

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

BETWEEN:

**SPENCE INTERNATIONAL INVESTMENTS, LLC, BOB F. SPENCE,  
JOSEPH M. HOLSTEN, BRENDA K. COPHER, RONALD E. COPHER,  
BRETT E. BERKOWITZ, TREVOR B. BERKOWITZ,  
AARON C. BERKOWITZ AND GLEN GREMILLION**

**INVESTORS / CLAIMANTS**

AND

**THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA**

**PARTY / RESPONDENT**

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**ADDENDUM TO CLAIMANTS' POST-HEARING BRIEF:  
REPLY TO RESPONDENT'S FACTUAL SUBMISSIONS**

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26 June 2015

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## Introduction

1. The gravamen of Claimants' case is that Respondent's expropriation process has not resulted in the payment of prompt or adequate compensation and thus it has breached its CAFTA obligations vis-à-vis Claimants.<sup>1</sup> As to jurisdiction, the evidence confirms that no completed acts of expropriation occurred before the CAFTA entered into force and that Claimants did not, nor could have, known of Respondent's breaches before 10 June 2010.<sup>2</sup> As to the merits, Respondent admits that it commenced expropriation proceedings against eighteen of Claimants' lots in 2005 and that, as of April 2015, allegedly full compensation had been provided in only two cases.<sup>3</sup>
2. Costa Rica did not issue a final determination of fair market value, in respect of any of these properties, until 21 July 2011 – which was 1.5 years after the entry into force of the CAFTA and less than 2 years before the filing of the Notice of Arbitration.<sup>4</sup> As Ms. Chaves herself explained, transfer of title to the State cannot occur until after the judicial expropriation process returns a firm judgment on the amount of compensation.<sup>5</sup> Such determination constitutes a necessary precondition for a finding of direct expropriation under international law. Although a breach of the obligation to provide compensation without delay could occur earlier than this date, it is in the nature of a delay claim that some passage of time must occur after the process of expropriation has commenced.
3. Claimants do not contest Respondent's right to expropriate, nor do they dispute the claim that the taking of their lots was for a public purpose. The fact remains, however, that when Claimants made their initial investments in the lots, none formed part of the planned Park<sup>6</sup> and all were capable of being lawfully developed.<sup>7</sup> At some point in time, through a combination of judicial, executive and legislative acts, Respondent's policy on the planned Park's eastern boundary changed (extending it landward). At some point thereafter, Respondent decided to prohibit any form of development within the planned Park.<sup>8</sup> In implementing this subsequent

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<sup>1</sup> Claimants also say that the Respondent has breached its obligation to afford them fair and equitable treatment.

<sup>2</sup> As this submission is in reply to Respondent's factual submissions, Claimants focus here on pre-2009 events as completed acts of expropriation. See Claimants' Counter-Memorial on Jurisdiction at ¶¶72-83 and Claimants' Rejoinder on Jurisdiction for Claimants' other submissions with respect to the date of expropriation and jurisdiction, which are not mutually exclusive and also relied upon.

<sup>3</sup> Respondent's PHS at ¶12. The most prompt of the expropriations involved in this case took more than 5 years from the Decree of Public Interest to a final determination of fair market value and almost 4 additional years for those amounts to be paid out to the Claimant. See documents related to Lot A40: Decree of Public Interest issued 30 March 2006 (Ex. C-16c), Appeal Judgment issued 21 July 2011 (Ex. C-16h), payment of principal 15 February 2012 (Ex. C-16i), payment of interest after 4 February 2015 but before 22 April 2015 (Transcript at 645:15-21 (Chaves)). Also see Annex A to Chaves WS1.

<sup>4</sup> The Notice of Arbitration was filed on 10 June 2013. Also see Respondent's PHS at ¶¶4 and 39.

<sup>5</sup> Transcript at 653:17-654:3 (Chaves).

