

**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
BRETT ELLIOT BERKOWITZ**

Submitted February 4, 2015

1. My name is Brett Elliott Berkowitz. I am the same Brett Elliott Berkowitz 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 (the “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 witness statement accurately reflects my knowledge and recollection of the facts described herein. This testimony was drafted in English, which is my first language and the language in which I would be prepared to testify, if necessary.
3. In this witness statement, I will provide an update on the status of payments for the B lots, as well as describe the landholder-Government negotiations which took place from 2008 to 2010.

Status of Payments for the B Lots

4. Since my Second Witness Statement dated October 2, 2014, the Government has withdrawn its appeal with respect to lot B3 and thus the final decision is the first instance decision.¹ Accordingly, the administrative appraisal was paid to me on December 16, 2014.² I submitted the calculation of interest payment on August 28, 2014, and have still not been paid the interest accrued.³
5. With respect to lot B6, I have still not been paid the administrative appraisal. In Georgina Chavez' witness statement dated December 22, 2014,⁴ she states at paragraph 35 that the legal interest for lot B6 is not applicable because the court decision confirmed the administrative value. She states that I'm entitled to request the payment of interest generated by the deposit of the administrative valuation during the time it was located in the court's account. This is the first time I have heard of this process and it does not appear to be related to the expropriation regime. The administrative appraisal was deposited on May 11, 2006.⁵ Almost 9 years have gone by where interest has not been calculated on this amount while it has been in the court's account.
6. With respect to lot B8, Georgina Chavez explains in her witness statement that the Government has appealed the award of interest for lot B8.⁶ The Appeal of Calculation of Interest says that the Government is appealing, in part, because the calculation made by the Court is from March 12, 2008 (the date of dispossession), but that the Court judgment of September 2, 2012 states that interest should be paid from November 9, 2008. There is no basis that the interest should be calculated from November and not March. I appealed the dispossession order for lot B8 and the court ordered that until the appeal was complete, the dispossession was conditional on the judgment. The judgment was enacted on November 9, 2008. Nonetheless, the interest still ought to be calculated as of March 12, 2008, the date of dispossession, because it is not possible to have conditional possession. To have possession means that I can transfer possession, and I cannot transfer something I own conditionally. I lost possession of lot B8 on March 12, 2008 and that is the date that interest should be calculated from.

Government Negotiations

7. In the three years that followed President Óscar Arias ordering the expropriation decrees on the Claimants' lots, the Government realized the extent of the financial burden on Costa Rica of having to pay for the expropriated properties.

1 Exhibit R-83.

2 Exhibit R-154; Exhibit C-24i-2.

3 Exhibit C-24j.

4 RWE-10.

5 Exhibit C-26f.

6 Exhibit R-127.

8. I had many conversations with Ana Catalina Facio about the dilemma, whom I met in the context of selling lot B4 to her sister, Jeanina Facio. Ana Catalina told me of her conversations with various Government officials and meetings that she was attending within Government to try and rectify the situation. My understanding from our conversations was that President Arias had vowed to fix the problem by presenting a mixed refuge solution to Congress to become a project of law.
9. A few projects of law were tabled through the period of 2008 to 2010 which sought to amend the 1995 Law that created the *Las Baulas National Marine Park* (the “Park”) to allow beachfront developments, while ensuring the protection of the turtles. Bills 16.915 and 17.383 were supposed to save the Government the cost of expropriating the Claimants’ properties.⁷
10. While I did not attend any of the meetings at the Presidential House, I was told by those landholders attending the meetings that the reason the expropriations were dragging on was due to the fact that the President was going to introduce the Bill 17.383 (the “Bill”) to the Legislature, which would reverse the expropriation decrees. The intent of the Bill was to re-classify the land as a mixed refuge, instead of a national park. By doing so, the land which was being expropriated to protect the turtles, would in fact, be protected via strict parameters described within the text of the Bill, thus making the expropriations unnecessary.
11. I read press releases stating that at the time, the Minister of the Environment, Jorge Rodriguez, and the Director of the Area of Conservation, Emel Rodriguez were in favour of the President’s effort to introduce the Bill.⁸ After almost two years, the Bill made its way to the floor of the legislature.
12. I communicated with the greater Playa Grande community seeking their support to move forward with the Bill to show the legislature that there was one community voice and it was in support of the Bill. I attended meetings with Emel Rodriguez and other functionaries, one of which was the regional director of SINAC at the time, Gil Ruiz. Emel Rodriguez and Gil Ruiz spoke to the entire community at a forum and told us that the Area of Conservation and MINAE were in favor of the Bill.
13. However, the Bill was not without opposition. Congress received protests from environmental groups and non-governmental organizations.⁹ This opposition continued until the spring of 2010 and with the change of a new government, the Bill was eventually archived.¹⁰

