C-21a]; Lot SPG3: Land Registry Drawing, January 8, 2013 [Exhibit C-22a]; Lot B1: Land Registry Drawing, January 8, 2013 [Exhibit C-23a]; Lot B3: Land Registry Drawing, January 8, 2013 [Exhibit C-24a]; Lot B5: Land Registry Drawing, January 8, 2013 [Exhibit C-25a]; Lot B6: Land Registry Drawing, January 8, 2013 [Exhibit C-26a]; Lot B7: Land Registry Drawing, January 8, 2013 [Exhibit C-27a]; Lot B8: Land Registry Drawing, January 8, 2013 [Exhibit C-28a].

[123] *See* Reddy Second Witness Statement at paras. 10, 11, 13.

[124] *See* Lot V30: Land Registry Drawing, January 8, 2013 [Exhibit C-3a]; Lot V31: Land Registry Drawing, January 8, 2013 [Exhibit C-4a]; Lot V32: Land Registry Drawing, January 8, 2013 [Exhibit C-5a]; Lot V33: Land Registry Drawing, January 8, 2013 [Exhibit C-6a]; Lot V8: Land Registry Drawing, January 8, 2013 [Exhibit C-7a]; Lot V39: Land Registry Drawing, January 8, 2013 [Exhibit C-8a]; Lot V40: Land Registry Drawing, January 8, 2013 [Exhibit C-9a]; Lot V46: Land Registry Drawing, January 8, 2013 [Exhibit C-10a]; Lot V47: Land Registry Drawing, January 8, 2013 [Exhibit C-11a]; Lot V61: Land Registry Drawing, May 1994 [Exhibit C-099].

[125] *See* 1991 Decree, Executive Decree No. 20518-MIRENEM, Art.2 [Exhibit C-1b].

[126] *See* Lot V30: Land Registry Drawing, January 8, 2013 [Exhibit C-3a]; Lot V31; Land Registry Drawing, January 8, 2013 [Exhibit C-4a]; Lot V32 Land Registry Drawing, January 8, 2013 [Exhibit C-5a]; Lot V33: Land Registry Drawing, January 8, 2013 [Exhibit C-6a]; Lot V38: Land Registry Drawing, January 8, 2013 [Exhibit C-7a]; Lot V39: Land Registry Drawing, January 8, 2013 [Exhibit C-8a]; Lot V40: Land Registry Drawing, January 8, 2013 [Exhibit C-9a]; Lot V46: Land Registry Drawing, January 8, 2013 [Exhibit C-10a]; Lot V47: Land Registry

law, the property owner is the one in charge of registering updated land drawings.[127] In these cases, none of these drawings were properly updated; thus, they did not reflect the Park in Playa Grande in 1991 or inclusion of Playa Ventanas in the Park in 1995. In fact, land registry drawings for Playa Ventanas that were registered post-1995 (*i.e.*, V59, V61a, V61b, and V61c) do show that the properties fall inside the Park.[128]

58. Respondent also showed in its Counter-Memorial that Mr. Berkowitz was fully aware of the existence of the land portion of the Park since June 2003, prior to his acquisition of any of the properties referred to in this arbitration as the "B Lots."[129] In a Resolution issued by MINAE approving certain activity in Lots B1, B3, and B6, it clearly states that "as indicated in the Executive Decree No. 20518 of July 9, 1991 and in Law No. 7524 of August 16, 1995 the National Marine Park Las Baulas and the protective zone consider a 125-meter zone inland from the mean high tide line."[130] Mr. Berkowitz alleges that in the course of a separate Administrative Procedure that was initiated against him for cutting trees inside the Park, the National Geographic Institute ("IGN") issued a letter in which it certified that these properties were outside the park.[131] But this Administrative Procedure began in 2004, well after Mr. Berkowitz purchased any of the "B Lots" at issue in this case. Therefore, Mr. Berkowitz could not have relied on any decisions made during that procedure when he purchased the aforementioned property.

Drawing, January 8, 2013 [Exhibit C-11a]; Lot V61: Land Registry Drawing, May 1994 [Exhibit C-099]; Lot A39: Land Registry Drawing, January 8, 2013 [Exhibit C-17a]; Lot A40: Land Registry Drawing, January 8, 2013 [Exhibit C-16a]; Lot C71: Land Registry Drawing, January 8, 2013 [Exhibit C-19a].

[127] *See* Regulation on the National Cadastre Law, Regulation No. 34331, Arts. 53, 54 [Exhibit R-169].

[128] *See* Lot V59: Land Registry Drawing, January 8, 2013 [Exhibit C-12a]; Lot V61a: Land Registry Drawing, January 8, 2013 [Exhibit C-13a]; Lot V61b: Land Registry Drawing, January 8, 2013 [Exhibit C-14a]; Lot V61c: Land Registry Drawing, January 8, 2013 [Exhibit C-15a].

[129] *See* Respondent's Counter-Memorial at para. 28.

[130] Resolution on Use of Forest, Resolution No. 067 ACT-067-2003-IF, June 2003, final page [Exhibit R-016].

[131] *See* Berkowitz's Second Witness Statement at para. 29.

59. In sum, each of Claimants knew at the time they acquired their land that the land they acquired was inside the Park. First, Claimants purchased their property well after the creation of the Park in 1991.[132] Second, several of the land registry drawings for Claimants' properties expressly specified that their properties (or portions thereof) were (and are) located in the *Las Baulas* National Park[133] Third, MINAE informed Mr. Berkowitz in June 2003 that the Park included a 125-meter strip of land including Lots B1, B3, B6, and B7 before Mr. Berkowitz purchased those properties.[134] Fourth, several of Claimants' properties were acquired after the *Procuraduría* issued its 2004 opinion on the interpretation of Article 1 of the 1995 Park Law that clarified that limits of the Park included a 125-meter strip of land inland from the high tide line.[135] Finally, several of Claimants' properties were acquired after MINAE first started expropriating private land located within the 125-meter strip of land inside the Park.[136] This information is summarized in the following chart.

[132] *See* 1991 Decree, Executive Decree No. 20518-MIRENEM [Exhibit C-1b]; *Las Baulas* National Park Law [Exhibit C-1e].

[133] This is true for Lots SPG1, SPG2, SPG3, B1, B3, B5, B7, B8, V47, V59, V61a, V61b, V61c, C71 and C96. *See* Lot V59: Land Registry Drawing, January 8, 2013 [Exhibit C-12a]; Lot V61a Land Registry Drawing, January 8, 2013 [Exhibit C-13a]; Lot V61b: Land Registry Drawing, January 8, 2013 [Exhibit C-14a]; Lot V61c: Land Registry Drawing, January 8, 2013 [Exhibit C15a]; Lot SPG1: Land Registry Drawing, January 8, 2013 [Exhibit C-20a]; Lot SPG2: Land Registry Drawing, January 8, 2013 [Exhibit C-21a]; Lot SPG3: Land Registry Drawing, January 8, 2013 [Exhibit C-22a]; Lot B1: Land Registry Drawing, January 8, 2013 [Exhibit C-23a]; Lot B3: Land Registry Drawing, January 8, 2013 [Exhibit C-24a]; Lot B5: Land Registry Drawing, January 8, 2013 [Exhibit C-25a]; Lot B6: Land Registry Drawing, January 8, 2013 [Exhibit C-26a]; Lot B7: Land Registry Drawing, January 8, 2013 [Exhibit C-27a]; Lot B8: Land Registry Drawing, January 8, 2013 [Exhibit C-28a].

[134] *See* Resolution on Use of Forest, Resolution No. 067 ACT-067-2003-IF, June 2003, p. 7 [Exhibit R-016].

[135] This is true for Lots A39, A40, SPG1, SPG2, SPG3, B7, V38, V46, V47, V59, V61a, V61b, V61c, C71, and C96. *See* Claimants Memorial on the Merits, paras. 28, 30, 33-37, 40, 46; *see also Procuraduría's* Legal Opinion No. OJ-015-2004 [Exhibit C-1t].

[136] This is true for Lots A39, A40, V38, V46,V47,V59,V61a,V61b,V61c, C71, C96, SPG1, SPG2, SPG3, and B7. *See* Claimants Memorial on the Merits at paras. 28, 30, 33-37, 40, 46; *see also* Letter from MINAE to SETENA, February 28, 2005 [Exhibit C-074] (explaining that the first expropriation was initiated in November 2003).

Lot	Date of Purchase[137]	Events that occurred before Claimants acquired their properties - Claimants knew they were buying land in the Park and that it would be expropriated
A39	February 22, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion
A40	February 22, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion
SPG1	2006	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map
SPG2	2006	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map
SPG3	2006	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map
B1	September 22, 2003	1991 Decree; 1995 Park Law; 2003 Resolution on Use of Forest; Stamp on Cadastre Map
B3	September 22, 2003	1991 Decree; 1995 Park Law; 2003 Resolution on Use of Forest; Stamp on Cadastre Map
B5	September 24, 2003	1991 Decree; 1995 Park Law; 2003 Resolution on Use of Forest; Stamp on Cadastre Map
B6	September 24, 2003	1991 Decree; 1995 Park Law; 2003 Resolution on Use of Forest; Stamp on Cadastre Map
B7	April 21, 2004	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003);Stamp on Cadastre Map; 2004 *Procuraduría* Opinion
B8	September 21, 2003	1991 Decree; 1995 Park Law; 2003 Resolution on Use of Forest; Stamp on Cadastre Map
V30	September 30, 2003	1991 Decree; 1995 Park Law
V31	September 30, 2003	1991 Decree; 1995 Park Law

[137] *See* Claimants' Memorial on the Merits at paras. 23-47.

Lot	Date of Purchase[137]	Events that occurred before Claimants acquired their properties - Claimants knew they were buying land in the Park and that it would be expropriated
V32	August 20, 2003	1991 Decree; 1995 Park Law
V33	August 20, 2003	1991 Decree; 1995 Park Law
V38	November 19, 2004	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion
V39	September 25, 2003	1991 Decree; 1995 Park Law
V40	September 25, 2003	1991 Decree; 1995 Park Law
V46	February 8, 2006	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion
V47	February 8, 2006	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion
V59	May 11, 2007	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map
V61a	February 4, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map (at the time the land was reverted to Spence Co. in March 2008)
V61b	February 4, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map (at the time the land was reverted to Spence Co. in March 2008)
V61c	February 4, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion; 2005 *Procuraduría* Opinion; Stamp on Cadastre Map (at the time the land was reverted to Spence Co. in March 2008)
C71	February 4, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion
C96	June 28, 2005	1991 Decree; 1995 Park Law; First Park Expropriation (November 2003); 2004 *Procuraduría* Opinion

2. Costa Rica Consistently Treated the Park as Including a 125-Meter Strip of Land from the High Tide Line

60. In an effort to rebut the clear evidence that the Park included a 125-meter strip of land from the high tide line, Claimants focus in their Reply on alleged inconsistencies in government action that purportedly demonstrates that government officials did not believe that the boundaries of the Park extended 125 meters inland following the enactment of the Park Law in 1995. As discussed below, there is no merit to Claimants' allegations.

61. First, Claimants allege that if the boundaries of the Park had in fact been consistent since 1991, there would have been no need to ask the *Procuraduría* to interpret the language in Article 1 of the 1995 Park Law.[138] The fact that MINAE requested that the *Procuraduría* issue an opinion on the 1995 Park Law, however, does not mean that the boundaries of the Park changed in 1995 with the enactment of the Park Law. They did not. Article 1 of the Park Law merely contained a mistake, in the word "seaward." This is clear based on a review of the text of the 1991 Decree and the 1995 Park Law.

62. But even if the "seaward" language in Article 1 of the Park Law had not been a mere mistake, that language left the Park Law internally incoherent—and thus in need of a reconciling interpretation, from the appropriate Costa Rican legal authorities. As explained in Respondent's Counter-Memorial, the "seaward" language in the Park Law cannot be reconciled with the geographic coordinates used in that same Article, much less with the very purpose of the Park Law, which is to protect the turtles' nesting habitat on the beach.[139]

[138] *See* Claimants' Reply at para. 68.

[139] *See* Respondent's Counter-Memorial at paras. 23-27.

63. Claimants also allege that Respondent's own witness, Ms. Solano, admitted that the language of Article 2 of the 1995 Park Law was ambiguous.[140] Claimants, however, misrepresent Ms. Solano's statement. Ms. Solano explained in her first witness statement that Claimants could not have reasonably concluded (without any doubt) that the 1995 Park Law had created a Park that extended 125 meters seawards, because, at minimum, it is clear from the language in the law that there is a contradiction between Articles 1 and 2.[141] Article 1 provides the limits of the Park, and Article 2 provides the need to expropriate private land held within Park area. If the 125 meters referenced in the Park Law only extended seawards, there would be no reason to include references to expropriation of private property. At most, the 1995 Law could have raised a question about what was intended—it certainly could not, however, have been treated as a clear change in the Park boundaries that were originally declared in the 1991 Decree, as Claimants allege. No reasonable investor could have relied on such a text, without further due diligence, for his understanding of property boundaries.

64. Moreover, as already discussed, whatever ambiguity that might have been created by the error in the language of the Park Law (if any) was definitively eliminated by authoritative interpretations of the Law issued by the *Procurador General* in February 2004 and December 2005 and ultimately validated by the Costa Rican Supreme Court in October 2005 and May 2008, as discussed above and in Respondent's Counter-Memorial.[142] Thus, contrary to Claimants' assertions, there has been no ambiguity at all since at least the date of the *Procurador's* first opinion in February 2004 that, under the Park Law, the boundaries of the *Las*

[140] *See* Claimants' Reply at para. 68.

[141] *See* Witness Statement of Gloria Solano Martínez, July 14, 2014, at para. 5 [Exhibit RWE-001].

[142] *See supra* at Sections II.B.2-3; *see also* Respondent's Counter-Memorial at paras. 31-40.

Baulas National Park in fact do run 125 meters inland, not seaward, from the high tide line. Fifteen of Claimants' properties were acquired after February 2004.[143]

65. Second, Claimants allege that "[i]t is quite clear now that the Costa Rican officials did not believe that Claimants' Lots were located in an area that was considered part of the PNMB from 1995 until the Constitutional Court's re-reconstruction of Article 1 of the 1995 PNMB Law in 2008."[144] In support of their assertion, Claimants allege that documents from 2003 show that the then-Minister of the Environment, Mr. Carlos Rodríguez, understood that the Park's boundary ended 50-meters from the high tide line.[145] The conclusions Claimants seek to draw from these documents are unsupportable.

66. One such document is a letter from Minister Rodriguez to the Special Environmental Committee of Congress in February 2003.[146] The letter, issued in response to a request from the Special Environmental Committee, includes MINAE's comments on a bill sponsored by the Leatherback Trust (an environmental non-governmental organization) aimed at expanding the limits of the Park to 1,000 meters from the high tide line.

67. The February 2003 letter does not say, however, as Claimants suggest, that the land area of the Park included only the 50 meter public zone. Rather, Minister Rodriguez was discussing a proposal for creating a "mixed wildlife refuge."[147] This apparently would have allowed for some development on private properties. Significantly, however, the letter addressed a proposed bill; it was not commenting on existing law. Thus, any changes to boundaries that

[143] Lots A39, A40, SPG1, SPG2, SPG3, B7, V38, V46, V47, V59, V61a, V61b, V61c, C71, C96.

[144] Claimants' Reply at para. 83.

[145] *See* Claimants' Reply at. 72.75, 77-82

[146] *See* Letter from MINAE Minister to Congressman, DM-10-2003, February 20, 2003 [Exhibit C-113].

[147] *See* Letter from MINAE Minister to Congressman, DM-10-2003, February 20, 2003 [Exhibit C-113].

would constitute the refuge were proposed changes; they were not changes that had already occurred. Indeed, the bill in question never became law.

68. Claimants also rely on Meeting Minutes from a meeting that was held in June 2003 between Ministry officials and other key players in the Park.[148] Claimants appear to claim that these meeting minutes show that Minister Rodriguez understood that the land portion of the Park included only the 50 meter public zone, rather than the 50-meter public zone plus an additional 75 meters inland.[149] But Claimants ignore language in the document that shows that the Minister understood at that time that the Park included a portion of privately owned land that needed to be expropriated.

69. In particular, the Meeting Minutes refer to "the private areas declared as a National Park in 1991 and 1995."[150] If Claimants' interpretation were correct – that is, if the participants in the meeting believed that the only land included in the Park under the 1995 Park Law was land in the 50 meter public zone – there would have been no need to mention "private areas declared as a National Park," because no such "private areas" would ever have been included within the 50 meter public zone.[151]

70. Claimants and, in particular, Mr. Berkowitz, also point to the fact that the Minister wanted to promote "a voluntary conservation regime" rather than expropriate the land,[152] as evidence that the Park only included the 50 meter public zone, not an additional 75 meters inland.[153] Such a statement, however, in no way supports an understanding by the

[148] *See* Claimants' Reply at para. 77.

[149] *See* Claimants' Reply at paras. 81-82.

[150] *See* Minutes from Meeting between Government Agencies, July 16, 2003 [Exhibit C-053].

[151] *See* Minutes from Meeting between Government Agencies, July 16, 2003 [Exhibit C-053].

[152] *See* Minutes from Meeting between Government Agencies, July 16, 2003 [Exhibit C-053].

[153] *See* Claimants' Reply at paras. 73-82; *see also* Second Berkowitz Witness Statement at para. 19.

Minister that no private land existed within the limits of the Park at that time. And again, significantly, the conservation regime mentioned in the Meeting Minutes was only a proposal; it did not become the law of Costa Rica. Thus, the land boundary of the Park remained as it was following the 1991 Decree and the 1995 Park Law.

71. Third, Claimants assert that, if the Park's boundaries had been consistent since 1991, Mr. Piedra would not have stated in a video in 2000 that the Park was mainly a marine park, with a terrestrial zone comprised of a 50 meters strip of land.[154] Claimants have taken Mr. Piedra's statement out of context. As explained by Mr. Piedra in his second witness statement, in the video he is only referring to the portion of land in the Park that at that time was owned by the State.[155] As Respondent has previously explained, the 125 meter strip of land included in the Park is comprised by a 50 meter public zone plus a 75 meter zone that is privately owned.[156] At that time, no expropriation of private property within the Park had been initiated. Thus, the only portion of Park that belonged to the State at that time was the 50 meter public zone, which has existed since 1977.[157]

72. In addition, from the video it is clear that the State was expecting to initiate the process of consolidation of the Park by acquiring privately owned property that fell within the Park boundaries.[158] Specifically, in the video, the narrator states, "the biological value enclosed in the [Park] has gradually created awareness of what it means to provide assistance and care to the turtles coming to Playa Grande to nest. For this reason, and as a future plan, the

[154] *See* Claimants' Reply at para. 69.

[155] *See* Piedra Second Witness Statement at para. 22 [Exhibit RWE-008].

[156] *See* Respondent's Counter-Memorial at paras. 22, 24.

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

[158] *See* Hector Durán, "Parque Nacional Marino Baulas" in: Relatos del Viento: Una historia bien contada sobre los Parques Nacionales de Costa Rica, produced in February 2000, first aired on July 17, 2001, 19:01 [Exhibit C-087]

Administration of the Park expects to purchase the properties suitable to expand the nesting areas."[159] Thus, there is no contradiction. In 2000, the Park included a 125-meter strip of land along the coastline, as it has since 1991, even if only 50 meters was at that point under direct State ownership.

73. Importantly, as a contrast to these very few items which Claimants have misconstrued and taken out of context, there is ample evidence on the record of statements by government officials that shows that they understood that the Park included 125 meters inland from the high tide line, including statements well prior to the *Procuraduría*'s interpretation of the Law in 2004 and 2005. For example, in 2003 MINAE issued two letters stating that the Park included a 125-meter strip of land that ran along the coast. In one such letter, signed by Minister Carlos Rodríguez, the Minister asked the Municipality of Santa Cruz to refrain from issuing building permits inside the 125 meter strip of land that is included in the Park.[160] In the second letter, MINAE refers to the 125 meter strip of land when discussing with local owners the alternative regime to expropriation, provided by Costa Rican law.[161]

74. In sum, it was always the government's understanding that the Park included a 125-meter strip of land from the high tide line.

3. Claimants Knew or Should Have Known that Their Land Was Subject to Being Expropriated

75. Faced with this evidentiary record, Claimants also articulate a fallback position to the effect that, even if they knew that their land was inside the Park, they reasonably believed

[159] Hector Durán, "Parque Nacional Marino Baulas" in: Relatos del Viento: Una historia bien contada sobre los Parques Nacionales de Costa Rica, produced in February 2000, first aired on July 17, 2001, 19:01 [Exhibit C-087] ("El valor biologico que encierra marino baulas ha permitido que poco a poco se haga conciencia de los que significa dar asistencia y cuidado a las torugas que vienen a Playa Grande a desovar. De esta forma y como plan a futuro la administración del Parque espera extender la zona de anidación comprando áreas aptas para ello.")

[160] *See* Letter from MINAE to Municipality of Santa Cruz, May 7, 2003 [Exhibit R-100].

[161] *See* Letter from MINAE to Neighbors of Playa Ventanas and Grande, May 5, 2003 [Exhibit R-101].

that the government would not actually expropriate their land because (i) Costa Rica had not initiated any expropriation process within the Park since its creation in 1991;[162] (ii) Costa Rican officials had made several efforts to enact legislation to avoid expropriating private property for the purposes of creating the Park;[163] (iii) Costa Rica did not have excess public funds with which to purchase the properties subject to expropriation; and (iv) the Municipality of Santa Cruz had been issuing building permits for such properties as late as 2006.[164] None of these points constitutes a basis for Claimants reasonably to have believed that their properties inside the Park were not subject to expropriation or that they would not be expropriated.

76. First, with respect to Claimants' allegation that they did not expect their properties to be expropriated because no expropriation had occurred since 1991, Respondent notes that Claimants' argument fails on its face with respect to more than half of the properties (fifteen out of twenty-six)[165] at issue in these proceedings. That is because those fifteen properties were purchased after the first expropriation proceedings for private land within the Park were initiated on November 5, 2003.[166]

77. Although the November 2003 expropriation proceedings involved other landowners, they were important and much-discussed among Playa Grande and Playa Ventanas landowners. Nevertheless, Claimants Spence International Investments, LLC, Brett Berkowitz, Ronald Copher, and Joseph Holsten proceeded to acquire at least 15 similarly situated properties (*i.e.*, properties that included land inside the Park's boundaries that were likewise subject to expropriation). Thus, Claimants' allegation that they did not expect to be expropriated because

[162] *See* Claimants' Reply at para. 85.

[163] *See* Claimants' Reply at para. 76.

[164] *See* Claimants' Reply at para. 119.

[165] Lots A 39, A40, V38, V46,V47,V59,V61a,V61b,V61c, C71, C96, SPG1, SPG2, SPG3, and B7.

