

**Contra el tigre suelto: understanding the options available to landowners who contest  
expropriation in Costa Rica**

by

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Submitted to the Graduate Faculty of the  
Graduate School of Public and International Affairs in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

University of Pittsburgh

2021

UNIVERSITY OF PITTSBURGH

GRADUATE SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS

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University of Pittsburgh, 2021

## **Abstract**

Property owners who face expropriation must decide whether to contest the taking of their property by the state. Theory holds that judicial review is the most important constraint on the executive's expropriation power. This qualitative study advances our practical understanding of this constraint by illuminating the highly subjective considerations that landowners must weigh when deciding whether to contest expropriation in Costa Rica. Informality in the judicial system offers some relief to property owners, but reforms have made informal institutions less inclusive. In the context of expropriation for infrastructure development, issues of administrative capacity and judicial corruption mix with factors such as the availability of public finance to make property rights less secure.

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## **Preface**

I wish to thank my family, who supported and encouraged me. Thank you for having the good nature to make Pitt a part of our lives together over the last four years. We had a lot of fun together.

I would also like to thank the kind and generous people in GSPIA who support the PhD program behind the scenes. You contributed to my success.

I would like to thank Dr. Jennifer Brick Murtazashvili for guiding me and encouraging me. I would also like to thank the following people and departments: Dr. Ilia Murtazashvili, Dr. Jeremy Weber, Dr. Erica Owen, Dr. Manuel Roman Lacayo, the Center for Latin American Studies, and Hillman Library. Many others helped me. Thank you.

I would like to thank my research informants, who shared their perspectives generously. I hope to fulfill my commitment to share my research with you in the immediate future.

Finally, I would like to recommend the GSPIA PhD program to prospective students. It offers an excellent blend of rigor and humanity. Pitt is a wonderful university in a wonderful city.

## 1.0 Introduction

This dissertation assesses the practical value of judicial review as a resource available to smallholding landowners in Costa Rica who contest expropriation in an attempt to enforce their property rights. It contributes to a line of inquiry associated with James Scott, whose work examines the methods used by the weak to resist various forms of domination by the state (2009; 1990; 2008). By illuminating the expropriation process from the property owner's perspective, this dissertation contests the established narrative that landowners' individual rights have grown more secure as the state's expropriation powers have purportedly narrowed in Latin America (Azuela and Herrera-Martín 2009). Additionally, this dissertation shows that the state does not work alone to suppress property rights, but is aided by a cast of accomplices including international investors, journalistic media, and bystanders in the general public. To understand the landowner's options, this dissertation analyzes formal and informal avenues for contesting expropriation.

Expropriation wreaks havoc on individuals and communities. At the same time, expropriation is often necessary for governments to lower barriers to economic and human development through expansion and improvement of infrastructure. The ubiquity of two constitutional constraints on expropriation, that private property only be taken for a public purpose and when just compensation is paid, indicates that liberal constitutions are in consensus about the best path to fairly balance individual and collective interests when private property is at stake. Faithfully following this path to its end, however, is another matter. That requires high-performing public administration, the rule of law, and state capacity to enforce policy (Cai, Murtazashvili, and Murtazashvili 2019). It requires individual property owners, government, and society to

coordinate in equilibrium and in harmony with attractive norms such as property rights (Hadfield and Weingast 2014).

This dissertation asks what happens when government, international lenders, and society align in equilibrium against individual rights. To put an even finer point on it, this dissertation asks how increases in public investment exacerbate problems in public administration, aggravate imperfections in the rule of law, and undermine property rights at the local level.

In particular, this dissertation illustrates how seemingly low-impact imperfections in the rule of law can deteriorate rapidly and seriously threaten property rights when triggered by a dramatic shift in the political economic equilibrium. Costa Rica presents a useful case of how an influx in available public finance shifts the political economic equilibrium and alters the incentives of public officials in ways that undermine property rights institutions. Since 2007, Costa Rica has demonstrated a willingness to change foreign and domestic policy in order to obtain loans and investments from China (Sequeira 2015). Similar patterns have played out between China and Nicaragua, and throughout most of Latin America, for that matter (Tegel 2021). This dissertation contributes to our understanding of these patterns and their impacts on individual rights by seeing these changes from the perspective of the landowner.

With a focus on the landowner's perspective, this dissertation illuminates the inner-workings of the administrative process of expropriation and the legal process of judicial review. This analysis contributes to our understanding of the rule of law by introducing us to informal law brokers in the Costa Rican process of judicial review of expropriation. Known locally as "*choriceros*," these informal actors maneuver at the edge of the law to obtain favorable rulings for their clients.

Based on key informant interviews, this dissertation describes a variety of tactics used by *choriceros* to activate a judicial system that has been conditioned not to respond to landowners' appeals without pay-offs.<sup>1</sup> The accounts of informants corroborate patterns detailed in the literature on judicial corruption (Buscaglia 2001; Rose-Ackerman 2007). This dissertation makes a more significant contribution, however, when it identifies a particular mechanism that makes this system selective. As a result, large landowners enjoy protections while smallholding landowners suffer systematic exclusion. This analysis allows us to appreciate how property rights are selectively enforced in ways that exclude smallholding landowners. Additionally, by considering how major reforms to the expropriation code affect access to *choriceros*, this dissertation shows how selective enforcement is the product of formal and informal institutions in the Costa Rican expropriation regime.

Owing to its interest in the landowner's perspective, this dissertation assumes a broad scope. The following pages discuss the history of surface infrastructure and public finance in Costa Rica and Latin America, the growing influence of China as a lender and trading partner in Latin America, how other international actors have responded to China's emergence, reforms to the expropriation code in 2014 and 2017 in Costa Rica, and informal institutions that become ingrained in judicial processes in Costa Rica.

The next section provides context for analysis by outlining the history of infrastructure development in Costa Rica in the 20<sup>th</sup> century.

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<sup>1</sup> Interviews 1, 2, 3, 4, 9

## **1.1 Infrastructure and Expropriation in Costa Rica**

For decades in Costa Rica, delays in expropriation and infrastructure development have contributed to public exasperation about the quality of the national road network (Recio 2018; Bosque 2017a). In 2014, sixty-seven percent of citizen respondents rated roads in Costa Rica as bad or very bad (LANAMMEUCR 2015). Transport infrastructure facilitates economic activity and improves access to vital public services like hospitals and schools. This catalyzes long-term economic growth and human development, the thinking goes. Costa Ricans have grown tired of waiting for these benefits.

Citizens resoundingly condemn the quality of the road network in Costa Rica (Perry and Berry 2016; Keeling 2008). The World Economic Forum agrees, citing poor transport infrastructure as a “persistent weakness” holding back competitiveness (Schwab 2014, 33). For all that Costa Rica has achieved in terms of consolidated democracy and public welfare, surface infrastructure stands out as an area of deficiency and underinvestment.

Spending on infrastructure has not reached the levels deemed necessary in Costa Rica’s National Transport Plan for 2011-35. That plan recommends spending 4% of GDP (MOPT 2011). Only twice between 2002 and 2013 did spending surpass 1% of GDP, in 2009 with spending of 1.23% and in 2008 with spending of 1.03% (Pisu 2016).

Obstacles to infrastructure investment stem, in large part, from Costa Rica’s struggles to obtain finance. Despite similar GDP, Panama pays 2.2% interest on international bonds while Costa Rica faces rates of 8.3%, owing to the latter’s risk rating as “speculative” (Rico 2020; Leitón 2020). When competition among international lenders spiked after 2010, Costa Rica seized the opportunity. It eagerly joined intensive infrastructure programs like the Mesoamerica Project, a regional integration plan backed by the US and the Interamerican Development Bank, and the Belt

and Road Initiative, China's global infrastructure platform (IADB 2009; Ortiz 2018). This resulted in a sharp increase in major road projects, evidenced by the simple comparison between two such projects in 2008 and twenty projects in 2020 (Pisu and Villalobos 2016; BNamericas 2020).

Opportunities to expand infrastructure investment have the power to shift the political economic equilibria in ways that destabilize the rule of law and property rights. For example, the universality of law suffers damages when policymakers improvise workarounds to laws in order to alleviate conflict between the law and the demands of creditors and investors. This is exactly what happened when, in order to comply with the demands of China's Exim Bank, Costa Rica suspended rules about open and competitive processes for bidding and procurement of construction contracts along Highway 32. Costa Rica acquiesced to the Bank's conditions that material purchases and construction contracts be awarded to pre-selected Chinese firms such as the Chinese Harbor Engineering Company (Sequeira 2015).

Blinded by their eagerness to seize the opportunity of a \$485 loan from China, Costa Rican officials agreed to loan terms in 2013 that would have renegotiated less than one year later. Among other things, these terms stipulated that disputes between Costa Rica and China would be arbitrated in Chinese tribunals (Noesselt and Soliz-Landivar 2013). The numerous special dispensations illustrate how the urgent need for infrastructure creates overriding incentives that lead to situational policy enforcement and undermine established policy.

The rush to build infrastructure puts enormous pressure on public administration and the judiciary, whose role is to keep the executive within the bounds of lawful project execution, including expropriation. If we accept that judicial review is the most important mechanism for setting the limits of the state's expropriation powers (Esposito 1996), then pro-infrastructure reforms in Costa Rica have expanded these powers prodigiously. Reforms in 2014 and 2017

accelerated the expropriation process and subordinated the judiciary by reducing its discretion for review of expropriation (Ruiz 2014). Reforms responded to available public credit by blunting protections for property rights and sharpening the executive's tools for taking property. In other words, the legislature cleared a path for the infrastructure agenda by disabling constitutionally enshrined safeguards for individual rights (Foros La Nación 2013).

For constitutional scholars, eminent domain is a natural power of the state that requires no enumeration (Nader and Hirsch 2004). Private property, on the other hand, must be enumerated. Constitutions, and Costa Rica's is no exception, create private ownership rights when they constrain the state's powers of eminent domain. From this viewpoint, expropriation is the definition of property rights. A landowner's rights are upheld when he is compensated, provided he agrees with the amount or has unencumbered access to judicial review of expropriation.

When viewed from afar or in the hypothetical, expropriation may appear a sterile matter of clearly prescribed legal procedures. It is not. Expropriation is untidy, owing to idiosyncrasies in ownership, human error, subjective valuation, ambiguous or incomplete cadastral records, and a host of other complicating factors (Downing and Downing 2009). These realities create the need for skillful administration of expropriation policy, and honest and effective judicial review to redress deviations from policy when they occur.

"Honest" and "effective" do not describe the formal system of judicial review of expropriation in Costa Rica. During field-work interviews in 2019, key informants reported frustration and futility when they entered appeals using only formal channels.<sup>2</sup> Landowners need to employ an informal law broker to shepherd a case to resolution. Informal law brokers, known

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<sup>2</sup> Interviews 1, 4, 9, 15



locally as *choriceros*, liaise with court personnel, paying bribes to speed and smooth the progress of a case.

This dissertation does not use corruption and informality in lower courts to paint a negative picture of Costa Rica's justice system as a whole or governance in Costa Rica in general. Costa Rican democracy is widely celebrated, and for good reason. In a region where democratic regimes have historically been scarce and short-lived, Costa Rica has managed to steer clear of authoritarianism and sustain impressive levels of wealth distribution and citizen participation in government, both at the polls and in the presidency (Booth 2008). For contemporary Costa Rica, the country's association with democracy is an important part of its wholesome image and how it attracts tourism. Tourism employs more Costa Ricans than any other sector of the economy (DeHart 2018).

My interviews with landowners, however, suggest that consolidated democracy is not sufficient to protect individual rights. Landowners facing expropriation lack the necessary concentration of political interests to mobilize the support or to punish the governing administration when it violates property rights. The differences between dispersed and concentrated political interests have been noted in the literature on citizen demand-making (Orloff and Skocpol 1984). The nature of the judicial review process in Costa Rica allows government to deal with appeals by powerful landowners on an individual basis through *ad hoc* concessions, and prevent these concessions from generalizing to a systems level.<sup>3</sup> Protections against abusive expropriation requires the rule of law, which this dissertation argues is malformed in Costa Rica.

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<sup>3</sup> Interview 9

Costa Rica presents a useful case for study of growth and governance issues in a middle-income country believed to have consolidated democracy, advanced levels of institutionalization. Costa Rica has demonstrated state capacity in a number of domains, including in “downstream delivery” like healthcare and education, and “upstream” as in environmental policy (Manning and Holt 2014). As explained below, however, infrastructure maintenance and development represent weak points in state capacity, largely due to a combination of corruption, excessive institutional fragmentation, and inadequate technical expertise in the Ministry of Public Works and Transport (Pisu 2016; Foros La Nación 2011).

Costa Rica ranks high in all five World Bank governance indicators in Latin America, trailing only Uruguay and keeping pace with Chile. Costa Rica reported a GDP of \$69.2 billion in 2019, with per capita GDP of approximately \$12,000, and rising. Nominal declines in the Gini coefficient, .5 in 2019, show that while growth has not noticeably exacerbated inequality at the national level, it remains a lingering problem (World Bank 2019).

Though annual population growth is declining, car ownership sustains increases of five percent annually, which matches the highest growth rates in the region (Tipping 2018; Roque and Masoumi 2016; MOPT 2014). This has overwhelmed the existing road network, especially in cities. Rush-hour commute times in San Jose have increased forty percent since 2015 (Estado de la Nación 2019). Economists estimate the negative impact of widespread congestion to be 3.8% of GDP (Woodbridge 2020).

Outside of cities, unfulfilled promises to rehabilitate, diversify, and expand the transport network hinder competitiveness (Pisu and Villalobos 2016). Multiple successive administrations have pledged to catch up on an estimated 25-year lag in infrastructure development. Carlos Alvarado, the current president, outlined a \$4.6 billion infrastructure agenda to improve

connectivity, facilitate regional integration, and alleviate bottlenecks in and between urban centers (CentralAmericaData 2018). To underscore the fiscal impossibility of such an agenda and the infrastructure sector's reliance on credit and foreign investment, tax revenue allocated to public works in 2019 was the lowest in 13 years, and 20.5% less than in 2018 (Jenkins 2018).

This dissertation details the state of infrastructure development and related political pressures in order to establish these as contextual factors influencing expropriation. Additionally, it compares the quality and access of judicial review before and after reform. By focusing on the tension between demands for infrastructure development and constitutionally guaranteed individual rights, this dissertation explores the paradox of how attempts to strengthen the private sector undermine property rights. Ultimately, the empirics and analysis illuminate the situation facing smallholding landowners who resist expropriation, the way reforms have weakened judicial review, and the impact of corruption on judicial institutions.

## **1.2 Facing Expropriation: the landowner's perspective**

Landowners in Costa Rica face threats to land security from a number of sources. In the expropriation process, the first hazard they must navigate is administrative incompetence. Poorly administered land policy creates confusion and seeds conflict. In the southern highlands of Costa Rica, failure to move former owners off expropriated land gave rise to claims of double ownership. Unresolved conflicts simmered for decades and eventually turned lethal (Robles 2016). According to observers, the root cause of those conflicts was poor enforcement of public policy (Guevara n.d.).

Costa Rica's low capacity to regulate land relations does not prevent it from enacting ambitious land policy. In order to create indigenous territorial reserves in the 1970s, the federal government in Costa Rica expropriated land from non-indigenous farmers. These landowners were supposed to be compensated, but few were. Many of these farmers remain on the land until today, leading to standoffs between the uncompensated former title holders and the indigenous groups who feel their territory is being usurped. According to reports, the Brörán indigenous tribe's requests for state intervention have gone unanswered (Villegas and Robles 2020). Ineffective and lackluster administration of policy creates ambiguity that the more powerful in Costa Rican society can use to gain advantage over the marginalized.

