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 MEMORIAL ON JURISDICTION AND COUNTER-MEMORIAL ON THE MERITS

July 15, 2014

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I. INTRODUCTION

1. This dispute is about the sovereign right of a state to protect the natural environment within its borders. The Republic of Costa Rica has a responsibility to safeguard the environment and to balance public and private interests in pursuit of that goal. In this case, Costa Rica has undertaken not just a responsibility for itself, but a global responsibility for the protection of one of the world's most endangered species—the leatherback sea turtle (*Dermochelys coriacea*).

2. Costa Rica's Pacific coast is home to the leatherback sea turtle, which has critical nesting sites on the beaches of the Nicoya peninsula, including a beach called Playa Grande. To try to save the turtle from extinction, Costa Rica in 1991 created a national park—*Las Baulas* National Park ("National Park" or "Park")—to protect the beaches and the turtles' nests from human encroachment and development. Costa Rica has since taken steps to regulate the use of land in and around the *Las Baulas* National Park in order to protect the ecologically fragile habitat. These measures seek to strike a balance between the need to protect the turtles and the property rights of landowners inside and adjacent to the Park. They include legal, compensated expropriation of private property located within the Park's boundaries and guidelines for ecologically sensitive development in the area around the Park.

3. In this case, Claimants acquired properties that included land within the National Park, even though they were, or should have been, well aware that the area was protected. Claimants were, or should have been, aware that their properties, or portions of them, were subject to expropriation, as provided by the law creating the Park. Apparently, when Claimants acquired their properties, they were hoping the State would not, in fact, proceed to expropriate the area of their properties located within the Park. But Claimants lost that gamble. The

inescapable fact is that the land Claimants purchased was within the boundaries of the Park. It was, therefore, going to be expropriated and, in the meantime, was subject to land use restrictions related to the protection of the Park.

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

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

6. None of Costa Rica's other *bona fide* regulatory measures affecting the portions of Claimants' properties in the Park have been expropriatory, or have in any way breached Respondent's obligations under the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA").[1] All of Costa Rica's actions represent reasonable efforts by the State to carry out its sovereign responsibility to protect the natural environment.

7. In their Memorial, in an apparent attempt to dramatize their factually inaccurate tale, Claimants allege a grand conspiracy between the Costa Rican government and environmental non-governmental organizations ("NGOs") to thwart Claimants' exploitation of their properties. Claimants decry the "surreptitious"[2] lobbying by "unelected mandarins"[3] and Costa Rican government "accomplice[s]"[4] to pursue the "horrendous policy choices"[5] to establish national parks in exchange for plum jobs at NGO's.[6] The alleged conspiracy here is the genuine effort of the Costa Rican government and its officials responsible for environmental protection to prevent the extinction of an endangered species, in full compliance with Costa Rican and international law.

8. Claimants' case is also defective because this Tribunal lacks jurisdiction over the claims that Claimants have asserted. First, the Tribunal lacks jurisdiction because Claimants knew or should have known about the alleged breaches more than three years before they submitted their Notice of Arbitration, and therefore their claims are barred under CAFTA's

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

[2] *See* Claimants' Memorial on the Merits, April 26, 2014 ("Claimants' Memorial on the Merits"), para. 143.

[3] Claimants' Memorial on the Merits at para. 297.

[4] Claimants' Memorial on the Merits at para. 143.

[5] Claimants' Memorial on the Merits at para. 297.

[6] Claimants' Memorial on the Merits at para. 149.

statute of limitations. Second, jurisdiction is lacking, because the alleged breaches occurred before the entry into force of CAFTA on January 1, 2009.

9. In Section II below, Respondent sets out the background of the case, focusing in particular on correcting the record as Claimants have presented it with respect to, *inter alia*, the creation and boundaries of the Park, and Costa Rica's measures relating to Claimants' properties inside the Park. Section III sets out Respondent's arguments that the Tribunal does not have jurisdiction over this case. In Section IV, Respondent rebuts Claimants' allegations on the merits. Finally, in Section V, Respondent explains that Claimants' quantification of their damages is grossly overstated.

II. FACTS

10. In this Section, Respondent rebuts Claimants' factual allegations and corrects the record. Respondent first provides the context for the case—that is, the situation of the leatherback sea turtles (or *tortugas baula*, or simply *las baulas*, in Spanish) and the need for Costa Rica to protect the turtles' nesting grounds. Respondent then describes the creation and boundaries of the Park and the fact that Claimants knew or should have known—at least since 1991—that portions of the properties that they acquired fell within the Park's boundaries. Next, Respondent discusses the environmental sensitivity of land within the Park and how that sensitivity impacts landowners' ability to develop land within the Park. Finally, because Costa Rica has taken legal steps to expropriate certain portions of Claimants' properties, Respondent describes the status of Claimants' properties in the government's administrative and judicial expropriation procedure.

A. THE LEATHERBACK SEA TURTLES (*LAS BAULAS*)

11. The leatherback sea turtle is one of the most endangered species on Earth. It is the largest of all living sea turtles and the only living species in the genus *Dermochelys*. The leatherback turtle lives for 30 years or more and adults typically range from 1.3 to 1.8 meters long and weigh 300 to 500 kilograms.[7] At present, the species is on the verge of extinction.

Photo Courtesy of Sea Turtle Conservancy[8]

12. As adults, the turtles are pelagic, living in the open Pacific and Atlantic oceans from tropical to sub-polar regions. Female turtles come ashore on tropical beaches to lay eggs by digging nests in the sand above the high tide line.[9]

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[7] *See* Sea Turtle Conservancy, "Species Fact Sheet: Leatherback Sea Turtle," *available at* http://www.conserveturtles.org/seaturtleinformation.php?page=leatherback (last visited July 9, 2014) ("Sea Turtle Conservancy, Leatherback Species Fact Sheet") [Exhibit R-045].

[8] Sea Turtle Conservancy, Leatherback Species Fact Sheet [Exhibit R-045].

[9] *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 July 9, 2014) ("IUCN, 2014 Red List of Threatened Species") [Exhibit R-025].

Photo Courtesy of The Leatherback Trust[10]

13. The females return to the ocean, and the eggs incubate in the sand for approximately 60-65 days before juvenile turtles emerge and make their way into the ocean. Females may nest multiple times in a single season, but may then go several years without nesting.[11]

14. The turtles' habitat as juveniles is not well known; the juveniles are thought to stay in warmer waters, moving to colder waters over the years as they grow.[12] Scientists estimate that only a few juveniles in each thousand will reach adulthood. Turtles must survive for 10-15 years in the open ocean before reaching sexual maturity; they then return to the same nesting sites from which they hatched more than a decade earlier.[13] Thus, the pace for any recovery of the turtles' population is necessarily slow.

[10] The Leatherback Trust, "Las Baulas Conservation Project: Turtle Biology," *available at* http://www.leatherback.org/turtle_biology.html (last visited July 9, 2014) [Exhibit R-055].

[11] *See* Sea Turtle Conservancy, Leatherback Species Fact Sheet [Exhibit R-045].

[12] IUCN, 2010 Red List of Threatened Species, "Dermochelys coriacea," *available at* http://www.iucnredlist.org/details/46967807/0 (as accessed August 16, 2010) ("IUCN, 2010 Red List of Threatened Species") (emphasis added) [Exhibit R-024].

[13] *See* Witness Statement of Rotney Piedra, June 19, 2014 ("Piedra Statement"), para. 25 [Exhibit RWE-002].

15. At least 174 countries (including the United States and Costa Rica) officially recognize that the leatherback turtle is in grave and imminent danger of extinction.[14] The International Union for the Conservation of Nature ("IUCN") includes the leatherback turtle in its Red List of Threatened Species under the status of "critically endangered"—the only higher levels of threat assigned by the IUCN are "extinct in the wild" and "extinct."[15] The IUCN Red List evaluates the extinction risk of thousands of species and subspecies and is widely considered to be the world's most authoritative and comprehensive inventory of the global conservation status of plant and animal species.[16] The leatherback turtle is also included in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), which identifies the species that are the most endangered among CITES-listed animals and plants.[17]

16. Costa Rica is home to some of the most important nesting sites of the leatherback sea turtles—including Playa Grande, the beach next to which some of Claimants' properties are located and which is part of the *Las Baulas* National Park. But those sites have witnessed precipitous declines in the populations of nesting leatherback turtles. Scientific research shows that decline in nesting "[is] *much greater than 80%* in most of the populations of the Pacific, which has been considered the species' major stronghold."[18] According to the IUCN, this

[14] *See* IUCN, 2014 Red List of Threatened Species [Exhibit R-025].

[15] *See* IUCN, 2014 Red List of Threatened Species [Exhibit R-025].

[16] *See* IUCN, 2014 Red List of Threatened Species [Exhibit R-025].

[17] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Appendices I, II and III, June 12, 2013, p. 27 [Exhibit R-023]*; see also* Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 U.N.T.S. 243, Art. II, para. 1 ("Appendix I shall include all species threatened with extinction which are or may be affected by trade") [Exhibit R-022]. Costa Rica ratified CITES in 1974. *See* Law Ratifying CITES, Law No. 5605, October 30, 1974 [Exhibit R-029].

[18] IUCN, 2010 Red List of Threatened Species (emphasis added) [Exhibit R-024].

subpopulation will nearly be extinct in another generation (*i.e.*, by 2040).[19] The precipitous decline has continued. As noted in the chart below, in the 2013-2014 nesting season, only twenty-three female leatherbacks arrived in the *Las Baulas* National Park to nest.[20]

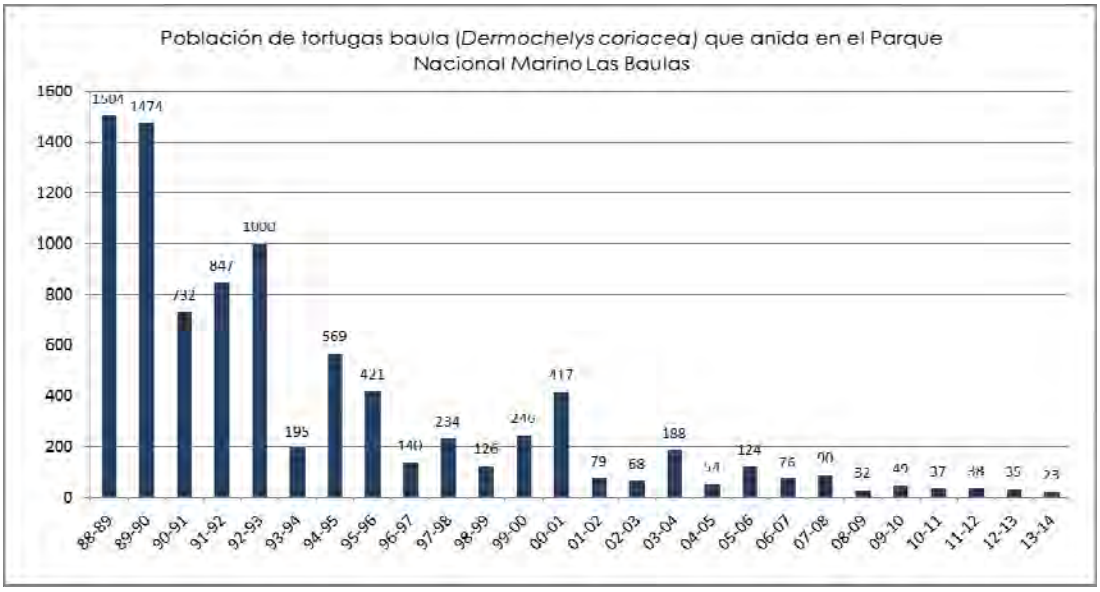

Figure 1: Nesting female leatherback turtles in the *Las Baulas* National Park[21]

17. In a little more than a decade—from 2000 to 2013/14—the number of nesting leatherback females that came to lay their eggs on the beaches now included in the *Las Baulas* National Park declined by approximately 90 percent.[22]

18. One of the main reasons for the leatherback turtle's decimation is beachside development. It is critical to protect the nesting sites of the turtle to give the species any chance

[19] *See* IUCN, 2010 Red List of Threatened Species [Exhibit R-024]; *see also* The Leatherback Trust, "Las Baulas Conservation Project," *available at* http://www.leatherback.org/las_baulas_conservation_project.html (last visited July 9, 2014) (citing research by biologists from Drexel University and Indiana Purdue University) [Exhibit R-054].

[20] *See* Piedra Statement at para. 12 [Exhibit RWE-002].

[21] Piedra Statement at para. 12 [Exhibit RWE-002].

[22] *See* The Leatherback Trust, "Las Baulas Conservation Project," *available at* http://www.leatherback.org/las_baulas_conservation_project.html (last visited July 9, 2014) (citing research by biologists from Drexel University and Indiana Purdue University) [Exhibit R-054].

of survival.[23] Nesting sites must be protected against human activity that destroys the beaches' suitability for nesting as well as any activity that directly harms the turtles or their eggs. The beaches must be protected against erosion, such as erosion caused by water run-off from buildings and constructed sites even well away from the beach, and against pollution such as that from wastewater. The nests and juvenile turtles must be protected not only from direct threats, like poachers or domesticated animals, but also from indirect threats like compaction of the sand (from pedestrian or vehicle traffic), and from light and noise pollution that disorients the turtles as they make their way across the beach.

B. CLAIMANTS KNEW OR SHOULD HAVE KNOWN THAT THE LAND THEY ACQUIRED WAS PROTECTED AS EARLY AS 1991 WHEN THE *LAS BAULAS* NATIONAL PARK WAS CREATED

19. As the plight of the leatherback sea turtle began to draw worldwide attention, the Republic of Costa Rica—which has long been in the vanguard of ecologically sensitive development and tourism—took action to protect critical, fragile nesting sites on its Pacific coast together with the adjacent waters.

20. The sections below describe the means by which the *Las Baulas* National Park was created. As the Park was created by duly enacted public decrees and law, Claimants knew or should have known that much of the land that they acquired (long after the creation of the Park), fell within the boundaries of the *Las Baulas* National Park.

[23] *See generally* Letter from SINAC to Members of Congress, ACT-OR-DT-916, July 28, 2009 (identifying habitat threats) [Exhibit R-033]; *see also* Piedra Statement at paras. 9-25 [Exhibit RWE-002]. Other major threats include the poaching of eggs and incidental capture by oceanic fishing vessels. *See* Piedra Statement at para. 8 [Exhibit RWE-002].

1. 1991 Decree

21. The *Las Baulas* National Park was established to protect the leatherback turtle, as well as other species and natural resources. It was first created by an Executive Decree (No. 20518) in June 1991.[24] As the 1991 Decree explained, Costa Rica's Playa Grande (3.5 kilometers long)—where most of Claimants' properties are located—and Playa Langosta (1.3 kilometers long) are two of the most important nesting sites in the world for the leatherback turtle.[25] The government was concerned that tourist development in the vicinity of the beach (including light, noise, and other forms of pollution) would seriously affect the nesting of the leatherback turtles. The 1991 Decree thus called for the creation of a national park to protect the leatherback turtles and other species, as well as other natural resources in the area.[26]

22. Since 1977, under Costa Rican law, the first 50 meters of land running inland from the mean high tide line along Costa Rica's entire coastline are non-transferable (inalienable) property of the State that is known as the "public zone" (*zona pública*).[27] Articles 1 and 2 of the 1991 Decree set out the boundaries of the Park, including a "strip of land of 75

[24] *See* Executive Decree No. 20518-MIRENEM, July 9, 1991 ("Executive Decree No. 20518-MIRENEM") [Exhibit C-1b]. At the time of the creation of the *Las Baulas* National Park, the official title of the Ministry of the Environment was *Ministerio de Recursos Naturales, Energía y Minas* (MIRENEM). In 1995, the Ministry was renamed *Ministerio del Ambiente y Energía* (MINAE). In August 2008, the Ministry changed its name to *Ministerio del Ambiente, Energía, Minas y Telecomunicaciones* (MINAET). For purposes of this submission, we refer to the Ministry as "MINAE."

[25] *See* Executive Decree No. 20518-MIRENEM, Preamble at para. 1 [Exhibit C-1b]*; see also* Supreme Court of Justice, Constitutional Chamber, File No. 06-014770-0007-CO, Resolution No. 07-10578, July 25, 2007, p. 9 ("*El Decreto [Ejecutivo No. 20518-MIRENEM] afirma la importancia de someter a Playa Grande, Playa Langosta y lugares aledaños a un régimen de protección especial en tanto éstas playas, ubicadas dentro de los límites territoriales del Parque, están entre las tres áreas de importancia mundial donde anidan las tortugas baula.*") [Exhibit C-1zc].

[26] *See* Executive Decree No. 20518-MIRENEM, Preamble at paras. 5-6 [Exhibit C-1b]. A total of 26.28 percent of Costa Rica's entire territory, and 17.19 percent of its territorial waters, are now under some form of environmental management category, including national parks, biological reserves, wetlands, protected areas, and others. *See* SINAC, Protected Areas Policy 2011-2015 [Exhibit R-051].

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

meters, [counted] from the public zone [of 50 meters from high tide]."[28] Thus, the Park covers a 125-meter strip of land, consisting of the 50-meter "public zone" plus the additional 75-meter strip specified in the 1991 Decree. The additional property beyond the "public zone" is necessary to protect the turtles, because it encompasses a tall "green curtain" of trees that borders the beach. It is significant for the Park: the tree curtain helps to shield the beach from the lights and noise of human development further inland, and the vegetation helps to protect the beach from runoff and erosion. The Park also includes the waters offshore of the beaches, extending approximately 12 miles into the Pacific Ocean. Hence, the Park's official name is the *Parque Nacional Marino Las Baulas* (National Leatherback Turtle Marine Park).

2. 1995 Park Law

23. On July 10, 1995, the Costa Rican Congress passed Law No. 7524 (the "*Las Baulas* National Park Law" or "Park Law"), which set out in greater detail the means to achieve the environmental protection objectives that had motivated the creation of the Park.[29] Importantly for this case, Article 2 of the *Las Baulas* National Park Law authorizes the State to acquire, either through direct purchase or expropriation, any private properties (or portions thereof) that are located within the boundaries of the Park.[30] The State's right to expropriate such private properties, and the procedures for doing so, are discussed in more detail in Section II.D below.

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[28] *See* Executive Decree No. 20518-MIRENEM at Art. 2 ("*incluyendo una franja de terreno de 75 metros, contada a partir de la zona pública*") [Exhibit C-1b].

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

[30] *See Las Baulas* National Park Law at Art. 2 ("*Para cumplir con la presente Ley, la institución competente gestionará las expropiaciones de la totalidad o de una parte de las fincas comprendidas en la zona delimitada en el artículo anterior. Los terrenos privados comprendidos en esa delimitación serán susceptibles de expropiación y se considerarán parte del Parque Nacional Marino las Baulas, hasta tanto no sean adquiridos por el Estado, mediante compra, donaciones o expropiaciones; mientras tanto los propietarios gozarán del ejercicio pleno de los atributos del dominio.*") [Exhibit C-1e].

24. The *Las Baulas* National Park Law also restated the boundaries of the Park, specifying that the Park covers certain territorial waters, a strip of 125 meters of land (the 50 meters of inalienable "public zone" from the high tide line and the additional strip of 75 meters pursuant to Decree 20518), as well as two mangrove estuaries and two islands.[31] To identify the 125 meter strip of land, the Park Law makes reference to coordinates—located inland—that are used to determine the end point of an imaginary line that is drawn parallel to the coast (following the curve of the coastline) and 125 meters from the mean high tide line.[32] However, in the course of doing so, the Park Law erroneously referred to the 125 meter zone as extending seaward, not landward, from the high tide line.

25. Claimants attach great significance to this self-evident error, which would have left the Park comprised of no land at all. They contend in this proceeding that the *Las Baulas* National Park Law of 1995 created an exclusively maritime Park without any land areas, and on that basis they repeatedly claim that they bought land outside the Park and that Respondent started the expropriations of properties inside the Park only after a biased interpretation of the Park Law was issued by Costa Rica's *Procuraduría General de la República* (the "*Procuraduría*," Costa Rica's Attorney General).[33] This contention is one of the central premises of Claimants' claims of "illegal" expropriation and unfair and inequitable conduct. It is, however, incorrect.

26. First, the notion that the 1995 Park Law's "seaward" language was anything but an inadvertent error is simply implausible:

[31] *See* Annex C: Maps of the Land Area of the *Las Baulas* National Park.

[32] *See* Annex C: Maps of the Land Area of the *Las Baulas* National Park.

[33] *See* Claimants' Memorial on the Merits at paras. 60-69, 145, 174-75.

- At the most fundamental level, the essential purpose of the Park is to protect the nesting grounds of the leatherback sea turtles. If the Park were comprised solely of the waters adjoining the beaches, the Park would do nothing to protect the actual nesting grounds or to protect the turtles at their most vulnerable stages—nesting, incubation, and the hatchlings' return to the water.

- The Decree creating the Park in 1991 was explicit that it comprised "a strip of land" (*una franja de terreno*), and there is no suggestion in the *Las Baulas* National Park Law that it is intended to reverse the 1991 Decree or substantially reduce the protected area.

- The error in the Park Law, if read literally, would render the law internally incoherent. Article 2 of the Park Law authorizes the expropriation of "the lands" included within the Park. If the Park were wholly at sea, Article 2 would be unnecessary; in fact, it would be non-sensical.

- The Park Law would also be internally incoherent because in the same Article 1 that contained the error (the language "seaward"), the Park Law uses land coordinates to describe the end point of the 125 meter strip of land that forms part of the Park. It would not make any sense for the Law to identify land coordinates if the 125 meter strip of land ran seaward rather than inland.

- If, in fact, the Park Law had intended to reduce the limits established in the 1991 Decree, it should have done so in reliance on technical studies and no such studies were ever performed. Article 38 of the Environment Law of Costa Rica provides that the surface area of a protected zone may only be reduced by a law duly supported by the applicable technical studies.[34] No technical study was performed to support reducing the area of the protected zone of the *Las Baulas* Park. It is thus clear that the law never intended to reduce the area of the National Park.

27. Second, the authorities of Costa Rica consistently acted on the basis that the Park included 125 meters of beach and beachfront land, in addition to the adjacent coastal waters. As the very simplest of examples, the Park authorities erected signs at the Park's boundaries, alerting visitors to the applicable rules within the Park to protect the turtles' nesting habitat. Park administrators patrolled the beaches and restricted access to the Park when the turtles were

[34] *See* Organic Law of the Environment, Law No. 7554, October 4, 1995 ("Organic Law of the Environment"), Art. 38 [Exhibit R-004].

nesting. In short, they did not act as if the Park were located at sea.[35] Moreover, in 2003, the Ministry of Environment, Energy, Mines and Telecommunications ("MINAE," for its initials in Spanish) started formal legal proceedings to expropriate certain lots that were located within the 75-meter strip of the Park. The Costa Rican authorities have consistently taken the position that the 75-meter strip of territory of the Park is counted from the 50 meters of public zone inland.[36]

28. In addition, the record is replete with government documents subsequent to 1995 stating that Claimants' properties lie within the boundaries of *Las Baulas* National Park. For example, several of the land registry drawings that Claimants themselves have placed on the record show that post-1995 (and before Claimants acquired the properties) their properties are inside the Park. This is true for Lots V59, V61a, V61b, V61c, SPG1, SPG2, SPG3, B1, B3, B5, B6, B7 and B8.[37] Further, Resolution No. 067 of MINAE which approved in 2003 the cutting of certain trees on part of Mr. Berkowitz's property expressly states that he is obligated to respect the boundaries of the *Las Baulas* National Park which includes a 125 meter zone "inland" ("*tierra adentro*") from the high tide mark.[38]

29. Although Mr. Berkowitz attempts to claim that he received confirmation from the Minister of Environment that the properties he sought to acquire in 2003 fell outside the

[35] *See, e.g.*, The Leatherback Trust, "Las Baulas Conservation Project," *available at* http://www.leatherback.org/las_baulas_conservation_project.html (last visited July 9, 2014) (discussing cooperation with Park personnel and management) [Exhibit R-054].

