

Spence International Investments LLC et  
al. v.  
The Republic of Costa Rica

Closing Submissions of the Claimants

**Fasken Martineau DuMoulin LLP**

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# Introduction

# Facts

# Facts - Knowledge of Claimants

- \* Reasonable for Claimants to conclude that the properties they were purchasing were outside of the Park.

# Facts – Spence’s Knowledge

- \* No knowledge of controversy surrounding Park boundaries in 2003.
- \* Purchased Lots V30, V31, V32, V33 in 2003 (Spence WS1 paras. 8-10).
- \* No stamps on registry documents (Ex. C-3a, C-4a, C-5a, C-6a)
- \* Sold Lot V34 for approx. double the price in 2004 (Spence WS1 para. 11).

# Facts – Cophers' & Holsten's Knowledge

- \* Cophers had no knowledge of controversy surrounding Park boundaries in 2003 and 2004.
- \* Cophers purchased Lots V39 and V40 in 2003 (Copher WS1 para. 9).
- \* Cophers purchased Lot V38 in 2004 (Copher WS1 para. 13).
- \* Cophers and Holstens purchased in 2006 Lots V46 and V47.
- \* MINAE stamps on registry documents indicate properties are outside the Park (Ex. C-7a, C-8a, C-9a, C-10a, C-11a).

# Facts - Spence Co.'s Knowledge

- \* Reddy performed extensive due diligence (Testimony p. 262-265, 283-284)
  - \* Engaged local counsel (WS1 para. 5).
  - \* Met with real estate agents Pennye Wheeler and Bob Davey (WS1 para. 5).
  - \* Reviewed property surveys (WS1 para. 9; WS2 paras. 10-16)
    - \* Lot V59: stamp only refers to 1991 Decree (Ex. C-12a)
    - \* Lot V61: stamped as outside the Park (Ex. C-99)
    - \* Lot C96: stamped as outside the Park (C-18a)
    - \* SPG Lots: stamps only refer to 1991 Decree (Ex. C-20a, C-21a, C22a)

# Facts - Berkowitz' Knowledge

- \* Genuine belief that before purchasing the B Lots, B Lots were outside of the Park (Testimony p. 372, p. 378, p.379).
- \* Understanding of the Law was that he could build on land and until the government expropriated the land, it did not form part of the Park (Testimony p. 373-374).
- \* Purchased B Lots in January 2003 (Berkowitz Testimony p. 354-355; WS1 para. 7).
- \* June 2004 IGN Study: not part of the Park (Testimony p. 568; WS1 para. 16; Ex. C-57; C-58).
- \* Minister Rodriguez informed Berkowitz that the government's preference was to permit building, so that they would not have to expropriate (WS1 paras. 9-12; Testimony p. 345-350).
- \* Berkowitz subsequently suspended from building on B Lots (WS2 para. 50).
- \* Fencing the boundaries of the park (Jurado Testimony p. 610)



# Facts – Gremillion's Knowledge

- \* No knowledge of controversy surrounding Park boundaries in 2004
- \* Purchased Lot B7 in 2004 (Gremillion WS1 para. 8)
- \* Kaczmarek agreed that Gremillion was unaware that Lot B7 might be within the Park boundaries (Kaczmarek Testimony p. 873)

# Facts – Creation of the Park Overview

- \* 1987 Decree creating Tamarindo Wildlife Refuge
- \* 1990 Law creating Tamarindo Wildlife Refuge
- \* 1991 Decree creating the Park
- \* 1995 Law creating the Park
- \* 2004 Procuraduría opinion interpreting boundaries
- \* 2005 Procuraduría *dictamen* interpreting boundaries
- \* 2008 Constitutional Court decisions
- \* 2009 Constitutional Court direction

# Facts - Purpose of the Park

- \* Park created to protect the Leatherback nesting beaches to reverse observed decline in nesting activity.

# Facts – Turtles

- \* Main threats to turtle population:
  - \* Fisheries (Piedra Testimony p. 516)
  - \* Egg poaching (Piedra Testimony p. 517-518)
  - \* Climate change (Piedra Testimony p. 492)
  - \* Development (Piedra Testimony p. 492)
- \* Catastrophic decline occurred before 1991 (Piedra Testimony p. 521)
- \* Santa Rosa National Park – no development, yet same decline in turtle population (Piedra Testimony p. 521)

# Facts –Turtles

- \* Nesting only occurs on sandy part of beach (Piedra Testimony p.541, 542)
- \* Possible to manage development and minimize lights beyond 50m → voluntary conservation regime → Park patrol (Rusenko Testimony p. 465-466; Piedra Testimony p. 527, 545, 547, 550)
- \* 75 m not necessary to protect the turtles (Rusenko Testimony p. 467-469)

# Facts – Piedra's Testimony

- \* Advocate for the turtles (Piedra Testimony p. 504)
- \* Advocate for expanding Park boundaries as broadly as possible (Piedra Testimony p. 505)
- \* No mention of 75 m area in interview (Piedra Testimony p. 508, 510)

# Facts - Creation of the Park

## 1987 Decree Tamarindo Wildlife Refuge

- \* Playa Grande residents lobby for the creation of a wildlife refuge to protect the turtle nesting beach (Pastor WS1, para. 10)
- \* 1987 Decree creating Tamarindo Wildlife Refuge, which protects the first 50 m inland from the mean high tide mark (the inalienable zone) in Playa Grande, as well as the Tamarindo estuary and mangroves (Ex. C-29)