For the landowners I interviewed in Costa Rica, inept administration of policy compounded the challenges they faced while experiencing expropriation for a road project. In their rush to expropriate swiftly, field officials for the Ministry of Public Works and Transport (MOPT) cut corners. For example, they made verbal rather than written offers of compensation and failed in

their duty to inform the landowner about their right to appeal.<sup>4</sup> Journalistic accounts document how MOPT field staff grow impatient and confrontational when landowners express interest in appealing or otherwise contesting expropriation (Ruiz 2014). Field staff prioritize speed of expropriation over integrity.

Even the possibility of expropriation creates enough uncertainty to paralyze property owners' economic activity. Such was the case in Orotina, Costa Rica. In 2017, more than 440 property owners received expropriation notices from the federal government in relation to a new international airport (Bosque 2017b). While under expropriation notice, landowners could not sell their property or refinance their mortgage. This uncertainty inhibited investment at the level of the individual property owner, but also at level of local networks and economies. The full bundle of individual property rights was not restored until two years later when the government officially abandoned the project and annulled the expropriation notices (Canales 2019).

Smallholding landowners do not have an interest in slowing down the expropriation process, per se. Landowners find the expropriation process agonizing and unpredictable, and they wish it would end.<sup>5</sup> They do, however, have an interest to explore the full range of their options for compensation. After all, there is a lot at stake. For many of them, the loss of land imperils their livelihood and presents risks for impoverishment.

Landowners that I interviewed were working extra to make ends meet. The yawning gap between the rapidly rising cost of living and wages forces families to find inventive ways to meet their needs through productive land use rather than purchases in cash. To reduce cash

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<sup>4</sup> Interviews 4, 5, 10, 12

<sup>5</sup> Interview 12

expenditures, they maximize the productivity of their land through mixed use. These uses include residential, small-scale agriculture for household consumption, micro-scale livestock like chickens or a dairy cow, and some sort of informal cottage industry that generates income or creates opportunities for barter. Informal micro-businesses may be cheese production, a shop for fixing household appliances, or a stand for selling tamales, ceviche, or homemade popsicles. Family economies in Costa Rica allow little margin for error, which makes them vulnerable to even small disruptions, let alone large ones like expropriation.

The situation of one property owner I interviewed illustrates how the complexity of expropriation requires expert public administration. The landowner had three lots simultaneously expropriated by MOPT for the Costanera Sur Highway 34. For one lot, he accepted the compensation offer without objection. For the second lot, he contested the offer on the grounds that it did not consider damages to the business he operated there, a restaurant catering to truck drivers. Lastly, the road bisected his third lot, rendering the remaining strips of land useless. This prompted him to request total rather than partial expropriation.<sup>6</sup>

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<sup>6</sup> Interview 4



**Figure 1 Hillside that remained as part of a landowner's property after expropriation. The hill cannot be used for rational economic activity by this landowner. Costa Rica's expropriation law provides for total expropriation in circumstances such as these. The landowner requested total expropriation via formal channels but his request was never heard in court.**

Fortunately, the expropriation code in Costa Rica provides systems for adjudicating complex issues. The judiciary plays an active role in the expropriation process and ultimately decides disputes between landowners and the executive. Unfortunately, the conspicuously slow processing rates in the Court of Administrative Justice (*El juzgado administrativo contencioso*) leave landowners in limbo for years while their cases are decided. Clearance rates in Costa Rica rank last in the region when controlling for the number of judges per capita (Sánchez Urribarrí 2008). Cases take an average of 4 years to reach definitive resolution (Proyecto Estado de la

Nacion 2020), and accounts of cases taking 10 years are not uncommon.<sup>7</sup> The World Justice Project has taken notice of this problem, as well, citing “unreasonable delay” as the most serious deficiency in Costa Rica’s civil justice system (2021).

In addition to financial hardships, delays exact an emotional toll on landowners. Landowners who submit formal appeals in good faith feel stress and disempowerment as time passes and their cases show no sign of progress. This demoralizes landowners and reduces their confidence when making demands on the state. During a visit with one informant, he and his wife engaged in a well-trodden disagreement about why he had lost the will to pursue his appeal of compensation. He agreed that something should be done, but the state’s unresponsiveness had made him feel that further insistence was futile.<sup>8</sup>

Many landowners with resources and experience with legal matters resort to informal law brokers, known locally as *choriceros*, who liaise with court personnel to smooth the path of a case. For example, these informal actors may pay off court staff to assign property appraisers who are friendly to the landowner’s interests and will increase the amount of compensation. At other times, bribes will accelerate a case by moving it ahead of others in the queue. Since judges often sign but don’t read resolutions drafted by their staff, bribing a clerk can afford landowners influence over the outcome of a case.<sup>9</sup>

*Choriceros* possess sophisticated knowledge of how to covertly steer a case to a prompt and favorable ruling. They know how to transact with court staff without being detected. They

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<sup>7</sup> Interview 2

<sup>8</sup> Interview 4

<sup>9</sup> Interview 2



also understand conventions around compensation and can increase amounts without attracting attention from monitoring entities. *Choriceros*, however, do not offer their services to just anyone. Since they collect a percent of the additional compensation awarded, they only assist cases where the reward justifies the risk.<sup>10</sup> As such, *choriceros* improve access to justice for owners of large and valuable property, but offer no assistance to smallholding landowners.

Petty corruption among low-ranking judicial officials conditions the courts to respond to appeals when accompanied by a bribe and ignore the rest. This alienates low-income landowners for whom a bribe represents a significant marginal cost (Riley 1999). It also delegitimizes the legal system and teaches that protections like judicial review of expropriation are not universal. By making formal judicial channels unresponsive to demands by low-income landowners, these citizens see their individual rights diminished and their property left to the mercies of the executive. A problem in its own right, this issue grew more consequential after 2010, when available public credit ignited a boom in public investment and the land acquisition department of the MOPT tried to handle a 500% jump in caseloads (Recio 2019).

In real terms, property owners in Costa Rica bear the costs of a deficient system of expropriation and judicial review. Judicial review, in particular, fails in its purpose to hold the executive ministries accountable through the cost constraint, i.e., compensation. To make matters worse, justice is not accessible, impartial, or timely. According to standards and norms articulated by practicing attorneys, scholars, and civil society, the justice system does not serve property owners (Fonseca Pión 2002; Hadfield and Weingast 2014; World Justice Project 2021).

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<sup>10</sup> Interview 3

### **1.3 Reforms to the expropriation law**

The situation facing landowners became even more precarious after reforms to the expropriation code in 2014 and 2017. In its haste to facilitate infrastructure development, the National Assembly eliminated some of the only means of self-defense available to landowners. For example, the reforms required landowners to vacate expropriated property before their cases could be decided by the judiciary (Sequeira 2017). Reforms changed the rules of the game to the government's advantage.

In addition, reforms took aim at the judiciary's role in expropriation. The National Assembly imposed stricter time limits for the judiciary to issue expropriation decrees and generally subordinated the judiciary to pro-infrastructure policy by restricting its discretion in review of expropriation. For example, reforms stiffened the criteria for judicial appraisers to make changes to the administration's original valuation of the property being expropriated. These reforms adjusted timelines and procedural standards in ways that reduced the burden on public administration without taking corresponding measures to maintain the system of checks and balances that protect individual rights (Foros La Nación 2013).

The policy window that allowed its passing owes more to an opportunity for public credit than to domestic political circumstances. Not by coincidence, legislators advanced reforms in the National Assembly at the same time that President Chinchilla negotiated a \$485 million loan with China to rehabilitate and expand Highway 32 (Arias 2013). The terms of this loan reflect how desperate the Costa Rican government was to obtain financing. Much of the loan contract had to be renegotiated later to address inadequate planning and impact studies, immunity for Chinese officials in Costa Rica, and the process for settling disputes. The contract originally stipulated that such disputes would be settled in Chinese tribunals (Arias 2014).

All in all, the 2014 and 2017 reforms earned the moniker “integral” by changing more than twenty statutes in the expropriation law. The National Assembly framed the 2014 and 2017 reforms to the expropriation code as cutting the Gordian knot that had frustrated infrastructure development and, by extension, national competitiveness. An exasperated public welcomed the reforms. From an anti-corruption perspective, reforms tried to close loopholes in the judicial process. As will be discussed later, changes to the formal rules governing expropriation altered the cost/benefit equilibrium for informal actors who assist property owners in the appeals process. In response, informal actors needed to adapt their methods. By and large, this forced informal actors to make access to their services more exclusive.

Reform to the expropriation law enjoyed broad support in the legislature. Given public opinion about the quality of the road network and the delays associated with expropriation, lawmakers risked very little politically by supporting the bill. Both the 2014 and the 2017 rounds of reform passed during the presidency of Luis Guillermo Solís, member of the Citizens’ Action Party, but negotiations and the shaping of the 2014 bill took place in 2013 while Laura Chinchilla held the presidency. Chinchilla belongs to the National Liberation Party, one of the two dominant parties in contemporary Costa Rican politics. During this period, the other dominant party, Christian Social Unity Party, held many seats in the National Assembly. There was no noteworthy political opposition to the reform bill. Even in national media, criticism of the reform remained muted. Extensive internet searches find only scant evidence of opposition, and even then only in editorial columns (Foros La Nación 2013).

The more salient governance question is why policymakers considered the removal of protections on individual rights a more feasible solution than the alternatives. Why not address the problem closer to its source, namely, the public administration problems and poor enforcement

of land policy that generate legal challenges and project delays? Policymakers' choice to narrow individual rights signaled trouble for landowners and property rights in general, especially for a society that was charging headlong into a period of intensive infrastructure development.

#### **1.4 Infrastructure and Financing in Costa Rica: historical points of reference**

Numerous reports and polls show that roads in Costa Rica do not satisfy standards for competitiveness or the public's expectations. Many of these reports suggest that Costa Rica's transport infrastructure lags 20-30 years behind the level of development required for sustainable productivity (Umaña and Loría 2014; Pisu and Villalobos 2016). How did this happen? What are the historical and political explanations for such a significant delay?

For one, Costa Rica's long-running fiscal crisis consumes resources that could otherwise be allocated to infrastructure. The economic crisis of the 1980s, the so called "lost decade" in Latin America, forced Costa Rica to reduce the size of the public sector. Deep cuts into MOPT's technical and administrative staff limited the work the ministry could do to maintain and expand the transportation network. MOPT has never recovered. Simply put, MOPT lacks sufficient human, financial, and technical resources to bring the Costa Rican road network up to date (Umaña and Loría 2014).

Much of Costa Rica's debt is internal. Borrowing from domestic banks costs the Costa Rican government more than foreign or multilateral bonds (Cuffe 2021). Attempts to balance the national budget have been met with intense protest like those of the 1980s, when Costa Rica expelled a mission from the International Monetary Fund over explosive issues like a public sector wage freeze. In a country that pride itself on social investments, austerity measures remain hugely

unpopular. Compounding the problem, only Guatemala and Panama have a lower tax revenue-GDP ratio.

To address the shortfall in financial resources, Costa Rica has repeatedly turned to international financial institutions such as the Interamerican Development Bank (IDB), the Central American Bank for Economic Integration (CABEI), and the World Bank, among others. The IDB has traditionally been a lending tool for the US and European states, while the CABEI has served similar purposes for Taiwan.

Costa Rica's credit rating, however, raises the cost of financing. In part stemming from its long-running fiscal deficit, the nation's credit score teeters on the verge of "speculative." To put this in context, Costa Rica's credit score is worse than that of Honduras, despite Costa Rica having a GDP that is three times that of Honduras (Trading Economics 2021). Costa Rica's debt-GDP ratio in 2013 was 35.08%. This, however, does not tell the entire story. Much of Costa Rica's rising debt is internal. The country has not enacted fiscal reform since the 1990s, and efforts to do so as part of a loan package with the International Monetary Fund triggered massive public demonstrations (Cuffe 2021). The political economy of international finance took a turn when China seized the opportunity created by the 2008 financial crisis to build inroads in Latin America.

The following section describes the ways that China's rise have changed public investment in Costa Rica and Latin America.

### **1.5 How China's emergence in Latin America impacts infrastructure development**

China's emergence as a lender and investor in Latin America marked an inflection point for contemporary global trade and politics in the western hemisphere. Though cooperation and

project execution have suffered setbacks, schisms, and controversies in different contexts in Latin America, a natural match exists between Chinese supply of infrastructure and demand for the same in Latin America. Ultimately, China sees strategic advantage in exporting its surplus industrial output and construction capacity, and Latin American countries are eager accept China's aid and close their infrastructure gaps (Stanley 2018). Given what China offers in terms of infrastructure development, it is no wonder that many countries in Latin America have become vocal partisans of China's One Belt One Road Initiative (Ortiz 2018).

Fierce competition between China and the US for influence, trade, and access to resources has played out in a complex and dynamic chess match between the two global giants. Some observers have gone as far as to refer to this competitive process as "the current Sino-US scramble for Latin America" (Noesselt and Soliz-Landivar 2013, 6). Moves and countermoves create a constantly shifting mosaic of cooperation agreements, trade alliances, and public and private loans between Latin American nations and the two rivals, but one thing seems clear: Chinese influence is waxing while US influence wanes.

In this highly competitive environment, small states like Trinidad and Tobago, Costa Rica, and El Salvador enjoy heightened status and importance. Until recently, Central America and the Caribbean had formed a regional bloc with loyalty to Taiwan. Beijing, however, convinced multiple countries to cut ties with Taipei and support the "One China" policy. Despite China's opaque authoritarian style, experts agree that isolating Taiwan is a motivating priority for Chinese foreign policy in Latin America.

In 2007, Costa Rica was the first Central American country to break with Taipei and officially recognize Beijing, effectively endorsing the "One China" policy. The tangible benefits of this diplomatic pivot materialized immediately in the form of a \$105 million new national soccer

stadium, at zero cost to Costa Rica (Russell 2019). One by one, countries like Panama and the Dominican Republic have switched their official allegiance to China. In 2018, El Salvador followed suit, with President Sánchez Cerén publicly calling Taiwan, “an inalienable part of the Chinese territory” (Cerén cited in Kahn 2018). El Salvador’s allegiance mattered so much to Beijing that it endured political wrangling and a renegotiation of the deal when Nayib Bukele assumed the presidency in El Salvador. Beijing also tolerated Bukele’s public boasting about the deal’s bottom line of \$500 million in public investment (The Rio Times 2021).



**Figure 2** El Salvador’s president, Nayib Bukele, tweeted a series of messages about the “gigantic” cooperation deal “awarded” to El Salvador by China in December, 2019. In multiple messages Bukele emphasizes that the cooperation package does not add to El Salvador’s foreign debt. The flagship project in this deal, and the first mentioned by Bukele, is a “new, modern, and high capacity” national soccer stadium.

*Credit: Nayib Bukele, 12/03/2019*

“Stadium diplomacy,” as some call it, give critics an easy target that exemplifies the cheap price Latin American countries demand for their cooperation with China. These cooperation packages, however, have deep purchase in the hearts and minds of citizens in the receiving countries. In El Salvador, China donation equipment for water purification and distribution, and put 15,000 new Lenovo laptops into the hands of school children. These highly visible acts improve China’s public image in El Salvador and reverse the longstanding view of Chinese products as inferior in quality (Londoño 2019).



