

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

CASE NO. UNCT/13/2

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

**FIRST WITNESS STATEMENT OF
BRETT ELLIOT BERKOWITZ**

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Submitted April 25, 2014

1. My name is Brett Elliot Berkowitz. I am a citizen of the United States of America and reside at 115 Malinche Reserva Conchal Brasilito, Guanacaste, Costa Rica.¹
2. I submit this witness statement on behalf of myself and my two sons, Trevor B. Berkowitz and Aaron C. Berkowitz, in support of the Claimants' First Memorial in connection with a DR-CAFTA claim brought by the Claimants against the Republic of Costa Rica (the "Respondent" or the "Government") pursuant to the UNCITRAL Arbitration Rules with its seat in Washington, D.C.
3. This witness statement was prepared in collaboration with the attorneys for the Claimants in this proceeding, following several meetings and consultations with me. However, this statement accurately reflects my knowledge and recollection of the facts described herein.

1 Appendix A.6.



This testimony was drafted in English, which is my first language and the language in which I would be prepared to testify, if necessary.

4. I am a chiropractor and practiced as such since 1978 in California, USA. In addition to practising as a chiropractor, I have experience in the construction industry, which I have gained over the years by working as supervising contractor in various construction projects.
5. I fell in love with Costa Rica and its people after having travelled on a surf trip to this country for the first time in 1991. After this trip, I came back several times before finally settling here. Not only did I like Costa Rica as a place to reside permanently, but I could also see great potential for successful business opportunities.
6. In October 1992, while surfing, I had a serious injury that no longer allowed me to practice as a chiropractor. I was limited to performing only administration work. As a result, I sold my practice and decided to make a gradual move to Costa Rica. I became a permanent resident of Costa Rica in 1994.
7. In early in 2003, I acquired a piece of property that comprised more than 17 hectares with a considerable amount of beach frontage in Playa Grande. I saw the project as an excellent investment opportunity to develop the property into a low-density, highly exclusive beachfront and beachside residential housing community.
8. At the time of the purchase, the property was already subdivided into twenty-four, seven thousand square meter parcels. The parcels were stamped with all of the necessary official seals in order to be legal lots categorized as "*parcelas agricolas*" in full accordance with Costa Rican law. These parcels were approved for up to a ten-thousand square foot home. This zoning was in complete harmony with my vision for a low-density, highly exclusive beachfront - beachside residential community. I made a small down payment in order to hold the property in 2003 and before I was due to make the final closing payment, I began all legal formalities of the entitlement process before local entities in order to get permits and services for my lots before I had to come up with the lion's share of the purchase price.
9. As a key factor in making the decision to go through with the purchase of the property, in early 2003 I met with the then Minister of the Environment, Carlos Manuel Rodriguez Echandi, in his office in San José. I met with Mr. Rodriguez in the presence of my attorney, Alejandro Montealegre Isern in order to go straight to the source, the highest-ranking government official for affairs of the environment.
10. During the meeting I explained to the Minister that I intended to invest a large share of my life savings in property in Costa Rica. I was relying on what was the legislation in force at the time, the 1995 Park Law. However, in order to go forward with the final terms of the purchase of the investment and be prudent about my decision, I needed to confirm what I understood the administration's policy was with respect to the conflict created by the contradictory legislation: the 1991 Decree and the 1995 Park Law,



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

11. The Minister confirmed my understanding by stating that the administration's policy was not to expropriate the private property which was "adjacent" to the park nor were they intending to prevent the development of those privately held properties "adjacent" to the park. Furthermore, he confirmed that his administration did not support the expansion of the Park beyond the boundaries of the Park established by the 1995 Park Law. He added that the privately held properties could be developed as long as the proposed developments were low density and followed the appropriate mitigation practices that were required for building near turtle nesting beaches. In summary, the Minister confirmed my understanding.
12. After impressing once again upon the Minister the fact that a good part of my life's savings were going to be devoted to this project, I asked him for something in writing that I would be able to base my final decision whether or not to move forward with the execution of the main purchase contract. He informed me that a directive would be forthcoming from his Ministry as to his administration's position in writing on the rights of the private lands bordering the park immediately following an upcoming meeting which he had planned with all of his heads of department and parks together with members of various non-governmental organizations who were also requesting his administration's position be clearly stated in reference to the Baulas Marine Park.
13. Within several weeks of my meeting with Mr Rodriguez, true to his word, he held a meeting on the 18th of June 2003, where various government officials and representatives from NGO's gathered to discuss the preparation of a project to modify the Bill to Extend and Consolidate the National Marine Park Las Baulas de Guanacaste (*Proyecto de Ley de Ampliación y Consolidación del Parque Nacional Marino Las Baulas de Guanacaste*) which had been presented before the Legislative Assembly. The minutes of the meeting, signed by Minister Rodriguez, had answers to all of the questions I posed during my private meeting with him. Among the statements, it was clearly stated that the Pacheco/Rodriguez administration were not going to pursue the expropriation of the privately held properties (which had fallen into a storm of controversy as to whether or not they were inside or outside the boundaries of the Park as defined by the July 10, 1995