<sup>6</sup> In 2004, the Minister of the Environment attached a map of the existing Park to MINAE's comments in respect of a proposed law that would expand the Park's boundaries (Ex. C-2f) that showed the terrestrial portion of the Park to be 50 meters from the mean high tide. This map differs from that prepared in 2013 by Mr. Piedra, which indicates the terrestrial portion of the Park to be 125 meters from the mean high tide (Annex D to the Respondent's Reply on Jurisdiction and Rejoinder on the Merits).

<sup>7</sup> The lots were legal building lots at the time of purchase and, in July 2006, the Municipality of Santa Cruz, i.e. Respondent, issued zoning regulations which permitted low density development (Ex. C-1zo). The Constitutional Court declared those zoning regulations to be unconstitutional in May 2008 (Ex. C-1h).

<sup>8</sup> See note 7, above. The Respondent itself argued before the Constitutional Court in May 2008 that the 1995 Park

decision, Respondent was required to proceed without delay for this indirect expropriation of all remaining lots.<sup>9</sup> Respondent has instead established and maintained an expropriation process that typically takes more than a decade to result in the payment of full compensation.<sup>10</sup> It subsequently suspended the administrative process entirely without notice to Claimants<sup>11</sup> and has since failed to take any steps at all to formally expropriate eight of Claimants' properties.<sup>12</sup>

#### **Claimants Did Not Buy Properties that Were within the Park**

4. The 1991 Decree identified the boundaries of the planned Park as including a 125-meter strip of land running inland from the high tide mark. This delimitation included both the 75-meter public zone and the first 75 meters of privately-held land adjacent to it in Playa Grande only. Contrary to Respondent's submission, the 1991 Decree did not contemplate any privately-held land located in Playa Ventanas.<sup>13</sup> Instead, the land located between the mean high tide mark and the Ventanas estuary constituted "a protective zone," within which "[e]very residential development and of any other type made in this zone" was to be approved by MINAE.<sup>14</sup> The 1991 Decree also stipulated that the planned Park would only become "fully valid once the State purchased the private properties existing within these delimitations."<sup>15</sup> In other words, privately-held lands within the Park's borders would not form part of "the Park" unless and until purchased by Respondent.
5. The 1995 Park Law superseded the 1991 Decree. The 1995 Park Law identified the planned Park's boundaries as including: "one hundred and twenty-five meters from the ordinary high tide offshore." The contemporaneous legislative record confirms that legislators explicitly intended to alter the boundaries delineated in the 1991 Decree.<sup>16</sup> Hence, the Park would include the public zone for *both* Playa Ventanas *and* Playa Grande, but *not* any of the privately-held lands at issue in this dispute. Rather, it explicitly delineated the privately-held land to which it applied, such as Cerro el Morro.<sup>17</sup>
6. This was the state of affairs when each Claimant each acquired property rights in land located in Playa Ventanas and/or Playa Grande.<sup>18</sup> Bob Spence and the Cophers acquired lots in Playa

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Law did not include the 75-meter strip of land. See Ex. C-1h at pp. 6-7.

<sup>9</sup> Respondent itself has always linked a potential prohibition on development with the obligation to expropriate quickly. See sources cited at Respondent's PHS at ¶¶18-19, in particular the string of Constitutional Court decisions, e.g. Ex. C-1i and C-1j.

<sup>10</sup> See Respondent's PHS at ¶12. 26 lots are involved in this arbitration. 9 of these commenced the judicial phase to determine fair market value and 7 had yet to complete this phase at the time of the hearing.

<sup>11</sup> 9 of the properties are affected by the Respondent's suspension of the expropriation process for lots in the administrative phase. See Respondent's PHS at ¶13.

<sup>12</sup> Respondent's PHS at ¶14.

<sup>13</sup> Ex. C1-b, Article 1. As of April 2015, there was still no official, published map delineating the Park boundaries (Transcript at 695:6-18). Neither the 1991 Decree nor the 1995 Law were accompanied by a map. Each identified only two points and described the Park boundary in relation to those points. See Transcript at 582:4-8 and 575:7-9 (Jurado).

<sup>14</sup> Ex. C1-b, Article 2.

<sup>15</sup> Ex. C1-b, Article 5.