[166] *See* Letter from MINAE to SETENA, February 28, 2005 [Exhibit C-074].

the government had not done so in the past is factually false with respect to at least the majority of their properties.

78. Second, Claimants allege that they reasonably believed that Costa Rica never intended to expropriate privately-held land within the Park, on the basis that draft legislative proposals that were circulated would have allowed restricted development on land inside the Park instead of expropriating it.[167] Claimants point to proposed bills that were submitted to Congress in 2002, 2008 and 2009.[168] Of course, those were only proposals submitted to Congress, which were never approved.[169] More to the point, Claimants could not reasonably have relied on any of this proposed legislation as assurances that their properties could not or would not be expropriated—to the contrary, the proposals were confirmation that, unless the law was changed (which it was not), their properties were subject to expropriation. In addition, given that two of the three bills cited by Claimants were only proposed after the last of Claimants' properties was acquired in May 2007, they could not form any basis for Claimants' alleged belief that their properties were not subject to expropriation.

79. Third, Claimants support their claim that they did not expect their land to be expropriated by pointing to various declarations by government officials stating that Costa Rica did not have sufficient budgetary funds to complete all of the expropriations required for all the national parks inside Costa Rica.[170] That argument ignores the fact that the government has indeed been carrying out expropriations of park lands on a prioritized basis. While Costa Rica may not be able to fund all expropriations at once, it has budgeted for and carried out

[167] *See* Claimants' Reply at paras. 76, 177.

[168] *See* Claimants' Reply at paras. 76, 177.

[169] *See* Document Archiving 2002 Bill, Bill No. 14,989, July 10, 2006 [Exhibit R-164]; Document Archiving 2008 Bill, Bill No. 16,916, December 10, 2008 [Exhibit R-165]; Document Archiving 2009 Bill, Bill No. 17,383, May 23, 2013 [Exhibit R-166].

[170] *See* Claimants' Reply at para. 85.

expropriations. As explained by Ms. Loáiciga, a former official of the National System of Conservation Areas ("SINAC" in Spanish), in her first witness statement, MINAE has an assigned budget to pay the expropriations, and has been expending those funds.[171] Claimants have offered no reason why they think their properties would be exempted even as other expropriations of land within the Park have been proceeding since 2003.

80. In addition, most, if not all, of the statements about budgetary constraints on which Claimants rely were made by officials seeking additional funding or modifications to bills they might be authorizing, who can be expected to make politically dramatic or expedient statements for the sake of advancing their proposals. For example, Minister Jorge Rodríguez declared in 2008 that Costa Rica would need 250 years to pay all the expropriations anticipated in the Costa Rican National Park system[172]—but the statement was made in the context of promoting a 2008 bill in Congress to modify the management structure of the Park.[173] Claimants could not reasonably have relied on such political grandstanding and hyperbole as a basis to believe that their properties would be immune from expropriation, contrary to the express provisions of the 1995 Park Law. In any case, the statements to which Claimants point were also made well after Claimants made their investments. Therefore, there can be no question that when Claimants acquired their properties, they were fully aware that they were acquiring land that was subject to being expropriated.

[171] *See* Witness Statement of Sabrina Loáiciga Pérez, July 14, 2014 ("Loáiciga First Witness Statement"), at para. 16 [Exhibit RWE-003]; *see also* Jurado Witness Statement at para. 15[Exhibit RWE-006]

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

[173] This bill was never approved by Congress. *See* Document Archiving 2008 Bill, Bill No. 16.916, December 10, 2008 [Exhibit R-165].

81. Finally, Claimants allege that at the time they purchased their properties, they reasonably believed they could obtain construction permits for their Lots.[174] As support, they point to the fact that, as late as 2006, the Municipality of Santa Cruz had issued building permits even for land inside the Park. Claimants' argument, however, ignores Costa Rican law. The fact that the boundaries of the Park had been identified in 1991 and elaborated in 1995 did not prohibit the Municipality of Santa Cruz from issuing building permits for properties within the Park. The 1995 Park Law clearly provides that as long as property has not yet been expropriated, the owner of that property may exercise fully his property rights.[175] In other words, there is nothing in the law preventing property owners from acquiring building permits for Lots inside the Park—at least, until the 2008 Supreme Court decision that suspended all environmental and building permits for property located inside the Park.[176] That is not, however, the same thing as saying (as Claimants try to do) that the possibility of obtaining building permits from a municipal governmental entity means that such permit-eligible properties are somehow exempt or immunized from later expropriation by a national agency with the explicit legal mandate to do so.

82. Thus, evidence on the record shows that Claimants could not have reasonably believed that Costa Rica would not expropriate their properties (or portions thereof). At the time Claimants acquired their properties, they were fully aware that their properties were inside the Park and that in consequence Costa Rica would eventually expropriate them.

[174] Claimants' Reply at para. 118.

[175] *See Las Baulas* National Park Law, Art. 2 [Exhibit C-1e].

[176] *See* Supreme Court of Justice, Constitutional Chamber, File No. 07-005611-0007-CO, Resolution No. 2008-018529, December 16, 2008, p. 22 [Exhibit 1j].

D. CLAIMANTS' PROPERTIES COULD NOT BE DEVELOPED FOR REASONS OTHER THAN THE EXISTENCE OF THE *LAS BAULAS* NATIONAL PARK

83. In its Counter-Memorial, Respondent explained that the expropriation, or prospect of expropriation, of Claimants' properties (or portions thereof) was far from the only barrier to the development of those properties. Other constraints, such as water availability in the Guanacaste area, impaired Claimants' properties for reasons entirely apart from their location inside the Park's boundaries.[177] In their Reply, Claimants allege that at the time they acquired their land, there were no restrictions on the availability of water or on the development of the area based on water-related issues.[178] They allege that "even today, Claimants would be able to get SENARA's clearance for a building permit to construct residential homes on their Lots."[179] In the Section below, Respondent responds to Claimants' allegations related to water access in the region.

1. The Guanacaste Area Has Limited Water Resources

84. The Huacas-Tamarindo aquifer, which supplies water to the area of Guanacaste that includes Claimants' properties, has limited availability of fresh water. Claimants allege that, contrary to Respondent's assertions, the National Service for Subterranean Waters of Costa Rica ("SENARA") has not determined that the Huacas-Tamarindo aquifer has limited availability.[180] Claimants' assertion is incorrect.

85. As early as 2003, SENARA issued an alert based on a study of water availability in the area that indicated that there was a risk that the Guanacaste aquifer could be

[177] *See* Respondent Counter-Memorial at paras. 54-61.

[178] *See* Claimants' Reply at para. 104.

[179] Claimants' Reply at para. 104.

[180] *See* Claimants' Reply at para. 106.

overexploited.[181] Respondent explained in its Counter-Memorial SENARA's findings in its 2003 study.[182] In their Reply, Claimants deny Respondent's characterization of SENARA's 2003 study and report and assert that SENARA actually concluded that the aquifer's recharge rates were higher than its extraction rates, meaning that there was more than enough water to meet development needs.[183] Claimants' allegations are incorrect.

86. As Ms. Clara Agudelo explains in her witness statement, the 2003 SENARA report placed an alert on the management of the aquifer.[184] Thus, as early as 2003, SENARA was expressing concern that there was a risk of over-exploitation of the aquifer's water supplies. Ms. Agudelo also explains that for SENARA's purposes, the recharge and extraction rate cited by Claimants are considered only one point of reference of extraction – human extraction.[185] The extraction rates provided in the report did not include extraction from other natural sources, such as the amount of water that flows into the ocean. Thus, the stated extraction rate in the 2003 study underestimated the actual demands on the aquifer. As the rates discussed in the SENARA report were near equilibrium, any additional demand for water in the area might adversely impact the supply of water.

87. Claimants also assert that any restrictions imposed by SENARA in light of water availability concerns in the region would not have adversely impacted Claimants' ability to access water for new homes or other development.[186] Claimants claim that, in order to build new homes in the area, they had only to obtain a water availability letter from the Administrative

[181] *See* SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003 [Exhibit R-046].

[182] *See* Respondent's Counter-Memorial at paras. 56-7.

[183] *See* Claimants' Reply at para. 106.

[184] *See* Witness Statement of Clara Agudelo, December 22, 2014 ("Agudelo Witness Statement"), at para. 5 [Exhibit RWE-005].

[185] *See* Agudelo Witness Statement at para. 5 [Exhibit RWE-005].

[186] *See* Claimants' Reply at para. 109.

Association of the Rural Aqueduct of Playa Grande ("Playa Grande ASADA" using the Spanish acronym).[187] Claimants allege that these water availability letters have been routinely granted for years for lots in Playa Grande and Playa Ventanas, notwithstanding SENARA's 2003 alert.[188] Claimants' assertions are misleading. As discussed below, there is no guarantee that Claimants in fact would be able to easily gain access to water supplies if they were otherwise in a position to develop their land.

88. Water availability letters from an appropriate authority are issued or not based on whether an aqueduct system has enough water supply for the subject additional property at a certain point in time.[189] In Costa Rica, three different entities may issue water availability letters, depending on the jurisdiction in which the property is located.[190] These entities are the National Institute of Aqueducts and Sewage System of Costa Rica ("AyA" in Spanish), the municipalities, and the regional ASADAs. In the case of Playa Grande and Playa Ventanas, the Playa Grande ASADA is the competent authority.[191] The Playa Grande ASADA is a private association that administers and manages public services, including the distribution of water resources.[192] An ASADA receives such authority from the AyA, which delegates certain of its administrative

[187] *See* Claimants' Reply at para. 109.

[188] *See* Claimants' Reply at para. 109.

[189] *See* Agudelo Witness Statement at para. 9 [Exhibit RWE-005]; *see also* Law Creating the National Institute of Water and Sewage, Law No. 2726, April 14, 1961, Art. 2g [Exhibit R-091].

[190] *See* Law Creating the National Institute of Water and Sewage, Law No. 2726, April 14, 1961, Art. 2g [Exhibit R-091]; *see also* Regulations of Administrators for the Association for Aqueducts and Communal Sewage, N. 32529-S-MINAE, February 2, 2005 [Exhibit R-090].

[191] *See* Law Creating the National Institute of Water and Sewage System of Costa Rica, Law No. 2726, April 14, 1961 [Exhibit R-091]; *see generally* Regulations of Administrators for the Association for Aqueducts and Communal Sewage, N. 32529-S-MINAE, February 2, 2005 [Exhibit R-090]; Playa Grande ASADA Agreement, August 7, 2010 [Exhibit R-140].

[192] *See* Regulations of Administrators for the Association for Aqueducts and Communal Sewage, N. 32529-S-MINAE, February 2, 2005 [Exhibit R-090].

functions to the ASADA.[193] The AyA is a public institution in charge of administering the supply system of drinking water and sewage system in Costa Rica.[194] The Playa Grande ASADA grants availability letters for single family homes only; requests for bigger projects need to be submitted to the AyA and must comply with a list of requirements, including a technical study of long-term water use and availability.[195]

89. The Playa Grande ASADA has not granted availability letters "without issue for years," as Claimants allege.[196] In fact, the ASADA entirely suspended the issuance of such letters on April 15, 2007, and has only recently started issuing these types of letters again.[197] In addition, these letters have a validity term of only six months.[198] Thus, if in the six-month period, the landowner has not started the intended construction, the letter expires and the owner must request a new letter in order to proceed. If, in the meantime, supply or demand conditions have changed, the new request could very well be denied.

90. Claimants have put on the record what appears to be a water availability letter from 2003 that was granted for a property owned by the Rancho Ecológico Las Baulas. Mr. Berkowitz alleges that this 2003 letter was granted for his properties and that he proceeded to

[193] *See* Regulations of Administrators for the Association for Aqueducts and Communal Sewage, N. 32529-S-MINAE, February 2, 2005 [Exhibit R-090].

[194] *See* Law Creating the National Institute of Water and Sewage, Law No. 2726, April 14, 1961, Art.1 [Exhibit R-091].

[195] *See* Playa Grande ASADA, "Water Availibility Letter," *available at* http://www.playagrande net/asada/news_cartas_disponibilidad.html (last visited December 12, 2014) [Exhibit R-092].

[196] Claimants' Reply at para. 109.

[197] *See* Playa Grande ASADA, "Water Availability Letter," *available at* http://www.playagrande net/asada/news_cartas_disponibilidad.html (last visited December 12, 2014) [Exhibit R-092].

[198] *See* Regulations of Administrators for the Association for Aqueducts and Communal Sewage, N. 32529-S-MINAE, February 2, 2005, Art. 21(19) [Exhibit R-090].

install 24 water meters on those Lots.[199] However, Mr. Berkowitz did not start any construction at that time. Thus, this letter is not currently effective, and he would have to request a new one—which would be subject to new analysis of more recent water availability conditions—if he wanted to build on that property.

91. Claimants also allege that the Playa Grande Aqueduct has sufficient fresh water supplies for the next twenty years.[200] However, they fail to clarify that this availability has been calculated for a "normal" growth of the area's population.[201] Even in that scenario, there is a prohibition on digging new wells on local properties to obtain additional water from the aquifer.[202] Furthermore, if any mass development is intended, *i.e.*, something other than the construction of a single family home, then the water availability calculation would necessarily change.[203]

92. Claimants allege that this calculation of 20 years' water availability has been certified by the AyA and the ASADA.[204] With respect to the letter from the ASADA, Respondent submits that this letter has no evidentiary value. The letter is only a general statement regarding the Playa Grande area.[205] The letter is not itself a water availability letter, and it does not contain any guarantee that the owners will, in fact, obtain a water availability letter if and when they request it.

[199] *See* Berkowitz Second Witness Statement at para. 42.

[200] *See* Claimants' Reply at para. 110.

[201] *See* Expert Report of Federico Peralta, September 29, 2014 ("Peralta Expert Report"), para. 12.

[202] *See* Agudelo Witness Statement at para. 9 [Exhibit RWE-005].

[203] *See* Agudelo Witness Statement at para. 9 [Exhibit RWE-005].

[204] *See* Claimants' Reply at para. 110; *see also* Peralta Expert Report at para. 12.

[205] *See* Letter from the ASADA and AyA, September 30, 2014 [Exhibit C-103].

93. The AyA letter is also not a water availability letter, nor does it provide any guarantee that owners will obtain one when they request it.[206] Given that the area is currently experiencing a drought,[207] it is entirely likely that reduced water supplies could restrict the issuance of water availability letters, making the generalized, non-binding statements about water availability that Claimants obtained from the AyA and ASADA in 2014 for purposes of this litigation even less probative.[208]

2. The Majority of Claimants' Lots Are in an Extremely Environmentally Sensitive Area

94. Development on Claimants' Lots is also restricted due to the extreme level of vulnerability of the area – that is, the risk of contamination of the aquifer. In 2009, SENARA found that the Playa Grande area was at extreme risk of contamination and that development in the area was, therefore, restricted.[209] In its Counter-Memorial, Respondent explained in detail the 2009 study performed by SENARA, in which SENARA created a vulnerability map for the Huacas-Tamarindo Aquifer.[210] Respondent also explained the relation between the vulnerability map and the vulnerability matrix, which determines the type of construction or development that

[206] *See* Letter from the ASADA and AyA, September 30, 2014 [Exhibit C-103].

[207] *See* Decree Declaring State of Emergency for Drought, Decree No. 38642-MP-MAG, September 30, 2014 [Exhibit R-149].

[208] Respondent notes that one of the members of the Board of Directors of the Playa Grande ASADA is a Claimant in this case, Mr. Brett Berkowitz. Mr. Berkowitz has been a member of the Board off and on over the past ten years. Specifically, he was a member of the Board from August 2005 to July 2007; from 2009 to 2011; and from 2013 to today. *See* Playa Grande ASADA, Members of the Boards *available at* http://www.playagrande net/asada/junta_directiva.html (last visited December 12, 2014) [Exhibit R-112] (showing as Mr. Alejandro Berkowitz as Secretary of the Board); *see also* Official Registry of the Members of the Board of Directors of Playa Grande ASADA, December 9, 2014 [Exhibit R-147] (showing Mr. Alejandro Berkowitz as Secretary of the Board since August 2003). Mr. Brett Berkowitz has been identified as being the same person as Mr. Alejandro Berkowitz. *See* Criminal Complaint Against Mr. Brett Berkowitz, 2004, p. 1 [Exhibit R-148]; *see also*; Piedra Second Witness Statement at fn. 52 [RWE –008].

[209] *See* Study of Vulnerability Maps of the Huacas-Tamarindo Aquifer, January, 2009 [Exhibit R-058].

[210] *See* Respondent's Counter-Memorial at paras. 59-61.

may be allowed in the area depending on the vulnerability level.[211] For example, if the area is identified as extremely vulnerable (as is the case for the area of Playa Grande), no development or construction will be permitted.[212]

95. Claimants allege that in spite of the vulnerability identified in SENARA's map of the Huacas-Tamarindo Aquifer, SENARA has also created a "work-around . . . [to the] blanket prohibition on development."[213] Claimants allege that an owner may perform a study to determine the actual vulnerability level of a specific lot. While it may be the case that a work-around has been allowed for certain properties, the so-called work-around is not automatically granted by SENARA. Instead, the landowner must comply with several requirements which include submitting a technical study to SENARA that needs to be analyzed and approved.[214] Ms. Agudelo explains in her witness statement that upon analyzing any such study, SENARA may conclude that the lot should remain in the vulnerability level initially identified, or it may increase or decrease the specific lot's vulnerability level (thereby affecting the kind of development that is permitted).[215] Thus, the mere submission of a study itself is no guarantee that the outcome of SENARA's vulnerability analysis will be favorable.

96. Claimants have put on the record technical studies concerning certain lots in the Huacas-Tamarindo Aquifer. These studies conclude that the lots studied should be classified as having a "high" vulnerability level—where some development is allowed —as opposed to an

[211] *See* Respondent's Counter-Memorial at paras. 59-61.

[212] *See* Respondent's Counter-Memorial at paras. 59-61.

[213] *See* Claimants' Reply at para. 115; *see also* Peralta's Expert Report at para. 14.

[214] *See* SENARA, Terms of Reference for the Execution of Hydrogeological Studies, February 2012 [Exhibit R-118].

[215] *See* Agudelo Witness Statement at para. 13 [Exhibit RWE-005].

"extreme" vulnerability level—where no development is allowed.[216] However, the studies referenced by Claimants have not yet been submitted to SENARA for its analysis and approval. As each study is considered on a case-by-case basis, it is not possible to determine in advance whether SENARA would maintain the "extreme" vulnerability category for those properties, or whether it would adjust Claimants' properties vulnerability levels based on the studies provided.[217] There is certainly no way to say now that Claimants' properties would obtain lower classifications; instead, the only appropriate presumption is that they will continue to be governed by their current "extreme" vulnerability classifications, which would not permit any development on those properties.

97. The factors discussed in this section are additional and unrelated to the Park. These factors have restricted since at least 2003, and will continue to restrict, the development of Claimants' properties. Thus, even if the Tribunal disagrees that Claimants knew or should have known that they were acquiring protected land that would be expropriated, potential development on Claimants' properties was restricted because of factors that are entirely unrelated to the measures to protect the leatherback turtles within the boundaries of the Park that are being challenged in this arbitration.

E. EXPROPRIATION OF CLAIMANTS' PROPERTIES

98. Since 2003, Costa Rica has endeavored to carry out Article 2 of the Park Law by formally expropriating properties located within the 75 meter strip of Park that extends from the 50 meter public zone. With respect to certain of Claimants' properties, that expropriation

[216] *See* Facio, Geophysical, Geological and Hydrological Study, May 2013 [Exhibit C-084]; Fostry, Hydrological Study, July 2014 [Exhibit C-085], Hydrotechnical Report for B and SPG lots, September 2014 [Exhibit C-086].

[217] *See* Agudelo Witness Statement at para. 13 [Exhibit RWE-005].

process is either complete or close to completion. Claimants' other properties are either in the middle of the expropriation process or have yet to be initiated into the process.

99. In their Reply, Claimants allege that Costa Rica has arbitrarily delayed the expropriation procedures concerning their properties and that Respondent has not provided an explanation for its actions.[218] Claimants also allege that Respondent has failed to provide prompt or adequate payment for the properties that have been expropriated.[219] In this Section, Respondent responds to Claimants' allegations concerning the expropriation system in Costa Rica and, in particular, the expropriation of Claimants' properties inside the Park.

1. Priorities for Expropriating Property in the *Las Baulas* National Park

100. As discussed in Respondent's Counter-Memorial, Costa Rica has undertaken to expropriate properties located in the *Las Baulas* National Park on a priority basis. That is, Costa Rica has identified which properties are the most critical for the State to obtain in terms of protecting and preserving the leatherback turtle habitat and which properties are less important and has initiated expropriation procedures accordingly.[220] In their Reply, Claimants allege that Respondent has acted arbitrarily in applying its expropriation procedures. Specifically, Claimants allege that MINAE's expropriation priorities were only developed in 2012 and that any such prioritization was never made public.[221] Claimants also assert that Respondent has failed to comply with its own priorities.[222] Claimants' assertions are without merit.

101. First, it is not the case, as Claimants allege, that the prioritization procedures used by MINAE were only developed in 2012. As explained by Mr. Piedra in his witness statement,

[218] *See* Claimants' Reply at paras. 126-149.

[219] *See* Claimants' Reply at paras. 137-149.

[220] *See* Respondent's Counter-Memorial at paras. 76-80.

[221] *See* Claimants' Reply at paras. 128-29.

[222] *See* Claimants' Reply at paras. 128-130.

the prioritization procedures used by MINAE in the Guanacaste region have existed since MINAE initiated expropriations of property in that area in 2003. Only the formalization of that process occurred in 2012.[223] For example, in a letter from MINAE to SETENA in 2005, MINAE explains that lots of higher priority are those located in Playa Grande Sur, because that is the turtle's major nesting area.[224] Also, in 2010 MINAE issued a document explaining each of the levels of priorities.[225] The levels of priorities identified in those documents are the same as those identified in the 2012 report.

102. Second, it is not the case, as Claimants allege, that Costa Rica has failed to comply with its own priorities.[226] As Mr. Piedra explains in his witness statement, there are several steps that a State needs to take in order to initiate an expropriation procedure.[227] The length of those steps may vary depending on the specific features of each property. When the expropriation of a piece of property takes longer, the Administration in the meantime initiates an expropriation with respect to other property. The list of priorities is a guide to the State to identify the areas that need to be expropriated first; it is not intended to completely restrict the government from acting.[228]

103. Finally, Respondent stated in its Counter-Memorial that SINAC has initiated the expropriation procedures for sixty lots, out of the one-hundred lots that have been identified to be inside the Park.[229] Claimants allege that it is unclear what initiation of expropriation procedures

[223] *See* Piedra Second Statement at para. 31 [Exhibit RWE-008].