# Facts - Creation of the Park

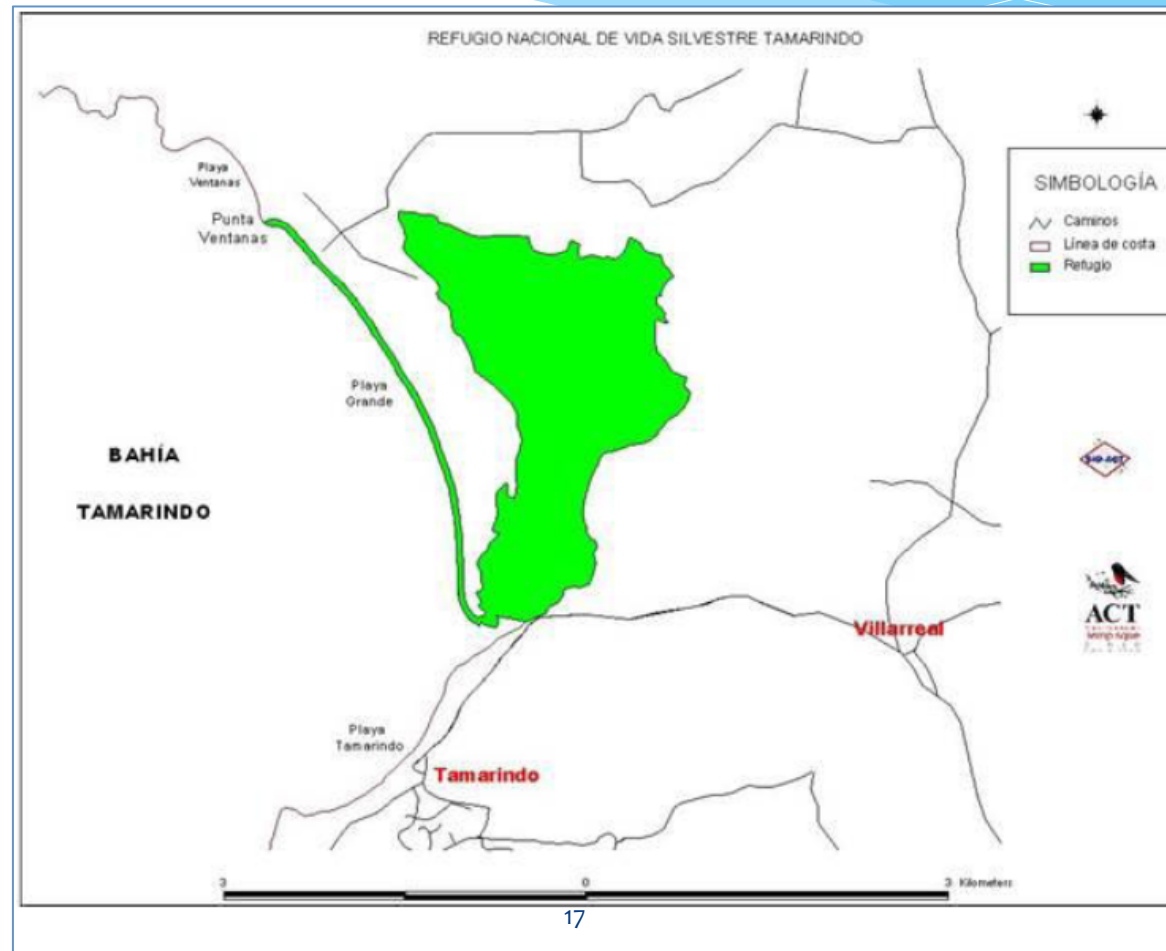
## 1990 Law Tamarindo Wildlife Refuge

- \* 1990 Law confirming Tamarindo Wildlife Refuge
- \* Like the 1987 Decree, the 1990 Law protects the first 50 m inland from the mean high tide mark (the inalienable zone) in Playa Grande, as well as the Tamarindo estuary and mangroves (Ex. C-30)



# Facts – Tamarindo Refuge

Pre-1991 Decree



# Facts - Creation of the Park

## 1991 Park Decree

- \* 1991 Decree creating the Park (Ex. C1-b)
  - \* Declares the Park 125 m from the mean high tide from south point of Playa Ventanas to a coordinate at the southern end of Playa Grande (Art. 1)
  - \* No eastern or western boundary delineated
  - \* Declares the Ventanas estuary and mangroves, the hill behind Punta Ventanas, Isla Capitan, Punta Carbon, inalienable zone between Punta Conejos and Punta Ventanas and the territorial waters of Tamarindo Bay to be park (Art. 1)

# Facts - Creation of the Park

## 1991 Park Decree Cont'd

- \* 1991 Decree creating the Park (Ex.C-1b)
  - \* Declares that the area 75 m from the inalienable zone on Playa Carbon and Playa Ventanas is a protective zone where residential developments require approval (Art. 2)
  - \* Provides that the declaration of the Park shall be fully effective once the State purchased the private properties existing within these delimitations (Art. 5)

# Facts - Creation of the Park

## 1991 Park Decree - Summary

- \* Playa Ventanas properties not included in the Park boundaries, but residential building to be regulated
- \* Playa Grande properties included in the Park boundaries
- \* Park would not be created until private properties within the Park had been purchased