[36] *See* Piedra Statement at paras. 35-38 [Exhibit RWE-002].

[37] *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, 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].

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

boundaries of the *Las Baulas* National Park,[39] a review of the document that Mr. Berkowitz cites shows that it, in fact, provides no support for his claim. Instead, the document demonstrates that the discussion concerned the possible extension of the Park's boundaries *beyond* the 125 meters that already constituted the Park, not whether the Park's existing area did include the 125 meters.[40] Thus, for example, the document states that, for various reasons, "MINAE does not encourage the expansion of this National Park up to 1000 meters from the public zone . . . ."[41] It does not, however, suggest that the Park did not already comprise land or was entirely at sea. This understanding is confirmed by Mr. Piedra, a Park official, who attended the Ministry of Environment meeting referenced by Mr. Berkowitz in his witness statement and who says that the discussion was solely related to the possibility of further inland expansion of the Park.[42]

30. The third and definitive response to Claimants' attempted reliance on the *Las Baulas* National Park Law's mistaken wording is that the error was subsequently corrected in a binding legal interpretation issued by the *Procuraduría* and that correction has been endorsed by the Supreme Court of Costa Rica. Even if it were at one time arguable whether the Park should be defined to exclude the very turtle nesting grounds that it was created to protect, notwithstanding Respondent's nearly uniform conduct and interpretations to the contrary, that argument must fail in the face of definitive, binding interpretations of Costa Rican law, which are discussed next.

[39] *See* Witness Statement of Brett Elliot Berkowitz, April 25, 2014, paras. 9-13.

[40] *See* Minutes from Meeting between Government Agencies, July 16, 2003 [Exhibit C-53].

[41] Minutes from Meeting between Government Agencies, July 16, 2003, p. 2 [Exhibit C-53].

[42] *See* Piedra Statement at para. 38 [Exhibit RWE-002].

3. Interpretation of the *Procuraduría* of 2004-2005

31. The *Procuraduría* is the State's legal advisory body and its legal representative in judicial proceedings.[43] It is also advisor to the Constitutional Chamber of the Supreme Court concerning constitutional challenges to laws and regulations, and it provides legal information to the general public.[44] Its legal interpretations are authoritative and, in some cases (such as the *dictamen* discussed below), legally binding.[45]

32. In a legal opinion (*opinión*) of February 10, 2004, the *Procuraduría* interpreted Article 1 of the *Las Baulas* National Park Law and concluded that, in addition to oceanic waters, the area of the Park includes a strip of 125 meters of land extending inland from the high tide line that is comprised of the 50-meter public zone that runs along the entirety of Costa Rica's coastline, plus an additional 75-meter strip of land beyond that public zone.[46]

33. The *Procuraduría* based its interpretation on the text of the *Las Baulas* National Park Law (including Article 1, which specifies land coordinates, and Article 2, which creates the obligation to expropriate land that is within the Park). The opinion also relied on the Executive Decree that had created the Park in 1991;[47] the Park Law's environmental objective of protecting the natural habitat of the leatherback turtles, including their nesting sites on the beach; the State's constitutional obligation to guarantee a healthy environment; and Costa Rica's international

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

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

[45] *See* Witness Statement of Gloria Solano Martínez, July 14, 2014 ("Solano Statement"), para. 12 [Exhibit RWE-001].

[46] *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]*; see also* Solano Statement at paras. 8-11 [Exhibit RWE-001]; Annex C: Maps of the Land Area of the *Las Baulas* National Park.

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

obligations under the Inter-American Convention for the Protection and Conservation of Sea Turtles. The *Procuraduría* noted that to exclude any beachfront land from the boundaries of the Park—as Claimants now want to read the Park Law—would defeat the stated purpose of the Park Law, which is to protect the beach nesting sites of the leatherback turtles.[48]

34. The *Procuraduría* later formally confirmed its interpretation of the *Las Baulas* National Park Law in an authoritative and legally binding interpretation (*dictamen*) issued on December 23, 2005.[49] In the *dictamen*, the *Procuraduría* recalled that the Park Law's precursor, the Executive Decree that created the Park in 1991,[50] defined the Park's boundaries as including a strip of 125 meters inland from the high tide line (50 meters of public zone plus a band of 75 meters inland).[51] The *dictamen* stated that, in light of the boundaries of the Park established by that 1991 Decree and in light of Article 50 of the Constitution, as interpreted by the Constitutional Chamber of the Supreme Court, the correct interpretation of the Park Law is that the Park includes a band of 125 meters *inland*, including the beaches where the leatherback turtles come to nest and lay their eggs.[52] The *Procuraduría* thereafter articulated and defended

[48] *See Procuraduría*'s Legal Opinion No. OJ-015-2004 at p. 8 ("*La exclusión playa Carbón, playa Ventanas y playa Grande del parque es incongruente con los propósitos expresados en la exposición de motivos del proyecto de ley que se tramitó en el expediente número 11.202, que corresponde a la ley número 7524 y en la cual se señala expresamente la necesidad de ejercer un control sobre el desarrollo urbanístico con fines turísticos en dichas playas, para evitar la contaminación lumínica. Esto quiere decir que, desde el punto de vista de la finalidad perseguida por la ley, o el fin público tutelado como criterio interpretativo, ha de interpretarse lo dispuesto en el artículo 1° de la citada ley número 7524 de manera tal que dicho control pueda ser ejercido.*") [Exhibit C-1t]*; see also* Solano Statement at paras. 8-11 [Exhibit RWE-001].

[49] *See* Binding Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, C-444-2005, December 23, 2005 ("*Procuraduría*'s Binding Legal Opinion No. C-444-2005") [Exhibit C-1w]*; see also* Solano Statement at para. 12 [Exhibit RWE-001].

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

[51] *See Procuraduría*'s Binding Legal Opinion No. C-444-2005 at p. 15 [Exhibit C-1w].

[52] *See Procuraduría*'s Binding Legal Opinion No. C-444-2005 at pp. 15-16 [Exhibit C-1w].

this interpretation in proceedings before the Supreme Court[53] and explained it to Members of Congress.[54]

35. Claimants maintain that the Costa Rican authorities inappropriately called upon the *Procuraduría* to achieve the purpose of expanding the Park, which they could not achieve through the legislative process when creating the Park in 1995.[55] But what they fail to acknowledge is that it is entirely appropriate for the *Procuraduría* to issue an opinion when there is an apparent error in the law that creates internal inconsistencies and that needs to be resolved.[56] The *Procuraduría*, as the institution with the power to issue a binding interpretation of a legislative act, was called upon by MINAE to resolve an apparent error in the Park Law that made the language of the Law ambiguous. In turn, the *Procuraduría* provided an interpretation of the Law that gave coherent meaning and effect to what would otherwise have been a non-sensical provision of the law. There is nothing improper or irregular about the *Procuraduría*'s actions.[57]

4. The Constitutional Chamber of the Supreme Court's Decisions in 2005 and 2008

36. Even if there were any question of the *Procuraduría*'s power to render such a binding interpretation of the Park Law (there is not), that question would be mooted by the fact

[53] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-008369-0007-CO, Resolution No. 2008-008713, May 23, 2008, para. 4 [Exhibit C-1h].

[54] *See Procuraduría*'s Letter to Congress Regarding Legal Opinion on the *Las Baulas* National Park Law, OJ-017-2004, February 12, 2004 [Exhibit R-044].

[55] *See* Claimants' Memorial on the Merits at paras. 144-45.

[56] *See* Solano Statement at para. 7 [Exhibit RWE-001].

[57] The opinion and binding interpretation carefully considered the *Procuraduría*'s legal powers under Costa Rican law to render that interpretation and confirmed its propriety. *See Procuraduría*'s Legal Opinion No. OJ-015-2004 at pp. 4-6 [Exhibit C-1t]; *Procuraduría*'s Binding Legal Opinion No. C-444-2005 at pp. 5-11 [Exhibit C-1w]; *see also* Solano Statement at paras. 12-13 [Exhibit RWE-001].

that Costa Rica's Supreme Court itself, through its Constitutional Chamber, has validated the very same interpretation of the *Las Baulas* National Park Law.

37. In October 2005, after the *Procuraduría* issued its opinion (but prior to the issuance of the *dictamen*), the Constitutional Chamber of the Supreme Court embraced the same interpretation that the *Procuraduría* had stated in its opinion.[58] The Constitutional Chamber reviewed the constitutionality of a Resolution, No. 2238-2005 of the National Environmental Technical Secretariat ("SETENA" in Spanish), that suspended the issuance of environmental permits within the *Las Baulas* National Park. The Court rejected the claim that the Resolution was unconstitutional. In the course of reaching that decision, however, the Court interpreted the Park Law with respect to the Park's boundaries.

38. Significantly, when referring to the property rights of the claimant in that case, the Constitutional Chamber held that the Park Law established that the Park included 125 meters from the high tide mark, which included the 50 meter public zone.[59] Thus, while the *Procuraduría* had not yet issued its binding decision (*dictamen*) on the interpretation of the Park Law, the Constitutional Chamber formally confirmed the understanding that the 125 meters of parkland was inland, not seaward, as Claimants allege in this case.

39. The Supreme Court also addressed the proper interpretation of the Park Law in a later case concerning the constitutionality of a zoning regulation for the district where the Park is

[58] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution. No. 2005-014289, October 19, 2005 [Exhibit C-1v].

[59] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution. No. 2005-014289, October 19, 2005, p. 4 [Exhibit C-1v].

located.[60] The Municipality of Santa Cruz had issued a zoning regulation that would have allowed development of properties within the *Las Baulas* National Park. The Municipality defended the constitutionality of its zoning regulation relying on exactly the same arguments advanced by Claimants in this arbitration—*i.e.*, that the Park extended only seaward and did not cover any land.[61] The Supreme Court expressly rejected that interpretation, concluding instead that the Park extends *inland* over a 125-meter strip of land.[62]

40. Accordingly, there is no question that, as a matter of settled Costa Rican law, the *Las Baulas* National Park includes 125 meters of land, measured inland from the mean high tide line.

C. THE GUANACASTE AREA IS ENVIRONMENTALLY FRAGILE AND, AS A RESULT, DEVELOPMENT ON THE LAND IS RESTRICTED

41. As recognized by the 1995 Law creating the *Las Baulas* National Park, the area within the Park is particularly fragile and needs to be protected in order to try to maintain the leatherback sea turtle population in Costa Rica's Pacific coast. Consistent with this understanding, Costa Rica has taken certain actions to protect the land located within the National Park from further development. Thus, for example, Costa Rica's Supreme Court has issued decisions requiring that MINAE take measures necessary to protect land located in the National Park.

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[60] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-008369-0007-CO, Resolution No. 08-008713, May 23, 2008, pp. 5-6 [Exhibit C-1h]*; see also* Zoning Regulation Issued by the Municipality of Santa Cruz, published in *La Gaceta* No. 127, July 3, 2006 [Exhibit R-056].

[61] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-0008369-0007-CO, Resolution No. 08-008713, May 23, 2008, pp. 8-9 [Exhibit C-1h].

[62] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-0008369-0007-CO, Resolution No. 08-008713, May 23, 2008, pp. 25-26 [Exhibit C-1h].

42. Claimants have criticized these decisions and the subsequent actions by MINAE and SETENA as being part of an alleged agenda to increase unjustifiably the regulation of coastal properties.[63] There is no merit to Claimants' allegations. As discussed below, all of the actions taken by the Supreme Court, and by MINAE and SETENA, as a result of the Court's decisions, are consistent with the goals of establishing the National Park—to protect the leatherback sea turtle from extinction.

43. In addition to the need to protect the land within the Park for the purposes of trying to maintain the leatherback sea turtle population, studies have shown that land within the Park is also environmentally sensitive for reasons independent of the sea turtle population. For example, land in the Park has limited water resources, which also necessarily restricts development in the area. We discuss next both of these grounds for Costa Rica's measures to protect the environmentally fragile region in and around the Park, which is known as Guanacaste.

1. The Constitutional Chamber of the Supreme Court Found that the Guanacaste Area Was Environmentally Fragile and Ordered MINAE to Take Measures Necessary to Protect the Area of the *Las Baulas* National Park

44. Claimants allege that in 2005 MINAE, in response to certain orders by the Constitutional Chamber of the Supreme Court, launched a series of efforts to expropriate land within the boundaries of the Park.[64] Claimants assert that the Supreme Court's orders and its subsequent decisions by SETENA and MINAE are part of an alleged agenda to unreasonably prevent development inside the Park.[65] There is no merit to Claimants' claim. These measures

[63] *See, e.g.*, Claimants' Memorial on the Merits at paras. 152-66.

[64] *See* Claimants' Memorial on the Merits at para. 147.

[65] *See* Claimants' Memorial on the Merits at para. 147.

were reasonably taken in the public interest, with the primary objective of protecting the environmentally fragile area of the Park.

45. On March 8, 2005, certain individuals presented to the Supreme Court in Costa Rica a *recurso de amparo* against MINAE and SETENA, among other institutions, challenging them for not taking all of the necessary steps to protect the area of *Las Baulas* National Park.[66] On March 9, 2005, the Supreme Court issued a resolution admitting the case; in that resolution, it recognized the fragile nature of the land in the Park and instructed MINAE to develop guidelines to protect the areas within the Park.[67]

46. On June 28, 2005, the Constitutional Chamber of the Supreme Court issued a decision on another case. This decision was the result of a different *recurso de amparo* action, this time initiated by several companies alleging that certain actions of MINAE had not allowed them to exercise their property rights with respect to land inside the *Las Baulas* National Park. In this decision, the Constitutional Chamber reiterated its position taken on March 9, 2005, that

[66] An *amparo* action (*recurso de amparo*) is a special summary proceeding before the Constitutional Chamber of Costa Rica's Supreme Court that may be filed by any person to safeguard his or her constitutional rights and freedoms. It may be directed against a State agency, public official, or agent of the State who has violated or threatens to violate the plaintiff's constitutional rights and freedoms. *See* Law on Constitutional Jurisdiction, Law No. 7135, October 11, 1989 ("Law on Constitutional Jurisdiction"), Arts. 2(a), 33, 39 [Exhibit R-006]. *Amparo* actions may challenge and seek to invalidate acts or omissions based on incorrect interpretations or implementation of laws, regardless of whether they are arbitrary or not. *See id.* at Art. 29 [Exhibit R-006]. The filing of the *amparo* stays the implementation of the law, regulation, or measure vis-à-vis the plaintiff during the pendency of the proceedings. *See id.* at Art. 41 [Exhibit R-006].

[67] *See* Supreme Court of Justice, Constitutional Chamber, File No. 05-002756-0007-CO, March 9, 2005, pp. 2-3 ("*emitir las directrices necesarias y girar las órdenes pertinentes dentro del ámbito de sus atribuciones y competencias, para que los permisos municipales y viabilidades ambientales que se otorguen garanticen la no afectación de la especie conocida como tortuga baula, así como las playas donde éstas anidan*") (cited in Supreme Court of Justice, Constitutional Chamber, File No. 05-002-2756-0007-CO, Resolution No. 2008-007549, April 30, 2008, p. 7 [Exhibit C-1zb]) [Exhibit R-052].

MINAE was required to adopt all necessary measures to protect the designated area of the Park.[68]

47. Pursuant to the Supreme Court's resolution and decision, on August 30, 2005, SETENA suspended all environmental impact assessment proceedings involving properties located within the *Las Baulas* National Park, including some proceedings involving Claimants' property.[69] This action was not taken arbitrarily or capriciously, as Claimants suggest, but, rather, in response to a conservatory measure ordered by the Supreme Court on March 9, 2005 and on June 28, 2005, and to several requests by the MINAE and the Administration of the *Las Baulas* National Park to suspend all present and future environmental impact assessment proceedings for development projects located within the boundaries of the Park.[70] In effect, SETENA determined that any infrastructure or tourist developments inside the boundaries of the Park would be inconsistent with the need to protect the turtles and carry out the Park's objectives.[71]

48. The measure taken by SETENA was nothing more than a precautionary measure taken in good faith by the government of Costa Rica to protect the area of *Las Baulas* National Park. This decision has since been ratified several times by the Supreme Court of Costa Rica. For example, on October 11, 2005, the Constitutional Chamber received yet another *recurso de amparo* action filed by an owner of property located in the Park, requesting that the Supreme

[68] *See* Supreme Court of Justice, First Chamber, File No. 05-007357-0007-CO, Resolution No. 2005-08238, June 28, 2005 [Exhibit C-1u].

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

[70] *See* Supreme Court of Justice, Constitutional Chamber, File No. 05-002576-0007-CO, March 9, 2005 [Exhibit R-052]; Letter from MINAE to SETENA, DM-305-2005, February 28, 2005 [Exhibit C-74]; Letter from MINAE to SETENA, DM-394-2005, March 10, 2005 [Exhibit C-75]; Letter from MINAE to SETENA, DM-568-2005, April 26, 2005 [Exhibit R-057].

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

Court find that the resolution issued by SETENA suspending environmental impact assessment proceedings was unconstitutional.[72] The landowner alleged that the resolution was unconstitutional because it was contrary to property rights established by the Costa Rican Constitution.[73] The Constitutional Chamber rejected the action, finding that the measure was taken to protect land that was subject to expropriation for environmental reasons.[74]

49. On November 30, 2006, another individual with property inside the Park, Ms. Marion Unglaube, filed an *amparo* action against SETENA with the Constitutional Chamber of the Supreme Court. In that action, she argued that SETENA's suspension of the environmental impact assessment proceedings amounted to an illegal *de facto* expropriation of her property, in violation of Article 45 of the Constitution (right to private property) and Article 4 of the Costa Rica-Germany Bilateral Investment Treaty (protection against expropriation without compensation).[75]

50. The Supreme Court ruled on July 25, 2008 that SETENA's resolution was not contrary to the right of private property protected by Article 45 of the Constitution, and thus rejected Ms. Unglaube's *amparo* action against SETENA.[76] The Court held that SETENA's decision to suspend the environmental impact assessment proceedings for properties located within the National Park was reasonable and proportionate, as well as necessary and appropriate

[72] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution. No. 2005-014289, October 19, 2005, p. 1 [Exhibit C-1v].

[73] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution. No. 2005-014289, October 19, 2005, p. 1 [Exhibit C-1v].

[74] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution. No. 2005-014289, October 19, 2005, p. 3 [Exhibit C-1v].

[75] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-014727-0007-CO, Res. No. 2008-011675, July 25, 2008, p. 2 [Exhibit R-053].

[76] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-014727-0007-CO, Res. No. 2008-011675, July 25, 2008, pp. 8-9 [Exhibit R-053].

to protect the critically endangered leatherback sea turtle in accordance with Costa Rica's obligations under public international law. The Supreme Court also rejected Ms. Unglaube's contention that SETENA's suspension of the environmental impact assessment proceedings for her property amounted to an illegal *de facto* expropriation. The Court held that the suspension of those proceedings did not affect the essential nucleus of the property right under Article 45 of the Constitution.[77]

51. The 2005 SETENA resolution did not purport to impose a permanent suspension of all environmental permits' processing. In December 2008, however, the Supreme Court ordered the permanent suspension of processing permits inside the Park and their temporary suspension outside the Park. This order came as a result of a *recurso de amparo* initiated by several property owners inside and outside the Park against SETENA, claiming that planned construction underway in the area could affect their constitutional rights to environmental protection.[78] Claimants erroneously allege that it was not until March 2010, when SETENA issued an order forbidding the granting of environmental viability permits within the Park that the permanent suspension of permits for development inside the Park culminated.[79] The permanent suspension of environmental permits within the Park was ordered by the Supreme Court in December 2008. All of the subsequent actions that Claimants allege were taken by

[77] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-014727-0007-CO, Resolution No. 2008-011675, July 25, 2008, p. 4 [Exhibit R-053].

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

[79] *See* Claimants' Memorial on the Merits at para. 212g.

MINAE and SETENA with respect to permits inside the park were merely a consequence of the order that was issued by the Supreme Court in December 2008.[80]

52. The December 2008 order of the Supreme Court was a reasonable precautionary measure to prevent any further adverse impact of development in the area protected by the Park. This measure was limited in scope, because it only affected the 125 meters inside the Park itself; it did not extend to properties in the vicinity of, but outside the boundaries of, the Park.

53. With respect to properties outside but near the Park—within a 500 meter "buffer zone"—the Supreme Court *temporarily* suspended the validity of permits and the processing of any environmental viability permit applications. That temporary suspension was also imposed as a precautionary measure, in order to give SETENA adequate time to conduct a comprehensive study of the area and to determine whether different or more stringent regulations were needed for such neighboring properties. SETENA was ordered to consider in that study the impact of aspects of development such as noise, light, use of water for human consumption, sewage and wastewater, and human presence on the area's ecosystem and, in particular, on the leatherback turtles.[81] SETENA conducted the required study and applied the recommendations that resulted from it. The suspension of permits for properties outside the Park was lifted in September 2009.[82]

[80] *See* Resolution No. 2174-2010-SETENA, September 8, 2010 (citing DAJ-701-2010, March 6, 2010) [Exhibit C-1z1]; *see also* List of Actions by SETENA Resulting from Decision No. 2008-018529 of December 16, 2008, February 20, 2009 [Exhibit R-035].

[81] *See* Supreme Court of Justice, Constitutional Chamber, File No. 07-005611-0007-CO, Resolution No. 2008-018529, December 16, 2008, Decision (c) [Exhibit C-1j].

[82] *See* Letter from SETENA to the Constitutional Chamber of the Supreme Court of Justice, CP-253-2009-SETENA, September 30, 2009 [Exhibit R-032].

2. The Guanacaste Area Has Limited Water Resources, Which Restricts Development in the Area

54. Claimants' properties lie in an area that is not only environmentally fragile with respect to the turtles, as just discussed in Section II.C.1 above, but that also has limited water resources. For purposes of obtaining potable water, Claimants' properties would receive water from what is called the Huacas-Tamarindo aquifer.[83] The National Service for Subterranean Waters of Costa Rica ("SENARA," in Spanish), the government institution that oversees the proper management and use of Costa Rica's water resources, has determined that the Huacas-Tamarindo aquifer area has limited water resources and that the existing resources are easily contaminated. These facts necessarily require the government to impose limits on development of properties that would depend on the aquifer.[84]

55. In the following section, Respondent first explains the limitations on water resources that have been known to exist on Claimants' properties since 2003—before they purchased their properties—and limitations on Claimants' ability to develop these properties due to water-related environmental sensitivities that Claimants knew or should have known about since 2009. Thus, Claimants knew or should have known that their ability to develop their land was uncertain or restricted, even apart from the measures specifically protecting the turtles.

[83] *See generally* SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003, p. 3 [Exhibit R-046].

[84] *See* Letter from SENARA to SETENA, DIGH-038-09, February 13, 2009, pp. 1-2 [Exhibit R-031]; *see also* SENARA, Technical Criteria for the Protection and Management of Coastal Aquifers of Santa Cruz, August 2005 [Exhibit R-048].

a. 2003 Study Shows that There Is Not Enough Water in the Guanacaste Area to Support New Development

56. In May 2003, SENARA performed a hydrological study of the Huacas-Tamarindo aquifer.[85] The main purpose of this study was to determine the availability of water in the Guanacaste area. This study was initiated due to the increase in tourism construction in the area. SENARA wanted to make sure that the water resources would be adequate to support anticipated demand.