[224] *See* Letter from MINAE to SETENA, February 28, 2005, p. 1 [Exhibit C-074].

[225] MINAE and SINAC, "Las Baulas National Park: Justification for Prioritization of Expropriation," 2010 [Exhibit R-009].

[226] *See* Claimants' Reply at para. 129.

[227] *See* Piedra Second Statement at para. 31 [Exhibit RWE-008].

[228] *See* Piedra Second Statement at para. 31 [Exhibit RWE-008].

[229] *See* Respondent's Counter-Memorial at para. 63.

means, and that Respondent has failed to explain why the other forty lots are not being expropriated.[230] As Respondent has explained, the expropriation process starts with the declaration of public interest – thus SINAC has issued a declaration of public interest for sixty out of the one-hundred lots in the Park.[231] The other forty lots will be expropriated in accordance with the list of priorities previously discussed and once SINAC lifts the suspension of the expropriation procedures. As explained in Respondent's Counter-Memorial, and as it will be further discussed below, SINAC has suspended the initiation of expropriation procedures to comply with a report issued by the *Contraloría* in 2010.[232]

2. Status of Expropriation of Claimants' Properties

104. As discussed in detail in Respondent's Counter-Memorial, expropriation procedures in Costa Rica are divided in two stages: the administrative stage which begins with a Declaration of Public Interest; and the judicial stage which begins with a Decree of Expropriation.[233] Expropriation of Claimants' properties began in 2005 with respect to the portion of land inside the 75-meter strip of land that forms the Park. The status of these procedures can be divided in three categories: (i) properties where no Declaration of Public Interest has yet been issued; (ii) properties where a Declaration of Public Interest was issued, but where the expropriations were suspended before the properties were transferred to the judicial stage; and (iii) properties that are currently in the judicial stage of the expropriation procedures. The status of expropriation of Claimants' properties is also described in detail in Respondent's

[230] *See* Claimants' Reply at para. 127.

[231] *See* Respondent's Counter-Memorial at para. 63; *see also* Letter from SINAC to the Ministry of Foreign Trade, SINAC-AL-024-2009, January 14, 2009 [Exhibit R-034]; Report by the *Contraloría General*, DFOE-PGAA-IF-3-2010, February 26, 2010, Art. 2.1.1 [Exhibit C-1zk].

[232] *See* Respondent's Counter-Memorial at paras. 89-91; Loáiciga Second Witness Statement at paras. 6-7 [Exhibit RWE-009]; *see also* Milano Expert Report at paras. 43-49 [Exhibit RWE-012].

[233] *See* Respondent's Counter-Memorial at paras. 65-74.

Counter-Memorial.[234] For purposes of this submission, Respondent will respond to Claimants' allegations with respect to properties in groups (i) and (ii) in Section II.E.2.a and those with respect to group (iii) in Section II.E.2.b.

a. MINAE Reasonably Suspended Expropriation Procedures of Claimants' Properties Where No Declaration of Public Interest Has Been Issued and Where Properties Are in the Administrative Stage

105. The first and second group of Claimants' properties correspond to (i) properties where no Declaration of Public Interest has yet been issued (Lots A39, C71, C96, SPG3, V59, V61a, V61b, and V61c); and (ii) properties where a Declaration of Public Interest was issued, but where the expropriations were suspended before the properties were transferred to the judicial stage (Lots V30, V31, V32, V33, V38, V39, V40, V46, and V47). All of the expropriation procedures for both groups of Lots were suspended as a result of the *Contraloría* 2010 Report.

(i) The Contraloría's 2010 Report Ordered MINAE to Suspend Its Ongoing Expropriation Procedures

106. Claimants allege that the decision to suspend the expropriation procedures is not in accordance with Costa Rican law.[235] They assert, in particular, that Respondent unilaterally imposed the suspension without authority and with no rational basis.[236] Claimants' allegations are incorrect. As explained in Respondent's Counter-Memorial, SINAC suspended the expropriation procedures in 2008-2009 when it learned about some of the *Contraloría's* findings during an audit of the expropriation procedures related to the *Las Baulas* National Park.[237] The

[234] *See* Respondent's Counter-Memorial at paras. 81-110.

[235] *See* Claimants' Reply at paras. 25h, 133.

[236] *See* Claimants' Reply at paras. 25h, 133.

[237] *See* Respondent's Counter-Memorial at paras. 85-95.

Contraloría issued several recommendations to improve the expropriation system in SINAC and to guarantee landowners' rights.[238] The *Contraloría's* final report was issued in February 2010.

107. SINAC suspended the expropriation procedures on a reasonable basis – it needed to suspend the procedures in order to fully comply with the *Contraloría's* recommendations. Ms. Loáiciga explained in her first witness statement that when SINAC officials met with the *Contraloría* officials carrying out the audit, it became evident that SINAC would need to suspend the expropriation procedures to fully comply with the *Contraloría's* recommendations.[239]

108. Contrary to Claimants' assertions, the decision to suspend was within the authority of SINAC.[240] The *Contraloría* issued several recommendations to SINAC on the expropriation procedures.[241] According to Costa Rican law, SINAC must comply with those recommendations.[242] Thus, given the number of recommendations made in the *Contraloría's* report, SINAC had no other choice but to suspend the ongoing procedures and comply with the *Contraloría's* report.

109. Claimants allege that the suspension of the initiation of expropriation procedures or of expropriation procedures in the administrative stage is not reasonable in light of Respondent's obligation to expropriate promptly and without delay.[243] Respondent notes that at this point in the proceedings, Claimants' properties have not yet been expropriated. That is, under Costa Rican law, Claimants retain their right to use, enjoy or dispose of any of the lots

[238] *See* Respondent's Counter-Memorial at para. 88.

[239] *See* Loáiciga First Witness Statement at paras. 18-19 [Exhibit RWE-003].

[240] *See* Milano Expert Report at paras. 47-49 [Exhibit RWE-012].

[241] *See* Report by the *Contraloría General*, DFOE-PGAA-IF-3-2010, February 26, 2010, pp.45-50 [Exhibit C-1zk].

[242] *See* Organic Law of the *Contraloría* of the Republic, Law No. 7428, September 7, 1994, Arts. 12 and 21 [Exhibit R-059]; Political Constitution of the Republic of Costa Rica, November 8, 1949, Art. 183, 184 [Exhibit R-018].

[243] *See* Claimants' Reply at para. 135.

affected by this suspension. Claimants lose possession of their lots only during the judicial stage and lose title once the judicial stage has been finalized.[244] Thus, these properties have not been formally expropriated. Costa Rica has indicated that it will pay promptly once the expropriation procedures are culminated. Accordingly, this suspension was neither arbitrary nor unreasonable.

(ii) The Contraloría's 2010 Report Was Issued to Improve Costa Rica's Expropriation Procedures

110. Claimants allege that Respondent has not suspended the expropriation procedures to improve the expropriation system, but to avoid its payment obligations to the landowners.[245] They allege that Costa Rica has no funds to comply with its payment obligations and that it has been constantly trying to find options to avoid compensation to landowners of the expropriated properties.[246] Claimants' allegations are without merit.

111. Costa Rica has declared several times that it will compensate the expropriations of properties within national parks once the expropriation process is completed.[247] As Ms. Loáiciga explains in her witness statement, SINAC has a budgetary item to pay for these expropriations.[248] Claimants have provided no credible evidence to support their assertion that Costa Rica is avoiding expropriations in order to keep from having to pay for those properties. The only evidence that they have put on the record is newspaper articles.[249] These articles have very little evidentiary value; they ignore the reality of Costa Rica and the efforts that the government has been doing to comply with its obligations.

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[244] *See* Expropriation Law, Law No. 7495, June 8, 1995, Art. 33 [Exhibit C-1c].

[245] *See* Claimants' Reply at para. 134, 136.

[246] *See* Claimants' Reply at para. 25f.

[247] *See e.g.* Respondent's Counter-Memorial at para. 5.

[248] *See* Loáiciga First Witness Statement at paras. 14-16 [Exhibit RWE-003]; *see also* Jurado Witness Statement at para. 15 [Exhibit RWE-006]

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

112. Claimants also allege that the *Contraloría* report in fact creates a negative impact on the valuation of the land within the National Park, instead of improving the system.[250] Claimants' allegation is incorrect. All of the recommendations made by the *Contraloría* were made with the intention of providing legal stability to land owners and their property rights.[251] Costa Rica is aware of its obligations to pay compensation for its expropriations and will do so. The recommendations by the *Contraloría* were issued so that MINAE and SINAC could review their systems and correct any internal errors that may have occurred in the past.

(iii) SINAC Has Complied with More than Two-Thirds of the Contraloría's Recommendations

113. As noted above, the *Contraloría* issued its formal report in 2010. Since that time, SINAC has been undertaking actions needed to comply with the *Contraloría's* recommendations. Claimants allege that Respondent has failed to provide information as to how much longer the suspension will last.[252] As established in Respondent's Counter-Memorial, SINAC has performed several studies and actions to comply with the multiple recommendations made by the *Contraloría*.[253] To date, SINAC has complied with nine out of the thirteen *Contraloría's* recommendations and, as Mr. Jurado explains in his witness statement, SINAC is working to implement all of them as soon as possible.[254]

[250] *See* Claimants' Reply at para. 134.

[251] *See Contraloría's* Report No. DFOE-PGAA-IF-3-2010, February 2010 [Exhibit C-1zk].

[252] *See* Claimants' Reply at para. 136.

[253] *See* Respondent's Counter-Memorial at paras. 89-91.

[254] *See* Chart of MINAE and SINAC Compliance with *Contraloría's* Report No. DFOE-PGAA-IF-3-2010 as of November 27, 2014 [Exhibit R-097]; *see also* Jurado Witness Statement at para. 15 [Exhibit RWE-006].

b. Respondent Has Provided or Is in the Process of Determining Fair Market Value of Claimants' Properties in the Judicial Stage

(i) Status of Claimants' Properties in the Judicial Stage

114. As explained in detail in Respondent's Counter-Memorial, nine of Claimants' properties are in the judicial stage of the expropriation procedures. These properties are Lots B1, B3, B5, B6, B7, B8, SPG1, SPG2 and A40.

115. Costa Rican courts have issued a final decision with respect to the fair market value of five of these lots: Lots A40, SPG2, B3, B6 and B8.[255] The judicial proceedings leading up to these decisions are explained in detail in Respondent's Counter-Memorial.[256] The decision for Lot B6 was issued on July 30, 2014, after Respondent had submitted its Counter-Memorial.[257]

116. The judicial process for determining fair market value for the other four Lots in the judicial phase – *i.e.*, Lots SPG1, B1, B5 and B7 – is still ongoing. The judicial process for Lot SPG1 has been suspended at the request of Claimants' for purposes of this arbitration.[258] Claimants have also requested the suspension of the judicial process for Lot B1 for purposes of this arbitration.[259] No final decision for Lots B5 and B7 has been rendered, because the parties are still presenting arguments before the courts.[260]

[255] *See* Lot A40: Appeal Judgment, July 21, 2011 [Exhibit C-16h]; Lot SPG2: Appeal Judgment, December 14, 2012 [Exhibit C-21h]; Lot B3: Judgment, February 7, 2013 [Exhibit C-24g1]; Lot B6: Appeal Judgment, July 30, 2014 [Exhibit C-26g];Lot B8: Appeal Documents, July 30, 2013 [Exhibit C-28h]; *see also* Witness Statement of Georgina Chaves, December 22, 2014 ("Chaves Witness Statement") at Annex A [Exhibit RWE-010].

[256] *See* Respondent's Counter-Memorial at para. 98.

[257] *See* Lot B6: Judgment, July 30, 2014 [Exhibit C-26g].

[258] *See* Lot SPG1: Suspension of Judicial Proceedings, July 29, 2013 [Exhibit R-038].

[259] *See* Lot B1: Request for Suspension of Judicial Proceedings, July 31, 2013 [Exhibit R-036].

[260] *See* Respondent's Counter-Memorial at para. 100.

(ii) Status of Payments of Properties in the Judicial Stage

117. Claimants allege that Respondent has failed to provide prompt or adequate payment for their properties expropriated by Costa Rica.[261] Claimants, however, do not present an accurate picture of the payment process for the properties' fair market value.[262]

118. In accordance with Costa Rican law, Respondent has made available for Claimants the administrative valuation amount for all of Claimants' property in the judicial stage: Lots B1, B3, B5, B6, B7, B8, SPG1, SPG2 and A40.[263] As explained in Respondent's Counter-Memorial, the State must have deposited an amount equivalent to the administrative appraisal in the court's bank account by the time MINAE issues a Decree of Expropriation to initiate the judicial stage of the expropriation procedure.[264] By law, Claimants are required to request payment of these amounts in order to receive payment.[265] Claimants have only requested payment of these amounts for Lots A40, B3, B6, SPG1 and SPG2.[266] Claimants have received

[261] *See* Claimants' Reply at para. 137.

[262] *See* Claimants' Reply at paras. 138-149.

[263]*See* Lots B1, B3, B5, B6, B7, and B8: Receipt of Payment of Administrative Appraisal, Receipt Nos. 341295 and 341296, May 11, 2006 [Exhibit R-103]; Lots B1, B3, B5, B6, B7 and B8: Receipt of Payment of Updated Administrative Appraisal, Receipt No. 0674192, November 16, 2006 [Exhibit R-105]; Lot SPG2: Receipt of Payment of Administrative Appraisal, Receipt No. 0673431, March 19, 2008 [Exhibit R-106]; Lot SPG1: Receipt of Payment of Administrative Appraisal, Receipt No. 0673430, March 19, 2008 [Exhibit R-122]; Lot A40: Receipt of Payment of Administrative Appraisal, Receipt No. 082198, December 15, 2006 [Exhibit R-102]; *see also* Lot A40: Initiation of Judicial Proceedings, April 17, 2007, p. 5 [Exhibit C-16f]; Lot SPG1: Initiation of Judicial Proceedings, April 11, 2008, p. 5 [Exhibit C-20f]; Lot SPG2: Initiation of Judicial Proceedings, April 11, 2008, p. 5 [Exhibit C-21f]; Lot B1: Initiation of Judicial Proceedings, December 1, 2006, p. 6 [Exhibit C-23f]; Lot B3: Initiation of Judicial Proceedings, December 1, 2006, p. 6 [Exhibit C-24f]; Lot B5: Initiation of Judicial Proceedings, December 1, 2006, p. 6 [Exhibit C-25f]; Lot B6: Initiation of Judicial Proceedings, November 30, 2006, p. 6 [Exhibit C-26f]; Lot B7: Initiation of Judicial Proceedings, November 30, 2005, p. 5 [Exhibit C-27f]; Lot B8: Initiation of Judicial Proceedings, December 1, 2006, p. 5 [Exhibit C-28f].

[264] *See* Respondent's Counter-Memorial at para. 71; *see also* Chaves Witness Statement at para. 4 [Exhibit RWE-010].

[265] *See* Expropriation Law, Arts. 34, 38 [Exhibit C-1c] ; *see also* Chaves Witness Statement at paras. 5 [Exhibit RWE-010].

[266] *See* Lot A40: Request of Payment of Administrative Appraisal, January 16, 2012 [Exhibit R-143]; Lot B3: Request of Payment of Administrative Appraisal and Principal, November 25, 2013 [Exhibit R-108]; Lot B6: Request of Payment of Administrative Appraisal, November 6, 2014 [Exhibit R-109]; Lot SPG1: Request of Payment of Administrative Appraisal, January 27, 2012 [Exhibit R-145] ; Lot SPG2: Request of Payment of

payment for each of these Lots, except for Lot B6.[267] This is because the request for Lot B6 was only submitted to the court in November 2014.[268] It is currently being processed by the court.[269] Payment for these Lots was made within 13 months from their request. This amount of time is the normal amount of time that the court takes to issue payments.[270]

119. Claimants allege that the timing of MINAE's deposits of the amount determined by the administrative appraisals for the B Lots is "puzzling."[271] According to Claimants, Respondent deposited the amount of the administrative appraisals four months before an appraiser inspected the property.[272] This is misleading. There were two appraisals: one made in March 2005, and one made in September 2006.[273] A deposit was made in May 2006 after the first appraisal and four months before the second appraisal was made.[274] The September 2006 appraisal updated the value of the land and is considered the definite administrative appraisal.[275] In November 2006, SINAC deposited the difference in the amounts between the March 2005 and September 2006 appraisals.[276]

Administrative Appraisal and Principal, December 17, 2013 [Exhibit R-111] ; *see also* Chaves Witness Statement at para. 45 [Exhibit RWE-010].

[267] *See* Lot A40: Resolutions ordering payment, 2012 [Exhibit C-16i]; *See* Lot SPG1 Order payment to Keeping Track, January 14, 2013 [Exhibit C-20i]; Lot SPG2: Resolutions regarding payment, June 10, 2014 [Exhibit C-21i]; Lot B3: Resolutions regarding payment, 2014 [Exhibit C-24i-1]; *see also* Chaves Witness Statement at para. 45 [Exhibit RWE-010].

[268] *See* Chaves Witness Statement at para. 33 [Exhibit RWE-010].

[269] *See* Lot B6: Request of Payment of Administrative Appraisal, November 6, 2014 [Exhibit R-109] ; *see also* Chaves Witness Statement at para. 33 [Exhibit RWE-010].

[270] *See* Chaves Witness Statement at paras. 46 [Exhibit RWE-010].

[271] *See* Claimants' Reply at para. 142.

[272] *See* Claimants' Reply at para. 142.

[273] *See* Chaves Witness Statement at paras. 22, 25, 30, 33, 38, 41[Exhibit RWE-010].

[274] *See* Chaves Witness Statement at paras. 22, 25, 30, 33, 38, 41[Exhibit RWE-010].

[275] *See* Chaves Witness Statement at paras. 22, 25, 30, 33, 38, 41[Exhibit RWE-010].

[276] *See* Lots B1, B3, B5, B6, B7, and B8: Receipt of Payment of Administrative Appraisal, Receipt Nos. 341295-6, May 11, 2006 [Exhibit R-103]; Lots B1, B3, B5, B6, B7 and B8: Receipt of Payment of Updated Administrative

120. As Respondent explained in its Counter-Memorial, during the judicial stage of the expropriation process, the judges review all the evidence that is presented to them on the valuation of the property being expropriated.[277] Based on this evidence, the judge may decide on a higher value than the one determined by the administrative valuation. This difference has also been available to Claimants for Lots A40, SPG2, B3 and B8.[278] Claimants have only requested payment for Lots A40, SPG2, and B3,[279] and they have received payment for the values for each of these Lots.[280] The difference between the fair market value determined by the courts and the administrative appraisal for Lot B8 has not yet been paid. This is because Claimants have not requested its transfer, as required by Costa Rican law.[281] For Lot B6, the court has made a final decision on the value of the property. The court decided that this value is equal to the one determined by the administrative appraisal. Thus, there is no difference to be paid. The owner requested the payment of the administrative appraisal in November 2014 – and the payment is currently being processed by the court.[282]

Appraisal, Receipt No. 0674192, November 16, 2006 [Exhibit R-105]; *see also* Chaves Witness Statement at 22, 25, 30, 33, 38, 41[Exhibit RWE-010].

[277] *See* Respondent's Counter-Memorial at paras. 72-73; *see also* Chaves Witness Statement at para. 5 [Exhibit RWE-010].

[278] Lot A40: Payment of Principal, January 3 2012 [Exhibit R-040]; Lot SPG2:Payment of Principal, May 14, 2014 [Exhibit R-043]; Lot B3: Payment of Principal, September 19, 2013 [Exhibit R-041]; Lot B8: Payment of Principal, March 28, 2014 [Exhibit R-042] ; *see also* Chaves Witness Statement at para. 45 [Exhibit RWE-010].

[279] *See* Lot A40: Request of Payment of Principal, October 26, 2011 [Exhibit R-113]; Lot SPG2: Request of Payment of Principal, December 17, 2013 [Exhibit R-111]; Lot B3: Request of Payment of Principal, November 25, 2013 [Exhibit R-108] ; *see also* Chaves Witness Statement at paras. 45 [Exhibit RWE-010].

[280] *See* Lot A40 Resolutions ordering payment, 2012 [Exhibit C-16i]; Lot SPG2 Resolutions regarding payment, June 10, 2014 [Exhibit C-21i]; Lot B3 Resolutions regarding payment, 2014 [Exhibit C-24i-1] ; *see also* Chaves Witness Statement at para. 45 [Exhibit RWE-010]..

[281] *See* Expropriation Law, Art. 34, 48 [Exhibit C-1c]; *see also* Chaves Witness Statement at paras. 42, 47 [Exhibit RWE-010].

[282] *See* Lot B6: Request of Payment of Administrative Appraisal, November 6, 2014 [Exhibit R-109]; *see also* Chaves Witness Statement at para. 33 [Exhibit RWE-010].

121. Claimants allege that Respondent has omitted to mention the lengthy process that is required to retrieve the awarded amounts from the courts' accounts.[283] Ms. Georgina Chaves, the attorney that has represented the State in most of the judicial expropriation proceedings for the Lots at issue in this case, has clarified that once a decision on the fair market value of a property is determined, the owner and the State must take several additional steps in order to guarantee the parties' due process.[284] First, the owner must request the court to deposit the awarded amount in his bank account. Second, once the court receives this request, the court must order payment. These orders are subject to revision by the State as requested by either party. If neither party objects, the judge orders the transfer of funds from the court's account to the owner's account. Third, once a decision is issued, the owner must request payment of interest. In doing so, the owner makes his/her own interest calculations. Fourth, after the court receives the request, it sets a hearing date where the State may present any objections to the calculation of interest made by the owner. Fifth, after the hearing, the judge assesses the parties' arguments and renders a decision on the amount of interest and costs due. Sixth, the State must then deposit the amount awarded in the court's account, and the owner must request its payment. Finally, the court orders the transfer of funds from the court's account.[285] The process is not unreasonably lengthy, but it is deliberative in order to guarantee both parties' due process rights.

122. Respondent will also pay the applicable interests due to Claimants. Claimants allege that interest is paid on the date of judgments.[286] This is incorrect. Costa Rican law provides that the government will pay interest from the date the landowner is dispossessed of the

[283] *See* Claimants' Reply at paras. 145-147.

[284] *See* Chaves Witness Statement at paras. 46-51[RWE-010].

[285] *See* Chaves Witness Statement at paras. 46-51[RWE-010].

