

Exhibit RWE-011

Second Expert Report of Brent C. Kaczmarek, CFA

December 22, 2014

UNDER THE UNCITRAL ARBITRATION RULES AND SECTION B OF CHAPTER 10 OF
THE DOMINICAN REPUBLIC - CENTRAL AMERICA - UNITED STATES FREE TRADE
AGREEMENT
ICSID CASE No. UNCT/13/2

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,
CLAIMANTS

v.

THE REPUBLIC OF COSTA RICA,
RESPONDENT

**SECOND EXPERT REPORT OF
BRENT C. KACZMAREK, CFA**

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22 DECEMBER 2014

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I. Scope of Work and Qualifications

1. Navigant Consulting, Inc. (“Navigant”) has been asked by the Ministry of Foreign Trade in the Republic of Costa Rica (“Costa Rica” or “Respondent”) through its counsel Sidley Austin LLP (“Counsel”) to prepare this second expert report in connection with the arbitration commenced by Spence International Investments, LLC (“Spence Co.”); Mr. Bob F. Spence; Mr. Joseph M. Holsten; Ms. Brenda K. Copher; Mr. Ronald E. Copher; Mr. Brett E. Berkowitz; Mr. Trevor B. Berkowitz; Mr. Aaron C. Berkowitz; and Mr. Glen Gremillion (collectively, “Claimants”) against Costa Rica. Claimants own land in Playa Ventanas and Playa Grande in Guanacaste, Costa Rica which they claim Costa Rica has treated inconsistently with its obligations under the Dominican Republic – Central America – United States of America Free Trade Agreement (“DR-CAFTA”). Claimants allege that Costa Rica’s move to expropriate 75 meters of property (“75-Meter Strip”) owned by Claimants within the Las Baulas National Marine Park (“BNMP”) (the “Measures”) subjected Claimants’ properties to being wholly or partially expropriated. Claimants claim that Respondent’s actions contributed to the expropriation of their properties over time, commencing in 2004 until 19 March 2010 when the expropriation “crystalized.”¹

2. Claimants claim that 13 lots in Playa Ventanas and 13 lots in Playa Grande were wholly or partially expropriated as a result of the Measures. Claimants have collectively engaged Mr. Michael P. Hedden of FTI Consulting, Inc. (“FTI”)² to calculate the fair market value of their 26 properties as of 27 May 2008, the date upon which Costa Rica’s Constitutional Court ruled that the government must expropriate the properties of landowners or encourage environmentally sensitive developments to proceed.³ In FTI’s first expert report, dated 23 April 2014, they calculated using the Sales Comparison Approach that the combined fair market value of the wholly and partially expropriated properties was US\$ 36,203,000 on 27 May 2008.⁴ In our first report, we explained that there were several inconsistencies between the prices and dates at

¹ Claimants’ Reply Memorial, ¶ 285(b)

² Mr. Hedden was assisted in preparing his first report by Mr. Mark W. Dunec (FTI First Report, pp. 9, 37, Section 9.3). Mr. Hedden does not note whether Mr. Dunec assisted him in preparing this second report.

³ FTI First Report, pp. 9, 17. We note, however, that Claimants convert the amounts claimed from US\$ to Costa Rican Colones (“CRC”) on 28 May 2008. Claimants’ Memorial, ¶ 331.

⁴ Claimants’ Memorial, ¶¶ 330-331; FTI First Report, pp. 7-8. Although FTI’s calculations (FTI First Report, Section 9.4) only calculate the value of the part taken and severance damages related to the actual property area expropriated by Respondent (which in many cases is less than 75 meters from the mean high tide line), Claimants claim damages of US\$ 36,543,000 (CRC 18,780,543,990) as though the full 75 meters has been expropriated.

which Claimants alleged they purchased their respective properties and the prices and dates relied upon by FTI in developing its valuation conclusions. Moreover, we explained that the methodology employed by FTI resulted in valuation conclusions that were overstated and inaccurate.

3. FTI prepared a second report in reply to our observations on 1 October 2014. In response to these observations, FTI changed many of the prices and dates at which Claimants purchased their respective properties. However, FTI rejects the observations we offered in our first report with regard to their methodology and valuation conclusions on the basis that: (1) we [Navigant] are not an accredited real estate appraiser, (2) we offer no alternative comparable sales data or analysis, (3) we do not attempt to value Claimants' property, and (4) we have no basis to determine the amount of knowledge that buyers and sellers possessed in the marketplace. As a result, FTI makes no changes to their damages quantum.⁵ Counsel has asked us to review FTI's reply report and to offer any additional comments surrounding FTI's damages methodology and calculations.

4. A number of the documents we have reviewed in this matter were originally prepared in Spanish. I do not speak or write in Spanish. Accordingly, I have relied upon translations of these documents or translation services provided by Counsel or members of my team that are fluent in Spanish. The list of documents we relied upon in preparing this report is provided as Appendix 1.

5. We understand that Claimants have made legal claims regarding alleged breaches of DR-CAFTA by Costa Rica. Nothing in the conclusions or opinions stated herein is intended to address those legal arguments. This report does not contain any opinions on matters of law that would require legal expertise.

6. This report contains eight sections including this introductory section (Section I). Section II is an executive summary. Section III summarizes my qualifications with respect to real estate valuation. Section IV explains that Claimants knew or should have known that the BNMP encumbered the properties when they were purchased. Section V explains how FTI's analysis is flawed as it would provide Claimants with double recovery for the expropriated properties and manufactures severance damages. Section VI summarizes the additional errors in FTI's analysis

⁵ FTI Second Report, p. 4

of the real estate market in Playa Grande and Playa Ventanas as well as presents several of the errors made in implementing the Sales Comparison Approach. Section VII explains how the Measures have not caused Claimants to suffer any harm. Finally, in Section VIII, we address Claimants' misconceptions with regard to our criticisms of their pre-award interest calculation.

II. Executive Summary

7. Claimants continue to claim, and FTI continues to calculate, the fair market value of Claimants' wholly and partially expropriated properties on 27 May 2008. This approach assumes that the proper measure of damages in this case is the fair market value of the properties as of 27 May 2008. This approach, however, disregards the impact that the BNMP had on the value of Claimants' properties when they were acquired. The evidence submitted by Claimants and FTI reveals that Claimants benefited from the BNMP via a reduced purchase price because they knew (or should have known) the BNMP already affected the acquired properties.

8. For example, the B-Lots owned by Messrs. Berkowitz were purchased in September 2003 for the nominal sum of CRC 500,000 per lot (or approximately \$1,200 per lot). Mr. Robert Reddy, Spence Co.'s CFO, also confirms that the SPG-Lots were purchased with full knowledge that a portion was within the BNMP and would be unable to be developed. Claimants therefore knew (or should have known) that the land (or a portion of it) was within the BNMP and would be restricted from development. Despite knowing their properties were within the BNMP when they were acquired, Claimants now seek a value for their properties as if the BNMP did not exist. Thus Claimants seek a double economic benefit: a low purchase price due to the existence of the BNMP and a high sales price assuming the BNMP does not exist. This is a form of double compensation.

9. Additionally, FTI's Sales Comparison Approach contains a flawed calculation of severance damages (i.e., damages related to the portion of the properties that was not expropriated) for the partially expropriated B-Lots and SPG-Lots. FTI explains that the value of the un-expropriated remainder of the B-Lots and SPG-Lots has been diminished because it is now further from the beachfront and lacks ocean or beach views. In arriving at this conclusion, FTI ignores that a thick layer of vegetation and foliage currently exists within the 50-Meter Inalienable Zone (i.e., the area 50 meters inland from the mean high-tide). This vegetation and foliage would exist but-for the Measures. As Claimants could not expect ocean views or direct beach access but-for the Measures, compensation is not necessary for the "loss" of these amenities under the Measures.

10. Accordingly, it is our view that Claimants should recover no more than their purchase prices for their properties affected by the 75-Meter Strip that defines the BNMP. As noted in our first report, however, the documentation provided by Claimants in support of their purchase prices and purchase dates contains several inconsistencies and discrepancies. Claimants have not submitted with their Reply submission any new documentation to clarify these discrepancies, such as sales and purchase agreements. As such, we are still unable to prepare an alternative damages calculation that quantifies Claimants' investment in this report. However, if the Tribunal does accept the evidence submitted by Claimants as support for their amounts invested, then Claimants have invested at most US\$ 4,529,490 (CRC 2,327,840,998) within the 75-Meter Strip, as shown in Table 1 below.

Table 1 – Claimants' Amounts Invested Within the 75-Meter Strip⁶

Claimant	Amounts Invested	
	US\$	CRC
Spence	\$ 700,000	₡ 359,751,000
R. Copher	\$ 350,000	₡ 179,875,500
B. & R. Copher	\$ 2,448	₡ 1,258,306
R. Copher & Holsten	\$ 550,000	₡ 282,661,500
Spence Co.	\$ 2,750,868	₡ 1,413,753,746
A. & T. Berkowitz	\$ 939	₡ 482,384
B. Berkowitz	\$ 1,419	₡ 729,383
Gremillion	\$ 173,816	₡ 89,329,178
Total Compensation Due Claimants	\$ 4,529,490	₡ 2,327,840,998

11. However, the amount shown in Table 1 above is still overstated because Claimants purchased several of their properties (such as the SPG-Lots and the B-Lots) with the knowledge that they were indeed located within the BNMP. In such circumstances, Claimants would not have suffered any damages at all since no rational buyer would ascribe any value to the portion of the property within the 75-Meter Strip.

12. If, on the other hand, the Tribunal does find that damages should be awarded to Claimants based on the fair market value of their properties (i.e., ignoring the impact the BNMP had on Claimants' purchase prices), FTI's valuation of these properties still contains flaws that render it

⁶ Amounts in US\$ are presented for the Tribunal's convenience as Claimants claim damages in CRC. Amounts have been translated from US\$ at a rate of US\$ 1 to CRC 513.93, the exchange rate as of 28 May 2008 as used in Claimants' Memorial.

unreliable. We note that FTI made no changes to their damages methodology or valuation conclusions in their second report despite making some corrections and clarifications to Claimants' purchase prices and purchase dates.

“Notwithstanding these modifications, FTI notes that the slight discrepancies noted in the Kaczmarek Report and corrected herein do not have any effect on the valuation conclusion in the FTI Report.”

13. Consequently, the flaws and errors in FTI's implementation of the Sales Comparison Approach from our first report remain valid. In this second report, we further explain the methodological errors in FTI's damages calculation. FTI's implementation of the Sales Comparison Approach contains at least six flaws.

14. First, FTI continues to incorrectly analyze the real estate market in Playa Grande and Playa Ventanas. FTI concludes that prices in Playa Grande and Playa Ventanas steadily increased at rates between 1 and 3 percent per month from 2003-2007. FTI concludes that prices remained at 2007 levels and did not decline in 2008. FTI's assessment of the real estate market is flawed, as real estate prices did decline from 2006 to 2008 as a result of the global financial crisis.

15. Second, the real estate market in Costa Rica is heavily influenced by North American buyers. Thus, we concluded that real estate prices in Costa Rica are correlated (i.e., follow the trend) with prices in the United States. The S&P/Case-Shiller U.S. National Home Price Index (“Case-Shiller Index”), which measures the price of residential real estate in the United States, showed prices rising to bubble levels in 2006 before rapidly declining in 2008 and 2009. A similar trend was observed in Costa Rica. As FTI's Sales Comparison Approach calculates fair market values for Claimants' properties that do not reflect the downturn in the Costa Rican real estate market during 2007-2008, their appraisals are overstated

16. Third, FTI states that its assessment of the market is supported by its interviews with market participants. However, Mr. Robert Davey, a real estate broker interviewed by FTI, told the Tico Times in September 2008 that the Costa Rican market was undergoing a “correction”. Ms. Penelope Lent, another broker interviewed by FTI, stated in a letter dated January 2013 that she sold only one beachfront lot in the Playa Grande area from 2005-2008 due to the BNMP. Reuters reported in August 2008 that prices for vacation homes in Costa Rica had fallen 40 percent from their peak a few years prior. FTI's position that real estate prices increased by 1 to 3 percent per month from 2003-2007 and never declined is incorrect.

17. Fourth, FTI also states that there is no evidence of the predominance of “flippers” or property speculators in the market. Yet the existence of “flippers” was confirmed both contemporaneously in 2008 and retrospectively. The predominance of “flippers,” caused prices in Costa Rica to fall even harder as property owners were left holding real estate they never intended to develop. FTI’s inability to identify the presence of speculators in the market indicates to us that they failed to correctly assess the real estate market.

18. Fifth, FTI continues to err in the selection of comparable sales transactions. FTI agrees that many of their comparable sales transactions were adjusted by as much as 121 percent upward and 70 percent downward. FTI attempts to rationalize these significant adjustments by stating that they seldom applied adjustments for size, location, and physical features and that the major adjustment was related to changes in market conditions (i.e., market appreciation). However, FTI made adjustments for size, location, and physical features with respect to all of the B-Lots and SPG-Lots that reduced the value of the comparable transactions by as much as 75 percent. Accordingly, the comparable sales transactions selected by FTI to value the B-Lots and SPG-Lots are not, in fact, comparable.

19. Sixth, FTI continues to assume that the properties could be developed but-for the Measures. However, FTI ignores that lots (or portions of lots) outside the 75-Meter Strip (and thus not subject to the Measures) have yet to be developed. For instance, Spence Co. planned to develop portions of the SPG-Lots that were not within the 75-Meter Strip immediately upon purchasing the lots in December 2006. Mr. B. Berkowitz also purchased 16 B-Lots that are situated outside of the 75-Meter Strip. Even though these properties are not within the BNMP or subject to the Measures, neither Spence Co. nor Mr. B. Berkowitz has developed them. In our view, the lack of development is an indication that the properties were affected by factors other than the BNMP.

III. My Qualifications

20. Claimants state that I am not qualified to value real estate and that I cannot assist the Tribunal in determining the value of the properties.

“Mr. Kaczmarek is not qualified to respond to the real estate valuation as he is not a qualified real estate valuation expert. The Kaczmarek Report is of no use to the Tribunal in

determining the value of the properties taken by Respondent.”⁷

“Mr. Kaczmarek does not possess special knowledge or expertise beyond that of the Tribunal with regard to the real estate market in Costa Rica, real estate valuation, the history of the BNMP, Claimants’ level of knowledge at the time of purchase, or the other areas with respect to which he provides opinion (and makes findings of fact and argument). Mr. Kaczmarek’s credentials regarding residential real estate valuation are limited to Costa Rica’s previous international arbitration with the Unlaubes.”⁸

21. FTI also joins Claimants in questioning my expertise.

“These assertions are without merit, as the Kaczmarek Report was not prepared by an accredited real estate appraiser”⁹

22. Claimants and FTI are misinformed about my qualifications. My Chartered Financial Analyst (“CFA”) designation is an international designation awarded to professionals that demonstrate competence in the investment valuation and decision-making process. The curriculum that must be mastered by a CFA candidate includes the valuation of all asset classes, **including** real estate. CFA candidates must demonstrate the ability to analyze and value equities, fixed income instruments, derivatives, and real estate on a global basis.¹⁰ For the avoidance of doubt, I include as an exhibit to this report a copy of the selected readings that were required at the various levels of the CFA examination involving real estate valuation when I took the examinations.¹¹ These selected readings were to be studied in addition to core recommended textbooks. Beginning in 1998, the recommended core textbook for the real estate section of the CFA examinations was the 11th edition of the Appraisal Institute’s *“The Appraisal of Real Estate.”*¹²

23. It is true that I do not describe myself as a real estate appraisal expert in particular. I also do not describe myself as a bank valuation expert, a gold mine valuation expert, a power plant

⁷ Claimants’ Reply Memorial, ¶ 207

⁸ Claimants’ Reply Memorial, ¶ 209

⁹ FTI Second Report, p. 4

¹⁰ See Topic Learning Objectives, *Association for Investment Management Research* and Candidate Body of Knowledge Topical Outline. *CFA Institute (R-155)*

¹¹ 1996 CFA Level I Readings – Portfolio Management, 1997 CFA Level II Readings – Asset Valuation II, 1998 CFA Level III Readings – Portfolio Management **(R-156)**

¹² 1998 CFA Study and Examination Program Textbooks: Primary Readings **(R-157)**

valuation expert, an oil and gas field valuation expert, or a steel mill valuation expert. I do not describe myself in these ways because my education, training, and professional qualifications cover all assets classes (equities and businesses, fixed-income, derivatives, and real estate) rather than just real estate. As such, I describe myself as a valuation expert.