# Facts - Creation of the Park

## 1995 Park Law

- \* 1995 Park Law creating the Park (Exhibit C-1e)
  - \* Creates the Park 125 m from the mean high tide offshore (“aguas adentro”) between 2 coordinates (near Punta Conejo in the north and the southern end of Playa Grande in the south) (Art. 1)
  - \* No eastern or western boundary identified
  - \* Declares the Tamarindo, Ventanas and San Francisco estuaries and mangroves, the hill behind Punta Ventanas, Cerro El Morro, Isla Capitan, and Isla Verde (Art. 1)

# Facts - Creation of the Park

## 1995 Park Law Cont'd

- \* 1995 Park Law creating the Park (Exhibit C-1e)
  - \* Provides for expropriation of any of the properties within the Park, but specifies that they will not be considered part of the Park until they are acquired by the State and that until then the owners will enjoy the full attributes of ownership (Art. 2)
  - \* Declares the Tamarindo, Ventanas and San Francisco estuaries and mangroves, the hill behind Punta Ventanas, Cerro El Morro, Isla Capitan, and Isla Verde (Art. 1)

# Facts – Park Boundaries

Legislative Debate

June 7, 1995

## **EL SECRETARIO:**

Moción del diputado Fournier Origgi y otros diputados  
CPL-2 (4-2):

"En el artículo 1 después de: '125 metros de la  
pleamar ordinaria' agregar: "aguas adentro".

Exhibit C-1r

## **SECRETARY**

Motion by Fournier Origgi and other deputies CPL-2(4-2):

"In article 1, after: '125 metres from the ordinary high tide  
add: "into the water".

# Facts – Park Boundaries

**DIPUTADO FOURNIER ORIGGI:**

Estudiando el texto original, me parece que sí cumple con los requisitos de una ley para este tipo de protección de parques, especialmente que debía haber sido marino porque es lo que se estila en este caso; sin embargo, no se le puso lo de marino. Al definir el Parque, se habla de ciento veinticinco metros, con una línea inmaginaria de ciento veinticinco metros de la pleamar ordinaria y esto debe entenderse mar adentro, exactamente lo que pienso que con esta moción se aclara.

**EL SECRETARIO:**

¿Se considera suficientemente discutida la moción?

**LA PRESIDENTA:**

Discutida. Catorce diputados presentes. APROBADA por unanimidad.

Legislative Debate

June 7, 1995

Exhibit C-1r

**DEPUTY FOURNIER ORIGGI:**

Studying the original wording, it appears to me that it meets the requirement of a law of this type to protect parks, especially it should have been marine, because that is what is customary in this case. However, it wasn't mentioned as being marine. When the Park is defined, it talks about one hundred and twenty-five metres, an imaginary line one hundred and twenty-five metres from the ordinary high tide and that should extend into the water, exactly what I think this motion has clarified.

**SECRETARY**

Do you think the motion was discussed sufficiently?

**CHAIRMAN:**

<sup>24</sup>  
It was. Fourteen representatives present. Unanimously APPROVED.



# Facts – Park Boundaries

Letter from Congressman Fournier

January 5, 2007

As a legislator who played an important role during the hearing and approval of the bill to create Las Baulas National Marine Park in Guanacaste, it surprised me that anyone would believe an “authentic interpretation” of Article 1 would be pertinent and necessary, as the bill is correctly drafted and does not leave room for any doubts whatsoever regarding the spirit of the legislators who unanimously approved it (Law No. 7524).

I recall that at that time, among other matters, we discussed the fact that since it was a National MARINE Park, created to protect the Leatherback Sea Turtles that use the beaches Playa Grande, Playa Ventanas and Playa Langosta to lay their eggs, that character of MARINE should be strengthened. Furthermore, as occurred with Executive Decree No. 20.518-Mirenem of July 9, 1991, which created the Park and which was repealed upon approval of the new legislation, we were not presented with any environmental justification whatsoever for establishing an area of onshore protection, measured starting from the edge of the 50-meter strip, which includes the most important part of the protected ecosystem. In that considerable strip of 50 meters that runs along more than five kilometers of the coastline, a beach area and a tree farm form a natural protective barrier. These elements ensure that the sea turtles have a nesting area that is free from anthropogenic threats.

# Facts – Park Boundaries “*Aguas Adentro*”

- \* Congress’s decision to add the words “*aguas adentro*” was intentional (Ex. C-1r; C-1z).
- \* But Procuradoría’s opinions said it was a mistake:
  - \* Consulted the legislative file and acknowledged that the addition of the words intentional, but still determined that it was an error (Jurado Testimony p. 568, 578-579)
  - \* Consulted the IGN (Jurado Testimony page 572), but this is inconsistent with IGN letter re: B lots in 2004 (Ex. C-57; C-58)

# Facts – Park Boundaries

## Procuraduría Opinión

- \* No private properties in the Park (Jurado Testimony p. 95)
  - \* Cerro El Morro (Jurado Testimony, p. 599)
  - \* Isla Verde (Jurado Testimony, p. 599)
- \* Coordinates
  - \* On land?
- \* Territorial Waters v. Internal Waters (Jurado Testimony, pp. 576, 577, 594)