57. The study found that there was a higher demand for water in the area than the aquifer could meet, and, thus, there was a risk of completely losing access to water in the area if the aquifer were over-drawn. The study issued an alert against further development of properties that would be dependent on the water basins and recommended that the government take measures to control the situation.[86] The study also warned about possible contamination of water resources in the area due to the increase in touristic activities.[87]

58. As a consequence, in 2005 SENARA restricted the ability of property owners to dig new wells into the lower areas of the aquifer to create new sources of water for new properties under development.[88] In order for the properties that did not already have wells to gain access to water, they would have to apply to get a permit to use water from the existing aqueduct system.[89] Due to limited water resources, there was no guarantee that new applicants

[85] *See* SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003, p. 3 [Exhibit R-046].

[86] *See* SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003, pp. 34-36 [Exhibit R-046].

[87] *See* SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003, p. 35 [Exhibit R-046].

[88] *See* SENARA, Technical Criteria for the Protection and Management of Coastal Aquifers of Santa Cruz, August 2005 [Exhibit R-048].

[89] *See* SENARA, Technical Criteria for the Protection and Management of Coastal Aquifers of Santa Cruz, August 2005 [Exhibit R-048].

would receive such permits. All of Claimants' properties are subject to such water resource limitations.[90]

b. 2009 Study Shows that the Existing Water Resources in *Las Baulas* National Park Are Easily Contaminated

59. In January 2009, SENARA issued a new study on the vulnerability of the Huacas-Tamarindo aquifer, this time to examine possible contamination of the existing water supply due to development in the area. The study found that the area was at high risk of contamination and that the use of water resources needed to be limited.[91]

60. In preparing the 2009 study, SENARA created a vulnerability map for the Huacas-Tamarindo aquifer. A vulnerability map is one that shows the areas of the aquifer that have a higher or lower risk of contamination.[92] This map is applied in conjunction with a matrix of the use of the land depending on the risk of contamination.[93] Depending on the level of the risk identified in the vulnerability map, the matrix indicates which types of construction and developments are allowed in the area. The Huacas-Tamarindo vulnerability map was completed in December 2008.[94]

61. As shown below, according to the Huacas-Tamarindo vulnerability map, the majority of Claimants' lots are located in an extremely sensitive area—that is, they are in an area

[90] Claimants' properties are located in the Huacas-Tamarindo aquifer, and thus are subject to these restrictions. *See* SENARA, Technical Criteria for the Protection and Management of Coastal Aquifers of Santa Cruz, August 2005 [Exhibit R-048].

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

[92] *See* Letter from SENARA to SETENA, DIGH-038-09, February 13, 2009 [Exhibit R-031].

[93] *See* Letter from SENARA to SETENA, DIGH-038-09, February 13, 2009, p. 2 [Exhibit R-031].

[94] *See* SENARA, Vulnerability Map of the Huacas-Tamarindo Aquifer, December 2008 [Exhibit R-049].

with a high risk of contamination.[95] In the figure below, Claimants' properties are located in the area highlighted in red, which indicates areas of extreme vulnerability. The land use matrix indicates that, in these areas, no development or construction will be permitted.[96] Thus, as of January 2009, Claimants were on notice that any attempted development of their properties would be constrained or even prohibited due to lack of water access and risk of contamination, quite apart from any measures to protect the turtles.

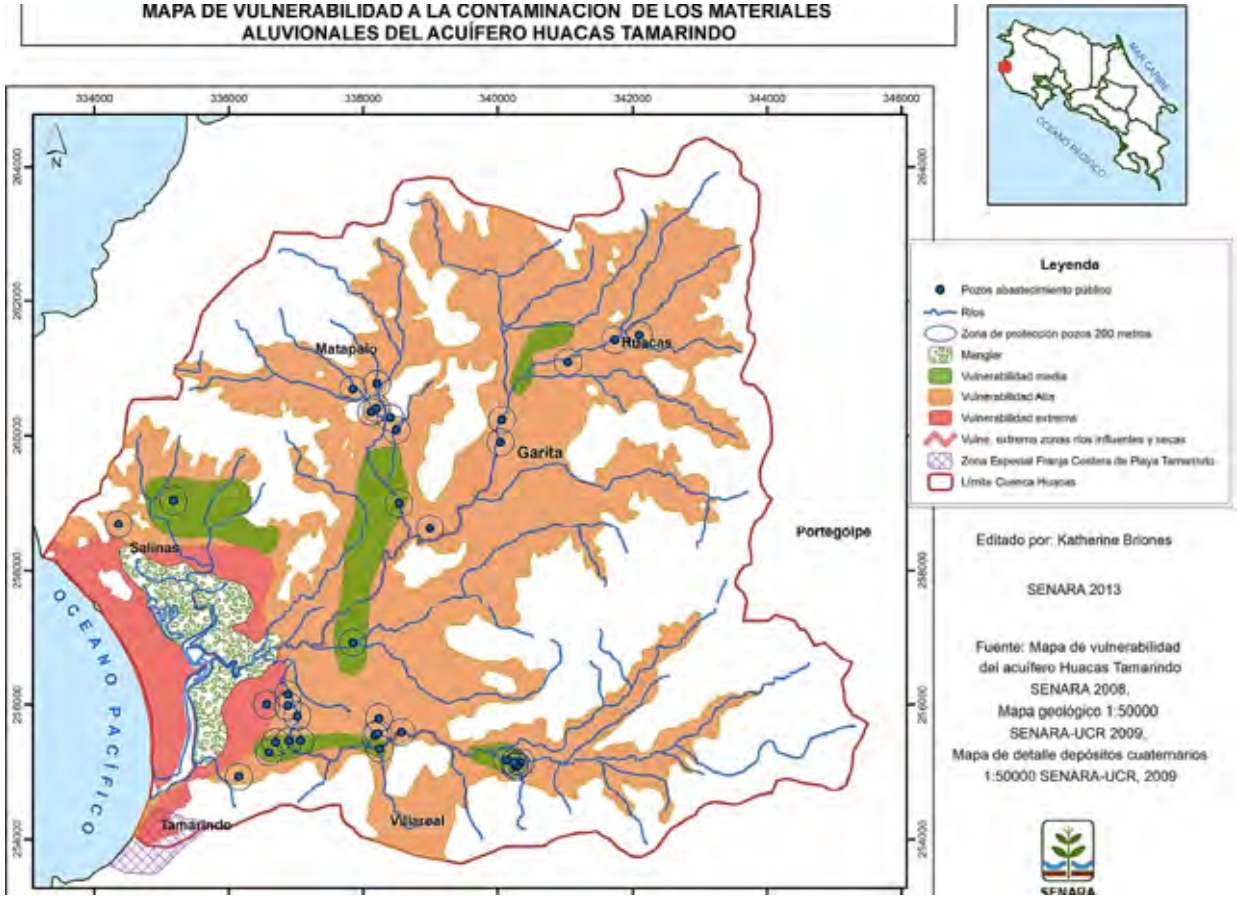

Figure 2: Vulnerability Map of the Huacas-Tamarindo Aquifer, updated in 2013.[97]

[95] *See* SENARA, Vulnerability Map of the Huacas-Tamarindo Aquifer, 2013 [Exhibit R-050]; *see also* SENARA, Vulnerability Map of the Huacas-Tamarindo Aquifer, December 2008 [Exhibit R-049].

[96] *See* SENARA, Matrix of Land Use Criteria in Accordance with the Vulnerability of Aquifers to Contamination, approved on September 2006 [Exhibit R-047].

[97] SENARA, Vulnerability Map of the Huacas-Tamarindo Aquifer, 2013 [Exhibit R-050].

D. EXPROPRIATION OF CLAIMANTS' PROPERTIES

62. Since 2003, the Republic of Costa Rica has endeavored to carry out Article 2 of the *Las Baulas* National Park Law by formally expropriating properties located within the 75-meter strip of the Park that extends from the public zone (*i.e.*, within the boundaries of the Park). With respect to Claimants' properties, that endeavor has proceeded in fits and starts, blocked by Claimants' own legal challenges to the expropriation proceedings in Costa Rican courts. It is close to completion for several of Claimants' properties. Claimants other properties are either in the middle of the expropriation procedure or have yet to be initiated into the procedure, as explained in Section II.D.2.b below.

63. Claimants' properties are not the only properties within the Park for which expropriation has been pursued. There are over one-hundred private properties that are entirely or partially within the *Las Baulas* National Park, including several owned by Costa Rican citizens. The State has commenced expropriation proceedings for more than sixty of those properties, pursuant to Article 2 of the *Las Baulas* National Park Law, and in accordance with Costa Rica's Expropriation Law.[98]

64. The following sections describe the expropriation procedures under Costa Rican law in greater detail, as well as the status of each of Claimants' properties in that process. Fundamentally, however, there can be no question that the Republic of Costa Rica is entitled to expropriate Claimants' properties within the Park and that it has acted to do so in the service of a clear public interest—namely, the protection of an endangered species. Costa Rica has determined that the goal of protecting that endangered species is best served by creating a zone

[98] *See* 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 ("*Contraloría*'s Report No. DFOE-PGAA-IF-3-2010"), Art. 2.1.1 [Exhibit C-1zk].

of state-owned, development-free property bordering the beaches on which the leatherback sea turtles nest.

1. Expropriation Procedures under Costa Rican Law

65. Respondent describes below the legal bases and procedures for State expropriations of property in Costa Rica. This information puts in context Claimants' complaints about the treatment of their properties, and is helpful in understanding why those complaints fall outside this Tribunal's jurisdiction, as discussed in Section III below.

66. The right of private property is enshrined in Article 45 of the Constitution of Costa Rica. The Supreme Court has recognized, however, that this fundamental right has limitations and that, under exceptional circumstances, the State has the right to acquire private property, including through expropriation, provided that certain conditions are met.[99] Those conditions are set forth in the Constitution and in the Expropriation Law.[100]

67. The Expropriation Law sets out the rules and regulations to which the Costa Rican State must adhere in order to acquire private assets through expropriation. The general principles under the Law on Expropriation are as follows:

- The expropriation of private property must be based on a legally-declared public interest.[101]
- Compensation, equivalent to the fair market price of the asset, shall be paid.[102]

[99] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-014770-0007-CO, Resolution No. 07-10578, July 25, 2007, pp. 8-10 [Exhibit C-1zc].

[100] *See* Expropriation Law, Law No. 7495, June 8, 1995 ("Expropriation Law") [Exhibit C-1c], as amended by Administrative Contentious Procedural Code Modifying the Expropriation Law, Law No. 8505, January 1, 2008 [Exhibit C-1d]*; see also* Organic Law of the Environment at Art. 37 (establishing the State's obligation to acquire the private properties included within the boundaries of, among others, national parks, in accordance with Costa Rica's Expropriation Law) [Exhibit R-004].

[101] *See* Expropriation Law at Art. 1 [Exhibit C-1c].

[102] *See* Expropriation Law at Art. 1 [Exhibit C-1c].

- Interest shall be paid at the prevailing legal rate, from the moment of dispossession of the asset until the time of actual payment.[103]

- The State may take conservatory measures for up to one year to preserve the condition of the asset pending the expropriation.[104]

- The State shall indemnify the owner for any damage that may result from unreasonable limitations on his or her property rights, particularly when the economic use of the asset is impaired.[105]

68. According to the Expropriation Law, certain procedural prerequisites must be met before the State can carry out an expropriation:

- The State must issue a reasoned and well-founded declaration of public interest in its acquisition of the asset in question; this declaration must be notified to the asset owner and published in the official journal.[106]

- In the event that the declaration of public interest is made through a law and refers to a group or category of assets, the State shall individualize that public interest through executive decrees that refer to the specific assets within that group or category.[107]

- The State shall give notice to third parties of the intent to expropriate the asset through a provisional annotation to the property's entry in Costa Rica's Public Registry.[108]

69. The Law on Expropriation specifies that the asset owner is to receive the fair market price of the asset, and that that fair market price is determined on the basis of an administrative appraisal conducted by an expert appointed by the State.[109] In the case of expropriation of land, the appraisal shall indicate the general physical characteristics of the

[103] *See* Expropriation Law at Art. 11 [Exhibit C-1c].

[104] *See* Expropriation Law at Art. 4 [Exhibit C-1c].

[105] *See* Expropriation Law at Art. 4 [Exhibit C-1c].

[106] *See* Expropriation Law at Art. 18 [Exhibit C-1c].

[107] *See* Expropriation Law at Art. 19 [Exhibit C-1c].

[108] *See* Expropriation Law at Art. 20 [Exhibit C-1c].

[109] *See* Expropriation Law at Art. 21 [Exhibit C-1c].

property, its use, licenses or permits for its exploitation or commercial use, liens, the estimated value of the surrounding properties, etc.[110]

70. The State must notify the owner of the asset to be expropriated of the results of the administrative appraisal of the property's value. The owner may either reject or accept the appraisal. If the owner expressly accepts the appraisal, a deed of transfer shall be drawn and the property transferred to the State, and the owner may not challenge the amount in a judicial proceeding at any later date.[111]

71. If the owner rejects the amount of the administrative appraisal, the State must refer the matter to a judicial court for a final decision on the amount of compensation.[112] The matter is referred to a judicial court by MINAE by issuing a Decree of Expropriation,[113] and then the *Procuraduría* initiates the court proceedings. At that point, the State has to deposit the amount of the administrative appraisal in the court's bank account, where it is immediately available to be withdrawn by the property owner, when ordering the owner to quit the property.[114] The court may stay the eviction order if it determines that the amount of the administrative appraisal is not adequate.[115] Alternatively, the owner may collect the appraisal amount, quit the property, and continue to contest the amount of the administrative appraisal in

[110] Either the State, the owner of the property, or the judge overseeing the proceeding may request at any time during the expropriation proceeding that the Costa Rican Tax Authority (*Dirección General de Tributación Directa*) conduct an on-site inspection of the property and issue a report within five days of the request. The appraisal may be revised in the event of a significant change to the asset or to adjust its value to take account of inflation. *See* Expropriation Law at Arts. 22, 23 [Exhibit C-1c].

[111] *See* Expropriation Law at Art. 25 [Exhibit C-1c].

[112] *See* Expropriation Law at Arts. 29, 30 [Exhibit C-1c].

[113] *See* Expropriation Law at Art. 28 [Exhibit C-1c].

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

[115] *See* Expropriation Law at Art. 31 [Exhibit C-1c].

the judicial proceeding.[116] If two months have passed since the deposit of the amount of the administrative appraisal and the owner has not quit the property, the judge may order the dispossession of (*i.e.*, eviction of the owner from) the property.[117] With dispossession, the landowner does not lose title to the property, but loses possession of the property.[118]

72. The court will appoint an independent expert to review the administrative appraisal.[119] Either party has the right to request that an additional expert also be appointed to perform yet another appraisal.[120] The parties also have the right to submit written evidence, including reports from real estate agents, selling prices of similar properties in the vicinity, the declared value of the property for tax purposes, and any other accepted means of evidence. The parties are also given the opportunity to be heard by the court during an oral hearing. In every case, the judge personally carries out an on-site inspection of the property in order to have first-hand knowledge and an understanding of the factors that inform the experts' appraisals. The court makes its final determination based on the totality of the evidence on the record.[121] The court, however, cannot award an amount lower than the amount determined in the administrative appraisal, or higher than any of the appraisals presented to the court during the judicial proceedings (if different than the administrative appraisal).[122] The decision of the court is then subject to appellate review.[123]

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[116] *See* Expropriation Law at Art. 34 [Exhibit C-1c].

[117] *See* Expropriation Law at Art. 33 [Exhibit C-1c].

[118] *See* Expropriation Law at Art. 33 [Exhibit C-1c].

[119] *See* Expropriation Law at Art. 31 [Exhibit C-1c].

[120] *See* Expropriation Law at Art. 38 [Exhibit C-1c].

[121] *See* Expropriation Law at Art. 40 [Exhibit C-1c].

[122] *See generally* Expropriation Law at Arts. 30, 40 [Exhibit C-1c].

[123] *See* Expropriation Law at Art. 41 [Exhibit C-1c].

73. The amount of compensation determined in these proceedings must be paid to the owner in cash, immediately after the court's ruling becomes final.[124] If the State deposited the amount of the administrative appraisal at the outset of the court proceedings and the final amount is higher, then at the end of the proceedings, the property owner (having already collected the initial sum) receives the difference, plus interest running from the date of dispossession.[125]

74. As will be discussed further in Section IV.A below, these detailed rules and procedures make clear that Costa Rica's legal regime governing the expropriation of land in the public interest is fully consistent with the requirements of Article 10.7 of Chapter 10 of CAFTA at issue in this case.

2. Expropriation Procedures Applied to Claimants' Properties

75. There are a total of twenty-six properties that are at issue in this arbitration. The status of Claimants' properties can be grouped into the following three categories: (i) properties where no declaration of public interest has yet been issued; (ii) properties where a declaration of public interest has been issued (and, therefore, the administrative stage initiated) but where the expropriation procedure has been suspended; and (iii) properties that are currently in the judicial stage of the expropriation procedure. Claimants allege that seventeen of those twenty-six properties have been subject to indirect expropriation (categories (i) and (ii)), and the remaining nine have been subject to direct expropriation (category (iii)).[126] Claimants also assert that the

[124] *See* Expropriation Law at Art. 47 [Exhibit C-1c].

[125] *See* Expropriation Law at Art. 11 [Exhibit C-1c].

[126] *See* Claimants' Memorial on the Merits at paras. 192-93.

expropriation procedure "lacks rationality" and "predictability."[127] Claimants' allegations are without merit.[128]

76. Costa Rica has undertaken to expropriate properties located within the *Las Baulas* National Park based 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 so and initiated expropriation procedures accordingly. In this Section, Respondent discusses the priority system created by Costa Rica to expropriate properties in the Park. Respondent then describes the status of each of Claimants' properties in the legal process for expropriation.

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

77. Since 2003, the Republic of Costa Rica has endeavored to carry out Article 2 of the *Las Baulas* National Park Law by formally expropriating the 75-meter strip of land inside the Park.[129] With the threat of further development in the area, the State started to take the necessary measures to protect the leatherback sea turtles by initiating expropriation proceedings for properties located within the Park. Claimants allege that the expropriation procedure Respondent has undertaken with respect to Claimants' properties has been irrational and unpredictable.[130] Claimants' allegations are without merit. As discussed below, Respondent has undertaken the expropriation procedures in a reasonable and predictable manner.

[127] *See* Claimants' Memorial on the Merits at para. 89.

[128] *See* Claimants' Memorial on the Merits at para. 89.

[129] *See* Letter from MINAE to SETENA, DM 305-2005, February 28, 2005 [Exhibit C-74].

[130] *See* Claimants' Memorial on the Merits at para. 89.

78. Respondent has evaluated the area within the National Park and prioritized which of the properties within the Park need to be expropriated first in order to best meet the goals of the National Park Law. In particular, the National System of Conservation Areas ("SINAC," in Spanish), MINAE's agency in charge of initiating expropriation procedures and carrying out the administrative stage of expropriations, developed a list of priorities to determine the most endangered areas where immediate action was required and, conversely, areas that did not require immediate action but that nevertheless would eventually be expropriated. According to SINAC officials, this strategy was based on the location of the lots and the areas where there was a greater concentration of turtle nests. The strategy was primarily based on technical information provided by Park officials working for SINAC.[131]

79. SINAC determined that the lots would be expropriated based on the following priorities (from areas in need of greatest protection to areas in need of least protection):

1. Playa Grande Sur: Records show that this is the area with the greatest concentration of turtle nests.

2. Playa Grande Norte: This area contains the greatest amount of construction and development, but there are still important open areas that can be protected. The priority is to expropriate the open areas first.

3. Playa Ventanas: There has been some development in this area, but there is still some nesting activity reported in the area.

4. Isla Verde: This is the second most important area for nesting; however no development has been reported in the area, and so expropriation is not immediately needed.

[131] *See* Piedra Statement at paras. 57-58 [Exhibit RWE-002]; Witness Statement of Sabrina Loáiciga Pérez, July 14, 2014 ("Loáiciga Statement"), para. 10 [Exhibit RWE-003]; *see also generally* MINAE and SINAC, "Technical Proposal for the Expropriation of Properties Inside *Las Baulas* National Park," 2012 [Exhibit R-010].

5. Cerro El Morro and Cerro Ventanas: Even though no nesting activities occur in these areas, they represent an important buffer zone to protect the biological richness of the entire Park.[132]

The sectors listed in the above prioritization are identified on the map below.

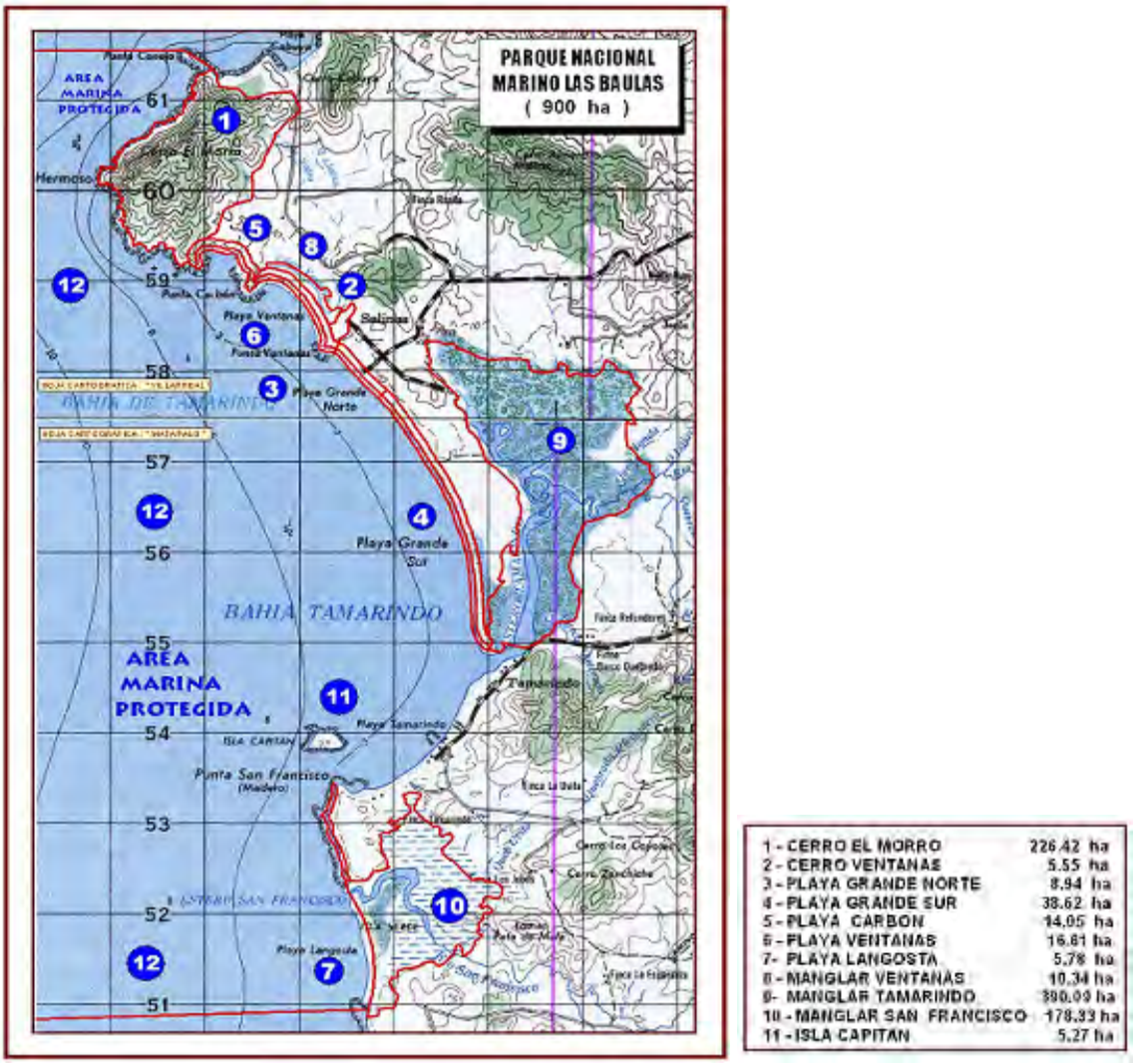

Figure 3 *Las Baulas* National Park Sectors[133]

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

[133] *See* MINAE and SINAC, "Technical Proposal for the Expropriation of Properties Inside *Las Baulas* National Park," 2012 [Exhibit R-010].