24. Many of the engagements listed on my CV qualify as the valuation of real property. Claimants' inability to recognize my expertise in real estate valuation may be attributable to their confusion over the definition of real property. In its June 2010 Exposure Draft, the International Valuation Standards Council set forth definitions for real property and real estate as follows:

“Real property – all rights, interests and benefits related to the ownership of real estate.”¹³

“Real estate – is land and all things that are a natural part of the land, eg, trees and minerals, things that have been attached to the land, eg, buildings and site improvements, all permanent building attachments, eg, mechanical and electrical plant providing services to a building, that are both below and above the ground.”¹⁴

25. Based upon these definitions, it is clear that my valuation work associated with mines, power plants, oil and gas fields, and toll roads qualifies as the valuation of real property. Indeed, it is common in the extractive industry (mining and hydrocarbon production) to refer to the value of these operations as “property valuations.” My CV also indicates where I have also been engaged as an expert in other disputes to provide an appraisal of real property for either residential or commercial development in Czech Republic, Romania, the Turks & Caicos Islands, Hungary, Venezuela, Kuwait, and Peru.

IV. New Evidence Further Reveals Claimants Were Aware that the BNMP Affected the Subject Properties Before They Were Acquired

26. In our first report, we explained that it was likely that Claimants knew (or should have known) that their properties were within the BNMP. Thus, we stated that it seemed highly likely that Claimants would have negotiated and obtained discounts when acquiring their properties due to the possibility that the area within the 75-Meter Strip would be unavailable for development.

¹³ IVS Exposure Draft, June 2010, International Valuation Standards Council, pg. 130. **(R-158)**

¹⁴ IVS Exposure Draft, June 2010, International Valuation Standards Council, pg. 130. **(R-158)**

27. In preparing our first report, we reviewed the evidence submitted with Claimants' Memorial and Reply to determine whether Claimants purchased their properties at discounted prices. Our review found discrepancies between the purchase prices and dates reported in FTI's Report and Claimants' pleadings with respect to 20 of Claimants' 26 properties. We stated that we would have preferred to see Claimants' purchase and sale agreements for the properties as they would allow us to resolve many of these discrepancies. Further, Claimants' purchase and sales agreements would also assist us to fully understand how the Claimants incorporated the risk of not developing the 75-Meter Strip within the BNMP. Claimants did not produce these purchase and sales agreements and FTI has made no effort to assess the reasonableness of Claimants' purchase prices, saying that they are irrelevant.

“FTI is not an expert in terms of the Claimants' motivation or perception of value. FTI is an expert in real estate valuation based on a fair market value standard. FTI provided an opinion of value on the real estate and not the rationale for the purchase of real estate by the Claimants....[T]he Kaczmarek Report wrongly claims that FTI assumes that Claimants did not know the properties could be subject to expropriation. FTI's assumption as to what the Claimant knew or did not know is irrelevant to our valuation.”¹⁵

28. Even though FTI finds Claimants' purchase prices and dates to be irrelevant, in their second report, FTI has attempted to clarify some of the discrepancies. Our review of Claimants' Reply Memorial and related witness statements, as well as FTI's second report, indicates that that several of these discrepancies were related to the reliance upon “Certification of Property” forms submitted by Claimants in support of their purchase prices and dates.¹⁶ FTI's own data entry errors contributed to other discrepancies.¹⁷ Claimants, in their Reply Memorial and related witness statements, also provide additional insight into what they knew when purchasing some of their properties. We note, however, that none of these explanations were accompanied by new documentation. In Appendix 2, we present a timeline of Claimants' purchases as they are now presented in Claimants' Reply Memorial.

¹⁵ FTI Second Report, p. 15

¹⁶ We note that Mr. Robert Reddy states “There is often a delay between the actual purchase date and the date of transfer noted in the National Registry. In some cases, this delay was many months.”(Second Witness Statement of Mr. Robert Reddy, ¶ 40). See also, FTI Second Report, pp. 18-20

¹⁷ FTI Second Report, p. 19

29. Considering this new information provided by FTI and Claimants, we can now better assess whether the properties were acquired by Claimants at a discount or if Claimants knew (or should have had known) that their properties were affected by the BNMP (although we still cannot perform a complete assessment). We also can now confirm that several of Claimants' purchases were made at a discount.

30. In the subsections below, we explain how the lots purchased by Mr. B. Berkowitz, Mr. Gremillion, Mr. and Mrs. Copher, Mr. Holsten, Mr. Spence and Spence Co. were acquired at a significant discount or acquired with the knowledge that the properties were within the BNMP.

A. Mr. Berkowitz's Purchases Were Made at a Significant Discount

31. In their first report, FTI reported that Mr. B. Berkowitz purchased Lots B1, B3, B5, B6, and B8 on 22 September 2003 and 24 September 2003 for US\$ 500,000 per lot.¹⁸ In our first report, we noted that the "Certification of Property" forms that were submitted by Claimants in support of Mr. B. Berkowitz's purchase prices and dates revealed that Lots B1, B3, B5, B6, and B8 were purchased for CRC 500,000 per lot (only US\$ 1,200 per lot or approximately US\$ 0.17/m²).¹⁹ In their second report, FTI confirmed a purchase price of US\$ 1,200 per lot.²⁰

32. When Mr. B. Berkowitz's purchase price of US\$ 1,200 per lot is compared with contemporaneous listings for properties owned by Mr. Reinhard Unglaube and Mrs. Marion Unglaube, it is clear that the B-Lots were purchased at a significant discount. As shown in Figure 1 below, the properties purchased by Mr. B. Berkowitz (shaded in red) are located adjacent to the subject properties in the consolidated Unglaube v. Costa Rica arbitrations (shaded in blue).²¹

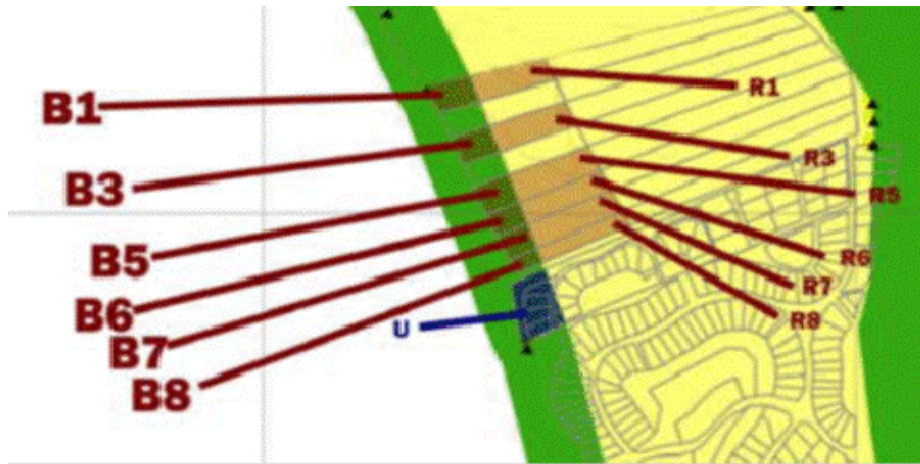
¹⁸ FTI Expert Report, pp. 71, 73, 75, 77, 81

¹⁹ Claimants' Exhibit C23b, C24b, C25b, C26b, C28b. Amounts have been converted at CRC 406.43 to US\$ 1, the prevailing exchange rate at 6 September 2003, the date that FTI and Claimants' Certification of Property forms indicate the lots were purchased.

²⁰ FTI Second Report, p. 20

²¹ Claimants' Exhibit C-2a

Figure 1 – Location of the B-Lots and the Unglaube Lots in South Playa Grande²²



33. At the time Mr. B. Berkowitz purchased the B-Lots, the Unglaubes had listed for sale several properties within their development, Palm Beach Estates, including two parcels adjacent to Lot B8. Palm Beach Estates Lot 1, a 20,000 m² “beachfront” lot, was listed for sale at US\$ 800,000 (or US\$ 40/m²).²³ Palm Beach Estates Lot 2, a 15,000 m² “interior” lot, was listed for US\$ 300,000 (or US\$ 20/m²).²⁴ Thus, Lots 1 and 2 were listed for sale at a price per m² that were 235 and 117 times higher than the prices paid by Mr. B. Berkowitz, respectively. The nominal prices paid by Mr. B. Berkowitz are indicative of his having paid a price that reflects that the B-Lots were within the 75-Meter Strip and may not be able to be developed. In Figure 2 below, we show a map of the Unglaube’s Palm Beach Estates development in South Playa Grande to illustrate the location of Lots 1 and 2.

²² Claimants’ Exhibit C-2a

²³ Unicaribbean, Price List, 14 August 2003 via Internet Archive, Accessed 19 November 2014 (<https://web.archive.org/web/20030814142154/http://unicaribbean.com/preise.html>) (R-159)

²⁴ Unicaribbean, Price List, 14 August 2003 via Internet Archive, Accessed 19 November 2014 (<https://web.archive.org/web/20030814142154/http://unicaribbean.com/preise.html>) (R-159)

Figure 2 – Map of Lots for Sale by the Unглаубes in Palm Beach Estates in July 2003²⁵



34. Mr. B. Berkowitz’s purchase prices are also significantly lower than the prices he received when he sold Lots B2, B4, and B7 in early 2004. In February and March 2004, Mr. B. Berkowitz sold Lots B2 and B4 for US\$ 425,000 and US\$ 400,000, respectively.²⁶ In April 2004, Lot B7 was sold to co-Claimant Mr. Glen Gremillion for US\$ 425,000 (or US\$ 57.70/m²).²⁷ Even though Mr. B. Berkowitz’s sales prices for Lots B2, B4, and B7 are consistent with the Unглаube’s list prices for Lot 1, Mr. B. Berkowitz stated that he considered the sales prices for Lots B2, B4, and B7 to have been “at a price below market value.”²⁸ If in Mr. B. Berkowitz’s opinion the sales prices of over US\$ 50/m² for Lots B2, B4, and B7 were “below market value”, then the purchase prices of Lots B1, B3, B5, B6, and B8 at US\$ 0.17/m² must also be below market value. In our view, Mr. B. Berkowitz’s ability to sell Lots B2, B4, and B7 at prices that are orders of magnitude higher than he just purchased them months before indicates

²⁵ Unicaribbean, Palm Beach Estates Plan, 27 July 2003 via Internet Archive, Accessed 20 November 2014 (<https://web.archive.org/web/20030727062659/http://www.unicaribbean.com/plan.html>) (R-160)

²⁶ First Witness Statement of Brett Berkowitz, ¶ 15.

²⁷ First Witness Statement of Brett Berkowitz, ¶¶ 14-15; First Witness Statement of Glen Gremillion, ¶¶ 7-8. Lot B7’s purchase price US\$ 425,000 divided by 7,365.18 m² area equals US\$ 57.70/m².

²⁸ First Witness Statement of Brett Berkowitz, ¶ 15

that he purchased the B-Lots for a discounted price that reflected the risk of owning properties within the BNMP.

B. Mr. Gremillion Should Have Known His Property Was Within the BNMP

35. In April 2004, Mr. Gremillion purchased Lot B7 from Mr. B. Berkowitz for US\$ 425,000 (or US\$ 57.70/m²),²⁹ despite the fact that the public record stated that Mr. B. Berkowitz purchased the property, as well as adjacent and nearby lots, only 7 months earlier for approximately US\$ 1,200 per lot.³⁰ Mr. B. Berkowitz's acquisition price of US\$ 1,200 should have informed Mr. Gremillion that the property he was seeking to purchase was within the BNMP or was otherwise unable to be developed.

36. Moreover, if Mr. B. Berkowitz's acquisition price did not alert Mr. Gremillion to the fact that Lot B7 was within the BNMP and unable to be developed, the Official Gazette on 5 November 2003 published that the Unglaubes' property in Palm Beach Estates was declared in the public interest.³¹ Thus, 5 months before Mr. Gremillion purchased Lot B7, it was known that property just a few hundred meters to the south was decreed to be part of the BNMP and subject to expropriation.

C. The Cophers and Mr. Holsten Purchased Their Lots at a Discount or with Knowledge of the Risk of Expropriation

37. In their first report, FTI stated that Mr. and Mrs. Copher purchased Lots V39 and V40 on 27 September 2000 for US\$ 500,000 per lot (US\$ 494.17/m² and US\$ 583.52/m², respectively).³² In our first report, we noted that the "Certification of Property" forms that were submitted by Claimants in support of Mr. and Mrs. Copher's purchase prices and dates revealed that Lots V39-V40 were actually purchased for CRC 500,000 each (approximately US\$ 1,200) per lot (or US\$ 1.11/m² and US\$ 1.43/m², respectively).³³ In their second report, FTI confirmed that the

²⁹ First Witness Statement of Glen Gremillion, ¶¶ 7-8. Lot B7's purchase price of US\$ 425,000 divided by 7,365.18 m² area equals US\$ 57.70/m². See also, Claimants' Exhibit C-27b

³⁰ The "Certification of Property" forms submitted by Claimants are available to the general public through the National Registry's website. Lots B1, B3, B5, B6, and B8 all have "Certification of Property" forms dated in 6 September 2003. Accordingly, it would follow that Lot B7's Certification of Property would have been available as of 6 September 2003. First Witness Statement of Brett Berkowitz, ¶ 15; First Witness Statement of Glen Gremillion, ¶ 7.

³¹ MIRENEM Resolution No. 375, 22 July 2003, published in La Gaceta No. 21 on 5 November 2003.

³² FTI Expert Report, pp. 50-51

³³ Claimants Exhibits C-8b, C-9b. Lot V39 and V40 purchase price of CRC 500,000 per lot, divided by their areas of 1,101.80 m² and 856.87 m², respectively. Amounts have been converted at CRC 408.43 to US\$ 1, the prevailing exchange rate at 25 September 2003, the date that FTI indicates the lots were purchased (FTI Second Report, p. 18).

purchase price “should have read colons [*sic*] rather than dollars.”³⁴ Thus, according to FTI’s correction, the Cophers purchased Lots V39-V40 for CRC 500,000 (as supported by the “Certification of Property” forms). This low purchase price indicates that they were aware that the properties were within the 75-Meter Strip.

38. Despite indicating that the properties were purchased for CRC 500,000, FTI also states in their second report that Mr. Robert Davey, the real estate broker that allegedly handled the transaction, confirmed that both properties were purchased in September 2003 for US\$ 340,000 (or US\$ 173.59/m²).³⁵ Claimants have not submitted any contracts or documents that explain this discrepancy and Mr. Davey has not provided a witness statement in this arbitration.

39. However, if we were to accept that the Cophers purchased both Lots V39 and V40 for US\$ 340,000 (which is not supported by the evidence submitted), the Cophers still appear to have purchased Lots V39-V40 at a discount. Indeed, in November 2004, FTI reports that Mr. Copher purchased V38 for US\$ 350,000 (or US\$ 325/m²).³⁶ The purchase price for V38 implies that real estate prices in Playa Grande nearly doubled in the course of the 14 months after V39-V40 were purchased.³⁷ In our view, it is more likely that the massive price appreciation observed from September 2003 to November 2004 was due to the Cophers having purchased Lots V39-V40 at a discounted price due to the properties being located within the BNMP.

40. It also appears that Mr. Holsten, whose investments in Lots V46-V47 were made jointly with Mr. Copher, acquired his properties at a discount and with knowledge of the BNMP. Since Mr. Copher had already purchased Lots V39-V40 at prices acknowledging those properties were located within the 75-Meter Strip, it is reasonable to assume that Mr. Holsten was also aware of the effect of the BNMP on the price of Lots V46-V47.

41. Messrs. Holsten and Copher purchased Lots V46-V47 jointly in February 2006 at the discounted price of US\$ 275,000 per lot (or US\$ 271.67/m² and US\$ 255.21/m², respectively).³⁸ Indeed, Messrs. Holsten and Copher purchased V46-V47 for prices between 20 and 27 percent

³⁴ FTI Second Report, p. 19

³⁵ FTI Second Report, p. 19. Lots V39-V40 purchase price of US\$ 340,000, divided by the total area of V39-40 of 1,958.67 m².

³⁶ FTI Second Report, p. 19, Claimants Exhibit C-7b. Lot V38 is 1,076.93 m².

³⁷ In contrast, FTI estimates that market prices increased at 2 percent per month during 2003 and 2004 (FTI Expert Report, p. 24)

³⁸ First Witness Statement of Ronald Copher, ¶ 17. Mr. Copher and Mr. Holsten each paid US\$ 137,500 for 50 percent of Lots V46 and 50 percent of V47, for a total investment of US\$ 275,000 in each lot. Lots V46 and V47 are 1,012.25 m² and 1,077.55 m², respectively. See also, Claimants’ Exhibits C-10b1, C-10b2, C-11b1, C-11b2.

less per m² than Mr. Copher paid for V38 just 15 months earlier. Given that Lots V46-V47 were purchased near the peak of the market in February 2006, it is illogical that Lots V46-V47 would have a sales price that is less than Lot V38. This discounted price (compared to Lot V38) is likely due to the fact that Mrs. Unglaube's property was declared in the public interest in July 2003 (with the decree having been published in the Official Gazette on 5 November 2003), the Attorney General's opinion that was issued in February 2004, and the B-Lots that were declared in the public interest on 14 July 2005 (with the decree having been published in the Official Gazette on 1 December 2005).

