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

THIRD WITNESS STATEMENT OF ROBERT REDDY

Submitted February 4, 2015

Introduction/Personal Background

1. My name is Robert Reddy. I am the same Robert Reddy who has already made two witness statements in these proceedings. I make this third witness statement to respond to specific points raised by the Government of Costa Rica in its Reply on Jurisdiction and Rejoinder on the Merits ("Reply").

2. This witness statement was prepared in collaboration with the attorneys for the Claimants in this proceeding, following several meetings and consultations with me. This statement accurately reflects my knowledge and recollection of the facts described herein. This testimony was drafted in English, which is my native language and which is the language that I would be prepared to testify in, if necessary.

3. In this witness statement, I will clarify my understanding of the *Las Baulas* National Marine Park ("Park") boundaries, describe the landowner-Government negotiations

which took place from 2008 to 2010, identify new building permits issued since the commencement of this arbitration, and provide an update on payments made since my last witness statement for the Spence Co. lots.

Park Boundaries

4. The Government has asserted that since 1991 the Park has included a 125-meter strip of land.[1] At paragraph 30 of the Respondent's Reply, a map is included of the delimitation of the Park in 1991. Referring to that map, at paragraph 36 the Govnerment mentions the May 2003 letter from Carlos Rodriguez, the then MINAE Minister to Congress, regarding the proposed law to expand the park boundaries. The Government did not mention the map that was actually annexed to his letter. The map attached to his letter, along with the text in the letter, shows that the Park was intended to be only 50 meters wide.[2]

5. When looking at the map that was actually attached to the Rodriguez letter, we can see how, just to the right of the "s" in Punta Ventanas, the delineation of the Park is marked, as well as a road paralleling the 50-meter line. This road still exists. To the right of the road are the second row lots in Playa Grande Estates, which have their front portions in the 75-meter zone. The map shows a space between the coloured 50-meter zone and the road. These are beachfront lots. While the map does not include a scale, one can look at the Tamarindo roads along the beach. Tamarindo only has a 50-meter public zone, then a built-up beachfront with a road immediately behind those stores. If the Park extended 125 meters here, it would extend through the stores and into the beachfront road. To me, this map clearly indicates the Park's boundary was drawn only to the 50-meter line.

6. Throughout the Reply, the Government says that if the 1995 Law were properly interpreted, it would not have changed the boundaries set out in the 1991 Decree. Even if this statement were true, it would not explain the Government's position on thirteen of the Spence Claimants' lots, which are located in Playa Ventanas. The lots in Playa Ventanas were explicitly excluded from the boundaries of the Park as set out in the 1991 Decree. The change to the 1995 Park Law, which the Government says was a mistake, only set the boundaries of the Park as being seaward. No change was made that would have affected the lots in Playa Ventanas. It therefore remains unclear to me how – following the Government's logic – the purchaser of a Playa Ventanas lot could have known that it was located inside a Park at the time of purchase. The purchasers knew that there would be restrictions on how they could build, since they were near a marine park, but not that they would be prevented from building or that their properties would be expropriated.

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[1] As noted in my second witness statement, neither the 1991 Decree nor the 1995 Law refer to "the 125-meter strip of land"; see Reddy Second Witness Statement at para. 6.

[2] Exhibit C-113 at page 20; see also Figure 1 of the Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction.

Building Permits

7. At paragraph 81 of the Reply, the Government has said that the Claimants argued: "that the possibility of obtaining building permits from a municipal governmental entity means that such permit-eligible properties are somehow exempt or immunized from later expropriation by a national agency with the legal mandate to do so." This is not what the Claimants have said in this arbitration and not what I thought at the time.

8. In my opinion, Spence Co. reasonably expected that it would be able to develop the land that it purchased – not in an unsustainable manner, but in an environmentally responsible manner, with low-density single family dwelling development. Spence Co. had no plans to build any hotels or high-density properties in Playa Grande or Playa Ventanas. One of the factors that informed this expectation was the fact that the Municipality of Santa Cruz continued to issue building permits for single family dwellings until 2008, including for lots that the Government now says are within the Park. To receive one of the permits granted at that time, the owner would have had to comply with all of the relevant requirements for a permit, including obtaining water availability letters from the ASADA and approved environmental assessments. If these conditions, which were set by the Government itself, had not been satisfied in each case, no permit would have been issued.

