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

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

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I. INTRODUCTION

1. Pursuant to Articles 10.16(1)(a) of the Dominican Republic - Central America - United States Free Trade Agreement (the "CAFTA"),[1] the Claimants hereby serve this Notice of Arbitration and Statement of Claim for the Government of the Republic of Costa Rica's breach of its obligations under the CAFTA and demand that this dispute be referred to arbitration.

2. Pursuant to CAFTA Article 10.16(2), Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher and Ronald E. Copher (collectively referred to as the "Spence Claimants") served written notice of their intent to submit a claim to arbitration ("Spence NoI") on the Government of the Republic of Costa Rica (hereinafter the "Respondent", the "Government" or "Costa Rica") on 9 October 2012.[2] On 21 December 2012, the Spence Claimants served written notice on Costa Rica that an additional parcel of land would be included in their claim. [3]

3. Pursuant to CAFTA Article 10.16(2), Brett E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion (collectively referred to as the "Berkowitz Claimants") served written notice of their intent to submit a claim to arbitration ("Berkowitz NoI") on the Government on 9 October 2012.[4]

4. More than 90 days have elapsed between service of both the Spence NoI and the Berkowitz NoI and the submission of this consolidated Notice of Arbitration.

5. Pursuant to Article 10.15 of the CAFTA, the Claimants have met with each other, and then with the Government to discuss the claim and attempt to negotiate a resolution. These efforts included a face-to-face meeting held in San José on 21 November 2012. The dispute remains unresolved. However, the Parties have agreed to consult with respect to the procedure for this arbitration and to seek to resolve the dispute in an expeditious and cost-effective manner.

6. The Respondent has indicated that it would prefer the claims noticed in the Spence NoI and Berkowitz NoI to be consolidated. In the interest of expediency, the Claimants are submitting this single, consolidated Notice of Arbitration and Statement of Claim. The filing of a single Notice of Arbitration and Statement of Claim is undertaken without prejudice to and expressly reserving the right to make different and/or further submissions with respect to the factual circumstances and losses of the respective Claimants.

7. Pursuant to Article 10.18 of the CAFTA, the Claimants hereby consent to arbitration in accordance with the procedures set out in the CAFTA and provide waivers of their rights to initiate or continue before any administrative tribunal or court under the law of Costa Rica, or other dispute settlement procedures, any proceeding with respect to the specific

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1 See Exhibit C-1a.

2 Appendix C.1.

3 Appendix C.2.

4 Appendix C.3.

measures alleged to constitute a breach referred to in Article 10.16. The waivers are attached at Appendix E to this Notice of Arbitration and Statement of Claim.[5] This Notice of Arbitration and Statement of Claim is served together with five Appendices (A-E) and Exhibits (C-1 through C-28).

II. PRELIMINARY STATEMENT

8. This case involves the unlawful taking of the Claimants' investments in Costa Rica. The Claimants, all citizens or nationals of the United States of America, made significant investments in highly prized land located on the Pacific coast of Costa Rica, with the intention to develop it in an ecologically sustainable manner, through the building of luxury beachfront homes. The Claimants made their investments in full compliance with the laws of Costa Rica, after having confirmed the validity of what would be their property rights with the appropriate authorities in Costa Rica.

9. The Claimants do not dispute Costa Rica's sovereign right to expropriate land for a public purpose, such as the establishment of an ecological zone or park. Indeed, the Claimants' investment-backed expectations were based upon their understanding that they would be developing luxury lots for environmentally conscious clientele, who would both value and support precisely the kinds of public policy goals that allegedly lay behind the expropriations that took place in this case.

10. Nevertheless, through a series of sometimes seemingly contradictory measures, including laws, regulations, interpretative statements, policy pronouncements and court decisions, Costa Rica has unlawfully deprived the Claimants of the use or enjoyment of their investments and it has failed to provide prompt or adequate compensation for the resulting deprivation. Such deprivation has been visited upon the Claimants through physical confiscation and/or rendering their property rights inutile – by commencing the expropriation process established under municipal law but failing to proceed with the expeditious and/or fair determination of compensation due for each respective taking.

III. NAMES AND CONTACT DETAILS OF THE PARTIES

A. The Claimants

11. The contact details for each of the Claimants follows:

Spence International Investments, LLC
1165 Investment Blvd., Suite 2
El Dorado Hills, CA 95762
USA

[5] References in the waivers to the "Request for Arbitration" are to this Notice of Arbitration and Statement of Claim.

Bob F. Spence
1165 Investment Blvd, Suite 2
El Dorado Hills, CA 95762
USA

Joseph M. Holsten
1147 Abbey's Way
Tampa, FL 33602
USA

Brenda K. Copher and Ronald E. Copher
861 Seddon Cove Way
Tampa, FL 33602
USA

Brett E. Berkowitz
115 Malinche, Reserva Conchal
Brasilito, Guanacaste
Costa Rica

Trevor B. Berkowitz
114 Malinche, Reserva Conchal
Brasilito, Guanacaste
Costa Rica

Aaron C. Berkowitz
114 Malinche, Reserva Conchal
Brasilito, Guanacaste
Costa Rica

Glen Gremillion
6 Lattingtown Woods Ct.
Locust Valley, NY 11560
USA

B. The Respondent

12. As per the CAFTA, the contact details for the Respondent are as follows:

Dirección de Aplicación de Acuerdos Comerciales Internacionales
Ministerio de Comercio Exterior
San José, Costa Rica

IV. BREACH OF OBLIGATIONS

13. The Government has breached international law and its obligations under Section A of Chapter 10 of the CAFTA, a copy of which is attached at Exhibit C-1a.

14. The CAFTA imposes legally binding obligations on Costa Rica. Costa Rica has unlawfully expropriated the Claimants' land and breached the following obligations:

i) Article 10.3 – National Treatment;

ii) Article 10.4 – Most-Favored-Nation Treatment;

iii) Article 10.5 – Minimum Standard of Treatment; and

iv) Article 10.7 – Expropriation and Compensation.

15. The applicable provisions of the CAFTA are as follows (with footnotes omitted):

> **Article 10.3: National Treatment**
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> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
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> 3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.
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> **Article 10.4: Most-Favored-Nation Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
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> **Article 10.5: Minimum Standard of Treatment**
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> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 10.7: Expropriation and Compensation

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

(d) in accordance with due process of law and Article 10.5.

2. Compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

16. Costa Rica violated each of these obligations with respect to the Claimants' investments.

V. FACTUAL BASIS FOR THE CLAIM

17. At root, this case is about the Respondent's failure to provide prompt and adequate compensation for its *de facto* and *de jure* takings of valuable residential real estate located on the Northwestern (Pacific) coast of its territory. It is also about the Respondent's failure to provide the Claimants with access to the necessary administrative and/or judicial means for the prompt review of its *de facto* expropriation of certain segments of the lots that comprise this grouping of prime beachfront land. The Respondent thereby deprived the Claimants of their right to take timely advantage of the unique development opportunity that had presented itself just as the takings were about to commence.

C. The Investors and their Investments

18. Spence International Investments, LLC ("Spence Co.") is a company established under the laws of California, USA. The individual Claimants Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brett E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion are nationals of the United States of America. Each of the Claimants made investments in land in Playa Grande and/or Playa Ventanas, which are neighbouring beaches located in the Canton of Santa Cruz, in the Province of Guanacaste, Costa Rica. Proof of US nationality for each Claimant is attached at Appendix A.