42. It is unclear why there are such significant variations in the prices paid by Mr. Copher, Ms. Copher, and Mr. Holsten, particularly since it was clear from their initial acquisition that they were purchasing properties within the BNMP. Such significant variations could likely be explained through an examination of the sales agreements. For instance, Mr. Copher, Ms. Copher, and Mr. Holsten could have purchased their properties for a small down payment with the remainder payable upon the receipt of building permits for the properties. Similarly, they could have been purchased at "fair market value" but with a clause allowing the sale to be reversed if the buyers were unable to obtain such building permits. As Claimants have not produced their sales agreements, we are unable to explain the rationale behind these pricing variations.

D. Mr. Spence and Spence Co. Purchased Their Lots at a Discount or with Knowledge of the Risk of Expropriation

43. In his witness statement, Mr. Spence states that he is a former business colleague and friend of Mr. Copher and that they travelled together to Playa Ventanas and Playa Grande in 2003 to view property.³⁹ Since Mr. Copher purchased Lots V39-V40 at prices that acknowledge those properties were located within the 75-Meter Strip, it is reasonable to assume that Mr. Spence should have been aware of the fact that his properties were within the BNMP.

44. However, even if it cannot be assumed that Messrs. Copher and Spence were aware of each other's actions, it appears that Mr. Spence purchased his properties at a discount. In August and September 2003, Mr. Spence states he purchased five lots in Playa Ventanas, Lots V30-V34, for

³⁹ First Witness Statement of Ronald Copher, ¶ 8

US\$ 800,000 (or approximately US\$ 190/m²).⁴⁰ Specifically, Mr. Spence purchased V32-V33 on 20 August 2003 for US\$ 150,000 each (or US\$ 175.55/m² and US\$ 164.17/m², respectively)⁴¹ and Lots V30-V31 in September 2003 for US\$ 200,000 each (or US\$ 238.23/m² and US\$ 247.90/m², respectively).⁴² Mr. Spence does not provide the purchase price for Lot V34, but it can be inferred that he purchased V34 for US\$ 100,000 (or approximately US\$ 127.30/m²).⁴³

45. Mr. Spence stated he sold Lot V34 for US\$ 300,000 in early 2004.⁴⁴ Thus, within months of purchasing Lot V34, Mr. Spence sold it for a price three times higher than what he paid. In our view, such a significant increase in Lot V34's value over such a short period of time can only be attributed to the fact that it, along with Lots V30-V33, was originally purchased by Mr. Spence at a discounted price.⁴⁵

46. Even though Mr. Spence was aware of the BNMP in 2003, he continued to purchase additional properties through Spence Co. from February 2005 to May 2007. It is clear that Spence Co.'s purchases were made at a discount or with knowledge that the property was within the BNMP.

47. Mr. Reddy and FTI offer clarifications and corrections with respect to some of the discrepancies regarding Spence Co.'s purchases of Lots V59, A39, A40, C71, and C96 during 2005. Based on the clarifications offered by Mr. Reddy and FTI, and as shown in Table 2 below, the purchases made by Spence Co. throughout 2005 are illogical if one assumes that they were all purchased at a fair market value that did not consider that the properties were within the 75-Meter Strip.

⁴⁰ First Witness Statement of Bob F. Spence, ¶¶ 6-10

⁴¹ First Witness Statement of Bob. F. Spence, ¶ 8; FTI Expert Report, pp. 47-48; Claimants' Exhibits C-5b, C-6b. Lot V32 and V33 purchase price of US\$ 150,000 per lot, divided by their areas of 854.46 m² and 913.71 m², respectively.

⁴² First Witness Statement of Bob. F. Spence, ¶ 9; FTI Expert Report, pp. 45-46; Claimants' Exhibits C-3b, C-4b. Lot V30 and V31 purchase price of US\$ 200,000 per lot, divided by their areas of 806.78 m² and 839.53 m², respectively.

⁴³ Mr. Spence states that the total land area purchased was approximately 4,200 m². The total land area of Lots V30-V33 is 3,414.48 m². Thus Lot V34 is approximately 785.52 m². First Witness Statement of Bob. F. Spence, ¶ 11.

⁴⁴ First Witness Statement of Bob F. Spence, ¶ 11. Even if Mr. Spence's purchase price of US\$ 800,000 was allocated evenly among Lots V30-V34 at US\$ 160,000/lot, Mr. Spence sold Lot V34 for 1.875 times what he purchased it for just a few months prior.

⁴⁵ Especially in light of FTI's view that property values increased only 2 percent per month during 2003 and 2004 (FTI Expert Report, p. 24).

Table 2 – Spence Co.’s 2005 Purchases⁴⁶

Lot	Purchase Date	Purchase Price (US\$)	Area (m ²)	Purchase Price/m ²	Lot Characteristics
A39	Feb-05	\$ 220,000	902.02	\$ 243.90	Beachfront
A40	Feb-05	\$ 220,000	892.62	\$ 246.47	Beachfront
C71	Feb-05	\$ 230,000	667.04	\$ 344.81	Interior
C96	Jun-05	\$ 250,000	1,945.65	\$ 128.49	Beachfront
V61	Aug-05	\$ 800,000	4,523.67	\$ 176.85	Beachfront

48. As Table 2 above reveals, Spence Co. paid the highest price per m² for Lot C71. Lot C71 is an “**interior**” lot that has no direct beach access and has more limited beach views than a “beachfront” lot.⁴⁷ The fact that Spence Co. purchased four “beachfront” lots – Lots A39, A40, C96, and V61 – at lower prices per m² than it paid for “interior” Lot C71 is indicative that the “beachfront” properties were purchased at a discount since they are within the BNMP.⁴⁸ This is unsurprising, as these properties were purchased after Ms. Unglaube’s property was declared in the public interest on 14 July 2003 (and after the related decree was published in the Official Gazette on 5 November 2003). Moreover, these purchases also were made after the Attorney General confirmed the boundaries of the park extended 125 meters inland in February 2004.

49. In December 2006 Spence Co. purchased Lots SPG1, SPG2, and SPG3 in South Playa Grande from a “distressed seller.”⁴⁹ Also, in May 2007, Spence Co. purchased Lot V59.⁵⁰ Mr. Reddy indicates that these lots were purchased after Spence Co. became aware of the Attorney General’s opinion that the BNMP extended 125 meters inland. Indeed, Mr. Reddy states that Spence Co. was aware it may not be able to develop the properties within the 75-Meter Strip.

⁴⁶ **A39**: FTI Expert Report, p. 58, Claimants Exhibit C-17b; First Witness Statement of Robert Reddy, ¶ 21**A40**: FTI Second Report, pp. 18, 20; First Witness Statement of Robert Reddy, ¶ 21; Second Witness Statement of Robert Reddy, ¶ 41, Claimants Exhibit C-18b; **C71**: FTI Expert Report, p. 58, FTI Second Report, p. 18, Second Witness Statement of Robert Reddy, ¶ 41, Claimants Exhibit C-19b; **C96**: FTI Expert Report, p. 61, Second Witness Statement of Robert Reddy, ¶ 41, Claimants’ Exhibit C-18b; **V61**: FTI Expert Report, pp. 55-57; FTI Second Report, pp. 18-19; Claimants Exhibits C-13b, C-14b, C-15b

⁴⁷ FTI Expert Report, p. 30

⁴⁸ We note that FTI concludes that beachfront properties in Playa Ventanas are valued between US\$ 805/m²-US\$ 815/m² and that beachfront properties in North Playa Grande are valued between US\$596/m²-US\$ 690/m² on 27 May 2008. FTI concludes that C71, the only “interior” lot at issue in this arbitration, was valued at US\$ 346/m² on 27 May 2008. (See Navigant First Report, Appendix 4 and FTI Expert Report, pp. 45-61).

⁴⁹ FTI Expert Report, pp. 62, 64, and 66; Second Witness Statement of Robert Reddy, ¶ 42. We note that FTI claims that Spence Co. purchased the SPG Lots on 11 February 2007 (FTI Second Report, p. 18).

⁵⁰ FTI Second Report, p. 19; Second Witness Statement of Robert Reddy, ¶ 42

“I became aware of the Attorney General's report on or around January or February 2006.”⁵¹

“[Spence Co.] did make two purchases after the date of the Attorney General interpretation was issued. In December 2006, we purchased the three SPG lots...The SPG lots are approximately 500 m deep with the first 75 m being beachfront in the now contested Park zone. Thus we expected we could develop the back 425 m right away and develop the beachfront 75 m when the legal issues surrounding the Park boundary sorted themselves out. In May of 2007, we also purchased lot V59. Again, we expected that we would be able to develop this lot in the medium term.”⁵²

50. Accordingly, it is uncontested that Spence Co. was speculating on the ability to develop a portion of the SPG-Lots, as well as all of Lot V59. In our view, a reasonable buyer aware of the fact that the properties were within the BNMP and could only be partially developed would have paid a nominal value for the portion of the properties within the 75-Meter Strip.

51. As with Messrs. Copher and Holsten, it is unclear why Mr. Spence/Spence Co. continued to purchase properties within the BNMP at a variety of purchase prices. In our view, this underscores the importance of the sales agreements as they would outline the terms of Mr. Spence and Spence Co.'s acquisition. If Mr. Spence or Spence Co.'s purchase agreements had terms allowing Mr. Spence/Spence Co. to rescind the transaction within a certain period of time if building permits could not be acquired, Mr. Spence/Spence Co.'s purchases would be quite rational. However, since Mr. Spence and Spence Co. have not submitted the purchase agreements, it is unclear why Mr. Spence and Spence Co. continued to purchase properties when it was known that they were within the BNMP.

E. FTI's Analysis Reveals that Claimants Purchased their Properties At a Discount

52. In our first report, we demonstrated that FTI's fair market value conclusions were overstated because they implied a higher rate of return on Claimants' property values than FTI concluded the market would have provided.⁵³ We arrived at our conclusion by increasing Claimants' alleged purchase prices by FTI's real estate market appreciation index to 27 May

⁵¹ Second Witness Statement of Robert Reddy, ¶ 36

⁵² Second Witness Statement of Robert Reddy, ¶ 42

⁵³ Navigant First Report, ¶ 112

2008.⁵⁴ After doing so, we found that FTI's fair market value conclusion was higher than Claimants' purchase prices adjusted to 27 May 2008.⁵⁵

53. In their second report, FTI states that our analysis is irrelevant because we did not determine whether Claimants' purchased their properties at a discount.

“This analysis might be relevant if the purchase prices were all at fair market value. Although the purchase price does not directly inform the fair market value assessment arrived at through a sales comparison approach, it would be logical for the same property to arrive at the same value by appreciating a fair market purchase price by market growth conditions. But the Kaczmarek Report forms no basis that the original purchase prices were reflective of market value.”⁵⁶

54. FTI is correct that we did not determine whether Claimants purchased their properties at fair market value. As Claimants claim the fair market value of their property (without consideration of the BNMP), we assumed that Claimants' purchased their properties at a price that did not consider the BNMP. FTI now disclaims that they did not consider whether Claimants purchased their properties at a discount and Claimants now admit that some properties were purchased at a discount with knowledge of the existence of the BNMP.⁵⁷

55. FTI agrees with the concept that the fair market value at any point in time can be adjusted by the appreciation (or depreciation) in market conditions to arrive at the property's fair market value at another point in time (assuming that the market growth rates FTI applies are correct).⁵⁸ Accordingly, we discounted FTI's fair market value conclusions as of 27 May 2008 back to Claimants' purchase dates using FTI's monthly real estate appreciation index. When FTI's valuation conclusions are discounted back to their purchase dates, all but one property – Lot C71 – appears to have been purchased at a discount (if FTI's valuation conclusions and real estate appreciation index are assumed to be correct).

⁵⁴ Navigant First Report, ¶ 112

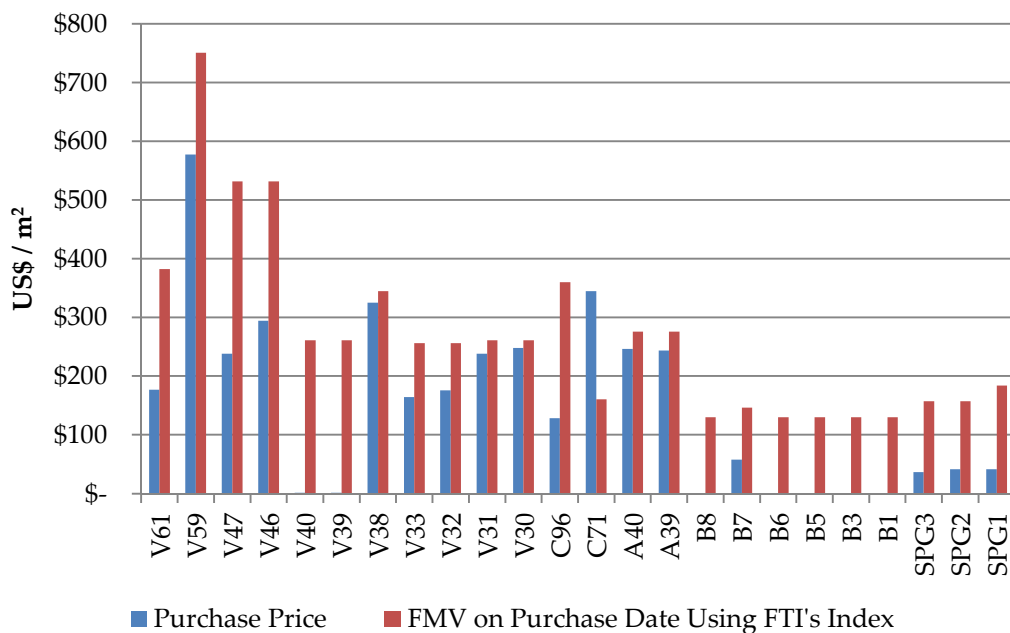
⁵⁵ Navigant First Report, ¶ 112

⁵⁶ FTI Second Report, pp. 12-13

⁵⁷ FTI Second Report, p. 15: “FTI is not an expert in terms of the Claimants' motivation or perception of value.... FTI provided an opinion of value on the real estate and not the rationale for the purchase of real estate by the Claimants.... FTI's assumption as to what the Claimant knew or did not know is irrelevant to our valuation.” See also Second Witness Statement of Robert Reddy, ¶ 42.

⁵⁸ FTI Second Report, p. 12: “Although the purchase price does not directly inform the fair market value assessment arrived at through a sales comparison approach, it would be logical for the same property to arrive at the same value by appreciating a fair market purchase price by market growth conditions.”

Figure 3 – Claimants’ Purchase Prices Compared to the Fair Market Value of Claimants’ Properties as of the Purchase Date⁵⁹



56. Figure 3 above also reveals that there is a significant disparity in the prices paid by Claimants for their properties (many of which are very similar to one another). FTI acknowledges this as well and concludes that it is based on a lack of transparency in the market.

“Based on the analysis of sales data, it was evident that there was a wide disparity in the sales prices for what would appear to be very similar properties. I concluded this inconsistency was attendant to the lack of transparency in the marketplace.”⁶⁰

57. In our view, the vast disparity in the prices for similar properties was not caused by a lack of transparency in the market, but reflects the various discounts and/or other sales terms that Claimants negotiated when purchasing their properties.

V. There Are Significant Flaws in FTI’s Damages Methodology

58. FTI calculates Claimants’ damages using the Sales Comparison Approach (i.e., using a comparables analysis). FTI calculates Claimants’ damages as the difference between the value of Claimants’ properties in the But-For Scenario (the value before Respondent’s expropriation) and Actual Scenario (the value after Respondent’s expropriation). When calculating the value of

⁵⁹ See Appendix 3

⁶⁰ FTI Second Report, p. 10

the properties in the But-For Scenario, FTI ignores the impact on Claimants' properties which were within the BNMP.

“In valuing the property before the taking, the influence of the scheme [i.e., the Measures] is ignored. Specifically, the dampening effect on the real estate market that the scheme instigated is ignored. But for the scheme, the oceanfront land market would have been robust without government's influence and the owners would have had the opportunity to sell or develop their property under more favorable market conditions in mid-2007.”⁶¹

59. For the wholly expropriated properties, FTI calculates damages as being equal to the But-For Scenario since the Actual Scenario value is zero. For the partially expropriated properties, FTI separates damages into two categories: (1) the value of the “part taken” (the prorated portion of the But-For Scenario's value that falls within the 75-Meter Strip), and (2) “severance damages” (the alleged incremental loss of value of the property outside the 75-Meter Strip).