[286] *See* Claimants' Reply at para. 149.

land until the effective payment of the fair market price.[287] Claimants have requested payments of interests for Lots A40, B3 and SPG2.[288] Claimants have already received payment for interest for Lot SPG2, which means that Respondent has already paid in full the fair market value for the expropriation of that Lot.[289] For Lot A40, the Court has already issued a decision on the amount of interest to be paid to the owner and payment should occur soon.[290] For Lot B8, the landowner failed to request the court to determine the amount of interest to be paid, but the court did it *ex officio*.[291] This decision is currently under a process of appeal.[292] For Lot B3, Claimants requested a decision on the amount of interests owed on August 2014.[293] The Court is currently processing Claimants' request and should issue a decision soon.[294] Respondent will pay this interest once the procedures described above have been completed. A complete list of what has been paid to date is described in Annex C.[295]

(iii) Claimants Have Unreasonably Delayed Proceedings in the Judicial Stage

123. In its Counter-Memorial, Respondent indicated that some of the delay in the expropriation process of Claimants' properties has occurred as a result of Claimants' own actions. In particular, Respondent alleged that Claimants had requested the suspension of the

[287] *See* Expropriation Law, Art. 11 [Exhibit C-1c]

[288] *See* Lot A40: Calculation for Payment of Interests, June 7, 2012 [Exhibit R-114]; Lot SPG2: Calculation of Interest, December 17, 2013 [Exhibit R-146]; Lot B3: Request of Payment of Interest, August 28, 2014 [Exhibit C-24j]; *see also* Chaves Witness Statement at paras. 45 [Exhibit RWE-010].

[289] *See* Lot SPG2: Payment of Interests, December 2, 2014 [Exhibit R-116] ; *see also* Chaves Witness Statement at para. 45 [Exhibit RWE-010].

[290] *See* Lot A40 Decision on Interests, January 17, 2013 [Exhibit R-117]; *see also* Chaves Witness Statement at para. 11 [Exhibit RWE-010].

[291] *See* Lot B8 Award on Interests, July 30, 2014 [Exhibit C-28i].

[292] *See* Chaves Witness Statement at para. 43 [Exhibit RWE-010].

[293] *See* Chaves Witness Statement at para. 26 [Exhibit RWE-010].

[294] *See* Chaves Witness Statement at para. 26 [Exhibit RWE-010].

[295] *See also See* Chaves Witness Statement at para. 45 [Exhibit RWE-010].

judicial procedures several times to challenge some of the decisions of the Court, and created a parallel process to resolve the alleged issues.[296]

124. In their Reply, Claimants assert that they have never delayed the process.[297] Rather, they have "exercised the limited legal options available to them within their due process rights."[298] In fact, they go so far as to say that Respondent has not provided any evidence demonstrating that Claimants have caused any delay.[299] Claimants' assertion is incorrect. Respondent submitted in its Counter-Memorial several examples where Claimants' counsel in Costa Rica clearly delayed the normal expropriation process:[300]

> [W]ith respect to Lot B5, the landowner's counsel filed several challenges that significantly delayed the judicial valuation procedure: the attorney challenged the initiation of the judicial proceeding,[301] requested a suspension of that proceeding,[302] and then presented several challenges to the process of dispossession,[303] which devolved into a parallel proceeding to determine the legality of the judge's decision to grant the Act of Dispossession.

125. In sum, Costa Rica's expropriation is in full compliance with its international obligations as discussed in Section IV.A below. Costa Rica initiated the process of expropriations of Claimants' properties in 2005, in accordance with Article 2 of the 1995 Park Law. Costa Rica accepts that it has an obligation to pay compensation when the property at issue

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[296] *See* Respondents' Counter-Memorial at para. 107.

[297] *See* Claimants' Reply at para. 126.

[298] Claimants' Reply at para. 126.

[299] *See* Claimants' Reply at para. 126.

[300] *See* Respondent's Counter-Memorial at para. 107; *see also* Chaves Witness Statement at paras. 29, 37 [Exhibit RWE-010].

[301] *See, e.g.*, Landowner's Challenge to Initiation of Lot B5 Judicial Proceedings, June 12, 2006 [Exhibit R-026].

[302] *See, e.g.*, Landowner's Request for Suspension of Lot B5 Judicial Proceedings, December 6, 2007 [Exhibit R-028].

[303] *See, e.g.*, Landowner's Challenges to Lot B5 Act of Dispossession [Exhibit R-027].

has been expropriated. Costa Rica is in the process of complying with these obligations with respect to Claimants' properties in the judicial stage.

III. JURISDICTIONAL OBJECTIONS

126. In its Counter-Memorial, Respondent demonstrated that the Tribunal lacks jurisdiction and, therefore, should decline to hear this dispute. The Tribunal lacks jurisdiction on two grounds: First, the alleged breaches about which Claimants complain occurred before CAFTA entered into force – that is, before Respondent had any obligation to Claimants under CAFTA. Second, Claimants have failed to bring this arbitration within the three-year statute of limitations period provided under CAFTA's Article 10.18(1).

127. In their Reply, Claimants have failed to respond in any meaningful way to Respondent's jurisdictional arguments. In fact, Claimants expressly state that they "will not answer the case Respondent has made" on jurisdiction.[304] Instead, with respect to the first basis on which the Tribunal lacks jurisdiction – *i.e.*, that the alleged breaches occurred before CAFTA entered into force – Claimants merely assert that any alleged breach that occurred before January 1, 2009 continued thereafter. With respect to the second basis on which the Tribunal lacks jurisdiction – *i.e.*, that Claimants knew or should have known of the alleged breaches more than three years before they filed their Notice of Arbitration – Claimants primarily argue that they should not be denied relief for any wrongs allegedly committed by the State on the basis that they should have filed their Notice of Arbitration three months before they actually did so. Claimants' allegations have no merit.

[304] *See* Claimants' Reply at para. 276.

128. In their Reply, Claimants also accuse Respondent of treating them as one "monolithic entity."[305] We do not understand the relevance of this comment. First, it was Claimants' choice to submit just one Notice of Arbitration concerning twenty-six different properties with twenty-six different claims. Claimants cannot now be heard to complain about their own choice. Second, with respect to jurisdiction, Respondent has shown (i) that all of the measures about which Claimants complain were adopted prior to January 1, 2009, when CAFTA came into force; and (ii) that all Claimants in this case knew, or should have known, of the measures adopted by Costa Rica prior to June 10, 2010 (*i.e.*, three years before Claimants submitted their Notice of Arbitration). Thus, the Tribunal has no jurisdiction over Claimants' claims whether or not Claimants have been treated as a "monolithic entity."

129. In the Sections below, Respondent summarizes its arguments regarding why this Tribunal lacks jurisdiction. First, Respondent will demonstrate that by Claimants' own admissions, the alleged breaches about which Claimants complain occurred before CAFTA entered into force. Respondent therefore has no obligation to Claimants for such alleged breaches. Second, Respondent will explain that even allowing Claimants a generous interpretation of the facts, Claimants knew or should have known of the alleged breaches for more than three years before they filed this arbitration. Respondent will conclude by showing how Claimants' attempts to refute Respondent's jurisdictional arguments fail to cure the fact that the Tribunal lacks jurisdiction *ratione temporis* over Claimants' claims.

[305] Claimants' Reply at para. 269.

A. CLAIMANTS' CLAIMS ARE EXCLUDED FROM THE TRIBUNAL'S JURISDICTION BECAUSE THEY ARE BASED ON ALLEGED BREACHES THAT OCCURRED BEFORE CAFTA ENTERED INTO FORCE

130. The jurisdiction of the Tribunal covers alleged breaches that occurred after CAFTA came into force on January 1, 2009. The effects of CAFTA are not retroactive.[306] Thus, if an arbitration claim under CAFTA is based on an alleged breach that occurred before January 1, 2009, an international arbitration tribunal would not have jurisdiction to hear that alleged claim. This is undisputed between the parties.[307] Here, the acts about which Claimants complain occurred before CAFTA entered into force. Thus, the Tribunal lacks jurisdiction over Claimants' claims.

131. The acts about which Claimants complain that allegedly constitute illegal expropriation or breaches of the fair and equitable treatment provision under CAFTA occurred or derived from actions that occurred before CAFTA entered into force. First, with respect to nine of Claimants' properties that are currently in the judicial stage of the expropriation procedures, Claimants point to the Act of Dispossession for each property as the moment when a direct expropriation occurred.[308] Second, with respect to the remaining seventeen properties, Claimants allege that they lost the use and enjoyment of those properties as a result of the State's confirmation of the boundaries of the Park and the State's restriction on development within the Park.[309] Third, Claimants' claims of unfair and inequitable treatment largely stem from the same alleged expropriatory acts. All of those acts occurred before CAFTA entered into force. Thus,

[306] Expert Opinion of Judge Stephen Schwebel, December 20, 2014 ("Schwebel Expert Opinion"), at para. 24 [Exhibit RWE-013].

[307] *See* Claimants' Memorial on the Merits at para. 243.

[308] *See* Claimants' Memorial on the Merits at para. 206.

[309] *See* Claimants' Memorial on the Merits at paras. 208-11.

all three of the alleged breaches Claimants set forth in this arbitration fall outside of the Tribunal's jurisdiction, as described in the following sections.

1. Claimants Allege that Costa Rica Directly Expropriated their Properties Before CAFTA Entered into Force

132. Respondent has undertaken a series of measures with respect to the creation of the Park, and the expropriation of private land within it, all of which occurred before CAFTA entered into force. As described in Section II.B.1, the Park was initially created in 1991 by an Executive Decree and in 1995 by Law. Both regulations provided that the Administration would expropriate any private land inside the boundaries of the Park to protect nesting sites of the leatherback sea turtle. Later, in 2004 and 2005, the *Procuraduría* issued two separate opinions in which it confirmed that the Park included a 125-meter strip of land. This strip of land includes a 75 meter area that is privately owned. In addition, the Supreme Court issued several decisions between 2005 and 2008 in which it also concluded that the Park included a 125-meter strip of land, and that the Administration had to proceed with the expropriations of any private property within the limits of the Park. All of these events occurred well before CAFTA's entry into force on January 1, 2009.

133. Even if the Tribunal were to consider the dates suggested by Claimants as the dates when direct expropriation of Claimants' properties took place, those dates also occurred before CAFTA entered into force. In particular, Claimants allege that the issuance of the Acts of Dispossession for Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7 and B8 was the point in the process when "the State takes possession of the land, thereby satisfying the customary requirements of a direct taking."[310] These Acts were issued on March 12, 13 and 14, 2008 and

[310] Claimants' Memorial on the Merits at para. 207.

on December 9, 2008.[311] Because all of these dates occurred before January 1, 2009, by Claimants' own admission, those expropriations occurred before CAFTA entered into force.[312] Thus, the Tribunal lacks jurisdiction to hear Claimants' claims regarding the alleged direct expropriation of those nine properties.

2. Claimants Allege that Costa Rica Indirectly Expropriated their Properties Before CAFTA Entered into Force

134. With respect to the other seventeen properties at issue in this case, Claimants assert that a series of acts that resulted in the indirect expropriation of their properties occurred upon the "permanent[] terminat[ion] [of] the permitting process [and the] revo[cation] [of] all existing permits" for those properties.[313] Claimants claim this occurred on March 19, 2010 with a decision by MINAE.[314] Respondent, of course, denies that Claimants' properties have been indirectly expropriated, for the reasons presented in Section IV.A.3. However, even if the Tribunal were to accept Claimants' arguments and find an indirect expropriation had occurred, the date of that expropriation would be December 16, 2008, not March 19, 2010, as Claimants allege. This is the date when the Costa Rican Supreme Court ordered the Administration to stop issuing environmental impact permits and revoked all existing environmental impact permits for properties inside the Park.[315] This decision became effective on the date it was issued.[316] After

[311] *See* Lot A40: Act of Dispossession, March 14, 2008 [Exhibit C-16f1]; Lot SPG1: Act of Dispossession, December 9, 2008 [Exhibit C-20fl]; Lot SPG2: Act of Dispossession, December 9, 2008 [Exhibit C-21fl]; Lot B1: Act of Dispossession, March 12, 2008 [Exhibit C-23fl]; Lot B3: Act of Dispossession, March 13, 2008 [Exhibit C-24fl]; Lot B5: Act of Dispossession, March 13, 2008 [Exhibit C-25fl]; Lot B6: Act of Dispossession, March 13, 2008 [Exhibit C-26fl]; Lot B7: Act of Dispossession, March 13, 2008 [Exhibit C-27fl]; Lot B8: Act of Dispossession, March 12, 2008 [Exhibit C-28fl].

[312] Claimants' Reply at para. 291.

[313] Claimants' Reply at para. 294.

[314] Claimants' Reply at para. 285(b).

[315] *See* Decision of the Constitutional Chamber of the Supreme Court of Justice, December 16, 2008, at VIII [Exhibit C-1j].

[316] *See* para. 52 *supra*.

December 2008, Claimants could not have received an environmental impact permit and, thus, a building permit for the portions of their properties inside the Park.

135. Accordingly, under Claimants' own claim of indirect expropriation based on the termination of permits for properties inside the Park, such termination took place on December 16, 2008. Because that date pre-dates CAFTA's entry into force, Claimants' claims fall outside the scope of the Tribunal's jurisdiction.

3. Claimants Allege that Costa Rica Breached Its Fair and Equitable Treatment Obligation Based on Actions that Took Place Before CAFTA Entered into Force

136. Claimants also allege that Costa Rica acted arbitrarily in the process of expropriating their properties in breach of its obligation under CAFTA to provide fair and equitable treatment.[317] Each of the acts and omissions about which Claimants complain, however, are steps taken by Costa Rica in the course of the alleged direct and indirect expropriations. All of the alleged direct and indirect expropriations took place, however, before CAFTA entered into force, as just described above. Thus, the Tribunal also lacks jurisdiction to hear Claimants' fair and equitable treatment claims.

137. In their Memorial, Claimants identified four groups of alleged arbitrary acts by the State in the implementation of its expropriation procedures: (i) the valuations of the properties by independent appraisers; (ii) the judicial decisions on the valuations of the properties; (iii) the partial expropriations of properties, portions of which lie within the Park; and (iv) the temporary suspension of the expropriation process for certain properties in-between the administrative and judicial phases.[318] In their Reply, Claimants also assert that Respondent's formal suspension of the expropriation process for properties not yet in the judicial state of

[317] *See* Claimants' Memorial on the Merits at para. 256.

[318] *See* Claimants' Memorial on the Merits at paras. 278-92.

expropriation as a result of the *Contraloría's* report constitutes a new breach of Respondent's obligations under CAFTA.[319] Claimants' "new breach" argument, however, is essentially a recasting of the fourth alleged arbitrary act discussed above.

138. Most of these acts took place before CAFTA entered into force. To the extent they did not, however, the acts about which Claimants complain represent the lingering effects of what Claimants claim were completed acts – *i.e.*, the acts of alleged direct and indirect expropriation. As aptly characterized by Judge Schwebel in his expert opinion: "[Claimants] are dressing up the lingering effects of the expropriation as a fair and equitable treatment claim."[320] But lingering effects of acts which are not illegal, cannot be illegal in and of themselves.[321] For example, if Costa Rica expropriated land within the Park before CAFTA entered into force (it did not), Costa Rica cannot have an obligation under CAFTA to expropriate for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law. In other words, prior to its entry into force, CAFTA, did not prohibit uncompensated expropriation without due process. Claimants, however, try to circumvent this inevitable result by arguing that the acts about which they complain are continuing or composite acts. They are not, as discussed in Section III.C.1 below.

139. Thus, in sum, both the nine alleged direct expropriations and the seventeen alleged indirect expropriations occurred in 2008, before CAFTA entered into force. In addition, all of the lingering effects of those acts, which Claimants characterize as constituting breaches of CAFTA's unfair and equitable treatment provision, stem from those alleged direct and indirect expropriations. To the extent Claimants' claims are time-barred by the entry into force of

[319] *See* Claimants' Reply at para. 196.

[320] Schwebel Expert Opinion at para. 35 [Exhibit RWE-013].

[321] *See* Schwebel Expert Opinion at paras. 35-6, 38 [Exhibit RWE-013].

CAFTA, so, too, are Claimants' claims regarding whether such expropriations were conducted in accordance with CAFTA's standard of fair and equitable treatment.

B. CLAIMANTS' ALLEGATIONS OF BREACH ARE EXCLUDED FROM THE TRIBUNAL'S JURISDICTION BECAUSE CLAIMANTS KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED BREACHING MEASURES MORE THAN THREE YEARS BEFORE THEY SUBMITTED THEIR NOTICE OF ARBITRATION

140. Claimants' arbitral claims are not only excluded from the Tribunal's jurisdiction because they concern alleged breaches that occurred before CAFTA entered into force, Claimants' arbitral claims are also excluded from the Tribunal's jurisdiction because Claimants did not submit them to arbitration within three years of the government actions that they now allege constitute breaches of Respondent's obligations under CAFTA.

141. CAFTA provides that claims may be brought to arbitration within three years of the date a claimant knows or should have known that he has suffered harm because of a breach of a CAFTA provision.[322] In this case, Claimants knew or should have known of the breaches they allege regarding both the expropriation provision and the fair and equitable treatment provision more than three years before they filed for arbitration. The Tribunal therefore lacks jurisdiction to hear Claimants' claims.

142. In their Reply, Claimants accuse Respondent of confusing "measure" with "breach."[323] Claimants' allegation is incorrect. Respondent is not confusing "measure" with "breach." The language of CAFTA clearly states that the investment chapter applies to "measures" adopted or maintained by a Party.[324] Those measures, depending upon how they are applied, may constitute breaches of the substantive provisions of CAFTA.[325] All of the alleged

[322] *See* CAFTA at Art 10.18(1) [Exhibit C-1a].

[323] Claimants' Reply at para. 280.

[324] *See* CAFTA at Art. 10.1(1) [Exhibit C-1a].

[325] *See e.g.* CAFTA at Art. 10. 7(1) [Exhibit C-1a].

measures about which Claimants complain constitute direct or indirect expropriation occurred more than three years before Claimants filed their Notice of Arbitration. As Claimants' filed their Notice of Arbitration on June 10, 2013, the relevant date for the purposes of CAFTA's statute of limitations is June 10, 2010. Thus, the resulting alleged breaches also fall outside of CAFTA's statute of limitations.

1. Claimants Knew or Should Have Known of the Alleged Breaches of the Expropriation Provision of CAFTA More than Three Years before They Filed their Notice of Arbitration

143. Claimants allege that Costa Rica has improperly expropriated their properties in breach of Article 10.7 of CAFTA.[326] Respondent maintains that Claimants' allegations are without merit and that there has been no breach of any treaty obligations; however, as explained below, Claimants' claims should be rejected by the Tribunal for lack of jurisdiction because Claimants knew or should have known for more than three years before they filed their Notice of Arbitration about the measures they now claim constitute breaches and for which they now seek compensation. Thus, Claimants' claims that Costa Rica has breached its obligations under CAFTA fall outside the Tribunal's jurisdiction.

144. In their Reply, Claimants demand subjective proof that each Claimant knew that he had suffered harm because of Respondent's alleged breach.[327] But the language of CAFTA states that for purposes of the statue of limitations, the important date is the date that the claimant "first acquired or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant . . . has incurred loss or damage."[328] This language clearly indicates that constructive knowledge is sufficient. Thus, subjective proof is not required if it is objectively

[326] *See* Claimants' Reply at paras. 161-182.

[327] Claimants' Reply at para. 278.

[328] CAFTA at Art. 18.1 [Exhibit C-1a].

reasonable that the claimant acquired knowledge of the alleged breach and has incurred loss of damages.

145. Claimants themselves have provided subjective evidence that they knew of the alleged breaches and that they incurred loss or damages as a result more than three years before they brought their claim to arbitration. Respondent reproduces below a table from its Counter-Memorial in which it cites to Claimants' own admissions of the dates on which they knew they were suffering a harm because of the State's alleged breach.

146. There are two key dates to consider when analyzing this chart: (i) Claimants filed their Notice of Arbitration on June 10, 2013; and (ii) the three-year period prior to Claimants' filing their Notice of Arbitration ends on June 10, 2010. Thus, any of the alleged breaches that took place at least three years before the critical date – *i.e.*, before June 10, 2010 – is time-barred. It is clear when reviewing the table below that all of the dates of the breaches Claimants allege occurred – by Claimants' own admission – before June 10, 2010, and Claimants knew or should have known about those alleged breaches.

Description of Event	**Relevant Date**
"[T]he answer to the question of when the composite impact of Respondent's measure substantially deprived the Claimants of their use and enjoyment of their property rights and interests in their investments was on or about **19 March 2010**, . . . MINAE officials ordered SETENA to terminate environmental assessments for lots, such as those of the Claimants, that fell within the . . . boundaries of the BNMP." (Claimants' Memorial on the Merits at para. 221) (emphasis added)	March 19, 2010
"[T]he order issued on **19 March 2010** . . . finally abolished any opportunity for the Claimants to freely exercise their property rights." (Claimants' Memorial on the Merits at para. 231) (emphasis added)	March 19, 2010

Description of Event	Relevant Date
"It would take until **19 March 2010** for Minister Jorge Rodriquez to finally issue the order to terminate any and all granted or outstanding environmental liability permits, thereby depriving a land holder of any benefit of his property rights." (Claimants' Memorial on the Merits at para. 220) (emphasis added)	March 19, 2010
"Respondent has maintained measures tantamount to expropriation of most of the Claimants' investments, which began with a decision of the Constitutional Court, rendered on **23 May 2008** and crystallized with an [order] of the Minister for MINAE on **19 March 2010**, in which he ordered his staff to terminate all pending environmental viability permit applications, and never accept another, for lots deemed to [be] inside the BNMP's 125 [m]eter restricted zone." (Claimants' Memorial on the Merits at para. 192) (emphasis added)	March 19, 2010
Claimants "lost their investments **five or more years ago**" (Claimants' Memorial on the Merits at para. 19) (emphasis added)	2009 (or earlier)
"[B]y **2009**, Respondent, through various agencies, ministries and courts (but not the legislature), had passed a series of resolutions and made a number of decisions that without taking title to land resulted in total deprivation of the Claimants' rights to own and enjoy their property." (Claimants' Memorial at para. 211) (emphasis added)	2009 (and earlier)
"[C]oncluding with the Constitutional Court's clarification of **27 March 2009**, the Respondent completed the creeping expropriation of the rest of the Claimants' properties." (Claimants' Memorial on the Merits at para. 213) (emphasis added)	March 27, 2009
"[I]nvestments were subjected to measures of direct expropriation, with the Respondent taking possession of certain of [Claimants'] lots between **12 March 2008** and **9 December 2008**." (Claimants' Memorial on the Merits at para. 193) (emphasis added)	December 9, 2008 (and earlier)
"[C]ommencing with the Constitutional Court's decision in **May 2008** directing MINAE to expropriate the land and concluding with the Constitutional Court's clarification of 27 March 2009, the Respondent completed the creeping expropriation of the rest of the Claimants' properties." (Claimants' Memorial on the Merits at para. 213) (emphasis	May 2008

Description of Event	Relevant Date
added)	
"The Court's confirmation of the scheme in **May 2008** permeated the actions of the brokers, buyers and sellers and distorted the level of market activity for oceanfront land in the marketplace. But for the scheme, the subject properties would have enjoyed an environment of robust market activity, continued rapid price appreciation and ownership of prime, fee-titled oceanfront property or significant investment returns." (Expert Report of M. Hedden, April 23, 2013, p. 18) (emphasis added)	May 2008
"At some point towards the **end of 2005**, all of the Claimants eventually heard about SETENA's decision to temporarily suspend its environmental assessment procedure, and, at some point in **2006**, each [Claimant] would have individually heard from a SETENA official that the Attorney General has issued some sort of opinion apparently requir[ing] them to treat their lots as being located within the BNMP . . . . The seriousness of their situation only dawned on the Claimants once the string of decisions rendered by the Constitutional Court in **2008** started to emerge." (Claimants' Memorial on the Merits at para. 173) (emphasis added)	2005, 2006, 2008

147. As can be seen above, some of Claimants knew as early as 2005 that their rights in their properties were allegedly expropriated, while others learned in 2008. In each case, however, Claimants acquired the knowledge of the alleged expropriation of their rights under CAFTA and knowledge that they had incurred loss or damages as a result more than three years before they brought their claims to arbitration. All of those dates fall outside CAFTA's statute of limitation which, in this case, bars any claim based on breaching acts prior to June 10, 2010. Thus, Claimants' claims that Respondent breached its obligations under Article 10.7 of CAFTA fall outside the Tribunal's jurisdiction.