9. The Government has also said that the Claimants could not have reasonably expected to build on their lots because they were within the Park. The 1995 Law specifically states that all of the landowners keep their land rights until the property is expropriated. It seems to me that if others were able to obtain building permits from the Government for lots located inside what the Government now says was the Park, it was reasonable for the Claimants to expect to have done the same. This is a different issue from the expectation I would later hold about what would happen if the properties were eventually expropriated.

10. At paragraphs 83 to 97 of the Reply, the Government appears to be saying that the Claimants should also have known that they could not develop their lots for reasons unrelated to the Park. It says that the lots were in an area designated as extremely fragile and that water resources were limited. I have already addressed these points in my second witness statement and will not repeat them, but I do wish to add the following.

11. The Claimants have said that not only was it reasonable for them to expect to build on their lots when they purchased them, but that it is also possible that they would still be able to develop those lots today if the Park boundary was different. The Respodent disagrees and refers to studies of the entire Huacas-Tamarindo Aquifer to imply that not only would it be impossible to build on those lots today, but also anywhere in Playa Grande. The reason I think this conclusion is not true is that I have just recently learned that the Municipality of Santa Cruz has been issued building permits in Playa Grande Estates. For example, on February 19, 2013, a building permit was issued for lot C-38; and on December 9, 2014 a building permit was issued for lot C-51.[3] While these lots are

[3] Exhibit C-116.

not located in what became the Park, they are most certainly located on the Huacas-Tamarindo Aquifer, and they fall within the responsibility of the ASADA.

12. I would also like to stress that none of these issues were relevant at the time the Spence Claimants made their investments. I know that must be true because, as I have just explained above, building permits were being issued for lots located inside the currently designated Park boundary right until 2008. If the Government's explanation applies today, it would have applied then too, and no permits would have been issued; yet they were.

Government Negotiations

13. In the Reply, the Government continues to insist that the Claimants knew or should have known that the Government had breached the CAFTA either before January 1, 2009 or more than three years before the arbitration was filed. For three of the Spence Co. lots (A40, SPG1 and SPG2), the expropriation process was well underway before January 1, 2009 but in none of those cases was it completed. I expected that the judicial process would result in a fair price being established and paid within a reasonable amount of time. At the same time these expropriations were commencing, the Claimants, together with other owners in the area, were in communications and negotiations with the Government to find an amicable alternative to expropriation. These discussions continued into the late spring of 2010.

14. The solution ultimately reached with the Government was a law that would create a mixed refuge (Bill 17383).[4] While I did not attend any of the meetings where the Bill was being negotiated and drafted, those working on behalf of the landowners kept me informed of the discussions. The discussions were also well publicized in both the Spanish and English newspapers in Costa Rica at the time. For example, one Tico Times article dated July 17, 2009, quotes Maureen Ballestero, a National Liberation Party legislator and president of the commission at the time, as stating that the Government made a park without paying for it and that an adequate solution to having to pay for the land would be to have people inside the Park.[5]

15. The same article also quotes Nelson Marín – who was the regional director of MINAE at the time – as saying that the idea behind the Bill was to have intelligent, mixed development with environmental restrictions that would protect sea turtles and prevent contamination. I also note that, in this particular news article, Marín was also quoted as saying that he was not, in fact, familiar with the SENARA study of February 13, 2009 study. This is the same study that the Government now says would prevent development because the water table near Playa Grande is too shallow to sustain it.

16. We were quite hopeful that, because of these negotiations, the Government would come up with an alternative to expropriating our land. We were therefore awaiting the outcome

[4] Exhibit C-1zj.

[5] Exhibit C-117.

of those discussions before seriously considering starting an international arbitration with the Government. This is the same reason that we delayed withdrawing the administrative appraisal amounts at that time, because we did not want to unnecessarily complicate a potential reversal of the expropriation process for the lots that were in the judicial stage, once the mixed refuge legislation had been passed.