Park Law 7524). Additionally, it was clearly stated that those very same privately-held properties should submit themselves to a "voluntary regimen of low density and low light emanation development".² In March 2003, I retained the professional services of an Environmental Engineer as well as a Forestry Engineer to perform the particular technical studies needed for the entitlement process in order to get the permits needed to acquire services to the lots.³ The first construction in the project was to be done on Lot B5 which was owned by me via one of my companies: Pochote Mar Vista Estates S.A. The home design reflected all of the preventive elements deemed necessary in order to maximally mitigate the impact of the home on the environment. Specifically, the home was designed in a way as to minimize the emission of light emanating from the home through the use of strictly vertical lighting and extended eaves and fascia to block most of the indirect illumination from the home.

- 14. Later in 2003, sixteen of the 24 parcels were transferred to other corporations. With respect to the lots that are relevant to this arbitration, on 6 September 2003, six beachfront estate lots B1⁴, B3⁵, B5⁶, B6⁷, B7⁸, and B8⁹ were acquired by my corporations, Aceituno Mar Estates A S.A.¹⁰, Guacimo Mar Estates C S.A.¹¹ Pochote Mar Vista Estates F S.A.¹², Saino Mar Vista Estates F S.A.¹³, Jocote Mar Vista Estates G S.A.¹⁴, and Nispero Mar Vista Estates H S.A.¹⁵¹⁶ Subsequently, I sold three lots, B2, B4, and B7 to third-party purchasers. Lot B7 was acquired by Glen Gremillion, through his company, Vacation Rentals, S.A. on 3 March 2004. I transferred Lots B1 and B8 as a gift to my two adult sons, Aaron Berkowitz and Trevor Berkowitz, who jointly own and control both lots.¹⁷

- 15. The property I bought is an absolutely beautiful property! It had everything going for it, a gorgeous white-sand beach, great waves right out in front, and a peaceful and natural setting inland from the beach. It had about 312 linear meters of white sand beach

2 Exhibit C-53 030716 Minutes from meeting between government agencies.
3 Exhibit C-52 030300 Lots B1, B3, B6, B7 Forestry Study 2003.
4 Folio Real No. 5-130538-000.
5 Folio Real No. 5-130540-000.
6 Folio Real No. 5-130542-000.
7 Folio Real No. 5-130543-000.
8 Folio Real No. 5-130544-000.
9 Folio Real No. 5-130545-000
10 See Exhibit C-23b.
11 See Exhibit C-24b.
12 See Exhibit C-25b.
13 See Exhibit C-26b.
14 See Appendices B.75, B.76.
15 See Appendices B.73, B.74.
16 Exhibit C-54 030906 Lots B1 and B3 Public registration of transfer.
17 Exhibit C-55 030304 Lot B7 Purchase by Vacation Rentals.



frontage and legally titled to the fifty meter line (a real rarity in Costa Rica).¹⁸ As I stated earlier, I bought this property with the intention of building luxury, environmentally friendly houses that would appeal to a high-end market. I also envisioned designing and building a house for me and my family on Lot B5. Around February and March 2004, I sold three of my beachfront lots, Lots B2, B4 and B7, in order to acquire funds to develop my other lots. I sold Lot B2 for \$425,000, Lot B4 for \$400,000 and Lot B7 for \$425,000. I considered these sales to be at a price below market value, but I needed to raise funds quickly in order to continue the development of the remaining lots.