<sup>16</sup> Ex. C-1r; Transcript at 573:5-10 (Jurado). Also see C-1z where the legislator later confirmed the original intent.

<sup>17</sup> Ex. C-1e, Article 1 and Transcript at 511:12-18 (Piedra).

<sup>18</sup> This interpretation is consistent with the contemporaneous record. See Ex. C-2f. Also, the stamps applied by MINAE to the property registry documents for each of the lots before 2005 only refer to the Park boundaries as

Ventanas in 2003.<sup>19</sup> The Cophers purchased another lot on Playa Ventanas in 2004.<sup>20</sup> Spence Co. purchased a number of different lots from a single seller in 2005, including lots C71, V61 (a, b and c), A39, A40 and C96, which are all involved in this claim.<sup>21</sup> Brett Berkowitz purchased a number of different lots from a single seller in early 2003, including all of the B lots.<sup>22</sup> Glen Gremillion purchased Lot B7 from Brett Berkowitz in March 2004.<sup>23</sup> The evidence shows that each buyer performed due diligence before making his/her/its purchase, including consulting local attorneys about the boundaries of the Park and reviewing the title documents in the State-maintained national property registry.<sup>24</sup> Brett Berkowitz also sought out, and received, an assurance from the Minister of the Environment that his property rights would not be expropriated, and that he would be permitted to develop in an environmentally responsible manner.<sup>25</sup> This was also the position taken generally by MINAE at the time.<sup>26</sup> Consistent with this view, Respondent issued zoning regulations in July 2006, which applied within the 75 m strip of privately-held land **and which provided for responsible development**.

7. Respondent claims: “any controversy with respect to the boundaries of the Park was resolved by the ... *Procuraduría* ...as early as February 2004.”<sup>27</sup> Leaving aside the fact that the *Procuraduría*'s Office issued an interpretation of a law that was not only contrary to its clear wording, but which also ignored the record that explicitly confirmed legislative intent, the February 2004 opinion was non-binding.<sup>28</sup> It was not until December 2005 that a binding, publicly available interpretation of the 1995 Park Law was issued.<sup>29</sup> Even that interpretation was only binding on MINAE - it was not a “law” in the general sense.<sup>30</sup> Nor has Respondent proved that either letter was made available to Claimants.<sup>31</sup> By December 2005 Claimants had

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delineated in the 1991 Decree. See Ex. C-13a, C-14a and C-15a as compared to Ex. C-99 (registry map for V61 as at the time of purchase in 2005, which refers to the 1991 Decree and confirms that the property is outside the Park). Also see Ex. C-23a, C-24a, C-25a, C-26a, C-27a, and C-28a and compare the lot stamp applied to the map for the expropriated portion of the property with the pre-expropriation map. Also see Ex. C-20a, C-21a and C-22a: the registry maps for the SPG lots issued in 2003 also refer only to the 1991 Decree and not the 1995 Park Law in relation to the Park boundaries.