7 Exhibit C-121: Bill of Law 16.915 published on 20 May 2008 in La Gaceta No. 96; Exhibit C-1zj: Bill of Law 17.383.

8 Exhibits C-122: La Nacion opinion, Jorge Rodríguez - Commitment Park Leatherback, December 3, 2009.

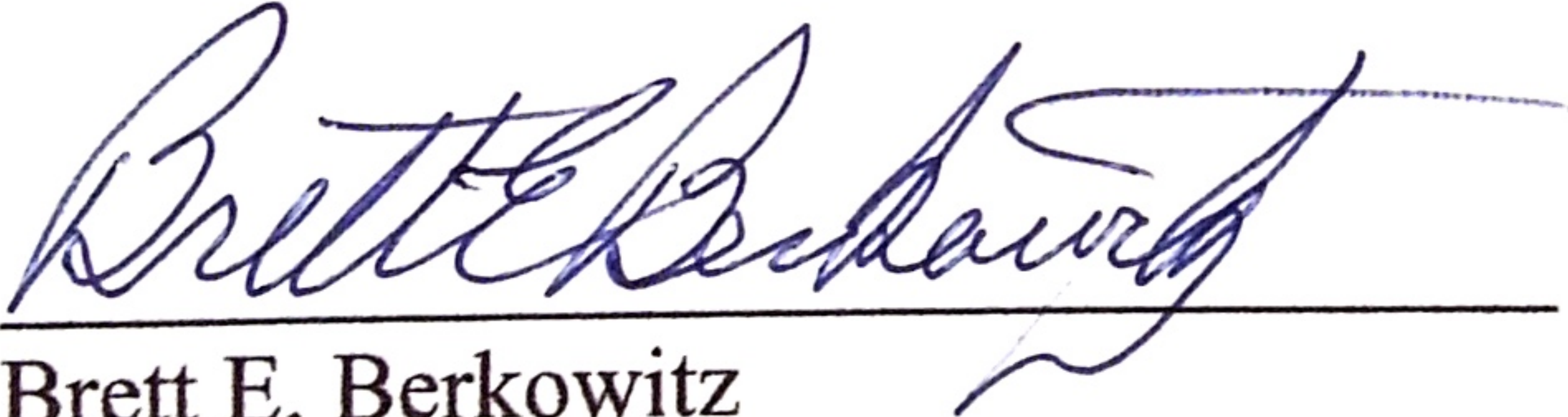
9 Exhibits C-123: Various press releases, 2009 and 2010.

10 Exhibit C-112g: La Nacion article, June 21, 2013.

Timing of Claim

14. The reason I did not file for arbitration earlier than when I did is because I was hopeful that the confusion and problems caused by the 1995 Law would be rectified. After all, even the former Legislative Assembly Deputy Hernan Fournier confirmed that the intent of the legislature was in fact to create a national marine park which would exclude privately-held land and that there was no "mistake" or "typo" in the 1991 Law. He stated in a letter to Deputy Williams that "the bill is correctly drafted and does not leave room for any doubts whatsoever regarding the spirit of the legislators who unanimously approved [Law No. 7524]." ¹¹
15. In Judge Stephen Schwebel's witness statement dated December 20, 2014, he refers to the expropriatory act as the "completed act" and makes a distinction of the "lingering effects" of the completed act in his reference to "prompt and adequate compensation". My claim under the DR-CAFTA is not a lingering effect of a completed act, but rather an ongoing breach in and of itself. I did not have a claim for lack of prompt and adequate compensation until I gave the Government a reasonable amount of time for its internal administrative and judicial process to mature. The lack of prompt and adequate compensation is ongoing and continuous even to this date for the B lots. The administrative and judicial process in Costa Rica was not completed in a three-year time period following the expropriatory act, so it would not have been reasonable for me to bring a claim forward within three years from the date of dispossession in 2008.

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

Signed: 
Brett E. Berkowitz

Date: February 4, 2015