60. FTI's damages methodology is flawed for two reasons.

61. First, as explained in Section IV above, Claimants were aware (or should have been aware) that their properties were within the BNMP. As such, Claimants purchased their properties at a discount (i.e., at a price that reflects the inability to develop the property within the 75-Meter Strip) and have not suffered any damages. By valuing the properties in the But-For Scenario without considering the impact of the BNMP, FTI's damages methodology assumes Claimants could have purchased their properties at low values because of the BNMP, but then sold their properties at high values as if the BNMP did not exist. In essence, Claimants are essentially claiming damages on the basis that the BNMP was not repealed rather than on the basis that the BNMP was created.

62. Second, FTI's damages methodology also provides Claimants with compensation for manufactured and baseless severance damages for the partially expropriated SPG-Lots and B-Lots.

63. We examine these two primary flaws in the subsections below.

⁶¹ FTI Expert Report, p. 18

A. FTI's Damages Methodology Used To Calculate the Value of the "Part Taken" Allows for Double Recovery

64. In our first report, we stated that if Claimants purchased their properties at a discounted price that considered the impact of the BNMP or if the Tribunal finds that Claimants failed to exercise adequate due diligence when purchasing their properties, Claimants should not be able to receive the value of the properties as if there was no risk of the BNMP being established.

“If Claimants did indeed receive a discount on their purchases for the risk related to the expropriation of properties located within the boundaries of the BNMP, or if the Tribunal finds that Claimants acted imprudently by either failing to do adequate due diligence or by acting in direct conflict with the reasonable conclusions from adequate due diligence, then Claimants should not be able to receive the value of the properties as if there were no risk of expropriation.”⁶²

65. In their second report, FTI explicitly states that they did not consider whether the Claimants knew or could have known whether their properties were within the BNMP. Instead, FTI states that whether Claimants knew about the BNMP at the date of purchase is irrelevant in determining the fair market value of the properties at 27 May 2008.

“FTI is not an expert in terms of the Claimants' motivation or perception of value. FTI is an expert in real estate valuation based on a fair market value standard. FTI provided an opinion of value on the real estate and not the rationale for the purchase of real estate by the Claimants....FTI's assumption as to what the Claimant knew or did not know is irrelevant to our valuation”⁶³

66. By ignoring Claimants' purchase prices and ignoring the impact of the BNMP in calculating the value of the But-For Scenario, FTI's damages methodology provides Claimants with double recovery for damages. FTI's But-For Scenario calculates losses to Claimants using a calculation of the fair market value of an “unencumbered” property. However, it is clear that Claimants were aware (or should have been aware) that they purchased properties that were within the BNMP. As such, the discounted price at which Claimants acquired their properties in the Actual Scenario reflects the expropriation risk. In other words, Claimants paid less to

⁶² Navigant First Report, ¶¶ 91-92.

⁶³ FTI Second Report, p. 15

acquire their properties in the Actual Scenario because there was a high risk that the Respondent would expropriate their properties for the BNMP.

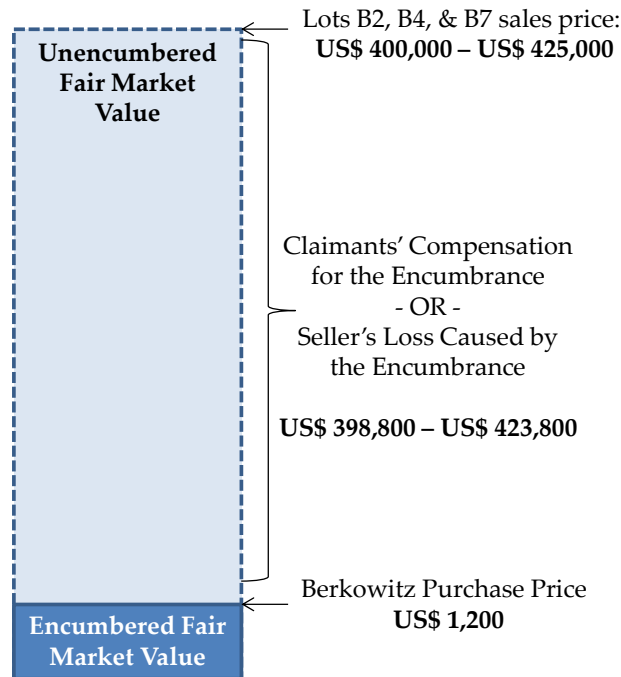
67. The discount Claimants obtained when acquiring their properties effectively compensated them for the expropriation risk they accepted. Yet, FTI calculates Claimants' damages as the difference between the value of an "encumbered" property (the Actual Scenario) and an "unencumbered" property (the But-For Scenario) as Claimants' compensation for the risk of expropriation (the Measures). Thus FTI's damages calculation provides Claimants with double compensation for the risk of expropriation.

68. For example, Mr. B. Berkowitz purchased the B-Lots in September 2003 for approximately US\$ 1,200 per lot.⁶⁴ He sold three of the lots (Lots B2, B4, and B7) at US\$ 400,000 or US\$ 425,000 only 6 months later.⁶⁵ If the sales prices of Lots B2, B4, and B7 represent an "unencumbered" fair market value (i.e., a But-For Scenario value) and the purchase prices represent an "encumbered" value (i.e., an Actual Scenario value), then Mr. B. Berkowitz effectively received compensation of US\$ 398,800 to US\$ 423,800 per lot when they were purchased. Nevertheless, FTI's damages calculation compensates Mr. B. Berkowitz again at 27 May 2008 as shown in Figure 4 below.

⁶⁴ FTI Second Report, p. 20; First Witness Statement of Brett Berkowitz, ¶ 15

⁶⁵ FTI Second Report, p. 20; First Witness Statement of Brett Berkowitz, ¶ 15

Figure 4 – Compensation Received by Mr. Brett Berkowitz for Taking on Expropriation Risk Related to the B-Lots⁶⁶



69. From an alternative perspective, FTI's damages methodology calculates the losses incurred by the prior owners of the properties, rather than by Claimants. Indeed, Mr. B. Berkowitz stated that he purchased the B-Lots from a developer who was unable to secure building permits for a 185-unit condominium.⁶⁷ In our view, his heavily discounted purchase price for the B-Lots of CRC 500,000/lot (or US\$ 1,200/lot) is indicative of the prior owner selling the B-Lots at a loss because they could not be developed. As such, Claimants did not actually suffer any loss as a result of their properties being within the BNMP. Rather, the seller of the properties incurred the loss. As seen in Figure 4 above, the seller of the B-Lots suffered losses of between US\$ 398,800 and US\$ 423,800. Since these losses were actually suffered by the prior owner of the properties, it is unreasonable for Mr. B. Berkowitz to now claim compensation for the diminution in the value of the B-Lots as a result of Respondent expropriating the 75-Meter Strip.

70. Finally, since Claimants knew (or should have known) about the impact of the BNMP on the values of the 26 properties, Claimants' damages claim and FTI's damages methodology is essentially calculating the damages related to Respondent's failure to repeal the BNMP

⁶⁶ FTI Second Report, p. 20; First Witness Statement of Brett Berkowitz, ¶ 15

⁶⁷ Second Witness Statement of Brett Berkowitz, ¶ 24

legislation. Indeed, Claimants themselves have expressed the view that they did not expect Costa Rica to move to expropriate their properties.

“For businesspeople such as ourselves, for the Government to spend hundreds of millions of dollars to expropriate undeveloped land that would not substantially benefit the endangered turtles made no sense whatsoever. Thus we always expected that we would eventually be able to responsibly develop and sell these beautiful and rare properties.”⁶⁸

“...Costa Rica has a forty-year history of declaring national parks, but not expropriating the private land situated within their boundaries. Its Governments of the day also gave no indication, throughout, that any had either the intention or the wherewithal to proceed with a large-scale project of expropriations.”⁶⁹

71. While Claimants have indicated that they did not expect that Respondent would expropriate their properties, they have not advanced any legal claim that the Respondent should have repealed the legislation forming the BNMP. Nevertheless, that is what FTI’s damages methodology calculates.

B. FTI’s Severance Damages Are Manufactured

72. In their second report, FTI continues to calculate and Claimants continue to claim severance damages for the partially expropriated SPG-Lots and B-Lots. As explained by FTI, severance damages represent the diminution in the value of the “remainder” of Claimants’ partially expropriated properties.

“Severance damages are generally used to mean those damages to a remainder property that are compensable. It is the decrease in value suffered by the remainder because of the taking of the more valuable portion of the land. In this case, the damage alludes not only to the loss of the value of the property in proximity to the beach...but also to the denial of beach access from the remaining lands which will require a drive to public access points, which is reflected in the lower price per m² of the remainder.”⁷⁰

73. Severance damages for the SPG-Lots and the B-Lots arise from slightly different circumstances. For the SPG-Lots, FTI claims that severance damages stem from “the loss in value from denial of direct beach access and the greater distance to the ocean” due to the

⁶⁸ First Witness Statement of Robert Reddy, ¶ 9

⁶⁹ Claimants’ Memorial, ¶ 215

⁷⁰ FTI Second Report, p. 7

Measures.⁷¹ In contrast, FTI claims that the B-Lots suffer from both a lack of beach access and from the fact that the B-Lots are unable to be developed unless they are assembled into larger parcels because they are smaller than 5,000 m².⁷² In the subsections below, we examine why the severance damages for the SPG-Lots and B-Lots are illogical and unsupported.

i. SPG-Lot Severance Damages Are Illogical

74. With respect to the SPG-Lots, FTI claims that severance damages exist as the “remainder” is no longer beachfront and does not have direct beach access.

“The effect of the taking on the remainder places the remainder of the subdivision 125 meters more [sic] removed from the water line behind the thick row of oceanfront brush, madero negro. The remainder is damaged by not having the associated prime oceanfront land associated with it. The view of beach, ocean and sunsets will be lost by the 75 m setback and the buffer vegetation that will grow undisturbed. The pro rata share of value of the oceanfront land far outweighs the value of the land now 125 meters back from the water line. Therefore, the remainder value has a lesser per unit value (dollar per square meter) than the before unit value and the remainder suffers a severance damage as a result of the taking.”⁷³

“The remainder properties are no longer either beachfront or even beach access.”⁷⁴

75. As discussed in our first report, none of the SPG Lots are “beachfront” nor do they have “direct beach access.” Indeed, we illustrated with photographs in our first report that none of the properties in South Playa Grande had views of the beach or direct beach access. FTI disputes that the properties lack beach or ocean views, stating:

“The photographs on pages 62, 64 and 66 of the FTI Report show the possibility of ocean views and sunsets and contradict the Kaczmarek Report’s rationale that views are not possible.”⁷⁵

76. Below, we have reproduced the photographs from pages 62, 64, and 66 of FTI’s report which were taken during the dry season in February 2014, as well as our photograph of the SPG-Lots taken during the wet season in July 2014. After reviewing FTI’s photographs, we still are

⁷¹ FTI Second Report, p. 8

⁷² FTI Second Report, pp. 8-9

⁷³ FTI First Report, p. 31

⁷⁴ FTI Second Report, p. 8

⁷⁵ FTI Second Report, p. 8

of the opinion that the properties do not offer views of the ocean or sunsets and do not offer direct beach access.

Figure 5 – View Toward the Pacific Ocean From SPG1 (FTI)⁷⁶



⁷⁶ FTI First Report, p. 62

Figure 6 - View Toward the Pacific Ocean from SPG2 (FTI)⁷⁷



Figure 7 – View Toward the Pacific Ocean from SPG3 (FTI)⁷⁸



⁷⁷ FTI First Report, p. 64

⁷⁸ FTI First Report, p. 66

Figure 8 – View Toward the Pacific Ocean of SPG-Lots from the Road (Navigant)⁷⁹



77. However, even if one could conclude that the SPG-Lots were “beachfront” and had direct beach access (which they do not), there still is no basis under which to calculate severance damages. Specifically, in the But-For Scenario, Spence Co. planned to assemble and then subdivide the SPG-Lots into 44 residential lots.⁸⁰ As a result of Respondent’s consolidation of properties within the BNMP, Spence Co. lost the ability to develop the eight lots nearest to the beach (and adjacent to the 50-Meter Inalienable Zone).⁸¹ Consequently, in the Actual Scenario, Spence Co. is only able to develop 36 lots.⁸²

78. In its application of the Comparable Sales Approach, FTI valued the entirety of the SPG-Lots in the But-For Scenario (i.e., all 44 subdivided lots) using comparable sales transactions of beachfront lots.⁸³ In other words, FTI valued all 44 properties as “beachfront” even though 36

⁷⁹ Navigant First Report, Appendix 3, p. 12

⁸⁰ FTI First Report, pp. 30-31, 68-70; Second Witness Statement of Robert Reddy, ¶ 42.

⁸¹ Second Witness Statement of Robert Reddy, ¶ 42.

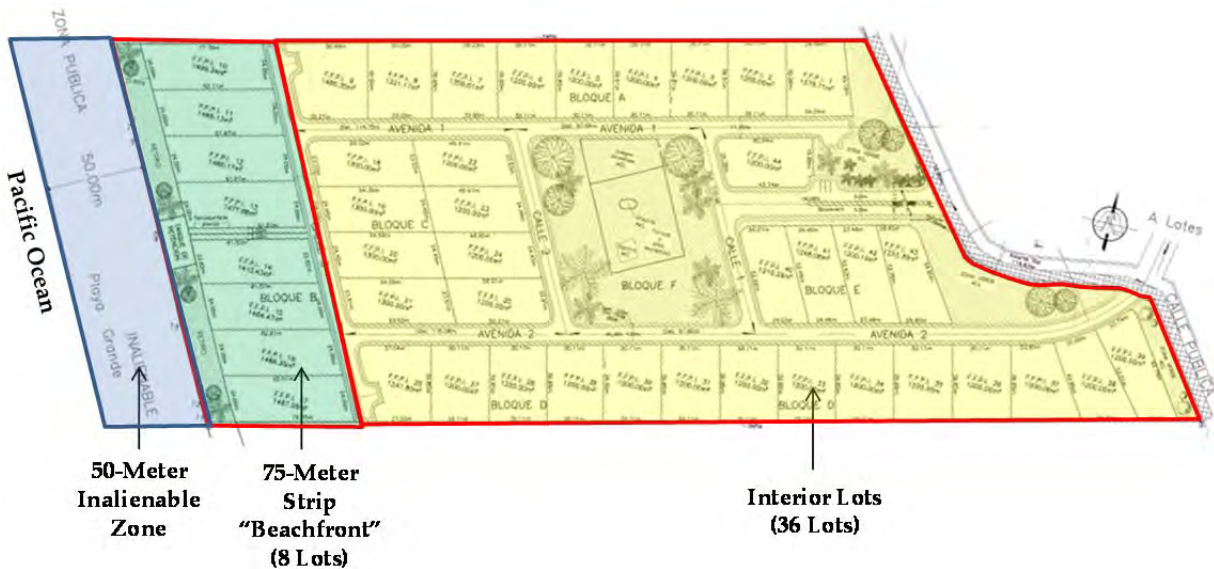
⁸² FTI First Report, pp. 30-31, 68-70

⁸³ Specifically, FTI used the February 2006 sale of Lot V61 by Spence Co. that ultimately was rescinded, the bulk purchase of Lots V30-V34 by Mr. Spence in August and September 2003, and the sale of Lot 18 in Playa Flamingo in May 2006 (FTI First Report, pp. 62-67. See also, Navigant First Report, Appendix 4)

lots are actually “interior.” FTI valued the “remainder” of the subdivided SPG-Lots in the Actual Scenario as “interior” lots.⁸⁴ In our view this is incorrect.

79. Figure 9 below shows the But-For Scenario development plan for Spence Co.’s 44-unit subdivision, highlighting the 50-Meter Inalienable Zone, the “beachfront” lots within the 75-Meter Strip, and 36 “interior” lots that fall between the 75-Meter Strip and the public roadway. As Figure 9 below reveals, the “beachfront” properties are still 50 meters from the Pacific Ocean, on the opposite side of the 50-Meter Inalienable Zone.

Figure 9 – Spence Co.’s But-For Scenario Development Plans for the SPG Lots⁸⁵

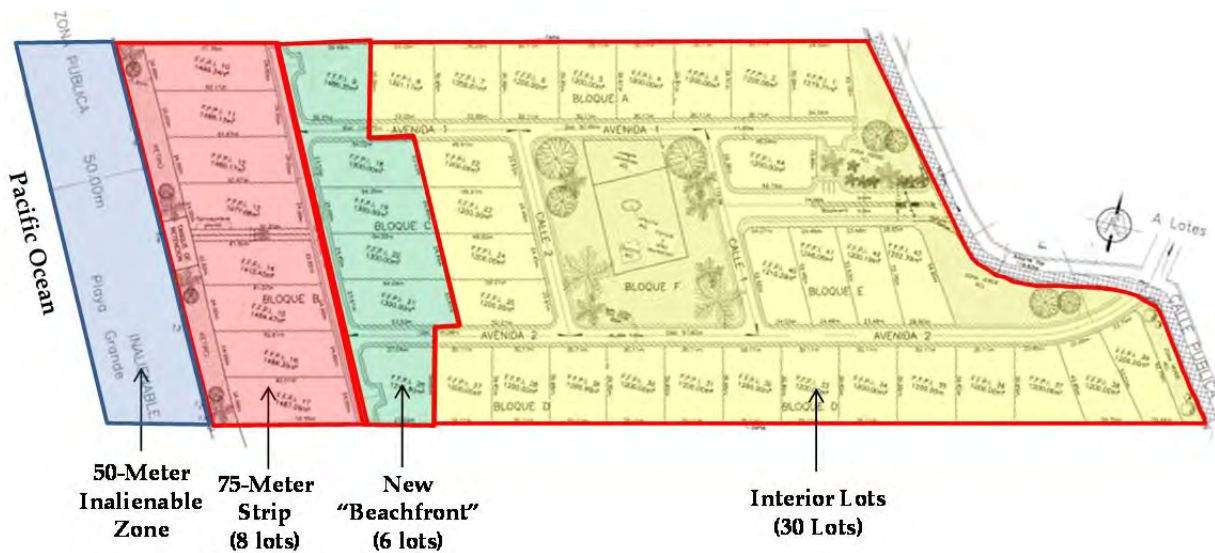


80. Figure 10 below illustrates Spence Co.’s Actual Scenario development plan after the properties within the 75-Meter Strip have been expropriated. As Figure 10 below reveals, the 6 lots adjacent to the 75-Meter Strip could now be considered “beachfront” as they are nearest the beach and have similarly obscured views of the ocean and sunsets as would properties within the 75-Meter Strip. More importantly, however, all 36 “interior” lots that exist in the Actual Scenario are no better or worse off after the taking of the 75-Meter Strip. For example, the lots nearest the public roadway in the But-For and Actual Scenarios would still remain between 320 and 400 meters from the ocean and would have no direct beach views or beach access.

⁸⁴ Specifically, FTI used the September 2007 sales of Lots A28, A29, and A30. (FTI First Report, pp. 62-67. See also, Navigant First Report, Appendix 4)

⁸⁵ Claimants’ Exhibit C-40, p. 1

Figure 10 – Spence Co.’s Actual Scenario Development Plans for the SPG Lots⁸⁶



81. FTI’s statement that the interior lots are damaged is not sustainable.

“[t]he remainder is damaged by not having the associated prime oceanfront land associated with it. The view of the beach, ocean and sunsets will be lost by the 75 m setback and the buffer vegetation that will grow undisturbed”⁸⁷

82. The characteristics of the “interior” lots (in yellow above), such as their views and beach access, have not changed as a result of the consolidation of the 75-Meter Strip. Indeed, no such views would have been allowed even if development had been permitted within the 75-Meter Strip. As Figure 10 above reveals, if the interior lots are in any way impacted, it would appear as though the 6 lots adjacent to the 75-Meter Strip would have appreciated in value as they are now the closest lots to the beach.

ii. B-Lot Severance Damages are Unfounded

83. FTI calculates that Claimants have suffered severance damages related to the B-Lots for two reasons.

84. First, FTI concludes that the B-Lots’ loss of “beachfront” property has reduced the value of the remainder.

“For the 9 other lots (the SPG and B lots), the Respondent has expropriate [sic] only a portion of each lot leaving the affected

⁸⁶ Claimants’ Exhibit C-40, p. 1

⁸⁷ FTI First Report, p. 31

Claimants with a remainder property that is no longer beachfront or beach access.”⁸⁸

85. Despite FTI’s claims that the B-Lots were beachfront and had beach access, as discussed in our first report, the B-Lots lacked ocean views and direct beach access.⁸⁹ Nevertheless, FTI continues to assert the opposite. FTI states,

“during [FTI’s] visit to the subject properties, it was clear that each of the subject lots had an ocean view and were beachfront. It was possible to access the beach from the subject properties through existing gaps in the vegetation.”⁹⁰

86. Indeed Claimants’ own photographs reveal that there are no ocean views or gaps in the vegetation through which to access the beach at the B-Lots.

Figure 11 – View of the B-Lots from Playa Grande, Produced by Claimants⁹¹



⁸⁸ FTI Second Report, p. 4

⁸⁹ Navigant First Report, ¶¶ 120-123

⁹⁰ FTI Second Report, p. 20

⁹¹ Claimants’ Exhibit C-56, p. 2

Figure 12 – View Toward the Pacific Ocean from the B-Lots, Produced by Claimants⁹²



87. FTI claims that the views are improved during the dry season, which is when their site visit took place.

“This does not mean that the lots in South Playa Grande do not have an ocean view. Figure 9 in paragraph 122 on page 43 of the Kaczmarek Report is a view with full vegetation in July and is quite different during the dry months. Notice the distinct difference between the photo on page 71 of the FTI Report and page 43 of the Kaczmarek Report of the same property.”⁹³

88. For the Tribunal’s convenience, we have reproduced the photograph of Lot B1 as presented on page 71 of FTI’s first report. As Figure 13 below reveals, despite FTI’s statements to the contrary, there are no ocean views from the subject properties even during the dry season.

⁹² Claimants’ Exhibit C-56, p. 3

⁹³ FTI Second Report, pp. 20-21

Figure 13 – View Toward the Pacific Ocean from Lot B1 as Shown in FTI’s First Report⁹⁴



89. In our view, it is incorrect to state that there are views of the ocean or beach from the B-Lots (or the SPG-Lots). However, even if the Tribunal accepts that there are views of the beach during the dry season, it is clear from Figures 11 and 12 above that those views would not exist through the entire year.

90. Second, FTI concludes that the B-Lots in the Actual Scenario are “undersized” and thus cannot be developed.

“The remnant of the remainder property is an undersized remnant parcel (less than 5,000 m² as required by zoning regulation) that without a government waiver cannot be independently developed. Given the nature of the subject zoning, a waiver is not likely.”⁹⁵

“FTI is correct to assert that the remaining B Lots are not standalone building lots....[M]y valuation assumes that these lots could be joined in order to create a legal building lot, albeit one without beachfront or beach access.”⁹⁶

⁹⁴ FTI First Report, p. 71

⁹⁵ FTI First Report, p. 34

⁹⁶ FTI Second Report, p. 8

91. As we discussed in our first report, neither FTI nor Claimants have provided any evidence that suggests that a single family residential home could not be constructed on the smaller B-Lots. In support of the 5,000 m² lot size restriction alleged by FTI, they have produced the Regulation for the National Control of Subdivisions and Housing Development issued by the Costa Rican National Institute of Housing and Urban Development. We understand that this regulation only imposes a minimum lot size restriction of 5,000 m² on newly created subdivisions that are for agricultural, livestock, and forestry purposes – not for residential purposes.

"Article II.2.1.6. For agricultural, livestock and forestry purposes it may be permitted the subdivision of plots against special easements, which will hereinafter be referred to as agriculture and forestry, the resulting lots must be equal to or greater than 5000 m², in these cases the individual plans should indicate "agricultural use", "livestock use"; or "forest use" as appropriate. The construction of housing and other facilities and structures are subject to a maximum of 15% coverage area."⁹⁷

92. However, even if the above regulation did apply to the B-Lots, it is unclear why the 5,000 m² restriction on creating a new subdivided agricultural lot would present a problem for the construction of a home. As the B-Lots had already been subdivided under the Measures, the fact that they are smaller than the 5,000 m² minimum size required for a new subdivided lot would not appear to be relevant. The only restriction that appears to be imposed by the regulation is a maximum coverage area of 15 percent.⁹⁸ After Respondent's expropriation, the B-Lots vary in size from 4,352.98 m² to 4,613.54 m².⁹⁹ Consequently, substantial homes with a footprint of 652.95 m² to 692.03 m² could be constructed on the remaining lots.

93. Even if there were a restriction that would preclude the construction of a home, FTI has indicated that a waiver of the minimum zoning requirement could be obtained by the government.¹⁰⁰ FTI has not provided any evidence that Claimants attempted to secure a waiver or that Respondent denied them a waiver. If Claimants had applied for a waiver and Respondent approved it, Claimants will not suffer severance damages.

⁹⁷ Regulations for the Control of Subdivisions and Developments, Regulation 3391-0 (**FTI-38**)

⁹⁸ Regulations for the Control of Subdivisions and Developments, Regulation 3391-0 (**FTI-38**)

⁹⁹ FTI First Report, pp. 71-82; See also Navigant First Report, Appendix 4

¹⁰⁰ FTI First Report, p. 34

94. It appears that Mr. B. Berkowitz's inability to develop the B-Lots that were partially expropriated is most likely due to problems other than the existence of the BNMP, such as a lack of market demand, financing, or other environmental issues (such as an inability to secure access to drinking water). Mr. B. Berkowitz purchased 24 lots in South Playa Grande in 2003, including the B-Lots.¹⁰¹ Only 8 of the 24 lots originally purchased by Mr. B. Berkowitz are within the BNMP (and Messrs. Berkowitz and Gremillion retain ownership of 6 of them).¹⁰² It is unclear whether Mr. B. Berkowitz has retained ownership of the 16 properties that are not within the BNMP. However, none of the other 16 B-Lots that were not within the BNMP have been developed. The fact that the 16 B-Lots unaffected by the BNMP have not been developed indicates that problems other than the Measures have halted development in South Playa Grande.

VI. Even If Claimants Did Not Benefit from Discounted Purchase Prices Due To the Existence of the BNMP, FTI's Valuation Analysis is Still Flawed

95. Even if it were appropriate to ignore that Claimants purchased their properties at a discount due to the existence of the BNMP, FTI's analysis is still unreliable and overstates the fair market value of Claimants' properties but-for the Measures for two reasons. First, FTI fails to adequately examine the real estate market in Costa Rica and incorrectly concludes that real estate prices in Costa Rica never declined from 2003-2008. Second, FTI incorrectly implemented the Comparable Sales Approach resulting in damages that are significantly overstated.

A. FTI's Analysis of the Real Estate Market in Guanacaste Continues to Ignore the Burst of the Real Estate Bubble Along the Gold Coast

96. FTI alleges to have performed an assessment of the real estate market in Playa Ventanas and Playa Grande. FTI concluded that the real estate market experienced constant appreciation from 2003-2007, at rates between 1 percent and 3 percent per month. FTI arrived at their conclusion after reviewing the sales of two properties in Playa Ventanas – Lots V52 and V59 – that sold five times from 2003 to 2007 as shown in Table 3 below.

¹⁰¹ First Witness Statement of Brett Berkowitz, ¶ 14; Second Witness Statement of Brett Berkowitz, ¶ 24

¹⁰² Second Witness Statement of Brett Berkowitz, ¶ 24

Table 3 – Sales Used by FTI to Justify their Market Conditions Adjustments¹⁰³

Lot	Sale Date	Sales Price	Area (m ²)	Sales Price/m ²	Monthly Appreciation
V52	2-Apr-04	\$ 255,000	817.39	\$ 311.97	
	9-Mar-05	\$ 430,000	817.39	\$ 526.06	5.7%
	15-Mar-07	\$ 575,000	817.39	\$ 703.46	1.4%
V59	15-Dec-03	\$ 255,000	892.58	\$ 285.69	
	11-May-07	\$ 515,000	892.58	\$ 576.98	2.5%

97. In implementing the Sales Comparison Approach to value Claimants’ properties in the But-For and Actual Scenarios, FTI applied a “market conditions adjustment” that was based on the sales of Lots V52 and V59.¹⁰⁴ The monthly sales appreciation factors applied by FTI are shown in Table 4 below.

Table 4 – FTI’s Monthly Inflation Factors¹⁰⁵

Year	2003	2004	2005	2006	2007	2008
Monthly Inflation	2%	2%	3%	3%	1%	0%

98. In our first report, we stated that FTI’s conclusion that the real estate market experienced the monthly growth shown in Table 4 above during 2003-2007 results in FTI overstating the adjusted value of the comparable sales transactions used to value Claimants’ properties. In contrast, we stated that the real estate market trends in Costa Rica were comparable to those in the U.S. The Case-Shiller Index reveals that prices peaked in 2006 and swiftly declined thereafter.¹⁰⁶

99. In their second report, FTI offers additional comments with respect to their market analysis. First, FTI reiterates the use of their market inflation factors stating that they reflect the market trends that FTI observed and were allegedly confirmed through interviews with market participants.¹⁰⁷ Second, FTI disagrees with our assertion that the Costa Rican market should be correlated with the Case-Shiller Index.¹⁰⁸ Third, FTI states they found no evidence that many of

¹⁰³ FTI First Report, p. 24

¹⁰⁴ FTI Second Report, pp. 9-10; FTI First Report, p. 24

¹⁰⁵ FTI First Report, p. 24

¹⁰⁶ Navigant First Report, ¶ 29

¹⁰⁷ FTI Second Report, pp. 9-10

¹⁰⁸ FTI Second Report, pp. 11-12

the purchasers in the market were speculators.¹⁰⁹ In our view, FTI's three comments suggest that FTI has continued to incorrectly analyze the Costa Rican real estate market.

i. FTI's Market Analysis Relies Upon a Small Sample Size and Uncorroborated Statements from Brokers

100. FTI reiterates that their "market inflation factors" are based on market data and that their "market condition adjustment" correctly reflects the appreciation of property values.

"The Kaczmarek Report states that FTI's market condition adjustment based on the application of the monthly inflation overstates the value. FTI calculated market condition adjustments based on monthly inflation factors correctly as shown on page 24 of the FTI Report....It is my opinion that the overall magnitude of adjustment to the comparables for market appreciation is reasonable based upon the market data and the paired sales analysis."¹¹⁰

101. In our view, it is unreasonable for FTI to conclude from the sale of only two properties in Playa Ventanas that the real estate market in the Playa Ventanas/Playa Grande area experienced constant growth in real estate prices from 2003-2007. In fact, FTI ignored information surrounding 31 additional transactions in both Playa Grande and Playa Ventanas to assess the overall direction of the market from 2003-2008. Specifically, FTI ignored 25 of Claimants' 26 purchases and ignored 6 of the 9 comparable transactions that it used to value Claimants' properties.¹¹¹ Since Claimants' purchases and the comparable transactions were for properties in Playa Ventanas and Playa Grande, these transactions would provide a greater view into the evolution of the local real estate market.

102. FTI also reiterates their confidence in their market assessment as they claim it is supported by interviews with local market participants.

"FTI conducted several interviews with local market participants. The Kaczmarek Report refuses to give any weight to the letters from the real estate agents that are indicative of market sentiment. Based on my personal interviews with the authors of the letters relied upon by FTI and as cited by Kaczmarek, I believe the letters

¹⁰⁹ FTI Second Report, pp. 12-13

¹¹⁰ FTI Second Report, pp. 9-10

¹¹¹ Of Claimants' purchases, FTI only considered Spence Co.'s acquisition of V59 in May 2007. Of FTI's comparable transactions, FTI only considered the sale of V52 in March 2007. (We note that FTI's comparable transactions overlap with Claimants' acquisitions. Of FTI's comparable transactions, they did not consider Mr. Spence's acquisition of V30-V34. FTI considered Spence Co.'s acquisition of V59 in its analysis.)

to be truthful and an accurate reflection of market conditions as of the date of value. Mr. Kaczmarek did not conduct any personal interviews and only relied upon media coverage without any corroboration.”¹¹²

103. FTI’s interviews with market participants cannot be independently reviewed as FTI submitted no notes from its interviews with market participants. However, FTI did submit letters from real estate brokers Ms. Penny Wheeler, Mr. Robert Davey, Mr. David Corredor, and Ms. Penelope Lent wherein they state their opinion as to the market prices in Playa Grande and Playa Ventanas.¹¹³ It is unclear in what context these letters were issued as all of these letters were addressed “To Whom it May Concern” and were dated in January 2012 or January 2013 (months before Claimants’ Notice of Arbitration). Moreover, none of these market participants have offered a witness statement in this case to explain the context of these letters or their views on the market.

104. We also found discrepancies between the statements made in Mr. Davey’s and Ms. Lent’s letters and their statements made elsewhere. For instance, Mr. Davey stated in his letter that property values in Playa Grande did not decline from 2005-2008.¹¹⁴ Yet, in September 2008, Mr. Davey told the Tico Times that the Costa Rican real estate market was experiencing a “healthy correction,” implying that property values were indeed decreasing during this time.