16. In June 2004, the National Geographic Institute (*IGN*), which at the time was part of the Ministry of Public Works and Transport (*MOPT*) confirmed that some of my properties, Lot B1, which I had given to my sons, and Lots B3, B6, and B7, which I had sold to Glen Gremillion, did not make part of the extension of the Park.¹⁹
17. In order to move forward with the construction of the house in Lot B5, on 25 November 2003, I requested the environmental viability before SETENA.²⁰
18. On 5 November 2004, I submitted the environmental impact study to SETENA in order to get the environmental viability for Lot B5. This is a prior condition that needs to be met prior to receiving a construction permit. I received a response from SETENA on 3 December 2004, communicating that they had reviewed my file and SETENA had approved that the process for the environmental evaluation proceeding for my lot could move forward to the following stages.²¹
19. As required by the letter, I immediately paid the environmental warranty deposit required for the process to continue. However, and with no explanation, SETENA officials failed to actually issue the permit. Two months after complying with the requirements stated in the December letter, I contacted SETENA to enquire about the environmental evaluation proceeding. SETENA officials claimed that no such application existed in their records. This answer was not rectified even after I informed them that I have copies of my submission to SETENA and SETENA's favourable response showing that I complied with the process. SETENA officials never issued a permit.²²
20. Our intention to develop the land was finally barred by the issuance of SETENA Resolution 2238 of 2005. This resolution suspended the environmental evaluation for all land located within 125 metres inland. Therefore, I was deprived of building the home I

18 Exhibit C-56 Panoramic Photos of B Lots from Playa Grande.

19 Exhibit C-57 040621 Lt Dept de Geodesia to IGN explaining Lots B1, B3, B6, B7 properties outside Park, Exhibit C-58 040621 Lots B1, B3, B6, B7 Lt MOPT to Admin Environment Tribunal properties outside Park.

20 Exhibit C-59 041105 Lot B5 Environmental Assessment Application.

21 Exhibit C-60 041203 LOT B5 Lt SETENA and B. Berkowitz.

22 Exhibit C-61 051206 LOT B5 Payment by Pochote Mar Vista States SA to MINAE.



envisioned for me and my family in Lot B5 and none of the B Lots I had originally purchased could be developed.

21. On 1 December 2005, the Government issued several Decrees declaring all the B Lots to be land of public interest and subject to expropriation.²³ In light of my discussion with the Minister, I was surprised and dismayed at this decision by the Government.
22. When describing how our lots have been subject to expropriation proceedings and the current status of these proceedings, I will refer to my lots and my sons' lots (Lots B1, B3, B5, B6 and B8). I will not refer to Glen Gremillion's property as I understand he will provide a witness statement of his own with respect to his investment in Lot B7.
23. Later, on 22 September 2006, the Ministry of Finance issued administrative appraisals for all lots.²⁴ The expropriation affected only a portion of the total area of the lots, leaving us a small piece of the lot. The administrative appraisals provided a value to the portion of the total area of the lots being expropriated. The value assigned to this portion of land amounted to C7,200 and C7,300 per square meter. Normally, when lots are not expropriated in their entirety, the appraisers take into account the damages for the remnant. In our case, the amounts in the administrative appraisals were ridiculously low and furthermore failed to include the compensation for damages to the remnant portion of my and my sons' land. In addition, the administrative appraisal amounts which were supposed to be deposited in good faith and in a timely fashion have yet to be deposited now some nine years after the lots were first noticed for expropriation. I was surprised by the fact that the administrative appraisals were extremely low, they were not even close to representing the fair market value for the lots. In addition, the administrative appraisals amounted to only a fraction of the value of the property for tax purposes (*Impuesto de Bienes Inmuebles*); these values form the basis of the property taxes payable to the Municipality of Santa Cruz. The administrative appraiser's final amounts for the B Lots provide values of C7,200 and C7,300 per square meter.
24. We presented objections to the amounts established in the administrative appraisals for all lots on 15 November 2006.²⁵ These led to the issuance of Decrees of Expropriation for all lots on 27 November 2006 and then triggered the commencement of the judicial proceedings.²⁶
25. In addition to objecting to the administrative appraisals, we also considered that the declaration of public interest of Lots B3, B5, B6 and B8 was illegal and challenged these decrees requesting that they be revoked by the Minister. This challenge was finally

23 Exhibits C-23c, C-24c, C-25c, C-26c, C-28c.

24 Exhibits C-23d, C-24d, C-25d, C-26d, C-28d.

25 Exhibit C-23d1 Lot B1 061115 Objection to the Administrative Appraisal; Exhibit C-24d1 Lot B3 061115 Objection to the Administrative Appraisal, Exhibit C-25d1 Lot B5 061115 Objection to the Administrative Appraisal; Exhibit C-26d1 Lot B6 061115 Objection to the Administrative Appraisal, Exhibit C-28d1 Lot B8 061115 Objection to the Administrative Appraisal.