2. Claimants Also Knew of Any Alleged Breaches of the Fair and Equitable Treatment Provision More than Three Years Before They Filed their Notice of Arbitration

148. Likewise, Claimants knew or should have known of the alleged breaches of the fair and equitable treatment provision of CAFTA more than three years before they filed their Notice of Arbitration. Claimants allege that Respondent has treated them unfairly and inequitably in violation of CAFTA Article 10.5 by conspiring to deny Claimants payment and delay the expropriation processes it started years ago.[329] Yet these are the same harms they claim are a result of the violation of the expropriation provision CAFTA Article 10.7. Respondent has just shown that Claimants were aware of these harms more than three years before they submitted their claim to arbitration. Therefore, Claimants' allegations of breach of the fair and equitable treatment provision of CAFTA are similarly time-barred.

149. For example, Claimants allege that Respondent's "interminable delays . . . cannot be alchemized into 'due process.'"[330] Claimants also allege, as Respondent discussed in its Counter-Memorial,[331] that they were arbitrarily deprived of the use and enjoyment of their investments.[332] In particular, Claimants point to the Acts of Dispossession that were issued on March 12, 13 and 14, 2008 and December 9, 2008. In addition, Claimants allege that the December 2008 decision of the Supreme Court to terminate all permits inside the Park constituted a breach under CAFTA Article 10.5.[333] Each of these dates is prior to June 10, 2010. In addition, each of the events alleged by Claimants is a consequence of the alleged expropriation by Costa Rica, which Respondent has already determined is also time-barred.

[329] *See* Claimants' Reply at para. 286.

[330] Claimants' Reply at para. 185.

[331] *See* Respondent's Counter-Memorial at para. 125.

[332] *See* Claimants' Memorial on the Merits at para. 196.

[333] *See* Claimants' Memorial on the Merits at para. 196.

150. As discussed in Section III.A.3 above, Claimants are trying to argue that the lingering effects of time-barred claims are themselves violations of CAFTA's fair and equitable treatment provision. Under Claimants' logic, every investor who was expropriated outside a statute of limitations period would have a fair and equitable treatment claim concerning the lingering effects of that expropriation (*e.g.*, non-payment) even if the lingering effects continued for years after the initial expropriation. This cannot be correct. As Judge Schwebel reasoned in his expert opinion: "To the extent that claims of expropriation are time-barred, so too are claims regarding whether such expropriations were conducted in accordance with the fair and equitable treatment provision."[334]

C. CLAIMANTS' ATTEMPT TO MANUFACTURE BREACHES AFTER JANUARY 1, 2009 AND WITHIN THE STATUTE OF LIMITATIONS TO BRING CLAIMS BASED ON THOSE BREACHES TO ARBITRATION FAILS TO CURE THE TRIBUNAL'S LACK OF JURISDICTION

151. Presumably because Claimants recognize that the events about which they complain occurred before CAFTA came into force and fall outside CAFTA's three-year statute of limitations, in their Reply Claimants attempt to overcome the lack of jurisdiction *ratione temporis* over their claims in four ways. First, Claimants assert that the lingering effects of the alleged indirect and direct expropriations of their properties are breaches in and of themselves that cause the expropriations to "continue" into the time period in which CAFTA was in force and within CAFTA's statute of limitations.[335] Second, perhaps in an act of desperation, Claimants seek to identify dates when alleged breaches of CAFTA may have occurred after CAFTA came into force or within the three-year statute of limitations.[336] Third, Claimants allege that they could not have known that they suffered damages because of the alleged

[334] Schwebel Expert Opinion at para. 40 [Exhibit RWE-013].

[335] *See* Claimants' Reply at paras. 311-36.

[336] *See* Claimants' Reply at paras. 289-300.

wrongful takings until some time after a final quantum had been identified.[337] Finally, Claimants allege that their claims fall outside of CAFTA's statute of limitation by only three months; as the time period in which they have missed the statute of limitations is minimal, Claimants assert that the Tribunal should hear their claims.[338] None of Claimants' arguments has any merit.

1. Claimants Continue to Assert Incorrectly that the Lingering Effects of the Alleged Indirect and Direct Expropriations Caused the Expropriations to "Continue" into the Time Period in which CAFTA Came into Force

152. In this case, the acts about which Claimants complain—*i.e.*, low administrative appraisals of their properties; delay in payment of the valuations; impairment of the use and enjoyment of their investments—are the effects of the alleged breach of a wrongful taking.[339] Because Claimants continue to feel the effects of the alleged wrongful expropriation of their properties, Claimants assert that Respondent has committed a breach of a continuing nature that "continues" into the period in which CAFTA entered into force.[340] But there is a difference between an act of a continuing nature and an act, already completed, that continues to cause harm.[341] Simply because an act allegedly breaches an obligation which continues to cause damage to a claimant after the act took place does not make that act of a continuing nature.[342] Although its damaging effects may continue, the alleged wrongful expropriation of Claimants' properties is an act that occurred at a single point in time—before CAFTA was in force.

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[337] *See* Claimants' Reply at paras. 301-10.

[338] *See* Claimants' Reply at paras. 301-10.

[339] *See* Claimants' Reply at para. 286.

[340] *See* Claimants' Reply at paras. 301-10.

[341] *See Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 ("*Mondev*, Award"), at para. 58 [Exhibit RLA-018]; Schwebel Expert Opinion at para. 27 [Exhibit RWE-013].

[342] *See* Schwebel Expert Opinion at para. 27 [Exhibit RWE-013].

153. As both Claimants and Respondent agree, the International Law Commission's Articles on State Responsibility ("ILC Articles") are instructive here. Article 14(1) states that "the breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."[343] A wrongful act of a continuing nature on, the other hand, "extends over the entire period during which the act continues. . ."[344]

154. The ILC Articles determine that a direct expropriation is by nature a completed act.[345] However, the ILC Articles also state that whether a case of indirect expropriation is a completed act or an act of a continuing nature depends on the primary obligation and the circumstances of the given case.[346] Therefore, the essential question for this case is whether the alleged wrongful taking of which Claimants complain is a completed act—in which case the debate becomes when that completed act occurred—or an act of continuing nature—in which case the debate is until what point in time that act continued. An examination of the prevailing jurisprudence of international arbitration tribunals and the facts of this case make it clear that the alleged wrongful expropriation in this case is an act that was completed before CAFTA came into force.[347]

155. In *Mondev v. United States*, the tribunal was faced with a question on jurisdiction nearly identical to the one before this Tribunal. Mondev, a Canadian investor, claimed that the United States had unlawfully expropriated its interest in an investment in the city of Boston

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[343] Claimants' Reply at paras. 326-327; James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 2002 (excerpts) ("ILC ARTICLES"), at Art. 14(1) [Exhibit RLA-005].

[344] ILC ARTICLES at Art. 14(2) [Exhibit RLA-005].

[345] *See* ILC ARTICLES at Art. 14, commentary 4 [Exhibit RLA-005]; Schwebel Expert Opinion at para. 30 [Exhibit RWE-013].

[346] *See* ILC ARTICLES at Art. 14, commentary 4 [Exhibit RLA-005].

[347] *See* Schwebel Expert Opinion at para. 29 [Exhibit RWE-013].

through the city's failure to fulfill certain construction contract obligations and the decisions of the Massachusetts Superior Court and the Massachusetts Supreme Judicial Court on the underlying construction dispute. The underlying contract dispute took place between 1985 and 1991 while the United States judicial decisions concerning that contract dispute occurred after January 1, 1994, the date of the entry into force of the North American Free Trade Agreement ("NAFTA").

156. The United States argued that the tribunal lacked jurisdiction over Mondev's claims of wrongful expropriation and unfair and inequitable treatment because Mondev's allegations were based on the underlying dispute that took place well before NAFTA entered into force. The United States argued that this circumstance, "first, [] deprive[d] the Tribunal of jurisdiction, since under Articles 1116(1)(a) and 1117(1)(a), jurisdiction is limited to breaches of specified obligations arising after NAFTA entered into force; secondly, [] render[ed] the claim time-barred, since under Articles 1116(2) and 1117(2) a claim may not be brought 'more than three years . . . 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', and thirdly, [] defeat[ed] the claim in substance, since there can be no breach of a treaty which was not in force at the time of the acts constituting the alleged breach."[348]

157. Mondev argued that the State's conduct in the underlying dispute which occurred before NAFTA came into force had created a continuing situation which the United States had an obligation to remedy. Mondev argued that the United States judicial court's failure to remedy the continuing situation post-1994 was itself a breach of NAFTA.

[348] *Mondev*, Award at para. 45 [Exhibit RLA-018].

158. On the question of jurisdiction and admissibility, the *Mondev* tribunal agreed with the United States. Each of the arguments the United States made in *Mondev* regarding jurisdiction and admissibility is applicable to this case.

159. Judge Schwebel further explains in his expert report:

> Under international law, an expropriatory act is readily classified as a completed act. According to the ILC Commentary on Article 14, "Where an expropriation is carried out by legal process, with the consequences that title to the property concerned is transferred, the expropriation itself will then be a completed act."[349] A similar finding was made by the tribunal in *Mondev*, of which I was a member. In that case, Mondev International Ltd., a Canadian real estate company, alleged that its option to purchase land had been expropriated without compensation because of a contractual breach. The contractual breach occurred before the applicable law – in that case, NAFTA – entered into force. Thus, the question before the Mondev Tribunal was whether the alleged breach of NAFTA that resulted from the State's action was an act of a continuing character or a completed act. We found that the alleged expropriation was a completed act, even if it continued to have lingering effects.[350]

160. Thus, under such interpretation, any acts that were completed before a treaty enters into force are beyond the Tribunal's jurisdiction. This same interpretation applies to the case at issue here.[351]

161. First, CAFTA in Article 10.1(3), like NAFTA, expressly states that its provisions "do [] 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 [CAFTA]."[352] CAFTA has no retroactive effect

[349] ILC ARTICLES at p. 136 (Art. 14, cmt. (4)) [Exhibit RLA-005].

[350] Schwebel Expert Opinion at para. 27 [Exhibit RWE-013].

[351] *See* Schwebel Expert Opinion at para. 28 [Exhibit RWE-013].

[352] CAFTA at Art. 10.3 [Exhibit C-1a].

and, therefore, it does not apply retroactively.[353] Therefore, as discussed in Section III.A, the Tribunal's jurisdiction in the instant case does not extend to Claimants' claims as the alleged breaches occurred before CAFTA entered into force.

162. Second, CAFTA in Article 10.18(1), like NAFTA, expressly states that the statute of limitations within which to bring a claim to arbitration is three years "from the date on which the investor first acquired, or should have first acquired, knowledge of the breach alleged [] and knowledge that the claimant [] has incurred loss or damage."[354] As discussed above in Section III.B, Claimants' claims are time-barred as Claimants did not file a Notice of Arbitration within three years of the time they knew or should have known that they had been damaged by Respondent's alleged breaches.[355]

163. Third, as Respondent discusses further below, there can be no breach of a treaty if the treaty is not in force at the time the acts constituting the alleged breach occurred. Before a treaty is in force, the future parties to that treaty have no obligations that could be breached under that treaty.

164. The *Mondev* tribunal found that it did not have jurisdiction over Mondev's expropriation claim because the claim concerned alleged breaches that took place before NAFTA was in force. The tribunal held that if there were an expropriation of Mondev's rights in the investment, it was completed at the time that the alleged expropriation had definitive effect, pre-1994.[356] Specifically, the Tribunal found that:

> events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the

[353] *See* Vienna Convention on the Law of Treaties, May 23, 1969, Art. 28 [Exhibit RLA-001]; Schwebel Expert Opinion at para. 10 [Exhibit RWE-013].

[354] CAFTA at Art. 10.18 [Exhibit C-1a].

[355] *See* Schwebel Expert Opinion at paras. 24-28 [Exhibit RWE-013].

[356] *Mondev*, Award at paras. 59-61 [Exhibit RLA-018].

> State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The 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.[357]

165. The Mondev tribunal's analysis is equally fitting to the case at hand. The only conduct which could possibly constitute a breach of any provision of CAFTA Chapter 10 is conduct that took place after January 1, 2009. Unless that conduct is itself inconsistent with Chapter 10 of CAFTA, the fact that it relates to pre-CAFTA conduct that might arguably have violated obligations under CAFTA (had CAFTA been in force at the time) cannot assist Claimants. As Judge Schwebel rightly puts it, "This [is] true even if [the conduct] continued to have detrimental effects."[358] The mere fact that Costa Rica's earlier conduct—including the Park law, Supreme Court decisions, decrees of expropriation, and administrative valuations, etc. that may have resulted in the uncompensated expropriation of Claimants' properties—had gone unremedied or unredressed when CAFTA came into force does not justify this Tribunal applying CAFTA retrospectively to that conduct.

[357] *Mondev*, Award at para. 70 [Exhibit RLA-018].

[358] Schwebel Expert Opinion at para. 32 [Exhibit RWE-013].

2. Where Alleged Breaches Have Occurred before Respondent's Obligations under CAFTA Came into Force, There Can Be No Continuing Obligation to Provide Compensation for Those Alleged Breaches

166. As the United States rightly argued in *Mondev*, there can be no breach of a treaty if the treaty is not in force at the time of the acts constituting the alleged breach.[359] This means that before parties have entered into a treaty that obligates the State not to expropriate the investor's property without compensation, the State has no such obligation not to do so—other than any obligation under Costa Rican law or customary international law that may exist. Yet Claimants have not made any claim under Costa Rican law or customary international law regarding the unlawful expropriation of their properties.

167. Thus, before January 1, 2009, Costa Rica did not have any obligation to Claimants not to take their property without "prompt, adequate and effective compensation"[360] paid "without delay,"[361] because CAFTA was not in force to require it. And because CAFTA was not in force to obligate the manner of expropriation of Claimants' properties, there could have been no breach of any such obligation. And if there were no such obligation that could have been allegedly breached, there can be no continuing obligation to provide compensation for those alleged breaches.

3. Claimants' Allegation that They Could Not Have Known that They Suffered Damages Because of the Alleged Wrongful Expropriation until After a Final Quantum Has Been Identified Is without Merit

168. Presumably because Claimants recognize that they knew or should have known about the alleged breaching measures more than three years before they filed their Notice of Arbitration, Claimants attempt in their Reply submission to fabricate jurisdiction by arguing that

[359] *See Mondev*, Award at para. 45. [Exhibit RLA-018].

[360] CAFTA at Art. 10.7(1) [Exhibit C-1a].

[361] CAFTA at Art. 10.7(2) [Exhibit C-1a].

they could not have known that they suffered damage because of the alleged wrongful takings until some time after a final quantum has been identified. Claimants' arguments are without merit.

169. With respect to Claimants' claims for those properties that were directly expropriated, Claimants argue that "[i]nvestors cannot possibly determine whether non-compliance [with CAFTA's obligation to provide adequate and effective compensation] even exists until after it has been presented with a final decision from the municipal expropriation process."[362] If Claimants' argument is that they have not exceeded CAFTA's three-year statute of limitations because they do not yet know if they have suffered damages as a result of inadequate or ineffective compensation for their expropriated properties because they have not yet received final compensation for those properties, then there has not yet been a breach of CAFTA that warrants any such compensation.

170. Under Claimants' argument, a breach of the CAFTA expropriation provision as a result of paying inadequate or ineffective compensation would only occur once a party has received the State's final valuation of the fair market value of that property. That is, a party cannot know if the amount they will receive is too little until that amount is final. As explained in Section II.D.2 of Respondent's Counter-Memorial, Costa Rica's expropriation system allows for landholders to object to initial appraisal amounts, multiple independent appraisals of expropriated properties, and multiple judicial reviews to determine a final fair market value. For those properties that have received an Act of Dispossession, but not a final decision on the fair market value of their property, under Claimants' own argument, they cannot yet claim that

[362] Claimants' Reply at para. 303.

Respondent has breached its obligations under CAFTA on the basis that it has failed to compensate them fairly.

171. Regarding the statute of limitations and Claimants' allegations of the delay in receiving a final valuation amount or in receiving payment, if Claimants have suffered any damages as a result, they most certainly knew or should have known of such damages more than three years before they submitted their Notice of Arbitration. As explained above in Section III.B.1, Claimants themselves noted several points in time when they were aware of alleged breaches of the expropriation provision and related injuries. As such, Claimants' expropriation claims fall outside the scope of the Tribunal's jurisdiction. In any case, even if investors do not know the exact amount of damages that they suffered, they can and do know that they have been harmed and that the statute of limitations has begun to run. Claimants' attempt to avoid the three-year statute of limitations in the CAFTA is without merit.

4. Claimants' Allegation that They Should Not Be Denied Relief on the Basis of the Statute of Limitations Merely Because They Failed to Meet the Statute of Limitations Requirement by Three Months Is Without Merit

172. Claimants also attempt in their Reply submission to fabricate jurisdiction by arguing that their failure to meet CAFTA's statute of limitations obligation by only three months somehow justifies the Tribunal to ignore CAFTA's statute of limitations with respect to Claimants' claims in this proceeding.[363] Claimants' arguments are without merit.

173. CAFTA expressly limits the time period within which claimants are eligible to bring arbitration claims to three years.[364] Three years is not merely an estimate.[365] If an investor brought a claim one day before the three year statute of limitations expired, that would be valid

[363] *See* Claimants' Reply at paras. 305, 310.

[364] *See* CAFTA at Art. 10.18 [Exhibit C-1a].

[365] *See* Schwebel Expert Opinion at para. 18 [Exhibit RWE-013].

under CAFTA. Likewise, if she brought the same claim one day after the statute of limitations expired, it would be time-barred. As Judge Schwebel explains in his expert report, "[Article 10.18] makes it clear that the State parties to CAFTA expressly restricted their consent to arbitrate pursuant to the limitations provided therein. Specifically, unless Claimants fulfill the requirements set forth in Article 10.18, Costa Rica does not consent to arbitrate under CAFTA, and the Tribunal lacks jurisdiction to hear Claimants' claims."[366] Thus, allowing the length of the statute of limitations to be extended merely because a claimant is "close" to the limit would defeat the purpose of including a statute of limitations in CAFTA in the first place.[367]

174. In sum, Claimants' attempt to cure their jurisdictional problems by asserting continuing breaches fails because the challenged acts are not continuing. Rather, they are, at best, completed acts that have lingering effects, which cannot overcome the fact that they were completed prior to CAFTA's entry into force. Not only does Claimants' attempt to characterize completed acts as continuing breaches not bring their claims within the time that CAFTA has been in force, it underscores the fact that that they knew of the alleged beaches far outside CAFTA's statute of limitations. By pointing to breaching acts or conduct prior to CAFTA's entry into force, Claimants admit knowledge well before the statute of limitations' critical date. Thus, Claimants' allegations remain outside of the Tribunal's jurisdiction both because of CAFTA's statute of limitations and because CAFTA was not in force when Claimants allege it was breached.

IV. LEGAL ARGUMENTS ON THE MERITS

175. In their Reply (as in their Memorial), Claimants tell a tale of overzealous conservationists and government agencies that have been conspiring behind the scenes to keep

[366] Schwebel Expert Opinion at para. 18 [Exhibit RWE-013].

[367] *See* Schwebel Expert Opinion at para. 18 [Exhibit RWE-013].

Claimants from owning and developing their land in the *Las Baulas* National Park. The reality is far different: As detailed above and in Respondent's Counter-Memorial, the Republic of Costa Rica has acted in good faith at all times to regulate the use of land in and around the Park in the public interest, in order to protect the leatherback turtles while also respecting affected landowners' property rights.

176. As outlined in the Counter-Memorial and confirmed in this Rejoinder, Claimants' characterizations of events are overstated in many respects: Costa Rica never conferred on Claimants any affirmative, perpetual rights to develop their properties or any immunity from future land use and environmental regulation. Most of the properties Claimants purchased included land that was within the National Park at the time Claimants purchased them and, thus, were and are subject to expropriation (with compensation) under the 1995 Park Law. Several of Claimants' other properties only partially fall within the boundaries of the Park. The portions of those properties that fall outside the boundaries of the Park remain and will continue to remain in Claimants' possession for their full use and enjoyment. Nor has Costa Rica unreasonably delayed the expropriation process of the lots inside the Park. The majority of Claimants' properties are progressing through the legal process of expropriation in Costa Rica. If allowed to continue through this process, the government will complete the expropriations and pay Claimants for the portions of their properties that fall within the Park boundaries.

177. Costa Rica has acted in accordance with its obligations under CAFTA throughout these arbitral proceedings. In the following sections, we explain first that Respondent has not breached its obligations under the expropriation provision of CAFTA; next, we explain that Respondent has not breached its obligations to treat Claimants fairly and equitably.