80. As discussed below, Costa Rica began expropriating properties within the boundaries of the Park, including certain properties owned by Claimants, according to the above-stated priorities.

b. Status of Claimants' Properties

81. The process of expropriation for Claimants' properties began in 2005 with respect to the portion of Claimants' properties located inside the 75-meter strip of land inside the Park. Claimants' properties can be grouped into the following three categories, as previously described: (i) properties where no declaration of public interest has yet been issued; (ii) properties where a declaration of public interest was issued (and, therefore, the administrative stage initiated), but where the expropriation procedures were suspended before the properties were transferred to the judicial stage; and (iii) properties that are currently in the judicial stage of the expropriation procedure. In this Section, Respondent will describe the status of Claimants' properties in these three categories and respond to Claimants' allegations concerning certain properties in each category. As will be further discussed in Section IV.A, Claimants have alleged indirect expropriation with respect to properties in categories (i) and (ii), and direct expropriation with respect to properties in category (iii). Respondent provides detailed information on the status of each lot in Annex A, attached.

(i) *Properties Where No Declaration of Public Interest Has Yet Been Issued*

82. The first group of Claimants' properties are those properties for which no declaration of public interest has yet been issued. Claimants' properties that are in this stage of the proceedings are Lots A39, C71, C96, SPG3, V59, V61a, V61b and V61c.

83. As explained in Section II.D.1 above, a declaration of public interest is the first step in the expropriation procedure once a law mandating expropriation has been adopted. For properties where a declaration of public interest has not been issued, the landowner has the right to fully enjoy and make use of its property, subject to all applicable laws, of course. Thus, there has been no deprivation of any property right for which compensation must be paid with respect to any of Claimants' properties at this stage in the expropriation procedure. With one exception, these properties are located in Playa Grande Norte and Playa Ventanas, which correspond to SINAC's designated priority areas two and three.[134] Thus, it is a priority for the government to begin the expropriation procedure for properties in these areas but, for reasons discussed below, it has not yet commenced that process with respect to these properties.

84. In 2008-2009, SINAC decided to suspend the initiation of any new expropriation procedures in order to comply with recommendations that the *Contraloría* (Costa Rica's government inspection and oversight agency) would issue to improve the management system of the Park.[135] Claimants have alleged that this suspension is contrary to Costa Rican Law.[136] Claimants' allegations are without merit. Respondent briefly describes below the findings of the *Contraloría* in its report about the management of the Park and the reasons for the suspension of the expropriation procedure.

(a) The *Contraloría* Issued a Report in 2010 to Improve Costa Rica's Expropriation Procedure

85. On August 5, 2008, the *Contraloría* informed to MINAE that it would review the Ministry's management of environmentally protected areas located next to the maritime zone,

[134] Lot SPG3 is located in Playa Grande Sur. *See* Map Identifying Location for Each Lot [Exhibit C-2a].

[135] *See* Loáiciga Statement at paras. 18-20 [Exhibit RWE-003].

[136] *See* Claimants' Memorial on the Merits at para. 287.

which included *Las Baulas* National Park.[137] The *Contraloría* is an independent agency of the Costa Rican government with authority to investigate any aspect of the government's activities that involves the management of public funds.[138] The *Contraloría* requested that MINAE collaborate with it to provide all necessary documents and to answer all questions from *Contraloría* officials; thus, MINAE and SINAC were actively involved in the preparation of the *Contraloría*'s report.[139]

86. The purpose of the *Contraloría*'s review was to evaluate MINAE's management of the protected areas, in particular *Las Baulas* National Park, and to make recommendations to improve, where necessary, MINAE's management of the Park.[140] The *Contraloría*'s review included an assessment of MINAE's implementation of Costa Rica's expropriation procedures.[141] The *Contraloría* kept in mind the need to protect landowners' rights while simultaneously protecting the leatherback sea turtles. The review was performed in compliance with the applicable rules of auditing for the public sector.[142]

87. The *Contraloría*'s final report was issued in February 2010.[143] Before the report's issuance, officials from the *Contraloría* held several meetings with officials from MINAE and SINAC to discuss their provisional conclusions.[144] During this process, it became evident that the *Contraloría* would ultimately recommend the suspension of all expropriation

[137] *See* Letter from *Contraloría* to MINAE, August 5, 2008 [Exhibit R-030].

[138] *See* Political Constitution of the Republic of Costa Rica, November 8, 1949, Arts. 183-84 (as amended) [Exhibit R-018]; Organic Law of the *Contraloría* of the Republic, Law No. 7428, September 7, 1994 [Exhibit R-059].

[139] *See* Letter from *Contraloría* to MINAE, August 5, 2008 [Exhibit R-030].

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

[141] Loáiciga Statement at para. 20 [Exhibit RWE-003].

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

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

[144] Loáiciga Statement at paras. 18-19 [Exhibit RWE-003].

procedures related to *Las Baulas* National Park in order to give MINAE and SINAC the opportunity to improve the expropriation procedure. Accordingly, MINAE reasonably decided to suspend ongoing expropriation proceedings and not to initiate new proceedings until the Ministry had complied with all of the *Contraloría*'s recommendations.[145]

(b) Findings in the *Contraloría*'s Report

88. Following its extensive review of MINAE's management of the Park, the *Contraloría* identified various areas in which MINAE's management could be improved. Significantly, although the *Contraloría* recognized the existence of some deficiencies in MINAE's management of the Park, the *Contraloría* never described MINAE's process as arbitrary or unreasonable, as Claimants allege in these proceedings.[146] In sum, the *Contraloría* made the following conclusions:

- The *Contraloría* found that there were some weaknesses in the system related to the delimitation of the Park. Although it was clear that the Park boundaries included property from the high tide mark running 125 meters inland, the *Contraloría* concluded that it would be useful for MINAE to create an official map of the Park.[147]

- The *Contraloría* identified a possible defect in the legal titles held by certain owners of properties located within the Park's boundaries.[148]

- The *Contraloría* found that the priority system for the expropriation of properties located in the Park had not yet been formalized; so, the *Contraloría* recommended that SINAC formalize that system.[149]

- The *Contraloría* found that SINAC did not have an Expropriation Manual and recommended that it create one. At the same time, although SINAC did not have

[145] Loáiciga Statement at para. 19 [Exhibit RWE-003].

[146] *See* Claimants' Memorial on the Merits at paras. 85, 89.

[147] *See Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 at p. 4 [Exhibit C-1zk].

[148] *See Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 at p. 7 [Exhibit C-1zk].

[149] *See Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 at p. 17 [Exhibit C-1zk].

a formal manual, the *Contraloría* acknowledged that SINAC officials always acted in accordance with the law.[150]

- With respect to the administrative appraisals, the *Contraloría* found that the appraisers had failed to consider all factors relevant to determining the market value of the properties. Thus, according to the *Contraloría*, valuations of the land made by administrative appraisers may be higher than actual fair market value of the land in the market. The *Contraloría* recognized in its Report, however, that by law, the owner of property subject to expropriation had the right to receive fair compensation for his or her property and that MINAE was in the process of fulfilling that obligation.[151]

- The *Contraloría* also found some deficiencies in the administration of the Park. For example, it highlighted the lack of access controls, insufficient security, and the presence of domestic animals in the Park, among other things.[152]

(c) Actions Taken by SINAC to Address the Findings of the *Contraloría*

89. Since the 2010 issuance of the *Contraloría*'s Report, MINAE and SINAC officials have been working diligently to comply with all of the *Contraloría*'s recommendations.[153] To date, SINAC has implemented nine out of the *Contraloría*'s thirteen recommendations.[154] Because of the number of recommendations made by the *Contraloría* concerning the expropriation procedure, SINAC officials decided that it would best to suspend all ongoing expropriation procedures that were then in the administrative stage and to freeze the initiation of any new proceedings until SINAC had the opportunity to comply with all of the *Contraloría*'s recommendations.

90. To comply with the *Contraloría*'s recommendations, SINAC has performed several studies, including studies of the titles of certain properties located with the boundaries of

[150] *See Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 at p. 22 [Exhibit C-1zk].

[151] *See Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 at p. 24 [Exhibit C-1zk].

[152] *See Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 at p. 38 [Exhibit C-1zk].

[153] Loáiciga Statement at para. 21 [Exhibit RWE-003].

[154] *See* Chart of MINAE and SINAC Compliance with *Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 as of May 27, 2014 [Exhibit R-060].

the Park. SINAC has also undertaken several measures affecting the Park, including (i) controlling access to the Park; (ii) improving the current infrastructure of the Park; and (iii) developing a work plan to determine the needs of the Park in order to better protect the leatherback sea turtles.[155]

91. In light of the fact that so many of the recommendations of the *Contraloría* impacted SINAC's expropriation procedure, it was reasonable for MINAE to suspend the expropriation procedure during this period, including the initiation of any new expropriation procedures for land located in the Park. Once implementation of the *Contraloría*'s recommendations has been completed, Respondent will once again commence the expropriation procedure with respect to properties that have not yet been subject to the expropriation procedures and will restart the process for properties that are currently in the administrative stage of the procedures, which are discussed below.

(ii) *Claimants' Properties in the Administrative Stage*

92. The second group of Claimants' properties are those that are currently in the administrative stage of the expropriation procedure. Nine of Claimants' properties fall into this category. They are Lots V30, V31, V32, V33, V38, V39, V40, V46, and V47. These properties are located in Playa Ventanas—the area ranked as the third level of priority for expropriation according to SINAC. Playa Ventanas is an area where there is a high concentration of nests that needs to be protected.

93. For these properties, the expropriation procedure has begun and the processing of Claimants' properties is at the first, preliminary stage in the proceedings. As explained in

[155] *See* Chart of MINAE and SINAC Compliance with *Contraloría*'s Report No. DFOE-PGAA-IF-3-2010 as of May 27, 2014 [Exhibit R-060].

Section II.D.1 above, the first stage in the expropriation procedure is the administrative stage, where the State declares the public interest in taking possession of the land and assesses its fair market value. This value is determined through an administrative appraisal conducted by an expert appointed by the State.[156] The landowner may object to the approval, in which case the State issues a decree referring the administrative expropriation file to the *Procuraduría*, so that it can initiate the judicial stage of the expropriation procedure. During the administrative stage, up to the issuance of the decree of expropriation, and even after the initiation of the judicial stage, the owner will not have been deprived of any of his property rights with respect to the land. Such a deprivation of property rights will only occur if an Act of Dispossession is issued, which can only occur during the judicial stage of the expropriation procedure and, even then, only after the State has deposited into a sort of escrow account funds in the amount of the administrative appraisal.

94. For each of Claimants' properties in the administrative stage of the expropriation procedures, a declaration of public interest has been issued and an administrative appraisal has been completed. The declaration of public interest for each of these lots was issued on October 8 or 9, 2007.[157] Costa Rica issued the administrative appraisals for these lots on September 17 and 18, 2007.[158] Claimants objected to each of these appraisals on January 21, 2009 and April 2,

[156] *See* Expropriation Law at Art. 21 [Exhibit C-1c].

[157] *See* Lot V30 Decree of Public Interest, October 9, 2007 [Exhibit C-3c]; Lot V31 Decree of Public Interest, October 8, 2007 [Exhibit C-4c]; Lot V32 Decree of Public Interest, October 9, 2007 [Exhibit C-5c1]; Lot V33 Decree of Public Interest, October 9, 2007 [Exhibit C-6c]; Lot V38 Decree of Public Interest, October 9, 2007 [Exhibit C-7c]; Lot V39 Decree of Public Interest, October 9, 2007 [Exhibit C-8c]; Lot V40 Decree of Public Interest, October 9, 2007 [Exhibit C-9c]; Lot V46 Decree of Public Interest, October 9, 2007 [Exhibit C-10c]; Lot V47 Decree of Public Interest, October 9, 2007 [Exhibit C-11c].

[158] *See* Lot V30 Administrative Appraisal, September 18, 2008 [Exhibit C-3d]; Lot V31 Administrative Appraisal, September 18, 2008 [Exhibit C-4d]; Lot V32 Administrative Appraisal, September 18, 2008 [Exhibit C-5d]; Lot V33 Administrative Appraisal, September 18, 2008 [Exhibit C-6d]; Lot V38 Administrative Appraisal, September

2009.[159] They alleged that the appraisers did not consider the initial investments Claimants had made for each property plus any additional improvements made on the land.[160]

95. Had Claimants not raised objections, the expropriation procedure would have been completed. Once objections have been raised, however, under Costa Rica's expropriation procedures, the next step is to transfer the properties from the administrative stage to the judicial stage. Respondent has not yet transferred these properties to the judicial stage for further assessment of the properties' values, however, because, as discussed in Section II.D.2.b.(i) and (ii) above, SINAC reasonably suspended all pending expropriation procedures in order to improve the expropriation process.

(iii) *Claimants' Properties in the Judicial Stage*

96. The third group of Claimants' properties are those that are currently in the judicial stage of the expropriation procedure. Nine of Claimants' properties fall into this category. Those properties are Lots B1, B3, B5, B6, B7, B8, SPG1, SPG2, and A40. In compliance with SINAC's prioritized approach to expropriation, these were among the earliest properties in the

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17, 2008 [Exhibit C-7d]; Lot V39 Administrative Appraisal, September 17, 2008 [Exhibit C-8d]; Lot V40 Administrative Appraisal, September 18, 2008 [Exhibit C-9d]; Lot V46 Administrative Appraisal, September 17, 2008 [Exhibit C-10d]; Lot V47 Administrative Appraisal, September 17, 2008 [Exhibit C-11d].

[159] *See* Lot V30 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-3d1]; Lot V31 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-4d1]; Lot V32 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-5d1]; Lot V33 Objection to the Administrative Appraisal, April 2, 2009 [Exhibit C-6d1]; Lot V38 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-7d1]; Lot V39 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-8d1]; Lot V40 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-9d1]; Lot V46 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-10d1]; Lot V47 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-11d1].

[160] *See* Lot V30 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-3d1]; Lot V31 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-4d1]; Lot V32 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-5d1]; Lot V33 Objection to the Administrative Appraisal, April 2, 2009 [Exhibit C-6d1]; Lot V38 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-7d1]; Lot V39 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-8d1]; Lot V40 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-9d1]; Lot V46 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-10d1]; Lot V47 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-11d1].

Park to be expropriated, because they are all located in Playa Grande Sur—the area where there is the greatest concentration of nests and, therefore, the greatest need for protection.

97. Claimants' properties that are in the judicial stage fall into two subcategories—those which have been assigned a final fair market value and those which are still in the process of having the fair market value determined. We discuss each below. In addition, we address each of Claimants' criticisms regarding Respondent's handling of properties in this stage in the proceedings.

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

98. The Costa Rican courts have issued a final decision regarding the fair market value of Claimants' **Lots A40, SPG2, B3, and B8**. The process leading up to those determinations was as follows. For each of the properties, judicial proceedings were initiated after the amount of the administrative appraisal was paid or made available to Claimants.[161] An Act of Dispossession was then issued,[162] meaning that the State now has possession of these properties. For each of the properties, except for Lot B3, two judicial appraisals were undertaken. In the case of Lot B3, only one judicial appraisal was undertaken.[163] For all four

[161] *See* 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. 5 [Exhibit C-23f]; Lot B3 Initiation of Judicial Proceedings, December 1, 2006, p. 5 [Exhibit C-24f]; Lot B5 Initiation of Judicial Proceedings, December 1, 2006, p. 5 [Exhibit C-25f]; Lot B6 Initiation of Judicial Proceedings, November 30, 2006, p. 5 [Exhibit C-26f]; Lot B7 Initiation of Judicial Proceedings, November 30, 2005, p. 3 [Exhibit C-27f]; Lot B8 Initiation of Judicial Proceedings, December 1, 2006, p. 5 [Exhibit C-28f].

[162] *See* Lot A40 Act of Dispossession, March 14, 2008, [Exhibit C-16f1]; Lot SPG1 Act of Dispossession, December 9, 2008 [Exhibit C-20f1]; Lot SPG2 Act of Dispossession, December 9, 2008 [Exhibit C-21f1]; Lot B3 080313 Act of Dispossession, February 20, 2008 [Exhibit C-24f1]; Lot B8 Act of Dispossession, March 12, 2008 [Exhibit C-28f1].

[163] *See* Lot A40 First Judicial Appraisal, July 24, 2008 [Exhibit C-16f2]; Lot A40 Second Judicial Appraisal, December 11, 2009 [Exhibit C-16f3]; Lot SPG1 First Judicial Appraisal, June 13, 2008 [Exhibit C-20f2]; Lot SPG1 Second Judicial Appraisal, February 9, 2010 [Exhibit C-20f3]; Lot SPG2 First Judicial Appraisal, June 27, 2008 [Exhibit C-21f2]; Lot SPG2 Second Judicial Appraisal, July 28, 2010 [Exhibit C-21f3]; Lot B3 070913 First Judicial

lots, a final decision determining the fair market value of the properties was issued: for Lots SPG2, B8, and A40—through appeal; for Lot B3—through a final decision of a lower court.[164] For all four lots, Claimants have received payment for the amount awarded.[165] No payment of interest or fees has yet been made because, in one of the four cases, the process for determining the amount is still ongoing and, in the other three cases, Claimants themselves have failed to request such payments as required by law.

99. The courts determined the fair market value of these lots in accordance with international law and the Costa Rican Expropriation Law. According to Article 40 of the Expropriation Law, the judge is required to consider all the evidence that has been presented to the court in order to render a decision on the matter.[166] In their decisions in all of these cases, the judges did take into consideration arguments presented by the State's *Procurador* and the landowner's counsel, the judicial appraisals, and all other information submitted by the parties, including reports of independent experts.

100. The judicial process for determining the fair market value for **Lots SPG1, B1, B5, B6 and B7** is on-going. For each of these properties, judicial proceedings were initiated after the amount for the administrative appraisal was paid or made available to Claimants.[167] An Act of

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Appraisal, September 13, 2007 [Exhibit C-24f2]; Lot B8 First Judicial Appraisal, April 12, 2007 [Exhibit C-28f2]; Lot B8 Second Judicial Appraisal, March 8, 2010 [Exhibit C-28f3].

[164] *See* Lot A40 Appeal Judgment, July 21, 2011 [Exhibit C-16h]; Lot SPG2 Appeal Judgment, December 14, 2012 [Exhibit C-21h]; Lot B3 Judgment [Exhibit C-24g1]; Lot B8 Appeal Documents, 2013[Exhibit C-28h].

[165] *See* Lot A40 Payment of Principal, January 3, 2012 [Exhibit R-040]; Lot B3 Payment of Principal, September 19, 2013 [Exhibit R-041]; Lot B8 Payment of Principal, March 28, 2014 [Exhibit R-042]; Lot SPG2 Payment of Principal, May 14, 2014 [Exhibit R-043].

[166] *See* Expropriation Law at Art. 40 [Exhibit C-1c].

[167] *See* Lot B5 Initiation of Judicial Proceedings, December 1, 2006, p. 7 [Exhibit C-25f]; Lot B6 Initiation of Judicial Proceedings, November 30, 2006, p. 5 [Exhibit C-26f]; Lot B7 Initiation of Judicial Proceedings, November 30, 2005, p. 5 [Exhibit C-27f]; Lot B1 Initiation of Judicial Proceedings, December 1, 2006, p. 5 [Exhibit C-23f]; Lot SPG1 Initiation of Judicial Proceedings, April 11, 2008, p. 5 [Exhibit C-20f].

Dispossession was then issued,[168] meaning that the State now has possession of these properties. For each of the properties, two judicial appraisals were undertaken (except for Lot B6, for which only one was performed).[169] The judicial procedures have been suspended for two of these properties—for Lots SPG1 and B1—at the request of Claimants for the purposes of this arbitration.[170] With respect to Lots B5, B6 and B7, no final decision has been rendered by the courts of first instance because the parties are still presenting evidence and arguments.[171]

(b) There Is No Merit to Claimants' Allegations of Wrongdoing in the Judicial Stage of the Proceedings

101. In their Memorial, Claimants have tried to characterize Respondent's expropriation system—in particular, at the judicial stage—as weak, arbitrary, contrary to principles of international law, and biased in favor of the State.[172] There is no merit to these allegations. We address the specific claims raised by Claimants below.

102. Claimants allege, in particular, that the judicial stage of the expropriation procedure in Costa Rica is biased in favor of the State because judges are required to take the

[168] *See* Lot SPG1 Act of Dispossession, December 9, 2008 [Exhibit C-20f1]; Lot B1 Act of Dispossession, March 12, 2008 [Exhibit C-23f1]; Lot B5 Act of Dispossession, March 13, 2008 [Exhibit C-25f1]; Lot B6 Act of Dispossession, March 13, 2008 [Exhibit C-26f1]; Lot B7 Act of Dispossession, March 13, 2008 [Exhibit C-27f1]; Lot B8 Act of Dispossession, March 12, 2008 [Exhibit C-28f1].

[169] *See* Lot SPG1 First Judicial Appraisal, June 13, 2008 [Exhibit C-20f2]; Lot SPG1 Second Judicial Appraisal, February 9, 2010 [Exhibit C-20f3]; Lot B1 First Judicial Appraisal, March 6, 2007 [Exhibit C-23f2]; Lot B1 Second Judicial Appraisal, November 5, 2009 [Exhibit C-23f3]; Lot B5 First Judicial Appraisal, March 15, 2010 [Exhibit C-25f2]; Lot B5 Second Judicial Appraisal, May 2013 [Exhibit C-25f3]; Lot B6 First Judicial Appraisal, August 26, 2007 [Exhibit C-26f2]; Lot B7 First Judicial Appraisal, February 15, 2007 [Exhibit C-27f2]; Lot B7 Second Judicial Appraisal, November 12, 2009 [Exhibit C-27f3]; Lot B8 First Judicial Appraisal, April 12, 2007 [Exhibit C-28f2]; Lot B8 Second Judicial Appraisal, March 8, 2010 [Exhibit C-28f3].

[170] The procedures for Lots SPG1and B1 were suspended before the judge could issue a decision on the matter. *See* Lot B1 Request for Suspension of Judicial Proceedings, July 31, 2013 [Exhibit R-036]; *see also* Lot SPG1 Suspension of Judicial Proceedings, July 29, 2013 [Exhibit R-038].

[171] *See* Claimants' Memorial on the Merits at paras. 182-83.

[172] *See* Claimants' Memorial on the Merits at paras. 113, 123, 125, 128, 131.

administrative appraisal into account when determining the fair market value of a property.[173] Claimants complain that some judges have dismissed much higher judicial appraisals because they did not refer to the administrative appraisals.[174] There is no merit to Claimants' assertions.