“‘The sky is not falling. There’s just a healthy correction going on,’ says Bob Davey, owner of Century 21’s Marina Trading Post in Flamingo Beach. ... ‘There were more realtors during the boom than ever,’ he says. ‘Many were unqualified, and they overpriced their properties. Now, that correction is setting in.’ ... ‘Costa Rica is not in danger of a fire sale,’ says Davey. ‘We’re really just back to where we were. We’re back to normal.’”¹¹⁵

105. Similarly, Ms. Lent stated in her letter that she only sold one beachfront lot in Playa Grande from 2005 to 2008.¹¹⁶ Yet FTI states that she informed them of the opposite.

“During my interview with Penelope she said that she continued to sell land in this area, as did others, despite her concerns...”¹¹⁷

¹¹² FTI Second Report, p. 11

¹¹³ See Letter from Penny Wheeler, 10 Jan 2012 (**FTI-5**), Letter from Robert F. (Bob) Davey, 8 Jan 2013 (**FTI-7**), Letter from Dave Corredor, 10 Jan 2013 (**FTI-8, FTI-9**), and Letter from Penelope Lent, 9 Jan 2013 (**FTI-10**)

¹¹⁴ Specifically, Mr. Davey reports prices were US\$ 700/m², US\$ 900/m², US\$ 1,200/m² and US\$ 1,200/m² in 2005, 2006, 2007, and 2008, respectively. See, Letter from Robert F. (Bob) Davey, 8 Jan 2013 (**FTI-7**)

¹¹⁵ Tico Times, Agents: No Real Estate Fire Sale on Horizon, 12 September 2008 (**R-161**)

¹¹⁶ Letter from Penelope Lent, 9 Jan 2013 (**FTI-10**)

106. Due to these contradictions and our inability to corroborate the statements of the market participants relied upon by FTI, we have not considered them in our analysis and we do not view that they support FTI's assessment that real estate prices increased from 2003-2007.

107. FTI also produced generic spreadsheets that purport to show the list prices and/or sales prices for properties during unspecified time periods.¹¹⁸ It is unclear whether these spreadsheets were prepared by FTI or prepared by the market participants. However, FTI does not offer any independent support for these prices, such as sales agreements, actual brokerage listings, or Certification of Property reports from the National Registry.

ii. The Case-Shiller Index Provides a Reasonable Estimate of the Pricing Trends in the Costa Rican Real Estate Market

108. Even though FTI agrees with our position that the Costa Rican real estate market is influenced by North American buyers, FTI disagrees that Costa Rican real estate prices should be correlated with the U.S. Case-Shiller Index.

“FTI agrees that real estate in Costa Rica is influenced by North American buyers but FTI does not agree that Costa Rican real estate prices should follow the S&P/Case-Shiller U.S. National Home Price Index. The Case-Shiller index is based on residential housing has nothing to do with land valuation trends in Costa Rica.”¹¹⁹

“...[T]he connection that Respondent would like to make – that the real estate market in Playa Grande is exactly correlated to the Case-Shiller Index – is inappropriate and not supported by the evidence.”¹²⁰

109. As discussed in our first report, U.S. investors commonly purchased real estate in Costa Rica in cash that was financed through either first or second mortgages on property owned in the U.S.¹²¹ Since investments in Costa Rica were heavily influenced and financed by investments in U.S. real estate, there would logically be a correlation between Costa Rican real estate prices and

¹¹⁷ FTI Second Report, p. 11

¹¹⁸ See for example, Excel Spreadsheets at **FTI-6**, **FTI-16**, and **FTI-17**; RipJack Real Estate Property Inventory In the Revision Dated January 2008 (**FTI-11**)

¹¹⁹ FTI Second Report, p. 11

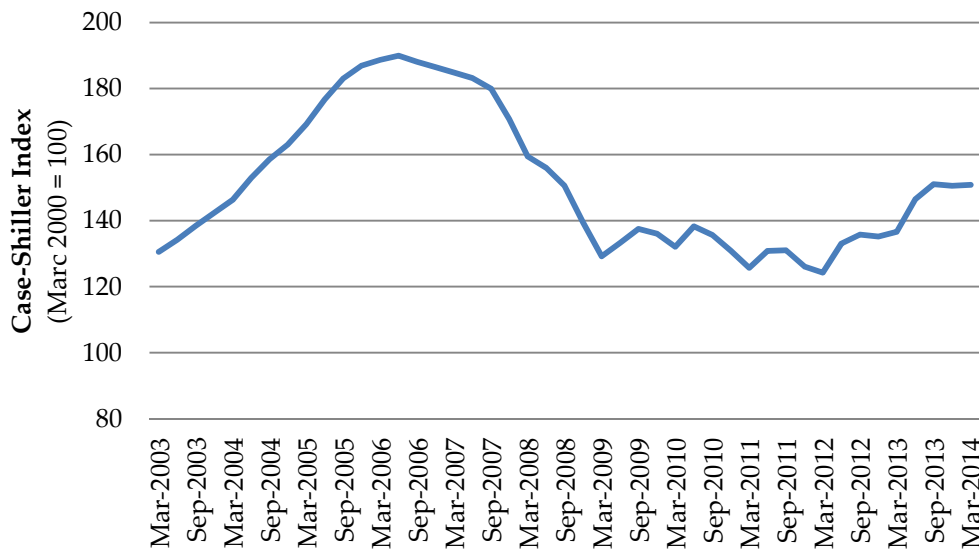
¹²⁰ Claimants' Reply Memorial, ¶ 155

¹²¹ Specifically, we noted that Reuters reported that “Most of the sales to Americans are in cash after they take out a second mortgage on a property or mortgage a property they have clear title to...I've only had seven sales that were (locally) financed in the 15 years I've been here.” (Navigant First Report, ¶ 27). See also, John McPhaul, “Costa Rica vacation homes hit by crisis,” *Reuters*, 1 August 2008 (**R-063**)

U.S. real estate prices. We did not, however, state that there is an exact correlation (i.e., a 1 to 1 relationship) between real estate prices in Costa Rica and in the U.S. as FTI and Claimants contend that we do.

110. As shown in Figure 14 below, the Case-Shiller Index reveals that property values steadily increased from 2003 to mid-2006 and decreased sharply thereafter. On FTI’s valuation date of 27 May 2008, property values had declined to 2004 levels. Even as of today, property values have yet to recover to 2006 levels. Accordingly, it is our view that prices in Costa Rica peaked in 2006 and declined thereafter.

Figure 14 – Case Shiller Index, March 2003 - March 2014¹²²



111. Various real estate brokers explained the boom and bust in Costa Rica and Guanacaste followed this trend. For instance, in August 2008, it was reported:

“Prices for some vacation houses and condominiums in the Central American country have dropped as much as 40 percent from their peak a few years ago and sales have slumped at least 30 percent over the past six months, they say.”¹²³

112. The Center for Responsible Travel, a non-profit research institute, found that the boom in Costa Rican residential real estate and tourism development was slowed in early 2008 and effectively ceased by 2009.

¹²² Navigant First Report, Figure 1

¹²³ John McPhaul, “Costa Rica vacation homes hit by crisis,” *Reuters*, 1 August 2008 (R-063)

“FDI in residential real estate and tourism development has proved to be highly vulnerable to the global market: by early 2008, investment and construction had begun to slow in Guanacaste and Puntarenas, and by 2009, it had virtually ground to a halt with no clear indication that it will resume.”¹²⁴

113. In our view, media reports and third-party research such as the statements above indicate that Costa Rican prices followed a similar trend as observed in the Case-Shiller Index, with prices peaking in late-2005 and early-2006 before swiftly declining in 2007-2008. In our view, it is not supportable for FTI and Claimants to state that real estate prices in Costa Rica (and the Gold Cost specifically) did not decline after 2006.

iii. FTI’s Denial of the Existence of Speculators in the Costa Rican Market Confirms That They Did Not Correctly Analyze the Market

114. We explained in our first report that speculators played a significant role in the boom and bust of the Guanacaste real estate market. Surprisingly, FTI claims that they did not find any evidence of speculators or “flippers” in the real estate market in Costa Rica.

“The market information that FTI discovered during its investigation indicates that many purchasers were looking to build vacation residences or second homes. There is no evidence of the predominance of speculators or ‘flippers’.”¹²⁵

115. FTI’s position leads us to believe they incorrectly analyzed the market, as it was reported contemporaneously that the Costa Rican market was rife with speculation.

“Les Nuñez, owner of First Realty Pacific Beach Properties in Playa Hermosa in the northwestern province of Guanacaste, says that region has experienced a ‘supercharged’ market over the last four years. ‘It was a very speculative market. I saw people flipping properties in four months for \$100,000 in profit. ...’”¹²⁶

116. Similarly, a study by Prof. María Paula Barrantes-Reynolds at the University of Costa Rica found that many developers were inexperienced. Prof. Barrantes-Reynolds also found that “flippers” were one of four types of purchasers of real estate in Guanacaste, as they sought to take advantage of the rapidly rising real estate prices.

¹²⁴ Center for Responsible Travel, “Impact of Tourism Related Development on the Pacific Coast of Costa Rica”, April 2010, p. 9 (**R-163**)

¹²⁵ FTI Second Report, p. 12

¹²⁶ Tico Times, Agents: No Real Estate Fire Sale on Horizon, 12 September 2008 (**R-161**)

“To better understand the dynamics of real estate tourism in Guanacaste, it is helpful to identify the types of sellers and buyers of residential tourism infrastructure during the years of the boom. The sellers of residential tourism infrastructure were not always consolidated hotel chains or developers, but amateur developers who saw an opportunity for quick profit.”¹²⁷

“Condominiums and houses in the coastal areas of Guanacaste were generally purchased by the following four kinds of buyers...Foreign house flippers, who purchase real estate with the intention of selling it on for profit, usually without making improvements.”¹²⁸

117. As FTI is of the view that “flippers” or speculators were not involved in the market despite evidence to the contrary, it is apparent that they incorrectly analyzed the Guanacaste real estate market.

B. FTI’s Comparable Sales Approach Contains Errors that Render It Unreliable

118. Even if the Tribunal finds that Claimants should be entitled to the fair market value of the properties without regard to expropriation and development risks and the Tribunal finds that FTI’s assessment of the real estate market in Costa Rica is accurate, FTI’s valuation analysis contains errors. In the following subsections we identify four errors in FTI’s valuation that render it unreliable.

i. FTI’s Comparable Transactions Are Either Not Comparable or Inappropriate

119. As noted in our first report, the comparable sales transactions selected by FTI to value the subject properties were adjusted by as much as 121 percent upward and 70 percent downward. In our view, such significant adjustments indicate to us that the comparable properties selected by FTI are not comparable. In their second report, FTI acknowledges the significant adjustments applied to the comparable properties and attempts to rationalize them.

“Comparable sales transactions were adjusted by as much as 121% upward and 70% downward.... There were meaningful upward and downward adjustments primarily based on market condition adjustments where real estate values were increasing between 2-3% in value per month. There were size and locational adjustments as well which FTI considered credible and reasonable. Playa

¹²⁷ Barrantes-Reynolds, “The expansion of ‘real estate tourism’ in coastal areas: Its behavior and implications”, University of Costa Rica, 2011, PDF p. 7 (R-162)

¹²⁸ Barrantes-Reynolds, “The expansion of ‘real estate tourism’ in coastal areas: Its behavior and implications”, University of Costa Rica, 2011, PDF p. 8 (R-162)

Ventanas and Playa Flamingo were judged to be better locations with better views and less vegetation. The adjustment for differences in location was confirmed by broker interviews and generally supported by market evidence and observation. The adjustment for size, location and physical features was seldom used throughout the valuation because it was not necessitated due to the similarity of the comparable transactions.... For this market, the major adjustment factor was related to market condition analysis, which was supported by the analysis.”¹²⁹

120. FTI’s explanation has two significant flaws.

121. First, FTI incorrectly claims that the adjustment for size, location, and physical features was seldom used. Indeed, the comparable transactions used to value the 6 B-Lots and 3 SPG-Lots in the But-For and Actual Scenarios **all** were adjusted for size, location, or physical features.¹³⁰ Moreover, the major adjustment factor was the size, location and physical features adjustment, not the market conditions adjustments as FTI contends. For example, in the But-For Scenario, the size, location, and physical features adjustment reduced the value of the comparable transactions (after the market condition adjustment) by between 40 and 75 percent for the SPG-Lots and between 12 and 70 percent for the B-Lots.¹³¹ In the Actual Scenario, the size, location, and physical features adjustment reduced the value of the comparable transactions (after the market conditions adjustment) by 65 percent for the SPG-Lots and between 31 and 71 percent for the B-Lots.¹³² It is incorrect for FTI to state that this adjustment was “seldom used”.

122. Second, FTI’s explanation continues to ignore the fact that the comparable properties are inconsistent with the four factors that would impact the reliability of the Sales Comparison Approach. As FTI states in its first report,

“The reliability of this technique depends on (a) the degree of comparability of the property appraised with each sale, (b) the length of time since the sale, (c) the accuracy of the sales data, and (d) the absence of unusual conditions affecting the sale.”¹³³

123. As we noted in our first report, the comparable sales transactions violate all of these factors. FTI’s adjustment of the comparables downward by as much as 75 percent due to

¹²⁹ FTI Second Report, p. 10

¹³⁰ FTI First Report, pp. 63, 65, 67, 72, 74, 76, 78, 80, 82

¹³¹ FTI First Report, pp. 63, 65, 67, 72, 74, 76, 78, 80, 82; See also Navigant First Expert Report, Appendix 4

¹³² FTI First Report, pp. 63, 65, 67, 72, 74, 76, 78, 80, 82; See also Navigant First Expert Report, Appendix 4

¹³³ FTI First Report, p. 22

differences in the property size, location, and characteristics implies FTI's comparable transactions are not actually comparable. Moreover, none of the comparables selected by FTI took place within 12 months of the valuation date, with some of FTI's comparables going back as far as 2003.¹³⁴ Moreover, at least one comparable used by FTI – the sale of Lot V61 in February 2006 – contained an “unusual condition” as it allowed the sale to be rescinded if the buyer could not secure a building permit.¹³⁵

ii. FTI's Valuation of Lot C71 Is Inconsistent With Its Market Appreciation Trends

124. As discussed above, FTI calculates that there was a consistent appreciation in the real estate market price from 2003 to 2007. Consequently, we would assume that all of the properties purchased by Claimants would be worth more on the valuation date than the purchase date. However, this is not the case for FTI's valuation of Lot C71, an “interior” lot in Playa Grande. Even though Lot C71 was purchased by Spence Co. in February 2005 for US\$ 230,000,¹³⁶ FTI concludes that it is only worth US\$ 231,000 on 27 May 2008.¹³⁷ At the same time, FTI concludes that the appreciation in the real estate market is 3 percent per month in 2005 and 2006, 1 percent in 2007, and 0 percent in 2008.¹³⁸ It is unclear why FTI concludes that Lot C71 did not appreciate in value, unless FTI's market appreciation analysis is not applicable to “interior” lots.

iii. FTI Continues to Assume That the Properties Could be Developed

125. In our first report, we stated that FTI incorrectly assumes the highest and best use of the properties was for the construction and development of single family residential homes and that Claimants could have obtained the permits and environmental approvals to develop their properties as they envisioned.¹³⁹ However, there are three factors that FTI continues to ignore that would impact the development of their properties.

126. First, we understand that there are density restrictions that are imposed on new development in Playa Ventanas and Playa Grande as such restrictions were imposed on the Unglaubes' development in South Playa Grande. It is unclear whether the density restrictions

¹³⁴ FTI First Report, pp. 83-85

¹³⁵ Claimants' Memorial, ¶ 36

¹³⁶ FTI Second Report, p. 18; FTI First Report, p. 60; Claimants' Exhibit C-19b

¹³⁷ FTI First Report, pp. 35, 60

¹³⁸ FTI First Report, p. 24

¹³⁹ Navigant First Report, ¶ 114

would have prevented Claimants from constructing residences on their properties as they envisioned.

127. Second, vegetation located within the 50-meter Inalienable Zone is prohibited from being removed. As shown in Figures 5-7 and 11-13 above, this vegetation would inhibit and restrict Claimants' beach access and ocean views. We also understand that there were height restrictions imposed on buildings in the Playa Grande area in order to eliminate lights from being seen by the turtles.

128. Third, we understand that there were environmental concerns with respect to the exploitation of the aquifer in the Tamarindo area that upset the water balance. A 2003 study by the National Service of Groundwater, Irrigation and Drainage ("SENARA") found that the aquifer reached maximum levels of exploitation.¹⁴⁰ Accordingly, it is uncertain whether new building permits would have been issued due to the environmental restrictions.