A. COSTA RICA HAS NOT BREACHED ITS OBLIGATIONS WITH RESPECT TO EXPROPRIATIONS

178. The parties are in agreement that Article 10.7(1) of CAFTA requires that an expropriation—such as the current expropriation proceedings against Claimants' properties located inside the Park—must be carried out in compliance with four requirements: (i) the expropriation must be made for a public purpose; (ii) it must be made in a non-discriminatory manner; (iii) the government must provide prompt, adequate, and effective compensation; and (iv) it must be done in accordance with due process of law.[368]

179. CAFTA further requires in Article 10.7(2) that compensation (i) be paid without delay; (ii) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place; (iii) not reflect any change in value occurring because the intended expropriation had become known earlier; and (iv) be fully realizable and freely transferable.[369] In addition, Annex 10-C states that "except in rare circumstances, nondiscriminatory regulatory actions . . . to protect . . . the environment, do not constitute indirect expropriations."[370]

180. As discussed below, Costa Rica's expropriation procedures are fully consistent with its obligations under CAFTA. Respondent reaffirms that there is no question that Costa Rica will compensate Claimants for the property that it is expropriating. Costa Rica has an expropriation system in force to fairly determine the fair market value of the properties that are being expropriated and to guarantee landowners' rights. Throughout the expropriation process, the landowner has at his disposal the value of the administrative appraisals at the time the

[368] *See* CAFTA at Art. 10.7(1) [Exhibit C-1a]; *see also* Respondent's Counter-Memorial at para. 163; Claimants' Reply at para. 162.

[369] *See* CAFTA at Art. 10.7(2) [Exhibit C-1a].

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

judicial stage of the process starts and the full payment of the principal at the end of the judicial process. Additionally, with respect to properties that have not yet been directly expropriated, the acts taken by Costa Rica to protect the leatherback turtles constitute legitimate, nondiscriminatory actions to protect Costa Rica's environment. Thus, those actions do not amount to indirect expropriation under CAFTA.

1. Costa Rica Has Compensated Claimants for the Expropriation of their Properties in the Judicial Stage of Expropriation Procedures, or Is in the Process of Doing So

181. As previously explained, nine of Claimants' properties are currently in the judicial stage of the expropriation procedure. With respect to those properties, Respondent's actions are fully consistent with its obligations under Article 10.7 of CAFTA, as discussed below.

a. *Las Baulas* National Park Was Created for a Valid Public Purpose

182. In their Reply, Claimants have suggested that the creation of the *Las Baulas* National Park was not necessary, in particular the inclusion of the 125-meter strip of land along the coast line.[371] Claimants even suggest that the leatherback turtle was decimated decades ago,[372] perhaps to suggest that there is no longer a need to protect the turtles. Claimants' allegations are without merit.

183. Costa Rica's public purpose in creating the *Las Baulas* National Park is unmistakable: to protect the fragile nesting habitat of one of the most endangered species in the world.[373] Respondent has provided extensive evidence on the record that urgent action has been and continues to be required to save the leatherback population in the East Pacific Ocean from

[371] *See* Claimants' Reply at paras. 61, 177.

[372] *See* Claimants' Reply at para. 54.

[373] *See* Executive Decree No. 20518-MIRENEM, Preamble [Exhibit C-1b].

extinction.[374] International organizations, scientists and Costa Rican authorities have determined since 1991 that development on the beach and its directly adjacent area affects the reproduction process of the leatherback turtle,[375] and thus that it is incompatible with the public purpose of protecting a critically endangered species.

b. There Is No Evidence of Discrimination

184. In their Memorial, Claimants provided no evidence whatsoever that Costa Rica has acted in a discriminatory manner in its expropriation of Claimants' land. In fact, Claimants expressly withdrew their earlier claims of discrimination from their Notice of Arbitration under the National Treatment and Most-Favored-Nation provisions of CAFTA.[376] Thus, up to this point, there has been no allegation and no evidence of discriminatory action by Costa Rica.

185. Surprisingly, in Claimants' Reply submission, in response to Costa Rica's statement that Claimants have provided no evidence that Costa Rica has acted in a discriminatory manner in its expropriation of Claimants' land, Claimants denied this fact and asserted that "when Respondent first began expropriations, it targeted two foreigners."[377] Specifically, Claimants allege that Costa Rica targeted a German investor, Ms. Marion Unglaube, and one of the U.S. Claimants, Mr. Brett Berkowitz. Claimants allege that Costa Rica did so because the two property owners "communicated directly with the Office of the Environment Minister."[378] Claimants, however, submit no evidence to support this statement.

186. Importantly, it is not the case that Costa Rica has acted in a discriminatory manner in expropriating Claimants' property. Costa Rica is, or will, expropriate all private

[374] *See* paras. 17-23 *supra*.

[375] *See* paras. 16-28 *supra*.

[376] *See* Claimants' Memorial on the Merits at para. 299.

[377] Claimants' Reply at para. 163.

[378] Claimants' Reply at para. 163.

property inside the Park, without consideration as to whether any particular property is foreign or domestically-owned. In any case, Respondent must clarify that the land owned by Ms. Unglaube and Mr. Berkowitz is located in Playa Grande Sur. As explained in Section II.E.1 above, Playa Grande Sur is in the high-priority area of the Park, because it is the area of the Park with the greatest concentration of turtle nests.[379] Thus, the two properties were not expropriated because they were foreign-owned, as Claimants allege; rather, they were expropriated because they were located in an area of the Park where the greatest concentration of turtle nests exists.

c. Costa Rica Has Complied with Its Obligation to Provide Prompt, Adequate and Effective Compensation

187. In its Counter-Memorial, Respondent explained that its ongoing expropriation proceedings satisfy CAFTA's requirement of compensation —*e.g.*, CAFTA's requirement that it pay "prompt, adequate, and effective compensation" in connection with any expropriation. In particular, Respondent argued that Costa Rica has a process for determining the amount of compensation to be paid for each expropriated investment plus interest by the time the taking has ripened, and it has a process to provide provisional compensation even before a property is dispossessed and while the final amount of compensation is being determined.[380] Respondent also explained that any delay that has occurred with respect to payment to Claimants' for the value of their properties occurred because Claimants' Costa Rican counsel filed appeals throughout the judicial process often when such appeals were not permitted by law, thus slowing the juridical process down.[381]

[379] *See* para. 101 above; *see also* MINAE and SINAC "Technical Proposal for the Expropriation of Properties Inside *Las Baulas* National Park," 2012, 5 [Exhibit R-010]; Piedra First Witness Statement at para. 57 [Exhibit RWE-002].

[380] *See* Respondent's Counter-Memorial at para. 169.

[381] *See* Respondent's Counter-Memorial at para. 172.

188. In their Reply, Claimants assert that there is no basis for Respondent's allegation that compensation for the direct expropriation of Claimants' properties has been "prompt." Claimants' argument is without merit. Claimants consider that "prompt" payment occurs when compensation has been paid "by the time the taking has ripened, or at least to have made meaningful progress towards a determination of the amount of compensation to be paid for each expropriated investment, so long as an appropriate rate of interest will be paid to compensate for any delay."[382] As explained in Respondent's Counter-Memorial, under Costa Rican law an expropriation has ripened when title passes to the State. This only occurs after the final judgment ordering the payment of compensation and the transfer of title is rendered and executed. Around that time, at minimum, the principal amount of value for the expropriated property is made available to the property owners. Therefore, consistent with Claimants' definition of "prompt," payment of the principal amount is made or made available to the property owner around the time the taking has ripened under Costa Rican law.

189. For example, in this case, for all of the lots for which a final judgment has been issued by the courts, Claimants have received either full payment (including interest) or payment of the principal or the principal has been made available to Claimants. Thus, for example, full payment (including interest) has been made for Lot SPG2; payment of principal has been made for Lots A40 and B3; and the principal payment has been made available for Lots B6 and B8. Claimants have requested payment of the amount awarded for Lot B6 in November 2014; that request is currently being processed. Claimants have not yet requested payment of the amount awarded for Lot B8.[383] With respect to the other four lots in the judicial stage of the expropriation proceedings for which a final judgment has not been issued, Claimants have

[382] Claimants' Memorial on the Merits at para. 225.

[383] *See* Chaves Witness Statement at para. 39 [RWE-010].

received payment of the administrative appraisal value for Lot SPG1, and Respondent has made available to Claimants the value of the administrative appraisal for Lots B1, B5, and B7. For the latter three lots, Claimants have not yet requested payment.

190. In addition, Claimants allege that Respondent is unduly blaming Claimants for not taking the low amounts offered through the administrative appraisals. In particular, Claimants allege that "Respondent offers up its system as proof that it meets the promptness test . . . but – if an investor seeks to vindicate one's rights by utilizing the protections allegedly offered by the system, it has surrendered it[s] right to demand that compensation be paid without delay."[384] Claimants' argument is without merit. Claimants appear to have misunderstood Respondent's arguments regarding the delay in the expropriation procedures in the judicial phase of the proceedings. Respondent did not allege that delay was caused by Claimants seeking to appeal the administrative valuation of their property. Rather, Respondent alleged that any delay in the expropriation process was due to unnecessary and unjustifiable appeals made by Claimants' Costa Rican counsel during the judicial proceeding not concerning valuation.[385] Claimants have no response to these allegations.

d. Ample Due Process Has Been Provided

191. There is no doubt that Costa Rica has satisfied its obligation to provide appropriate procedures and due process for the expropriation of Claimants' properties. In fact, Claimants have not made any claims—either in their Memorial or in their Reply—alleging that Costa Rica has breached such an obligation. The reality is that Claimants have had due opportunity to present their arguments and defend their interests throughout the entire expropriation process.

[384] Claimants' Reply at para. 166.

[385] *See* Respondent's Counter-Memorial at para. 172.

192. As explained above and in Respondent's Counter-Memorial, Costa Rican law provides for both administrative and judicial procedures to determine the fair market value of the property being expropriated. This process is based on independent appraisals and full consideration of the evidence by the courts reviewing each particular case. In addition, the property owner has multiple recourses, administrative and judicial, to challenge the expropriation and the fair market value awarded by the courts.[386] Therefore, Costa Rican law provides ample due process protections for landowners, such as Claimants in this case.

2. Costa Rica Will Compensate Claimants for the Expropriation of their Properties that Are in the Administrative Stage of Expropriation Procedures

193. Costa Rica's actions are also consistent with its obligations under Article 10.7 of CAFTA with respect to Claimants' nine properties that are in the administrative stage of the expropriation procedures. As noted above, there is no question that Costa Rica's expropriations are being undertaken for a public purpose—that is, the protection of the nesting habitat of one of the most endangered species in the world. There is also no evidence, or even an allegation, that Costa Rica has acted in a discriminatory manner in executing its expropriation procedures for these nine properties. In addition, Claimants will receive prompt, adequate, and effective compensation for their properties that are currently in the administrative stage as soon as the government completes its improvements of the expropriation process in line with the *Contraloría's* recommendations. Finally, Costa Rica's careful, multi-step process provides an abundance of due process to landowners such as Claimants.

[386] *See, e.g.,* Law on Constitutional Jurisdiction, Law No. 7135, October 11, 1989, Art. 32 [Exhibit R-006]; *see* Chaves Witness Statement at para. 50 [RWE-010].

194. In their Reply, Claimants allege that Costa Rica has unreasonably suspended expropriation procedures that are in the administrative stage.[387] Claimants' allegations are unfounded. As Respondent has explained in its Counter-Memorial and in its Rejoinder above, the decision to suspend proceedings in the administrative phase was made in order to allow MINAE and SINAC to implement the recommendations identified by the *Contraloría* in its February 2010 report aimed at improving expropriation procedures with respect to the *Las Baulas* National Park and guaranteeing the landowner's property rights.[388]

195. As soon as the government completes this improvement process, Claimants may either request an updated administrative appraisal for the properties in the administrative stage or continue to the judicial stage directly without an updated administrative appraisal (this is true for all of Claimants' nine properties where a Declaration of Public Interest was issued but the process was suspended before it reached the judicial stage).[389] If Claimants object to the new updated appraisals, the expropriation process will continue to the judicial stage. At that point, funds in the amount of each respective administrative appraisal will immediately be available to Claimants.[390] Claimants will have an opportunity to seek higher compensation for their properties in the judicial stage of Costa Rica's expropriation proceedings. At the end of this process, Claimants will be able to request and will be awarded interest for the time expended in the judicial stage.[391]

196. Claimants also allege in their Reply that Respondent has not explained when Claimants will receive prompt, adequate and effective compensation for properties in the

[387] *See* Claimant's Reply at paras. 173-174.

[388] *See Contraloría's* Report No. DFOE-PGAA-IF-3-2010 [Exhibit C-1zk].

[389] *See* Expropriation Law, Art. 23 [Exhibit C-1c].

[390] *See* Expropriation Law, Arts. 31, 34 [Exhibit C-1c].

[391] *See* Expropriation Law, Art. 11 [Exhibit C-1c].

administrative stage of the expropriation procedures.[392] As explained above, MINAE and SINAC have been working towards complying with the *Contraloría's* recommendations. They have already completed nine out of the thirteen recommendations and are working to complete the other four as soon as possible.[393] Once SINAC lifts the suspension, it will proceed with the expropriation procedure to determine fair market value for all of the properties and will pay the compensation awarded without delay. It will lift the suspension as soon as practicable.[394]

3. Costa Rica's Measures to Protect the Leatherback Turtle Do Not Constitute an Indirect Expropriation of Claimants' Properties that Have Not Been Subject to Costa Rica's Expropriation Procedures

197. Claimants alleged in their Memorial that their properties that have not yet received a Decree of Public Interest have been indirectly expropriated. Claimants alleged that this was the case for two reasons: (i) because Costa Rica allegedly redrew the boundaries of the Park so that Claimants' properties were included inside the Park; and (ii) because SETENA is no longer issuing environmental permits for properties within the Park.[395] We will deal with each of these allegations in turn.

198. First, it is not the case that Costa Rica redrew the boundaries of the Park in order to include Claimants' land within those boundaries, as Claimants allege. Rather, it has always been the case that the 125 meter protected area is inland and includes Claimants' properties (or portions thereof). Thus, for example, in 1991 Costa Rica designated a 125-meter strip of land in Playa Grande as being part of the Park and in Playa Ventanas as being part of a protected zone. In 1995, that entire 125-meter strip of land (*i.e.*, Playa Grande and Playa Ventanas) was designated as being part of the Park. As Respondent demonstrated in Section II.C.2, the

[392] *See* Claimants' Reply at para. 174.

[393] *See* para. 113 *supra*.

[394] *See* Jurado Witness Statement at para. 15 [Exhibit RWE-006].

[395] *See* Claimant's Memorial on the Merits at paras. 208-12.

Administration has consistently treated the 125-meter strip of land as being part of the Park following the enactment of the 1995 Park Law. Thus, there has been no grand conspiracy by government officials and environmental NGOs to deprive Claimants of their land, as Claimants attempt to allege. Instead, Claimants' properties (or a portion of Claimants' properties) have been in this protected strip of land since 1991.

199. Second, the suspension of permits within the Park was an action taken to protect the nesting grounds of the leatherback turtle; as such, it is not an indirect expropriation as provided in Annex 10-C of CAFTA.[396] Specifically, Article 4(b) of Annex 10-C provides that "[e]xcept 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."[397] In their Reply, Claimants deny that Costa Rica's suspension of environmental permits cannot be considered an indirect expropriation in accordance with Annex 10-C of CAFTA. In particular, Claimants allege that "[a]lthough the measures were ostensibly adopted and applied for the environmental object of saving the leatherback turtle from extinction, the truth is that there is no evidence . . . that Respondent's measures have done anything to help the leatherback turtle."[398] We disagree. As stated in Section II.A, Respondent has adopted these measures with the specific purpose of preserving an endangered species and its environmentally fragile nesting area.[399]

200. In any case, Annex 10-C of CAFTA does not require that a non-discriminatory regulatory measure must in fact protect legitimate public welfare objectives; rather, the

[396] *See* CAFTA, Annex 10-C [Exhibit C-1a].

[397] CAFTA, Annex 10-C at Art. 4(b) [Exhibit C-1a].

[398] Claimants' Reply at para. 180.

[399] *See also* Piedra Second Witness Statement at para. 29 [Exhibit RWE-008].

obligation is that the non-discriminatory measures be "designed and applied to protect legitimate public welfare objectives, such as . . . the environment."[400] There can be no debate that the suspension of the permits was designed to do just that. Nor have Claimants themselves refuted such a claim. Thus, Respondent's suspension of permits for properties in the Park does not constitute an indirect expropriation of Claimants' properties.

201. Recognizing the weakness of their own arguments, Claimants seek to identify a new measure they claim allegedly constitutes an indirect expropriation of Claimants' properties – the suspension of expropriation procedures due to the *Contraloría* 2010 Report.[401] Claimants assert that this measure "cannot possibly be justified on an environmental basis" and, therefore, does not fall within the exception in Annex 10-C.[402] Claimants' attempt to introduce a new measure allegedly constituting indirect expropriation shows Claimants' desperation to make new arguments in the hopes that one of their arguments will constitute a breach of Respondent's obligations under CAFTA. Claimants' efforts in this regard, however, fail.

202. First and foremost, Respondent's actions do not constitute a taking (direct or indirect). Respondent is merely suspending its expropriation procedures in order to improve Costa Rica's expropriation procedures. Importantly, the suspension of the expropriation procedures has not infringed on Claimants' possession of their properties. Rather, Claimants retain all attributes of ownership.

203. Second, Respondent's actions in suspending the application of its expropriation procedures are part of improving the process leading up to a direct expropriation. Measures affecting the due process of a direct expropriation cannot themselves be measures that are

[400] CAFTA, Annex 10-C at Art. 4(b) [Exhibit C-1a].

[401] *See* Claimants' Reply at para. 181.

[402] Claimants' Reply at para. 181.

tantamount to indirect expropriation. To allow that to occur would be to accept that every direct expropriation procedure creates a colorable claim of indirect expropriation until direct expropriation is complete. Such an outcome would be non-sensical.

B. COSTA RICA HAS AFFORDED CLAIMANTS FAIR AND EQUITABLE TREATMENT

204. Contrary to Claimants' allegations, Costa Rica has complied fully with its obligations under Article 10.5 of CAFTA which requires that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . ."[403] In their Reply, Claimants limit their discussion to two fair and equitable treatment claims: (i) Claimants' alleged legitimate expectations; and (ii) Costa Rica's allegedly arbitrary actions. As discussed below, each of these claims is without merit.

1. Costa Rica Has Not Contravened Claimants' Legitimate, Investment-Backed Expectations

205. In their Reply, Claimants contend that Costa Rica's actions breached Claimants' legitimate expectations.[404] Specifically, they allege that when they acquired their properties, they understood that their properties were outside the Park and that the government would not expropriate them.[405] Claimants also allege that at the time they made their investments, they reasonably believed that they could obtain construction permits for their property.[406] There is no merit to Claimants' allegations.

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

[404] *See* Claimants' Reply at paras. 63-103, 183-197.

[405] *See* Claimants' Reply at paras. 63-103.

[406] *See* Claimants' Reply at para. 118.

a. The Fair and Equitable Treatment Standard under Customary International Law Does Not Include Protections for Expectations of Legal Stability

206. As discussed in Respondent's Counter-Memorial, Article 10.5 of CAFTA provides for the minimum standard of treatment under customary international law. Article 10.5(1) of CAFTA provides that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . ."[407] Art. 10.5 (2) clarifies that, "for greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment . . . as the minimum standard of treatment to be afforded to covered investments . . . [It does] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights."[408] Thus, CAFTA provides for a very high threshold. Any treatment that falls below this standard would not be a violation of CAFTA.

207. Respondent also explained in its Counter-Memorial that the "minimum standard of treatment under customary international law was set out by the tribunal in *Neer v. Mexico* in 1926, although it is overwhelmingly agreed that this standard has evolved over time."[409] In addition, Respondent explained that the *Neer* tribunal stated that in order to violate the minimum standard of treatment under customary international law, acts "should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable man would readily recognize its insufficiency."[410]

[407] CAFTA at Art. 10.5(1) (emphasis added) [Exhibit C-1a].

[408] CAFTA, Art. 10.5(2) [Exhibit C-1a].

[409] Respondent's Counter-Memorial at para. 197.

[410] Respondent's Counter-Memorial at para. 197; *see also Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award, June 8, 2009 ("*Glamis Gold*, Award"), para. 612, n. 1258 (quoting *L.F.H. Neer and Pauline Neer v. United Mexican States*, Award, October 15, 1926, paras. 4-5) [Exhibit RLA-014].

208. In their Reply, Claimants have attacked this statement alleging that the *Neer* tribunal could not have interpreted the fair and equitable treatment standard, because that standard did not come into existence with respect to investment protection treaties until after the Second World War.[411] Claimants' attack is unjustified. Respondent refers to the *Neer* case for purposes of identifying a case in which the minimum standard of treatment under customary international law was set out. The *Neer* standard has been cited by numerous investor-state tribunals as providing the minimum standard of treatment under customary international law, even though it is overwhelmingly agreed that this standard has evolved over time.[412] Therefore, there is nothing "bizarre" about Respondent's reference to the *Neer* case.

209. What is more surprising is that Claimants have attacked Respondent for making such a reference. Claimants are simply trying to confuse the issue in order to avoid the obvious – the minimum standard of treatment under customary international law sets a very high threshold. As explained in Respondent's Counter-Memorial, the tribunal in the *Glamis Gold* case, which interpreted a similar standard of treatment under NAFTA, explained that the standard requires that "the measure [] 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" in order to fall below the accepted international standard.[413] None of Respondent's actions even come close to meeting that standard.

210. The *Glamis Gold* tribunal also held that "a violation of [the fair and equitable treatment of NAFTA] . . . requires . . . at least a . . . relationship between the State and the

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[411] *See* Claimants' Reply at para. 187.

[412] *See, e.g.*, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL (NAFTA), Award, January 26, 2006 ("*Thunderbird*, Award"), para. 194 [Exhibit RLA-015]; *Glamis Gold,* Award, para. 616 [Exhibit RLA-014].

[413] *Glamis Gold,* Award at paras. 616, 627 [Exhibit RLA-014].

investor, whereby the State has purposely and specifically induced the investment."[414] Thus, according to this tribunal, the minimum standard does not protect legitimate expectations, unless the State has intentionally created them. Other tribunals have also interpreted the minimum standard of treatment to exclude the protection of an investor's legitimate expectations when there has been no explicit government action inducing the investor to invest. Respondent cited in its Counter-Memorial to *Merrill & Ring v. Canada, International Thunderbird Gaming Corporation v. Mexico* and *ADF Group Inc. v. United States* as examples.[415]

211. Thus, as Respondent explained in its Counter-Memorial, the minimum standard of treatment under customary international law required by Article 10.5 of CAFTA 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.[416] As Costa Rica never purposely or specifically prompted Claimants to purchase their properties in the Park, the minimum standard of fair and equitable treatment would not include an obligation to honor Claimants' expectations.

212. In their Reply, Claimants contest Respondent's reliance on the *Merrill & Ring v. Canada* case, but fail to question Respondent's reliance on other similar jurisprudence. With

[414] *Glamis Gold*, Award at para. 766 [Exhibit RLA-014].