# Facts – Park Boundaries Procuradoría Opinion

- \* No protection for the public zone (Jurado Testimony, p. 577)
  - \* Tamarindo Refuge (Jurado Testimony, p. 593)
- \* No official Map of Park Boundaries (Jurado Testimony, p. 575, 582, 589)
  - \* Unpublished (Jurado Testimony page 590)

# Facts – Park Boundaries

## Amendments to Park Boundaries

- \* October 16, 2002 Bill 14.989 Expansion, Consolidation and Development of Las Baulas Marine Park of Guanacaste
  - \* Failed bill to expand the boundaries of the Park inland
- \* October 26, 2006 Bill 16.417 Authentic Interpretation of Article 1 of the Law of Creation of the Park
  - \* Failed bill to interpret “seaward” as inland
- \* January 23, 2008 Bill 16.916 Authentic Interpretation of Article 1 of the Law of the Creation of the Park
  - \* Failed bill to interpret “seaward” as seaward
- \* June 2, 2009 Bill 17.383 Rectification of the limits of the Park and the Creation of the mixed refuge
  - \* Lapsed and archived in 2013

# Facts – Park Boundaries

- \* May 23, 2008 Constitutional Court Decision
  - \* The Leatherback Trust (“TLT”) challenged 2006 municipality zoning regulations as unconstitutional.
  - \* TLT argued that 1995 Park Law contained a drafting error, relying on the Procuradoría *dictamen* of 2005.
  - \* Court found zoning regulations unconstitutional because municipality does not have ability to regulate building within the Park according to 1991 Decree (whose boundaries could not be reduced by the 1995 Law, unless accompanied by a scientific study).

# Facts – Park Boundaries

- \* 27 May 2008 Constitutional Court Decision
  - \* Court ordered MINAE to either immediately expropriate or encourage environmentally sensitive development to proceed by developing guidelines to permit SETENA to issue permits without endangering the nesting activities of turtles

# Facts – Park Boundaries

- \* 27 March 2009 Constitutional Court Decision
  - \* In response to SETENA and the Minister of the Environment's separate requests for clarification of the 27 May 2008 or 16 December 2008 judgments



# Facts - Contraloría report

- \* Critical of all the boundaries in 1995 law
- \* Critical of delays in conduct of expropriation
- \* Recommends short suspension pending determination of whether to seek annulment
- \* Deadlines for decision and action appear to have been ignored
- \* Official Map project ongoing and unpublished.
- \* Consideration of annulment will start after external report received.

# Facts - Contraloría report

- \* Delays in expropriation (Jurado Testimony, p. 600, 601)
- \* Suspension of the expropriations (Jurado Testimony, p. 603, 609, 617)
- \* Annul property titles (Jurado Testimony, p. 603, 604, 613, 623, 637)

# Facts – Contraloría Report

- \* Contraloría's criticisms of SINAC
  - \* Absence of internal procedures regarding expropriation (Jurado Testimony p. 616)
  - \* No manual of expropriation (Jurado Testimony page 615)

# Facts - MINAE Stamps on Land Registry Drawings

- \* When Spence, Copher, and Holsten purchased the Ventanas lots, the MINAE stamps on the Registry documents indicated that the property was outside the Park or they had no stamp at all (Claimants' Reply para. 122)
- \* Only Lot V59 had a stamp dated 1996 that referred to the Park (Claimants' Reply para. 122)
- \* For the large lots located in South Playa Grande, each bore a stamp that indicated that a portion of the lot was located within the PNMB pursuant to the 1991 Decree (but not the 1995 Park Law) (Claimants' Reply para. 123)

# Facts - MINAE Stamps on Land Registry Drawings Cont'd

- \* MINAE did not start stamping the registry documents as being inside the Park pursuant to the 1995 Law until after the Procuradoría opinion and once it was planning to expropriate the lots (Chaves Testimony p. 682:21 – 684:2)

# Facts - Admissions

- \* Respondent has appealed the decisions on interest and costs, further delaying the payment owed to Claimants by two years in one case (Chaves Testimony, p. 669-670)
- \* The date of dispossession can change (Chaves Testimony, p. 651 – 653)
- \* Dispossession is not the final step of the expropriation process (Chaves Testimony, p. 653)
- \* Final step of expropriation process is transfer of title after final determination of value (Chaves Testimony, p. 654)

# Law

## Costa Rica's Measures Have Generated Three Categories of Investment

1. Lots still awaiting a valid decree of public interest, followed by the decree of expropriation;
2. Lots that have been the subject of an expropriation decree, and have therefore moved into the judicial phase;
3. Lots for which a final determination of compensation has been provided (whether or not the final stage of the process - transfer of title from a Claimant to the Costa Rican State - has yet to occur).



# 1. Lots still awaiting a valid decree of public interest, followed by the decree of expropriation

- \* Costa Rica's position has been unequivocal: it will complete PNMB "consolidation" by expropriating all remaining private lots located within 75 meters of the 50 meter public zone.
  - \* It claims to be acting in compliance with a mandatory order from the Constitutional Court, issued in December 2008, demanding – on threat of penal sanction - that expropriations occur "immediately."
  - \* Further expropriations are imminent, just as soon as SINAC has finished implementing each of the recommendations made by the Contraloría in an allegedly binding 2010 Report.
- \* In fact:
  - \* The Court effectively lifted the immediacy requirement in a March 2009 letter to MINAE and SETENA;
  - \* The Contraloría recommended a three-month delay, only for SINAC to examine whether a title annulment action could release the State from its compensation obligation (which consideration Mr. Jurado says is still ongoing); and
  - \* At some point after May 2010, Costa Rica decided to maintain the suspension (which Ms. Loáiciga implied as beginning in 2008 but which probably began in late 2009 or early 2010) on new, undisclosed grounds.

# 1. Lots still awaiting a valid decree of public interest, followed by the decree of expropriation

- \* Costa Rica adopted this new delay measure after the CAFTA came into force and it only notified the Claimants of its existence during the course of the arbitration, so no jurisdictional objection applies.
- \* Given that the only basis Costa Rica has provided for maintaining the measure is contradicted by its own documentary evidence, it must be inferred that the measure is intended to be of indefinite duration, save for the possibility that title to the lots at issue could be annulled, which would obviate the need for proceeding any further with formal expropriation.
- \* Costa Rica admits that its measure has had the intended effect of delaying commencement of the formal expropriation process, which would ostensibly provide affected Investors with prompt adequate and effective compensation. The measure is therefore *prima facie* inconsistent with Costa Rica's obligations under paragraphs (1)(c) and/or (2)(a) of Article 10.7.
- \* Costa Rica's delay measure is also inconsistent with Article 10.5 because of the non-transparent manner of its adoption and the arbitrary manner in which it has been maintained [for the benefit of the State].
- \* Deprivation is total under any theory of liability; thus valuation should be the same for both.

## 2. Lots that have been the subject of an expropriation decree, and have therefore moved into the judicial phase

- \* All lots in this category have been mired in the judicial phase of Costa Rica's municipal arbitration regime since the CAFTA came into force on 1 January 2009.
  - \* The successful claimant in *IO European Group BV v. Venezuela* only experienced a delay of 4 years in length, involving the judicial phase of a similar expropriation process.
- \* The delays experienced by the Claimants are inconsistent with Article 10.7, because they constitute a self-standing, independently actionable breach of:
  - \* The customary international law promptness standard recalled in subparagraph (1)(c);
  - \* The “without delay” standard set out in paragraph (2)(a);
  - \* Subparagraph 1(d), because such delay is proscribed as a denial of justice, applicable as an element of the Article 10.5 minimum standard of treatment.
    - \* With paragraph (2) of Article 10.5, the CAFTA Parties sanctioned recourse to this doctrine by tribunals as an aid for applying the FET standard in appropriate cases.
- \* The theory of liability for each of the above breaches concerns only evidence of Costa Rica's conduct after the treaty came into force.

## 2. Lots that have been the subject of an expropriation decree, and have therefore moved into the judicial phase

- \* Under Article 10.18's objective test for knowledge of breach, the appropriate question is at what point a reasonable investor would have been expected to conclude that the delays she had endured since the treaty came into force ought to be regarded as a *de facto* repudiation of Costa Rica's promises:
  1. That, by the time title in her lot had passed from her to the State, she would have received 'adequate and effective compensation' and
  2. That the process would function without undue delay?
- \* Costa Rica vouchsafed its promises to the Claimants both under its municipal expropriation regime and under customary international law.
- \* Given the substantial, good faith efforts undertaken by the Respondent, particularly between 2008 and 2010, to sponsor new legislation that would have permitted the Claimants to proceed with their investment plans, it was reasonable that the Claimants did not pursue arbitration until June 10, 2013 – after having waited, in vain, for President Arias' protégé, Ms. Chinchilla, to see her predecessor's legislative agenda through to adoption.
- \* Article 10.7 stipulates the appropriate remedy for delays that constitute an effective repudiation, by the host State, of its original promise of prompt, adequate and effective compensation, as well as delays tantamount to a denial of justice under customary international law.

### 3. Lots for which a final determination of compensation has been provided (whether or not the final stage of the process - unilateral transfer of title from a Claimant to the Costa Rican State- has yet to occur).

- \* The small handful of lots, for which a final determination of compensation has been rendered, have all suffered from the same problem: the compensation offered by Costa Rica has not been consistent with the fair market value for each.
- \* The failure of Costa Rica's municipal expropriation regime to provide investors with compensation values equivalent to fair market value of their respective lots is inconsistent with:
  - \* The customary international law compensation standard recalled in subparagraph (1)(c); and
  - \* The FMV standard set out in paragraph (2)(b);
- \* The theory of liability for each of the above breaches concerns only evidence of Costa Rica's conduct after the treaty came into force.

3. Lots for which a final determination of compensation has been provided (whether or not the final stage of the process - unilateral transfer of title from a Claimant to the Costa Rican State- has yet to occur).

- \* Application of Article 10.18's objective test for knowledge of breach is uncomplicated.
- \* In every case, it has been impossible for an Investor to ascertain whether Costa Rica's municipal expropriation regime would eventually provide a correct outcome – i.e. a value equivalent to the FMV formulae set out in Article 10.7(1) and (2) – without waiting to first receive notification of a final determination from Costa Rica.
- \* The appropriate remedy for a breach of the Article 10.7 compensation standard is to award an amount consistent with the language of the provision, minus a set-off amount, for the avoidance of double recovery.