Many Latin American states, and Costa Rica is no exception, have carefully maneuvered to reduce their excessive dependence on the US without alienating this important partner. Perhaps Latin American countries so carefully steward their relationship with the US in order to soften the blow of an elemental fact: China's rise has changed the landscape of power relations in the hemisphere. China has replaced the US as the number one trading partner for three of the region's four biggest economies. China now outstrips the US in trade with Colombia, Brazil, and Argentina (Pleasant 2021). China has also become a major investor in energy and infrastructure in Latin America. As of August 2021, investments in infrastructure totaled \$94 billion, prompting US officials to declare Chinese involvement in the region, "a threat." While the investment portfolio still contains more projects on energy than infrastructure, focus has gradually shifted from the former to latter (Carbajal 2021a).

Among the four biggest economies in Latin America, only Mexico still counts the US as its biggest trading partner. Even there, where proximity and trade preferences like NAFTA promote US-Mexico trade, Chinese influence is waxing (K. Gallagher and Dussel Peters 2014). Chinese imports to Mexico grew by 86% between 2011 and 2021. Economists like Dussel Peters see the current trade war between China and the US as an opportunity. Commercial competition gives Mexico an opportunity to increase its exports to China (Carbajal 2021b).

Other countries in the region, notably Cuba, Venezuela, Ecuador, and to a lesser extent, Peru, treat China's rise as the arrival of a long-desired alternative to the US. Under Hugo Chavez and Nicolas Maduro, Venezuela has racked up more than \$50 billion in Chinese loans and investments (Pleasant 2021). To hedge its bets, China ties these loans to equipment purchase requirements and oil purchase deals (K. P. Gallagher and Irwin 2015).

Ecuador under Rafael Correa presents another interesting example, especially of how domestic politics open the door to China. China offered Ecuadorian politicians the opportunity to break away from the US and the long sordid history of US meddling in Ecuadorian politics. Many Ecuadorians see the conditions attached to US cooperation as an intrusion on Ecuadorian national sovereignty. President Correa frequently espoused this view. In his eagerness to fulfill political promises to escape the orbit of the US and to modernize Ecuador despite US preferences that it remain perpetually underdeveloped, Correa rushed into massive loans and ill-conceived infrastructure projects. Total debts to China now top \$19 billion. Ecuador's debt-GDP ratio sits at about 60%, and has risen sharply since 2013, according to Moody's Analytics Economic Indicators.

Correa ignored technical reports and impact studies on the Codo Sinclair dam. Experts advised that the dam's location presented too many risks. After all, it sits in the shadow of an active volcano. The dam stopped working just two years after its inauguration. To ensure repayment, China collects oil rather than dollars, claiming 80% of Ecuador's oil exports (Casey and Krauss 2018).

The US has a history linking loans to conditions that do not play well in domestic politics in the borrowing country. Plan Colombia, which provides military aid to Andean countries for combatting the production of illicit drugs, requires countries to enforce policies aimed at eradicating coca cultivation. This upsets millions of coca producers who consume the plant in leaf form, as their forebearers did, with no connection to cocaine or the illicit drug trade. Aerial spraying to destroy coca plants has led to widespread environmental damage (BORGÉN 2021). Similar to cooperation with the US, taking loans from many International Financial Institutions (IFI) require Latin American governments to enact austerity measures and fiscal reform, to rewrite

immigration policies, to liberalize markets and make guarantees to foreign investors that they do not make to domestic ones, and to redouble their efforts towards democratic governance and human rights.

Cooperation with China, by contrast, rarely involves such conditions. Instead, loan terms from China’s public banks have a more purely commercial nature. They focus on industry and infrastructure. Along with high interest rates and big loan amounts, conditions-free Chinese loans resemble those of commercial banks rather than IFIs (K. P. Gallagher and Irwin 2015). To highlight this difference in approaches, observers sometimes refer to Chinese financing as “aid without ideology.”

China’s emergence as a lender and investor in Latin America certainly marked an inflection point for international financing in connection with infrastructure in Costa Rica. Costa Rica took decisive diplomatic action to court a resurgent China, and was a forerunner in establishing ties with Beijing. China followed the stadium by investing in hospitals, schools, and, the subject of this dissertation, surface infrastructure (Noesselt and Soliz-Landivar 2013).

As the table below attests, China’s emergence caused financial flows to rev up across Latin America:

**Table 1 Comparison of Chinese and IFI Bank Loans to Latin America**

Total Loans	2005	2006	2007	2008	2009	2010	2011	Total
China	0.2	0.0	4.2	6.3	14.6	36.6	17.5	79.4
World Bank	5.2	5.9	4.6	4.7	14.0	13.9	9.6	57.9
IDB	7.1	6.4	7.7	11.2	15.5	12.5	10.9	71.3
US Ex-IM	0.0	0.1	0.0	0.0	1.1	1.0	2.7	4.9

Source: (K. P. Gallagher and Irwin 2015), figures are USD billions

## 1.6 Theory and Relevant Literature

This dissertation focuses on the landowner's perspective as it relates to two risks inherent to development. The bulk of this section deals with the main focus of this project: how public investment exacerbates deficiencies in governance systems that prevent citizens from enforcing their individual rights. This section begins, however, with reference to theories and criticism of development-induced impoverishment.

Critics of development have argued that it fails to benefit the most vulnerable, overwhelms ill-prepared public agencies, and violates both human rights and the fundamentals of democracy (Clark and Collier 2007; Pritchett, Woolcock, and Andrews 2010; Oliver-Smith 2011). A focused strain of criticism has coalesced around the impoverishment risks and insufficient social safeguards of major infrastructure projects like China's Three Gorges Dam, which displaced 1.27 million people (Wilmsen, Webber, and Duan 2011; Cernea 1997; Downing 2002).<sup>11</sup> While the expropriation cases under analysis in Costa Rica do not match the scale of the Three Gorges Dam, this paper treats that project as illustrative of the enormous costs of infrastructure development.

Infrastructure development requires creative destruction and, by design, alters landscapes. As development experts have noted, the destruction inherent in expropriation can have profound effects, "It unleashes a process of economic impoverishment and socio-political disempowerment in which communities lose control over their material environment and cultural identity" (Dwivedi

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<sup>11</sup> A 1994 World Bank review of projects estimated that 4 million people experience displacement and involuntary resettlement each year due to dam construction alone (World Bank 1994).

1999, 43). By reviewing the literature on development-induced impoverishment, this dissertation sets a sober tone for considering the risks facing landowners when the state takes land.

The risks facing landowners become more threatening when protections on constitutionally enshrined property rights malfunction. Corruption and informality have the potential to change property rights from a universal protection to an exclusive institution. Exclusive pacts in Mexico guaranteed property rights security for elites during decades of political upheaval, leading to the selective enforcement of property rights (Haber, Maurer, and Razo 2003). The story of selective enforcement of individual rights in Mexico highlights the link between corruption and exclusive institutions.

Exclusive and extractive institutions endure as a legacy of Latin America's colonial experience. European colonists took an extractive approach to their holdings in Latin America, using them to transfer wealth from the colonies to the colonizers. Weak protections of private property made expropriation by colonizers common. Institutional economists criticize exclusive institutions as impediments to a competitive market, economic growth, and justice (Acemoglu, Johnson, and Robinson 2001). Appreciating the negative effects of exclusive institutions is part of the puzzle. Another part is understanding how they develop and take root.

In the Costa Rican cases I analyze, judicial corruption explains more exclusivity in property rights than other frequently referenced factors. Chief among these other factors is property titling, or in the case of the poor, the lack thereof (De Soto 2003). This theory, however, has little bearing on the landowners I interviewed in Costa Rica, since they possess unambiguous titles and professionally drawn property diagrams, and the whole of Costa Rica has been brought under a digital cadastral system.

Predatory state theory, on the other hand, has some application. Vahabi, for example, theorizes that constraints on government will have the hardest time disciplining its predatory tendencies when the object of predation is a captive asset. Captive assets cannot be easily moved or concealed. For Vahabi, landed property is the quintessential captive asset and a type of indicator species for whether the state is effectively constrained (2016). Even in a context like Costa Rica, where institutions constrain the state, we may observe breakthrough predatory incidents when it comes to landed property and opportunities to expand infrastructure.

For those that see the state as inherently predatory, expropriation represents a major hazard to public welfare. After all, the power to appropriate private property ranks as perhaps the state's greatest domestic power after capital punishment. The power to abrogate a right that, in the case of Costa Rica, the constitution refers to as "inviolable" is a power that must be carefully constrained and its users held to account. Scholars of predatory state theory expect that the executive will run amok when it has no reason to fear accountability. In support of his thesis on anarchy, Leeson argues that throughout history the unconstrained state is the greatest instigator of violence and chaos (2014). Viewing the state as inherently predatory casts other ills, like judicial corruption, in a different light. If judicial corruption incentivizes judges to constrain the predatory state, we may view corruption with more tolerance.

Based on the literature and my own interviews with landowner-litigants, judicial corruption requires close examination. Excessive delays in civil justice in Costa Rica, for example, typifies a common problem identified in the literature. While unreasonable delay is not a smoking gun of corruption, it is a noteworthy red flag.

The following tables highlight how delays in civil justice jump out as an area of weakness in an otherwise high-performing justice system. The tables above show that unreasonable delay

stands out as a serious area of weakness in a justice system often celebrated for its independence. Especially in terms of prompt justice, the Costa Rican system falls short of its goal of “*Justicia pronta y cumplida*,” or “timely and complete justice,” in English. Another legal aphorism, “Justice delayed is justice denied,” also comes to mind.

#### Overall, Global and Regional Ranking, WJP Rule of Law Index

**Table 2 Overall Ranking, WJP Rule of Law Index**

	2020		2019		2017-18	
	Global	LAC	Global	LAC	Global	LAC
Uruguay	22	1	23	1	22	1
Costa Rica	25	2	24	2	24	2
Chile	26	3	25	3	27	3
Panama	63	15	64	16	61	17
Mexico	104	26	99	26	92	25
Nicaragua	118	28	114	27	99	27

#### Civil Justice, Global and Regional Ranking, WJP Rule of Law Index

**Table 3 Civil Justice Ranking, WJP Rule of Law Index**

	2020		2019		2017-18	
	Global	LAC	Global	LAC	Global	LAC
Uruguay	16	1	17	2	16	1
Chile	33	7	34	6	31	6
Costa Rica	38	8	37	7	32	7
Panama	83	22	78	20	78	20
Mexico	116	26	113	27	100	26
Nicaragua	120	27	109	26	102	27

Unreasonable Delay, Civil Justice, Global and Regional Ranking, WJP Rule of Law Index.

**Table 4 Unreasonable Delay Ranking, WJP Rule of Law Index**

	2020		2019		2017-18	
	Global	LAC	Global	LAC	Global	LAC
Uruguay	30	1	32	2	30	2
Chile	70	9	64	7	60	7
Nicaragua	89	13	71	11	76	13
Mexico	113	22	111	21	101	22
Panama	115	23	97	17	103	24
Costa Rica	120	25	119	27	102	23

Costa Rica, Global and Regional Ranking, WJP Rule of Law Index

**Table 5 Costa Rica Rank, WJP Rule of Law Index**

	2020	2019	2017-18
Costa Rica	Ranking in LAC	Ranking in LAC	Ranking in LAC
Overall Rule of Law	2	2	2
Civil Justice	8	7	7
Unreasonable Delay	25	27	23

Comparative studies of judicial corruption in Central America find that “speed money” is Costa Rica’s most serious problem (Galvis Patiño 2007). Judges and court staff, and many public officials for that matter, abuse their discretion to elicit “speed money.” Judges may allow frivolous motions, for example, as a way to slow down legal processes and covertly signal that a pay-off is necessary to get things moving. This imposes costs on litigants and induces them to offer bribes (Buscaglia and Dakolias 1998).

Schemes to hold judges accountable encounter difficult tradeoffs, since monitoring judges implies limiting the judiciary’s independence and discretion (Rose-Ackerman 2007; Cardenas and Chayer 2007). As we will see in Chapter 3, the Costa Rican legislature miscalculated in its attempt to limit discretion and enhance accountability. Changes passed in the 2014 reform to the



expropriation code overreached and were later struck down for infringing on the judiciary's domain.

Costa Rica's problems with corruption pale in comparison with regional peers. Transparency International, the World Justice Project, and Property Rights International rank Costa Rica in the top three countries in Latin America in terms of integrity. Aggregated rankings, however, do not differentiate between grand and petty corruption.

Table 1 suggests that petty and grand corruption covary differently with the factors most commonly associated with corruption. Red tape, which abounds in highly bureaucratized systems, shares a strong covariance with petty corruption, but not much of a relationship at all with grand corruption. The inverse prevails between petty corruption and judicial independence; they do not covary. Conversely, judicial independence and grand corruption do covary.

**Table 6 Corruption in Central America 1**

	<b>Red Tape</b>	<b>GDP</b>	<b>Judicial independence</b>
Petty corruption	.89	-.66	-.03
Grand corruption	-.03	-.83	-.71

*Values are Spearman's r.*

*(Ruhl 2011)*

The application of Table 5 (Ruhl's Spearman's r-values) is that we should exercise caution when considering Costa Rica's high aggregated rankings on the Corruption Perceptions Index (CPI). Since the CPI does not control for corruption at different levels of government, we cannot take the index ranking as a sign that corruption is equally well controlled throughout the government. A national justice system may earn high marks for judicial independence, holding elites accountable, integrity in criminal courts, or impartial treatment of minority groups, but it may at the same time suffer from rampant petty corruption in lower civil courts, which is precisely where landowners appeal expropriation in Costa Rica. As the following discussion shows, petty corruption is quite prevalent in Costa Rica.

Petty corruption should not be dismissed as trivial; it taxes "the bottom billion" for whom the extra burden of a pay-off weighs the heaviest (Clark and Collier 2007). This has a profoundly alienating effect on the poor. Malfeasance of this kind deals with low-sum bribes paid to junior officials, often in the most basic and widely-used public services like water, sanitation, education, healthcare, and basic legal procedures. The state's inability to control the self-interests of its officials reinforces the view that the state and public service provision are irredeemably biased.

Petty corruption delegitimizes the state, and the poor may choose not to interact with the state because of it (Riley 1999).

When governance systems respond only to bribes and “speed money,” the poor suffer from politicized justice and interruptions in public services, and countries face generally higher barriers to development (Riley 1999; Ang 2020). On the question of which Central American country has the most low-level corruption, Table 6 shows that Costa Rica cannot be separated from Honduras, Nicaragua, and Guatemala (Ruhl 2011). It goes without saying that Costa Rica’s reputation differs significantly from these other Central American countries.

**Table 7 Corruption in Central America 2**

	<b>Low-level corruption (petty)</b>	<b>High-level corruption (grand)</b>
<b>Costa Rica</b>	Middle-range	Moderate
<b>Guatemala</b>	Middle-range	Serious to rampant
<b>Honduras</b>	Middle-range	Rampant
<b>Nicaragua</b>	Middle-range	Rampant
<b>Panama</b>	Low	Serious
<b>El Salvador</b>	Low	Rampant

(Ruhl 2011)

Informality rises in the vacuum created by weak institutions (Van Cott 2006). In the context of judicial review in Costa Rica, informality is embodied in *choriceros*, or informal law brokers. These work as competing actors who make systems more efficient (Helmke and Levitsky 2006). In the case under analysis here, detection of corrupt dealings by these informal actors is made more difficult by the way that “corruption with theft” aligns the interests of seller (the court official), the buyer (the landowner), and the intermediary (the *choricero*) (Shleifer and Vishny 1993, 604)

In addition to the aforementioned points of reference in the literature, analysis in this paper will consider general theories of good governance. Fukuyama’s (2013) comments about subordination and autonomy provide a frame to understand the subordinating effects of the 2014 reform of the expropriation code. This reform took aim at judicial review, limiting the autonomy and discretion of the judiciary.