103. According to the Expropriation Law, the purpose of the judicial stage of the expropriation procedure is to review the administrative appraisals.[175] The appraisers appointed by the judge during the judicial stage must consider the earlier administrative appraisal in their valuations. If the judicial appraisers reach a result different from the administrative appraisal, they must explain the reason for the differences and the methodologies they used to value the property.[176] It is therefore logical that a judge would not give weight to a judicial appraisal that does not take into account the administrative appraisal.

104. This does not mean, however, that administrative appraisals are the only point of reference for judges. Costa Rican courts have recognized that if judges were restricted to considering only the administrative appraisal, the judicial procedure would lose its purpose: To protect the parties' due process rights to challenge the administrative appraisal.[177] Also, Costa Rica's appellate courts have pointed out that if judges consider the administrative appraisal to be too low, they can refuse to allow the dispossession of the land to proceed.[178] Thus, there is no evidence to support Claimants' allegation of systemic bias in favor of the State on the grounds that judges dismiss higher judicial appraisals.

[173] *See* Claimants' Memorial on the Merits at paras. 123, 125.

[174] *See* Claimants' Memorial on the Merits at para. 123.

[175] *See* Expropriation Law at Art. 30 [Exhibit C-1c].

[176] *See, e.g.,* Lot A40 Appeal Judgment, July 21, 2011, p. 15 [Exhibit C-16h].

[177] *See, e.g.,* Lot A40 Appeal Judgment, July 21, 2011, p. 15 [Exhibit C-16h].

[178] *See, e.g.,* Lot A40 Appeal Judgment, July 21, 2011, p. 15 [Exhibit C-16h].

105. Claimants also complain that some of the judges have decided to consider the reason the land is being expropriated—*i.e.*, the fact that the land is located within the Park—when determining the value of compensation.[179] Claimants allege that judges have deliberately and improperly considered this factor in order to lower the amount of compensation. Claimants' allegation is misguided. That their property is located within the Park is a circumstance relevant to its value regardless of the reason for the expropriation. The fact that all or portions of Claimants' properties are inside the Park needed to be considered as part of the valuation process because when Claimants purchased the land, they knew or should have known that the land was located inside the Park and the purchase price would have reflected that fact. Therefore, Claimants would reap a windfall if they were to be compensated for the land as if it were located outside of the Park.[180] The Costa Rican courts thus have consistently explained that they seek to reach a balance between the interests of the State and those of the landowner.[181]

106. In addition, Claimants complain that some courts have considered limitations on the use, and thus, the value of the land that, according to Claimants, developed after Costa Rica took possession of the land.[182] For example, Claimants complain about the fact that one of the judges considered the restrictions on development that affected one of Claimants' properties because of the property's dependence on the environmentally sensitive aquifer.[183] This was, however, only one of the factors that the judge considered in reaching a valuation determination.

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[179] *See* Claimants' Memorial on the Merits at paras. 114, 120, 122.

[180] *See, e.g.*, Lot A40 Appeal Judgment, December 11, 2009, p. 20 [Exhibit C-16g].

[181] *See, e.g.*, Lot B8 Appeal Judgment, May 13, 2013, p. 11 [Exhibit C-28h]; Lot A40 Appeal Judgment, July 21, 2011, p. 12 [Exhibit C-16h].

[182] *See* Claimants' Memorial on the Merits at para. 131. Claimants have characterized the Act of Dispossession as the moment when the State takes title of the land; however, as explained in para. 169, title transfers to the State only at the end of the expropriation procedure.

[183] *See* Claimants' Memorial on the Merits at para. 131.

He also considered information provided by the judicial appraisers and the administrative appraiser as well as other characteristics of the land, such as the fact that there are no easements allowing access to the land and that it is within the boundaries of the Park.[184] In any case, Costa Rican law is designed to prevent judges from lowering the value of the property determined by the administrative appraisal.[185] Thus, the law protects landowners from receiving a final value that is lower than the amount determined in the administrative appraisal due to facts that have occurred after that valuation was determined.

107. Claimants also complain that the expropriation process in Costa Rica is slow and often delayed.[186] What they omit to mention, however, is that in many cases, any delay is due in no small part to the various judicial actions filed by Claimants' counsel opposing the expropriation proceedings, rather than to actions of the State or the judiciary. For example, with 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,[187] requested a suspension of that proceeding,[188] and then presented several challenges to the process of dispossession,[189] which devolved into a parallel proceeding to determine the legality of the judge's decision to grant the Act of Dispossession.

108. Such delays, however, are to the State's credit. Costa Rica's courts and administrative bodies have ensured due process and respect for Claimants' substantive and

[184] *See, e.g.*, Lot B8 Appeal Judgment, May 13, 2013, pp. 18-22 [Exhibit C-28h].

[185] *See generally* Expropriation Law at Arts. 30, 40 [Exhibit C-1c].

[186] *See* Claimants' Memorial on the Merits at para. 105.

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

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

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

procedural rights, even when the result has been delaying the government's expropriation efforts. Claimants have fully exercised their substantive and procedural rights under the Expropriation Law and cannot complain that their rights of due process have been denied. Of course, they are fully entitled to exercise those rights. To the extent that doing so has contributed to any delay in completing the expropriations, however, Claimants cannot complain about those delays in the expropriation procedure.

109. Finally, Claimants surprisingly allege that they have not yet received payment for the lots where there has been a final decision on the amount of compensation.[190] Claimants' allegations are not true. Claimants fail to explain the current status of the situation of each lot. For every lot where an Act of Dispossession has been issued (*i.e.*, Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7 and B8), Costa Rica has made the amount of the administrative appraisal available to Claimants.[191] The payment of the administrative appraisal constitutes "preliminary" compensation to the property owner, while the expropriation procedure is being concluded.[192] Whether or not Claimants have chosen to receive those funds, the money is available and waiting for them. In addition, for the lots where a final court decision on valuation has been issued—*i.e.*, for Lots SPG2, B3, A40 and B8—Claimants have, in fact, received payment for the entire principal amounts due for each property.[193] The only payment that has not yet been made is for

[190] *See* Claimants' Memorial on the Merits at paras. 178, 183.

[191] *See* 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. 5 [Exhibit C-23f]; Lot B3 Initiation of Judicial Proceedings, December 1, 2006, p. 5 [Exhibit C-24f]; Lot B5 Initiation of Judicial Proceedings, December 1, 2006, p. 7 [Exhibit C-25f]; Lot B6 Initiation of Judicial Proceedings, November 30, 2006, p. 5 [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].

[192] *See, e.g.*, Lot B3 Judgment, February 7, 2013, pp. 10-11 [Exhibit C-24g1].

[193] *See* Lot A40 Payment of Principal, January 3, 2012 [Exhibit R-040]; Lot B3 Payment of Principal, September 19, 2013 [Exhibit R-041]; Lot B8 Payment of Principal, March 28, 2014 [Exhibit R-042]; Lot SPG2 Payment of Principal, May 14, 2014 [Exhibit R-043].

the interest and fees owed to the landowner at the conclusion of the proceeding, which in some cases is in the process of being determined and in some cases has not yet even been requested by Claimants. Costa Rican law requires that the landowner specifically request that interest and fees be paid in order to receive the compensation due;[194] thus, any delay in payment because of the landowners' failure to request such payment cannot be attributable to the State.

110. In sum, it is the case that, since at least 2005, Costa Rica has sought to expropriate the 75-meter strip of Claimants' properties that are located within the *Las Baulas* National Park. There is no question that Costa Rica has the right to do so, and that it accepts and complies with the obligation to pay compensation when the expropriation procedure has been completed together with interest to compensate for any delays in the process's completion. Costa Rica's legal process for carrying out expropriations is thus fully compliant with its international obligations as will be discussed in Section IV.A below.

III. JURISDICTIONAL OBJECTIONS

111. The Tribunal need not even reach the factual or legal merits of any of Claimants' claims, because the Tribunal lacks jurisdiction to hear those claims. The Tribunal lacks jurisdiction on two grounds: First, Claimants have failed to bring this arbitration within the statute of limitations period provided under CAFTA's Article 10.18(1). Second, the alleged breaches about which Claimants complain occurred before CAFTA came into force—that is, before Respondent had any obligation to Claimants under CAFTA. This section details how Claimants' allegations fall outside of the Tribunal's jurisdiction.

[194] *See* Civil Procedure Code of Costa Rica, Law No. 7130, August 16, 1989 ("Civil Procedure Code"), Art. 693 [Exhibit R-002].

112. Section III.A demonstrates Claimants' knowledge of the alleged breaches beyond CAFTA's three-year statute of limitations. Section III.B sets out the dates of the measures on which Claimants' claims of breach are based and demonstrates that all of them pre-dated CAFTA's entry into force. This Section also explains how Claimants' attempts to characterize Respondent's alleged breaches as being composite breaches or breaches with a continuing character do not cure the fact that their allegations fall outside of the Tribunal's jurisdiction.

A. 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

113. The Tribunal lacks jurisdiction over Claimants' claims in this arbitration because Claimants knew about the measures they now challenge more than three years before they submitted their Notice of Arbitration. CAFTA prohibits the submission of claims if more than three years have passed from the date on which a claimant knew or should have known of the breaches that it alleges. Claimants submitted their Notice of Arbitration in this case on June 10, 2013. Yet Claimants were well aware more than three years before that date—that is, before June 10, 2010—of the government actions that they now allege constitute breaches of Respondent's obligations under CAFTA. Thus, Claimants' allegations of breach fall outside of CAFTA's statute of limitations and the Tribunal lacks jurisdiction.

114. Article 10.18 of CAFTA sets a time limit for claims to be brought to investor-state arbitration under Article 10.16.1. Article 10.18(1) states:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the

> enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.[195]

115. Thus, for a tribunal to have jurisdiction over a claim for a breach of CAFTA's investor protections, that claim must be submitted to arbitration within three years of the date that the claimant first acquired or should have acquired knowledge of the alleged breach. Otherwise, the claim is time-barred. This is the case for all claims advanced by Claimants in this arbitration.

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

116. Claimants allege that Costa Rica has improperly expropriated Claimants' properties in violation of Article 10.7 of CAFTA.[196] Although Respondent maintains that Claimants' allegations are unfounded and that there has been no breach of any treaty obligation, as explained in detail below, as a preliminary matter, Claimants' claims should be rejected by the Tribunal for lack of jurisdiction. Claimants knew for more than three years prior to the date they filed their Notice of Arbitration about the measures they now claim as breaches and for which they now seek compensation. Thus, their claims that Costa Rica has breached its obligations under the expropriation provision of CAFTA fall outside the Tribunal's jurisdiction. (Claimants' claims under CAFTA's Article 10.5 (fair and equitable treatment) are also time-barred by the statute of limitations, as will be discussed in Section III.A.2 below.)

117. As explained in Section II.B above, there is no doubt that the government of Costa Rica established the *Las Baulas* National Park to protect the nesting grounds of the

[195] CAFTA at Art. 10.18(1) [Exhibit C-1a].

[196] *See* Claimants' Memorial on the Merits at paras. 232, 235, 241.

leatherback turtles and that properties that lie within that Park's boundaries were subject to expropriation. This fact was made known and reiterated publicly on several occasions:

- In 1991, a Decree was issued creating the Park, to protect the leatherback turtles and other species, as well as other natural resources in the area and setting the Park's 125 meter land boundaries.[197]

- In 1995, the Costa Rican Congress passed a law setting out in greater detail the means to achieve the environmental protection objectives that had motivated the creation of the Park and authorizing the State to acquire any private properties that are located within the boundaries of the Park.[198]

- In 2004, the *Procuraduría* clarified the boundaries of the Park, stating that the Park was located 125 meters inland from high tide, rather than seaward.[199]

- In 2005, the Supreme Court acknowledged that the boundaries of the Park included 125 meters inland from high tide.[200]

- In 2005, the *Procuraduría* confirmed, in a legally binding interpretation, its earlier opinion that the boundaries of the Park included 125 meters inland from high tide.[201]

- In 2008, the Supreme Court again confirmed the boundaries of the Park as including 125 meters inland.[202]

- And, in late 2008, the Supreme Court mandated the suspension of environmental assessment permits for all land within the Park.[203]

118. Claimants knew or should have known of all of these events when they actually occurred which, in every case, was more than three years before Claimants filed their Notice of Arbitration in June 2013. Thus, Claimants' claims that Costa Rica has breached its obligations under the expropriation provision of CAFTA fall outside the Tribunal's jurisdiction.

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

[198] *See Las Baulas* National Park Law [Exhibit C-1e].

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

[200] *See* Supreme Court of Justice, First Chamber, File No. 05-013125-0007-CO, Resolution. No. 2005-014289, October 19, 2005 [Exhibit C-1v].

[201] *See Procuraduría*'s Binding Legal Opinion No. C-444-2005 [Exhibit C-1w].

[202] *See* Supreme Court of Justice, Constitutional Chamber, File No. 06-0008369-0007-CO, Resolution No. 08-008713, May 23, 2008 [Exhibit C-1h].

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

119. Claimants themselves refer throughout their Memorial to any number of occasions—all prior to June 10, 2010—when they were expressly aware of what they allege were illegal expropriations of their properties, for which they now claim compensation in this arbitration. For example, in arguing that Respondent has arbitrarily deprived Claimants of the use and enjoyment of their investments and, therefore, indirectly expropriated their properties, Claimants state that:

> the answer to the question of when the composite impact of Respondent's measure substantially deprived the Claimants of their use and enjoyment of their property rights and interests in their investments was on or about 19 March 2010, when MINAE officials ordered SETENA to terminate environmental assessments for lots, such as those of the Claimants, that fell within the…boundaries of the BNMP.[204]

120. Claimants repeat this date on numerous occasions. Thus, for example, they state that "the order issued on 19 March 2010 . . . finally abolished any opportunity for the Claimants to freely exercise their property rights"[205] and that "[i]t 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."[206] Thus, the date on which Claimants allege that Costa Rica's actions culminated in the deprivation of the use and enjoyment of their properties was in March 2010—three months *outside* of the statute of limitations for their June 2013 claims.

[204] Claimants' Memorial on the Merits at para. 221.

[205] Claimants' Memorial on the Merits at para. 231.

[206] Claimants' Memorial on the Merits at para. 220; *see also id*. at para. 192 (stating that "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 of the BNMP's 125 [m]eter restricted zone").

121. This is not the only date on which Claimants allege Respondent illegally expropriated their properties. Significantly, the other dates on which Claimants allege Respondent breached its obligations under CAFTA occurred *even earlier* than March 2010—thus, falling even further outside the statute of limitations period. Thus, for example, Claimants argue that:

- they "lost their investments *five or more years ago*"[207] (*i.e.*, no later than April 2009, measured back from the date of Claimants' Memorial);
- "by *2009*, the Respondent, through various agencies, ministries and courts (but not the legislature), had passed a series of resolutions and made a number of decisions that without taking title to land resulted in total deprivation of the Claimants' rights to own and enjoy their property";[208]
- "commencing with the Constitutional Court's decision in *May 2008* directing MINAE to expropriate the land and concluding with the Constitutional Court's clarification of *27 March 2009*, the Respondent completed the creeping expropriation of the rest of the Claimants' properties";[209]
- "investments 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*. In no case was adequate (or in most cases any) compensation provided on a prompt basis or otherwise without delay, as prescribed under CAFTA Article 10.7(2)";[210] and
- "[a]t some point towards the *end of 2005*, all of the Claimants eventually heard about SETENA's decision to temporarily suspend its environmental assessment procedure, and, at some point in *2006*, each would have individually heard from a SETENA official that the Attorney General has issued some sort of opinion apparently 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."[211]

[207] Claimants' Memorial on the Merits at para. 19 (emphasis added).

[208] Claimants' Memorial on the Merits at para. 211 (emphasis added).

[209] Claimants' Memorial on the Merits at para. 213 (emphasis added).

[210] Claimants' Memorial on the Merits at para. 193 (emphasis added).

[211] Claimants' Memorial on the Merits at para. 173 (emphasis added).

122. The chart of dates below notes the statute of limitations of CAFTA determined by the date of Claimants' Notice of Arbitration and then compiles a list of the various points in time when Claimants knew or should have known of the acts of Respondent that they now allege constituted illegal expropriations of their properties:

Description of Event	Relevant Date
Claimants file Notice of Arbitration	June 10, 2013
Three-year period prior to Claimants filing their Notice of Arbitration	June 10, 2010
"[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 at para. 221)	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 at para. 231)	March 19, 2010
"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 at para. 220)	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 at para. 192)	March 19, 2010
Claimants "lost their investments five or more years ago" (Claimants' Memorial on the Merits at para. 19)	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)	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 at para. 213)	March 27, 2009

Description of Event	Relevant Date
"[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 at para. 193)	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 at para. 213)	May 2008
"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)	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 at para. 173)	2005, 2006, 2008

123. Thus, by Claimants' own admission, they were aware of the acts and omissions that they considered constituted illegal expropriations as early as 2005 and, in any case, at the latest by March 19 2010. All of those dates fall outside CAFTA's statute of limitations, which, in this case, bars any claims 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 Fair and Equitable Treatment More than Three Years Before They Filed their Notice of Arbitration

124. Claimants also allege that Respondent has breached the fair and equitable treatment requirement of CAFTA due to the allegedly arbitrary manner in which it has

purportedly indirectly and directly expropriated Claimants' properties.[212] In support of this claim, Claimants point to the same acts and dates on which they rest their allegations that Respondent has breached its obligations under the expropriation provision of CAFTA. Thus, Claimants' fair and equitable treatment claims are also barred by the three-year statute of limitations.

125. For example, Claimants allege they were arbitrarily deprived of the use and enjoyment of their investments in breach of CAFTA Article 10.5 (Minimum Standard of Treatment) because of the "manner in which [Respondent] has employed its municipal expropriation[s] [of] Claimants' investments and the manner in which it has held all of their investments hostage to the caprice of political and bureaucratic infighting over the past five years."[213] The "political and bureaucratic infighting" to which Claimants point consists of the same resolutions, constitutional court decisions, and suspensions of permits that Claimants cite as evidence of breach of the expropriation provision—*e.g.*, SETENA's permanent suspension of environmental assessment permits on March 19, 2010, the Acts of Dispossession that were issued on March 12, 2008 and December 9, 2008, and the Constitutional Court decision of 2008.[214]

126. Each date listed in the paragraph above and on the table in Paragraph 122 for which Claimants assert they knew of the alleged wrongful expropriation, and, therefore, also knew of the alleged breaches of fair and equitable treatment, is prior to June 2010. As noted above, CAFTA's statute of limitations excludes claims of breach when a claimant knew or

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

[213] Claimants' Memorial on the Merits at para. 196.

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

should have known of such alleged breaches more than three years before bringing the claim to arbitration. Consequently, the Tribunal lacks jurisdiction to hear Claimants' claims of breaches of CAFTA's fair and equitable treatment provision as well.[215]

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

127. Even if the Tribunal were to find that Claimants' allegations are not time-barred by CAFTA's three-year statute of limitations (they are), Claimants' claims still fall outside of the Tribunal's jurisdiction because they are based on alleged breaches that took place before CAFTA entered into force. Respondent only assumed obligations to Claimants as U.S. investors under CAFTA starting on January 1, 2009, the date that CAFTA came into force between Costa Rica and the United States. Under Article 10.16(1) of CAFTA, this Tribunal's jurisdiction extends only to claims for breaches of (i) an obligation under Section A of Chapter 10; (ii) an investment authorization; or (iii) an investment agreement. Claimants' claims pertain to the first category: claims for breaches of an obligation under CAFTA. Because there can be no breach of CAFTA prior to its entry into force, and the alleged breaching acts occurred before that date, Claimants' claims fall outside of the Tribunal's jurisdiction.

[215] Respondent notes that in its Response to Claimants' Notice of Arbitration, it raised the issue that Claimants' claims were time-barred under CAFTA's statute of limitations provision or were based on acts that took place before CAFTA came into force in 2009. *See* Respondent's Response to Claimants' Notice of Arbitration, July 26, 2013, para. 12. In their Memorial, Claimants have developed arguments in relation to the temporal application of CAFTA, but they have not addressed the point that their claims are time-barred by the statute of limitations.

Respondent is therefore at a disadvantage, because it does not yet know what arguments, if any, Claimants may try to make on this critical point. Assuming that Claimants will address this issue in their Reply, Respondent reserves the right to submit additional arguments—including through expert testimony—in its Rejoinder.

1. CAFTA Does Not Apply Retroactively to Acts or Omissions that Took Place Before It Entered into Force

128. CAFTA entered into force between Costa Rica and the United States on January 1, 2009. Before that date, Costa Rica did not have any obligations to U.S. investors under CAFTA. As provided in Article 28 of the Vienna Convention on the Law of Treaties, absent evidence of a contrary intention of the States parties, a treaty will not apply retroactively. According to Article 28:

> [u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party.[216]

Nothing in CAFTA provides for the retroactive application of the investment protections in its Chapter 10.

129. Further, Article 13 of the International Law Commission's Articles on State Responsibility ("ILC Articles") provides that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[217] The commentary on the ILC Articles explains that "for responsibility to exist, the breach must occur at a time when the State is bound by the obligation."[218] Accordingly, Respondent cannot have breached its obligations under CAFTA at a time when it had no such obligations, *i.e.*, before CAFTA entered into force.

130. CAFTA itself confirms, for greater certainty, this general rule. Article 10.1(3) states that "[f]or greater certainty, this Chapter does not bind any Party in relation to any act or

[216] Vienna Convention on the Law of Treaties, May 23, 1969, Art. 28 [Exhibit RLA-001].

[217] *See* James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2002) ("ILC ARTICLES"), p. 131 (Art. 13) [Exhibit RLA-005].

[218] ILC ARTICLES at p. 131 (Art. 13, cmt. 1) [Exhibit RLA-005].

fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."[219] The dispute here concerns acts and facts that took place before CAFTA entered into force. Situations that do not "cease to exist" but rather continue, concern conduct of a continuous nature, which, as discussed in Section III.B.3 below, is not the case here.

131. In fact, Claimants do not dispute this point. Claimants agree that before January 1, 2009, Costa Rica had no obligation to comply with the limitations on expropriation or the fair and equitable treatment requirement found in CAFTA.[220] Thus, any alleged breaches of Respondent's obligations under CAFTA only fall within the scope of the Tribunal's jurisdiction if the alleged breaches occurred after CAFTA came into force.

2. The Acts about Which Claimants Complain Constitute Breaches under CAFTA Occurred before January 1, 2009 and, Thus, Fall Outside the Jurisdiction of the Tribunal

132. The acts that Claimants allege constitute illegal expropriation or breaches of the fair and equitable treatment provision under CAFTA in fact occurred *before* CAFTA came into force. With respect to expropriation, Claimants allege both indirect and direct expropriation. For seventeen of Claimants' properties, Claimants allege that they lost the use and enjoyment of their properties through the combination of the State's confirmation of the boundaries of the Park and the State's restriction of development within the Park.[221] For the remaining nine 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 of a direct taking.[222] With respect to Claimants' allegations of unfair and inequitable treatment, their claims largely stem from the

[219] CAFTA at Art. 10.1(3) [Exhibit C-1a].

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

[221] Claimants' Memorial on the Merits at paras. 208-11.

[222] Claimant's Memorial on the Merits at para. 206.

same alleged expropriatory acts. As detailed below, each of these acts occurred before CAFTA entered into force on January 1, 2009.

a. Claimants Allege that the Acts about which They Complain Culminated upon the Permanent Suspension of Environmental Assessment Permits, which Occurred Before CAFTA Entered into Force

133. Claimants argue that the series of acts that resulted in the alleged indirect expropriation of seventeen of their properties culminated on March 19, 2010 with SETENA's permanent suspension of environmental assessment permits for properties within the Park.[223] Before that, Claimants point to the 2004-2005 confirmation of the boundaries of the Park by the *Procuraduría*, the declarations of public interest on their properties in 2005-2007, and the decisions of the Supreme Court confirming the boundaries of the Park as governmental acts contributing to and leading up to the alleged illegal taking of their properties in 2010.[224]

134. Claimants do not claim that "the fixing of the BNMP's boundaries to include [Claimants'] properties, in and of itself, interfered so substantially with the Claimants' rights in land as to rise to the level of a taking."[225] Nor do Claimants allege that the declarations of public interest constituted expropriations of their properties, let alone illegal expropriations. Claimants assert that it was when SETENA terminated the processing of any environmental assessments for proposed development of properties inside the Park's boundaries that "the composite impact of Respondent's measure substantially deprived the Claimants of their use and enjoyment of their property rights."[226]

[223] Claimants' Memorial on the Merits at para. 221.

[224] Claimants' Memorial on the Merits at para. 212.

[225] Claimants' Memorial on the Merits at para. 214.

[226] Claimants' Memorial on the Merits at para. 221.

135. While Respondent of course denies that Claimants' properties have been illegally expropriated, even if the Tribunal were to accept Claimants' arguments and find an indirect expropriation, the date of that expropriation would be December 16, 2008—not March 19, 2010, as Claimants repeatedly allege. SETENA halted the processing of environmental assessment permits for properties inside the Park in compliance with the December 16, 2008 decision of the Supreme Court that held that the Park's ecosystem was too fragile to permit any development.[227] SETENA was bound to follow the Supreme Court's explicit order to annul "all the environmental viabilities awarded in properties located inside the National Marine Park Las Baulas" and "to not process new viabilities inside the [P]ark" as of that December 2008 date, even if the policy was not formalized until March 2010.[228] Claimants could not have obtained approval of an environmental assessment after December 2008.

136. Thus, if the Tribunal were to accept Claimants' allegation that their properties were indirectly expropriated because they could not have obtained environmental assessment permits for the portions of their properties inside the Park, the Tribunal should also find that the date when Claimants suffered that alleged deprivation was on December 16, 2008, rather than in March 2010, as Claimants allege. Because December 16, 2008 pre-dates CAFTA's entry into force, Claimants' claims fall outside the scope of the Tribunal's jurisdiction.

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

[228] Decision of the Constitutional Chamber of the Supreme Court of Justice, December 16, 2008, VIII [Exhibit C-1j]. Supreme Court decisions on constitutional matters are binding. *See* Law on Constitutional Jurisdiction at Art. 13 [Exhibit R-006].

b. Claimants Allege that Their Properties Were Directly Expropriated as of the Date of Each Individual Decree of Expropriation, All of which Were Issued Before CAFTA Entered into Force

137. For their remaining nine properties, Claimants point to the issuance of the Acts of Dispossession for Lots A40, SPG1, SPG2, B1, B3, B5, B6, B7, and B8 as the point in the process when "the State takes possession of the land, thereby satisfying the customary requirements of a direct taking."[229] These Acts were issued on March 23, 2008 and December 9, 2008[230]—both of which pre-date the January 1, 2009 entry into force of CAFTA. Thus, the Tribunal lacks jurisdiction to hear Claimants' claims regarding the alleged illegal direct expropriation of those nine properties.

138. In sum, both the seventeen alleged indirect expropriations and the nine direct expropriations took place in 2008—squarely before CAFTA came into force on January 1, 2009. Respondent had no obligations to Claimants under CAFTA with respect to expropriations before CAFTA entered into force. All of Claimants' allegations of illegal expropriation in violation of CAFTA, therefore, fall outside of the Tribunal's jurisdiction.

c. Claimants' Allegations of Arbitrary Actions Are Derived from Alleged Illegal Expropriations that Occurred Before CAFTA Entered into Force, and Are Therefore Outside the Tribunal's Jurisdiction

139. Claimants allege that Costa Rica acted arbitrarily in the process of expropriating their properties, in breach of its CAFTA obligation to provide fair and equitable treatment.[231]

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

[230] *See* Lot A40 Act of Dispossession, March 14, 2008, [Exhibit C-16f1]; Lot SPG1 Act of Dispossession, December 9, 2008 [Exhibit C-20f1]; Lot SPG2 Act of Dispossession, December 9, 2008 [Exhibit C-21f1]; Lot B1 Act of Dispossession, March 12, 2008 [Exhibit C-23f1]; Lot B3 080313 Act of Dispossession, February 20, 2008 [Exhibit C-24f1]; Lot B5 Act of Dispossession, March 13, 2008 [Exhibit C-25f1]; Lot B6 Act of Dispossession, March 13, 2008 [Exhibit C-26f1]; Lot B7 Act of Dispossession, March 13, 2008 [Exhibit C-27f1]; Lot B8 Act of Dispossession, March 12, 2008 [Exhibit C-28f1].

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

But the acts and omissions about which Claimants complain are based entirely on the alleged indirect and direct expropriations that, as just explained in Sections III.B.2.a and b above, occurred before CAFTA entered into force. Therefore, the Tribunal lacks jurisdiction to hear Claimants' fair and equitable treatment claims as well.

140. Specifically, Claimants point to 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, the 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 stages of the process.[232] Each of these actions is tied to Claimants' allegations of illegal expropriation.

141. Most of these acts took place before CAFTA entered into force. To the extent that they did not, however, as explained in more detail in Section III.B.3 below, they represent the lingering effects of what Claimants claim were completed acts—the acts of alleged indirect and direct expropriation—which themselves took place no later than 2008, before Costa Rica had any obligation under CAFTA. The effects of a completed act, however, are not breaches in and of themselves. Each of these allegations is therefore excluded from the Tribunal's jurisdiction, because the alleged CAFTA violations—the alleged illegal expropriations which gave rise to these allegedly unfair or inequitable actions—took place before January 1, 2009.

142. To the extent that any of the judicial decisions that Claimants cite as arbitrary acts were issued after January 1, 2009, this still does not cure the Tribunal's lack of jurisdiction. The

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

court decisions were not independent acts that constituted breaches of CAFTA in and of themselves; instead, they dealt with the effects of the direct expropriation that Claimants say occurred on the dates of each of the Acts of Dispossession, *i.e.*, before CAFTA entered into force.

143. If Claimants wished to argue that the Costa Rican courts have engaged in a separate breach of CAFTA, Claimants could have made a denial of justice claim—but they did not do so. Presumably that omission is explained by the fact that Claimants could not meet the requisite high standard of injustice– *i.e.*, that the judicial decisions were "fundamentally unfair,"[233] represented a "gross deficiency in the administration of judicial or remedial process,"[234] or were "clearly improper and discreditable."[235] Costa Rica's judicial decisions setting the valuation amounts for Claimants' properties do not even come close to the level of this standard.

144. In any event, in the absence of a denial of justice claim, Claimants' fair and equitable treatment claims of arbitrary actions of the courts should be treated as merely derivative of their expropriation claims. Given that those claimed expropriations are outside the Tribunal's jurisdiction because they occurred in 2008, so too are the fair and equitable treatment claims.

[233] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 62 [Exhibit RLA-006].

[234] 1929 Harvard Draft Convention on State Responsibility [Exhibit RLA-004].

[235] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 ("*Mondev*, Award"), para. 127 [Exhibit RLA-018].

3. Claimants' Composite or Continuous Breach Allegations Fail to Cure the Tribunal's Lack of Jurisdiction

145. Presumably because Claimants recognize that the events about which they complain occurred before CAFTA came into force, Claimants attempt to fabricate jurisdiction by arguing that the alleged breaches of the expropriation provision are composite and continuing in nature, and that characterization somehow escapes CAFTA's temporal restrictions.[236] Claimants' assertions fail to cure the Tribunal's lack of jurisdiction, because even if labeled composite or continuous, the alleged breaches still occurred before January 1, 2009. Significantly, in making this argument, Claimants necessarily admit that they knew of the alleged breaches well before the three-year statute of limitations period—*i.e.*, at the very beginning of what they characterize as the "composite" or "continuing" breaches—further supporting a finding that their claims are time-barred under Article 10.18(1) of CAFTA.

a. A Composite Breach Arises When a Series of Acts Culminate in a Breach; In This Case, that Occurred When Environmental Assessment Permits Were Permanently Suspended, Before CAFTA Entered into Force

146. Claimants' effort to characterize the alleged indirect expropriation as a composite series of acts does not place the expropriation after CAFTA's entry into force because the culmination of those acts occurred before January 1, 2009. Article 15(1) of the ILC Articles provides that a composite breach "occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[237]

147. In this case, Claimants themselves have identified the specific action that they allege was sufficient, when taken together with the actions that preceded it, to constitute a breach

[236] *See* Claimants' Memorial on the Merits at para. 194.

[237] ILC ARTICLES at p. 141 (Art. 15(1)) [Exhibit RLA-005].

of Respondent's CAFTA obligations. But that culminating action still occurred before CAFTA came into force. Claimants described the alleged indirect expropriation as a series of acts that together rose to the level of a taking.[238] According to Claimants, the point at which the alleged breach "crystallized" was when Claimants could no longer obtain environmental assessment permits for their properties. Claimants assert that this occurred on March 19, 2010.[239] As discussed in Section III.B.2.a above, however, the event underlying Claimants' argument—that the inability to obtain an environmental assessment permit was the crowning act that completed the deprivation of the use and enjoyment of Claimants' properties—actually occurred when the Supreme Court issued its decision imposing the permanent restriction on environmental assessments. That decision was issued on December 16, 2008. Therefore, even if there were an indirect expropriation resulting from the State's acts, the culminating act constituting the alleged "composite" breach, still occurred before CAFTA entered into force. Claimants' effort to label that act as composite does nothing to bring it back within the Tribunal's jurisdiction.

b. Claimants' Claim of a Continuing Breach Also Does Not Cure the Tribunal's Lack of Jurisdiction

148. With respect to both the alleged indirect and direct expropriations, Claimants attempt to bring their claims forward into the period in which CAFTA is in force by also alleging a continuing breach.[240] Claimants' attempt to do so is unsuccessful. The ILC Articles distinguish between (i) breaches that are concluded, albeit with lingering effects; and (ii) continuing breaching acts. According to the ILC Articles, "The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the

[238] *See* Claimants' Memorial on the Merits at paras. 211-12.

[239] *See* Claimants' Memorial on the Merits at para. 192.

[240] *See* Claimants' Memorial on the Merits at paras. 232, 235, 241.

act is performed, even if its effects continue." This is distinct from a "breach of an international obligation by an act of a State having a continuing character [which] extends over the entire period during which the act continues and remains not in conformity with the international obligation."[241] Here, Claimants are alleging acts with continuing effects, not continuing acts, and those acts all occurred before CAFTA's entry into force, even if their effects may have continued to exist.

149. In *Mondev*, a case very similar to the one before this Tribunal, the tribunal found that whether an act is of a continuing character or is an act that happens at a set point in time but that continues to cause damage depends on the facts and the obligation said to have been breached.[242] In that case, Mondev International Ltd., a Canadian real estate development company, alleged that its option to purchase land had been expropriated without compensation by means of contractual breaches and judicial action by the United States in violation of the expropriation provision of NAFTA.[243] The contractual breaches occurred before NAFTA entered into force, while the court decisions were issued after NAFTA entered into force. Faced with the question –almost identical to the question before this Tribunal—of whether the alleged breach of NAFTA that resulted from the State's action was an act of a continuing nature or a

[241] ILC ARTICLES at p. 135 (Art. 14(1)-(2)) [Exhibit RLA-005].

[242] *See Mondev*, Award at para. 58 [Exhibit RLA-018]; *see also Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, November 19, 2007, para. 194 (finding that continuing breaches must be (i) continuing and (ii) uninterrupted and are distinguished from breaches that are not continuing but have effects that continue in time) [Exhibit RLA-019]; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, May 8, 2008 at para. 159 (finding that a *de facto* expropriation followed by a *de jure* expropriation was a completed act, distinct from the alleged denial of justice that followed) [Exhibit RLA-022].

[243] *See Mondev*, Award at paras. 57-59 [Exhibit RLA-018].

completed act, the tribunal found that the alleged expropriation was a completed act, even if it continued to have detrimental effects.[244]

150. Furthermore, the *Mondev* tribunal found that there was no jurisdiction over the alleged expropriation, because that completed act had taken place before NAFTA entered into force. The tribunal reasoned that it lacked jurisdiction unless the claimant could "point to conduct of the state after [the date the treaty came into force] which [was] itself a breach." Thus, "[u]nless [the court] decisions were themselves inconsistent with applicable provisions [under NAFTA], the fact that they related to [pre-NAFTA] conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time)" could not assist the claimant. According to the tribunal, "The mere fact that earlier conduct has gone unremedied or unrepressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct."[245]

151. If a wrongful expropriation of Claimants' properties has occurred, as Claimants (incorrectly) allege, then, as explained in Section III.B.2 above, Claimants' properties were directly expropriated in March and December 2008 and indirectly expropriated in December 2008 when Claimants were no longer able to obtain environmental impact permits from the State. Any alleged loss or damage of which Claimants complain after those points in time is the lingering effect of the posited breach. It does not convert it into a continuing breach.

[244] *See Mondev*, Award at para. 70 [Exhibit RLA-018]. The commentary on the ILC Articles also supports the understanding that an expropriatory act is readily classified as a completed act. According to the Commentary, "Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act." ILC ARTICLES at p. 136 (Art. 14, cmt. (4)) [Exhibit RLA-005].

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

152. Claimants assert that the lingering effects of the alleged indirect and direct expropriations—*i.e.*, the failure to pay prompt, adequate and effective compensation as required under CAFTA—is what causes the alleged expropriations to "continue" forward into the time period when CAFTA came into force.[246] Claimants' assertions are without merit. If the alleged breach of expropriation occurs before there is an obligation under CAFTA to provide "prompt, adequate, and effective compensation," then there can be no continuing obligation to provide that compensation, the failure of which could constitute a breach. In the words of the *Mondev* tribunal, Claimants cannot "point to conduct of the state" after CAFTA came into force which itself would be a breach rather than merely "unremedied" prior conduct.[247]

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

154. In sum, Claimants' attempt to cure their jurisdictional problems by asserting continuing breaches fails because the challenged acts are not, in fact, continuing. They are, at best, completed acts with lingering effects, which cannot overcome the fact that they were

[246] *See* Claimants' Memorial on the Merits at para. 232.

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

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 they knew of the alleged breaches far outside of CAFTA's statute of limitations. By pointing to breaching acts or conduct prior to CAFTA's entry into force, which allegedly continue thereafter, Claimants admit knowledge well before the statute of limitations' critical date. Accordingly, 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

155. Claimants' Memorial tells a dramatic tale of overzealous conservationists and government agencies that have been conniving in back rooms to keep Claimants from owning and developing their land in a protected marine park, apparently in the hopes of creating a generalized impression of a conspiratorial bureaucratic landscape. The reality is far simpler: 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 at the same time respecting the rights of the affected property owners.

156. Many or even most of the parts of the system about which Claimants complain are the result of Costa Rica's dedication to improving the efficacy and fairness of its legal expropriation process. Some of the delays about which Claimants complain are even of their own making, because they insisted on opposing the government at each and every step of the way, often with impermissible legal actions, and insisted on rushing their complaints to an international arbitration rather than accepting the funds made available to them while the domestic expropriation moves to completion.

157. If anything, Costa Rica has bent over backwards to treat Claimants fairly: Government agencies and the Costa Rican courts have dutifully followed the letter of the law in progressing through the expropriation of Claimants' properties—albeit while always confirming the propriety of the government's objectives (and confirming the Park's boundaries).

158. As outlined above, Claimants' characterization of events are also overstated in many respects. The properties that Claimants purchased clearly included land that was within a national park at the time Claimants purchased them, and the government never wavered from its intention to consolidate the Park in an effort to protect the leatherback turtles. Furthermore, several of Claimants' lots, in particular Lots B1, B3, B5, B6, B7, B8, SPG1, SPG2, and SPG3, only partially fall within the boundaries of the Park, and it is only a very small fraction of each lot that is subject to expropriation. Most of those properties—*i.e.*, the portions that fall outside the boundaries of the Park—currently remain and will remain in Claimants' possession for their full use and enjoyment within the bounds of Costa Rican law.

159. Claimants did not have any promise from the Costa Rican government that they would be allowed to develop their properties without being subject to expropriation proceedings or to future environmental and land use regulations. The majority of Claimants' properties are progressing through the legal process of expropriation. If allowed to continue with its official processes, the government will complete the expropriations and pay Claimants for all of the portions of their properties that are located within the Park.

160. As discussed below, Respondent has acted in accordance with its obligations under CAFTA throughout these expropriation procedures. First, we explain 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. RESPONDENT HAS NOT BREACHED ITS OBLIGATIONS WITH RESPECT TO EXPROPRIATIONS

161. There is no question that Costa Rica will compensate Claimants for the property that it is expropriating. The State's administrative and judicial expropriation procedures provide for as many as three separate, independent expert appraisals of the value of the properties (plus whatever evidence Claimants might additionally submit including additional appraisals if they so wish). On that basis, there will be a final judicial determination of the amount owed for each property. In the meantime, Claimants already have at their full disposal the amounts set in the administrative appraisals for nine of their lots, even as they continue to argue in court for higher values. And Claimants are soon to have the amounts of the administrative appraisals for nine more of their lots at their full disposal as well. (The rest of Claimants' properties have yet to be placed into the expropriation procedures.)

162. The current expropriation procedures are fully consistent with Costa Rica's obligations under CAFTA. Additionally, with respect to properties that have not been directly expropriated, the acts taken by Costa Rica to protect the leatherback turtles constitute legitimate, nondiscriminatory regulatory actions to protect Costa Rica's environment. Thus, those actions do not amount to indirect expropriation under CAFTA.

163. Article 10.7(1) of CAFTA requires that an expropriation (i) be for a public purpose; (ii) be conducted in a non-discriminatory manner; (iii) on payment of prompt, adequate, and effective compensation; and (iv) in accordance with due process of law and Article 10.5

(minimum standard of treatment).[248] It further requires in Article 10.7(2) that compensation (i) be paid without delay; (ii) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (iii) not reflect any change in value occurring because the intended expropriation had become known earlier; and (iv) be fully realizable and freely transferable.[249] In addition, Annex 10-C states that "except in rare circumstances, nondiscriminatory regulatory actions . . . to protect . . . the environment, do not constitute indirect expropriations."[250] As discussed below, Costa Rica has acted in full compliance with these requirements.

1. Costa Rica's Actions Relating to Claimants' Properties in the Judicial Stage of Expropriation Proceedings Are Fully Consistent with Its Obligations under CAFTA's Expropriation Provision

164. With respect to the properties that are currently in the judicial stage of the expropriation procedure—that is, the nine properties for which Acts of Dispossession have been issued and for which Claimants already have access to compensation in the amounts of their respective administrative appraisals—Respondent's actions are fully consistent with its obligations under Article 10.7 of CAFTA, as discussed below.

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

165. Claimants cannot plausibly contest that Costa Rica's expropriations are being undertaken for a public purpose—and indeed they do not attempt to do so, apart from a few flippant remarks belittling the fact that "giant sea turtles" are on the verge of extinction in Costa Rica or implying that other leatherback turtle populations in the world can make up for Costa

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

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

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

Rica's loss of the leatherback turtle population.[251] Costa Rica's public purpose is unmistakable: The protection of the fragile nesting habitat of one of the most endangered species in the world.[252] The Costa Rican authorities determined that the development of Claimants' (and many other) properties that are within (or the portion of such properties that are within) the *Las Baulas* National Park is incompatible with that public purpose and that land should be placed under State control in order to fulfill the mission of the Park.

b. There Is No Evidence of Discriminatory Action

166. There is no evidence whatsoever that Costa Rica has acted in a discriminatory manner in executing its expropriation procedures. In particular, Costa Rica has not displayed any bias or discrimination in its expropriation of Claimants' lands. In fact, Claimants withdrew their earlier claims of discrimination from their Notice of Arbitration under the National Treatment and Most-Favored Nation provisions of CAFTA.[253] Thus, there is no allegation and no evidence of discriminatory action by Costa Rica.

c. Respondent Has Either Paid Prompt, Adequate, and Effective Compensation or It Is in the Process of Doing So

167. The ongoing expropriation proceedings also satisfy CAFTA's requirement of compensation. CAFTA requires that Costa Rica pay "prompt, adequate, and effective compensation" in connection with any expropriation.[254] There is no issue as to the effectiveness of compensation in this case. Claimants have asked for Costa Rican Colones and that is what

[251] *See* Claimants' Memorial on the Merits at paras. 16, 295-96.

[252] *See* Piedra Statement at paras. 3, 9, 56 [Exhibit RWE-002].

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

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

they have received as compensation for their expropriated properties. With respect to the promptness and adequacy of compensation, those requirements are also met, as discussed below.

168. Costa Rica's legal regime provides a rigorous mechanism for the determination and provision of fair compensation, which is payable immediately either upon a landowner's acceptance of the administrative appraisal or prior to the Act of Dispossession. Moreover, the landowner has the opportunity to appeal the initial valuation amount. Interest from the date of dispossession through the date the final payment is made (plus legal costs) is also paid at the conclusion of the judicial proceedings, compensating the landowner for the impact of any delays during the process.

169. The focus of Claimants' complaints concerns the promptness of payments for the expropriation of their properties.[255] In their Memorial, Claimants interpret the promptness requirement of CAFTA Article 10.7(1)(c) to mean that "a host State must have already paid just compensation by the time the taking has ripened, or at least to have made meaningful progress towards a determination of the amount of compensation to be paid for each expropriated investment, so long as an appropriate rate of interest will be paid to compensate for any delay."[256] Under Costa Rica's Law of Expropriation, the date the expropriation has ripened is when title passes to the State, which occurs after the final judgment ordering the transfer of title is rendered and executed.[257] As discussed below, 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 the

[255] *See* Claimants' Memorial on the Merits at paras. 222-33.

[256] Claimants' Memorial on the Merits at para. 225, n. 198.

[257] *See* Expropriation Law at Art. 49 [Exhibit C-1c].

property is dispossessed and while the final amount of compensation is being determined. Thus, Costa Rica's Law of Expropriation is fully in line with Claimants' own definition of "prompt" under CAFTA. And the actions of Costa Rican government officials, including in the administrative and judicial stages of the expropriation procedures, are fully in line with Costa Rican law and CAFTA.

170. Specifically, for the nine properties that are currently in the judicial stage, the full amount of the administrative appraisal has been at Claimants' disposal since the dates of dispossession.[258] In fact, before the court can issue a formal Act of Dispossession, payment of the administrative appraisal must be made into the court's escrow-like account for the landowner's benefit.[259] If the result of the judicial stage is a higher valuation for the property, the additional amount, plus interest, is paid at the end of the process.[260]

171. Costa Rica's expropriation of Claimants' properties also satisfies CAFTA's requirement of payment "without delay." Claimants already have access to the full amounts of the administrative appraisals, but they wanted more. Thus, they objected to those valuations, which transferred their cases to the judicial stage. At the end of judicial proceedings they will likely receive a higher amount for their properties plus interest. Therefore, there has been no delay. Claimants were paid before the judicial stage and will probably be paid more at the end. But if Claimants complain that the judicial proceedings of the expropriation process have taken longer than expected, any delay has been a result of their own acts or omissions.

[258] *See* Section II.D.2.b.(ii) above.

[259] *See* Expropriation Law at Art. 31 [Exhibit C-1c].