# Costa Rica's agenda for the potential annulment of all lots for which title has yet to be transferred

- \* The Contraloría directed SINAC to provide a report regarding the potential annulment of title within 6 months
- \* Mr. Jurado testified that SINAC is presently awaiting the report of an outside consultant, whom it asked to research potential avenues for annulling any title held in lots targeted for 'PNMB consolidation' – as a new measure.
- \* Such a report is more than 5 years overdue and has resulted in delay to the process to date.
- \* Mr. Jurado admits that his receipt of the report will only lead to the beginning of yet another internal process of review and consideration.
- \* It is difficult to reconcile the gist of the Respondent's "lingering effects" idea with the very present efforts still being made by Costa Rican officials, in 2015, to identify means to undercut or eliminate the value of the private lands it seeks to "consolidate" into the PNMB.

# The Claimants' Expectations

- \* There was no park at the time the Claimants made their investments.
- \* Even if 1995 Law could be have been properly construed as applying to the 75 meter zone, it expressly provided that the park would not exist until title had been acquired and that – until such time – landholders would continue to enjoy all of their property rights.
- \* Costa Rica has a long and troubled history of declaring national parks without budgeting to pay for the expropriations their eventual “consolidation” would require.
- \* There is ample evidence on the record demonstrating how, between 2008 and 2010, Costa Rica’s most senior officials sought to avoid expropriation at all costs.
- \* It was only afterwards that the internal political battle appears to have finally been won by a faction that refused to contemplate the mixed development model championed by Minister Rodriguez.
- \* There is no evidence that members of this faction ever seriously concerned themselves with the budgetary implications of their policy triumph.
- \* The Claimants have repeatedly acknowledged Costa Rica’s sovereign authority to choose expropriation over more reasonable policy options.
- \* They just seek to receive the compensation and treatment that is their due under the CAFTA and customary international law.



# Damages

# Compensation – Hedden Reports

- \* The only appraisal of the subject lots before the Tribunal for consideration are the appraisal reports prepared by Michael P. Hedden, MAI, CRE, FRICS, of FTI Consulting, Inc.
- \* These appraisal reports have been prepared by a qualified and licensed appraiser in accordance with appropriate appraisal standards and in accordance with customary law and the CAFTA.

# Compensation – Hedden Reports

- \* The fair market value of the subject properties is determined in accordance with the sales comparison approach.
- \* The comparables used to determine the fair market value of the subject lots are appropriate comparables.
- \* For the V Lots the comparables used (V52, V59 and V61) are all located within the 75 meter zone beyond the 50 meter inalienable zone (Hedden Report, p.26). The sales prices for these lots would, therefore, reflect the lawful and non-expropriatory regulatory actions of the Republic.

# Compensation – Hedden Reports

- \* The sales prices for these lots are consistent with what would be expected based upon the considered and supported market analysis conducted by Mr. Hedden.
- \* The adjustments to reflect the market conditions are based upon and reflective of the increases in market prices for properties in the Guanacaste Province and Costa Rica generally and consistent with appreciation experienced with respect to Lots V52 and V59 in the period from 2003 to 2004. (Hedden Report, p.24; Hedden Reply Report, pp. 11-14).

# Costa Rica Real Estate Market

- \* Costa Rica experienced an extraordinary tourism and real estate tourism boom in 2006 and through into and including 2007. (Hedden Report, pp. 11-17; FTI-3, p.9, p.39 (last sentence); FTI-5, p.1, para.3, p.2 (last sentence); FTI-7, p.2 (last sentence of first para.); FTI-9, second to last para. (last para. says market prices came down in 2008 but do not say starting when).
- \* This is consistent with evidence relied upon by Mr. Kaczmarek, which places the decline in the market at the earliest at late 2008 and refers to the boom of 2006 and 2007. (R-62; R-66; R-67)
- \* The real estate market in Guanacaste is not correlative to the US market.

# Costa Rica Real Estate Market

- \* The fee simple beach front lots in Playa Grande and Playa Ventanas were particularly unique and desirable. (Hedden Report, p.20)
- \* In 2008 the real estate market remained flat until late (at least August or September, 2008 or 2009) before experiencing a decline in prices.