17. Even after the Bill failed to come up for a vote in May 2010, I did not believe that it was impossible for a solution to be achieved. I was told that the Bill was not defeated by a vote against it. It just did not make it to a vote before the end of the legislative session. My understanding is that it is not uncommon in many places for bills that could not make it through a legislature before the end of a session to be revived once the next session began. A new president was coming into office, but that did not mean that our consultations with the Government had to end. In Costa Rica, a president cannot serve two consecutive terms, so it was not as if President Arias had been voted out of office.

18. As it turned out, however, the new Administration was not prepared to follow the same path with the Claimants and other landowners. As I have already mentioned in a previous statement, and above, the Spence Claimants still put faith in the Government to quickly move forward with the rest of the expropriations, and to give us a fair price for each lot, as required under Costa Rican law.

Status of the Payments

19. Since my Second Witness Statement, dated October 2, 2014, interest was paid out to Spence Co. for lot SPG2. On December 2, 2014, the amount of ₡243,253,105.00 was received from the Court's account.[6]

20. The interest paid for lot SPG2 is insufficient. The interest calculation in the expropriation process does not take into account the lengthy delay by the courts to process the request and transfer the funds to the owner. At paragraph 121 of the Reply, the Government sets out the many steps required for payment of funds out of court, which they describe as "not unreasonably lengthy". I disagree. In particular, the system it describes fails to compensate an expropriated owner for the delay experienced in receiving the interest payment. In most cases, the interest payment ends up being a significant portion of the compensation received for an expropriation. Yet, for SPG2, there was a delay of four months between the decision on interest and its payment. For Lot A40, the decision on interest was made in January 2013 and those funds have still not been paid out - more than two years later.

21. With regard to lot SPG2, I requested payment of the administrative appraisal and the principal on December 17, 2013[7] and received the funds on July 11, 2014.[8] During the 8-month period when the court was processing the request, interest was not being

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[6] Exhibit C-21j-1.

[7] Exhibit R-111.

[8] Exhibit C-21i.

calculated on either the administrative appraisal or the principal.[9] We did not receive any additional interest for that period.

22. With regard to lot A40, I requested payment of the administrative appraisal on January 16th, 2012[10] and received the funds on December 13th, 2012.[11] During the 11-month period when the court was processing the request, interest was not being calculated on the administrative appraisal. I requested payment of the principal on October 26th, 2011[12] and received the funds on February 15, 2012.[13] During the 16-month period when the court was processing the request, interest was not being calculated on the principal.

23. At paragraph 11 of Georgina Chavez' witness statement, dated December 22, 2014, she stated that the court issued a decision on the payment of interest for lot A40 on January 17, 2013. I have still not received any interest payment for lot A40, which I requested in January 2014.[14] Assuming her information is correct, that means that the Court has taken over two years to make the interest funds available to me.

24. At paragraph 9 of Georgina Chavez' witness statement, she notes the dates when the Government deposited the amount of the administrative appraisal into the account of the Court of Administrative and Civil Financial Disputes, and then notes the dates that the Claimants requested payment of the amount. Any delay in requesting the administrative appraisal has been because the Spence Co. intended to dispute the valuations, which we considered to be very low. Further, we did not withdraw the money because we were hopeful that if the Government negotiations were successful, our land would not be expropriated.

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[9] A ruling was issued on the payment of interest for lot SPG2 on August 13, 2014, see Exhibit R-123. Spence Co. requested payment of this amount on September 10, 2014, see Exhibit R-124.

[10] Exhibit R-143.

[11] Exhibit C-16i.

[12] Exhibit R-113.

[13] Exhibit C-16i.

[14] Exhibits C-16j.

25. The Government maintains that its expropriation process is fair, timely and provides adequate compensation. For Lot SPG2 (the only Spence Claimant lot that has completed the expropriation process), the expropriation process took more than 7.5 years from the decree of public interest (April 2007) to the recent payment of interest (December 2014). Yet the Respodent now says that an investor seeking protection under the CAFTA must bring its claim within three years of the date of dispossession, which in the case of SPG2 (December 2008) was still more than 3 years before even the first instance judgment (February 2013). This cannot be correct. The Claimants would have had to incur legal fees to prepare a case that would never materialize if the Government paid adequate compensation within a reasonable-to-wait period of time.

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

Signed: _____
Robert Reddy

Date: 2/3/15