19. Each Claimant made its investment with an expectation of gains to be made in exchange for the commercial risk of committing capital and resources to the development of such real estate. Each Claimant also made his/her/its investment indirectly, by means of individual holding companies established under the laws of Costa Rica. The acquisition of each of the respective Claimant's lots is described in further detail below.

20. A map that identifies the approximate location of each lot at issue can be found at Exhibit C-2a.[6] In the interests of convenience, each lot shall be referred to using its subdivision abbreviation, as shown on the map, with cross-references to the unique parcel identifier or "*Folio Real*" number.

21. Documents evidencing each Claimant's right of ownership in the respective lots are appended and will be referenced further below. Documentary evidence reflecting the current status of the expropriation process for each individual lot has also been included in the exhibits, delineated by lot.

22. Titled beachfront property in Costa Rica is extremely rare and valuable. Less than five per cent of Costa Rica's coastline is privately titled property. The remainder can be leased through a concession agreement with the local municipality. Foreign investors are

[6] This exhibit was adapted by the Claimants from a map created by the environmental evaluation department of MINAET (which is publicly available) in order to provide the Tribunal with a geographic description of the lots at issue.

wary of concession property and the possibility that they could lose their property rights, and thus highly prize and value the rare privately titled properties. Playa Grande enhances this value with its long white sand beach (more valuable than brown, black or grey sand beaches, or rocky beaches), and it is also one of Costa Rica's best surfing locations. Playa Ventanas, which is adjacent to Playa Grande, is a similarly beautiful white sand beach. However, an estuary envelops Playa Ventanas, which makes each beachfront lot even more attractive, exclusive and valuable to potential landholders.

23. Furthermore, both Playa Grande and Playa Ventanas are conveniently located within one hour's drive from the Liberia International Airport, and within half an hour of the commercial centre of Tamarindo (which served as set location for the film "*Endless Summer*"), and of the exclusive Playa Flamingo resort. Playa Grande's proximity to these towns provided access to restaurants, grocery stores and other desirable services. Thanks to certain improvements by the investors, Playa Grande was also accessible entirely by paved road, and possessed the utilities infrastructure (e.g. water, electricity, etc.), not commonly found in this region of Costa Rica.

24. The combination of so many attractive features in one location, on the northwest coast of Costa Rica, represented an extremely rare investment opportunity. The fact that Costa Rica offers only a very limited supply of titled beachfront property, as contrasted against the very high demand that continues to exist for such beautiful, conveniently located and accessible land, presented the Claimants with a tremendous investment opportunity, of which they were deprived by the Respondent, without the payment of prompt and/or adequate and effective compensation, as required both under municipal and international law.

i. The Spence Lots

25. On 20 August 2003, Bob F. Spence ("Spence") purchased two lots on Playa Ventanas, Lots V32[7] and V33.[8]

26. On 30 September 2003, Spence purchased two further lots on Playa Ventanas, Lots V30[9] and V31.[10]

27. All four of the aforementioned lots lay entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

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[7] Folio Real No. 5-042334-000. This lot was purchased through The Purple Esmerald, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.40. Also see Exhibit C-5b.

[8] Folio Real No. 5-042336-000. This lot was purchased through Windows of the Blue Sky Net, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.38. Also see Exhibit C-6b.

[9] Folio Real No. 5-042330-000. This lot was purchased through My New Land of Costa Rica TRC, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.39. Also see Exhibit C-3b.

[10] Folio Real No. 5-042332-000. This lot was purchased through Luxury Lands of Costa Rica QRZ, SA, a company established under the laws of Costa Rica, and of which Bob F. Spence was the sole shareholder in 2003. Appendix B.41. Also see Exhibit C-4b.

28. In the intervening period, three of the four companies owned directly by Spence: My New Land of Costa Rica TRC, SA, Luxury Lands of Costa Rica QRZ, SA, and The Purple Esmerald, SA were consolidated, with all of their assets, into the fourth, Windows of the Blue Sky Net, SA, in 2012.[11] Thus, today, all four lots are owned by Windows of the Blue Sky Net, SA, which is an enterprise that is wholly owned by Spence.[12]

ii. The Copher and Holsten Lots

29. Brenda Copher and Ronald Copher (referred to collectively as "the Cophers") acquired two lots on Playa Ventanas, Lots V39 and V40,[13] through the purchase of 100% of the shares of Corporación Lacheaven de Ventana, SA, on 25 September 2003. [14]

30. On 19 November 2004, Ronald Copher acquired an additional adjacent lot on Playa Ventanas, Lot V38,[15] through Seize the Day, SA.[16]

31. All three of these lots are located entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

32. Ronald Copher is the sole shareholder of Ronco Realty Investments, Ltda, an enterprise established under the laws of Costa Rica.[17] Joseph Holsten is the sole shareholder of Joeco Realty Investments Ltda, which was also established under the laws of Costa Rica.[18] On 8 February 2006, Ronald Copher and Joseph Holsten acquired joint ownership of two beachfront lots on Playa Ventanas, Lots V46 and V47,[19] through these holding companies. Both of these lots lie entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.[20]

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11 Appendices B.35, B.36.

12 See Appendix B.37. Exhibit C-2b sets out the corporate structure of Spence's companies.

13 The registered date of purchase is 27 September 2000 for both beachfront lots on Playa Ventanas known as V39 and V40 (Folio Real Nos. 5-042348-000 & 5-042350-000), the transfer of Corporación Lacheaven de Ventana, SA to Brenda and Ronald Copher included these two properties. See Exhibits C-8b and C-9b.

14 Each of the Cophers hold 50% of the shares of Corporación Lacheaven de Ventana SA, an enterprise established under the laws of Costa Rica. See Appendices B.42, B.43, B.44, B.45 and B.46.

15 The registered date of purchase for Lot V38 is 19 November 2004, it was assigned Folio Real No. 5-042346-000. See Exhibit C-7b.

16 Ronald Copher holds 100% of the shares of Seize the Day, Ltda., which is an enterprise established under the laws of Costa Rica. Subsequent to the purchase of Lot V38, Seize the Day, SA was transformed into a Limited Partnership in 2005. See Appendices B.47, B.48, B.49, B.50, B.51, and B.52.

17 Appendices B.56, B.57, B.58, B.59, B.60, B.61, and B.62.

18 Appendices B.53, B.54, and B.55.

19 The registered date of purchase for Lots V46 and V47 is 8 February 2006. Lot V46 was assigned Folio Real Nos. 5-042362-001 and 002 and Lot V47 was assigned Folio Real Nos. 5-042364-001 and 002. Exhibits C-10b1, C-10b2, C-11b1 and C-11b2.

20 The official documents signifying specific coordinates for each of the lots acquired by both the Cophers and Joseph Holsten were certified with a 1993 stamp indicating that they were not encompassed by the boundaries of the Park contemplated by the Government's 1991 Decree, as explained further below.

iii. The Spence Co. Lots

33. Spence Co. acquired a number of properties in Playa Ventanas and Playa Grande and invested in the development of those properties. In general, legal and beneficial title to the properties was vested into individual trust enterprises, which each transferred title in lots to new owners, using special purpose vehicles.[21]

34. Thus, acting through two wholly-owned subsidiaries,[22] Spence Co. owned and controlled a number of enterprises established under the laws of Costa Rica, including Grande Beach Holdings, Ltda.;[23] Keeping Track, Ltda.;[24] Caminata En Pleamar, SA;[25] Guanacaste Sea Gull, SA;[26] Longboard Surf, SA;[27] Wake Up Call, Ltda.;[28] Forever Hold Your Peace, Ltda.;[29] and Building A Ruin, Ltda.[30]

35. On 4 February 2005, Spence Co. acquired Lot C71[31] on Playa Grande. On 22 October 2007, Spence Co. sold Lot C71.[32] The buyer did not honour the terms of the contract and possession of the lot reverted to Spence Co. on 10 December 2012.[33]

36. On 22 February 2005, Spence Co. acquired two lots on Playa Grande, Lots A39[34] and A40.[35]

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[21] To the extent it is relevant, the special purpose vehicles and their role in the acquisition and transfer of ownership are discussed in this section and documents are referred to and appended. If necessary, Spence Co. may refer to and rely on additional documents in subsequent pleadings that set out details of these arrangements. See Exhibits C-2c and C-2d for a diagrammatical summary of the relevant companies.

[22] Costa Rica Investments LLC, a Delaware corporation and Bromtence Investments Limited, a Cyprus company. See Appendices B.1 and B.2.

[23] Appendices B.12, B.14.

[24] Appendices B.3, B.6.

[25] Appendix B.26.

[26] Appendix B.27.

[27] Appendix B.18.

[28] Appendix B.28.

[29] Appendix B.19.

[30] Appendix B.20.

[31] Folio Real No. 5-043073-000. Following the transfer and subsequent transformation of a company called Counting the Stars, SA to Grande Beach Holdings, Ltda., a company established under the laws of Costa Rica, which was owned and controlled by Spence Co., Grande Beach Holdings, Ltda., became the registered owner (as trustee) for Lot C71. Appendix B.25. Also see Exhibit C-20b.

[32] Grande Beach Holdings, Ltda. sold Lot C71 to a third party. A Guaranty Trust was signed between the parties to secure the debt the buyer acquired with the seller, pursuant to which the collateral was the capital stock of the company Building A Ruin, Ltda., which was in turn the recorded owner of Lot C71. Appendices B.21, B.22, B.25.

[33] Appendix B.23.

[34] Folio Real No. 5-042781-000. Lot A39 was purchased through Caminata En Pleamar, SA, a company established under the laws of Costa Rica, which was owned and controlled by Spence Co. Appendix B.26. Also see Exhibit C-17b.

[35] Folio Real No. 5-042783-000. Lot A40 was purchased through Guanacaste Sea Gull, SA, a company established under the laws of Costa Rica, which was owned and controlled by Spence Co. Appendix B.27. Also see Exhibit C-16b.

37. On 28 June 2005, Spence Co. acquired Lot C96[36] on Playa Grande.

38. On 4 February 2005, Spence Co. acquired Lot V61 on Playa Ventanas.[37] On 6 February 2006, Spence Co. sold Lot V61 for approximately $600 m^2 subject to certain conditions, including the availability of a building permit for the lot.[38] Lot V61 was subdivided into three lots and assigned new *folio real* numbers in December 2006.[39] These lots are referred to in this claim as Lot V61a,[40] Lot V61b[41] and Lot V61c.[42] As the buyer was unable to obtain a building permit for Lot V61, on 31 March 2008, ownership of the lot reverted to Spence Co. and the purchase price was refunded to the buyer.[43]

39. On 11 May 2007, Spence Co. acquired Lot V59 on Playa Ventanas.[44]

40. All six (eight after subdivision of Lot V61) of the aforementioned lots lay entirely within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

41. In the intervening period, Caminata En Pleamar, SA; Guanacaste Sea Gull, SA; Longboard Surf, SA; Wake Up Call, Ltda.; Forever Hold Your Peace, Ltda.; and Building A Ruin, Ltda. and all of their assets were consolidated into Grande Beach Holdings, Ltda.[45] Thus, Lots A39, A40, C96, V61(a, b and c), V59 and C71 are all owned by Spence Co. today through Grande Beach Holdings, Ltda.[46]

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[36] Folio Real No. 5-043133-000. Lot C96 was purchased through Grande Beach Holdings Ltda. (as trustee), a company established under the laws of Costa Rica, which was owned and controlled by Spence Co. Appendix B.16. Also see Exhibit C-18b.

[37] Folio Real No. 5-042833-000. Lot V61 was purchased through Counting the Stars, SA, a company that was transformed into Grande Beach Holdings, Ltda. Grande Beach Holdings, Ltda., became the registered owner (as trustee) for Lot V61. Appendix B.32. Also see Exhibits C-13b, C-14b and C-15b.

[38] Lot V61 was sold subject to certain conditions to Wake Up Call, Ltda. Appendix B.29.

[39] Appendices B.32, B.33, B.34.

[40] Folio Real No. 5-144808-000.

[41] Folio Real No. 5-154432-000.

[42] Folio Real No. 5-154433-000.

[43] See Appendices B.30, B.31. The registered owner of Lot V61 was Wake Up Call, Ltda. The buyer purchased Lot V61 by acquiring the entire stock of Wake Up Call, Ltda. When the buyer was unable to obtain a building permit, the entire stock of Wake Up Call, Ltda. was transferred back to Spence Co.

[44] Folio Real No. 5-089606-000. Spence Co. acquired Lot V59 when it purchased the shares of Longboard Surf, S.A., a company established under the laws of Costa Rica. Lot V59 was subsequently transferred to Forever Hold Your Peace, Ltda., a company established under the laws of Costa Rica, which was owned and controlled by Spence Co., and later merged, with all of its assets, into Grande Beach Holdings, Ltda., a company established under the laws of Costa Rica, which was also owned and controlled by Spence Co. Appendices B.13, B.17, B18, B.19. Also see Exhibit C-12b.

[45] Guanacaste Sea Gull, SA, Caminata En Pleamar, Ltda., and Longboard Surf, SA were merged into Grande Beach Holdings, Ltda. in 2007. Appendices B.11, B.18. Wake Up Call, Ltda., and Forever Hold Your Peace, Ltda. were merged into Grande Beach Holdings, Ltda. in 2012. Appendix B.13. Building A Ruin, Ltda. was merged into Grande Beach Holdings, Ltda. in 2013. Appendices B.24, B.25.

[46] See Exhibit C-2c for the Spence Co. company structure at time of purchase and presently.

42. In 2006, Spence Co., also acquired three very large estate lots in south Playa Grande, which have been identified on the map as SPG1, SPG2 and SPG3.[47] Approximately 15,000 m^2 of these three lots is situated within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.

iv. The Estate Lots of Gremillion and the Berkowitz Claimants

43. The Estate Lots consist of six very large, beachfront estate lots located in south Playa Grande. All six of these lots were purchased by Brett Berkowitz in September 2003 and owned through local holding companies in order to facilitate their development. Today, Brett Berkowitz owns and controls three of these lots. Glen Gremillion owns and controls one lot, after having purchased it in 2004.[48] The remaining two lots are owned and controlled by the adult sons of Brett Berkowitz, Trevor Berkowitz and Aaron Berkowitz.[49]

44. In particular, Trevor and Aaron Berkowitz jointly own and control Lot B1,[50] which comprises a total of 7,358.14 m^2, 2,838.41 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.[51] The acquisition was made on 22 September 2003.[52]

45. Brett Berkowitz owns and controls Lot B3,[53] which comprises a total of 7,117.53 m^2, 2,736.77 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 22 September 2003.[54]

46. Brett Berkowitz owns and controls Lot B5,[55] which comprises a total of 7,292.53 m^2, 2,878.98 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 24 September 2003.[56]

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[47] These lots were purchased when Spence Co. acquired the shares of Field on the Beach, S.A. and Sendaluz, S.A., both are companies established under the laws of Costa Rica. These two entities were subsequently merged with all of their assets into Keeping Track, Ltda., a company established under the laws of Costa Rica, which is also owned and controlled by Spence Co. See Appendices B.4, B.5, B.6, B.7, B.8, B.9, B10. See Exhibit C-2d for a diagram of the company structure at the time of purchase and presently. Also see Exhibits C-20b, C-21b, and C-22b.

[48] The registered owner of Lot B7 was Jocote Mar Vista Estates, S.A., a company established under the laws of Costa Rica, and owned and controlled by Brett Berkowitz. In 2004, Glen Gremillion purchased 100% of the shares of Jocote Mar Vista Estates, S.A., which are today held through Vacation Rentals, S.A., a company established under the laws of Costa Rica and owned and controlled by Glen Gremillion.

[49] Lots B1 and B8 were purchased in September 2003 and were subsequently transferred to Trevor and Aaron Berkowitz. For completeness, Lots B2 and B4 were also purchased by Brett Berkowitz in September 2003 and subsequently sold to third parties; those lots do not form part of the Claimants' claims in this arbitration.

[50] Folio Real No. 5-130538-000. Each brother owns 50% of the shares of Aceituno Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.65, B.66.

[51] See Exhibit C-2a. For the Berkowitz Estate Lots, the portion of each lot located within a distance of 125 metres from the mean high tide mark is labeled as "B" and the corresponding lot number. The portion of the lot east of the 125 metre mark is labeled as "R" and the corresponding lot number.

[52] Aceituno Mar Vista Estates, SA is the sole, registered owner of Lot B1. See Exhibit C-23b.

[53] Folio Real No. 5-130540-000. Brett Berkowitz owns 100% of the shares of Guacimo Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.67, B.68.

[54] Guacimo Mar Vista Estates, SA is the sole, registered owner of Lot B3. See Exhibit C-24b.

47. Brett Berkowitz owns and controls Lot B6,[57] which comprises a total of 7,316.35 m^2, 2,773.95 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 24 September 2003.[58]

48. Glen Gremillion owns and controls Lot B7,[59] which comprises a total of 7,365.18 m^2, 3,012.20 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. The acquisition was made on 21 April 2004.[60]

49. Trevor and Aaron Berkowitz jointly own and control Lot B8,[61] which comprises a total of 7,444.45 m^2, 2,830.91 m^2 of which is located within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean.[62] The acquisition was made on 21 September 2003.[63]

D. The General Expropriatory Measures

50. On 9 July 1991, the Government issued Executive Decree no. 20518-MIRENEM,[64] (the "1991 Decree") which constituted a declaration of intent to establish a park to be known as *Parque Nacional Marino Las Baulas de Guanacaste* (hereinafter "the Park"). The terms of the Decree stipulated: (i) that the eastern boundary of the Park would be fixed at 125 metres inland from the mean high tide mark along the shore of the Pacific Ocean;[65] and (ii) that the Park itself would not exist until all of the land encompassed within its planned boundaries had been lawfully acquired by the Government.[66]

51. On 10 July 1995, the Government enacted legislation providing for establishment of the Park, which came into force on 16 August 1995. Under this legislation (Ley No. 7524

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55 Folio Real No. 5-130542-000. Brett Berkowitz owns 100% of the shares of Pochote Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.69, B.70.

56 Pochote Mar Vista Estates, SA is the sole, registered owner of Lot B5. See Exhibit C-25b.

57 Folio Real No. 5-130543-000. Brett Berkowitz owns 100% of the shares of Saino Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.71, B.72.

58 Saino Mar Vista Estates, SA is the sole, registered owner of Lot B6. See Exhibit C-26b.

59 Folio Real No. 5-130544-000. Glen Gremillion owns 100% of the shares of Vacation Rentals, SA, a company established under the laws of Costa Rica. See Appendices B.75, B.76.

60 Vacation Rentals, SA is the sole, registered owner of Lot B7. See Exhibit C-27b.

61 Folio Real No. 5-130545-000. Each brother owns 50% of the shares of Nispero Mar Vista Estates, SA, a company established under the laws of Costa Rica. See Appendices B.73, B.74.

62 Exhibit C-28c corresponds to Decree of Public Interest for Lot B8. However, article 1 of the Decree of Public Interest for this lot incorrectly refers to an area of 2,878.98 square metres; the correct area is 2,830.91 square metres.

63 Nispero Mar Vista Estates, SA is the sole, registered owner of Lot B8. See Exhibit C-28b.

64 Exhibit C-1b.

65 In Costa Rica, the first 50 metres of land, extending inland from the mean high tide mark, is deemed as an "inalienable zone," which cannot be occupied, etc. by a private landholder. Accordingly, fixing the eastern boundary of the Park 125 m inland from the mean high tide mark would have required the Government to expropriate the next 75 m of any privately held land fronting the beach.

66 By its own terms, the 1991 Decree stated that it would not come into force until after this condition had been satisfied.

hereinafter the "1995 Park Law"),[67] the eastern boundary of the Park was fixed at 125 metres west (i.e. seaward or "*aguas adentro*") from the mean high tide mark, rather than being fixed at 125 metres east from the mean high tide mark, which is what would have been the boundary of the Park contemplated in the 1991 Decree. In 1995, the Government was obviously not prepared to maintain the boundary envisaged in the 1991 Decree because it was not prepared to expend the funds necessary to expropriate all of the privately held land required. The inchoate Park's new boundary did not come about by accident. It was the result of a deliberate policy decision to create a marine park.[68]

52. After its election in 2002, the Administration of President Pacheco adopted a new policy posture with respect to the Park's eastern boundary. Demonstrating its intention to extend the boundary inland 125 metres from the mean high tide mark, the Government adopted Resolution No. 2238-2005-SETENA on 30 August 2005.[69] With this Resolution, the Government purported to suspend environmental assessment proceedings for privately owned land located 125 metres inland (rather than seaward) from the mean high tide mark. Such proceedings were putatively required in order for one of the permits necessary to develop land to be issued to any investor.

53. Then, on 23 December 2005, the Attorney General issued a statement conveying his opinion about the Park's eastern boundary stating that it was inland from the mean high tide mark.[70] The Government failed to issue a policy concerning how it intended to comply with its own municipal expropriation law, or with its obligations under international law, as a result of this interpretation. In the same vein, the Government also failed to announce any legislative agenda for the amendment of the 1995 Park Law, in order to realize the Government's policy aspirations. The Attorney General did not possess any authority to engage in the *de facto* amendment of the explicit terms of this legislation, so it was actually impossible for his opinion to change the words "*aguas adentro*" as found in the legislation.

54. The Government's 2005 change of heart appears to have been heavily influenced by the [at least partly clandestine] efforts of certain third parties, whose pecuniary interests would have been enhanced by a halt to any development in Playa Grande or Playa Ventanas. Those efforts appear to have been engaged immediately after entities controlled by Spence and Spence Co. began to ready the lots in their possession for development. Most notably, these investments included the installation of an eight-kilometre paved road, at a cost of approximately $500,000.00 to Spence and Spence Co. Replacing what had been an often-impassable dirt trail, the highway these Claimants constructed remains the only modern road connection between Playa Grande and Playa

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67 Exhibit C-1e.

68 As mentioned in note 65, above, the first 50 metres inland from the mean high tide mark is treated as "inalienable zone" under municipal law. The inalienability of this 50 metre strip of land, extending inland from the mean high tide mark, had also been previously recognized by legislation, which established the Tamarindo National Wildlife Refuge in 1990. Thus the 1995 law was drafted to establish park borders that went no further west than 125 metres from the mean high tide mark, and no further east than 50 metres from the mean high tide mark, thereby avoiding the need to expropriate any private property rights in beachfront land.

69 Exhibit C-1f.

70 Exhibit C-1g.

Ventanas and the rest of Costa Rica – thereby vastly improving the accessibility, convenience and commercial value of lots in both Playa Grande and Playa Ventanas.

55. It was apparent to all interested parties, including the Claimants, that by the time President Pacheco's term ended in 2006, the legal *status quo ante* remained intact. Apart from a rocky seaside ridge, known as Cerro el Morro, which demarcates the northern tip of the Park, its eastern boundary was simply not intended to extend inland. The non-legislative policy pronouncements of the Pacheco Administration would appear to have ended with the victory of the opposition National Liberation Party in the Parliamentary election of 5 February 2006 and the inauguration of President Arias on 8 May 2006.

56. It is not at all apparent, however, that the Government's policy on the Park's boundary, then or now, has been made in an objective and unbiased fashion. To the contrary, the public record today indicates that the Government's policies with respect to the Park have too often been marred by conflicts of interest and the untoward pecuniary influence of third parties on official decision-making. Such machinations have contravened fundamental precepts of fairness and transparency to the Claimants' detriment.

57. In any event, at all times the Claimants relied upon the legislation in force when they made each of their investment decisions. As such, none were in any way barred by the Government from exercising their property rights with respect to the sustainable development of their respective lots. The Claimants' reliance not only included the 1995 Park Law.[71] It also included Ley 7495, *Ley de Expropiaciones*, (the "Expropriation Law") which was sanctioned on 3 May 1995 and published and came into force on 8 June 1995.[72] The provisions of this law stated that – if the Government ever decided to expropriate lands such as those acquired by the Claimants between 2000 and 2007 – it would pay compensation to them on a like-for-like basis, ensuring that the Claimants would receive fair market value for surrendering their property rights in land declared of public interest.

58. Indeed, Claimant Brett Berkowitz took specific steps to ensure that his estate lots could be developed in an environmentally sensitive and profitable manner, consistent with the establishment of the proposed Park. In 2003, he met personally with the Minister of the Environment and Energy ("MINAE"), and received assurances that he would definitely be permitted to develop this real estate, even though large portions fell within the boundary envisioned in the 1991 Decree (but not within the boundary stipulated in the 1995 Park Law).

59. Further, the Berkowitz Claimants additionally relied upon the fact that the Government's own *Instituto Geográfico Nacional* (National Geographic Institute) had certified, on 24 June 2004 and 5 November 2004, that each of the lots at issue in their respective

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[71] Exhibit C-1e.

[72] The Expropriation Law has been modified since it was enacted. An important modification took place when the Administrative Contentious Procedural Code (*Código Procesal Contensioso-Administrativo)* or Law 8508 was published in 22 June 2006 and entered into force on 1 January 2008. Exhibits C-1c, C-1d.

claims lay outside of the boundaries of the Park. The Cophers and Holsten also relied on a similar assurance.[73]

60. On 21 June 2004, Brett Berkowitz received confirmation from Government officials that the park boundary fell to the west of the Claimants' lands after which he expended the capital and resources necessary to conduct an environmental assessment. The environmental assessment for his estate lots received the conditional approval of officials from Costa Rica's *Secretaría Técnica Nacional Ambiental* ("SETENA") on 3 December 2004. Two days later, Brett Berkowitz deposited his payment for the permit as approved. Inexplicably, however, SETENA officials failed to actually issue the permit, as required. When contacted by Brett Berkowitz two months later, SETENA officials claimed that no such application existed in their records. In spite of having been informed by Brett Berkowitz that he had kept copies of everything submitted, and thus could prove that an assessment had indeed been properly submitted and approved, SETENA officials never issued a permit and the land was accordingly never developed.

61. On 23 May 2008, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica (the "Court") decided a constitutional action resulting out of a challenge to a zoning regulation (which actually sought to regulate for a lower density) approved by the municipality of Santa Cruz that allowed development and construction projects within the area for Playa Grande and Playa Ventanas. In its decision the Court referred to the boundaries of the Park and stated that the limits of the park were 125 metres inland.[74]

62. On 27 May 2008, the Court issued a decision concerning lands owned by Marion and Reinhard Unglaube, which effectively extended the eastern border of the Park inward 125 metres inland (not seaward) from the mean high tide mark – without any amendment of the 1995 Park Law.[75]

63. The Court appeared to recognize the valuable property rights that would be affected by its decision – once its reasoning had been applied to all other beachfront landholders in Playa Grande or Playa Ventanas. The Court thus presented the Government with a simple choice: either the Costa Rican Ministry of the Environment and Energy ("MINAE") could expropriate all private property rights in land located within the newly defined boundaries of the Park – in compliance with the terms of the Expropriation Law – or it would be required to allow the kind of environmentally sensitive development proposed by landholders such as the Claimants to proceed – by granting all permits or authorizations required.

64. On 16 December 2008, the same Court issued another judgment concerning the Park's eastern boundary, which would unequivocally apply to all beachfront property holders in Playa Grande and Playa Ventanas.[76] The boundary line set by these same judges remained unchanged, but the choice they had afforded to Government officials seven

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[73] See Note 20, above.

[74] Exhibit C-1h.

[75] Exhibit C-1g.

[76] Exhibit C-1h.

months earlier did not. Instead, the Court now ordered the immediate annulment of all environmental assessment approvals previously granted to any beachfront landholders with rights in land now unambiguously stranded inside the redrawn boundaries of the Park. The Court further directed SETENA to immediately cease processing any new assessments on those lands and it directed MINAE to proceed with the lawful expropriation of all such lands immediately.

65. Together, these two judicial decisions constituted a final and binding prohibition on the development of all land within the eastern boundary of the park (i.e. all land situated within 125 metres of the mean high tide mark east). They also confirmed the Claimants' legitimate expectations that they would be entitled to like-for-like, fair market value compensation for the now-impending expropriation of their property rights. Not unexpectedly, in response to these two judgments, the bottom fell out of the real estate market in Playa Grande and Playa Ventanas, never to recover.

66. In response to the Court's order of December 2008 – that MINAE must immediately proceed with the expropriation of all private land within the Park's new eastern boundary – the Government did little to nothing. As of the date of the filing of this Notice only two of the Claimants' lots have actually made it to the point in Costa Rica's municipal expropriation process in which a final value has been assigned (much less compensation paid).[77] The rest of the Claimants' lots remain in a state of legal limbo. They cannot be developed – because the Court has irrevocably barred the grant of the necessary permits and approvals – and they cannot be sold for fair market value because they cannot be developed.

67. The effect of the current Government's seeming policy – of refraining from commencing or otherwise expeditiously completing the steps necessary to complete the expropriation process in respect of many of the Claimants' lots, while simultaneously refusing to grant the necessary permits for development to proceed – has been the *de facto* taking of their property rights in each lot.[78] By means of such tactics of interminable delay – contrary to the explicit instructions of its own Court – the Government has thereby managed to effectively expropriate the Claimants' lands without having paid prompt, adequate or effective compensation to them for the losses occasioned thereby.[79]

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[77] Lot A40 and Lot SPG2. In the case of SPG2, the interest payment is still outstanding for the portion of the land expropriated. It should also be noted that the Government has failed to expropriate or pay for the entire portion of SPG2 found within 125 metres of the mean high tide mark (it only expropriated 68 metres, rather than 75 metres), as it failed to expropriate the seven metre strip of land closest to the beach. Additionally, the government survey used in the expropriation process for SPG1 excluded a similar amount of beachfront coverage from the lot (i.e. approximately 7 metres in depth). Excluding this portion of the lot from the municipal expropriation process will deprive the Claimant of any direct compensation for its taking.

[78] *De facto* expropriation has also occurred in respect of the contiguous portions of certain of the Claimants' lots that do not lie within the 125 metre zone, but which have been rendered inutile by virtue of the taking of the majority of the parcel, without sufficient (or, in most cases, any) compensation being provided so as to ensure that *restitutio ad integrum* is accorded to the Claimants for each – recognizing the full extent of the deprivation being experienced for each parcel, in its entirety.

[79] In fact, the Claimants have learned that the Government's own Constitutional Chamber of the Supreme Court of Justice has recently declared that the expropriation process has not been carried out in accordance with the terms of the Respondent's own expropriation law.

E. The Lethargic Municipal Expropriation Process

68. The expropriation process established under the Expropriation Law involves an administrative phase and a judicial phase. The administrative phase involves official notification to the landholder, whom the Government presents with a determination of compensation for its surrender of all property rights in the land, the acquisition of which would have been declared to be in the public interest. The Government's determination of compensation is supposed to represent the fair market value of the rights to be surrendered, which should enable the expropriated person to acquire land of the same type and quality elsewhere. The judicial phase commences after a landholder has rejected the Government's initial determination of compensation due for the loss of its rights in the land at issue. Within six months after such rejection, the Government must petition the court for a final determination of the compensation to be paid. The Court is supposed to render its decision immediately after receiving up to two additional appraisals, both of which are provided by appraisers appointed by the Court from a list prepared by the Government.[80]

i. The Status of the Spence Claimants' Lots

69. Lot A40[81] was the subject of Public Decree No. 32 950-MINAE, which was issued on 1 February 2006 but not properly published until 30 March 2006 - declaring that the lot was subject to expropriation. An administrative appraisal was issued for this lot on 22 September 2006, which offered Guanacaste Sea Gull, SA approximately $\$54/m^2$ for the involuntary surrender of its land.[82] Through its investment enterprise, Spence Co. disputed this absurdly low appraisal and accordingly, on 12 April 2007, an expropriation decree was published for this lot (No. 004-2007-MINAE-SINAC).[83]

70. The Government commenced the judicial phase of the process in respect of Lot A40 on 17 April 2007, with physical possession being asserted over the land by 12 March 2008. It would take until 21 July 2011 for the Court to issue a final determination (under *Expediente No. 07-000438-0163-CA*).[84] The Court assigned a value to the lot of approximately $\$350/m^2$, plus interest, which does not come close to reflecting the fair market value of the lot as of the date Spence Co.'s ability to enjoy its property rights in it effectively ceased.

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[80] In describing this process by no means should the Claimants be taken as having ratified it as a suitable or effective means of carrying out the Respondent's obligations under the CAFTA. The egregious facts of this case powerfully indicate otherwise.

[81] Folio Real No. 5-042783-000.

[82] Exhibit C-16d. For the sake of consistency, the Claimants refer to monetary amounts in the US dollar ($) equivalent of Costa Rican Colones.

[83] The Claimants' claims with respect to the valuation of the properties will be further developed in their initial memorial. However, in order to provide the Tribunal with a point of reference, the Claimants submit that the appropriate valuation for their beachfront property ranges from $600 to $1200 (or more) per square metre, depending on the location and size of the particular lot at issue.

[84] Exhibit C-16h.

71. Moreover, to date the Government has still only paid the principal amount owing under the Court's decision for Lot A40.[85] It still owes approximately $105,466.51 in interest. Even after all amounts owing are eventually paid, they will not have been nearly enough to provide fair market value for the expropriated lot.

72. Two of the three large estate lots held by Spence Co. (SPG1 and SPG2) have also been subjected to expropriation. The expropriation proceedings for both lots were commenced with the publication of two decrees declaring the properties "of public interest" on 17 April 2007.[86] The initial amount offered for lot SPG1 in the administrative appraisal was approximately $32/m^2$.[87] This amount was rejected within the terms established in the Expropriation Law. Judicial proceedings were initiated by the Respondent in April 2008[88] and a judgment was issued on 26 February 2013.[89] This decision was appealed and admitted by the judge on 10 May 2013.[90] A final determination has not yet been reached for Lot SPG1.

73. For Lot SPG2, subsequent to the administrative appraisal[91] and the issuance of the Decree of Expropriation[92] for this property, judicial proceedings were commenced by the Government in 2008.[93] It was not until 14 December 2012 that this matter was finally decided in a final appeal decision where the court overturned a first judgment dated 29 February 2012, and assigned a value to the lot of approximately $350/m^2$.[94] To date the Government has paid only a small fraction of the amount owing under the Court's decision for Lot SPG2.[95]

74. The expropriation proceedings have been initiated for the four lots that were originally acquired by Spence (Lots V30, V31, V32 and V33). Decrees declaring the properties "of

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85 The Government deposited principal payments of for 132,107,770 CRC; (approximately $264,215 USD) on 14 December 2011 which was effectively paid on 15 February 2012 and deposited 24,100,740 CRC (approximately $48,201 USD) on 25 September 2012 which was effectively paid on 13 December 2012. Exhibit C-16i.

86 Exhibits C-20c and C-21c, respectively.

87 According to the administrative appraisal for the partial expropriation of Lot SPG1, this amount is comprised of 24,842,414 CRC for the value of the lot and 17,783,34 CRC for compensation for dividing the lot, resulting in a total of 42,625,961 CRC. Exhibit C-20d. Most of the administrative appraisals for the lots show two different dates: an "effective date of the appraisal" and the date for the appraisal's report. Where this is the case, the effective date of the appraisal is the one referred to in this document.

88 Exhibit C-20f.

89 Exhibit C-20g1.

90 Exhibit C-20g2.

91 According to the administrative appraisal for the partial expropriation of Lot SPG2 this amount is comprised of 36,393,912 CRC for the value of the lot and 30,418,000 CRC for compensation for dividing the lot, resulting on a total of 66,811,918 CRC. Exhibit C-21d.

92 Exhibit C-21e.

93 Exhibit C-21f.

94 Exhibit C-21h.

95 The Government deposited a payment of 42,625,961 CRC (approximately $85,250 USD) on 24 December 2012 which was effectively paid on 14 February 2013. Exhibit C-21i.

public interest" were issued for these lots in October 2007.[96] An administrative appraisal has been issued for Lots V30, V31, V32 and V33. The value of Lot V30 was appraised at approximately $406/m^2$;[97] Lot V31 was appraised at approximately $403/m^2$;[98] Lot V32 was appraised for approximately $407/m^2$;[99] and Lot V33 was appraised at approximately $390/m^2$.[100] Despite its commencement of the expropriation process, the Government has still failed to take the steps necessary to advance the administrative phase of its municipal expropriation proceedings in respect of each lot.

75. Inexplicably, the Government has not even begun the expropriation process for the other beachfront lots (for example Spence Co. lots C71, C96, SPG3, V59 and V61). Despite the fact that these lots are clearly identified in the Government's own maps, the Government has not even officially noticed these properties as being in the public interest. The Government clearly has no intention of even beginning the process to pay the Claimants compensation.

76. The lots owned and controlled by the Cophers and Holsten lie in a similar state of stasis. They were all declared "of public interest" on 9 October 2007 but, five years later, the Government has not even commenced the judicial part of the process (which has consumed over three years in all of the other cases anyway).

77. Even after the expropriations were declared (or otherwise came into force), in each case the Claimants have been required to continue paying taxes on lands they cannot put to any profitable use.

ii. The Status of Gremillion and the Berkowitz Claimants' Lots

78. The Berkowitz Claimants' lots have been mired in the Government's expropriation process for nearly seven years. The Government declared a public interest in the direct taking of the lots when it published a decree for each lot dated 1 December 2005.[101] Then in November 2006, the Government issued executive decrees expropriating the Claimants' lots, and in each case it offered an absurdly low amount of compensation of between $14.30 and $14.50 per square metre.[102]

79. Despite all of the years that followed, and due in no account to any acts or omissions of the Claimants in seeking like-for-like, fair market compensation for their lands, only two (Lots B3 and B8) of the lots have reached even a first instance decision.[103] The first

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96 See Exhibits C-3c, C-4c, C-5c and C-6c.

97 Administrative Appraisal AA-79-2008 set a value of 203,300 CRC per square metre for Lot V30. Exhibit C-3d.

98 Administrative Appraisal AA-77-2008 set a value of 201,400 CRC per square metre for Lot V31. Exhibit C-4d.

99 Administrative Appraisal AA-76-2008 set a value of 203,500 CRC per square metre for Lot V32 Exhibit C-5d.

100 Administrative Appraisal AA-75-2008 set a value of 195,700 CRC per square metre for Lot V33. Exhibit C-6d.

101 Exhibits C-23c, C-24c, C-25c, C-26c and C-28c. Exhibit C-23c corresponds to Decree of Public Interest of lot B1. However, under the decision section this decree incorrectly refers to Folio Real No. 5-130545-000, which is the Folio Real Number for Lot B8. The correct folio Real for Lot B1 is 5-130538-000.

102 Exhibits C-23e, C-24e, C-25e, C-26e and C28e.

103 There is a first instance decision for Lots B8 and B3, the other Estate Lots have only reached the 'initiation of judicial proceedings' stage and a decision has yet to be issued.

instance decision for Lot B3 was appealed by the Attorney General but no final decision has been notified yet to the Claimants. Until this point in the proceedings, the Government is obliged to pay approximately $88/m².[104]

80. For Lot B8, the first instance decision dated 31 May 2012 was appealed by the Claimants and the Attorney General within the period allowed in the Expropriation Law. However, due to procedural irregularities caused by the Court, the Berkowitz's appeal was not finally admitted until 13 May 2013.[105]

81. Thus far, for Lot B8 the Government is only obliged to pay approximately $347.77/m², plus interest, and then only for the 40% of the lot that falls within a distance of 125 metres from the mean high tide mark of the Pacific Ocean. [106]

82. To be clear, in none of these cases has the Government actually indicated its willingness to render compensation to the Claimants for the entire lot. Rather, officials have only deigned to dictate compensation for the portion of each lot lying within a distance of 125 metres from the mean high tide mark east of the Pacific Ocean. In doing so the Government is attempting to avoid responsibility for dramatically diminishing the value of the entire parcel of land, simply by not designating the entirety of the lots as expropriated.

83. Each of the Claimants' estate lots enjoyed access to public infrastructure on their eastern boundaries, including a road, but the Government has elected only to subject the western portion of each lot to expropriation. Adding insult to injury, court appraisers have relied upon such lack of access as a factor in assigning a lower value to the portions being expropriated. If the Government had expropriated each lot in *toto*, access to public infrastructure would have meant a higher value for the whole lot in every case.

84. Even after the expropriations were declared, in each case the Claimants have been required to continue paying taxes on lands they cannot put to any profitable use.

VI. LEGAL BASIS FOR THE CLAIM

85. With respect to Lots B3, B8, A40, SPG1 and SPG2, the grounds for the claim are Articles 10.7 and 10.4 of the CAFTA. Paragraph 1(c) of Article 10.7, which requires the Respondent to pay "adequate" compensation for expropriation, which paragraph 2(b) states shall be "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place." The appraisal amounts for Lots B3, B8, A40, SPG1 and SPG2 were much lower than their fair market value at the time of their expropriation.

86. The combined effect of Articles 10.3 and 10.4 of the CAFTA also requires the Respondent to accord to the Claimants and their investments treatment no less favourable than the better of which it has provided to its own nationals or to the investments of

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[104] Exhibit C-24g.

[105] Exhibit C-28g3.

[106] Exhibit C-28g1.

investors from third countries. The Government has failed to meet this standard. For example, pursuant to an ICSID award dated 16 May 2012, two German nationals, Marion and Reinhard Unglaube, are receiving more favourable treatment than the Claimants because they were paid more per square metre for their expropriated land and because payment of the monies owed to them has now been expedited.[107] This is in spite of the fact that the lands at issue in this case were of demonstrably higher value, given how they constitute finished lots accessible by existing roads, and with water and electricity readily available.[108]

87. With respect to all of the Claimants' beachfront land holdings, as recorded in detail above, it is apparent that the Respondent has utterly failed to provide the Claimants either with an effective right to the prompt review of the expropriation of their lands or with prompt payment for having engaged in these takings, as required under Article 10.7 of the CAFTA and the various obligations undertaken by the Respondent towards the investors and investments of third countries, as noted in the preceding paragraphs.

88. This is particularly the case with respect to the lots owned indirectly by Spence, the Cophers and Holsten, which were declared of public interest even before the Court had rendered its first decision in May 2008. The expropriation process purportedly began for these lots on 9 October 2007, which constitutes the valuation date for each. As of 1 January 2009, the Government was compelled, under its CAFTA obligations, to carry out all of these expropriations promptly, which it has manifestly failed to do.

89. The same failings apply in respect of the Claimants' lots that have still not seen even the commencement of an official expropriation process, or have proceeded little further, despite the fact that over four years have passed since the Court directed Government officials to immediately carry out expropriations of the land affected by its final determination of the boundaries of the Park, or alternatively to permit environmentally responsible development to proceed. Since 1 January 2009, the Claimants have continued to sit on their hands, watching these particular lots firmly ensconced in legal limbo, where development is prohibited but the official expropriation process has not yet even been initiated.

90. In the handful of cases where the Government has begun to at least putatively honour its obligation – to provide prompt access to an institutional mechanism for determination of their expropriation claims or the prompt payment of adequate compensation – the pace has been lethargic. Worse still is the fact that Government officials have initiated the process by basing their offer of compensation on an absurdly low appraisal value, which amounts to little more than contempt for the process or for the rights of the affected Investor.