[260] *See* Expropriation Law at Arts. 11, 47 [Exhibit C-1c].

172. Mr. Vianney Saborio, Costa Rican counsel for the Berkowitz and Gremillion Claimants, has persistently filed appeals at every step of the way throughout the judicial processes, often when those appeals are not even permissible.[261] The time it takes the courts to hear and respond to Mr. Saborio's appeals has largely been the reason for any delays in the judicial proceedings. Additionally, the responsibility to request interest and costs after the issuance of the final judicial decision on valuation lies with the landowner.[262] Claimants have not yet submitted those requests in several cases and, therefore, no payment of interest and costs for those properties has been made.[263]

173. Further, the compensation that Costa Rica has paid to Claimants is also "adequate." Costa Rica's Expropriation Law provides a comprehensive mechanism to ensure that landowners receive adequate compensation for expropriated property. In line with the CAFTA requirement that compensation "be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place,"[264] the Expropriation Law provides for as many as three independent valuations of the property at issue, plus any evidence the landowner wishes to submit in support of a particular valuation. A judge decides a definitive property value taking into consideration these independent appraisals and all of the evidence provided by both the landowner and the *Procuraduría*.[265] If the landowner is still dissatisfied with the property valuation, he has the option to appeal the judge's decision to the

[261] *See, e.g.*, Landowner's Challenges to Lot B5 Act of Dispossession [Exhibit R-027]; Landowner's Request for Suspension of Lot B5 Judicial Proceedings, December 6, 2007 [Exhibit R-028]; Landowner's Challenge to Initiation of Lot B5 Judicial Proceedings, June 12, 2006 [Exhibit R-026].

[262] *See* Civil Procedure Code at Art. 693 [Exhibit R-002].

[263] *See* Lot B1 Request for Suspension of Judicial Proceedings, July 31, 2013 [Exhibit R-036]; *see also* Lot SPG1 Suspension of Judicial Proceedings, July 31, 2013 [Exhibit R-038].

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

[265] *See* Expropriation Law at Art. 40 [Exhibit C-1c].

Tribunal Contencioso Administrativo, where he has two additional opportunities in which to argue for yet a higher valuation.[266]

174. Claimants' Lots A40, B3, B8, and SPG2 are already the subject of judgments in the judicial stage either from lower courts or from the appellate courts that have fixed the final valuations for those properties. Claimants are therefore in a position to receive fair market value for those properties. In fact, for all of these lots, compensation for the full value of the properties has already been paid to Claimants. The only amount of payment that remains outstanding is the interest and fees on the final valuation amounts, which Claimants have not yet even requested in some cases.[267]

175. Several others of Claimants' properties, namely Lots B1, B5, B6, B7, and SPG1, are on the verge of receiving judgments (or would be on the verge of receiving judgments but for this arbitral proceeding) that will decide the final valuations of those properties. The initial administrative appraisal amount is already available to Claimants. With the final judgments, Claimants will receive the full amount of the fair market value for their properties (if it exceeds the administrative appraisal). No final judgment has been made with respect to Lots B1, and SPG1, because Claimants have requested the suspension of the judicial process in light of this arbitration. The valuation processes for Lots B5, B6 and B7 are underway. But in any event, a substantial amount of compensation, the amount of the administrative appraisal for these lots, has been available to Claimants since the date the properties were dispossessed.

[266] *See* paras. 71-72 above.

[267] *See* para. 98 above.

d. Respondent Has Acted in Accordance with Due Process of Law

176. Costa Rica has more than satisfied its obligation to provide for appropriate procedures and due process for expropriations. Claimants could not possibly claim that Costa Rica's careful, multi-step legal process does not meet that requirement—and indeed they do not. Costa Rican law provides for both administrative and judicial procedures to determine the amount of compensation, based on multiple independent appraisals and full consideration of the evidence, with rights for the property owner to present evidence and to appeal the determinations. The legality of an expropriation itself is also subject to challenge through administrative and judicial procedures. Costa Rican law and practice thus provide ample due process protections to landowners such as Claimants.

2. Costa Rica's Actions Regarding Claimants' Properties in the Administrative Stage of Expropriation Procedures Are Fully Consistent with Its Obligations under CAFTA's Expropriation Provision

177. With respect to Claimants' properties that are in the administrative stage of the expropriation procedure—that is, the nine properties that have received administrative appraisals to which Claimants have since objected—Costa Rica's actions are also consistent with its obligations under Article 10.7 of CAFTA. Claimants allege that although these properties are currently in the expropriation procedure, they have also been indirectly expropriated as the result of two actions by the State: (i) the "expansion" of the boundaries of the Park to include Claimants' properties; and (ii) SETENA's suspension of environmental assessment permits for properties within the Park.[268] These allegations are unfounded for the reasons explained below.

[268] *See* Claimants' Memorial on the Merits at paras. 208-12, 221.

178. First, these properties are currently moving through the expropriation process which, as discussed above, is fully consistent with Respondent's CAFTA obligations. Second, contrary to Claimants' allegations, these properties have not been indirectly expropriated.

a. Costa Rica's Actions Concerning Properties in the Administrative Stage Are Consistent with Its Obligations under CAFTA

179. Just as Costa Rica's actions regarding Claimants' properties in the judicial stage discussed above are fully consistent with Costa Rica's obligations under CAFTA's expropriation provision, so, too, are its actions regarding Claimants' properties in the administrative stage. As noted above, there is no question that Costa Rica's expropriations are being undertaken for a public purpose—the protection of the nesting habitat of one of the most endangered species in the world. There is also no evidence, or even allegation, that Costa Rica has acted in a discriminatory manner in executing its expropriation procedures. In addition, as discussed in greater detail below, Claimants will receive prompt, adequate, and effective compensation for their properties that are presently in the administrative stage as soon as the government completes its improvements of the expropriation process in line with the *Contraloría*'s recommendations. And, finally, Costa Rica's careful, multi-step legal process provides an abundance of due process to landowners such as Claimants.

180. In their allegations that Costa Rica's actions constitute illegal expropriation, Claimants focus primarily on alleged violations of CAFTA's compensation requirement for these properties.[269] Claimants' allegations are unfounded. The Costa Rican expropriation system provides a balanced system through which Claimants are assured to be paid prompt, adequate, and effective compensation without delay. In addition, the expropriation process permits both

[269] *See* Claimants' Memorial on the Merits at paras. 234-41.

judicial and administrative appeals and requires multiple independent appraisals to ensure that adequate compensation is provided.

181. As noted in Section II.D.2.b.(i)(c) above, Costa Rica is currently endeavoring to improve its expropriation process in line with recommendations from the *Contraloría*. As soon as the government completes this improvement process, Claimants' properties in the administrative stage will move to the judicial stage (because Claimants have objected to the administrative appraisals) and then funds in the amount of each respective administrative appraisal will be immediately available to Claimants.[270] Claimants will be able to access these funds even though they have objected to the administrative appraisals.[271] In addition, Claimants will have the opportunity to seek higher compensation for their properties in the judicial stage of Costa Rica's expropriation procedures. At the end of those proceedings, Claimants will be able to request and will be awarded interest to compensate for the time expended in the judicial stage.

182. Hence, there is no question that Claimants will receive prompt, adequate, and effective compensation once properties in the administrative stage complete their progress through the judicial stage of the expropriation procedure. Thus, Costa Rica's actions are, and will be, fully consistent with its obligations under CAFTA's expropriation provision.

183. To the extent that Claimants argue that acts and omissions of Costa Rica in the process leading up to a direct expropriation constitute indirect expropriations of these nine

[270] *See* Expropriation Law at Art. 34 [Exhibit C-1c]*; see also* Section II.D.1 above.

[271] *See* Lot V30 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-3d1]; Lot V31 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-4d1]; Lot V32 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-5d1]; Lot V33 Objection to the Administrative Appraisal, April 2, 2009 [Exhibit C-6d1]; Lot V38 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-7d1]; Lot V39 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-8d1]; Lot V40 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-9d1]; Lot V46 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-10d1]; Lot V47 Objection to the Administrative Appraisal, January 21, 2009 [Exhibit C-11d1].

properties, they are incorrect. Such an argument would be non-sensical. The due process provided as part of a legal expropriation procedure cannot itself be a measure that is tantamount to indirect expropriation. To allow this argument 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.

184. Claimants' properties in the administrative stage of the expropriation procedures will be expropriated—that much is certain. And they will be expropriated according to Costa Rica's fair and careful procedures, which are consistent with its obligations under CAFTA, as soon as the government completes its improvement of the expropriation process to avoid any injustices. Claimants have not, however, been indirectly expropriated by virtue of being in the middle of Costa Rica's expropriation process.

b. Actions Taken by Respondent to Protect the Leatherback Turtle with Respect to Properties Located within the National Park Do Not Constitute Indirect Expropriation under CAFTA

185. Claimants also allege that their properties that are in the administrative stage of the expropriation procedure (and their properties that are not yet subject to expropriation procedures, *see* Section IV.A.3 below) have been indirectly expropriated for two reasons: (i) because the properties are within the "redrawn" Park; and (2) because SETENA is no longer issuing environmental assessment permits for properties within the Park.[272] This is not the case.

186. Claimants' properties (or some portion of Claimants' properties) have always been within the Park's boundaries. There has been no grand conspiracy by a cadre of government officials and environmental NGO accomplices to deprive Claimants of their

[272] *See* Claimants' Memorial on the Merits at paras. 208-12.

properties by surreptitiously redrawing the Park boundaries. The Park boundaries have been the same since the Park was created in 1991. This is the settled binding interpretation of the law in Costa Rica as already discussed in Section II.B above.

187. With respect to the suspension of permits within the Park, this was an action taken by Costa Rica to protect the nesting grounds of the leatherback turtle. Under CAFTA, this is not an indirect expropriation. CAFTA explicitly exempts regulatory actions of general application designed to protect the environment from qualifying as indirect expropriations. According to Annex 10-C of CAFTA, "[N]ondiscriminatory 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." Actions taken by Costa Rica to regulate the use of Claimants' properties that have not yet been directly expropriated fall squarely within this exception.

188. The public purpose of establishing the *Las Baulas* National Marine Park and controlling development therein is undisputed: To protect the habitat of the nesting grounds of the endangered leatherback turtles. Actions taken by the State to create the Park, and the acts of SETENA and the Supreme Court to implement the environmental mission of the Park, were thus taken in order to protect the environment in Costa Rica. In addition, as stated in Section IV.A.1.b, there is no evidence that Costa Rica has discriminated against Claimants in implementing its expropriation procedures. It is reasonable for Costa Rica to regulate the use of the properties within the Park and to restrict development for the purpose of protecting the leatherback turtles. This is exactly the kind of regulatory action that Annex 10-C contemplates.

189. And, although there is a "rare circumstances" exception to the rule in Annex 10-C(4)(b),[273] Claimants have failed to prove that such circumstances exist in this case. Rather, Claimants have merely asserted, without any support whatsoever, that "[t]he instant case represents just such an occasion."[274] This is insufficient to argue, much less establish, that Costa Rica's actions fall within the "rare circumstances" exception of Annex 10-C. Thus, actions taken by Costa Rica to regulate the use of Claimants' properties that have not been directly expropriated do not and cannot constitute indirect expropriation under CAFTA.

3. Actions Taken by Respondent Regarding Claimants' Properties that Have Not Been Subject to Costa Rica's Expropriation Procedure Are Consistent with Its Obligations Under CAFTA's Expropriation Provision

190. Seven of Claimants' properties included in this arbitration have not been subjected to Costa Rica's expropriation procedures—Lots C71, SPG3, A39, C96, V61a, V61b, and V61c. No decree of public interest nor Act of Dispossession has been issued for these properties. Accordingly, there has been no infringement of Claimants' possession of these properties. Instead, Claimants retain all attributes of ownership. Importantly, when Claimants purchased their properties, they knew or should have known that their properties (or portions thereof) were in a national park and that they would be subject to being expropriated. Thus, any restrictions placed on their land in order to protect that land in the National Park should have been expected by Claimants from the outset.

191. Claimants nevertheless allege that the facts that these properties are within the Park and that SETENA is no longer issuing environmental assessment permits for properties

[273] CAFTA at Annex 10-C(4)(b) ("Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.") [Exhibit C-1a].

[274] *See* Claimants' Memorial on the Merits at para. 208.

within the Park means that these properties have been indirectly expropriated.[275] This is incorrect. As explained above, non-discriminatory regulatory actions taken by a CAFTA party that are designed to protect legitimate public welfare objectives, such as protection of the environment, do not constitute indirect expropriations. All of the actions that Claimants complain of with respect to Claimants' properties that have not been subject to Costa Rica's expropriation procedures fall squarely within this exception. Thus, Costa Rica's actions, by definition, do not constitute indirect expropriation.

192. A final point is worth noting in the context of expropriation. If, notwithstanding all of the foregoing, the Tribunal were to find that any of Claimants' properties have been indirectly expropriated, any award of compensation for expropriation of that property should be paired with a requirement for Claimants to surrender title to the property to Costa Rica. In that way, Costa Rica would properly obtain possession of the property in exchange for compensation, just as it would have done had the property been expropriated *de jure*.

B. COSTA RICA HAS AFFORDED CLAIMANTS FAIR AND EQUITABLE TREATMENT

193. Contrary to Claimants' contentions, Costa Rica has complied fully with Article 10.5 of CAFTA, which provides that each Contracting Party "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . ."[276] Each of Claimants' specific variations on the theme of fair and equitable treatment will be taken up in the sections that follow. Here again, Claimants try to paint with a broad brush, pointing to legislative and judicial actions of the Costa Rican government and suggesting that Costa Rica has acted unfairly and inequitably toward all of their

[275] *See* Claimants' Memorial on the Merits at paras. 208-12.

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

investments. But when the allegations are examined more closely and carefully, the weaknesses in Claimants' arguments come into focus. Their own role in making risky investments is exposed, for example, as is the fact that Claimants awkwardly predicate a number of their complaints on the fact that Costa Rica's institutions have acted exactly in line with the government's stated intentions—even though Claimants were betting that they would not.

194. This is not unfair or inequitable treatment. This is the operation of a state whose institutions act with abundant regard for procedure, due process, and individual rights, and who is engaging with its subjects (like Claimants) simultaneously on many issues through many institutions. Such multi-agency interaction is not always linear, because a state is not a monolithic actor. But each of the Costa Rican State's actions, considered in its appropriate context, has been taken in a good faith effort to carry out the State's sovereign responsibility to balance public and private interests within the bounds of the law. Importantly, as the tribunal in *S.D. Myers* emphasized, any assessment of allegedly unfair and inequitable treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[277]

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

195. Claimants contend that Costa Rica has failed to provide a stable and predictable legal environment and that this uncertainty has frustrated legitimate expectations on which they relied in making their investments.[278] As a threshold matter, CAFTA's obligation to provide fair and equitable treatment does not encompass protections for expectations of legal stability.

[277] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, November 13, 2000, para. 263 [Exhibit RLA-020].

[278] *See* Claimants' Memorial on the Merits at paras. 275-77.

Moreover, even if CAFTA Article 10.5(1) extended to legitimate expectations of legal stability, Respondent has provided just such a stable legal environment.

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

196. 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 . . . ."[279] Article 10.5(2) clarifies that the customary international law minimum standard of treatment of foreign investors constitutes the standard of treatment that is promised to covered investments. This is the "floor" or "bottom" of acceptable treatment—treatment that does not fall below this standard would not be a violation of CAFTA, even if such treatment is not to a party's liking. Article 10.5 and Annex 10-B further clarify that "customary international law" should be understood to be the general and consistent practice of States that they follow from a sense of legal obligation.

197. 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. 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."[280] In order to understand how this minimum standard of treatment under customary international

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

[280] *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].

law has evolved since *Neer*, it is relevant to examine recent cases that have interpreted this standard.

198. Few cases have interpreted this standard under CAFTA; however, NAFTA uses an almost identical standard of treatment. Article 1105 of NAFTA requires each party "to accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment."[281] In 2001, the Free Trade Commission clarified that the fair and equitable treatment to be accorded under "international law" as referred to in Article 1105 is that of the minimum standard of treatment under customary international law[282]—the same standard that CAFTA explicitly refers to in Article 10.5(2). Interpretations of the standard under NAFTA are therefore relevant and instructive in this context. The decision in *Glamis Gold* provides a clear articulation of the current state of the minimum standard of fair and equitable treatment under customary international law.[283]

199. In *Glamis Gold*, the tribunal explained that in order to violate the minimum standard of treatment, a measure attributable to the State "must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below the accepted international standards."[284] Furthermore, in examining the question of whether the breach of an investor's legitimate expectations qualified as a violation of this minimum standard of fair and equitable treatment, the *Glamis* tribunal held that "a violation of [the fair and equitable treatment requirement of NAFTA] based on the unsettling of reasonable, investment-

[281] North American Free Trade Agreement, Chapter 11, January 1, 1994, Art. 1105(1) [Exhibit RLA-002].

[282] *See* FTC Interpretation of NAFTA Chapter 11, 2001, Section B [Exhibit RLA-003].

[283] *See Glamis Gold*, Award at para. 616 [Exhibit RLA-014].

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

backed expectation[s] requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[285]

200. Thus, the minimum standard, as articulated by the *Glamis* tribunal, does not include obligations of transparency, reasonableness, or refraining from anything that is less than egregious or shocking, and would not include the obligation not to frustrate an investor's legitimate expectations unless the State had intentionally given rise to those expectations.[286] Other NAFTA tribunals in applying the high standard of customary international law articulated by the *Glamis* tribunal, such as the tribunals in *Merrill & Ring v. Canada* and *ADF Group Inc. v. United States*, have also interpreted the minimum standard to exclude the protection of an investor's legitimate expectations when there has been no explicit government action inducing the investor to invest.[287]

201. Therefore, as interpreted by international tribunals, 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.[288] Costa Rica never

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

[286] *See Glamis Gold*, Award at paras. 620-21, 627, 766 [Exhibit RLA-014].

[287] *See Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL (ICSID administered) (NAFTA), Award, March 31, 2010 ("*Merrill & Ring*, Award"), paras. 213, 233, 242 [Exhibit RLA-016]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 ("*ADF Group*, Award"), para. 189 [Exhibit RLA-007].

[288] *See Merrill & Ring*, Award at 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*, Award at 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

purposely or specifically prompted Claimants to purchase their properties in the Park. There is no evidence of any contract-like relationship between Claimants and Costa Rica that encouraged Claimants' decision to buy land in Costa Rica, nor have Claimants alleged that there was. Moreover, Costa Rica never made any promise to Claimants regarding the state of its environmental regulatory regime. Quite the contrary, Claimants invested knowing they were purchasing land in a national park where property is restricted. Thus, in this case, the minimum standard of fair and equitable treatment would not include an obligation to honor Claimants' expectations. To interpret the obligation as including protection of legitimate expectations of legal stability would be to raise Costa Rica's obligation above that which has been widely accepted to be the minimum acceptable level of treatment of investors, and above that to which it agreed in CAFTA.

b. Even if the CAFTA and Customary International Law Standard Were to Include Protections for Expectations of Legal Stability, Respondent Has Not Contravened Claimants' Expectations in this Case

202. Even if the Tribunal were to decide that CAFTA's Article 10.5 imputes an obligation on the State not to contravene an investor's legitimate expectations, Respondent has not violated Claimants' legitimate expectations of legal stability in this case. In alleging that Costa Rica has frustrated their legitimate expectations, Claimants point, in particular, to the supposedly uncertain legal status of their properties created by the application of the *Las Baulas* National Park Law and other measures taken by Costa Rica to protect property in and near the Park.[289] But Claimants greatly exaggerate the uncertainty they faced, and downplay the risks

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].

[289] *See* Claimants' Memorial on the Merits at paras. 275-77.

they took with their investments in betting that the State would not follow through on its stated intention to expropriate property located within the boundaries of the Park. They also greatly overdramatize the effects of various state actions, and rely on faulty premises—such as the notion that Costa Rica had declared other national parks that it has not yet expropriated[290]—that cannot form a basis for legitimate expectations of Claimants' investments.

203. At the outset, it should be noted that a stable legal environment is not the same thing as a "stabilized" legal environment: A treaty like CAFTA cannot be read to freeze the host State's legal regime for foreign investors at the moment they make an investment. Likewise, an investor's expectations are not legitimate if they are predicated on a belief that the State will not regulate his investment and that the State's 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 taken into consideration as well."[291]

[290] *See* Claimants' Memorial on the Merits at para. 215.

[291] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL (NAFTA), 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].

204. In particular, an investor making an investment in a particularly sensitive sector or location must necessarily anticipate even greater than average State intervention and regulatory changes.[292] Just as an investor in a heavily regulated industry such as pharmaceuticals must expect extensive and evolving State requirements and oversight, a purchaser of land in a highly sensitive ecological zone that is home to an endangered species cannot legitimately expect that the State will refrain from protecting the environment by placing limitations on the use of that land and potentially increasing the stringency of those regulations over time.

205. With respect to Claimants' property that is located inside the Park, the actions of the Costa Rican authorities have in fact been remarkably consistent in their intent and their effects: The State means to expropriate, or at a minimum restrict development upon, property inside the boundaries of the Park. This is hardly a surprising or unusual objective with respect to a national park. The form through which that generally consistent objective has been expressed, or the entity expressing it, has changed over time. But the thrust of Costa Rica's actions has been consistent, culminating with the current proceedings to formally expropriate the 75-meter strip of property inside the Park's boundaries.

206. Claimants start from the faulty premise that the boundaries of the *Las Baulas* National Park have been changed to include their properties, thus interfering with an alleged prior expectation that their properties were outside the Park, free from the prospect of expropriation and eligible for development.

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[292] *See, e.g., Alex Genin, Eastern Credit Limited, Inc. and AS Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, paras. 298-99, 300-01, 370 ("The Tribunal accepts Respondent's explanation that it took the decision to annul EIB's license in the course of exercising its statutory obligations to regulate the Estonian banking sector. The Tribunal further accepts Respondent's explanation that the circumstances of political and economic transition prevailing in Estonia at the time justified heightened scrutiny of the banking sector. Such regulation by a state reflects a clear and legitimate public purpose.") [Exhibit RLA-008].

207. Claimants conveniently neglect to mention the undisputed fact that at the time they purchased each of their properties, between 2003 and 2007, the Park's boundaries under the 1991 Decree explicitly extended inland by 125 meters.[293] Indeed, the plat maps for several of Claimants' properties acknowledged this directly, specifying that their properties (or portions thereof) are located "within *Las Baulas* National Park of Guanacaste."[294] Claimants instead suggest that they believed that in 1995, with the enactment of the *Las Baulas* National Park Law, the Park's boundaries changed to exclude their properties, and that the Costa Rican authorities then improperly reversed course starting in 2004 (the first *Procuraduría* opinion) through 2008 (the decision of the Supreme Court) by interpreting the National Park Law to once again include 75 meters of beachfront within the Park.[295]

208. But as discussed in Section II.B above, Claimants have effectively invented that zig-zag between 1995 and 2008 for the purposes of this arbitration. They rely on what was obviously an error in the text of the 1995 law, while ignoring the practice of those who applied and lived under the law during that time. During that period, no one acted as if the Park had ceased to exist on land; the Park carried out programs to protect the turtle nesting sites. Thus the *Procuraduría*'s and the Supreme Court's interpretations in 2004, 2005, and 2008 served only to confirm, not to change, the common understanding dating back to 1991 that the Park's boundaries included 125 meters of land. Thus, Claimants' purported expectations that their

[293] *See* Executive Decree No. 20518-MIRENEM at Art. 1 [Exhibit C-1b].

[294] *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, 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 26a 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].