## 1.7 Methods

Field research presented in this dissertation began in November 2019 with a series of preliminary interviews with landowners in Costa Rica who had experienced expropriation for the Costanera Sur highway project, and a handful of informants in other locations in Costa Rica who had either experienced expropriation or had received notice of expropriation but the takings were never realized. I planned to follow a snowball method to recruit additional informants for future plans to conduct extensive interviews. I was also in discussion with my dissertation director about the option of a survey. These plans proceeded on schedule until March 2020, when the COVID-19 pandemic disrupted my field research and that of many field researchers around the world.

For the benefit of future readers, COVID-19 is an acute respiratory illness caused by the coronavirus. It can be fatal. In response, public health officials all over the world have tried to limit the spread of the virus by imposing travel restrictions, closing schools, limiting the operating hours of face-to-face businesses, and issuing physical distancing guidelines. Many universities, including the University of Pittsburgh, joined the effort by moving its classes to virtual platforms and closing campus buildings.

The University of Pittsburgh also prohibited university-sponsored travel starting in March 2020 and continuing to the time of this writing (September 2021). This eliminated any possibility of realizing my plans for extensive field work in Costa Rica in the summer of 2020. Even after the pandemic worsened and multiple iterations of my research plans had to be scrapped, I clung to the hope that the pandemic would ease and I would be able to conduct field work in Costa Rica with a tolerable degree of delay. This turned out to be wishful thinking. Though my dissertation director saw things with clearer eyes, it was not until September 2020 that I accepted that follow-up visits to the field would be impossible.

Despite my stubborn hope that I could return to the field, my research methods began to change in March 2020. I used my contacts to arrange phone interviews with informants who were willing to speak about sensitive topics like judicial corruption. This change of medium of communication allowed me to continue with interviews, but not interviews with individuals who are the main focus of my research. For example, I interviewed legal professionals by phone rather than smallholding landowners.

Even though I could not do fieldwork, I was able to rely upon other primary sources of data. These include primary journalistic sources from Costa Rica. The country's leading newspaper, *La Nación*, became a vital source for context about expropriation in Costa Rica, debates about reforms to the expropriation code, Costa Rica's relations with China and other financial partners, and a number of highly relevant subjects. I intentionally sought out viewpoints from a range of outlets in Costa Rica's mass media, citing print and online newspapers, televised debates between experts, blogs, and radio programs.

My research uses public opinion from a number of sources in Costa Rica. These include general surveys like the Latin American Public Opinion Project, and more specific ones like the Corruption Perception Index. Sources also include surveys conducted and reported by MOPT and other research organizations with interests in Costa Rica's transportation network.

I also used resources at University of Costa Rica libraries for law, the social sciences, and the humanities. I read masters and doctoral theses relating to expropriation and property law. For research into the origin and evolution of the term, *choricero*, I relied on Costa Rican sources from philology.

## **1.8 Project Map**

This dissertation will proceed as follows. Chapter 2 will document in greater detail the experiences of landowners along the Costanera Sur highway and, for comparative perspective, the announced site of the Orotina airport. This chapter shows how the combination of booming public investment, freewheeling public administration, and corruption in the judiciary impacts property rights. Additionally, this chapter will build context by describing the state of property in Costa Rica in terms of land titling, systematic cadastral data, and the local and federal offices responsible for these. For the purpose of comparison, this chapter will examine a case when landowners managed to work through the courts to successfully enforce their property rights.

Chapter 3 conducts a close comparison of the expropriation law before and after reform. This comparison reveals multiple areas where legislators tightened the process of judicial review and subordinated the judiciary. With few exceptions, these changes favored the expropriating ministry and disadvantaged landowners. Reforms altered the formal rules of the game.

In light of changes to the formal rules, Chapter 4 examines the new conditions under which informal law brokers must operate. This chapter considers how changes to the formal rules tip the balance of costs and benefits, making informal law brokers more selective with whom they choose to work with. The price they charge likely increases, as well.

The final chapter concludes and identifies opportunities for future research.

## **2.0 Expropriation from the landowner's perspective**

In order to gain insight into the landowner's perspective, this chapter documents and analyzes the options available to landowners who contest expropriation in Costa Rica. This chapter takes a political economy approach to understand how policy makers, journalistic media, public opinion, and international investors shape the choices available to landowners. Political-economic analysis shows how high politics and diplomatic maneuvering positioned Costa Rica to gain access to significantly greater levels of public credit and investment for infrastructure development. Costa Rica capitalized on available credit to undertake infrastructure projects in the name of increasing economic competitiveness. This played well with the public, which in turn sweetened incentives for policy makers to clear obstacles to infrastructure by passing expropriation reform. That reform drastically altered the choices facing landowners who face expropriation.

Analysis considers points of divergence between the Costa Rican case and regional trends that suggest expropriation powers are in decline. Instead of seeing the state's powers wane, landowners face an emboldened state and an impatient public who know opportunities for public investment do not come around often. This chapter also explains why landowners resort to informal law brokers, when possible, instead of accessing property rights justice through formal legal channels.

Although landowners in Costa Rica face threats to land security from public administration and an unresponsive justice system, they enjoy other benefits that are not available in other parts of the world. Unambiguous titling is a prime example. Starting in 2001 with a loan from the Interamerican Development Bank, the whole of Costa Rica has come under one digital geospatial



map. This has helped to clarify ownership of land, lot boundaries, and titles (Ramírez-Núñez and Mora-Vargas 2014).

In order to establish useful context, this chapter begins with a theoretical overview and a review of expropriation in regional and historical perspective. After describing the “narrowing thesis” on expropriation, this chapter evaluates how well this thesis fits the Costa Rican case. Discussion then turns to the social, political, economic, and global factors that weaken constraints on expropriation in Costa Rica. The subsequent section details the *de jure* process of expropriation and appeal, using available evidence to paint an accurate picture of landowners’ options. This chapter describes how informal law brokers redress inefficiencies in the judicial process. Finally, this chapter illuminates the inner-workings and dynamic incentives of the corrupt trio: landowner litigant, informal law broker, judicial staff.

## **2.1 Expropriation in regional and historical perspective**

Expropriation occupies an important, albeit utilitarian, position in Latin American political, economic, social, and intellectual history. Marxist theorists of the mid-20 century argued that efforts to improve the situation of the poor and indigenous in Latin America hinged on changes to land ownership, more than any other factor. More than once in Latin America, these ideas have been used to justify massive government intervention in the form of agrarian reform and redistribution of land and property.

Land disputes, big and small, never fail to influence life in Latin America. Many prominent events and figures in Latin American history trace their origins to questions of land ownership. Under president Lázaro Cárdenas, Mexico expropriated property and assets from private owners,

national and foreign, in sectors and at scales rarely seen before or since (Chatterjee 2018). In 1954, Guatemalan president Jacobo Arbenz risked political disaster by his attempts to force the United Fruit Company to divest of lands it held in the country (Chapman 2014). Government's active approach to land policy embodies the principle that land has a social function.

The notion that land has a social purpose is known in legal terms as “the social function doctrine.” It rests on the premise that land is a source of social benefit. By extension, land has a policy character. “Land as a policy tool” implies a different relationship between the state, the individual, and landed property. The social function doctrine goes beyond empowering the state. It *obliges* the state to intervene in property relations when land is not being used to benefit society. It stipulates that the state “should cease to be a simple regulator of private relations, to become a true agent of social change” (Mercedes Maldonado and Isaías Peña 2017, 253). As an institutional feature of property rights in Latin America, the social function doctrine requires owners to use land for the benefit of society. It attaches obligations to land ownership and requires the state to enforce said obligations.

This principle of land having a social purpose has permeated political and legal discourse and taken root in 20<sup>th</sup> century socialist constitutions in Latin America that condemned the latifundio system,<sup>12</sup> with its fallow land, as a vestige of colonialism. The latifundio and its owner stand as quintessential symbols of bossism and the consolidation of local power by rural landed elites in Latin American. Famously, in Peru, concentrated land ownership lent so much political, economic, and social power to the elite class of latifundio owners that state law could not touch them, turning them into a sort of feudal lord (Mariátegui 1928). Concentrated land ownership has

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<sup>12</sup> *Latifundio* refers to land holdings on the scale of haciendas and plantations.

perpetuated inequality and violent cycles of concentration and redistribution of land. It has caused conflict in Latin America since at least colonial times, though some scholars trace its origins to pre-Colombian civilizations who themselves sought to conquer and control territory (Ankersen and Ruppert 2019).

The social function doctrine does not replace the “public purpose” condition that constrains expropriation in most liberal constitutions. Constitutions that explicitly articulate the social function doctrine also include the public purpose clause, such as the Bolivian constitution. This authorizes an altogether more expansive role for government in regulating land use and ownership. Legal analysis sees the social doctrine as a force to be reckoned with. It is enshrined in constitutions and upheld by prevailing jurisprudence.

While expropriation in Latin America is guided and justified by the social doctrine of land, it is by no means unbounded. Global forces constrain expropriation. Foreign direct investment figures prominently in economic strategies pursued by Latin American governments since at least the 1980s. Logically, investors do not want to put their money where it may be appropriated. As a result, governments must signal to prospective investors that risks of expropriation remain low. Minimizing risk of expropriation complements economic reforms to attract foreign direct investment (Biglaiser and DeRouen 2006).

The social function doctrine provides the legal rationale for expansive government intervention in enforcing obligations to use land for social benefits. It endures as an important historical, political, and legal factor that guides government’s role in land relations. The next section describes the political economic factors that nonetheless constrain government’s role in land relations.

## 2.2 The Narrowing Thesis

Ironically, though the social doctrine allows government a more active role in land relations, scholars in Latin America note a decline in expropriation powers in the period between 1968 and 2004 (Saavedra-Herrera 2006). The “narrowing” thesis uses a political economic frame to assert that contemporary governments face stiffer and more numerous domestic constraints when taking land, and their *de facto* expropriation powers have diminished. The narrowing thesis draws lessons from a number of high-profile infrastructure projects in Latin America that were challenged, curtailed, and cancelled as a consequence of resistance to expropriation. This resistance may come from below, but also from within government, e.g., from competing political actors or uncooperative judiciaries. For adherents to the narrowing thesis, cancelled plans to build a new airport in Mexico City illustrate how expropriation powers have receded in the face of growing opposition (Flores Dewey and Davis 2013).

According to the narrowing thesis, expropriation powers in Latin America have been reduced by a combination of activist judiciaries, greater awareness of the environmental and social costs of large projects, rights-based social movements like the right to housing, and democratization, especially where the political arena has seen parties proliferate, party discipline decline, and competition intensify (Azuela, Herrera, and Saavedra-Herrera 2009; Saavedra-Herrera 2006). The narrowing thesis offers these conditions to explain the waning power of expropriation in bellwether Latin American countries like Brazil and Mexico, though the exact mix of factors differs from one case to the next.

Naturally, the performance of the economy and a nation’s fiscal situation influence the number and scale of infrastructure projects and, by extension, expropriations. However, economic factors speak more to the availability of finance and less to the robustness of expropriation powers.

When making claims about dwindling powers of expropriation, the narrowing thesis purports to control for variance in financial resources.

While the narrowing thesis has merit, it suffers notable limitations. First, it rests on empirical studies that for one reason or another limit their samples to one urban environment. These studies are not cross-sectional or nationally representative. Such studies do not compare City A with City B. The lack of systematically collected quantitative data calls into question the generalizability of most studies of expropriation (Becher 2014; Azuela 2017).

Second, its findings are biased towards urban settings, where expropriation unfolds in the context of closer media coverage, contending public officials at multiple levels of government, and greater access to judicial resources (Flores Dewey and Davis 2013). Generally speaking, urban property owners possess higher levels of legal literacy by virtue of their proximity to seats of state power. Expropriation in rural settings, where the state is historically weak or absent, follows a different pattern. There, state penetration destabilizes existing tenure systems and exposes inadequately secured property to opportunistic actors. Such was the case in the northern lowlands of Guatemala, which historically stood beyond the frontier of state interest and reach. Shifting interests induced the state to introduce new property systems, like formalization of titles, setting up a scenario where owners had to navigate a new and unfamiliar property code (Grandia 2012).

Third, the narrowing thesis omits the influence of transnational civil society advocating for human and property rights. In some cases, these organizations have played a decisive role in raising the political costs of expropriation, adding capacity to opposition movements, and closely watching judiciaries as a way to compel them to more strictly follow due process measures and enforce social and environmental safeguards (Carls et al. 2010). While transnational civil society

can make the difference, its predilection for a *cause célèbre* makes it an inconsistent and unpredictable stakeholder.

Finally, the narrowing thesis fails to account for changes in the availability of credit to finance public investment. Global factors, such as the emergence of China as a lender, have the potential to intensify competition among lenders and increase investment in infrastructure by multiple factors (Ortiz 2018). Political actors in cash-strapped countries like Costa Rica make haste to capture available finance, and exhibit a willingness to rewrite policy in order to remove barriers to public investment. As I will show later, reforms in Costa Rica expanded the state's expropriation powers in response to available public finance.

Though the narrowing thesis explains some episodes in the story of infrastructure development in Latin America in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries, it does not fit all countries in the region equally well.

### **2.3 Road Infrastructure, Expropriation Powers and Land Security: The case of Costa Rica**

Recent reforms in some Latin American countries run counter to the trends that underpin the narrowing thesis on expropriation. For example, in 2013, Colombia relaxed constraints on expropriation powers by divorcing the taking of property from the complicated judicial process, with the ultimate goal of accelerating infrastructure development (Umaña and Loría 2014). The subject case of this dissertation, Costa Rica, offers a similar counterexample to the narrowing thesis.

Expropriation powers have expanded in Costa Rica as the power balance shifted in favor of executive ministries. In 2014 and 2017, the National Assembly reformed the expropriation code

to accelerate the process for taking land. A detailed examination of these reforms will come in Chapter 3.

Among many changes meant to simplify the expropriation process, these reforms imposed time limits on the judiciary to issue expropriation decrees and required owners to vacate land before appeals and grievances could be heard in court (Sequeira 2017). One Costa Rican lawyer described the post-reform situation using the popular saying, “*El burro amarrado contra el tigre suelto*,” or, “A leashed donkey against a loose tiger.”<sup>13</sup> By nature, the state (the tiger) has a strength advantage over the landowner (the donkey). Reform exacerbated power asymmetries by further reducing the landowner’s ability to defend themselves. A letter to the editor of the leading national newspaper echoed this sentiment, “*Dios, ten misericordia del que llegue a ser expropiado*,” or, “God, have mercy on the owner whose property is expropriated” (Foros La Nación 2013; *author's translation*).

By and large, however, the public approved of the reforms. Sick of delays and projects going over budget, citizens’ muted response suggests they were supportive of pro-infrastructure reform as long as the development did not mean their land was going to be expropriated. One informant told me he was happy that legislators finally took action to speed up expropriations and prevent landowners from holding up projects in an effort to extort money from the public treasury.<sup>14</sup> There were no protests in San Jose or days of editorial columns scrutinizing the reforms from every possible angle. The journalistic record contains little about debates of the reform bill, and nothing about opposition to the bill.