26 Exhibits C-23e, C-24e, C-25e, C-26e, C-28e. Exhibits C-23f, C-24f, C-25f, C-26f, C-28f.



resolved by the Minister of MINAE on March 22, 2006. In his decision, he dismissed the challenge after considering that the Expropriation Law did not foresee any remedy against the decrees of public interest.²⁷

26. Our lots were then subject to judicial proceedings, which continued with new judicial appraisals that are meant to assist the judge in deciding what is the fair price for the expropriated land. The B Lots were all the subject of new judicial appraisals. The methods used to reach a fair price and the results stemming from these appraisals seem inconsistent to me given that the methodology and the results of the appraisals over one same property varied extensively.
27. Below I set out a brief summary of what were the amounts decided by the appraisers for the Lots B1, B3, B5, B6 and B8.

Lot B1

28. Lot B1, owned by my two sons, was subjected to a first and a second judicial appraisal. The criteria for the first judicial appraisal varied in comparison to the administrative appraisal and to the second judicial appraisal given that it took into account damage to the remnant.
29. The Administrative Appraisal, dated 22 September 2006, had assigned a value to the portion of the land to be expropriated (2,838.41m²) that amounted to a total of C20,436,552.00, an equivalent of C7,200 per square meter.²⁸
30. Later, in the first judicial appraisal that took place on 6 March 2007, the appraiser confirmed the price per square meter to be C7,200. However, contrary to what was done in the Administrative Appraisal, the appraiser took into account damages to the remnant of the land in his calculations. After taking this and other factors into account the appraisal amounted to C23,259,109.18.²⁹
31. Finally, in the second judicial appraisal for Lot B1, dated 5 November 2009, the expert valued the land using the Comparative Method or the Method of Comparable Sales, which consists in comparing the land to be expropriated to other similar lots. He determined that the price per square meter for Lot B1 was C535,500. His calculation for the land to be expropriated amounted to a total of C1,519,968.555. In his observations the appraiser stated that the Administrative Appraisal had failed to present any comparative amount to reach a value and therefore the Administrative Appraisal (No AA-116-2006) did not comply with Article 22 of the Expropriation Law.³⁰

27 Exhibit C-62 061205 Challenge to Decree of Public Interest, Exhibit C-63 060322 Lots B3, B5, B6, and B8 Decision to Challenge Decrees of Public Interest.

28 Exhibit C-23d Administrative Appraisal.

29 Exhibit C-23f1 Lot B1 091105 First Judicial Appraisal.

30 Exhibit C-23f2 Lot B1 091105 Second Judicial Appraisal.



32. Since the second judicial appraisal of 2009, the expropriation proceeding has not moved forward. No substantial decision has been issued with respect to the expropriation of this lot.

Lot B3

33. On 13 September 2007, the judicial appraiser valued the portion of the land to be expropriated, 2,736.77 square meters at a total of C1,209,652,340, an equivalent of C442,000 per square meter. Even though the expropriation was over a section of the total area of the lot, the appraiser failed to calculate the damages arising from the remnant for my property.
34. Since the first judicial appraisal the expropriation proceedings have not moved forward.

Lot B5

35. The first judicial appraisal for Lot B5 took place on 15 March 2010. The appraiser confirmed the price set in the Administrative Appraisal, C20,728,656 or the equivalent of C7,200 per square meter. There was no analysis with respect to the damages arising from being a partial expropriation and leaving a remnant.³¹
36. The second judicial appraisal took place in May 2013. In this appraisal the expert considered damages with respect to the remnant. The appraiser calculated damages to the remnant (4,413.55 m²) equivalent to C1,151,936,550. He also calculated the price for the expropriated area, which was calculated by multiplying the area 2,878.98 square meters times the price per square meter, C435,000, which amounted to a total of C1,252,356,300. He finally set the final price by adding the two values (1,51,936,550 plus 1,252,356,300) reaching a final compensation of C2,404,292,850.³²
37. The judge has yet to make a decision on the fair price for the property being expropriated for Lot B5.