[295] *See* Claimants' Memorial on the Merits at para. 212.

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 have expected that the portions of their properties that lay inside those boundaries would be treated accordingly.

209. Based on the above, what appears to have happened is that Claimants took a gamble that even though their properties (or portions thereof) fell within the boundaries of the Park, the government would not, in fact, expropriate their land. That this was the case is evident from some of Claimants' own witnesses. For example, Mr. Reddy, speaking on behalf of Spence International Investments, LLC, explained that "we always expected that we would eventually be able to responsibly develop and sell these beautiful and rare properties."[296] This was because "[i]t did not make sense to us that [the government] would expropriate private property that they could not afford to pay for rather than find a way to ensure that the development proceeded in a manner that would not impact the turtles they were trying to protect."[297] Therefore, Claimants themselves admit they were betting that Costa Rica would not expropriate their properties, but because of lack of funds, not because there was any doubt that the properties were within the boundaries of a national park. But Claimants have no legitimate expectation that the government will not carry out the expropriations they have indicated by law they would undertake. Claimants simply speculated the government would not act—in the end, they lost that bet.

2. Respondent Has Acted in a Consistent and Reasonable Manner

210. Claimants allege Respondent also breached Article 10.5 of CAFTA by acting in an arbitrary manner. Claimants point specifically to the treatment of those of their properties that

[296] Witness Statement of Robert Reddy, April 25, 2014 ("Reddy Statement"), para. 9.

[297] Reddy Statement at para. 30.

are about to enter the judicial stage or that are currently in the judicial stage of the expropriation procedure, and complain about the scope of valuations, and the progression from the administrative stage to the judicial stage.[298] None of this alleged treatment constitutes a breach of Article 10.5 of CAFTA.

211. Any allegation that a State's conduct is arbitrary must meet a very high standard. As Claimants' themselves acknowledge,[299] the conduct must be, in effect, antithetical to the rule of law as a whole. Claimants point to the International Court of Justice's articulation of the standard in the *ELSI* case: "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 propriety."[300] There is nothing in the actions that Claimants identify that comes even close to meeting that very high standard.

212. First and foremost, as discussed several times above, Costa Rica's interpretation and application of the *Las Baulas* National Park Law as encompassing 75 meters of Playa Grande and Playa Ventanas is entirely appropriate and has been validated by the highest legal authorities of Costa Rica. It was also consistent with acts Costa Rica has taken to date and with evidence on the record indicating that Claimants' properties (or portions thereof) lie within the Park's boundaries. Second, there is nothing surprising, much less shocking, about Costa Rica's environmental and land use regulations that have applied to the Park in one form or another since 1991. Claimants were never promised any unfettered right to develop their properties. Nothing in these actions of Costa Rica stands in opposition to the rule of law; to the contrary, the

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

[299] *See* Claimants' Memorial on the Merits at para. 270.

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

sequence of events demonstrates the pervasiveness of the rule of law and the dedication to the fair and efficient implementation of that law that characterizes Costa Rica's legal system and behavior.

213. Costa Rica's approach to expropriating Claimants' properties has been reasonable and justified every step of the way. Claimants first complain that a number of their properties have received multiple valuations during the judicial stage that have ranged from small to very large amounts.[301] It is surprising that Claimants would point to this as unfair treatment, as they are the ones who benefit from this wide range of valuations. The fact that each property is valued multiple times demonstrates the fairness of Costa Rica's expropriation procedure.

214. The first administrative appraisal is reviewed multiple times in the judicial stage by independent appraisers so as to ensure that the expropriated property is valued as accurately as possible. The judge's final decision on valuation cannot be lower than the administrative appraisal.[302] The judge can order compensation in an amount as high as the highest judicial appraisal.

215. Historically, the final valuations from judges have skewed closer to the ceiling of the valuation ranges rather than to the administrative appraisal floors. For example, of the four properties at issue in this case for which a final valuation has been determined, all have received a final decision valuing the property at an amount substantially greater than the administrative

[301] *See* Claimants' Memorial on the Merits at para. 278.

[302] *See* Expropriation Law at Art. 40 [Exhibit C-1c].

appraisals.[303] There is no reason to assume that the outcome for Claimants' other properties will be any different.

216. Claimants next complain that they cannot predict the exact valuations of their properties because different judges express different opinions in their decisions.[304] However, Costa Rican law ensures that the final valuation of an expropriated property is fair and that the expropriated party has ample opportunity to plead and, if necessary, appeal its case. Costa Rica's expropriation system is designed to effectuate this fairness. For Claimants' Lots A40, B3, B8, and SPG2, the judges' decisions have been remarkably consistent. Each judge has considered that the expropriated property is located inside a national park, as it has been since the landowner purchased it, because it would unfairly benefit the landowner not to do so.[305] Regardless of the judges' reasoning in their decisions at the judicial stage, the party whose property has been expropriated still has the opportunity to appeal those decisions and present virtually any evidence it likes in support of its position for a higher valuation. Furthermore, the expropriation system itself protects the landowner by setting a ceiling and a floor for the judicial decision.[306] Even if a judge were to take into consideration *post-hoc* factors in her decision on valuation that would devalue the property, the judicial decision cannot value the property any lower than the administrative appraisal. Thus, the system itself ensures the fairness of the compensation for expropriated property. Claimants have not raised a claim for denial of justice

[303] *See* Annex B: Comparison of Administrative Appraisals with Amounts Awarded in Final Decisions.

[304] *See* Claimants' Memorial on the Merits at para. 280.

[305] *See* Lot A40 Appeal Judgment, July 21, 2011 [Exhibit C-16h]; Lot B3 Appeal Judgment, February 7, 2013 [Exhibit 24g1]; Lot B8 Appeal Judgment, May 13, 2013 [Exhibit C-28h]; Lot SPG2 Appeal Judgment, December 14, 2012 [Exhibit C-21h]; *see also* para. 105 above.

[306] *See* above para. 72.

and, therefore, cannot be heard to complain that the Costa Rican judiciary has not properly protected their rights and interests.

217. Given the number of opportunities that the Costa Rican legal system affords a landowner to present evidence and to appeal decisions on valuations in both the administrative and judicial stages, Claimants should not be allowed to use this Tribunal as a court of appeals. The Costa Rican expropriation process has given Claimants every opportunity to argue and appeal for more money for their properties. Claimants should not be allowed to ask this Tribunal to engage in yet another *de novo* review of the outcome of a legal system that already provides them ample avenues to obtain fair valuations of their properties.

218. Claimants' third allegation of arbitrariness concerns the partial expropriation of Lots SPG1, SPG2, B1, B3, B5, B6, B7, and B8.[307] Only a portion of each of those lots is within the Park, and so the State has only initiated expropriation of that portion of each of the properties. The exact dimensions of the portion that the state is expropriating is based on the coordinates of the Park as determined by the Park Law.[308] There is nothing arbitrary about that approach. The State is expropriating property located within the boundaries of the National Park, and nothing more. In fact, such an act is an example of a reasonable approach that is mindful of private property rights. In essence, the state is endeavoring not to expropriate more property than strictly necessary to maintain the Park and protect the leatherback turtles. Claimants' allegations are, thus, without merit.

[307] *See* Claimants' Memorial on the Merits at paras. 281-84.

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

219. Finally, Claimants cite the suspension of the expropriation proceedings for nine of their lots as evidence of arbitrariness.[309] Claimants could have accepted those appraisals and would thus have received compensation. Instead, Claimants rejected the administrative appraisals of Lots V30, V31, V32, V33, V38, V39, V40, V46, and V47, at which point those lots ordinarily would have moved into the judicial stage of the expropriation process within six months. Those lots have not proceeded to the judicial stage for the same reason that all of the expropriation proceedings in the administrative stage have been temporarily suspended: Costa Rica is working diligently to improve its expropriation system in line with recommendations from the *Contraloría*'s office—to the benefit of landowners like Claimants.

220. The *Contraloría's* report was officially released in February of 2010, but SINAC, the agency in charge of transferring files from the administrative to the judicial stages of the expropriation procedure, was informed in 2008 that the *Contraloría* would recommend that SINAC suspend all expropriations until it addresses the inefficiencies in the expropriation system the *Contraloría* would identify in its report.[310] This was at the same time that Claimants were objecting to the administrative appraisals of their properties, which triggers the transfer of their files from the administrative stage to the judicial stage. In line with the strict observance of the legal system that has characterized all of Costa Rica's actions, SINAC heeded the *Contraloría's* recommendations and suspended proceedings. The recommendations of the *Contraloría* are in the process of being implemented. The expropriation procedure will continue, and Claimants will be paid compensation plus interest. Costa Rica's actions have thus been consistent with its obligations under Article 10.5 of CAFTA.

[309] *See* Claimants' Memorial on the Merits at paras. 285-92.

[310] *See* Loáiciga Statement at paras. 18-19 [Exhibit RWE-003].

V. DAMAGES

221. For the reasons outlined in the preceding Sections, Costa Rica 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 damages beyond that which they have received or will receive from the Costa Rican expropriation procedures. Claimants have already received CRC 1,425,782,097.35 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 final, possibly higher compensation amounts to be determined in court proceedings. Claimants will also receive compensation in the form of interest for delays in Costa Rica's carrying out of the judicial stage of the expropriation.

222. Should this Tribunal nevertheless determine that Claimants' rights under CAFTA have been breached and award compensation accordingly, it should go without saying that any amounts received by Claimants in the domestic legal proceedings must be offset against the Award. Furthermore, 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.

223. Claimants seek an award of damages totaling US $59,484,100 dollars, comprised of US $36,543,000 dollars for the value of their allegedly expropriated properties, and US $22,941,100 dollars in interest.[311] These valuations, however, are grossly overstated—both on technical grounds and because they ignore reliable indicators of fair market value.

[311] *See* Claimants' Memorial on the Merits at paras. 330-32. 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,

224. Respondent will address the methodological and calculation flaws in Claimants' petition for relief. These flaws are also addressed in the Expert Report prepared by Mr. Brent C. Kaczmarek of Navigant Consulting, Inc. at Respondent's request. Mr. Kaczmarek explains that the proper valuations of the properties in light of the circumstances of this case are either (i) the purchase price that Claimants paid for each of their lots (if Claimants were to provide reliable evidence that demonstrated that the price was based on reasonable assessments of the properties' values) or (ii) the amounts of the administrative appraisals conducted by independent appraisers, adjusted downward to account for any information known to a potential buyer immediately before the alleged date of expropriation that could adversely affect the value of the properties at issue.[312]

225. Claimants' principal claims in this arbitration are claims of expropriation, and they have valued their injuries on the basis of compensation for the full value of the allegedly expropriated properties. The standard for compensation in the event of expropriation is spelled out explicitly in Article 10.7 of CAFTA: "Compensation shall…be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the 'date of expropriation')."

Currency Converter, Exchange Rate Between the Costa Rican Colón (CRC) and U.S. Dollar (USD) as of May 28, 2008, *available at* http://www.oanda.com/currency/converter/ (last visited July 13, 2014) [Exhibit R-061].

We note that in his report Mr. Hedden includes two amounts for damages—one based on the amount of property allegedly actually expropriated by Costa Rica for the SPG and B Lots (which, according to Claimants, is less than the 75 meters provided by law) and one assuming that the full 75 meters was expropriated by Costa Rica. In their Memorial, Claimants seek the higher of the two options (which is approximately 1% higher). *See* Expert Report of Brent C. Kaczmarek, CFA, July 15, 2014 ("Kaczmarek Report"), para. 63 [Exhibit RWE-004]. There is no basis for Claimants' request. There is no justification for awarding Claimants damages based on an amount of land that has not been expropriated.

[312] *See* Kaczmarek Report at paras. 11-12, 165-67 [Exhibit RWE-004].

226. CAFTA itself thus spells out the key variables in a valuation exercise. It identifies the basis for the calculation: Compensation equal to fair market value of the expropriated asset.[313] It identifies the date of the valuation: "[I]mmediately before the expropriation took place." It specifies the interest rate that should be applied to compensate the expropriated investor for any delay in that payment: "[A] commercially reasonable rate for [the freely useable] currency" in which the fair market value is denominated, and "accrued from the date of expropriation until the date of payment."[314]

227. The *Chorzów Factory* standard[315] is an appropriate starting point for the calculation of compensation owed in cases where a treaty is silent on that issue, or perhaps for the calculation of compensation for other claims in a treaty, like CAFTA, that specifies the applicable standard for one type of claim (*i.e.*, expropriation) but not for others. Of course, many tribunals have applied an investment treaty's expropriation standard when calculating damages for all manner of other claims under an investment treaty.[316] But the standard specified in Article 10.7 represents CAFTA's express instruction for the calculation of the required compensation in the event of an expropriation, and it must be followed at least with respect to such claims. Claimants' valuation approach, however, rejects CAFTA's express instructions

228. *Fair market value:* Rather than establishing the *actual* "fair market value of the expropriated investment," Claimants and their expert, Mr. Hedden, base their valuations on a

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

[314] CAFTA at Art. 10.7(3) [Exhibit C-1a].

[315] *See Factory at Chorzów (Germ. v. Pol.),* 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), paras. 124-26 [Exhibit RLA-013].

[316] *See, e.g., Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, August 20, 2007, para. 8.2.8 [Exhibit RLA-011]; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award, June 27, 1990, para. 88 (for full protection and security claim, calculating damages as of the day on which the destruction of the investment had taken place) [Exhibit RLA-010].

but-for scenario that ignores the location of Claimants' properties within a national park. In fact, properties within the Park are subject to restrictions and eventual expropriation, which negatively affects their value—an obvious fact that Claimants knew or should have known when they purchased their land.[317]

229. Furthermore, Claimants' and Mr. Hedden's valuations are unreliable because of technical flaws, as Mr. Kaczmarek explains in his report. Mr. Hedden's data is riddled with conflicts when compared with Claimants' witness statements and their Memorial.[318] For comparison purposes, he uses appraisals that are entirely inconsistent with the trend of the real estate market in Costa Rica at the time he is valuing the properties.[319] He values Claimants' properties using sales transaction data from distant points in time that involve properties so dissimilar to Claimants' that it requires unreasonable adjustments in order to compare them.[320] He fabricates severance damages for those lots that are only partially located within the Park by attributing the value of ocean front views to Claimants' properties where there are no clear views or access to the beach.[321] And Claimants and Mr. Hedden neglect to subtract the amounts that Claimants have already received from Costa Rica in compensation for their properties.[322]

230. Another glaring omission in Mr. Hedden's report concerns the limited ability to obtain permits for development on Claimants' properties—a factor that would significantly affect fair market values.[323] As noted in Section II.C.2 above and in Mr. Kaczmarek's report, in

[317] *See* Kaczmarek Report at paras. 64-67, 74-83 [Exhibit RWE-004].

[318] *See* Kaczmarek Report at paras. 94-100 [Exhibit RWE-004].

[319] *See* Kaczmarek Report at paras. 109-13 [Exhibit RWE-004].

[320] *See* Kaczmarek Report at paras. 101-08 [Exhibit RWE-004].

[321] *See* Kaczmarek Report at paras. 132-44 [Exhibit RWE-004].

[322] *See* Kaczmarek Report at paras. 145-52 [Exhibit RWE-004].

[323] *See* Kaczmarek Report at paras. 114-31 [Exhibit RWE-004].

2003 SENARA determined that there was not enough water to support increased development in the Playa Grande and Playa Ventanas areas.[324] Based on further studies of the ecosystem, in 2009, SENARA determined that Playa Grande and Playa Ventanas were ecologically fragile and that no development permits should be issued for property located within the most fragile zone, which included Claimants' properties.[325] Thus, since 2003, it would have been difficult for Claimants to obtain access to water. And, after January 2009, when the SENARA report was issued, it would have been difficult, if not impossible, for Claimants to obtain the permits necessary to develop their properties, a fact which would heavily negatively affect the price that any third-party would be willing to pay for the properties after that time. Mr. Hedden fails to consider these facts in any of his calculations.[326]

231. *Date of Expropriation/Date of Valuation*: Claimants and Mr. Hedden ignore CAFTA's instruction about the date on which the expropriated investment should be valued. CAFTA states that the expropriated investment is to be valued "immediately before the expropriation took place." If the Tribunal were to accept Claimants' allegations in full, it would find the expropriation of the indirectly expropriated properties to have occurred on March 19, 2010 (a date they selected in an attempt to cure the lack of jurisdiction *ratione temporis*), and the expropriation of the directly expropriated properties to have occurred as of the date the Act of Dispossession was issued for each property, either March 12, 2008 or December 9, 2008. If the Tribunal were to accept Claimants' allegations of expropriation, but were instead to agree with Respondent's contention that the suspension of permitting was caused by the Supreme Court

[324] *See* SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003, p. 3 [Exhibit R-046]; *see also* Kaczmarek Report at paras. 124-31 [Exhibit RWE-004].

[325] *See* Letter from SENARA to SETENA, DIGH-038-09, February 2009, pp. 1-2 [Exhibit R-031]; *see also* SENARA, Technical Criteria for the Protection and Management of Coastal Aquifers of Santa Cruz, August 2005 [Exhibit R-048].

[326] *See* Kaczmarek Report at paras. 114-31 [Exhibit RWE-004].

decision in 2008, the indirect expropriation of certain of Claimants' properties would be found to have taken place on December 16, 2008. But Claimants and Mr. Hedden do not value the properties individually as of *any* of those dates. Instead, they value all of the properties as of May 27, 2008, a date they cherry-picked in a fairly transparent attempt to maximize the value of their properties. But if 2008 is the date of the expropriation, Claimants claims are outside of CAFTA's statute of limitations and the expropriation pre-dates CAFTA's entry into force.

232. Claimants' Memorial, Claimants' witness statements, and Mr. Hedden's expert report are replete with inconsistencies regarding the alleged dates of expropriation. As a general comment, Respondent notes that Claimants appear to be selecting dates to best suit their interests for different legal issues rather than to recount a coherent sequence of events. On the one hand, for example, Claimants repeatedly assert that March 19, 2010 was the culmination of an indirect taking of certain of Claimants' properties. This, of course, serves their jurisdictional interests by identifying a date that post-dates the entry into force of CAFTA. On the other hand, Mr. Hedden insists that expropriation occurred in May 2008 with the issuance of the Supreme Court decision holding that the 125 meters run inland rather than seaward from the high tide mark and that language to the contrary in the Park Law was simply incorrect.[327] Mr. Hedden also uses a May 2008 date for the purposes of calculating damages.[328] If Claimants and their damages expert prefer 2008 as the turning point for their damages calculation, then their allegation of breach should be tied to 2008—and well before CAFTA entered into force—as well. If Claimants wish to hold to 2010 for claims of breach, they must be held to it for damages, too.

[327] *See* Expert Report of Michael P. Hedden, April 23, 2014 ("Hedden Report"), p. 18.

[328] *See, e.g.*, Hedden Report at p. 6.

233. *Interest:* Claimants fail to apply a commercially reasonable rate of interest based on the currency in which the fair market value of damages is denominated, as required under CAFTA.[329] Claimants claim damages in Costa Rican Colones ("CRC") because they claim they used CRC to manage their investments and because all the direct owners of their properties are companies established under Costa Rican law.[330] Claimants apply the legal interest rate as published by the Costa Rican Central Bank in accordance with Article 1163 of Costa Rica's Civil Code. This rate is the six-month bank deposit rate in Colones. Claimants then apply this rate on a semi-annual, compounding basis, resulting in CRC 12,147,713,918 in pre-award interest up to November 1, 2015.[331]

234. Respondent does not disagree with the six-month bank rate as an appropriate interest rate. But there is no basis for applying this rate on a semi-annual, compounding basis. Mr. Kaczmarek calculated the proper amount of interest under Article 1163 of the Civil Code using the property values and severance damages calculated by Mr. Hedden. The interest Mr. Kaczmarek calculated was approximately 22 percent less than the rate Claimants calculated. Mr. Kaczmarek explains in his report that this difference is due to the difference between applying a simple rate of interest (as provided under Costa Rica's Civil Code) and a compound rate of interest (as applied by Claimants).[332] Thus, applying the Cost Rican legal interest rate, as provided under CAFTA, simple interest, rather than compound interest, should be used.

235. In sum, Mr. Kaczmarek's report examines Mr. Hedden's methodological errors in all respects and explains that the more reasonable amount of compensation would be in the form

[329] *See* CAFTA at Art. 10.7(3) [Exhibit C-1a].

[330] *See* Claimants' Memorial on the Merits at para. 327.

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

[332] *See* Kaczmarek Report at paras. 168-69 [Exhibit RWE-004].

of the price Claimants paid to purchase their properties (provided that Claimants' sales contracts—which Claimants have not put on the record—were based on reasonable market criteria), or the State's administrative appraisals of Claimants' properties. These values should then be adjusted downward to account for any information known to a potential buyer just before the date of expropriation that would adversely affect the value of the properties that might not have been included in the purchase price or State appraisals (*e.g.*, such as SENARA's determination regarding the amount of water resources available to properties in the Park).[333] Until the facts surrounding the purchase of Claimants' properties are better known, Mr. Kaczmarek is not in a position to propose an alternative number for Claimants' damages claim.

VI. CONCLUSION

236. Based on the foregoing, Respondent respectfully requests:

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

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

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

Respectfully submitted,

Stanimir A. Alexandrov
Counsel for Respondent

[333] *See* Letter from SENARA to SETENA, DIGH-038-09, February 2009, pp.1-2 [Exhibit R-031]; *see also* SENARA, Technical Criteria for the Protection and Management of Coastal Aquifers of Santa Cruz, August 2005 [Exhibit R-048].

Annex A

Status of Expropriations Under Costa Rican Law

Annex A

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	01/03/2012
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	03/05/2013		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	04/16/2012	12/14/2012	05/14/2014
B1	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006	12/01/2006	03/12/2008	03/06/2007	11/05/2009				Suspended[15]
B3	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006	12/01/2006	03/13/2008	09/13/2007	N/A	02/07/2013	02/19/2013[16]		09/17/2013
B5	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006	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	11/30/2006	03/13/2008	08/26/2007					No decision
B7	12/01/2005	09/22/2006	11/15/2006	11/27/2006	05/11/2006	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	12/01/2006	03/12/2007	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													

[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.

Annex A

STATUS OF EXPROPRIATIONS UNDER COSTA RICAN LAW

Spence Int. et.al. v. Republic of Costa Rica

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[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; B3: Exhibit C-24f, p.5; B5: Exhibit C-25f, p. 7; B6: Exhibit C-26f, p.5; B7: Exhibit C-27f, p. 3, Exhibit R-039; B8: Exhibit C-28f, p.5

[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; 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. 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.

Annex B

Comparison of Administrative Appraisals with Amounts Awarded in Final Decisions

Annex B

Comparison of Administrative Appraisals with Amounts Awarded in Final Decisions

Spence Int. et. al. v. Republic of Costa Rica

Lot	Amount of Administrative Appraisal[1]	Amount Awarded by Court[2]
A40	¢24,100,740	¢156,208,500 (final decision through appeal)
SPG1	¢42,625,961	¢124,417,880 (first instance decision – appeal decision pending)
SPG2	¢66,811,918	¢697,625,900 (final decision through appeal)
B1	¢20,436,552	Not yet awarded
B3	¢19,978,421	¢120,417,880 (final decision through first instance decision)
B5	¢20,728,656	Not yet awarded
B6	¢19,972,440	Not yet awarded
B7	¢21,687,840	Not yet awarded
B8	¢20,382,552	¢326,078,368.35 (final decision through appeal)

[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.

Annex C

Maps of the Land Area of the *Las Baulas* National Park

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

SECTOR DE FRANJA DE 125 m

Parque Nacional Marino Las Baulas