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<sup>13</sup> Interview 3

<sup>14</sup> Interview 15

On the contrary, national media celebrated these reforms as an appropriate response to public exasperation over the perennial problem of slow infrastructure development (Bosque 2017a; Recio 2018). Media played on widespread impatience for infrastructure and embellished the narrative about expropriation using outlier cases where the process had undeniably gone off the rails. “Calle Blancos,” for example, became a household name, a symbol of the dysfunction of the expropriation regime, and the object of popular ire over government inefficiency and landowner obstinacy. Expropriation in the Calle Blancos section of the capital city ring road prolonged that project for decades. The process deviated from policies and procedures to such an extreme that residents and businesses remained on their lots 15 years after the government assumed title of the properties, raising the absurd legal question of whether they had regained ownership by virtue of a statute allowing residents to apply for title after occupying a property for 10 consecutive years (EL PAÍS La Nación 2014).

Sensationalized media aside, underperforming public administration deserves much of the blame for slow infrastructure development. This extends beyond expropriation, but chronic delays due to expropriation are a painful symptom of the gap between public administration capacity and the complex demands of road infrastructure development (Recio 2018; Umaña Venegas 2016). The roots of public administration problems include excessive institutional fragmentation, poor project planning, unclear project selection criteria, and insufficient stakeholder engagement (Pisu and Villalobos 2016).

The fragmented institutional framework complicates infrastructure development in a number of ways, but it provokes the greatest problems in the area of strategic planning. More than ten public, semi-autonomous, and autonomous entities claim transport as their domain of authority, and at least five of these claim road transport in particular. Excessive institutional fragmentation



generates uncertainty, since project approval and execution depend on coordination between institutions (Infraestructura La Nación 2014; Umaña and Loría 2014). Politicians frequently tinker with the distribution of power between MOPT and the constellation of entities to which it has deconcentrated authority. Ostensibly, deconcentration was done in the name of improved governance, but nothing seems to make the sector more agile and responsive (Chinchilla Cerdas 2018).

Between 2010 and 2020, Costa Rica racked up \$54 million in penalties for failing to adhere to project timelines laid out in loan agreements with the Interamerican Development Bank, the Central American Bank for Economic Integration, and the Japanese International Cooperation Agency (Campos 2021). Though multiple public entities contributed to the \$54 million tab, MOPT racked up the highest tally of penalties. According to the comptroller general, these penalties stem from a culture of poor planning. On a related note, the comptroller also mentioned an inability to expeditiously expropriate land without having to reformulate project designs.

To make matters worse, political decision-makers approve public investment on an annual basis, which precludes the possibility of multiyear budgeting. Numerous studies cite the lack of an infrastructure project pipeline to explain why private investors do not find Costa Rica more appealing (Pisu 2016).

Carelessness and repeated mistakes reinforce to the perception of MOPT as inept, inefficient, and wasteful (Infraestructura La Nación 2014; Bosque 2017a; Córdoba González 2019; Editorial La Nación 2019). Disarray at MOPT threatens multiple stakeholders. It damages the sitting administration's image, denies citizens the full benefits of their tribute, and cuts against property rights by neglecting quality control measures (Recio 2019). Even in discourse not predisposed to hyperbole, the term “*caos vial*,” or, “traffic chaos,” prevails as a popular description

of the state of road transport in Costa Rica. Disarray at MOPT lowers public confidence in the ministry, but it does not reduce the demand for more and better transport infrastructure (Foros La Nación 2017).



**Figure 3** This MOPT sign is a common sight along roadway construction sites in Costa Rica.

**“Recuperamos el derecho de via” literally means “We recover the right of way,” but a more accurate translation is “We recover the right of mobility.” This sign asks motorists to be patient while road crews reclaim the right of mobility, implying that this right was lost and needs to be restored.**

*Photo credit: Ileana Arauz*

*June 22, 2010, La Nación*

Demands for infrastructure development are enduring and come from many domains of Costa Rican life, including household economics, national self-image, national competitiveness, national standing relative to regional peers, and domestic electoral politics. Livelihoods depend on mobility. More than 50% of Costa Ricans cross county lines when traveling between home and work (Woodbridge 2020). The World Economic Forum identified road infrastructure as a persistent weakness limiting Costa Rica’s competitiveness (Schwab 2014). Estimates of the economic costs associated with traffic congestion put it at 3.8% of GDP (Woodbridge 2020).

National pride is another area. Costa Rica's standing as a regional leader depends, in part, on accomplishments in public services and technology (Umaña Venegas 2016). Costa Rican healthcare is a good example of this. When Panama City opened Line 1 of its metro after just three years of planning and construction, Costa Rica responded by fast-tracking a commuter rail project in San José (Araya Monge 2020). In Costa Rican electoral politics, a candidate's road infrastructure plan carries similar importance to, say, the healthcare plan of a contemporary US presidential candidate. Every candidate's platform includes an ambitious road plan. Even *síndicos*, the lowest elected municipal official, campaign on the promise of improved infrastructure.



**Figure 4** In this facebook post, a candidate for local office in Costa Rica makes a campaign promise to build and repair bridges between two towns in San Carlos *cantón*.

**Credit: Crisley Chacón Céspedes, January 28, 2020**

In light of sustained high levels of public support and the widespread belief that Costa Rican infrastructure is running at least 20 years behind where it should be, politicians feel pressure to act (Foros La Nación 2011). Their options, however, are constrained by the country's difficulty in obtaining credit. Costa Rica faces interests rates of 8.3%, while Panama borrows at 2.2% (Rico 2020). Even when Costa Rica obtains financing, chronically poor management prevents it from spending the money in a timely fashion. As a result, interest and penalties pile up before the economic and human development benefits materialize (Pisu and Villalobos 2016). Table 8 summarizes Costa Rica's borrowing from international lenders as of 2015.

**Table 8 Costa Rica's borrowing from international lenders as of 2015**

<b>Lending institution</b>	<b>Amount</b>	<b>Purpose</b>
Interamerican Development Bank	\$810 million	Road and port
Eximbank (China)	\$395.75 million	Road
Central American Bank of Economic Integration	\$340 million	Road
Andean Development Corporation (CAF)	\$52.45 million	Road

*Source: Pisu and Villalobos 2016*

The emergence of China as a lender creates new financing opportunities for Costa Rica. Costa Rica understands the importance of courting China as an investor for the sake of financing direct from China, but also for the benefits that come with greater competition among lenders. When Costa Rica became the first Central American country to break with Taipei and officially recognize Beijing, Costa Rican president Oscar Arias described it as “an act of elemental realism,” in reference to China's economic superiority (The New York Times 2007). Four years later, Costa Rica inaugurated its National Stadium, built to modern specifications by Chinese engineers with Chinese money (Will 2012). The shift in diplomatic allegiances paid immediate and ongoing dividends for infrastructure development in Costa Rica.

In 2019, construction began on China's signature investment in Costa Rica's road network, the widening of Highway 32.<sup>15</sup> Despite constant controversy and finger pointing about project missteps, Costa Rica's highest officials maintain a cooperative and appreciative public posture towards China (Rojas 2020). With China's influence waxing in Latin America, Costa Rica wants to stay in Beijing's good graces for the infrastructure bonanza that will come with China's Belt and Road Initiative (BRI). As it relates to the BRI, Costa Rica has been more than a consenting participant. It has pledged to actively promote the initiative (Ortiz 2018).

Chinese investment in Costa Rica unlocked project financing, but at a cost. Costa Rica betrayed its own standards for project bidding and procurement when it acquiesced to financing conditions that awarded the Highway 32 project to a pre-selected Chinese firm (Sequeira 2015).

Sharp increases in public investment reverberated at the level of individual property rights, too. Heavier investment flows have strained public administration across MOPT's portfolio of active projects. This raises the question of how the chronically underperforming ministry could possibly cope with a 500% increase in its expropriation caseload without sacrificing quality and control (Recio 2019). This situation obliges property owners to interact with harried field staff who face burgeoning workloads and diminishing accountability. Reports document that MOPT field staff do not take time to explain owners' rights, as policy requires, and they grow confrontational when owners show interest in exploring their options for appeal (Ruiz 2019).

Two main factors explain why MOPT's internal monitoring and accountability controls have gone by the wayside. First, ballooning caseloads have outstripped the ministry's hiring of

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<sup>15</sup> Highway 32 carries Chinese imports from Costa Rica's biggest port (Limón) to its biggest market (San José).

technical and managerial staff, leaving field staff to answer to fewer internal accountability controls (Lara Salas 2019). Second, the subordination of the judiciary means that MOPT has less to fear from judicial review of expropriation (Sequeira 2017). This shifts the equilibrium of incentives to favor expropriation that is swift over that which is procedurally sound.

Unchecked by accountability controls, freewheeling MOPT field staff pose a hazard to property rights. In their rush to cope with a 500% increase in caseloads, they cut corners (Recio 2019). Informant-landowners along the Costanera Sur Highway told me that field staff actively discouraged landowners from opposing expropriation rather than informing them of their right to appeal.<sup>16</sup> In addition, field staff made verbal rather than written offers of compensation. This lack of a written offer slowed the appeals process and increased costs of litigation for landowners. In the face of so much disorder and unpredictability, one informant decided that opposing expropriation entailed too much stress and uncertainty. He accepted MOPT's compensation, though he maintains the ministry took more land than it paid for.<sup>17</sup>

Many of the landowners I interviewed are unfamiliar with legal processes. Before the Costanera Sur highway was paved, few cars traveled this road because of its ruggedness. The state had a faint presence in this area. Few landowners paid property taxes and even fewer public officials came through providing services like trash collection. Landowners barely make ends meet, and the cost and unfamiliarity of legal proceedings erect barriers to them taking action.

For other landowners, expropriation imperils their livelihoods to the extent that they have no choice but to resist. One informant showed me multiple small lots simultaneously expropriated

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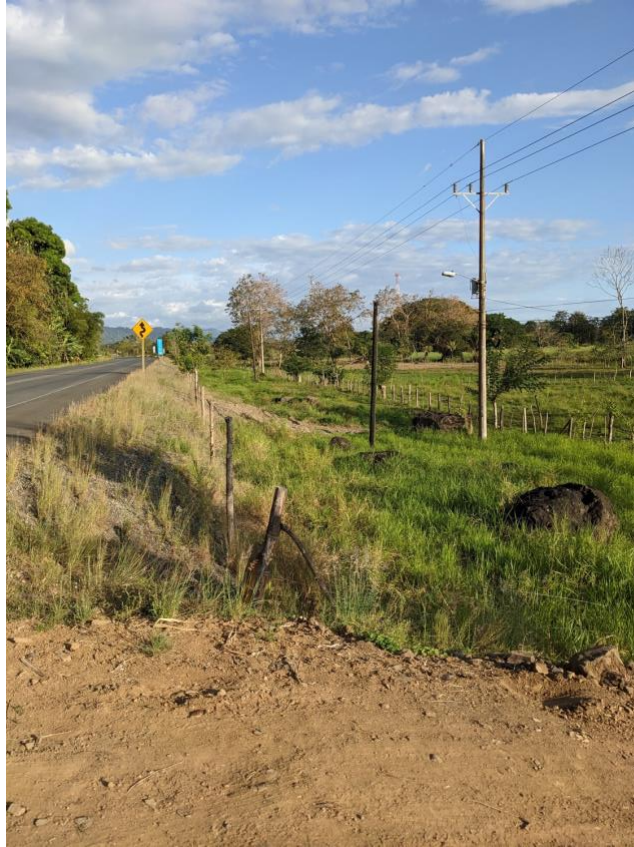
<sup>16</sup> Interviews 4, 6, 7, 9, 11

<sup>17</sup> Interview 10

by MOPT for the Costanera Sur Highway 34.<sup>18</sup> Together, these lots made ends meet in his family economy. He accepted the compensation offer for the first lot without contest. For the second lot, he contested the offer on the grounds that it did not consider damages to the business he operated there, a restaurant that catered to truck drivers. Expropriation eliminated parking spots, which directly translated to fewer paying customers in the restaurant. Finally, the road bisected his third lot, which he used for grazing livestock. This rendered the remaining strips of land useless. In response, he appealed for total rather than partial expropriation. Fortunately, the law provides a process for settling cases such as these.

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<sup>18</sup> Interview 4



**Figure 5 The narrow strip of land pictured here is what remains of a landowner's lot after expropriation. The landowner requested total expropriation because the leftover lot was insufficient for reasonable use. Previously it had been used for grazing cattle, but this activity requires more land than what is left after expropriation. The leftover strip of land measures approximately 15 meters wide and 80 meters long. It sits at the edge of Highway 34.**

Unfortunately, the process for settling appeals takes too long and suffers from petty corruption. Cases languish in the Court of Administrative Justice for an average of four years, according to the best sources available (Proyecto Estado de la Nación 2020). Reforms in 2014 and 2017 that addressed time traps only shortened the time MOPT must wait before taking a property, not the time an appellant must wait for resolution of his case (Foros La Nación 2013). In response to delayed justice, litigants may choose to hire an informal law broker, a *choricero*, to shepherd



their case to resolution. Before describing a *choricero* and his work, it is important to understand the *de jure* process of expropriation in Costa Rican law.

## **2.4 The Process of Expropriation in Costa Rica, *de jure* v. *de facto***

When a ministry of the Costa Rican state decides to expropriate a property, it must first present a file containing basic data, including a declaration of public interest, to the Office of the Attorney General. This file includes an appraisal, although it is merely “administrative” and will eventually be replaced by the report of a professional appraiser named by a judge. After reviewing the file, the Office of the Attorney General sends the file to the Court of Administrative Justice, where a judge must review the file and issue a resolution. The judge’s resolution includes an expropriation decree for the property. Additionally, the resolution orders the ministry to transfer to the property owner a deposit in the amount of the administrative appraisal. Finally, the resolution triggers the National Registry of Properties to immobilize the property. This prevents the owners from buying, leasing, or using the property for collateral, etc.

Owners have a specific amount of time to vacate the property so the ministry may take possession of it. This period begins once the ministry completes the deposit. If the owner does not yield possession of the property by the end of the period specified by the judge, the police may evict the owner by force. If the owner objects to the ruling, they may appeal. If both parties accept the ruling, the owner must sign and deliver the expropriation file at the National Registry so the property title may be transferred to the state (Bosque 2017a; LEY DE EXPROPIACIONES 1995).

This may appear a reasonably clear and tidy process for something as fraught as taking private property. Reality, however, presents complexity and ambiguity which no expropriation

code could fully anticipate (Downing and Downing 2009).<sup>19</sup> Idiosyncrasies in each case must be sorted out by public officials and verified by a judge, which requires time and technical expertise. We have already documented the shortfall in MOPT capacity relative to the demands placed on it (Recio 2019). The Court of Administrative Justice also suffers a deficit in capacity. Just ten judges preside over hundreds of expropriation cases (Bosque 2017a). Insufficient staffing has real consequences for individual rights. Property rights for an informant landowner became a casualty when appeals for two of his three lots never received their day in court.<sup>20</sup>

According to my informants and national sources, landowner-appellants seeking just compensation put their fortunes at the mercy of a corrupt, slow, and unpredictable process when they adhere to formal channels alone. It takes an average of four years for an appeal to reach final resolution (Proyecto Estado de la Nación 2020). Theory on judicial corruption in Latin America warns that overly-complex, opaque, and highly-bureaucratized systems of justice provide cover for venal court staff who abuse their discretion to elicit pay-offs (Buscaglia and Ulen 1997). The Court of Administrative Justice exhibits many of the warning signs identified in the theory.