91. This is particularly the case with respect to the eastern-most portions of the Berkowitz Claimants' lots, each of which has been arbitrarily excluded from the official

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[107] The Unglaubes were apparently paid an amount of approximately $423 per square metre for their beachfront land, plus interest; the last instalment of which was provided before the end of 2012.

[108] The Unglaube land, for which compensation for expropriation has been arranged, did not benefit from access to any similar infrastructure enhancements.

expropriation process - no doubt as a cost-saving expedient. As of 1 January 2009, the Government was compelled, under its CAFTA obligations, to provide prompt compensation for the each entire lot, which it has manifestly failed to do.

92. Costa Rica's responsibility for failing to observe any of the aforementioned CAFTA obligations vis-à-vis the Claimants was engaged when the treaty came into force between it and the United States of America, on 1 January 2009. Pursuant to Article 10.1(3) of the CAFTA, Costa Rica is bound by any acts, omissions or other facts pertaining to a state of affairs that arose or continued to exist on or after 1 January 2009. As of this date, in addition to its existing obligations to the Claimants, the Respondent became obligated under the CAFTA: (1) to provide the Claimants with prompt access to a fair and effective municipal expropriation process; and (2) to provide the Claimants with prompt payment of adequate and effective compensation for its expropriation of their lands.

93. It has now been more than four years since the CAFTA came into force as between the parties. Every day since 1 January 2009, the Claimants have been faced with the same problem: they have land that they cannot develop or sell for a fair price and the Government is doing little to nothing about it – in spite of its international obligations to the contrary.

94. There is no definition of "prompt" that could extend long enough to cover the amount of time the Claimants have already been waiting to receive adequate and effective compensation for the deprivations that commenced for them no later than 24 May 2008.

95. Finally, the treatment accorded to the Claimants, in *toto*, constitutes a breach of the standard of fair and equitable treatment owed to them under customary international law and compensable under Article 10.5 of the CAFTA. By means of its various acts and omissions, the Respondent has conducted its expropriation process in an arbitrary manner, thereby failing to accord administrative due process to the Claimants. One example of treatment inconsistent with the fair and equitable treatment standard recalled in Article 10.5 includes launching the municipal expropriation process in respect of only some of the Claimants' beachfront lots, but then arbitrarily refraining from following through on continuing with the process for certain lots, thereby stranding the Claimants in a legal limbo, in which they cannot enjoy the use of their investments, whilst also seeing no prospect of receiving even a determination of compensation for such deprivation.

96. Other examples of the Respondent's failure to accord fair and equitable treatment, in failing to maintain an effective compensation process for its expropriation of the Claimants' lands, include the failure to base compensation decisions upon the proper dimensions of various individual lots, either by basing specific valuation on incorrect land surveys or by arbitrarily excluding portions of lots from a determination of compensation. Most recently, the Respondent has in some cases indicated that the value of certain lots was zero, on the capricious basis that the only alternative use of the land - today - would be as part of a larger conservation area. The very fact that similar lots are still receiving valuations above zero demonstrates the caprice of such decisions. Such decisions are also manifestly inconsistent with customary international law, because they require one to adopt a temporally absurd valuation analysis, in which the act of expropriation itself [negatively] impacts upon the compensation to be paid.

VII. ISSUES

97. Since 1 January 2009, has the Government of Costa Rica failed to provide the Claimants with prompt, adequate and effective compensation, representing fair market value for their investments, for the Respondent's *de facto* and *de jure* takings of land affected by the fixing of the boundaries of the Park in 2008 or by the commencement of expropriation proceedings at some earlier date?

98. Since 1 January 2009, has the Government of Costa Rica failed to provide the Claimants with prompt review of either the *de facto* or the *de jure* taking of lands affected by the fixing of the boundaries of the Park in 2008, as well as prompt, good faith valuation of the lands so affected?

99. Since 1 January 2009, has the Government of Costa Rica failed to accord fair and equitable treatment to the Claimants or their investment enterprises, with respect to any of the ways in which Park policies have been formulated or implemented by officials who have exercised public authority in spite of their manifest conflicts of interest or otherwise?

100. Has the Government of Costa Rica provided better treatment to investors from third countries, or to its own investors, in respect of any of the means described above?

VIII. RELIEF SOUGHT AND DAMAGES CLAIMED

101. The Claimants will seek the following relief from an Arbitral Tribunal for the Respondent's breaches of CAFTA Articles 10.3, 10.4, 10.5 and/or 10.7:

(a) A declaration that the Respondent has violated its obligations under the CAFTA;

(b) An order that the Respondent immediately pay to the Claimants damages of not less than US $49 million, before interest, as compensation for the losses caused by, or arising out of, the Government of Costa Rica's conduct, which is inconsistent with its obligations contained within Part A of the CAFTA Chapter 10;

(c) All of the damages incurred in contesting the Respondent's conduct and all of the costs incurred in proceeding with this arbitration, including all legal and other professional fees and disbursements;

(d) Pre-award interest at a rate to be fixed on the basis of the average deposit rate prevailing in the national banking system of Costa Rica at all relevant times, but nonetheless paid out in US dollars;

(e) Post-award interest at a rate to be fixed on the basis of the average deposit rate prevailing in the national banking system of Costa Rica on the date of the award, but nonetheless paid out in US dollars;

(f) Payment of a sum of compensation equal to any tax consequences of the award, if necessary in order to maintain the award's integrity;

(g) Reimbursement of all property taxes paid after the effective date of expropriation;

(h) An order that any damages or costs awarded to the Claimants shall be paid out to them, by means of wire transfer, in United States currency, to the foreign financial institutions of their choosing, without delay, and in no case later than two months from the date the award is recognized or otherwise becomes enforceable pursuant to the terms of the CAFTA Article 10.26(6); and

(i) Such further relief as counsel may advise and that a tribunal may deem appropriate.

IX. LANGUAGE OF THE ARBITRATION

102. Pursuant to Article 19 of the UNCITRAL Rules, the Claimants propose that English be used as the sole procedural language.

X. APPOINTMENT OF ARBITRATOR

103. Pursuant to the CAFTA Article 10.16.6, the Claimants hereby appoint Mr. Mark Kantor, Esq., of Washington D.C. as an arbitrator who shall adjudge the parties' dispute, either sitting as sole arbitrator, subject to the agreement of the parties, or as a member of a three-person tribunal, as per Article 10.19.1 of the CAFTA. Mr. Kantor has confirmed that he is independent of the parties.[109]

XI. NOTIFICATIONS

104. All required notifications for the Claimants should be sent to:

Dr. Todd Weiler
#19 - 2014 Valleyrun Blvd.
London, ON N6G 5N8
Canada

Ms. Tina Cicchetti
Mr. D. Geoffrey Cowper Q.C.
Ms. Tracey Cohen
Ms. Mónica Jimenez Gonzalez
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Lic. Vianney Saborío Hernández
Barrio Maynard #56
San Rafael, Escazú
San José, Costa Rica

10 June 2013

Counsel for the Claimants:

[109] Mr. Kantor's disclosure in this respect is attached as Appendix D.

Dr. Todd Weiler
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Served to:

Dirección de Aplicación de
Acuerdos Comerciales Internacionales
Ministerio de Comercio Exterior
San José, Costa Rica