[415] *See* Respondent's Counter-Memorial at para. 200; *see also Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL (ICSID administered) (NAFTA), Award, March 31, 2010 ("*Merrill & Ring*, Award"), paras. 213, 233, 242 (finding that the minimum standard under NAFTA is that of customary international law and that in order to breach that standard of fair and equitable treatment by thwarting an investor's legitimate expectations, the State must have made representations to induce the investment) [Exhibit RLA-016]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, para. 189 (holding that the investor's legitimate expectations had not been breached under the NAFTA minimum standard of fair and equitable treatment because its expectations had not been induced by actions of the government) [Exhibit RLA-007]; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL (NAFTA), Award, January 26, 2006, paras. 147-48 (finding that there was no breach of fair and equitable treatment under the customary international law standard because claimants had not shown that the State's actions had been sufficient to generate the investor's legitimate expectations that the State had allegedly failed to honor) [Exhibit RLA-015].

[416] *See* Respondent's Counter-Memorial at para. 201.

respect to the *Merrill & Ring v. Canada* case, Claimants seem to suggest that Respondent missed paragraph 232 of this Award.[417] It did not. In fact, that paragraph also supports Respondent's position. The tribunal states that there needs to be an "*abrupt* change of the legal environment" and it says "to the extent that it was adverse, it has continuously been adverse."[418] Thus, the tribunal agreed that the minimum standard of treatment protects the investor only from shocking, outrageous, abrupt changes in the legal system.

213. As Respondent discusses in the following Section, not only was there no abrupt or shocking actions on behalf of Costa Rica, but Costa Rica has always acted consistently with respect to the boundaries of the Park and the need to expropriate private land that fell within the Park's boundaries.

b. <u>At the Time of their Investments, Claimants Could Not Have Legitimately Expected that their Land Was Outside the Park or that It Would Not Be Expropriated</u>

214. In their Reply, Claimants allege that when they acquired their properties, they understood that their properties were outside the Park and that the government would not expropriate them.[419] There is no legitimate basis for Claimants' alleged expectations. Claimants acquired their properties between 2003 and 2007. At that time, Claimants knew, or should have known, that they acquired land within the limits of the National Park, and, thus, that their land was subject to being expropriated by the State.

215. As detailed in Section II.C.1, evidence on the record shows that Claimants were fully aware when they made their investments that their properties were inside the Park and that, as such, the land was subject to being expropriated. At that time, the Park had been created by

[417] *See* Claimants' Reply at para. 189.

[418] *Merrill & Ring*, Award at para. 232 (emphasis added) [Exhibit RLA-016].

[419] *See* Claimants' Reply at paras. 63-103.

the 1991 Decree and the 1995 Park Law. Both the Decree and the Law indicated that the *Las Baulas* National Park included a 125-meter strip of land from the high tide line, and that any private property within the boundaries of the Park would be expropriated. If there were any doubt, the *Procuraduría* issued a public opinion in February 2004, which clarified that the Park included a 125-meter strip of land from the high tide mark. This was followed by a binding *dictamen* issued by the *Procuraduría* in December 2005 and decisions of the Supreme Court of Costa Rica in 2005 and 2008 also indicating that the Park included a 125-meter strip of land.

216. In spite of these clear and consistent facts, Claimants maintain in their Reply that there is an "abundance of evidence outlining the vacillations of the various official entities."[420] Claimants allege that not even government officials understood the Park to include a 125-meter strip of land nor that Costa Rica would carry out expropriations of that land due to the alleged lack of economic resources to pay for the expropriations.[421]

217. Claimants' support for these statements, however, is baseless. In making such statements, Claimants ignore the practice of those who applied and lived under the law during that time. During that period, no one acted as if the Park ceased to exist on land. Instead of focusing on the *status quo* at that time, Claimants prefer to focus on political statements and bills presented to Congress (but never approved) to try to change the scope of the Park.[422] But nothing Claimants have identified undermines the common understanding dating back to 1991 that the Park's boundaries include 125 meters of land. Thus, Claimants' purported expectations that their properties fell outside the boundaries of the National Park and that those boundaries would not change are unfounded; the Park's boundaries were consistent, and Claimants should

[420] Claimants' Reply at para. 191.

[421] *See* Claimants' Reply at para. 83.

[422] *See* paras. 65-69, 78 *supra*.

have expected that the portions of their land that lay inside those boundaries would be treated accordingly – they would be expropriated.

218. As stated in Respondent's Counter-Memorial, what appears to have happened is that Claimants took a gamble that even though their properties (or portions thereof) were within the boundaries of the Park, the government would not expropriate their land.[423] Whether Claimants believed this to be the case because of an alleged lack of government funds or because legislation was introduced that might have changed the *status quo* is irrelevant. Rather, what is relevant is that Claimants could not have had a legitimate expectation that the government would not carry out the expropriations that they have indicated by law they would undertake.

c. At the Time of their Investments, Claimants Could Not Have Legitimately Expected that They Had the Right to Develop their Land

219. In their Reply, Claimants also allege that at the time they made their investments, they reasonably believed that they could obtain construction permits for their property.[424] Claimants' allegations are without merit. 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.

220. An 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. As the *Saluka* tribunal observed: "No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be

[423] *See* Respondent's Counter-Memorial at para. 209.

[424] *See* Claimants' Reply at para. 118.

taken into consideration as well."[425] Thus, because Claimants knew that they were acquiring land inside the Park, they could not have legitimately expected that Costa Rica would not adopt measures to restrict development in a protected area.

221. Claimants make their assertion in part based on the fact that Article 2 of the 1995 Park Law provided that they could make full use their properties.[426] While it is true that Article 2 of the 1995 Park Law provides that landowners *m*ay use and enjoy their properties until the moment they are expropriated, it is incorrect for Claimants to assume that there is no question that they could have obtained construction permits for their land or even that they had a right to build on their land at the time they made their investments.

222. In order to have a right to build on their land, Claimants would have had to obtain a building permit from the Municipality of Santa Cruz.[427] As previously explained, to obtain any such permit, the landowner must comply with a series of requirements, including obtaining an environmental permit granted from SETENA.[428] The Municipality studies the application submitted by the landowner and then determines whether or not to approve the application.[429]

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[425] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, para. 305 [Exhibit RLA-023]; *see also Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, Part IV, Chapter D, p. 5 (finding that Methanex was well aware that California regulated potentially hazardous substances and could not reasonably expect that its product would be immune from such regulation) [Exhibit RLA-017]; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011, para. 290 (finding that "fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements") [Exhibit RLA-009]; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, para. 332 (finding that "[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment") (emphasis omitted) [Exhibit RLA-021].

[426] *See* Claimants' Reply at para. 193.

[427] *See* Letter from Municipality of Santa Cruz on Building Permits, August 1, 2014 [Exhibit C-091].

[428] *See* Letter from Municipality of Santa Cruz Regarding Requirements to Obtain a Building Permit in Playa Grande, August 1, 2014 [Exhibit C-091].

[429] *See* Letter from Municipality of Santa Cruz on Building Permits, August 1, 2014 [Exhibit C-091].

The Municipality may deny the permits if the application is defective.[430] Claimants have not obtained any such permits for any of their land, except for Lot B5, and there is no guarantee that they would obtain any such permits if they were to request them now. Thus, Claimants could not have legitimately expected that they could build on their land at the time they acquired their property. In fact, after December 16, 2008, the Municipality is prohibited from granting permits for property located inside the Park as a result of the Supreme Court's decision.[431]

2. Costa Rica Has Acted in a Consistent and Reasonable Manner

223. Claimants also allege that Respondent has breached Article 10.5 of CAFTA by acting in an arbitrary manner. In particular, Claimants point to the treatment of their properties that are about to enter the judicial stage or are currently in the judicial stage of the expropriation procedures and complain about the scope of valuations and the progression from the administrative stage to the judicial stage.[432] As discussed in Respondent's Counter-Memorial and elaborated below, none of the alleged treatment constitutes a breach of Article 10.5 of CAFTA.

224. In its Counter-Memorial, Respondent stated that any allegation that a State's conduct is arbitrary must meet a very high standard.[433] In fact, both parties seem to agree that the applicable standard is the one set forth in the *ELSI* case where the International Court of Justice held that: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law . . . It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical property."[434] Thus, for a Tribunal to find that

[430] *See* Construction Law of Costa Rica, Law No. 833, November 4, 1949, Arts. 1, 74 [Exhibit R-099].

[431] *See* paras. 49-52 *supra*.

[432] *See* Claimants' Reply at para. 194; Claimants' Memorial on the Merits at paras. 278, 280-284.

[433] *See* Respondent's Counter-Memorial at para. 211.

[434] *Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20), para. 128 [Exhibit RLA-012].

Costa Rica has acted in an arbitrary manner, it must meet the high standard articulated in *ELSI*. Respondent's actions do not even come close to meeting that standard.

225. First, Respondent's decision to expropriate Claimants' property located inside the Park was reasonable and consistent with its policy to protect the nesting sites of the leatherback sea turtles. As discussed in Section II.B.1 above, in 1991 Costa Rica created a National Park to protect the nesting sites of the leatherback sea turtles. This Park includes a 125-meter strip of land from the high tide line, which in some areas includes private property. For this reason, the Decree provided that the State would acquire such land to ensure the protection of the area.[435] This situation did not change in 1995 when the Park Law was issued.[436] Even after 1995, official documents show that the Park continued to include the 125-meter strip of land and that it would be expropriated.[437] And, if there were any doubt, the *Procuraduría* issued an interpretation of the 1995 Park Law which concluded that the Park in fact included this portion of land.[438] Likewise, Costa Rica's measures to regulate the use of land in this protected area were justified and based on technical criteria – scientific studies showed that human pressure on the nesting sites directly affected the reproductive process of the turtles. Therefore, Respondent's measures and conduct serve a public purpose. There is nothing surprising or shocking about them.

226. With respect to the expropriation process, Claimants assert in their Reply that their experience with Costa Rica's expropriation process is "not nearly as unusual as they, or Respondent, would have hoped."[439] They also allege that "one of the leading legal authorities on the law of expropriation in Costa Rica has been appalled and chagrined upon examining the

[435] *See* para. 30, 54*supra*.

[436] *See* paras. 32-34, 54 *supra*.

[437] *See* paras. 56-58, 75-82 *supra*.

[438] *See* paras. 35-41 *supra*.

[439] Claimants' Reply at para. 194.

evidence."[440] Claimants point in particular to the variations in valuations, but submit no evidence of the alleged arbitrariness.[441]

227. In any case, there is nothing arbitrary about the variations in valuations of Claimants' properties. To the contrary, such variations show that Claimants have had the opportunity to object to the valuations presented by the State and to submit their own independent assessments. It also shows that judges consider different evidence when trying to decide the fair market value of an expropriated property. Thus, there is nothing inherently arbitrary about the fact that judges have awarded different values for different expropriated property.

228. Claimants also assert in their Reply that Respondent's decision to suspend the expropriation procedures as a result of the 2010 *Contraloría* Report was arbitrary.[442] Claimants allege that the only reason SINAC decided to impose this suspension is to avoid paying Claimants to expropriate their properties.[443] It was not. As discussed in Section II.E.2.a above, Respondent adopted this measure in order to comply with the *Contraloría's* Report and avoid any future inefficiencies in the system, not to avoid payment to Claimants. In addition, SINAC's actions were not "self-imposed" as Claimants allege.[444] Instead, SINAC was implementing the recommendations of the *Contraloría*. As Mr. Milano explains in his expert report, SINAC had both a duty and the authority to adopt these measures.[445] SINAC has already complied with nine out of the thirteen recommendations and is working on completing the others as soon as

[440] Claimants' Reply at para. 194.

[441] *See* Claimants' Reply at para. 194.

[442] *See* Claimants' Reply at paras. 18-19, 196-97.

[443] *See* Claimants' Reply at para. 19.

[444] Claimants' Reply at para. 14.

[445] *See* Milano Expert Report at para. 47-49 [Exhibit RWE-012].

possible.[446] After the process of implementation is completed, SINAC will reinitiate the expropriation procedures and will pay Claimants plus interests. In the mean time, Claimants continue to have property rights on their lots, as have not been expropriated. In sum, Costa Rica's actions have been consistent with its obligations under Article 10.5 of CAFTA.

229. As Claimants have asserted, they are not a "monolithic entity."[447] Thus, for the Tribunal to determine that Costa Rica has breached its obligations under CAFTA, it must determine for each of the twenty-six properties at issue in this case (i) whether it was expropriated (a) without a public purpose, (b) in a discriminatory manner, (c) without prompt and adequate compensation, and/or (d) without due process; and (ii) whether it was treated fairly and equitably. Respondent is not the party treating Claimants as a "monolithic entity." Claimants are. They are the ones who filed one Notice of Arbitration for twenty-six different properties and twenty-six different claims. They want the Tribunal to forget there are twenty-six separate properties at issue in this case. They want the Tribunal to rule in their favor and award damages one the basis that there was one big conspiracy against Claimants (there was not) and that Costa Rica has generally breached its obligations under CAFTA (it has not). The Tribunal should not be persuaded by Claimants' attempts to make this case simpler than it is. It is a complicated case and, if the Tribunal were to rule on the merits, it would have to do so for each separate property.

V. DAMAGES

230. For the reasons outline in this Rejoinder and in Respondent's Counter-Memorial, Respondent maintains that it has at all times acted reasonably and in good faith in accordance with its obligations under CAFTA. Therefore, there is no basis for awarding Claimants any

[446] *See* para. 113 *supra*.

[447] Claimants' Reply at para. 269.

damages beyond that which they have already received or will receive through the expropriation procedures in Costa Rica. Claimants have already received (or will receive once requested by Claimants) CRC 1,669,035,202 colones for nine of their properties, and Claimants will soon have in hand provisional compensation for the remainder of the properties that are in the process of being expropriated, with possibly higher amounts to be determined in future court proceedings.[448] In addition, Claimants will receive compensation in the form of interest for delays in Costa Rica's expropriation proceedings carried out in the judicial stage of expropriation.

231. If the Tribunal were nevertheless to determine that Claimants' rights under CAFTA have been breached and award compensation accordingly, any amount received by Claimants in the domestic proceedings must, of course, be offset against the Award. In addition, in the event that the Tribunal awards damages based on the value of a property, Claimants must be required to surrender that property to the State without further court proceedings in Costa Rica. In their Reply, Claimants agree with both requests. That is, Claimants agree that any amounts that have been paid to them should be offset against any final amount awarded by the Tribunal[449] and that they will surrender title to their property to the State if the Tribunal awards damages on the value of their property.[450]

232. Claimants do not adjust the damages value that they seek in their Reply. Thus, as in Claimants' Memorial, in its Reply, Claimants seek an award for damages totaling US $59,484,100 dollars, comprised of US $36,543,000 dollars for the value of their allegedly

[448] *See* Section II.E.2.b *supra; see also* Chaves Witness Statement at Annex A [Exhibit RWE-010]; Annex C to this Rejoinder.

[449] *See* Claimants' Reply at para. 235.

[450] *See* Claimants' Reply at para. 182.

expropriated properties, and US $22,941,100 dollars in interest.[451] In its Counter-Memorial, Respondent indicated that these valuations were grossly overstated – both on technical grounds and because they ignore reliable indicators of fair market value.[452] As Claimants have not adjusted the damages they seek, Claimants' valuations remain grossly overstated, as discussed below.

233. In their Reply, Claimants demand that the report of Respondent's damages expert, Mr. Kaczmarek, be struck from the record because, Claimants allege, (i) Mr. Kaczmarek is not a qualified real estate valuation expert; (ii) Mr. Kaczmarek's report is unnecessary; and (iii) Mr. Kaczmarek's report is rife with legal argument.[453] Claimants' attack of Mr. Kaczmarek is without merit. First, Mr. Kaczmarek's qualifications as a real estate valuation expert and damages expert are sterling. His *curriculum vitae* attached to his First Expert Report demonstrates his vast relevant experience. Second, Mr. Kaczmarek's expert reports are absolutely necessary. In them, he examines Mr. Hedden's conclusions, the facts of the case, and the attributes of the disputed properties and provides an expert opinion on a fair measure of Claimants' damages calculations. Finally, Mr. Kaczmarek does not make legal conclusions; rather, he analyzes the facts of the case from the perspective of a damages expert—a role for which he is most certainly qualified. Thus, there is no basis for Claimants' motion to strike Mr. Kaczmarek's report from the record.

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[451] *See* Claimants' Memorial on the Merits at paras. 330-32; *see also* Claimants' Reply at para. 337(b). We have converted the amount of interest Claimants request from CRC to US dollars using the exchange rate on May 28, 2008, 513.93 CRC to the US dollar, as that is the exchange rate at which Claimants initially converted US dollar amounts from their expert report. *See* Oanda Currency Converter, Exchange Rate Between the Costa Rican Colón (CRC) and U.S. Dollar (USD) as of May 28, 2008, *available at* http://www.oanada.com/currency/converter (last visited July 31, 2014) [Exhibit R-061].

[452] *See* Respondent's Counter-Memorial at para. 223.

[453] Claimants' Reply at paras. 207-16.

234. Mr. Hedden, on the other hand, appears to have no experience whatsoever in assessing damages in international arbitration cases. In his Second Expert Report, Mr. Kaczmarek catalogues in detail the faults of Mr. Hedden's report. Mr. Kaczmarek also responds to each of Claimants' allegations and provides a complete analysis of his damages assessment in his Second Expert Report.[454] For the sake of efficiency, Respondent highlights certain of Claimants' allegations regarding damages below and provides Respondent's responses.

A. FAIR MARKET VALUE OF CLAIMANTS' PROPERTIES SHOULD REFLECT THE FACT THAT CLAIMANTS' PROPERTIES ARE WITHIN THE NATIONAL PARK

235. Claimants' principal complaint is one of wrongful expropriation.[455] CAFTA specifies that compensation for expropriation should be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.[456] In this case, Claimants identify the May 2008 Constitutional Court judgment as the single point in time when their properties were allegedly wrongfully expropriated.[457] Claimants allege that with the May 2008 Constitutional Court judgment—a measure that took place before CAFTA came into force in January of 2009—rights in their properties were taken. Respondent explained in detail in its Counter-Memorial its objections to Claimants' seemingly random selection of this date as the valuation date. There is no need to repeat those allegations here.

236. By Claimants' calculations then, they should receive the fair market value of their properties as of May 2008. But the fair market value of their properties in 2008 was significantly affected by the fact that the properties were located within the boundaries of the National Park. Oddly, Mr. Hedden in his reports fails to take into consideration the fact that Claimants'

[454] *See* Second Expert Report of Brent C. Kaczmarek, CFA, December 22, 2014 ("Kaczmarek Second Report") [Exhibit RWE-011].

[455] *See* Claimants' Reply at para. 217.

[456] *See* CAFTA at Art. 10.7(2) [Exhibit C-1a].

[457] *See* Claimants' Reply at para. 230.

properties were located in the National Park even though, as noted above, that fact has a substantial impact on the value of Claimants' properties.

237. Respondent's expert, Mr. Kaczmarek, has evaluated Claimants' investments in Costa Rica and determined that a proper approach for determining the compensation owed Claimants is the refund of Claimants' purchase price.[458] In their Reply, Claimants are critical of Mr. Kaczmarek's approach, alleging that there is no justifiable basis for his proposed alternative valuation method.[459] The purchase price is a proper approach for determining compensation, however, because it reflects the value of Claimants' properties taking into consideration the fact that the properties purchased by Claimants were inside the Park, as that fact was known at the time Claimants purchased their land.

238. In their Reply, Claimants argue that the value of Claimants' properties should not take into consideration the location of the properties within the National Park because Article 10.7 of CAFTA states that compensation for expropriation should "not reflect any change in value occurring because the intended expropriation had become known earlier."[460] This provision of CAFTA is intended to protect investors from receiving less than the fair market value of an expropriated investment where the value that an investor holds in the investment would be devalued by the prospect of expropriation.[461] In the case at hand, however, Claimants

[458] *See* Expert Report of Brent C. Kaczmarek, CFA, July 15, 2014 ("Kaczmarek First Report"), para. 167 [Exhibit RWE-004]; *see also* Kaczmarek Second Report at paras. 10-11 [Exhibit RWE-011]. In his first report, Mr. Kaczmarek also suggested that the administrative appraisals could serve as an alternative value of Claimants' properties. In his second report, based on additional evidence submitted by Claimants, Mr. Kaczmarek believes that the administrative appraisals overstate the value of the properties. Therefore, he no longer believes that they could reasonably serve as an alternative value for Claimants' property.

[459] *See* Claimants' Reply at paras. 208-16.

[460] CAFTA at 10.7(2) [Exhibit C-1a]; Claimants' Reply at para. 228.

[461] *See* CAFTA 10.7(2) [Exhibit C-1a].

purchased their properties at a discount from fair market value precisely because of the impending expropriations and location within a national park.

239. In fact, based on the purchase prices and information that Claimants have provided, it is evident that Claimants purchased their properties at a value below fair market value at the time—and with full knowledge of the risk of expropriation.[462] For example, Mr. Reddy states in his second witness statement that he was "aware at the time of purchase that the government could subsequently decide to expropriate any property in Costa Rica."[463] The company for which he is Chief Financial Officer, Spence Co., purchased each of its lots at a price much lower than what would have been the fair market value of those lots at the time. The only reason it could have received such a discount is because of the properties' location within a national park. Claimants Berkowitz, Holsten, Copher, and Spence also purchased each of their respective properties at a price discounted from what would have been fair market value for the properties if they had not been located within the Park.[464]

240. FTI and Claimants' damages approach would allow Claimants double recovery. This is because, as noted above, Mr. Hedden's fair market valuation of Claimants' properties excludes the impact of the Park, but Mr. Hedden's analysis reveals that Claimants' properties (except for Lot C71) were purchased at less than fair market value.[465] Thus, if Claimants were awarded the fair market value that excludes the impact of the Park for properties that they purchased at a significant discount to that fair market value because of the impact of the Park,

[462] *See* Kaczmarek Second Report at paras. 26-51 [Exhibit RWE-011].

[463] Reddy Second Witness Statement at para. 17.

[464] *See* Kaczmarek Second Report at paras. 26-51 [Exhibit RWE-011].

[465] *See* FTI Second Report at 12.

Claimants would unjustly receive a windfall for the expropriation of their properties. This would be categorically unfair and in conflict with the expropriation provisions under CAFTA.

B. FTI'S VALUATION ANALYSIS IS ALSO FLAWED IN OTHER WAYS

241. Mr. Hedden and FTI's analysis is flawed in several other ways as well. In fact, even if it were correct to ignore the fact that Claimants' purchased their properties at a discount, Mr. Hedden's valuations would still be inflated. First, Mr. Hedden ignores the reality of the real estate market in Guanacaste. His analysis does not take into account the bursting of the real estate bubble in 2008. Second, for those properties that were only partially expropriated, Mr. Hedden's damages calculation is nonsensical. Third, the Comparable Sales Approach that he employs contains errors. Mr. Kaczmarek in his Second Expert Report addresses each of these flaws in Mr. Hedden's report. Respondent briefly discusses below the most egregious flaws.