129. Claimants and FTI dismiss the restrictions on development and instead note that Respondent was continuing to approve building permits in Playa Grande.¹⁴¹ Nevertheless, we note that no development on any properties outside the 75-Meter Strip has occurred. Despite Mr. Reddy's statement that Spence Co. actually planned to develop the portion of the SPG-Lots that were not within the 75-Meter Strip "right away",¹⁴² that portion of the SPG-Lots remains undeveloped. Similarly, Mr. B. Berkowitz has not developed any of the additional 16 B-Lots he purchased in 2003 in South Playa Grande that were not within the BNMP.¹⁴³ Neither Spence Co. nor Mr. B. Berkowitz has explained why they did not develop these properties that were not within the BNMP. If the lots were not subject to development restrictions (such as permitting, zoning, or environmental restrictions) and if the market were "the hottest real estate market in the entire world in 2007"¹⁴⁴ as Claimants contend, it is confounding that Claimants did not develop their remaining properties. The fact that Claimants' lots outside of the 75-Meter Strip were not developed indicates to us that the properties were unattractive for reasons unrelated to the BNMP.

¹⁴⁰ SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003, pp. 34-35 (R-046)

¹⁴¹ FTI Second Report, pp. 9 and Claimants' Reply Memorial, ¶¶ 104, 119

¹⁴² Second Witness Statement of Robert Reddy, ¶ 42

¹⁴³ Mr. Berkowitz notes that he purchased 24 properties in South Playa Grande, sold Lots B2, B4, and B7 to third parties, and gifted Lots B1 and B8 to his Messrs. Aaron and Trevor Berkowitz. First Witness Statement of Brett Berkowitz, ¶¶ 14-16

¹⁴⁴ Claimants' Reply Memorial, ¶ 154

iv. FTI's Analysis Lacks Transparency

130. We are unable to replicate FTI's Sales Comparison Approach as FTI makes several non-transparent adjustments and calculations that cannot be independently verified or replicated. We discuss two of FTI's non-transparent adjustments below.

131. First, FTI averages the three adjusted comparable transactions in order to arrive at the value of the subject property as of 27 May 2008. FTI clarified in its second report that it actually takes a weighted average of the comparable sales transactions, but does not explain their weighting or the methodology it used to determine the weighting.

“The adjusted sales prices of the comparables were reconciled and weighted appropriately, FTI did not simply average as alleged by the Kaczmarek Report.”¹⁴⁵

132. For example, FTI concludes that Lot V30's fair market value is US\$ 805/m² using adjusted prices for three comparable transactions: Lot V52 for US\$ 774/m², Lot V61 for US\$ 1,053/m², and Lot V59 for US\$ 623/m².¹⁴⁶ As Table 5 below illustrates, to arrive at a fair market value of US\$ 805/m², FTI could have weighted the three comparable properties at least four different ways.

Table 5 – Possible Weightings of the Comparable Sales Transactions Used to Value V30¹⁴⁷

	Comparable Transaction			FTI's FMV Conclusion
	V52	V61	V59	
Adj. Price	\$ 774	\$ 1,053	\$ 623	\$ 805
Weighting 1	9.5%	39.0%	51.5%	\$ 805
Weighting 2	26.5%	33.0%	40.5%	\$ 805
Weighting 3	35.0%	30.0%	35.0%	\$ 805
Weighting 4	49.5%	25.0%	25.5%	\$ 805

133. Second, FTI does not explain its adjustments for size, location, and physical features. For example, in Table 6 below, we replicate FTI's calculation to adjust the sale of V61 in February 2006, a comparable sales transaction selected by FTI to value the SPG-Lots in the But-For Scenario.

¹⁴⁵ FTI Second Report, p. 5

¹⁴⁶ FTI First Report, p. 45

¹⁴⁷ FTI First Report, p. 45

Table 6 – Lot V61 Adjusted to Value SPG1, SPG2, and SPG3¹⁴⁸

Comparable Sales Transaction	Lot V61
Sale Date	6-Feb-06
Sale Price	\$3,100,000
Site Size (square meters)	4,524
Sales Price per m²	\$685
Market Conditions Adjustment	45%
Adjusted Sale Price per m²	\$994
<u>Physical Characteristics Comparison</u>	
Location	Superior
Size	Very Superior
Physical	Similar
Adjusted Sale Price per m²	\$338

134. As shown in Table 6 above, FTI concludes that Lot V61’s fair market value at 27 May 2008 is US\$ 994/m² (i.e., after its market conditions adjustment). FTI then reduces the value of Lot V61 because it is “Superior” in location, “Very Superior” in size, and “Similar” in physical characteristics to the SPG-Lots. These adjustments result in Lot V61’s fair market value decreasing 66 percent to US\$ 338/m². It is unclear to us how much of this 66 percent reduction was due to Lot V61 being located in Playa Ventanas and how much was related to Lot V61 being “Very Superior” in size to the SPG-Lots.

135. Furthermore, we note that Lot V61 was always adjusted downward to US\$ 338/m² when valuing the SPG-Lots, even though the SPG-Lots are 16,801.73 m², 24,270.20 m², and 46,245.33 m².¹⁴⁹ This is illogical, as we would have expected to see different adjustments corresponding to the different sizes of the SPG-Lots.

VII. Claimants Should Receive Compensation Equal To The Amounts They Invested

136. In our first report, we explained that the appropriate compensation owed to Claimants should be a refund of their purchase prices. Claimants were aware (or should have been aware) of the existence of the BNMP and the very distinct possibility that the properties they purchased formed part of the BNMP. As such, Claimants purchased many of their properties at a discount,

¹⁴⁸ FTI First Report, pp. 63, 65, 67

¹⁴⁹ FTI First Report, pp. 64, 66, 68

on a speculative basis, or without performing adequate due diligence that would have informed them of the fact their properties were within the BNMP. Because Claimants knew (or should have known) of the risk of expropriation, Claimants should not now get the benefit of a damages award for their properties that does not consider the expropriation risks they accepted.

137. Accordingly, if the Tribunal decides to award Claimants damages, Claimants should receive the amounts that they invested in Costa Rica. Based on the information submitted by FTI and Claimants, however, we cannot determine with certainty the amounts that Claimants invested. As Table 7 below reveals, discrepancies remain between the evidence submitted by Claimants (i.e., the “Certification of Property”) and either Claimants’ statements or FTI’s reports for 20 of Claimants’ 26 lots. Accordingly, we have been unable to calculate Claimants’ investment with certainty.

Table 7 – Purchase Prices and Dates in FTI’s Reports and Claimants’ Pleadings¹⁵⁰

Lot	Claimant	Purchase Date					Purchase Price			
		FTI's 1st Report	FTI's 2nd Report	Claimants' 1st Witness Stmt	Claimants' 2nd Witness Stmt	Cert. of Prop.	FTI's 1st Report	FTI's 2nd Report	Claimants' Witness Stmt	Cert. of Prop.
V30	Spence	30-Sep-2003	30-Sep-2003	30-Sep-2003		30-Sep-2003	\$ 200,000	\$ 200,000		\$ 200,000
V31	Spence	30-Sep-2003	30-Sep-2003	30-Sep-2003		30-Sep-2003	\$ 200,000	\$ 200,000	\$800,000 for	\$ 200,000
V32	Spence	30-Sep-2003	30-Sep-2003	20-Aug-2003		30-Sep-2003	\$ 150,000	\$ 150,000	V30-V34	\$ 150,000
V33	Spence	30-Sep-2003	30-Sep-2003	20-Aug-2003		30-Sep-2003	\$ 150,000	\$ 150,000		\$ 150,000
V38	R. Copher	19-Nov-2004	19-Nov-2004	19-Nov-2004		19-Nov-2004	\$ 350,000	\$ 350,000	\$ 350,000	\$ 350,000
V39	B. & R. Copher	27-Sep-2000	25-Sep-2003	25-Sep-2003		27-Sep-2000	\$ 500,000	€500,000 or	\$ 340,000	€ 500,000
V40	B. & R. Copher	27-Sep-2000	25-Sep-2003	25-Sep-2003		27-Sep-2000	\$ 500,000	\$340,000		€ 500,000
V46	R. Copher & Holsten	8-Feb-2006	8-Feb-2006	8-Feb-2006		8-Feb-2006	\$ 275,000	\$ 275,000	\$ 550,000	\$ 274,000
V47	R. Copher & Holsten	8-Feb-2006	8-Feb-2006	8-Feb-2006		8-Feb-2006	\$ 275,000	\$ 275,000		\$ 274,000
V59	Spence Co.	3-Oct-2007	3-Oct-2007	11-May-2007	May 2007	3-Oct-2007	\$ 1,100,000	\$ 515,000	\$ 515,000	\$ 1,100,000
V61a	Spence Co.	6-Feb-2006	4-Feb-2005	4-Feb-2005		17-Feb-2006				\$ 3,100,000
V61b	Spence Co.	6-Feb-2006	4-Feb-2005	4-Feb-2005		15-Jan-2007	\$ 3,100,000	\$ 800,000		\$ 950,000
V61c	Spence Co.	6-Feb-2006	4-Feb-2005	4-Feb-2005		15-Jan-2007				\$ 950,000
A39	Spence Co.	29-Sep-2005	29-Sep-2005	22-Feb-2005	February 2005	29-Sep-2005	\$ 220,000	\$ 220,000		\$ 220,000
A40	Spence Co.	1-Sep-2005	1-Sep-2005 or 22-Feb-2005	22-Feb-2005	February 2005	29-Jun-2012	\$ 110,000	\$220,000		\$ 24,100,740
C71	Spence Co.	22-Oct-2007	4-Feb-2005	4-Feb-2005	February 2005	22-Nov-2007	\$ 230,000	\$ 230,000		\$ 230,000
C96	Spence Co.	11-Aug-2005	11-Aug-2005	28-Jun-2005	June 2005	11-Aug-2005	\$ 250,000	\$ 250,000		\$ 250,000
SPG1	Spence Co.	20-Dec-2006	11-Feb-2007	2006	December 2006	2-Nov-2007	\$ 695,437	\$ 695,437		\$ 695,437
SPG2	Spence Co.	11-Feb-2007	11-Feb-2007	2006	December 2006	2-Nov-2007	\$ 695,437	\$ 1,004,563		\$ 1,004,563
SPG3	Spence Co.	11-Feb-2007	11-Feb-2007	2006	December 2006	2-Nov-2007	\$ 1,700,000	\$ 1,700,000		\$ 1,700,000
B1	A. & T. Berkowitz	22-Sep-2003	22-Sep-2003	6-Sep-2003		22-Sep-2003	\$ 500,000	€ 500,000		€ 500,000
B3	B. Berkowitz	22-Sep-2003	22-Sep-2003	6-Sep-2003		22-Sep-2003	\$ 500,000	€ 500,000		€ 500,000
B5	B. Berkowitz	24-Sep-2003	24-Sep-2003	6-Sep-2003		24-Sep-2003	\$ 500,000	€ 500,000		€ 500,000
B6	B. Berkowitz	24-Sep-2003	24-Sep-2003	6-Sep-2003		24-Sep-2003	\$ 500,000	€ 500,000		€ 500,000
B7	Gremillion	21-Apr-2004	21-Apr-2004	3-Mar-2004		21-Apr-2004	\$ 425,000	\$ 425,000		\$ 425,000
B8	A. & T. Berkowitz	24-Sep-2003	24-Sep-2003	6-Sep-2003		24-Sep-2003	\$ 500,000	€ 500,000		€ 500,000

¹⁵⁰ FTI First Report, Section 9.4; FTI Second Report, pp. 18-20; Claimants’ Exhibits C-3-C28 (subexhibit “b” only); First Witness Statement of Bob F. Spence, ¶¶ 8-10; First Witness Statement of Ronald Copher, ¶¶ 9; First Witness Statement of Robert Reddy, ¶¶ 20-24, 35; Second Witness Statement of Robert Reddy, ¶¶ 41-42; First Witness Statement of Brett Berkowitz, ¶ 14; First Witness Statement of Glenn Gremillion, ¶ 7

138. For the Tribunal’s convenience, however, we have compiled Claimants’ investments in their properties based on the purchase prices reported in FTI’s second report (which still is unreliable and unsupported in our view). If the Tribunal accepts Claimants’ investments as presented by FTI, Claimants’ total investment in Costa Rica related to the wholly expropriated properties is US\$ 3,837,448 (CRC 1,972,179,856) as shown in Table 8 below.¹⁵¹

Table 8 – Claimants’ Investments in Wholly Expropriated Properties¹⁵²

Lot	Claimant	FTI Second Report	
		Purchase Date	Purchase Price
V30	Spence	30-Sep-03	\$ 200,000
V31	Spence	30-Sep-03	\$ 200,000
V32	Spence	30-Sep-03	\$ 150,000
V33	Spence	30-Sep-03	\$ 150,000
V38	R. Copher	19-Nov-04	\$ 350,000
V39	B. & R. Copher	25-Sep-03	\$ 1,224
V40	B. & R. Copher	25-Sep-03	\$ 1,224
V46	R. Copher & Holsten	8-Feb-06	\$ 275,000
V47	R. Copher & Holsten	8-Feb-06	\$ 275,000
V59	Spence Co.	3-Oct-07	\$ 515,000
V61.a	Spence Co.	4-Feb-05	
V61.b	Spence Co.	4-Feb-05	\$ 800,000
V61.c	Spence Co.	4-Feb-05	
A39	Spence Co.	29-Sep-05	\$ 220,000
A40	Spence Co.	1-Sep-05	\$ 220,000
C71	Spence Co.	4-Feb-05	\$ 230,000
C96	Spence Co.	11-Aug-05	\$ 250,000
Claimants' Investment in Wholly Expropriated Properties			\$3,837,448

139. Likewise, Claimants’ total investment in Costa Rica related to the partially expropriated properties is US\$ 3,831,126, as shown in Table 9 below. When Claimants’ investment is

¹⁵¹ Amounts have been converted to CRC at the exchange rate of CRC 513.93 to US\$ 1, the exchange rate as of 28 May 2008 as used in Claimants’ Memorial.

¹⁵² FTI First Report, pp. 45-82, Second Expert Report, pp.18-20 The amount of Claimants’ investment has been presented in US\$ as most of Claimants’ investments were made in US\$. Where Claimants’ purchased their properties in CRC (V39-V40), we have converted the purchase price to US\$ at the prevailing “tipo de cambio venta” exchange rate on the date of purchase. (Central Bank of Costa Rica, Colones-USD Exchange Rates (**R-072**)).

allocated to just the portion of the properties expropriated, Claimants' investment is US\$ 692,042 (CRC 355,661,142).¹⁵³

Table 9 - Claimants' Investments in Partially Expropriated Properties¹⁵⁴

Lot	Claimant	FTI Second Report		Lot Size Before Expropriation (m ²)	Lot Size After Expropriation (m ²)	% Expropriated	Portion of Investment Expropriated
		Purchase Date	Purchase Price				
SPG1	Spence Co.	11-Feb-07	\$ 695,437	16,801.73	14,158.92	16%	\$ 109,388
SPG2	Spence Co.	11-Feb-07	\$ 1,004,563	24,270.20	20,314.34	16%	\$ 163,736
SPG3	Spence Co.	11-Feb-07	\$ 1,700,000	46,245.33	39,641.93	14%	\$ 242,744
B1	A. & T. Berkowitz	22-Sep-03	\$ 1,226	7,358.14	4,519.73	39%	\$ 473
B8	A. & T. Berkowitz	24-Sep-03	\$ 1,225	7,444.45	4,613.54	38%	\$ 466
B3	B. Berkowitz	22-Sep-03	\$ 1,226	7,117.53	4,380.76	38%	\$ 471
B5	B. Berkowitz	24-Sep-03	\$ 1,225	7,292.53	4,413.55	39%	\$ 484
B6	B. Berkowitz	24-Sep-03	\$ 1,225	7,316.35	4,542.40	38%	\$ 464
B7	Gremillion	21-Apr-04	\$ 425,000	7,365.18	4,352.98	41%	\$ 173,816
Total Investment in Partially Expropriated Properties			\$ 3,831,126				\$ 692,042

140. In sum and as shown in Table 10 below, Claimants' total investment within the 75-Meter Strip is at most US\$ 4,529,490 (CRC 2,327,840,998) if the Tribunal accepts the amount of Claimants' investment as presented by FTI.

Table 10 – Claimants' Total Investment Within the 75-Meter Strip¹⁵⁵

Claimant	Amounts Invested	
	US\$	CRC
Spence	\$ 700,000	₡ 359,751,000
R. Copher	\$ 350,000	₡ 179,875,500
B. & R. Copher	\$ 2,448	₡ 1,258,306
R. Copher & Holsten	\$ 550,000	₡ 282,661,500
Spence Co.	\$ 2,750,868	₡ 1,413,753,746
A. & T. Berkowitz	\$ 939	₡ 482,384
B. Berkowitz	\$ 1,419	₡ 729,383
Gremillion	\$ 173,816	₡ 89,329,178
Total Compensation Due Claimants	\$ 4,529,490	₡ 2,327,840,998

¹⁵³ Amounts have been converted to CRC at the exchange rate of CRC 513.93 to US\$ 1, the exchange rate as of 28 May 2008 as used in Claimants' Memorial.