# Costa Rica Real Estate Market

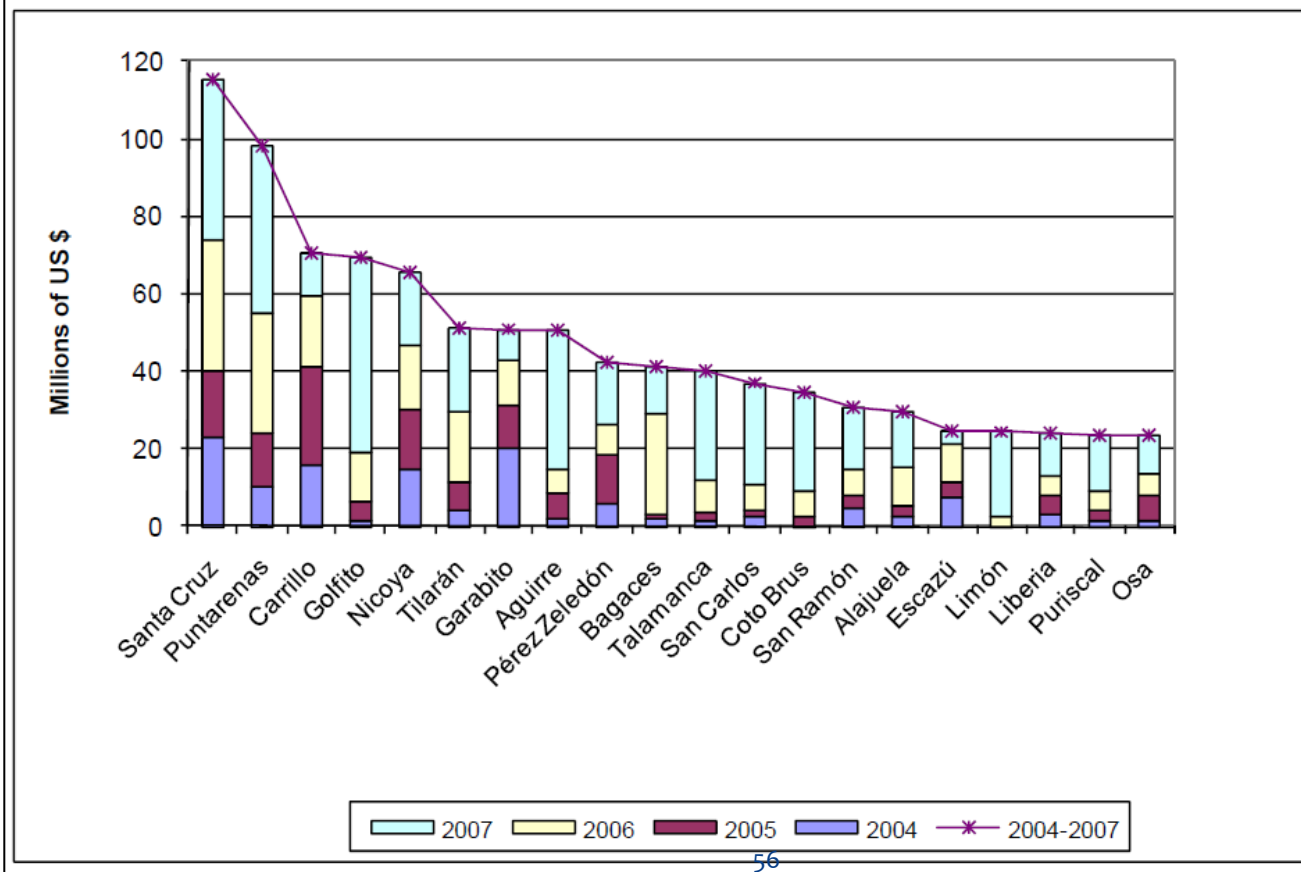
- \* Mr. Kaczmarek's suggestion that the boom of the real estate market peaked in 2006 and that the market thereafter declined is not supported by the evidence.
- \* Leading economic indicators suggest that since 2009 Costa Rica's economy has rebounded and grown from where it was at in 2007. (Hedden Report, pp.12-13)

# Costa Rica Real Estate Market

FTI Expert Report #1 footnote 27

**Figure 5: Main Counties receiving Foreign Real Estate Investment 2004-2007**

(millions of dollars)





# Compensation – Kaczmarek Reports

- \* It is clear from the Scope of Work section of Mr. Kaczmarek's Report (pp.1-9) that he was not asked to provide an appraisal (or any valuation of the subject lots) and from the content of his Report that he did not do so.
- \* Mr. Kaczmarek is not a qualified or licenced appraiser. He did not prepare his reports in conformity with, or with any regard to USPAP or the Code of Professional Ethics and the Standards of Professional Practice of the Appraisal Institute.

# Compensation – Kaczmarek Reports

- \* Mr. Kaczmarek was a partial witness, whose presentation in this proceeding sounded like counsel's closing submissions. He engaged in fact finding and interpretation of law. (Kaczmarek Report, paras. 10-11, 12, 15, 66, 68-91 are a few examples)
- \* Many of his conclusions go to the ultimate issues which are strictly within the purview of the Tribunal.

# Compensation – Kaczmarek Reports

- \* He does not identify the source for many of his statements and there is no evidence that he did any independent verification other than a review of the articles that are referred to in Appendix 1 to his Second Report.
- \* Mr. Kaczmarek acknowledged that if his findings of fact are not concurred in by the Tribunal it may alter his opinion on the appropriate compensation to be paid to the Claimants.

# Credibility of Mr. Kaczmarek

- \* Mr. Kaczmarek is an advocate for the lowest possible measure of compensation.
- \* In his First Report, Mr. Kaczmarek, absent any analysis whatsoever of the administrative appraisals, concludes that the Administrative Appraisals are reasonable. In fact, in his Reply Report he goes even further and says that the Administrative Appraisals are overstated because they do not consider that Claimants knew (or should have known ) about the impact of the Park and that the Claimants appear to have purchased many of their properties at a discount. (Reply Report, p.52, para.144)
- \* His own Reply Report contradicts this conclusion and confirms that even if one were to accept the price paid by the claimants for the subject lots as indicative of fair market value, which we do not, the Administrative Appraisals result in significant under-compensation for the takings. (He says that market had declined by September 2008 but Administrative Appraisals for September 2008 are higher than for 2007 (Report pp.56-57); did not assess comparables; acknowledged that some could be as far as a mile from the beach; Second Report, p.14, para.41 suggests US\$271 and US\$255 reflect discounted prices in February 2006, yet concludes \$12-\$14 reasonable, p.57).