242. First, the Costa Rican market, like the U.S. real estate market that influences it, underwent a boom in the early 2000s and bust in 2008. Mr. Hedden's analysis ignores this fact. Instead Mr. Hedden attacks Mr. Kaczmarek's expert credentials and use of the Case-Schiller Index as a reference point.[466] As discussed above, Mr. Kaczmarek is an expert in the field of damages calculations, including real estate valuations. His expertise is unquestionable.[467]

243. Further, Mr. Kaczmarek's choice of the Case-Schiller Index as a reference point of real estate market trends is entirely reasonable. The Case-Schiller Index reflects the U.S. real estate market. The Costa Rican market will not exactly resemble the market prices in the U.S., but it is heavily influenced by the U.S. market. North Americans are the primary potential

[466] *See* Second Hedden Report at p. 11.

[467] *See* Kaczmarek First Report at Appendix 1 [Exhibit RWE-004].

purchasers of coastal real estate in Costa Rica.[468] Many North American buyers will finance the purchase of real estate in Costa Rica with mortgages on residences in the United States, further strengthening the relationship between the U.S. market and that of Costa Rica.

244. Second, regarding those properties that were partially expropriated, Mr. Hedden's damages analysis does not make sense. Mr. Hedden argues that there should be severance damages awarded for the partially expropriated lots, the SPG properties. Mr. Hedden arrives at this conclusion by claiming that because the portion of the property that was closest to the beach is expropriated, the remaining parcel has lost its "beachfront" value.[469] This is incorrect for two reasons: (i) The SPG lots never had an inflated "beachfront" value because environmental regulations prohibit the removal of vegetation that borders and covers access to the beach in front of the SPG properties. Thus, the SPG lots never had beachfront access or views to lose; and (ii) even if one were to assume that a view of thick trees and brush is a beachfront view, the SPG properties did not lose that because of the partial expropriation, because nothing can be constructed on the expropriated property.[470] Thus, there is no added value from the partial expropriation that should be compensated through severance damages.

245. Finally, Mr. Hedden's Sales Comparison Approach contains errors that make it unreliable. Mr. Hedden selects comparable transactions to estimate the market value of Claimants' properties, yet the transactions he selects are either Claimants' own transactions for other of the properties under dispute or transactions that are entirely incomparable.[471]

[468] *See* Kaczmarek First Report at para. 26 [Exhibit RWE-004]; Kaczmarek Second Report at paras. 108-09 [Exhibit RWE-011].

[469] FTI Second Report at pp.7-9, 20-21.

[470] *See* Kaczmarek Second Report at paras. 77-82 [Exhibit RWE-011].

[471] *See* Kaczmarek Second Report at paras. 119-23 [Exhibit RWE-011].

246. Mr. Hedden and Claimants also continue to assume that there would be no problem for Claimants to develop their properties as single family residences.[472] But this is not the case. Because of density restrictions on new developments, restrictions on clearing vegetation bordering the beach, and environmental concerns with respect to groundwater, Claimants may not be able to develop their properties as single family residential homes.[473] In fact, Claimants' properties outside of the disputed 75 meter zone have not been developed at all.[474] If there really were no environmental impediment to developing properties in that area, as Claimants allege, one would expect Claimants to have developed those properties. They have not.

C. SIMPLE INTEREST IS APPROPRIATE BECAUSE THAT IS WHAT COSTA RICAN COURTS AWARD

247. Article 10.7(3) of CAFTA provides that if the fair market value to be awarded for the expropriation of an investor's property is made in a freely usable currency, compensation shall be made at the fair market value as of the date of expropriation "plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment."[475] The parties agree that interest on any damages award should be calculated at the interest rates set by the Banco Nacional de Costa Rica.[476] The parties disagree, however, on whether interest should be compounded or not.

248. Respondent has calculated simple interest and believes that to be the appropriate calculation because that is the way interest is calculated under Article 1163 of the Costa Rican

[472] *See* Claimants' Reply at para. 240.

[473] *See* Second Kaczmarek Report at paras. 125-29 [Exhibit RWE-011].

[474] See Second Kaczmarek Report at para. 129 [Exhibit RWE-011].

[475] CAFTA at Art. 10.7(3) [Exhibit C-1a].

[476] *See* Claimants' Reply at para. 254.

Civil Code for legal damages awards. In Navigant's first report, Mr. Kaczmarek explained that he used the interest calculator published on the Judiciary of the Republic of Costa Rica's website to calculate the amount of interest on a hypothetical damages award in this case. That website calculator does not compound the interest rate it applies. Thus, the interest rate applied under the civil code of Costa Rica to legal awards is not compounded.[477] Respondent asserts that because this is the legal rate applied by the Costa Rican judiciary, this is also the type of interest that should be applied in this case. In other words, that is the commercially reasonable rate for the currency in Costa Rica, which is standard set forth in CAFTA.

249. Claimants, on the other hand, argue that the interest rate should be compounded semi-annually.[478] The justification for Claimants' argument, however, is not that a compounded interest rate reflects the commercially reasonable rate for the currency in Costa Rica, but, rather, because it reflects a form of commercial investment in common use in Claimants' own country.[479] In Claimants' view, Respondent has engaged in unlawful expropriation and, according to Claimants, under international law, compensation for unlawful expropriation results in higher damages, presumably justifying Claimants' call for compound rather than simple interest.[480]

250. That, however, is not what CAFTA says. Article 10.7 of CAFTA does not distinguish between alleged "lawful" and "unlawful" expropriation. It merely states that any compensation paid shall be equivalent to the fair market value and that corresponding interest shall be paid "at a commercially reasonable rate" for the freely useable currency in which the fair

[477] *See* Civil Code of Costa Rica, Law No. 63, September 28, 1887, Art. 1163 [Exhibit R-167].

[478] *See* Claimants' Reply at para. 248.

[479] *See, e.g.*, Claimants' Reply at para. 264.

[480] *See* Claimants' Reply at paras. 250-65.

market value is denominated.[481] In this case, Claimants have identified the fair market value of their properties in colones. Thus, it is appropriate to apply a simple rate of interest as provided under Costa Rica's Civil Code in this case.

VI. CONCLUSION

251. Based on the foregoing, Respondent respectfully requests that:

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

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

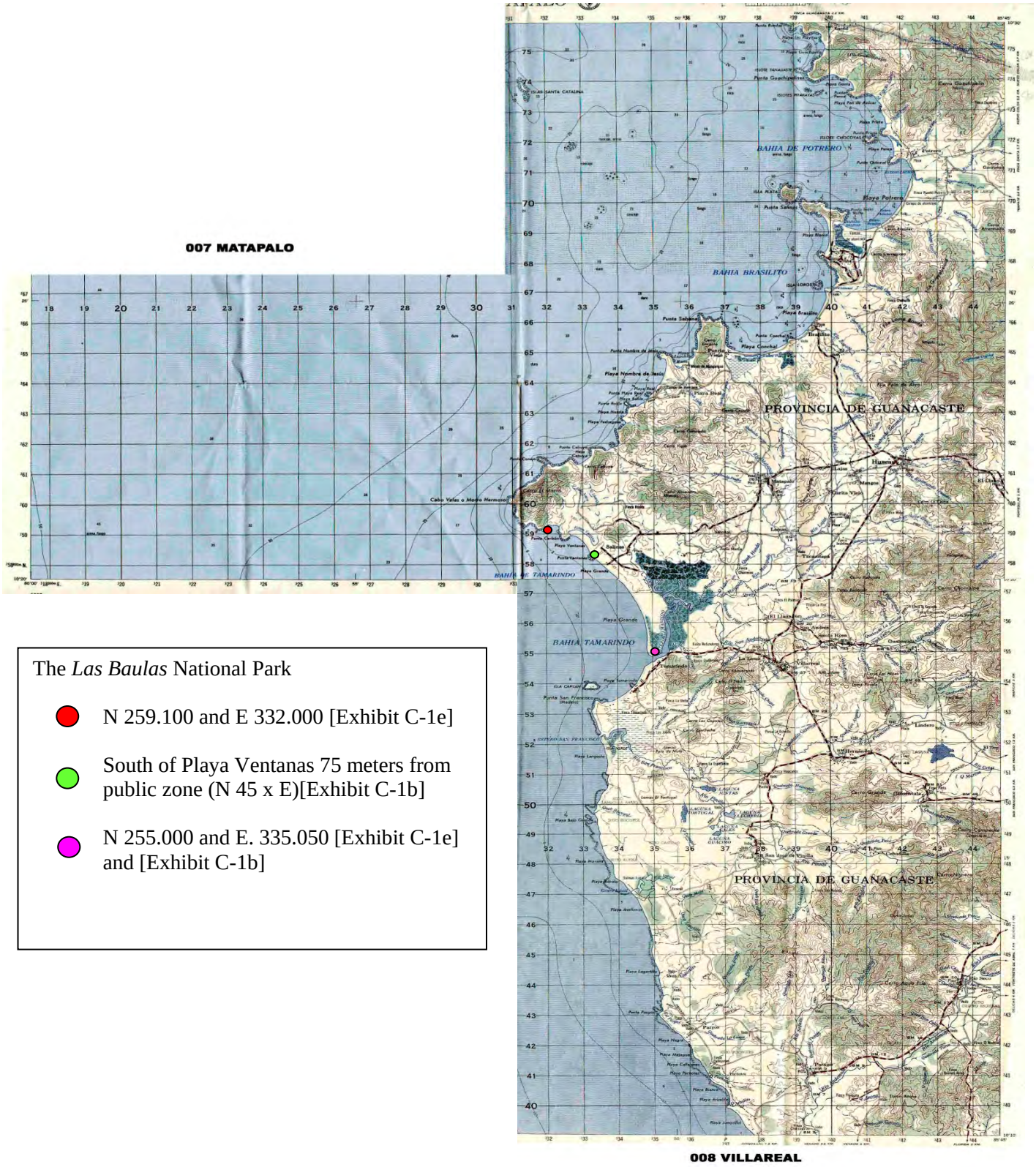
Respondent also respectfully requests an award of its costs, including counsel's fees that have been incurred in the proceedings.

Respectfully submitted,

Stanimir A. Alexandrov
Counsel for Respondent

[481] CAFTA, Art. 10.7 [Exhibit C-1a].

Annex A



The *Las Baulas* National Park

- N 259.100 and E 332.000 [Exhibit C-1e]
- South of Playa Ventanas 75 meters from public zone (N 45 x E)[Exhibit C-1b]
- N 255.000 and E. 335.050 [Exhibit C-1e] and [Exhibit C-1b]

The *Las Baulas* National Park

- N 259.100 and E 332.000 [Exhibit C-1e]
- South of Playa Ventanas 75 meters from public zone (N 45 x E)[Exhibit C-1b]
- N 255.000 and E. 335.050 [Exhibit C-1e] and [Exhibit C-1b]

Annex B

Annex B

STATUS OF EXPROPRIATIONS UNDER COSTA RICAN LAW

Spence Int. et.al. v. Republic of Costa Rica

Lot	Declaration of public interest[1]	Admin. Appraisal[2]	Objection Admin. Appraisal[3]	Referred to Judicial Stage[4]	Payment of Admin. Appraisal[5]	Initiation Judicial Procedure[6]	Act of Dispossession[7]	First Judicial Appraisal[8]	Second Judicial Appraisal[9]	First Judgment[10]	Appeal[11]	Appeal Decision[12]	Payment[13]
A40	03/30/2006	09/22/2006	02/17/2007	04/12/2007	12/15/2006	04/17/2007	03/14/2008	07/24/2008	12/11/2009	12/24/2010	01/20/2011	07/21/2011	12/14/2011
SPG1	04/17/2007	06/22/2007	09/04/2007	03/11/2008	03/19/2008	04/11/2008	12/09/2008	06/13/2008	02/09/2010	02/26/2013	03/06/2013		Suspended[14]
SPG2	04/17/2007	06/21/2007	09/04/2007	03/11/2008	03/19/2008	04/11/2008	12/09/2008	06/27/2008	07/28/2010	02/29/2012	04/17/2012	12/14/2012	03/28/2014
B1	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006 11/16/2006	12/01/2006	03/12/2008	03/06/2007	11/05/2009				Suspension requested[15]
B3	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006 11/16/2006	12/01/2006	03/13/2008	09/13/2007	N/A	02/07/2013	02/19/2013[16]		09/11/2013
B5	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006 11/16/2006	12/01/2006	03/13/2008	03/15/2010	05/2013				No decision
B6	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006 11/16/2006	12/01/2006	03/13/2008	08/26/2007		07/30/2012			Same as Admin. Appraisal[17]
B7	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006 11/16/2006	11/30/2006	03/13/2008	02/15/2007	11/12/2009				No decision
B8	12/01/2005	09/22/2006	11/15/2006	11/28/2006	05/11/2006 11/16/2006	12/01/2006	03/12/2008	04/12/2007	03/08/2010	05/31/2012	10/17/2012	07/30/2013	03/28/2014
V30	10/09/2007	09/18/2008	01/21/2009										Suspended
V31	10/08/2007	09/18/2008	01/21/2009										Suspended
V32	10/09/2007	09/18/2008	01/21/2009										Suspended
V33	10/09/2007	09/18/2008	04/02/2009										Suspended
V38	10/09/2007	09/17/2008	01/21/2009										Suspended
V39	10/09/2007	09/17/2008	01/21/2009										Suspended
V40	10/09/2007	09/18/2008	01/21/2009										Suspended
V46	10/09/2007	09/17/2008	01/21/2009										Suspended
V47	10/09/2007	09/17/2008	01/21/2009										Suspended
A39													
SPG3													
C76													
C91													
V59													
V61a													
V61b													
V61c													

Annex B

STATUS OF EXPROPRIATIONS UNDER COSTA RICAN LAW

Spence Int. et.al. v. Republic of Costa Rica

[1] A40: Exhibit C-16c; SPG1: Exhibit C-20c; SPG2: Exhibit C-21c; B1: Exhibit C-23c; B3: Exhibit C-24c; B5: Exhibit C-25c; B6: Exhibit C-26c; B7: Exhibit C-27c; B8: Exhibit C-28c; V30: Exhibit C-3c; V31: Exhibit C-4c; V32: Exhibit C-5c1; V33: Exhibit C-6c; V38: Exhibit C-7c; V39: Exhibit C-8c; V40: Exhibit C-9c; V46: Exhibit C-10c; V47: Exhibit C-11c.

[2] A40: Exhibit C-16d; SPG1: Exhibit C-20d; SPG2: Exhibit C-21d; B1: Exhibit C-23d; B3: Exhibit C-24d; B5: Exhibit C-25d; B6: Exhibit C-26d; B7: Exhibit C-27d; B8: Exhibit C-28d; V30: Exhibit C-3d; V31: Exhibit C-4d; V32: Exhibit C-5d; V33: Exhibit C-6d; V38: Exhibit C-7d; V39: Exhibit C-8d; V40: Exhibit C-9d; V46: Exhibit C-10d; V47: Exhibit C-11d.

[3] A40: Exhibit C-16d1; SPG1: Exhibit C-20d1; SPG2: Claimants' Memorial on the Merits at Appendix 2; B1: Exhibit C-23d1; B3: Exhibit C-24d1; B5: Exhibit C-25d1; B6: Exhibit C-26d1; B7: Exhibit C-27d1; B8: Exhibit C-28d1; V30: Exhibit C-3d1; V31: Exhibit C-4d1; V32: Exhibit C-5d1; V33: Exhibit C-6d1; V38: Exhibit C-7d1; V39: Exhibit C-8d1; V40: Exhibit C-9d1; V46: Exhibit C-10d1; V47: Exhibit C-11d1.

[4] A40: Exhibit C-16e; SPG1: Exhibit C-20e; SPG2: Exhibit C-21e; B1: Exhibit C-23e; B3: Exhibit C-24e; B5: Exhibit C-25e; B6: Exhibit C-26e; B7: Exhibit C-27e; B8: Exhibit C-28e.

[5] Correspond to dates when administrative appraisal was made available to property owner. A40: Exhibit R-037; SPG1: Exhibit C-20f, p. 5; SPG2: Exhibit C-21f, p. 5; B1: Exhibit C-23f, p.5, Exhibits R-103, R-105; B3: Exhibit C-24f, p.5, Exhibits R-103, R-105; B5: Exhibit C-25f, p. 7, Exhibits R-103, R-105; B6: Exhibit C-26f, p.5, Exhibits R-103, R-105; B7: Exhibit C-27f, p. 3, Exhibits R-103, R-105, Exhibit R-039, Exhibits R-103, R-105; B8: Exhibit C-28f, p.5, Exhibits R-103, R-105.

[6] A40: Exhibit C-16f; SPG1: Exhibit C-20f; SPG2: Exhibit C-21f; B1: Exhibit C-23f; B3: Exhibit C-24f; B5: Exhibit C-25f; B6: Exhibit C-26f; B7: Exhibit C-27f; B8: Exhibit C-28f.

[7] A40: Exhibit C-16f1, Exhibit R-077; SPG1 Exhibit C-20f1; SPG2: Exhibit C-21f1; B1: Exhibit C-23f1; B3: Exhibit C-24f1; B5: Exhibit C-25f1; B6: Exhibit C-26f1; B7: Exhibit C-27f1; B8: Exhibit C-28f1.

[8] A40: Exhibit C-16f2; SPG1 Exhibit C-20f2; SPG2: Exhibit C-21f2; B1: Exhibit C-23f2; B3: Exhibit C-24f2; B5: Exhibit C-25f2; B6: Exhibit C-26f2; B7: Exhibit C-27f2; B8: Exhibit C-28f2.

[9] A40: Exhibit C-16f3; SPG1 Exhibit C-20f3; SPG2: Exhibit C-21f3; B1: Exhibit C-23f3; B5: Exhibit C-25f3; B7: Exhibit C-27f3; B8: Exhibit C-28f3.

[10] A40: Exhibit C-16g1; SPG1 Exhibit C-20g1; SPG2: Exhibit C-21g; B3: Exhibit C-24g1; B6: Exhibit C- 26g; B8: Exhibit C-28g1.

[11] A40: Exhibit C-16h1, Exhibit R-078; SPG1: Exhibit R-079; SPG2: Exhibit R-080; B3: Exhibit R-081; B8: Exhibit R-082.

[12] A40: Exhibit C-16h; SPG2: Exhibit C-21h; B8: Exhibit C-28h.

[13] Correspond to dates when final fair market value was made available to property owner. Respondent is correcting the dates initially included in Annex A of its Counter.Memorial. A40: Exhibit R-040; SPG2: Exhibit R-043; B3: Exhibit R-041; B8: Exhibit R-042.

[14] Process suspended due to this arbitration. *See* Exhibit R-038.

[15] Process suspended due to this arbitration. *See* Exhibit R-036.

[16] Appeal submitted by the State and withdrawn; thus the final decision is the first instance decision *See* Exhibit R-083.

[17] Court did not award any difference between the Administrative Appraisal and Final Fair Market Decision. *See* Exhibit C- 26g.

Annex C

Annex C

Comparison of Administrative Appraisals with Amounts Awarded in Final Decisions

And Status of Payments

Spence Int. et. al. v. Republic of Costa Rica

Lot	Amount of Administrative Appraisal[1]	Amount Awarded by Court[2]	Amount Paid (or Made Available) to Property Owner[3]
A40	¢24,100,740	¢156,208,500 (final decision through appeal)	¢156,208,500 (paid)
SPG1	¢42,625,961	¢124,417,880 (first instance decision – appeal decision pending)	¢42,625,961 (paid)
SPG2	¢66,811,918	¢697,625,900 (final decision through appeal)	¢697,625,900 (paid) ¢243,253,105 (paid in interests)
B1	¢20,436,552	Not yet awarded	¢20,436,552 (made available)
B3	¢19,978,421	¢120,417,880 (final decision through first instance decision)	¢120,417,880 (paid)
B5	¢20,728,656	Not yet awarded	¢20,728,656 (made available)
B6	¢19,972,440	¢19,972,440(final decision through first instance decision)	¢19,972,440 (made available)
B7	¢21,687,840	Not yet awarded	¢21,687,840 (made available)
B8	¢20,382,552	¢326,078,368.35 (final decision through appeal)	¢326,078,368.35 (made available)

[1] A40: Exhibit C-16d; SPG1: Exhibit C-20d; SPG2: Exhibit C-21d; B1: Exhibit C-23d; B3: Exhibit C-24d; B5: Exhibit C-25d; B6: Exhibit C-26d; B7: Exhibit C-27d; B8: Exhibit C-28d; V30: Exhibit C-3d; V31: Exhibit C-4d; V32: Exhibit C-5d; V33: Exhibit C-6d; V38: Exhibit C-7d; V39: Exhibit C-8d; V40: Exhibit C-9d; V46: Exhibit C-10d; V47: Exhibit C-11d.

[2] A40: Exhibit C-16h; SPG1: Exhibit C-20g1; SPG2: Exhibit C-21h B3: Exhibit C-24g1; B8: Exhibit C-28h.

[3] A40: Exhibit C-16i; SPG1: Exhibit C-20i; SPG2: Exhibit C-21i; B1: Exhibits R-103, R-105; B3: Exhibits R-054, C-24i-1; B5: Exhibits R-103, R-105; B6: Exhibits R-103, R-105; B7: Exhibits R-103, R-105; B8: Exhibits R-103, R-105, R-042.

Annex D

LÍMITES DEL PARQUE NACIONAL MARINO LAS BAULAS DE GUANACASTE, SEGÚN DECRETO Nº 20518 DEL 9/7/1991 y LEY Nº 7524 DEL 16/8/1995, GUANACASTE, COSTA RICA

LÍMITES DEL PARQUE NACIONAL MARINO LAS BAULAS DE GUANACASTE, SEGÚN DECRETO Nº 20518 DEL 9/7/1991 y LEY Nº 7524 DEL 16/8/1995, GUANACASTE, COSTA RICA

IMBOLOGIA

- Poblados
- Áreas a proteger
- Vías de acceso
- Ríos y Quebradas
- Parque Nacional Marino Las Baulas (Terrestre)
- Parque Nacional Marino Las Baulas (Marino) ***
- PNMLB según interpretación Ley Nº 7524

* El límite marítimo es más extenso pero para efectos de presentación del apa en su parte terrestre, el área marítima no se presenta en su totalidad

Coordenadas Costa Rica Lambert Norte
Elaboró: Jiménez, V.
Fuente: Hoja cartográfica Villareal, Matapalo del IGN,escala 1: 50000, 1995; Mapa Parque Nacional Marino Las Baulas, Guanacaste, MINAE, Base de Datos Digital, 2002; trabajo de campo, 2002

€000 00

SECTOR DE FRANJA DE 125 m

Parque Nacional Marino Las Baulas