For observers of Latin American democracy, this discussion forces a re-examination of long-held beliefs about integrity in the Costa Rican justice system as an exception to rule of corruption. Numerous indices give Costa Rica high marks, especially for judicial independence. These include the Corruption Perceptions Index (CPI) by Transparency International, the Rule of Law Index by the World Justice Project, and the International Property Rights Index by the

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<sup>19</sup> This issue is even more concerning in light of the paucity of systematically collected information about expropriation, in Latin America and globally (U.S. Government Accountability Office 2006; Azuela 2017).

<sup>20</sup> Interview 4

Property Rights Alliance. Judicial independence prevents effective monitoring by other branches of government, making corruption more difficult to detect and root out (Rose-Ackerman 2007). Past efforts for effective monitoring of the Costa Rican judiciary only produced more bureaucracy, duplication, and confusion (Proyecto Estado de la Nacion 2020). The balance of independence and accountability in the judiciary is elusive (Cardenas and Chayer 2007).

The aggregation methods of the aforementioned indices gloss over the endemic corruption in lower courts that prevents landowner appellants from accessing justice. Ruhl points out the inability of these indices to detect petty corruption by questioning the disconnect between perception-based surveys like CPI, and experience-based surveys like those of Latin American Public Opinion Poll (2011). Despite all the nuance lost in aggregated rankings, one important fact shines though clearly in the Rule of Law Index: Costa Rica has a serious problem with “unreasonable delay” in civil justice (Neukom 2009). Compared with impunity in Mexico, delay may seem a relatively benign problem. Scholars of judicial corruption, however, view delay more gravely. Delay is the most common manipulation of process available to low-level judicial staff (Buscaglia and Dakolias 1998).

To prevent venality and opportunism, institutions must regulate the self-interests of their officials (Rose-Ackerman and Palifka 2016). Corruption in lower courts in Costa Rica weakens the rule of law in the domain of property rights, creating a vacuum in which informal institutions rise. Informal law brokers, or *choriceros*, work covertly to align the interests of rent-seeking judicial staff and landowner litigants.

*Choriceros* are competing actors who smooth the path of a case by paying off court personnel. They make systems more efficient, but they distort the formal system in the process

(Helmke and Levitsky 2004). *Choriceros* do not take the place of lawyers, though they can at times play both roles. One informant detailed the work of a *choricero*.

This informant owns a wildlife preserve and eco-lodge. He had previous experience with expropriation and land deals. He first encountered the *choricero* at a community meeting called by MOPT to inform local residents of the construction plans for the Costanera Sur Highway. Though the *choricero* owned no land in the path of the project, he made a show of his interest and knowledge of compensation to all in attendance by repeatedly asking the MOPT representative about compensation formulas, even though the representative avowed no knowledge or authority on the matter. The representative was an engineer, not a land acquisition official. After the informant submitted a formal appeal and waited months with no result, he reluctantly acted on his business partner's advice to seek help from the *choricero*. The informant and the *choricero* negotiated a deal by which the *choricero* would receive 20% of any additional compensation awarded by the court. In a matter of weeks, the *choricero* had guided the appeal to a favorable ruling. The informant did not share compensation figures with me, but he said the *choricero* "ended up with a pile of cash."<sup>21</sup>

This account illuminates the inner-workings of the informal triangle of litigant, *choricero*, and judicial staff. First, it shows that *choriceros* operate in the light of day and make themselves visible to landowner litigants. They offer service through subtle and suggestive means, like displaying knowledge of compensation at the community meeting. Working at the edge of the law, they must have good contacts and sophisticated knowledge in order to transact with landowners and judicial staff without exposing either stakeholder to risk of detection.

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<sup>21</sup> Interview 9

Second, the asset-based fee system incentivizes *choriceros* to work with high-value cases. This arrangement excludes smallholding landowners. Low-value cases mean smaller pay-outs, which do not justify the risks. Though one informant paid 20%, other informants told me the fee could be as much as 50%.<sup>22</sup>

Third, landowners use a *choricero* as a last resort. For one, landowners would surely prefer not to share added compensation. They also face the reputational consequences of working with a *choricero*. *Choriceros* occupy a conflicted space in Costa Rican society. On the one hand, society repudiates their corrupt dealings. On the other hand, people acknowledge that without *choriceros* things do not get done (Espinoza Rodriguez 2017; Galvis Patiño 2007).

Since court personnel pay nothing for the extra compensation they pass on to landowners, this qualifies as “corruption with theft” in the taxonomy of corrupt practices (Shleifer and Vishny 1993). Theory holds that actors are less inclined to call out corruption with theft since it aligns the interests of all involved. Though interests may align, *choricero*-style corruption has clear winners and losers. First, the percentage-based fee system gives *choriceros* no incentive to assist smallholding landowners. Small pay-offs do not justify the risk of detection. Second, corruption conditions the justice system to respond to pay-offs, meaning that demand-making through formal channels alone is futile. Smallholding landowners lose twice.

This chapter provides the empirical and contextual material to understand land, expropriation, and infrastructure development in Costa Rica. The next chapter describes the reforms enacted by the Costa Rican legislature when the aforementioned boom in foreign credit and investment created opportunities to expand infrastructure.

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<sup>22</sup> Interviews 9, 2

### **3.0 Reforms to Expropriation Code in Costa Rica**

This chapter closely examines two rounds of reform to the expropriation code in Costa Rica, one in 2014 and the other in 2017. Though the political context of the reforms will be considered, much of the analysis will focus on the statutes, themselves. Changes to statutes considerably reduced the latitude afforded to judges and property appraisers. This chapter will evaluate how reforms to the expropriation code shifted the formal rules of the game for the landowner or the expropriating ministry. To situate this analysis relative to theory and literature, the discussion will address the larger context of changes in expropriation practice in the region, the role of judicial review in distributing the costs of expropriation, the relation between judicial discretion and corruption, and theories of good governance. This chapter details changes in the expropriation code in order to highlight the specific points where the balance of power has shifted.

Public works should produce net benefits. About that there is little disagreement. Expropriation, on the other hand, produces only costs. With the exception of the rare landowner who sees expropriation as an opportunity, landowners experience expropriation as a costly process. The best they can hope for is to be made financially whole again after receiving just compensation for the titled property they have lost. This compensation, however, does not account for costs like profound uncertainty, disruptions to livelihood, demoralization, disempowerment, and involuntary changes to life plans (Downing and Downing 2009; Dwivedi 1999). At the community level, there is an additional array of social costs. Although it took decades, these costs eventually engendered skepticism about the so-called symbols of progress, like ports and dams, that often motivate expropriation (Azuela 2007).

Leading scholars of expropriation in Latin America hypothesize that expropriation powers in the region started to narrow in the late 1990s. While acknowledging many counterexamples, they associate waning expropriation powers with social resistance, a rise in democratic regimes, and new forms of legal protections that elevate the status of marginalized social groups and environmental concerns (Azuela and Herrera-Martín 2009). These arguments, however, seem overly influenced by a small number of high-profile cases, like the cancellation of a project to build a new airport in Mexico City (Thompson 2002). The factors leading to the cancelled airport project conspicuously mirror those enumerated in the “narrowing hypothesis” (Flores Dewey and Davis 2013). If these high-profile cases exert oversized influence, it is in part due to the dearth of systematically collected data about expropriation (Azuela 2007).

Costa Rica, however, presents a counterexample for the narrowing hypothesis. Close analysis of the 2014 reform to the expropriation code will show that reform imposed new constraints on judicial review, effectively narrowing protections for individual property rights and expanding the state’s expropriation powers.

Since this dissertation aims to illuminate the expropriation process from the perspective of smallholding landowners, judicial review holds special relevance for analysis and discussion. Judicial review of expropriation is the principal formal avenue for landowners to challenge a freewheeling and opportunistic public administration that responds more to political pressure for infrastructure development and less to individual rights. Unfortunately, judicial review before reform fell well short of the desirable legal attributes enumerated by Hadfield and Weingast, which were mentioned in the introduction to the present paper: stability, openness, universality, clarity (2014, 23). The situation facing landowners became even more difficult when, in response to opportunities to obtain international financing for infrastructure improvements, the Costa Rican

legislature reformed the expropriation code to narrow the judiciary's power to intervene on behalf of the landowner.

### **3.1 Politics of reform**

The politics of the 2014 reform were made possible by a shift in the political economic equilibrium, which itself owed to marked increases in the availability of public credit. The increases in available public credit documented in previous chapters added urgency to reforms.

Calls for reform, however, had existed for years, if not decades. Popular media portrayed expropriations as the weak link in the machine of infrastructure development, and the principal cause of delays (Recio 2018; Bosque 2017a). This mirrored the public stance of MOPT ministers since at least the term of minister Rodolfo Silva Vargas, who took office in 1997. Vargas argued for limiting property rights on a number of fronts, including the forceful removal of unsanctioned billboards and, of course, clarifying the limits of property rights as defined in the expropriation code (Silva Vargas 1997). Silva Vargas belonged to the National Liberation Party (PLN), which has historically maintained the friendliest posture towards national elites and foreign investors. The party's longtime leader, Oscar Arias, is cited in earlier chapters for making the diplomatic shift from Taiwan to China. Though it was on their agenda for some time, the PLN and its counterpart in the two-party system, the Social Christian Unity Party, prioritized reform to the expropriation code when the availability of public credit spiked in 2010.

Before reform, national media made the case that Costa Rica was a dysfunctional outlier (Soto Morales 2013). Why should it take four years to expropriate land for a project when other Central American countries averaged three months? Unlike Costa Rica, neighboring countries did



not require the appeals process to reach a final resolution before the state took possession of private property.

Most journalistic accounts identified the judicial process as a cause of chronic delay (EL PAÍS La Nación 2014; Editorial La Nación 2019; Foros La Nación 2017; Lara Salas 2019). It was undeniable that judicial review added time to the expropriation process. Media's focus on judicial review, however, distracts from an important factor that sits upstream from judicial review: poor administration of policy.

Specific to the development of road infrastructure, experts have suggested reforms to improve public administration. Proposed reforms include correcting diffuse authority and fragmented institutionalization by recentralizing authority in MOPT; improving the technical capacity of MOPT personnel in multiple areas, including expropriation; redressing the longstanding lack of planning, both at the project level and in terms of the project pipeline; and assisting the MOPT to learn from past projects by creating an entity to evaluate projects *ex ante* and *ex post* (Umaña and Loría 2014; Pisu and Villalobos 2016; Parajeles Mora 2016). To the frustration of citizens, MOPT seems unable to free itself from cycles of avoidable mistakes, poor planning, delays, and multiplying costs (Editorial La Nación 2019).

Errors in public administration motivate landowners to appeal, thereby increasing judicial caseloads and contributing to delays. Many articles connect slow infrastructure development with problems in public administration, in general, but only a few articles search for the root causes of public administration problems in the expropriation process (Bosque 2017a).

Reforms reflected this myopic view. They focused on anomalies in the judicial process but did nothing to address chronic problems in public administration. One Costa Rican lawyer is quoted as saying, in reference to proposals to reform the expropriation code, "No matter how good

the law is, if we don't improve the administration of the expropriation process, we will always have problems" (Donato, cited in Soto Morales 2013, *author's translation*). Years after reform, expropriation still causes the most delay in infrastructure projects (Recio 2018). The causes of underperforming public administration persist. These issues were ignored by reformers who focused on subordinating the judiciary and its appraisers.

The comparative analysis that follows will show that reforms in 2014 took aim at the judicial review process as a way to redress the problem of delays. Wherever possible, reformers shortened and more tightly prescribed the process and the time allowed for each stage of the process. Some reforms went so far that legislators were found to have violated principles of separation of powers, and reforms were later amended or struck down. At the same time, reformers loosened requirements on the expropriating ministry, gave it new powers, and opened shortcuts for officials.

The one-dimensional character of the reforms, illustrated by the juxtaposition of numerous reforms to constrain the judiciary and the virtually nonexistent measures to preserve landowner's rights or improve public administration, forces the discussion back to the question of why reformers chose this approach.

### **3.2 Reforms in Detail**

This section takes stock of the reforms made to the expropriation code. The 2014 reform was considered "comprehensive," while the 2017 reform served to refine the changes made in 2014. As detailed below, some of the 2017 reforms repealed changes from 2014, while others

strengthened and extended 2014 reforms. In all, the reforms changed 24 of 61 statutes. Detailed below are the statutes that were reformed.

#### Statute #9

(2014) Strengthens language authorizing and obligating the Attorney General, the State Notary, and the National Registry to act with diligence and expediency on matters relating to state expropriation of private property. Reform adds explicit language threatening sanctions if these offices unnecessarily delay the processing of documents.

#### Statute #16

(2014) Limited to a period of three years the time when a former owners can request return of property that was taken but not used for the associated public work. The restitution period begins ten years after the state takes possession of the property. Previously, there had been no time limit on when former owners could request restitution.

#### Statute #17

(2014) Provides guidance on the minimum surface area required to qualify a property for total expropriation, rather than partial. This change reduces the discretion afforded to judges, who previously had broad discretion to decide whether the remaining surface area of a property was sufficient for rational and productive use.

#### Statute #18

(2014) Authorizes the minister, or the head of the expropriating agency, to make a declaration of public interest. Previously, only the minister could make this declaration.

(2017) Establishes that the property owner may claim damages, commercial or otherwise, as a result of the declaration of public interest.

#### Statute #20

(2014) Lengthens the time allowed, from six months to one year, for the expropriating entity to obtain an official expropriation annotation from the Court of Administrative Justice.<sup>23</sup>

#### Statute #22

(2014) Details the factors that an appraiser must consider and present in the administrative appraisal. This appraisal will determine the amount of compensation. The list of factors is significantly more prescriptive than in previous versions of the expropriation code.

#### Statute #23

(2014) Provides that the property owner must allow six months after accepting the administrative amount before asking for an update to the amount due to inflation.

#### Statute #25

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<sup>23</sup> The “official annotation” immobilizes the property and prevents it from being bought, sold, donated, used for collateral, etc. A public annotation is made in the national registry of properties.

(2014) Reduces the time allowed, from eight to five working days, for the property owner to accept or dispute the administrative appraisal. Specifies that no response will be taken as acceptance of the compensation offered.

(2017) Establishes that once the offer has been accepted, or no response given by the property owner, and the five working days have passed, the owner will have no recourse to dispute the administrative appraisal or appeal to the judiciary. If the property owner cannot be located, the administrative appraisal will be published in the two national newspapers with widest distribution, on different days. Doing this will satisfy the ministry's obligation to notify the property owner.

#### Statute #26 (former)

(2014) Removes a statute that allowed property owners to appeal the administrative appraisal before the Court of Fiscal Administration. This statute guaranteed to property owners that the appeals process would not result in a reduction of the administrative appraisal.

#### Statute #26

(2014) Establishes that arbitrage will not impede the expropriating from taking possession of property in question.

#### Statute #27

(2014) Empowers a judge to sign an expropriation agreement on behalf of the property owner if the owner first accepted the administrative appraisal but later refuses to sign the legal documents transferring ownership.

#### Statute #28

(2014) Removes a requirement that the expropriating entity must begin the special expropriation process within three months of declaring a property to be of public interest. Provides that the special expropriation proceedings will take place before the Court of Administrative Justice in San Jose rather than before a civil judge in the place where the property is located. Previous versions of the expropriation code required the proceedings to take place in civil courts closer to the physical location of the property.

#### Statute #29

(2014) Requires that an appeal may only allege explicit defects in the administrative appraisal, rather than broader arguments about fair price.

#### Statute #30

(2014) Requires a second appraiser to review the administrative appraisal according to the prescriptions laid out in Statute #22. This is a change from earlier versions of the expropriation code, which required the second appraiser to evaluate the property and submit their own report.