- <sup>19</sup> Bob Spence purchased lots V30, V31, V32, V33 and V34 from the same seller. These transfers were registered in August and September 2003. See Spence WS1, ¶¶8-9 and Ex. C-5b, C-6b, C-3b and C-4b. Bob Spence sold lot V34 in early 2004 for twice its purchase price. See Spence WS1, ¶11. Ronald and Brenda Copher purchased lots V39 and V40 at the same time that Bob Spence made his purchase and the transfers were registered in September 2003. See Copher WS1, ¶9 and Ex. C-8b and C-9b.
- <sup>20</sup> Copher WS1, ¶13, this purchase was registered in November 2004. See Ex. C-7b.
- <sup>21</sup> Reddy WS1, ¶¶20-23. Also see Ex. C-13b, C-14b, C-15b, C-16b, C-17b, C-18b, and C-19b.
- <sup>22</sup> Those lots were transferred to individual holding companies later in 2003 as part of the development plan. See Ex. C-23b, C-24b, C-25b, C-26b, C-27b, and C-28b. Lots B1 and B8 were transferred to Aaron and Trevor Berkowitz jointly.
- <sup>23</sup> Gremillion WS1, ¶7, C-27b.
- <sup>24</sup> Reddy WS1, ¶¶5-6; Reddy WS2, ¶¶3-19; Berkowitz WS1, ¶¶8-9, 16-18; Berkowitz WS2, ¶¶11-20; Transcript at 309-311, 325-327 (Reddy), 356-359 (Berkowitz); Copher WS1, ¶20.
- <sup>25</sup> Berkowitz WS1, ¶¶9-12; Transcript at 345-350 (Berkowitz).
- <sup>26</sup> See Ex. C-53, which refers to avoiding expropriations, requiring low density development and promoting a voluntary conservation regime in the areas declared as Park in 1991 and 1995.
- <sup>27</sup> Respondent's PHS at p. 2, ¶8.
- <sup>28</sup> Ex. C1-t; Transcript, 564:10-566:1 (Jurado).
- <sup>29</sup> Ex. C1-g.
- <sup>30</sup> As the record indicates, the Respondent itself, in the form of the Municipality of Santa Cruz, did not consider itself bound by the *Procuraduría*'s dictamen. See note 7, above. Also see generally Ruiz ER1.

already purchased lots on the basis of due diligence indicating that none were located within the boundaries of the Park as defined by the 1995 Park Law. Claimants had also invested in further development – through building roads, hiring architects and engineers, applying for environmental assessments, and maintaining the lots.<sup>32</sup> Respondent ignores all of this evidence by continuing to insist that Claimants were gamblers who hoped to “buy low and sell high” before Costa Rica expropriated the properties.<sup>33</sup> The evidence does not support such a finding. Such a strategy is also inconsistent with Respondent’s case, as it would require Claimants to find buyers ignorant of what Respondent says was the clear and obvious threat of expropriation.

8. In any event, twenty of the twenty-six lots involved in this claim were purchased *before* the *Procuraduría* issued its December 2005 *dictamen*.<sup>34</sup> In this regard, Respondent does not even attempt to explain how Claimants could possibly have known of facts that did not exist at the time that they purchased the properties.<sup>35</sup>

### **A Valuation and Expropriation Process that Takes Decades to Complete Cannot Be Fair**

9. Respondent claims that its 2008 decision to suspend all other expropriations related to the Park as a result of the not yet released *Contraloría* report was reasonable. That report criticized the expropriation process, in part, for taking too long. It also recommended that a study be conducted to determine whether titles could be challenged, so as to avoid paying any compensation to landholders.<sup>36</sup> Respondent would nevertheless have this Tribunal believe that it was reasonable for Respondent to entirely suspend further expropriations for seven years (and counting) in order to “improve” its process.<sup>37</sup> It alleges that it will “promptly pay once the value of the properties is determined”.<sup>38</sup> Respondent contends that Claimants should be content to wait indefinitely for these improvements and then a further ten years for a valuation. This proposition is absurd and cannot possibly satisfy Respondent’s CAFTA obligations.

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<sup>31</sup> Respondent’s witnesses only claimed that a technical legal information system exists, today, upon which such opinion letters ought to have been published. Transcript, 557:15-558:1 (Jurado).

<sup>32</sup> Reddy WS1, ¶¶13-15; Berkowitz WS1, ¶¶16, 18; Berkowitz WS2, ¶15, 25-26, 27; Copher WS1, ¶¶11-12; Gremillion WS1, ¶11.

<sup>33</sup> Respondent’s PHS, ¶3.

<sup>34</sup> Only 6 lots were purchased after this date; all by or with existing investors. Ronald Copher and Joe Holsten purchased lots V46 and V47 in 2006 after the Cophers had commenced the process for obtaining building permits on their existing lots, which was proceeding normally. See Copher WS1, ¶¶11-12; Ex. C-10b and C-11b. Spence Co. purchased lots SPG1, SPG2 and SPG3 in 2006 (see Reddy WS1, ¶35, Transcript 261 (Reddy) and Ex. C-20b, C-21b and C-22b). Spence Co. purchased lot V59 in May 2007 (see Reddy WS1, ¶24 and Ex. C-12b).