# Credibility of Mr. Kaczmarek

- \* In Mr. Kaczmarek's Second Report (p.3, para.8), he suggests that Mr. Berkowitz purchased the B Lots for a substantial discount at \$1,200 per lot. Exercising professional judgment and reasonableness, as he is required to do in his capacity as an expert, he could not possibly have concluded that to be the actual price paid for the lots, particularly in light of the mortgages on the property noted on the very registry documents that Mr. Kaczmarek says he relied upon to determine the purchase price. (Ex.C-23b)

# Compensation – Purchase Price plus Return

- \* Suggestion that purchase price is appropriate measure of compensation is not supported by case law, customary law or the CAFTA.
- \* Any award based upon a return of purchase plus would have to ensure that genesis for analysis reflects fair market value at the time of purchase.
- \* The price indicated in Registry documents often did not reflect true value of properties. (FTI-3, p.55 (first full paragraph))

# Compensation – Purchase Price plus Return

- \* Purchase prices as testified to by the Claimants ought to be accepted as a starting point for any award of compensation based upon purchase price.
- \* Purchase prices should then be adjusted to reflect fair market value at time of purchase, if appropriate.
- \* V61 is appropriate example in the record of real estate return for the subject lots. V61 was purchased in February 2005 for \$800,000 and sold in February 2006 for \$3,100,000. This is reflective of a 288% one year return. This purchase price is reflective of value that includes the lawful and non- expropriatory regulatory actions of the Republic.

# Severance Damages

- \* In the case of partial takings, the Claimants seek expropriation and compensation for the entire parcel.
- \* Alternatively, any partial taking should include compensation for damage to the remainder.
- \* Mr. Kaczmarek acknowledged that lots closer to the beach will sell at a premium to lots that are further from the beach. (Day 4)



# Article 10.7(2) of the CAFTA

- \* Article 10.7(2)(c) of the CAFTA expressly provides that the compensation shall not reflect any change in value occurring because the intended expropriation had become known earlier.
- \* Should not reflect either a positive or negative change in value as a result of the scheme becoming known.
- \* The Respondent seeks to rely upon its intended expropriation to challenge the comparables used by Hedden in his Report. (Kaczmarek Reply Report, p. 45, paras. 119-124) This is exactly what appraisal standards, customary law and the CAFTA (Article 10.7(2)(c)) precludes. The Republic of Costa Rica should not be permitted to avoid, or minimize its obligation to compensate caused by the fact of its very delay and deferral of its obligation to compensate.

# Article 10.7(2) of the CAFTA

- \* The Respondent suggests that to pay fair market value to the Claimants would result in them receiving a windfall. The Claimants refute this allegation and say that to allow the Respondent to take advantage of uncertainty in the market caused by its intended taking becoming known would encourage the unjust behaviour that has been exhibited in this case.
- \* The determination of the fair market value of the subject lot should not be influenced by who is in legal possession of the lot at the time of the taking. The Respondent has no obligation to compensate the individual who sold the lot to the current owner. Such a result would encourage deleterious conduct in the carrying out of the expropriation.

# Valuation Date

- \* The valuation date of May 27, 2008 was not challenged by the Respondent's expert who adopted the same valuation date. (Day 4)
- \* Where there is an expropriation through a series of actions, the date of expropriation is the date on which the actions first lead to a deprivation of the investor's property that crossed the threshold and became tantamount to an expropriation.
- \* In the case of unlawful expropriation, as in the present case, Claimants are entitled to select either the date of expropriation or the date of the award as the valuation date.

# Unglaube

- \* The language of the Treaty in issue with respect to the measure of compensation is not the same. (Unglaube, para.301)
- \* Conclusions of the experts on compensation varied widely. (Unglaube, para.309)
- \* Claimants sought compensation at valuation date of July 2006 (which they characterized as peak of demand in the market). The Respondent's expert, Mr. Kaczmarek advocated for a valuation date of 2003/2004.

# Unglaube

- \* Tribunal agreed to a significant degree with Claimant's expert but concluded more reasonable to assume sale 6 month prior to July 2006. (Unglaube, paras. 317-318)

# Damages

- \* Public purpose engaged by ensuring fair market value and payment, not arbitrarily and without delay, in accordance with FET.
- \* Damages include the fair market value plus delay damages.
- \* Remedy for breach of Article 10.5 is award that should have been made plus delay damages.
- \* In this case it is equivalent of fair market value plus interest sought.
- \* Put the party in the same position they would have been in as if the wrongful conduct had not occurred. (Unglaube, para.308)

# Interest

- \* Interest that which could have been earned if compensation had been paid and invested favourably. (Unglaube, para.319)
- \* Interest rate should be set to achieve result of full reparation. (Unglaube, para.320)
- \* Tribunal in Unglaube awarded interest at 5 year U.S. Treasury Bill rate compounded semi-annually for the period both pre and post award. (paras. 325-326)
- \* In the Claimants' Reply on the Merits, the Claimant seeks interest in an amount based upon a commercially reasonable rate for Costa Rica colones, such as the Costa Rican Central Bank Rate, on a compound basis.
- \* The Respondent's expert has advocated for compound interest in other proceedings.

# Costs

- \* Costs on a reasonable recovery basis
- \* Tribunal to determine costs
- \* UNCITRAL rules: circumstances of case to be taken into account
- \* Not a frivolous claim





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