(2014) Requires owners to vacate the property within fifteen working days after receiving the deposit of the administrative evaluation. Previous versions of the expropriation code allowed owners two months to vacate the property.

(2017) Amends the 2014 reform to allow owners two months to vacate the property, if the property is a home residence.

#### Statute #32

(2014) Strengthens and clarifies language requiring a judge to order the police to remove owners who remain on the property after the time allowed in Statute #30.

(2017) Authorizes the expropriating entity to order the police to remove owners who remain on the property after the time allowed in Statute #30.

#### Statute #34

(2014) Specifies sanctions for appraisers who cause delays. If a judge names an appraiser, and that appraiser fails to respond within eight working days, then the judge will suspend the appraiser for one year and immediately name another appraiser.

#### Statute #35

(2014) Requires the appraiser to give a detailed justification for each instance where their appraisal disagrees with the administrative appraisal.

#### Statute #36

(2014) Provides that either party, or the judge, may request that the second appraisal be audited by an appraisals board.

#### Statutes #39-43

(2014) These reforms were later repealed for having violated separation of powers.

#### Statutes #59

(2014) Establishes that appraisers are personally liable for damages an over-valuation may cause the public administration. In such cases, public administration is required by law to pursue administrative, civil, and criminal action against the appraiser. If an appraiser is found to over-value a property, the affected parties may bring suit in civil court.

### **3.3 Analysis**

Changes to numerous statutes in the expropriation code shifted the balance of power in favor of the expropriating ministry. Judges found themselves with less time. Appraisers confronted more prescriptive procedures. Property owners quite simply had fewer options at their disposal when contesting expropriation.

For example, Statute #25 shortened the period afforded to property owners to accept or oppose the administrative valuation. Additionally, this statute established that failure to formally accept or oppose the valuation constitutes acceptance.

Statute #26 revoked the property owner's right to appeal compensation amounts without initiating a process of special expropriation, which has substantially higher legal costs. Statute #30 reduced from two months to 15 days the time allowed for property owners to vacate expropriated property, though this was changed back to two months for property used as a residence.

If the National Assembly had intended to accelerate the process of expropriation without privileging one adverse party over another, it would have made changes that maintained the balance of power as it was before reform. Instead, it stiffened restrictions on property owners while relaxing them for the expropriating entity. Statute #20, for example, doubled the time



allowed for the expropriating ministry to obtain an official annotation, from six months to one year. In some cases, reforms granted the expropriating entity new powers.

Statute #32 authorizes the expropriating ministry to order the police to forcefully evict property owners who do not vacate expropriated property within the allotted time. Before reform, the ministry had to work through a judge to order the police to act.

Reforms became most prescriptive in their attempts to control the work of property appraisers. Statute #22 specified a much more detailed system for calculating the administrative appraisal. Statutes #30 and #35 explicitly confined second- and third-opinion appraisals to the state-prescribed system. In other words, appraisals by experts from the judiciary must adhere to the same system used to create the administrative valuation. Additionally, second and third appraisers must justify any divergence from the original administrative valuation. This was a significant change from the situation before reform, when second and third appraisals were done independently of the original administrative appraisal.

In addition, reforms specified sanctions for appraisers who decline assignments (Statute #34) and subjected second and third appraisals to an auditing board (Statute #36). Attempts to discipline appraisers reached its most extreme in Statute #59. This statute threatens appraisers with personal liability if an appraisal is found to overvalue a property. The bias of these reforms starkly revealed by the absence of a penalty for undervaluing property. In this situation, incentives incline the state to make a lowball administrative appraisal. There is nothing to prevent it.

One of the only reforms to assist landowners amended Statute #18. Reform provided landowners with the right to claim damages originating in the declaration of public interest.

Through an anti-corruption lens, reforms clearly tried to close loopholes by subordinating the judiciary. Judicial appraisers, for example, saw their work tightly prescribed, with clear

sanctions for deviations. Reforms took aim at judicial delays, which the literature on judicial corruption identifies as one of the most common tools for soliciting pay-offs. Reformers tried to take the subordination further, but their more aggressive reforms overreached and were struck down as unconstitutional.

In its haste to remove barriers to infrastructure development, reforms empower the expropriating ministry to exercise discretion in its use of force. Statute #32 changes procedures and allows the expropriating ministry to order the police to forcefully evict landowners who remain on the property after the allotted time. Before reform, public administration had to work through a judge to order the police to act. This change expands the discretionary license of public administration. In a round of reform where the judicial discretion is purposefully narrowed, it is troubling to see public administration's discretion expanded without concern for the consequences. Discretion in public administration is associated with opportunism and corruption to similar degrees as discretion in the judiciary (Vargas 2019).

The use of police to evict expropriated landowners does not impact the work of *choriceros* directly, but it does have indirect effect by way of judicial review. A legal principle, known as “presumptive ownership,” states that in the absence of clear and convincing evidence, ownership is presumed to belong to the individual in possession of the disputed property (Rutledge 2004). Simply remaining on their land has proven an effective strategy for Costa Rican landowners who seek to resist expropriation. In the Calle Blancos neighborhood of San Jose, landowners continued to live and operate businesses on land that was officially expropriated more than 15 years prior (EL PAÍS La Nación 2014).

Reforms may have made judicial corruption more difficult to conceal, but this did not lead to its eradication. It did, it seems, raise the stakes of corrupt dealings and limit access to informal

avenues to only the upper strata of society. A corruption scandal in 2020 centering on an expropriation case litigated by the country's most prestigious law firm showed that there is still a market for malfeasance, but only for the well-heeled in Costa Rican society (Rodriguez 2020).

### **3.4 Conclusion**

Political decision-makers in Costa Rica removed barriers to expropriation and addressed the problems of uncertainty and delay for expropriating ministries. A pro-infrastructure National Assembly approved two waves of reform, one in 2014 and another in 2017, that attempted to restructure and control processes of expropriation and judicial review with the overarching goal of accelerating the expropriation process. Legislators overreached and certain reforms were later nullified on grounds that they infringed on constitutionally protected separation of powers. Even after these rollbacks, the net change of reforms clearly subordinated the judiciary and blunted the principal tool available to property owners to challenge unjust takings in court.

Diminishing the recourse available to property owners could hardly be passed off as an unforeseeable and unintended consequence of reform. Citizens raised concerns about the ramifications for property owners in the pages of the leading national newspaper (Foros La Nación 2013). Legislators consciously chose to defang judicial review as the preferred option for reducing the risk of delay in the expropriation process. In failing to take commensurate measures to maintain a balance of power, these reforms weakened the landowner's position to enforce property rights against slapdash public administration.

Stakeholders in Costa Rica met this shift in the power balance with celebration or consternation, depending on their interests. Attorneys representing property owners could clearly

see the power balance shifting away from private citizens and towards a situation of clear and disproportionate advantage for the expropriating ministry. As debates gave reforms gradually more definition, it became clear that legislators intended to repeal longstanding articles from previous versions of the expropriation code that afforded property owners “broader instances for defense” (Córdoba Ortega 1995, 107; *author’s translation*). Ultimately, they succeeded in repealing these statutes. The next chapter analyzes how changes to the formal rules affect *choriceros* and informal institutions.

## 4.0 Informal Law Brokers

This chapter analyzes the practices of informal law brokers and how reforms to the expropriation code restrict their abilities to act on behalf of landowners who fight expropriation. Informal law brokers belong to a larger group of corrupt actors known in Costa Rica as *choriceros*. As this chapter explains, *choriceros* are so entrenched in Costa Rican public life that many citizens tolerate their illicit dealings as a part of how things get done in the country. This chapter examines connections between the reforms described in Chapter 3 and the work of informal law brokers. Analysis of these connections will consider how reforms curtailed and eliminated tools that previously allowed informal law brokers to influence the process of judicial review of expropriation.<sup>24</sup>

In the domain of expropriation, property owners employ informal law brokers to obtain special influence in judicial proceedings. Most frequently, a *choricero* receives money to speed up or slow down judicial processes, influence rulings, and/or increase the compensation amounts paid by the state for expropriated property.

More generally, Costa Ricans use the colloquial term, “*choricero*,” to refer negatively to corrupt officials. It can also be applied to actors who intervene in public affairs but do not hold public office, as in the case of informal law brokers. Linguistic studies associate the term with, “thief,” but it most commonly refers to white-collar crimes that take advantage of the public wealth to benefit an individual. Some dictionaries of Costa Rican colloquial Spanish even define the term

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<sup>24</sup> Owing to the COVID-19 pandemic and associated restrictions on international travel and field research imposed by the University of Pittsburgh, a promising line of inquiry on informal law brokers could not be followed.

as “an act of administrative corruption” (Agüero Cháves 1996). The term derives from “*chorizo*,” which means, “sausage,” but connections with pork-barrel politics are vague and unfounded. Rather, dialectologists believe the term comes from slight-of-hand tricks used by butchers in order to overcharge customers who order sausage. In Costa Rica, *chorizo* finds its way into many popular phrases. The expression, “*huele a chorizo*,” or “it smells like sausage,” hints that something seems suspicious or illegal (Meléndez 2018).

Corruption pervades public life in Costa Rica. A survey by the Latin America Public Opinion Poll found that 77% of citizens believed corruption to be widespread in public functions in Costa Rica (2007). Corruption in public works figures among the most common forms of malfeasance, and the most significant in terms of dollar amounts. The *Cementazo* scandal, which dealt with phantom material purchases, and the ongoing *Cochinilla* scandal, which exposed corrupt procurement dealings, attest to the pervasiveness of corruption in public works (Bermúdez 2021; Chinchilla 2020). Corruption in public works has been an open wound in the public consciousness for so long, exasperated political commentators question whether new projects are created to serve the citizen or to enrich the corrupt (Espinoza Rodriguez 2017).

While there is social stigma attached to using illicit means, Costa Ricans generally exhibit an attitude of tolerance towards corruption they consider inoffensive due to its low social impact or the fact that it redresses unjust or inefficient state systems. For example, the use of a *choricero* to contest lowball property appraisals would likely fall within the bounds of tolerable corruption, given the actors involved, their motivations, social impact, and amounts of money involved in such a scenario (Galvis Patiño 2007). The common term for a small bribe, “*una mordida*,” or, “a nibble,” exemplifies the attitude that corruption can persist on a small scale without altering the overall composition of the public work in question.

Conditional social acceptance allows informal law brokers to lead lives as ordinary members of society, even though they are known to have special connections and know-how. A *choricero* signals that he can help, but he does not advertise his services. He relies on his reputation in the community to help potential clients seek out his services while at the same time maintaining an outward image of propriety with those he does not know or trust. One *choricero* that I interviewed, who had worked with one of my informant landowners, hastened to distance himself from anything resembling corruption. He told me that, “Costa Rica is a country of laws, not men”.<sup>25</sup> According to one of his clients, that same *choricero* “ended up with a pile of money” after obtaining a profitable ruling in an expropriation case.<sup>26</sup>

Along the Costanera Sur highway, the experiences of property owners who contested administrative appraisals through strictly formal methods differed markedly from those who employed a *choricero*. In one particularly illustrative case, a property owner tried “parchment” methods at first, but after more than a year of frustration and fruitless efforts, he agreed to work with a *choricero*. The *choricero* changed the course of his case, from languishing in endless delay to reaching a favorable ruling.<sup>27</sup>

Under the pre-reform regime, informal law brokers belonged to a category of informal institutions categorized by Helmke and Levitsky as competing actors (2006). *Choriceros* do not offer an alternative channel for dispute resolution. Cases still are decided by the courts. However, *choricero*-assisted cases follow a different path on their way to resolution by a judge. *Choriceros*

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<sup>25</sup> Interview 8

<sup>26</sup> Interview 9

<sup>27</sup> Interview 9

catalyze the formal process, reducing inefficiencies and lowering barriers. The formal system has become so conditioned to respond to this catalyst, that it ceased to function properly without it.<sup>28</sup>

While there is no doubt of their informal dealings, *choriceros* do operate within a system of standards and norms. *Choriceros* practice their work in expropriation cases using an established set of rules and conventions. For example, *choriceros* work on a percentage basis, meaning they collect a percent of the additional compensation awarded by a judge. The *choricero* earns nothing until the judge decides a case and the compensation amount increases. This aligns incentives between the *choricero* and the property owner, discouraging property owners from reporting corruption.

This percentage-based arrangement inclines *choriceros* to discriminate and only take cases where the potential reward justifies the risk of getting caught. These conditions discourage the *choricero* from working with smallholding landowners, where their take is insufficient to justify the risk.

The percentage-based system suggests that a *choricero* must possess know-how and connections in order to maximize his reward and minimize his risk. Without good connections, a *choricero* could not secretly and effectively liaise with court personnel to achieve his desired ends. In order to arrange for a friendly appraiser to be assigned to his client's case, for example, a *choricero* must identify a trusted contact and have the means to transact with that person covertly.

Without know-how, the *choricero* could not maximize his take. He has incentives to raise the compensation amount, but not so much that it attracts attention and risks detection. To do this, the *choricero* must stay current on benchmarks in compensation awarded by the courts. It would

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<sup>28</sup> Interview 1



arouse suspicion, for example, to increase the per-hectare value of a property so much that it stands apart from other similar properties.

As frequently happens, changes to the formal rules of expropriation appeals triggered a change in the informal rules (Helmke and Levitsky 2006). Reforms subordinated the judiciary and prescribed judicial procedures, which made malfeasance more difficult to conceal behind the opaque cover of judiciary discretion, as had been done previously. The price of hiring a *choricero* likely increased with the passage of the 2014 reforms, especially before *choriceros* could decipher how the new rules would be implemented and enforced. Manipulation and interference by *choriceros* did not cease completely, as evidenced by a string of corruption scandals (Saborío 2020).

Based on my interviews and journalistic accounts, two forms of malfeasance stand out above the others in the judicial review process in Costa Rica. These are speed money and bribes to appraisers. Neither of these touch judges, necessarily, which may explain the contradiction between Costa Rica's reputation for judicial integrity and the experiences of landowners I interviewed.

In Costa Rica, *choriceros* pay speed money to court personnel who can affect the progress of an expropriation case. Depending on the payor's interest, speed money buys advantage by accelerating or delaying a case. Litigants on either side of an expropriation case may find it worthwhile to influence its speed. Speed money, known as "the sale of celerity," is the most common form of illicit transaction in the Costa Rican justice system (Galvis Patiño 2007).

Some have explained low clearance rates in Costa Rican courts as a symptom of the courts' conditioning to respond to speed money (Antillón 2020). On balance, it is difficult to point to some other factor that explains the dismally low clearance rates in Costa Rica. When we control

for the number of judges per citizen, Costa Rica has the lowest clearance rates in Latin America (Sánchez Urribarrí 2008). Proving this type of low-level judicial corruption is nearly impossible, but the conditions on the ground parallel those identified in the literature as red flags for abuse of discretion, sale of celerity, and general judicial malfeasance.

Unlike speed money, bribes to appraisers are exclusively paid by appellate landowners who seek to raise compensation amounts. These bribes may flow directly to judicial appraisers, themselves, or through court personnel who have the authority to assign appraisers to cases. The chosen appraiser may have a friendly posture towards landowners, or he may be open to pay-offs, or both.<sup>29</sup>

The discussion so far has centered on what landowners and *choriceros* do to influence the courts. The expropriating ministry also has interest in the outcome of judicial review, especially in light of the extra project costs that accompany protracted litigation. Public entities may pay speed money, but they are better positioned to buy influence with political favors and in-kind exchanges. For example, a MOPT official may invite judges and court staff on inspection tours to see projects. While on tour, MOPT officials ingratiate themselves to court officials and lavish fancy meals and hotel stays on them. One respondent told me of an inspection tour that included a helicopter ride along the pacific coast under the pretense that it was necessary in order to properly appreciate the scale of a project.<sup>30</sup>

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<sup>29</sup> Interview 1

<sup>30</sup> Interview 2

Reforms to the expropriation code did nothing to limit corruption between MOPT officials and the courts. Anti-corruption efforts focused on the avenues for landowners to influence court personnel, especially appraisers.

The following sections present insights from theory and make connections between *choriceros* and reforms.

## 4.1 Theory

Before fitting *choriceros* into typologies of informal institutions, we must first determine whether the work of *choriceros* qualifies as an informal institution to begin with. *Choriceros* work outside the officially sanctioned channels. The need for *choriceros* arises from unresponsiveness in the judiciary. If an appellate-landowner wishes to increase his compensation above the administrative appraisal, then he must employ the services of a *choricero*. Court personnel, acting outside their “parchment” roles, reinforce this rule by ignoring formal appeals entered without the help of a *choricero*. The baseline definition of informal institutions states that they are “created, communicated, and enforced outside of officially sanctioned channels” (Helmke and Levitsky 2004). The work of *choriceros* in judicial review of expropriation exhibits these characteristics.

Informal institutions provide practical solutions to situations where formal state structures are inefficient or incomplete. Unfortunately, limited access to *choriceros* exemplifies a larger issue affecting the rule of law in Latin America. Too often, the rule of law fails to protect segments of society: the poor and/or ethnic minorities. These groups suffer a two-fold exclusion. They do

not enjoy the benefits provided by the formal rule of law, but neither can they access justice through informal means offered by *choriceros*.

Some scholars see corruption through a practical and eschew the moral one. Corruption may represent an effective solution to practical problems, like the unreasonably low levels of compensation paid to public officials. Méon and Weill (2010) find evidence that corruption greases the wheels of weak institutions and makes them more efficient. Ang (2020) finds that certain forms of corruption, and “speed money” for business permits in particular, promotes development in China. These studies, along with social tolerance of low-impact corruption, combine to suggest that the benefits of small-scale corruption could actually outweigh the costs in some circumstances.

Leeson also explains corruption and governance issues with an emphasis on the practical. As a rational choice theorist, Leeson points out that informal actors are an efficient response to a problem. They no different from other rational actors in that they do what they can to optimize the constraint they are given. In this sense, the problem is not corrupt practices but rather with the law itself and the choices it offers (Leeson 2007).

Another branch of the literature on corruption focuses on the costs, particularly the costs of low-level corruption. While this branch receives less attention, it raises important concerns over types of corruption that are often overlooked. Riley (1999) cautions against the temptation to dismiss petty corruption as trivial. The poor, he writes, feel the impacts of corruption more acutely since the marginal costs of even a small bribe are much greater for those with scarce resources. The poor already have a cynical and mistrusting relationship with the state. When public officials demand bribes, the poor are even less likely to use public services and interact with the state. Ruhl

(2011) finds that in terms of petty corruption, Costa Rica is as corrupt as Honduras and Nicaragua, and more corrupt than El Salvador and Panama.

In the typology of informal institutions developed by Helmke and Levitsky (2006), *choriceros* most closely fit the description of competing institutions, though the fit is not perfect. To a certain degree, they are competing institutions. The hallmarks of a competing institution are (1) it makes process more efficient and (2) it forces actors to decide between formal and informal rules. *Choriceros* do this by forcing court personnel to choose between following court procedures faithfully and impartially, or accepting a bribe and affording the payor illicit influence.

Scholars have taken a keen interest in how informal institutions form and change, especially in response to changes in the formal rules. While informal institutions have shown themselves to stubbornly resist change, this rule admits exceptions when reforms to formal rules alter the balance of costs and benefits associated with an informal institution.

The 2014 reform to the expropriation code in Costa Rica strengthened both the rules and the enforcement of the rules constraining judicial staff and appraisers. This likely increased the costs of informal practices that sought to increase the administrative appraisal.

In analyzing the incentives and roles of buyers and sellers of illicit judicial services, the literature distinguishes between corruption with theft and corruption without theft (Shleifer and Vishny 1993). The former more closely describes the relationship between landowners, *choriceros*, and court personnel involved in judicial review of expropriation. Judicial officials sell celerity and appraisers sell favorable valuations of property. In both cases, the landowners buy via *choriceros*. Since corrupt officials do not sell tangible goods, like a passport or a business license, the transaction can be easily hidden and the sellers keep all of the money transacted. This is corruption with theft.

Corruption with theft presents greater challenges for those responsible to monitor and punish illicit dealings. Corruption with theft lowers the cost of the public good for the buyer while at the same time increasing the corrupt official's take. This aligns the interests of buyers and sellers, greatly reducing the incentive for the buyer to report the seller. At the risk of oversimplifying things, using informal channels makes sense for the buyer as long as the seller manages to deliver the good requested at a price lower than through the formal channel. Reality is more complicated, since the buyer must consider, among other things, whether the difference in price between the informal and formal markets justify the risks and consequences of being caught.

The analysis section of this chapter will unpack the unique features of the *choricero*'s role, since he works as an intermediary. He buys and sells with theft. In this particular case, corruption with theft must happen twice in order deliver the desired good to the end-buyer, the landowner.

At the individual level, *choriceros* benefit landowners by increasing compensation for expropriated property. On an aggregated level, increased compensation works to discipline the state by imposing costs on the expropriating ministry. Legal scholars in Costa Rica see the cost of expropriation as the only effective constraint on excessive expropriation by the executive (Fonseca Pión 2002). By contrast, activist courts in Mexico have demonstrated a greater willingness to intervene based on "public purpose" grounds, but even there the courts prefer to operate on a case-by-case level. They have not developed a consistent concept of "public purpose" that constrains the state's power (Herrera-Martin 2014).

In this respect, the situation in Costa Rica resembles that of the United States, where the Judiciary's deference to the Executive has rendered the public use constraint toothless (Ely 2003). Legal scholars in the US and in Costa Rica do not equivocate about the implications of neutering

the public use constraint. They see it as the betrayal of a constitutional guarantee to protect private property (Olejarski 2017; Fee 2006; Somin 2015).

*Choriceros* activate the judiciary to enforce landowners' rights and protect them from incursions by an unconstrained state. In this way, *choriceros* join with a long and varied list of informal actors all over the world who provide, "an important bulwark against abusive behavior on the part of the state" (Murtazashvili 2016, 6).

*Choriceros* incentivize the judiciary to fulfill its role in judicial review. As Esposto has written, judicial review affects the cost function by injecting uncertainty into the expropriation process. Judicial review constrains the expropriating ministry and sets the limits of the state's power of expropriation (1996). In anticipation of intervention by the judiciary, the expropriating ministry treats the administrative appraisal as the opening bid in a negotiation. Like any rational negotiator, the state will strategically undervalue property in the administrative appraisal to give itself cushion to negotiate and arrival at a final price it can afford. Here, the state has developed its own set of *de facto* practices and strategies that depart from "parchment" rules. This system of anticipated moves and countermoves ingrains informality into the expropriation process. Unfortunately for landowners who cannot secure the services of a *choricero*, the systematically underestimated administrative appraisals are a first step towards impoverishment.

## **4.2 Analysis: Changes to the formal rules of the game**

Landowner appeals attempt to raise the compensation paid for expropriated property. Reforms countered these attempts by thoroughly prescribing the appraisal process and threatening appraisers with audits, suspension, and legal action. As a consequence, judicial appraisers face a

set of incentives that discourage them from disputing administrative appraisals, even the ones they consider “vile.”<sup>31</sup>

Of all the reformed statutes, Statute #59 most significantly disincentivizes judicial appraisers from challenging an administrative appraisal. Reforms changed this statute to specify that overvaluation of property by an appraiser could result in administrative, civil, or even *criminal* action against the appraiser, and a suspension of his employment with the court. Reformers clearly intended to insulate the administrative appraisal and discourage other appraisers from assigning a higher value to the property in question.

By specifying and stiffening the penalties for overvaluing property, reforms made the consequences of getting caught in a corrupt act more severe. For one, the reforms incentivize judicial appraisers to disagree with the administrative appraisals only when it commits a flagrant and unquestionable error. Even in the context of an obvious error, the judicial appraiser must bear in mind that increasing the appraisal too much could result in legal exposure and temporary loss of livelihood.

Stiffening the rules and consequences for appraisers alters the cost:benefit equilibrium they face. More severe consequences induce them to charge a higher price. Fewer *choriceros* will take the risk, which will reduce the supply of the service and cause prices to increase even more. *Choriceros* that used to sell their services for 30% of the extra amount awarded will now charge 50% or 60%. They will be more selective when deciding who to work with. A smaller proportion of judicial review cases will present the characteristics necessary to justify the increased risk.

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<sup>31</sup> Interview 1



Though Statute #59 stands out for its punitive stance towards appraisers, it is not the only reform that impacted their work. Statute #34 threatens suspension for appraisers who takes more than eight days to accept to the judge's request for an appraisal. Statute #35 requires judicial appraisers to justify each instance where they disagree with the administrative appraisal. Statute #36 provides that either party, or the judge, may have the judicial appraisal audited by an appraisals board. The cumulative effect of these statutes is to discourage judicial appraisers from disagreeing with the administrative appraisal.<sup>32</sup>

Another reform had a weakening effect on the work of *choriceros*. Statute #28 establishes that special proceedings, e.g., judicial review, will take place in San Jose in the Court of Administrative Justice instead of before a civil judge in a court near the expropriated property. This change has several effects. For one, it moves the court proceedings out of the zone of influence of local *choriceros* and into the zone of influence of the expropriating ministry. All ministries have their headquarters in San Jose, the capital. The effectiveness of a *choricero* depends on his network of contacts within the courts and his ability to covertly liaise with court staff. In most scenarios, relocating the proceedings from a local court to a central one diminishes the *choricero*'s network and his ability to protect landowner rights through informal channels.

Centralizing special proceedings in San Jose could be justified as a measure to monitor and standardize how courts process expropriation cases. Using civil judges with less specialization and from different regions of the country could lead to inconsistent rulings. Arguments that treat centralization as an anti-corruption tactic, however, should be scrutinized. Both sides of a legal case have incentives to seek extra influence over a judge's ruling. As mentioned earlier in this

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<sup>32</sup> Interview 1

dissertation, the expropriating ministry has its own methods for obtaining extra influence. Moving the proceedings to San Jose transfers power to judges within the expropriating ministry's network, creating more opportunity for the ministry to obtain influence through in-kind exchanges and political favors.

Statute #28 had other impacts, too. Holding court proceedings in San Jose imposes travel costs on landowners. Some that I spoke with had been to San Jose only one or two times in their lives, and found it overwhelming and intimidating.<sup>33</sup>

From an anti-corruption perspective, these reforms achieve the objective of inhibiting *choriceros* from intervening in judicial review. From the perspective of individual rights, these changes narrow informal avenues available to landowners for the enforcement of the cost constraint on expropriation. From a theoretical perspective, reforms tilt the equilibrium of power and constraints to favor the state without enacting countermeasures to prevent the change in equilibrium from cutting too deeply into property rights. As noted earlier in this dissertation, reformers aggressively took action to address irregularities in judicial review without taking corresponding action to fix irregularities in public administration. As a result, landowners must contend with the same transgressing public administration, but reforms have weakened their tools for self-defense.

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<sup>33</sup> Interview 4

## 5.0 Conclusion

The objective of this dissertation is to illuminate the expropriation and judicial review process from the landowner's perspective. This provides insight into why some landowners resist expropriation through the formal appeals process, others use informal channels, and others still accept the government's original offer of compensation without contest.

From a distance, the process of expropriation in Costa Rica appears to be above board. Government does not arbitrarily confiscate property. Democratic institutions and a free press monitor government and expose malfeasance. The legislature recently reviewed the expropriation law, where it was updated without major political or popular blowback. A highly-regarded judiciary decides appeals while maintaining independence from undue political influence. Multiple aggregated indices support the view that individual rights are protected in Costa Rica (World Justice Project 2021; Levy-Carciente 2018; Pring et al. 2019).

My interviews, however, reveal that landowners face systematic barriers when enforcing their property rights through the *de jure* system of judicial review. Judicial review of expropriation does not function with integrity and inclusivity in Costa Rica. Instead, judicial review suffers from corruption that biases the process in favor of litigants with high-value assets, advanced levels of legal literacy, and the economic means to prevail in costly system. To help navigate this legal landscape, property owners turn to informal law brokers. This conditions the legal system to respond to demands made through informal channels, further excluding property owners who are either unfamiliar with informal methods or do not have the means to obtain the assistance of an informal law broker.

Many of the legal problems facing landowners originate upstream in administrative deficiencies in the government agencies responsible for infrastructure development and expropriation. The administrative disorder at the MOPT is well-documented (Infraestructura La Nación 2014). Attempts to redress this problem have only served to complicate matters. Deconcentration, for example, has not improved efficiency. It has exacerbated institutional fragmentation in infrastructure development and maintenance without resolving pain points like the egregious lack of planning and poor project management (Pisu 2016).

To make matters worse, Costa Rica is racing to make up on a 30-year delay in infrastructure development. The government demonstrated its Machiavellian approach to infrastructure when it turned its back on Taipei in favor of Beijing because the latter offered more resources, despite decades of support from the former. The influx of money from Beijing has accelerated the rate of expropriations for infrastructure development, adding pressure to an already overextended MOPT.

To streamline the expropriation process and make Costa Rica more attractive for foreign investment in infrastructure, the National Assembly passed integral reform to the expropriation law. More than anything else, this reform subordinated the judiciary and its property appraisers. For property owners, this meant fewer protections for property rights, through both formal and informal channels.

This dissertation contributes to our understanding of property rights and the expropriation process in a democratic, highly institutionalized context. Common challenges to property rights, like ambiguous titling, are not major problems in this case. Instead, this dissertation illuminates the inner-workings of the expropriation process to show how petty corruption and zealously pro-infrastructure policy erode individual rights.

## Appendix A Informants

**Table 9 Informants**

	Profile	Location	Method	Length of interview
1	Retired attorney, female, with experience in expropriation cases	San Jose, CR	In-person	Multiple sessions, 60 minutes each
2	Retired judge, male, with experience in expropriation cases	San Jose, CR	In-person	45 minutes
3	Active attorney, male, with experience in expropriation cases	San Isidro, CR	Phone	60 minutes
4	Landowner, adult male, owner of multiple plots, owner-operator of restaurant	Matapalo, CR	In-person	60 minutes
5	Landowner, adult male, neighbor to #4	Matapalo, CR	In-person	20 minutes
6	Landowner, adult female, facing eviction	Uvita, CR	In-person	60 minutes
7	Landowner, elderly male, staying on public land after expropriation	Uvita, CR	In-person	90 minutes
8	<i>Choricero</i> , adult male, landowner	Matapalo, CR	Phone	30 minutes
9	Landowner, adult male, owner-operator of small hotel, worked with #8	Dominical, CR	In-person	90 minutes
10	Landowner, adult male, neighbor to #9	Dominical, CR	In-person	60 minutes
11	Landowner, adult female, neighbor to #9	Dominical, CR	In-person	60 minutes
12	Landowner, adult female	Orotina, CR	In-person	40 minutes
13	Landowner, adult male, community organizer opposed to airport project	Orotina, CR	In-person	60 minutes
14	Community member, male	Herradura, CR	In-person	30 minutes
15	Landowner, adult male, friend of expropriated farmer	La Tigra, CR	Phone	30 minutes

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