¹⁵⁴ FTI First Report, pp. 45-82, Second Expert Report, pp.18-20. The amount of Claimants' investment has been presented in US\$ as most of Claimants' investments were made in US\$. Where Claimants' purchased their properties in CRC (B1, B23, B5, B6, B8), we have converted the purchase price to US\$ at the prevailing "tipo de cambio venta" exchange rate on the date of purchase. (Central Bank of Costa Rica, Colones-USD Exchange Rates (R-072)).

¹⁵⁵ FTI First Report, pp. 30, 32, 45-82, Second Expert Report, pp.18-20. Amounts have been converted to CRC at the exchange rate of CRC 513.93 to US\$ 1, the exchange rate as of 28 May 2008 as used in Claimants' Memorial

141. However, the amounts in Tables 8, 9, and 10 above are still overstated because Claimants purchased several of their properties (such as the SPG-Lots and the B-Lots) with the knowledge that they were indeed located within the BNMP.¹⁵⁶ In such circumstances, Claimants would not have suffered any damages at all since no rational buyer would ascribe any value to the portion of the property within the 75-Meter Strip.

142. As discussed in our first report, FTI does not deduct the amounts we understand were already received by Claimants from Costa Rica through the administrative appraisal process.

143. Respondent has paid Spence Co. a total of CRC 132,107,760 on 15 February 2012 and 24,100,740 on 13 December 2012 for Lot A40.¹⁵⁷ Respondent has paid Spence Co. CRC 66,811,918 on 11 July 2014, CRC 630,813,982 on 11 July 2014, and CRC 243,253,105 on 2 December 2014 for Lot SPG2.¹⁵⁸ Respondent has paid CRC 19,978,421 on 16 December 2014 and CRC 100,439,459 on 14 August 2014 for Lot B3.¹⁵⁹ Respondent has paid CRC 42,625,961 on 14 February 2013 for Lot SPG1.¹⁶⁰ Respondent has set aside CRC 326,078,368.35 as compensation for Lot B8 and CRC 19,972,440 as compensation for Lot B6.¹⁶¹ Furthermore, Respondent has made available for payment CRC 62,853,048 since lots B1, B5, and B7 were dispossessed on 12-13 March 2008.¹⁶² Thus, Claimants' claims, or any amount awarded to Claimants, should be reduced by the amount paid or set aside by Respondent.

144. In our first report, we also suggested that Claimants could be entitled to the value of their properties according to the values in the administrative appraisals, but noted that the administrative appraisals could be overstated in terms of fair market value. After reviewing the additional information provided by FTI, we are of the view that the administrative appraisals were indeed overstated, as they did not consider that Claimants knew (or should have known) about the impact of the BNMP and that Claimants appear to have purchased many of their properties at a discount. Thus, Claimants should not be entitled to damages in accordance with the administrative appraisals.

¹⁵⁶ For example, Mr. Reddy indicates that Spence Co. purchased the SPG Lots and Lot V59 with knowledge that the portion within the 75-Meter Strip could not be developed. See Second Witness Statement of Robert Reddy, ¶ 42.

¹⁵⁷ Claimants' Exhibit C-16i

¹⁵⁸ Claimants' Exhibit C-21i; Respondent's Exhibit R-116

¹⁵⁹ Respondent's Exhibit R-154; Claimants' Exhibit C-24i-1

¹⁶⁰ Claimants' Exhibit C-20i

¹⁶¹ B8: Exhibit R-103, R-105, R- 042; B6: R-103, R-105

¹⁶² B1: Exhibit C-23d, R-103-R-105; B5: Exhibit C-25d, R-103-R-105; B7: Exhibit C-27d, R-103, R-105

VIII. Interest

145. In Claimants' Memorial, Claimants' counsel calculated pre-award interest on the alleged value of the expropriated properties from 1 January 2009 until 1 November 2015. Claimant's counsel applied the legal interest rate as published by the Costa Rican Central Bank in accordance with Article 1163 of the Civil Code. Claimants' counsel compounded this interest rate on a semi-annual basis.¹⁶³

146. In our first report, we stated that our review of the interest calculator published on the Judiciary of the Republic of Costa Rica's website revealed that the legal rate of interest in Costa Rica is not compounded.

“We have been referred to a website that provides a proper calculation of interest under Article 1163 of the Civil Code. Using the property values and severance damages calculated by Claimants, the website calculated simple interest...Therefore, if the Costa Rican legal interest rate is to be applied, simple interest should be used.”¹⁶⁴

147. Claimants now allege that we suggest that the Tribunal should award simple interest.

“The Kaczmarek Report suggests that a simple rate of interest is appropriate because, in Costa Rica, court awarded amounts are subject to simple interest.”¹⁶⁵

148. This is not our position. We did not opine whether it is appropriate for interest to be compounded or simple. Rather, we stated that the interest rate requested by Claimants is to be applied without compounding. In our experience, it is not uncommon for a legal rate of interest to apply without compounding. Moreover, in jurisdictions where the prejudgment interest is not compounded, it is common for the legal rate of interest to be higher than a commercial rate of interest.



Brent C. Kaczmarek, CFA
22 December 2014

¹⁶³ Claimants' Memorial, ¶¶ 327-329, 332

¹⁶⁴ Navigant First Report, ¶ 169

¹⁶⁵ Claimants' Reply Memorial, ¶ 257

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Documents Relied Upon

Appendix 1

Exhibit	Document
R-012	Resolution No. 1410-2010-SETENA, 28 June 2010
R-021	Administrative Appraisal Manual, 15 November 1996
R-046	SENARA, Hydrological Study of the Huacas-Tamarindo Aquifer, May 2003
R-062	Williams, Adam; Real Estate on Slow Upswing; <i>Tico Times</i> ; 10 September 2010
R-063	John McPhaul, "Costa Rica vacation homes hit by crisis," <i>Reuters</i> , 1 August 2008
R-064	S&P/Case-Shiller U.S. National Home Price Index, S&P Dow Jones Indices LLC
R-065	Rebecca Clower, "Guanacaste Costa Rica Real Estate: State of the Market address, or (Recognizing a steal when you see one)," <i>Articlesbase</i> , 20 September 2010
R-066	"Surcharge still around Guanacaste," <i>Cozta Rica News</i> , 2 June 2010
R-067	"Real Estate Continues Upward Trend," <i>The Costa Rica News</i> , 4 October 2010
R-068	Central Bank of Costa Rica, 2008 Annual Report, March 2009
R-069	American Society of Appraisers, "ASA Business Valuation Standards", 2008
R-070	Letter from SENARA to the Municipality of Santa Cruz, ASUB-517-07, 13 November 2007
R-071	SENARA, "Application of hydrogeochemical and isotopic tools in validating the hydrogeological model of the Huacas-Tamarindo aquifer, in the North Pacific of Costa Rica (IAEA – Project RLA-8-041)"
R-072	Central Bank of Costa Rica, Colones-USD Exchange Rates
R-073	Judiciary of the Republic of Costa Rica, "Interest Calculator," available at http://sitios.poder-judicial.go.cr/calculointereses/CalcInt.aspx , 10 July 2014
R-074	Ministry of Finance, Director General of Tax Administration, "Investigation and Determination of Values," File No. 04-2008, 23 September 2008
R-075	Unicaribbean, Lots for Sale, available at http://www.unicaribbean.com/plan.php , 12 July 2014
R-076	Ministry of Finance, Director General of Tax Administration, Supporting Document for Administrative Appraisal of FINCA FR-5-130540-000, 9 July 2014
R-155	Topic Learning Objectives, <i>Association for Investment Management Research</i> and Candidate Body of Knowledge Topical Outline. <i>CFA Institute</i>
R-156	1996-1998 CFA Candidate Readings
R-157	1998 CFA Study and Examination Program Textbooks: Primary Readings
R-158	IVS Exposure Draft, June 2010, International Valuation Standards Council,
R-159	Unicaribbean, Price List, 14 August 2003 via Internet Archive, Accessed 19 November 2014 (https://web.archive.org/web/20030814142154/http://unicaribbean.com/preise.html)
R-160	Unicaribbean, Palm Beach Estates Plan, 27 July 2003 via Internet Archive, Accessed 20 November 2014 (https://web.archive.org/web/20030727062659/http://www.unicaribbean.com/plan.html)
R-161	<i>Tico Times</i> , Agents: No Real Estate Fire Sale on Horizon, 12 September 2008
R-162	University of Costa Rica, The Expansion of "Real Estate Tourism" in Costal Areas: Its Behaviour and Implications
R-163	Center for Responsible Travel, "Impact of Tourism Related Development on the Pacific Coast of Costa Rica", April 2010

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Timeline of Claimants' Purchases

July 1991:	MINAE Decree Establishing the BNMP (including coordinates that correspond to 125 meters inland from high tide line)
July 1995:	Law establishing the BNMP (including coordinates that correspond to 125 meters inland from high tide line but which mistakenly makes reference in text of law to 125 meters "seaward" rather than "inland")
July 2003:	Ms. Unglaube's property is declared in the public interest
August 2003:	Mr. Spence Purchases Lots V32, V33
September 2003:	Mr. & Mrs. Copher Purchase Lots V39, V40
September 2003:	Mr. Brett Berkowitz Purchases Lots B1, B3, B5, B6, B7, B8
September 2003:	Mr. Spence Purchases Lots V30, V31
February 2004:	Attorney General opinion issued confirming BNMP boundaries 125 meters inland from high tide line
April 2004:	Mr. Gremillion purchases Lot B7 from Mr. Berkowitz
November 2004:	Mr. Copher purchases Lot V38
February 2005:	Spence Co. Purchases Lots V61, A39, A40, C71
June 2005:	Spence Co. Purchases Lot C96
July 2005:	B Lots are declared in the public interest
October 2005:	Supreme Court finds the BNMP extends 125 meters inland.
December 2005:	The Attorney General issues a binding opinion on the boundaries of the BNMP
January 2006:	Spence Co. becomes aware of the Attorney General opinions
February 2006:	Messrs. Copher & Holsten Purchase Lots V46, V47
February 2006:	Spence Co. sells Lot V61 with "Boomerang Clause"
December 2006:	Spence Co. purchases Lots SPG1, SPG2, SPG3
May 2007:	Spence Co. purchases Lot V59
October 2007:	Spence Co. sells Lot C71
March 2008:	Ownership of Lot V61 is returned to Spence Co., as the buyer was unable to obtain a building permit
December 2012:	Ownership of Lot C71 is returned to Spence Co., as the buyer did not honor the terms of the contract

Sources and Notes:

[1] Dates of Claimants' purchases and sales are as noted in Claimants' Memorial, ¶¶ 23-24, 27-28, 30, 33-36, 40, 42-47. Previously, we had relied upon the dates in Claimants' Certification of Property exhibits.

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Fair Market Value of Claimants' Properties at Purchase Date Using FTI's Market Index

Appendix 3

Lots	Claimant	Purchase Date ^[1]	Purchase Price ^[2]	Land Area (m ²) ^[2]	Purchase Price (m ²)	FTI Index, Beginning Month ^[3]	FTI Index, Ending Month ^[3]	FTI Adjustment Index	FTI's But-For Property Values ^[4]	FMV per FTI Index at Purchase Date	FMV at Purchase Date (m ²)
Calc.			[A]	[B]	[C] = A / B	[D]	[E]	[F] = E / D	[G]	[H] = G / F	[I] = H / B
V30	B. Spence	30-Sep-03	\$ 200,000	806.78	\$ 247.90	117.17	361.21	3.08	\$ 649,389	\$ 210,646	\$ 261.1
V31	B. Spence	30-Sep-03	\$ 200,000	839.53	\$ 238.23	117.17	361.21	3.08	\$ 675,750	\$ 219,196	\$ 261.1
V32	B. Spence	20-Aug-03	\$ 150,000	854.46	\$ 175.55	114.87	361.21	3.14	\$ 687,767	\$ 218,720	\$ 256.0
V33	B. Spence	20-Aug-03	\$ 150,000	913.71	\$ 164.17	114.87	361.21	3.14	\$ 735,458	\$ 233,887	\$ 256.0
V38	R. Copher	19-Nov-04	\$ 350,000	1,076.93	\$ 325.00	154.60	361.21	2.34	\$ 866,836	\$ 371,011	\$ 344.5
V39	B. & R. Copher	25-Sep-03	\$ 1,224	1,011.80	\$ 1.21	117.17	361.21	3.08	\$ 814,412	\$ 264,175	\$ 261.1
V40	B. & R. Copher	25-Sep-03	\$ 1,224	856.87	\$ 1.43	117.17	361.21	3.08	\$ 689,707	\$ 223,724	\$ 261.1
V46	R. Copher & J. Holsten	8-Feb-06	\$ 275,000	935.05	\$ 294.10	238.52	361.21	1.51	\$ 752,653	\$ 497,011	\$ 531.5
V47	R. Copher & J. Holsten	8-Feb-06	\$ 275,000	1,154.49	\$ 238.20	238.52	361.21	1.51	\$ 929,265	\$ 613,636	\$ 531.5
V59	Spence Co.	11-May-07	\$ 515,000	892.58	\$ 576.98	336.90	361.21	1.07	\$ 718,450	\$ 670,111	\$ 750.8
V61	Spence Co.	4-Feb-05	\$ 800,000	4,523.67	\$ 176.85	167.29	361.21	2.16	\$ 3,733,127	\$ 1,729,009	\$ 382.2
A39	Spence Co.	22-Feb-05	\$ 220,000	902.02	\$ 243.90	167.29	361.21	2.16	\$ 537,235	\$ 248,822	\$ 275.8
A40	Spence Co.	22-Feb-05	\$ 220,000	892.62	\$ 246.47	167.29	361.21	2.16	\$ 531,636	\$ 246,229	\$ 275.8
C71	Spence Co.	4-Feb-05	\$ 230,000	667.04	\$ 344.81	167.29	361.21	2.16	\$ 230,911	\$ 106,947	\$ 160.3
C96	Spence Co.	28-Jun-05	\$ 250,000	1,945.65	\$ 128.49	188.29	361.21	1.92	\$ 1,343,386	\$ 700,284	\$ 359.9
SPG1	Spence Co.	20-Dec-06	\$ 695,437	\$ 16,802	\$ 41.39	320.55	361.21	1.13	\$ 3,477,586	\$ 3,086,181	\$ 183.7
SPG2	Spence Co.	20-Dec-06	\$ 1,004,563	\$ 24,270	\$ 41.39	320.55	361.21	1.13	\$ 4,300,601	\$ 3,816,565	\$ 157.3
SPG3	Spence Co.	20-Dec-06	\$ 1,700,000	\$ 46,245	\$ 36.76	320.55	361.21	1.13	\$ 8,194,523	\$ 7,272,223	\$ 157.3
B1	T. & A. Berkowitz	22-Sep-03	\$ 1,226	\$ 7,358	\$ 0.17	117.17	361.21	3.08	\$ 2,950,327	\$ 957,013	\$ 130.1
B3	B. Berkowitz	22-Sep-03	\$ 1,226	\$ 7,118	\$ 0.17	117.17	361.21	3.08	\$ 2,853,852	\$ 925,719	\$ 130.1
B5	B. Berkowitz	24-Sep-03	\$ 1,225	\$ 7,293	\$ 0.17	117.17	361.21	3.08	\$ 2,924,100	\$ 948,505	\$ 130.1
B6	B. Berkowitz	24-Sep-03	\$ 1,225	\$ 7,316	\$ 0.17	117.17	361.21	3.08	\$ 2,933,571	\$ 951,577	\$ 130.1
B7	G. Gremillion	21-Apr-04	\$ 425,000	\$ 7,365	\$ 57.70	134.59	361.21	2.68	\$ 2,953,150	\$ 1,100,359	\$ 149.4
B8	T. & A. Berkowitz	24-Sep-03	\$ 1,225	\$ 7,444	\$ 0.16	117.17	361.21	3.08	\$ 2,984,934	\$ 968,238	\$ 130.1

Sources and Notes:

- [1] FTI First Expert Report, pp. 45, 46, 49, 52, 53, 62; First Witness Statement of Bob F. Spence, ¶¶ 8; First Witness Statement of Ronald Copher, ¶¶ 9, 13; First Witness Statement of Mr. Robert Reddy, ¶¶ 20-24, 35; Claimants' Memorial, ¶¶ 41-47
- [2] Exhibits C-3-C28 (sub-exhibit "b" only); Note that purchase prices for lots V39, V40, B1, B3, B5, B6, and B8 have been converted from CRC to US\$ using exchange rate on purchase date. See Central Bank of Costa Rica, Colones-USD Exchange Rates, (R-072)
- [3] See Index in Navigant First Report, Appendix 5
- [4] FTI First Expert Report, Section 9.4