<sup>35</sup> Respondent’s PHS, ¶9.

<sup>36</sup> Transcript, 603:11-605:21 (Jurado).

<sup>37</sup> Respondent’s PHS, ¶¶10-13. While Respondent contends that the system is not inherently arbitrary, they ignore the fact that some of the judgments take into account severance damages while others do not. The evidence is clear that all of the B lots and SPG lots would lose their beach access after taking. See Transcript, 610:16-611:12 (Jurado).

<sup>38</sup> Respondent’s PHS, ¶¶15-16. The evidence shows that Respondent’s valuations were also arbitrary - providing wide variations in value for neighbouring lots. See for example lot B3’s final valuation at \$83/m<sup>2</sup> (Ex. C-24g-1), B6’s at \$14/m<sup>2</sup> (Ex. C-26g) and B8’s at \$217/m<sup>2</sup> (Ex. C-28h).

**Respondent’s “additional measures” to Protect the Park Amounted to a Creeping, Indirect Expropriation without Compensation – which was Designed both to Delay Payment to Claimants and to Drive Down the Amount of Any Payment Eventually Made**

10. On legal grounds that remain opaque, SETENA first issued what was styled as a temporary ban on the issuance of environmental assessments in 2005, which it subsequently renewed for determinate periods of time.<sup>39</sup> In May of 2008, the Constitutional Court ordered MINAE to either expropriate property within the Park “in a reasonable time period” or to “award the private property owners the permits and authorizations so that they can effectively exercise their right to property.”<sup>40</sup> In December of 2008, the same court annulled all of the environmental assessments within the Park and ordered MINAE “to continue immediately with the expropriation processes”.<sup>41</sup> In March of 2009, the same court refused to clarify the inconsistency in these two judgments, but confirmed that it was the responsibility of MINAE to determine how and when to expropriate properties within the Park.<sup>42</sup>
11. Respondent then drafted new legislation, which would have overcome the inconsistencies generated by the Court’s decisions and, most crucially for the public purse, avoid any expropriations. Such proposed legislation was not archived until 2013.<sup>43</sup>
12. With its legislative agenda stalled – and despite the direction of its own Constitutional Court to its own ministry (MINAE) to get on with the expropriations – Respondent has not commenced or advanced the expropriation process in respect of fifteen of Claimants’ lots. Instead, for the purported purpose of “improving” the State’s expropriation procedures, it suspended the process for these lots at some undeclared point in 2008 and 2009.<sup>44</sup> The *Contraloría* issued its report in February 2010, yet the suspension remains in place today. Respondent only advised Claimants of this suspension in the course of the pleadings in this arbitration. Yet, Respondent claims that Claimants knew or ought to have known that it breached the CAFTA in 2008, before any time had elapsed after the Court’s decisions, years before any final judgment on valuation and years before they knew of the suspension in the administrative proceedings.

**Conclusion**

13. Respondent has confused the actual intent of the Park Law with formal intent, which was the subject of the *Procuraduría*’s interpretation and, later, the Constitutional Court decisions. Investors were entitled to rely on the explicit terms of the Park Law, as confirmed by their due diligence, which permitted them to engage in responsible development of their lots. Respondent’s summary of the facts is misleading. A review of the entire record, including the decisions of the Constitutional Court, clearly indicates that no completed act of expropriation occurred before the entry into force of the CAFTA and that Claimants did not and could not have known about individual breaches of the treaty until after 10 June 2010 or that continuing breaches existed and were renewed or maintained beyond this date.

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<sup>39</sup> Respondent’s PHS at ¶18, Ex. C-1f.

<sup>40</sup> Ex. C-1i at p. 11.

<sup>41</sup> Ex. C-1j at p. 21.

<sup>42</sup> Ex. C-1zi at p. 2.

<sup>43</sup> Ex. C-112g.

<sup>44</sup> Respondent’s PHS at ¶13.