Lot B6

38. The first judicial appraisal for Lot B6 was prepared on 26 August 2007. The expert appraised the portion of the land to be expropriated (2,773.95 square meters) and determined that the value was \$845.42 dollars per square meter, which resulted in a total of \$2,345,152.81 dollars for the total area of 2,773.95 square meters. The expert converted this amount to Colons at an exchange rate of \$520 dollars for each Colon, which resulted in a total price of C1,219,479,460.00. The damages to the remnant were not calculated in this first appraisal.³³

31 Exhibit C-25f1 100315 Lot B5 First Judicial Appraisal.

32 Exhibit C-25f2 130500 Lot B5 Second Judicial Appraisal.

33 Exhibit C-26f1 070826 Lot B6 First Judicial Appraisal.



39. The Government has not issued any substantial resolution for Lot B6 ever since the 2007 first judicial appraisal.

Lot B8

40. The first judicial appraisal for Lot B8 took place on 12 April 2007. The expert appraised the portion of the land to be expropriated and determined the value to be \$800 dollars per square meter, which resulted in a total of \$2,264,728 dollars for the total area of 2,830.91 square meters. The expert converted this amount to Colones at an exchange rate of 12 April 2007 equivalent to \$520 a dollar (¢416,000/m²) which resulted in a total price of ¢1,177,658,560.00. The damage to the remnant was not calculated in this first appraisal.³⁴
41. The second judicial appraisal was prepared on 8 March 2010. The land to be expropriated was appraised at a total of ¢325,973,550.00. The appraiser determined that the lot is located in an area that has hotels and luxurious developments and therefore the desirability of this lot would be high. He set a price per square meter of ¢115,185.³⁵ The damage to the remnant was not calculated in this appraisal.³⁶
42. On 31 May 2012, the Contentious Administrative and Civil Finance Court issued Decision No. 1263-2012, on the judicial expropriation proceedings regarding Lot B8, owned by Nispero Mar Vista Estates H SA. The Court decided that the fair price for the land being expropriated was ¢175,000.00 per square metre and a total of ¢495,409,250.00 for the entire portion taken. The Decision also determined that interest should be paid by the Government on the difference between the administrative appraisal and the compensation decided in this decision, from the day in which the Government attained possession of the lot, until compensation had been paid in full.³⁷
43. On 2 September 2012, the Administrative and Finance Judge clarified its decision by stating that the Government must pay interest over the difference between the administrative appraisal and the compensation fixed in the decision, starting on 9 November 2008 which is when the Government took possession over my land.³⁸
44. Decision No. 1263-2012 was appealed by both parties and this appeal was resolved on 30 July 2013, by the Contentious Administrative and Finance Court. This Tribunal considered that fair compensation for Lot B8 is ¢115,185.00 per square meter, for a total compensation of ¢326,078,386.35.³⁹

34 Exhibit C-28f1 070412 Lot B8 First Judicial Appraisal.

35 The amount should be ¢115,147.97, the math on the Second Judicial Appraisal for Lot B8 was incorrect.

36 Exhibit C-28f2 100308 Lot B8 Second Judicial Appraisal.

37 Exhibit C-28g1.

38 Exhibit C-28g2, Lot B8 110902 First Judgment clarification and additions.

39 Exhibit C-28h1 Lot B8 130730 Appeal Decision.



45. It is also worth mentioning that the Government took possession of my lots and my sons' lots even though the Government never deposited or paid us any of the amounts determined in the Administrative Appraisals or decisions rendered for these lots. In addition, in the latest property certifications I have for my Lots B3 and B5, the Government appears as the registered owner of the portion of land that was expropriated.⁴⁰ This comes as a surprise since the Government, to date, has not made available any of the amounts that were determined in the Administrative Appraisals or decided in the final court decisions for these lots.
46. In 2008, I was informed of the Supreme Court's decision by which pursuant to article 50 of the Constitution, it ordered MINAE to initiate the expropriation proceedings of the private property within the Park and required it to pay compensation for any undue delay in the expropriation proceedings. At the time, I thought that finally this might have been a demonstration of good faith from the Government. However, it has been more than six years and after having the title and possession of my property usurped from me with a complete disregard for this ruling and for that matter, the country's expropriation law, I was left with no alternatives than to seek remedy through international arbitration.
47. With respect to the other Claimants in this arbitration, I met Glen Gremillion during the negotiation of the sale of Lot B7. I have not met the other individual Claimants. I met Bob Reddy, Chief Financial Officer of Spence International Investments, LLC, around 2005 when the several landowners were discussing the creation of a mixed use nature refuge that would allow developments that were environmentally friendly.

I confirm that the facts stated in this witness statement are true.

Signed:


Brett E. Berkowitz

Date:

