

International Centre for
Settlement of Investment Disputes
(ICSID)

In the Matter of the Arbitration between

COMPAÑÍA DEL DESARROLLO DE SANTA ELENA, S.A.

and

THE REPUBLIC OF COSTA RICA

Case No. ARB/96/1

FINAL AWARD

Date of dispatch to the parties: February 17, 2000

President: Mr. L. Yves FORTIER, C.C., Q.C.

Members of the Tribunal: Professor Sir Elihu LAUTERPACHT, C.B.E., Q.C.
Professor Prosper WEIL

Secretary of the Tribunal: Ms. Margrete Stevens

In Case No. ARB/96/1.

Between: **Compañía del Desarrollo de Santa Elena, S.A.**

Represented by:

Messrs. Alexander E. Bennett, Kenneth I. Juster, Michael
A. Lee and David B. Bergman
of the law firm *Arnold & Porter*, as counsel

CLAIMANT

And

The Republic of Costa Rica

Represented by:

Mr. Charles N. Brower, Ms. Abby Cohen Smutny, Ms. Anne
D. Smith Mr. Frank Panopoulos and Mr. Jamie M. Crowe
of the law firm *White & Case*, as counsel;

RESPONDENT

TABLE OF CONTENTS

A. INSTITUTION OF PROCEEDINGS	4*
B. THE FIRST SESSION OF THE TRIBUNAL	5
C. FACTS GIVING RISE TO ARBITRATION.....	7
D. OTHER RELEVANT PRE-ARBITRATION EVENTS	11
E. THE WRITTEN PHASE	13
F. THE ORAL PHASE	18
G. POST-HEARING AND OTHER SUBMISSIONS.....	22
H. THE DISPUTE IN BRIEF	23
I. THE APPLICABLE LAW	24
J. STANDARD OF COMPENSATION	27
K. VALUATION	28
1) The Date as at Which the Property Must be Valued	29
2) Value of the Santa Elena Property as of 5 May 1978.....	32
L. INTEREST	35
M. COSTS.....	39
N. AWARD	39

* The pages in the above table of contents refer to the page numbering in the original award.

THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Award:

A. Institution of Proceedings

1. On 2 June 1995, the International Centre for Settlement of Investment Disputes (hereinafter, the “Centre” or “ICSID”) received a request for arbitration dated 15 May 1995 (hereinafter, the “Request”) from Compañía del Desarrollo de Santa Elena, S.A. (hereinafter, the “Claimant” or “CDSE”), a Costa Rican corporation the majority of whose shareholders are citizens of the United States of America (hereinafter, the “U.S.”).
2. The Request stated that CDSE wished to institute arbitration proceedings against the Republic of Costa Rica (hereinafter, the “Respondent” or “Costa Rica”) under the terms of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter, the “ICSID Convention”) to which the U.S. and Costa Rica are Contracting Parties.
3. The Claimant indicated in its Request that a dispute had arisen in relation to the expropriation by Respondent of a property known as “Santa Elena” (hereinafter, “Santa Elena” or the “Property”) and, in particular, in relation to the compensation owed to Claimant by Respondent as a result of said expropriation.
4. The Request was received under cover of a letter dated 31 May 1995, in which the Claimant asked that the Request not be considered as lodged with the Centre until further notice, in order to pursue consultations with the Respondent. By letter of 19 March 1996, the Claimant informed the Centre that the Request should be considered as lodged. On 20 March 1996, accordingly, the ICSID Secretariat acknowledged receipt of the Claimant’s letter of 19 March 1996, and transmitted copy of the same to the Respondent, together with copy of the Request, its accompanying documentation and the Claimant’s letter of 31 May 1995. On 22 March 1996, the Secretary-General of ICSID registered the Request and notified the parties accordingly.

5. The Arbitral Tribunal (hereinafter, the “Tribunal”) was constituted on 28 May 1997. The Tribunal consists of Mr. L. Yves Fortier (nominated jointly by the parties) as President, Professor Sir Elihu Lauterpacht (nominated by Claimant) and Professor Prosper Weil (nominated by Respondent).
6. In the absence of any agreed request by the parties to the Tribunal to vary the rules of procedure laid down in the Convention and the ICSID Rules of Procedure for Arbitration Proceedings, in effect from 26 September 1984 (hereinafter, the “Arbitration Rules”), the Tribunal has followed the direction given in Article 44 of the Convention to the effect that the proceedings shall be conducted in accordance with Section 3 of Chapter IV of the ICSID Convention and the Arbitration Rules.

B. The First Session of the Tribunal

7. The First Session of the Tribunal was held on 21 July 1997, in Paris, France, in accordance with, and within the period set out in, Rule 13(1) of the Arbitration Rules.
8. At that Session, counsel for both parties confirmed that the Tribunal had been properly constituted in accordance with the ICSID Convention and the Arbitration Rules.
9. Among the procedural and other matters addressed at the First Session of the Tribunal, it was confirmed that the language of the proceedings would be English and that the place of the proceedings would be Washington, D.C., the seat of the Centre.
10. It was also confirmed that the proceedings would comprise a written procedure followed by an oral procedure.
11. At the First Session of the Tribunal, prior to addressing issues related to the framework and timing of the written and oral procedures, counsel for the Claimant informed the Tribunal that he had reason to believe that, while Respondent had not yet made a formal objection to the jurisdiction of the Tribunal, such an objection might be forthcoming. Counsel for the Respondent confirmed that no such objection had been filed and that he did not anticipate filing any such objection on behalf of Costa Rica; he did, however, state that Respondent retained the right to make such an objection. The President reminded counsel that, pursuant to Arbitration Rule 41(1), objections to jurisdiction should be made as early as possible in the proceedings and, in any event, no later than the

expiration of the date for the filing of Respondent's Counter-Memorial. He further recalled that, under Arbitration Rule 41(2), the Tribunal could consider, on its own initiative and at any stage of the proceedings, whether the dispute is within the jurisdiction of the Centre or within the Tribunal's own competence. The President then declared that, the matter having thus been brought to the attention of the Tribunal, it could not be ignored. In order for the Tribunal to be kept fully informed regarding this issue, the President directed the parties to provide to the Tribunal copies of any previous and future correspondence between them concerning the matter of the Tribunal's jurisdiction. Counsel confirmed that they would provide the Tribunal with copies of all such documents, as directed by the President.¹

12. Following counsel's presentations, and after deliberation among the members of the Tribunal, the President informed counsel of the specific time-limits fixed by the Tribunal for the filing of the parties' written procedures:
 - 15 January 1998 for the Claimant to file its Memorial;
 - 15 June 1998 for the Respondent to file its Counter-Memorial;
 - 31 July 1998 for the Claimant to file its Reply; and
 - 15 September 1998 for the Respondent to file its Rejoinder.
13. The Tribunal also set the date of 9 November 1998 for the commencement of the oral hearing on the merits in Washington, D.C.
14. The final matter addressed during the Tribunal's 21 July 1997 Session concerned a proposal by the parties that the Tribunal schedule a visit to the site of the Property in Costa Rica that was the subject of the dispute. After deliberation, the President informed the parties that the Tribunal would contemplate scheduling a site visit only upon conclusion of the oral hearing, in the event that it believed then that such a visit would be useful.²

¹ The parties did provide the Tribunal with copies of these documents but no objection to the jurisdiction of the Tribunal was ever made by Respondent.

² The matter of a possible site visit was considered a number of times by the Tribunal during the course of the arbitration proceedings. The Tribunal eventually concluded that a site visit would not be necessary, and no such visit took place.

C. Facts Giving Rise to Arbitration

15. The Property is located in Costa Rica's Guanacaste Province, in the northwest corner of the country. The terrain consists of over 30 kilometres of Pacific coastline, as well as numerous rivers, springs, valleys, forests and mountains. In addition to its geographical and geological features, the Property is home to a dazzling variety of flora and fauna, many of which are indigenous to the region and to the tropical dry forest habitat for which it is known.³
16. Claimant, CDSE, was formed in 1970 primarily for the purpose of purchasing Santa Elena, with the intention of developing large portions of the Property as a tourist resort and residential community. A majority of CDSE shareholders are citizens of the United States of America. After acquiring the Property for the sum of approximately U.S. \$395,000,⁴ CDSE proceeded to design a land development program and undertook various financial and technical analyses of the Property with a view to its development.⁵
17. On 5 May 1978, Costa Rica issued an expropriation decree for Santa Elena (the "1978 Decree"). In accordance with an appraisal of the Property conducted by one of its agencies less than one month earlier, on 14 April 1978, Costa Rica proposed to pay CDSE the sum of approximately U.S. \$1,900,000 (based on the then-current exchange rate for Costa Rican colones) as compensation for the intended expropriation of the Property.⁶
18. The terms of the 1978 Decree are, in many respects, material to the present arbitration. They should be recited in full:

"Whereas:

1. The current area of the Santa Rosa National Park is insufficient to maintain stable populations of large feline species such as pumas and jaguars, and that a sub-

³ Memorial, pp. 5 *et seq.*; Counter-Memorial, pp. 3 *et seq.*

⁴ Reply, p. 16, footnote 14.

⁵ Memorial, pp. 1, 7 *et seq.*

⁶ Counter-Memorial, p. 23. The compensation offered by Costa Rica was in fact equivalent to U.S. \$1,919,492 (elsewhere in its submissions, Respondent uses the figure U.S. \$1,919,487). For the purposes of this Award, this amount is approximated to U.S. \$1,900,000.

stantial area needs to be added to it if it is to carry out its conservationist objectives.

2. The lands situated to the north of the Santa Rosa National Park contain flora and fauna of great scientific, recreational, educational, and tourism value, as well as beaches that are especially important as spawning grounds for sea turtles.

3. To meet these objectives, the Government of the Republic requires the property that belongs to the Compañía de Desarrollo Santa Elena S.A. registered in the Public Register, Property Section, District of Guanacaste, tome 1975, folio 321, entries 2-3, number 24,165, located in the fourth district of Santa Elena, canton 10, La Cruz, province of Guanacaste, which is currently used for stock breeding and other uses, and has several facilities; with a total area of 15,800 hectares, with the following bounds: to the north, the Hacienda Murciélago; to the south, Pacific Ocean and Santa Rosa National Park; to the east, the Pan American Highway and the Santa Rosa National Park; and to the west, the Pacific Ocean.

4. With the above-noted purpose in mind, a note was sent, dated May 2, 1978, to Mr. James O'Dea Heelan, as President of the Compañía de Desarrollo Santa Elena S.A., informing him of the state's purpose.

5. By note of May 5, 1978, Mr. O'Dea Heelan notified the state of his consent to the expropriation of the property described above, although in the same communication he indicated he is not in agreement with the price offered by the state.

Therefore,

DECREE:

Article 1: Based on law thirty-six, of June 26, 1896, supplemented by Legislative Decree seventy-eight of June 24, 1934, the property owned by the Compañía de Desarrollo Santa Elena S.A. described in the third whereas clause of this decree, is hereby expropriated.

Article 2: The price to be paid for said real property shall be sixteen million, four hundred fifty thousand colones, all in cash, pursuant to special appraisal No. 15581-A.V.E. of April 14, 1978, by the General Bureau of Direct Taxation; this amount shall be provided by the Family Allocations Program for this purpose.

Article 3: The Attorney General of the Republic is authorized to formalize the respective deed and register the real property in the name of the state, under the administration of the National Parks Service of the Ministry of Agriculture.

Article: It shall take effect as of May 5, 1978.

Done at the Casa Presidencial. San José. May 5, 1978.”

[emphasis added]

19. As stated in the 1978 Decree, Claimant advised Respondent that it had no objection to the expropriation but contested the price fixed by Respondent.⁷ CDSE then claimed, as compensation, the sum of approximately U.S. \$6,400,000 (also based on the then-current exchange rate for Costa Rican colones), in accordance with an appraisal of the Property that had been commissioned by CDSE and conducted by the Chief Appraiser of the Banco de Costa Rica in February 1978, three months prior to the 1978 Decree.⁸
20. The approximately twenty-year period from the date of Respondent's 1978 Decree until the commencement of the present arbitration was marked by intermittent inactivity and intensive legal proceedings between the parties before the Courts of Costa Rica. These are described in the parties' written pleadings. While we have familiarised ourselves with those proceedings, we are of the view that they need not be detailed here. Suffice it to say that each party blames the other for the very long delay in resolving the issue of compensation. In the opinion of the Tribunal, the issue of blame or fault on the part of one or other of the parties in this

⁷ Memorial, p. 12, Claimant's Exhibit 14.

⁸ Memorial, pp. 12-13. The valuation proposed by Claimant in 1978 was in fact equivalent to U.S. \$6,389,991, which is approximated to U.S. \$6,400,000 for the purposes of this Award.

regard does not affect the outcome of the case and need not be addressed by the Tribunal. What is relevant is that, from the date of the expropriation until the commencement of the present proceedings, the amount of compensation to be paid for the Property remained unresolved.

21. The Tribunal considers it necessary to underscore the fact that, for the purposes of the arbitration, neither the size nor the boundaries of the Property are in dispute. While the Costa Rican “*Public Register, Property Section, District of Guanacaste ... number 24,165*”, referenced in the 1978 Decree, in fact registers Santa Elena as containing 21,252 hectares,⁹ the 1978 Decree itself refers to the Property as containing “*a total area of 15,800 hectares.*” CDSE has explicitly and repeatedly stated its agreement to abide by the boundaries and total area referred to in the 1978 Decree for the purpose of valuing the Property.¹⁰ Indeed, as explained in its written submissions, CDSE bases its claim for compensation and its calculation of the value of the Property on only 15,210 hectares of the Property, which excludes approximately 5,400 hectares in the northwest¹¹ and approximately 590 hectares of the Property that has either been sold or is subject to squatters’ claims¹² and, as a consequence, “over which CDSE does not currently exert ownership rights.”¹³ CDSE’s various statements regarding the size of the Property to be considered in the arbitration, referred to above, have not been contested by Costa Rica.¹⁴ Accordingly, the Prop-

⁹ See generally Memorial, pp. 2-3, 87-90 and 101-107, and Reply, p. 230.

¹⁰ Memorial, p. 2 and footnote 2.

¹¹ *Ibid.*, pp. 88, 102, 106

¹² *Ibid.*, pp. 2, 88.

¹³ *Ibid.*, p. 107.

¹⁴ See Counter-Memorial, p. 28, footnote 159. The Tribunal takes note of the following statement contained in a letter dated 13 August 1999, addressed to counsel for Costa Rica by counsel for CDSE:

“We emphasize that CDSE does not intend to retain titled ownership rights, or any rights of possession, to any of the areas encompassed within Farm No. 24, 165A. CDSE is prepared to convey to the Government all right, title, interest and possession it enjoys with respect to all areas encompassed within Farm No. 24, 165A upon full payment of the award. Still, it is obvious that CDSE has not represented, and cannot represent, that it is in a position to convey possession of the tracts within the registered title for Farm No.

erty is considered to comprise those 15,210 hectares on which CDSE bases its claim for compensation.

D. Other Relevant Pre-Arbitration Events

22. As Costa Rican law provides that property expropriated for a public purpose must be dedicated to that purpose within ten years, failing which the original owner may petition for its return, Respondent issued a decree dated 25 July 1987 expanding the boundaries of the neighbouring Santa Rosa National Park so as to incorporate the Santa Elena Property.¹⁵
23. The matter of compensation thus remained outstanding and, on 26 February 1993, another appraisal of the Property was conducted on behalf of Costa Rica (the “1993 Appraisal”), which valued the Property at approximately U.S. \$4,400,000 based on the then-current exchange rate for Costa Rican colones.¹⁶
24. Mention should be made of one aspect of a 1994 U.S. enactment, known as the “Helms Amendment”,¹⁷ which prohibits U.S. foreign aid, including U.S. approval of financing by international financial institutions, to a country that has expropriated the property of a U.S. citizen or corporation at least 50% owned by U.S. citizens, where the country in question has not:

- (A) returned the property,*
- (B) provided adequate and effective compensation (...) as required by international law,*
- (C) offered a domestic procedure providing prompt, adequate and effective compensation in accordance with international law, or*
- (D) submitted the dispute to arbitration under the rules of the [ICSID Convention] or other mutually agreeable binding international arbitration procedure.”*

24,165A for which compensation is not sought, namely, the approximately 5,400 hectares of land in the northwest section of the Property within what is now Murcielago National Park or the several small tracts occupied by squatters or sold by CDSE.”

¹⁵ Counter-Memorial, pp. 24-25 and accompanying footnotes.

¹⁶ Counter-Memorial, p. 27 and footnote 153.

¹⁷ 22 USC sec. 2378 a. (30 April 1994). See the discussion in Respondent’s Counter-Memorial, pp. 37 to 39 and accompanying footnotes.

25. This enactment was invoked against the Republic of Costa Rica in connection with the Santa Elena case, with the result that a U.S. \$175,000,000 Inter-American Development Bank loan to Costa Rica was delayed at the behest of the U.S. until Costa Rica consented to refer the Santa Elena case to international arbitration.
26. By letter dated 21 March 1995, Costa Rica consented to arbitration proceedings before an ICSID tribunal. CDSE filed its own consent, subject to further confirmation from Respondent that it considered Claimant to have met the ICSID jurisdictional requirement of majority ownership by U.S. citizens, on 31 May 1995. On 19 March 1996, as indicated above, this question having been resolved, CDSE formally registered its consent to this proceeding.

E. The Written Phase

27. As ordered by the Tribunal, Claimant duly filed its Memorial on 15 January 1998. The Memorial was not accompanied by any supporting documentation.¹⁸
28. In its Memorial, Claimant submitted that the central purpose of the arbitration is to determine the compensation owed by Respondent to Claimant for the expropriation of the Property. As such, the core issue to be resolved is the value of the Property which, in turn, requires a determination of the appropriate valuation methodology. While Claimant's Memorial also chronicled the history of CDSE's ownership of the Property, from the time of its purchase through the tortuous legal wrangling in Costa Rica, the bulk of the Memorial, and the thrust of Claimant's case, related to the issue of valuation. As regards applicable law, Claimant argued that the dispute is to be resolved in accordance with Costa Rican law which, in this instance, is not incompatible with principles of international law relating to expropriation.
29. Claimant requested, in its Memorial, an award in the amount of U.S. \$41,200,000, with interest and other amounts, as fair and full compensation for the expropriation of the Property. This valu-

¹⁸ In the following paragraphs we summarise in very brief form the parties' principal submissions. Because these summaries draw on an overall appreciation of each party's case, no citations are necessary. Later in this Award, where particular allegations, arguments and evidence are considered, specific references to the parties' pleadings are provided.

ation was determined on the basis of the current fair market value of the Property, as calculated by Claimant's experts, principally Mr. Steven Beauchamp of Landauer Associates, Inc., whose opinions are referred to in the Memorial. The amount requested included a value of \$39,000,000 for the approximately 4,200 hectares of land deemed most suitable for tourist-related development (referred to in these proceedings as the "prime land") and U.S. \$2,200,000 for the approximately 11,000 hectares of additional land.

30. Shortly after the filing by Claimant of its Memorial, the Respondent filed with the Tribunal an application for issuance of a Partial Award or, in the alternative, for issuance of a Partial Award on Agreed Terms, with respect to the valuation of a portion of the Property regarding which the Claimant, in its Memorial, appeared to accept as the basis of its valuation the figures used by the Respondent in its own 1993 Appraisal. The Respondent also sought an Order that Claimant be precluded from submitting any further evidence whatsoever, whether documentary, testimonial or otherwise "except as permitted within the proper scope of its Reply Memorial". Alternatively, the Respondent sought from the Tribunal an Order compelling Claimant immediately to submit all testimonial evidence, including any expert opinion on Costa Rican law, as well as any other evidence on which it relied in support of its claim. The relief sought by the Respondent was opposed by Claimant.
31. Following Respondent's applications and Claimant's opposition, there ensued a lengthy series of submissions to the Tribunal on these issues by both parties.
32. After deliberation, the Tribunal, on 8 April 1998, issued a unanimous Order denying Respondent's applications.¹⁹
33. As ordered by the Tribunal, the Respondent duly filed its Counter-Memorial with supporting documentation on 15 June 1998.
34. In its Counter-Memorial, Respondent concurred with Claimant that the core issue to be resolved is the amount of compensa-

¹⁹ After the issuance of the Tribunal's 8 April 1998 Order, and indeed throughout the written and oral phases of these proceedings, the Tribunal was called upon to deal with a series of procedural applications at the behest of both parties. The Tribunal thus issued a number of procedural orders and many more decisions and directions. Since none of these procedural orders or other decisions of the Tribunal have any impact on the present Award, it is not necessary to review and summarise them here.

tion owed to Claimant for the expropriation of the Property, to be determined on the basis of an appropriate valuation. Respondent then offered a review of Costa Rica's history of environmental commitment and of the ecological uniqueness and importance of the Santa Elena site, as well as a discussion of the legal and political background to the parties' dispute, prior to turning to the key matter of valuation.

35. Respondent submitted that, under international law, which, it asserted, the parties had agreed was applicable to the dispute, Claimant is entitled to compensation on the basis of the fair market value of the Property as of the date of its expropriation on 5 May 1978. That amount, as determined by the 14 April 1978 appraisal conducted by Costa Rica and referred to in the 1978 Decree, is U.S. \$1,919,492. The Respondent further submitted that, were Costa Rican law found to apply, valuation of the Property would be based on its current fair market value taking into account the existing environmental legislation that would significantly restrict, if not prohibit outright, the commercial development of Santa Elena. On the basis of the opinion of its expert, KPMG, Respondent stated that that value is U.S. \$2,965,113.68. Respondent went on to challenge, in detail, the methodology and calculations employed by Claimant in its Memorial. Respondent also submitted that, in the event that interest is applicable to the Award, international law supports an award of simple interest only, at a nominal rate.
36. As ordered by the Tribunal, Claimant filed its Reply Memorial on 21 August 1998, with supporting documentation.²⁰
37. In its Reply, CDSE argued, *inter alia*, that the long delay in determining the compensation owed to it under the 1978 Decree had been caused by Costa Rica. It also disputed Respondent's contentions as regards the applicable law and argued that, since the parties had never agreed as to the law applicable to the dispute, international law could only apply where it is found to conflict with the law of Costa Rica. As regards the means of valuing the Property, Claimant submitted that it is entitled to receive the current fair market value of the Property without regard to any legisla-

²⁰ The date for the filing by Claimant of its Reply Memorial had originally been fixed for 31 July 1998. That date was vacated and changed by the Tribunal to 21 August 1998, following representations by Claimant.

tion, regulation or other government acts subsequent to the 1978 Decree.

38. On the basis of an updated appraisal prepared by Mr. Beauchamp, CDSE claimed the reduced sum of U.S. \$40,337,750 as compensation. In reply to Respondent's argument concerning interest, CDSE claimed that, if the Property were to be valued as of 5 May 1978, it would be entitled to receive compound interest on that amount, as of that date.
39. As ordered by the Tribunal, the Respondent filed its Rejoinder Memorial and accompanying documentation on 23 October 1998.²¹
40. In its Rejoinder, Costa Rica defended its actions during the period between the date of the 1978 Decree and the commencement of this arbitration. It reiterated that international law applies to the dispute, with the result that compensation should be awarded on the basis of value of the Property as of 5 May 1978, as calculated in Respondent's valuation at that time. As regards the present value of the Property, in the event that Costa Rican law is found to apply, Respondent emphasized that Claimant had completely ignored the physical, legal and financial obstacles to development that significantly diminish the value of the Property. Respondent reiterated that the sum of approximately U.S. \$1,900,000 represented, in 1978, and represents today, the full amount of compensation owed Claimant.
41. Shortly thereafter, the date set for the commencement of the oral hearing, to wit 19 January 1999, had to be vacated due to the illness of one of the members of the Tribunal.
42. After a telephone conference between members of the Tribunal and counsel for the parties, the Tribunal fixed the date of 10 May 1999 for the commencement, in Washington, D.C., of the oral hearing.
43. Late in the day, on Friday 7 May 1999, Respondent filed with the Tribunal an application for provisional measures and for emer-

²¹ The date for the filing by Respondent of its Rejoinder had originally been fixed for 15 September 1998. That date was vacated and changed by the Tribunal to 23 October 1998 following representations by the parties. The date for the commencement of the oral hearing on the merits was also changed from 9 November 1998 to 19 January 1999.

gency interim restraining measures. The Respondent's application concluded with a request for the following relief:

“To recommend as provisional measures pursuant to Article 47 of the ICSID Convention:

- *That Claimant not engage in any earth-moving activity for the purpose of constructing new roads on the Santa Elena property;*
- *That Claimant not remove any vegetation (including dead vegetation, for example, trees) from the Santa Elena property other than dead vegetation that has fallen across roadways that are in use or debris in the limited areas of the property used by Claimant; and*
- *That Claimant not set, ignite, tolerate, or desist from making all reasonable attempts to extinguish, any fire on the Santa Elena property;*

To issue an emergency restraining order pursuant to Article 47 recommending that such measures be taken by Claimant in the interim pending resolution of this Request.”

44. Immediately at the outset of the oral hearing, on Monday 10 May 1999, the Tribunal, having deliberated during the intervening week-end, dismissed Respondent's application.

E. The Oral Phase

45. In accordance with the Tribunal's directions, each party filed with the Tribunal, prior to the commencement of the oral hearing, written statements by its witnesses. On behalf of Claimant, the following seven witnesses appeared and gave evidence during the oral hearing:
- Mr. Francisco Chacon gave evidence regarding issues of Costa Rican law pertaining to ownership of the 200-metre strip of coastal property adjacent to the high tide line under Costa Rica's Terrestrial Maritime Zone Law. He concluded, in particular, that CDSE owns that strip of land, as evidenced by the Property's chain of title.
 - Mr. Fernando Guier testified regarding his legal opinion as to Costa Rican constitutional law and the law of expropriation. He concluded that Costa Rica may not take advantage of its environmental

laws and regulations subsequent to 1978 in determining the value of the Property for the purposes of compensation.

- Mr. Phillip Bogdal, of Eco-Plan, had conducted a land-use planning analysis of the Property for the purposes of the appraisal done for Claimant by Mr. Beauchamp of Landauer Associates, Inc. In particular, Mr. Bogdal prepared three (3) “conceptual land-use plans” on the basis of which an overall appraisal could be made. Mr. Bogdal testified regarding his work and conclusions, and addressed the criticism levelled by Respondent’s expert, KPMG.
- Mr. Manrique Lara had conducted an engineering analysis of certain aspects of the land-use plans developed by Mr. Bogdal that had been questioned by KPMG. These related to supposed physical obstacles such as liquefaction, stability, erosion, etc. He gave evidence regarding his conclusion to the effect that the proposed land-use plans were physically feasible. He also estimated the infrastructure cost for such things as road and bridge construction, water supply and waste disposal, etc.
- Mr. Álvaro Carballo, a former counsel to various Costa Rican ministries and para-governmental organizations, provided an assessment of current Costa Rican environmental law and regulations and their impact on the development of the Property. He concluded that such laws and regulations would not preclude development of the Property along the lines laid out in Mr. Bogdal’s conceptual plans.
- Ms. Fern Kanter, a consultant to the tourism and hospitality industries, testified as to the potential for tourism development of the Property, on which Mr. Beauchamp’s appraisal was, in part, based.
- Mr. Steven Beauchamp, of Landauer Associates, Inc., is the author of the so-called “Landauer Appraisal” relied on by Claimant with respect to the current fair market value of the Property: U.S. \$41,200,000, subsequently revised to U.S. \$40,337,750.²² On the basis of the conclusions of Claimant’s other experts, Mr. Landauer determined, in particular, that the “highest and best use” of a significant portion of the Property is resort and tourism-related development, which is, in his opinion, physically possible, legally permissible and financially feasible.

²² See paragraphs 29 and 38 of this Award.

46. The following eight witnesses gave evidence on behalf of Respondent during the oral hearing:

- Mr. Bruno Stagno Ugarte, a diplomat and advisor to Costa Rica's Minister of Foreign Affairs, testified as to Costa Rica's efforts to have the *Area de Conservación Guanacaste*, including the Santa Elena Property, designated as a World Heritage Site, due to its biological and geological significance.
- Professor Daniel Janzen, an academic, provided evidence as to the "conservation analysis" of the Property conducted by him for Respondent. His evidence consisted of a comprehensive review of the ecological features of the Property, many of them unique and, in his opinion, requiring protection from the sort of development contemplated by Claimant.
- Professor Jorge Cabrera Medaglia testified as to his opinion regarding Costa Rican environmental law, particularly the limitations imposed on the right to private property and free enterprise in the context of environmental protection.
- Professor Rodrigo Barahona is professor of agrarian and environmental law at the University of Costa Rica, Senior Counsel at KPMG Legal Services, Respondent's legal experts, and co-author of the KPMG expert legal opinion relied upon by Respondent. He testified regarding Costa Rican laws governing expropriation and the procedure for expropriation under that legislation.
- Mr. Juan Carlos Chavarría, Managing Partner of KPMG Legal Services and, with Professor Barahona, author of Respondent's KPMG expert legal opinion, testified as to the judicial history of the case, including the compensation proceedings before the courts of Costa Rica.
- Mr. Jerry Turner is the author of the so-called "KPMG Appraisal" relied upon by Respondent to determine the value of the Santa Elena Property and the compensation owed to Claimant. He gave evidence regarding all aspects of his appraisal, including as regards the Property's highest and best use (in his opinion, conservation), regulatory issues, physical constraints to development, etc. Mr. Turner also offered commentary and criticism of the Landauer Appraisal prepared for Claimant by Mr. Beauchamp.
- Mr. Craig Zgabay, a senior consultant and appraiser at KPMG, provided evidence concerning the KPMG appraisal prepared for Respondent, including as regards the methodologies used by KPMG to establish the current value of the Property.

- Ms. Ana Quiros Lara, founding partner of EcoGlobal and partner in charge of that firm's consultancy practice in the area of sustainable development, gave evidence on EcoGlobal's role in the conduct and elaboration of the KPMG appraisal. She also testified regarding certain of the physical aspects of the Property, as they relate to Claimant's development plans.

47. As scheduled, the hearing commenced on Monday 10 May 1999 in Washington, D.C. As mentioned above, fifteen witnesses were heard and counsel for the parties presented oral arguments. The hearing ended late on Friday 14 May 1999.

48. One matter, in particular, occurred during the course of the hearing which should be mentioned in the present Award. On Wednesday 12 May 1999, during his examination-in-chief of Professor Daniel Janzen, Mr. Charles Brower, one of counsel for the Respondent, applied to the Tribunal to file four additional witness statements by, respectively, Professor Janzen, Mr. Jorge Cabrera Medaglia, Mr. Jerry Turner and Messrs. Juan Carlos Chavarría and Rodrigo Barahona on behalf of the KPMG legal group. Claimant opposed Respondent's application.

49. Having deliberated, the Tribunal ruled that Respondent's supplemental witness statements would be admitted only to the extent that they dealt with matters properly to be treated as evidence. The Tribunal noted that this was consistent with one of its earlier rulings in respect of the admissibility of certain witness statements that had been filed by Claimant on 15 March 1999.

50. Subsequent to the Tribunal's decision, the parties asked for an adjournment in order to consult with one another on the next steps to be taken. Later during the day, counsel informed the Tribunal that they had reached agreement on how to proceed with respect to Respondent's four supplemental witness statements. The hearing then continued. A signed copy of the parties' Agreement was filed with the Tribunal the next day, 13 May 1999, and was confirmed by the Tribunal.²³

²³ This Agreement was subsequently modified by a 17 June 1999 amendment between the parties, the terms of which were confirmed by the Tribunal in a letter to the parties dated 5 July 1999.

G. Post-Hearing and Other Submissions

51. During the course of the oral hearing, as well as after its conclusion, both parties filed with the Tribunal voluminous submissions and documents identified as follows:

Claimant:

- a) Materials Referred to in CDSE's Opening Statement, dated 10 May 1999;
- b) Materials Referred to in CDSE's Oral Presentation, dated 10 May 1999;
- c) CDSE's Oral Presentation, dated 13 May 1999;
- d) CDSE's Opening and Closing Statements, dated 25 May 1999.

Respondent:

- a) Documents Relied Upon by Respondent at Oral Hearing, 10-14 May 1999;
- b) Argument Presented by Respondent at Oral Hearing, 10-14 May 1999.

52. Further to the parties' 13 May 1999 Agreement (as amended on 17 June 1999), each party also submitted to the Tribunal, on 12 July 1999, a Post-Hearing Memorial on Valuation of Conservation Land.

53. Finally, at the request of the Tribunal, each party subsequently submitted its application for an award of costs, legal fees and related expenses incurred in connection with the present arbitration.

H. The Dispute in Brief

54. This is, at the end of the day, a case of expropriation in which the fundamental issue before the Tribunal is the amount of compensation to be paid by Respondent, Costa Rica, to Claimant, CDSE. While a host of sub-issues were raised by the parties in the context of the written and oral procedures, both parties agree that such matters are relevant only insofar as they tend to affect this central issue.

55. As mentioned above, the Respondent's right to expropriate the Property is not in dispute, nor (for the purposes of this Award) are matters such as the size or the boundaries of the Property.²⁴

²⁴ See paragraph 21 of this Award.

56. Thus, the sole issue in the present arbitration could not be more simply stated: What is the amount of compensation now owed to CDSE for the expropriation of the Property by Costa Rica?
57. Claimant claims U.S. \$41,200,000, revised in its Reply to U.S. \$40,337,750. Respondent states that the compensation owed Claimant is U.S. \$1,900,000.
58. In its Reply, Claimant refers to a “worst case scenario” and opines that the combined value of one resort parcel on the Property and the remaining land could be U.S. \$22,200,000.²⁵ This was increased by Claimant, during the oral hearing, to U.S. \$33,400,000.²⁶
59. Respondent, in its Rejoinder, refers to a variety of figures, ranging from U.S. \$395,000 (CDSE’s purchase price for the Property) to U.S. \$10,000,000, and states: “Clearly, the true market value of Santa Elena lies somewhere within the range circumscribed by these various figures.”²⁷

I. The Applicable Law

60. The law to be applied by the Tribunal to the substance of the dispute is laid down in Article 42(1) of the ICSID Convention as follows:

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

61. Claimant posits that the parties to the present arbitration have not agreed as to the rules of law that shall govern the issues in dispute. In the absence of such agreement, Claimant argues that it is the second sentence of Article 42(1) of the ICSID Convention that applies. Thus, it submits:

²⁵ Reply, pp. 221 *et seq.*

²⁶ Claimant’s Closing Statement, p. 34.

²⁷ Rejoinder, p. 81.

- i) the Tribunal must apply the law of Costa Rica to the issues in dispute;
 - ii) rules of international law are to be applied only in the event of a *lacuna* in Costa Rican law or if such law is inconsistent with the international law principles of good faith and *pacta sunt servanda*.
 - iii) In the present case, there is no such inconsistency, with the result that the Tribunal should apply Costa Rican law, though "... the result would be the same if principles of international law were applied".²⁸
62. Respondent submits that international law applies to the merits of the dispute by virtue of the parties' agreement to that effect. That agreement, although not in writing or even stated expressly, finds its sources, according to Respondent, in Costa Rica's 24 March 1995 consent to ICSID jurisdiction and Claimant's 15 May 1995 Request for arbitration. Both of these, argues Respondent, incorporate a description of the dispute found in certain reports prepared in the U.S. Senate in virtue of the Helms Amendment, discussed above,²⁹ which evidence a common desire to determine the compensation owed Claimant in accordance with international law, as provided by that statute.³⁰
63. Article 42(1) of the ICSID Convention does not require that the parties' agreement as to the applicable law be in writing or even that it be stated expressly. However, for the Tribunal to find that such an agreement was implied it must first find that the substance of the agreement, irrespective of its form, is clear. Having reviewed and considered Respondent's oral and written argument on this question and analysed the documents to which we have been referred, including, in particular, the Helms Amendment and related documents, the Tribunal is unable to conclude that the parties ever reached a clear and unequivocal agreement that their dispute would be decided by the Tribunal solely in accordance with international law.

²⁸ Memorial, p. 58. *See also* Claimant's Reply Memorial, pp. 61-62, 75 and Closing Statement, pp. 2-3.

²⁹ *See* paragraph 24, *supra*.

³⁰ Counter-Memorial, pp. 34-39 and accompanying notes; Rejoinder, pp. 18-26; Smutny oral argument, p. 1.

64. This leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) (“In the absence of such agreement...”) and thus apply the law of Costa Rica and such rules of international law as may be applicable. No difficulty arises in this connection. The Tribunal is satisfied that the rules and principles of Costa Rican law which it must take into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the ICSID Convention would, in this respect, be frustrated.
65. The parties’ apparently divergent positions lead, in substance, to the same conclusion, namely, that, in the end, international law is controlling. The Tribunal is satisfied that, under the second sentence of Article 42(1), the arbitration is governed by international law.
66. This conclusion is reinforced by the history of the dispute, in particular the circumstances in which the dispute was submitted to arbitration and in which the parties’ consent was given, as well as the language of the Helms Amendment itself, which refers to compensation “...as required by international law” and “...in accordance with international law”.³¹
67. The question, therefore, boils down to the following: under international law, what are the applicable principles and rules governing compensation in a case such as this?

J. Standard of Compensation

68. As the parties themselves submit, there rests upon the expropriating state a duty, in both Costa Rican and international law, to pay compensation in respect of even a lawful expropriation.
69. The vocabulary describing the amount of compensation properly payable in respect of a lawful taking has varied considerably from time to time. It comprises such words as “full”, “adequate”,

³¹ See paragraph 24 of the present Award.

“appropriate”, “fair” and “reasonable”. Sometimes, the descriptive adjective is elaborated by the additional mention of “market value”.

70. In the present case, the Tribunal is spared the need to enter further into any doctrinal discussion of the standard of compensation because it is common ground between the parties, and the Tribunal agrees, that the compensation to be paid should be based upon the fair market value of the Property calculated by reference to its “highest and best use”.
71. In approaching the question of compensation for the Santa Elena Property, the Tribunal has borne in mind the following considerations:
- International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the parties.
 - While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.³² The international source of the obligation to protect the environment makes no difference.
72. Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.
73. As mentioned above, there is no dispute between the parties as to the applicability of the principle of *full compensation for the*

³² For this reason, the Tribunal does not analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property.

fair market value of the Property, i.e., what a willing buyer would pay to a willing seller.³³

74. There is, however, a dispute as to the value of the Property derived by applying that principle. Specifically, the parties differ with respect to *the date* on which the Property was expropriated and as of which its fair market value is to be assessed, and as to *the value* of the Property on that date. This difference of views lies at the heart of the case, and will be explored in the following section of our Award, dealing with the crucial issue of valuation.

K. Valuation

75. On the question of valuation, as noted earlier, the views of the parties are widely divergent. The Tribunal considers it useful to summarise the parties' positions here:
- Claimant states that the fair market value of the Santa Elena Property, based on its highest and best use in the market place, is equivalent to its present day value, undiminished by any expropriatory actions of the Government and, in particular, by any environmental statutes or regulations enacted after 1978.³⁴
 - Respondent contends that the relevant date at which the fair market value of the Property is to be assessed is the date of the expropriation decree, i.e., 5 May 1978.³⁵

1) The Date as at Which the Property Must be Valued

76. As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series

³³ Memorial, pp. 74-77; Counter-Memorial, pp. 42-43.

³⁴ Memorial, pp. 59-60, 81-82.

³⁵ Counter-Memorial, pp. 39-42.

of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property. A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.

77. There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property:

“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”³⁶ [Emphasis added.]

³⁶ *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2 (June 22, 1984), reprinted in 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1986), citing 8 Whiteman, *Digest of International Law* 1006-20; Christie, *What Constitutes a Taking Under International Law?* 38 Brit. Y.B. Int'l. Law 307 (1962); Cf. also the *Mariposa Development Company* case decided by the U.S.-Panama General Claims Commission (6 UNRIAA 390), where the tribunal observes that legislation may sometimes be of such a character that “...its mere enactment would destroy the marketability of private property, render it valueless and give rise forthwith to an international claim.” See also Claimant’s Closing Statement, pp. 13-14.

78. Stated differently, international law does not lay down any precise or automatic criterion, such as the date of the transfer of ownership or the date on which the expropriation has been “consummated” by agreed or judicial determination of the amount of compensation or by payment of compensation.³⁷ The expropriated property is to be evaluated as of the date on which the governmental “interference” has deprived the owner of his rights or has made those rights practically useless. This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case.³⁸
79. Claimant does not really contest this approach. The determination of the relevant date, so Claimant writes, “...may vary under different circumstances, thereby affecting the determination of the actual date of expropriation.”³⁹
80. Although the expropriation by the decree of 5 May 1978 was only the first step in a process of transferring the Property to the Government, it cannot reasonably be maintained, as Claimant seeks to do, that this Decree expressed no more than an “intention” to expropriate⁴⁰ or that, in 1978, the Government merely “sought to expropriate”.⁴¹ In the circumstances of this case, the taking of the Property occurred as of 5 May 1978, the date of the 1978 Decree.
81. As of that date, the practical and economic use of the Property by the Claimant was irretrievably lost, notwithstanding that CDSE remained in possession of the Property. As of 5 May 1978, Claimant’s ownership of Santa Elena was effectively blighted or sterilised because the Property could not, thereafter, be used for the development purposes for which it was originally acquired (and which, at that time, were not excluded) nor did it possess any significant resale value.

³⁷ As maintained by Claimant. *See* Reply, p. 76, footnote 120.

³⁸ *Supra*, para. 71. *See also* World Bank Guidelines, in 2 *ICSID Rev.—FILJ*, 303 (1992).

³⁹ Memorial, p. 79. *See also* Claimant’s Closing Statement, p. 13, referring to the date on which “the Government’s regulatory action essentially renders the foreigner’s property rights useless” because “a taking has occurred”.

⁴⁰ Memorial, pp. 78-82.

⁴¹ Reply, p. 19.

82. As noted in the U.S. Senate Staff Report entitled “Confiscated Property of American Citizens Overseas: Cases in Honduras, Costa Rica and Nicaragua”:

*“This odd situation has caused the owners of the land to lose a great deal of money because they are not allowed to develop the property as a profit-making, eco-tourism project, yet they are required to pay for the maintenance of the property...”*⁴²

83. Since the Tribunal is of the view that the taking of the Property occurred on 5 May 1978, it is as of that date that the Property must be valued. There is no evidence that its value at that date was adversely affected by any prior belief or knowledge that it was about to be expropriated. Consequently, for the purpose of retrospectively attributing a value to the Property in 1978, the Tribunal has not had to consider later appraisals, such as the Government’s 1993 Appraisal or those submitted by the parties in these proceedings.

84. The significance of identifying the date of taking lies in its bearing on the factors that may properly be taken into account in assessing the “fair market value” of the Property—a value which, as noted, both sides are agreed must be the basis of the present Award. If the relevant date were the date of this Award, then the Tribunal would have to pay regard to the factors that would today be present to the mind of a potential purchaser. Of these, the most important would no doubt be the knowledge that the Government has adopted an environmental policy which would very likely exclude the kind of tourist, hotel and commercial development that the Claimant contemplated when it first acquired the Property. If, on

⁴² U.S. Senate, Committee on Foreign Relations, Republican Staff Report (March 1994), annexed to Respondent’s Exhibit 9, p. 27. The following statements in the evidentiary record are also relevant to this issue. According to a letter dated 18 August 1997, from counsel for CDSE to counsel for Costa Rica: “... the owners of Santa Elena, while being deprived of the ability to use their property for any effective commercial purpose have been responsible for maintaining the Property throughout the many years that the Government of Costa Rica has failed to address the issue of adequate and just compensation”. (Respondent’s Exhibit 42, p. 3.) According to a letter of 14 October 1997 from counsel for CDSE to counsel for Costa Rica: “... during the last 19 [years] of which Santa Elena has been denied the opportunity to make any economic use of the property due to the actions of the Government of Costa Rica”. (Respondent’s Exhibit 45).

the other hand, the relevant date is 5 May 1978, factors that arose thereafter—though not necessarily subsequent statements regarding facts that existed as of that date—must be disregarded.

2) Value of the Santa Elena Property as of 5 May 1978

85. As noted earlier,⁴³ Claimant purchased the Santa Elena Property in 1970 with the intention of developing it partly as a tourist resort.

86. It is interesting to note that Respondent's own 1978 Appraisal recognizes that the Property, at that time, had a certain potential for tourism development. In that appraisal, the Tribunal finds expressions such as:

“a beach with good potential for tourism”;

“it is thought that the coast could be developed for tourism projects, giving it a special value”;

*“beaches and the lands around them where certain tourist projects may be feasible”.*⁴⁴

87. Similarly, the 1993 Appraisal conducted for Costa Rica contained descriptions of portions of the property such as the following:

“could be exploited for tourism”; *“excellent prospects for tourism”;* *“the Potrero Grande beach is the largest and has the greatest potential for tourism”;*

“well suited for the construction of tourism infrastructure”;

*“Santa Elena is a rural property that combines ingredients of agriculture, ecology, and tourism amidst great unexploited beauty”.*⁴⁵

88. The great difficulty in this case is that, apart from Costa Rica's unilateral appraisal of 14 April 1978 and CDSE's February 1978

⁴³ *Supra*, para. 16. Memorial, pp. 1, 7 *et seq.*

⁴⁴ Respondent's Exhibit 6, 1978 Government Appraisal, pp. 3-4. *See also* Reply, pp. 9-10.

⁴⁵ Respondent's Exhibit 8, 1993 Government Appraisal, pp. 12-15.

valuation, there is no other evidence of what the Property was actually worth as at the date of expropriation.

89. We agree with the parties that the Tribunal cannot go back in time to 1978 to perform its own appraisal of the Property,⁴⁶ but that we can, and must, "...make some assessment of the two [1978] appraisals that the parties have provided."⁴⁷
90. In determining the fair market value of the Property as of the date of expropriation, 5 May 1978, the Tribunal has proceeded by means of a process of approximation based on the appraisals effected by the parties in 1978 and submitted to the Tribunal in the context of these proceedings, as has been done in several international arbitrations, as discussed below.⁴⁸
91. As regards the type of conclusions that may be drawn from this sort of evidence, we refer to the reasoning of the Iran-U.S. Claims Tribunal in the *AIG* case, where it is stated:

*"From what has been stated above, it might be possible to draw some conclusions regarding the higher and the lower limits of the range within which the value of the company could reasonably be assumed to lie. But the limits are widely apart. In order to determine the value within those limits, to which value the compensation should be related, the Tribunal will therefore have to make an approximation of that value, taking into account all relevant circumstances in the case."*⁴⁹

92. In the *Phillips Petroleum* case,⁵⁰ the same Tribunal found that,

⁴⁶ In Respondent's words (Rejoinder, p. 79, note 464): "...it is impractical, if not impossible, to appraise a property today for its value 20 years earlier."

⁴⁷ Reply, pp. 89-90.

⁴⁸ See generally John A. Westberg, "Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation; ICSID and Iran-United States Claims Tribunal Case Law Compared" in 1 *ICSID Review—FILJ*, 24 (1993). See also *American International Group, Inc. and American Life Insurance Company v. The Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran)*, Award No. 93-2-3, 4 Iran-U.S. C.T.R. 96 (Dec. 19, 1983) [hereinafter "*AIG*"].

⁴⁹ *AIG*, *supra*, at 109.

⁵⁰ *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, The National Iranian Oil Company*, Award No. 425-39-2, 21 Iran-U.S. C.T.R. 79 (June 29, 1989) [hereinafter, "*Phillips Petroleum*"].

in deciding the price that a purchaser could be expected to have been willing to pay for the asset in question at the date the asset was taken, the Tribunal was required to exercise its own judgment, taking into account all relevant circumstances, including equitable considerations:

“The Tribunal recognizes that the determination of the fair market value of any assets inevitably requires the consideration of all relevant factors and the exercise of judgment.

[...]

*In “Starrett, supra ... the Tribunal made various adjustments to the conclusions [of the Tribunal-appointed outside expert] and the resulting amounts. The need for such adjustments is understandable, as the determination of value by a tribunal must take into account all relevant circumstances, including equitable considerations.”*⁵¹

93. As discussed above, Costa Rica’s valuation of Santa Elena in 1978 was approximately U.S. \$1,900,000.⁵² Claimant’s 1978 valuation was approximately U.S. \$6,400,000.⁵³
94. The Tribunal will, consequently, take as a starting point these appraisals. It can safely be assumed that the actual and true fair market value of the Property was not higher than the price asked by the owners and not lower than the sum offered by the Government, i.e., that it was somewhere between these two figures. It can also safely be assumed that both of these appraisals took account of, and included, the “potential for tourism development” of the Property, discussed above.
95. In the circumstances of this case, making the assessment that we have been invited to make and having considered the evidence submitted by the parties and the factors relevant to the value of

⁵¹ *Ibid.*, at 122, 123, citing *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat, Bank Markazi*, Award No. ITL 32-24-1, 4 Iran-U.S. C.T.R. 122, 157 (Dec. 19, 1983) [hereinafter, “*Starrett*”].

⁵² See paragraph 17, *supra*, of this Award and accompanying footnote.

⁵³ See paragraph 19, *supra*, of this Award and accompanying footnote.

the Santa Elena Property in 1978, the Tribunal has determined that the sum of U.S. \$4,150,000 constitutes a reasonable and fair approximation of the value of the Property at the date of its taking.

L. Interest

96. As indicated above, Claimant claims that it is entitled to an award of compound interest on the value of the Property in 1978, calculated from the date of the expropriation. Respondent argues that no interest is due or, if interest is due, then Claimant is entitled to simple interest only at a nominal rate.
97. Even though there is a tendency in international jurisprudence to award only simple interest, this is manifested principally in relation to cases of injury or simple breach of contract. The same considerations do not apply to cases relating to the valuation of property or property rights. In cases such as the present, compound interest is not excluded where it is warranted by the circumstances of the case.⁵⁴
98. First, there are international arbitral decisions where compound interest has been expressly allowed.⁵⁵
99. Secondly, there are decisions where the possibility of compound interest appears to have been acknowledged, but the circumstances were not thought to be appropriate for its award.⁵⁶
100. Thirdly, there is the decision of Chamber I of the Iran-US Claims Tribunal in the *Sylvania Technical Services* case⁵⁷ in which, although it was stated that “the Tribunal has never awarded compound interest”, the Tribunal specifically declared its intention to “derive a rate of interest based approximately on the amount that

⁵⁴ See *Flexi-Van v. Iran* 9 Iran-US CTR 206 (“Most awards allocate only simple interest, but occasionally compound interest has been awarded”).

⁵⁵ *Fabiani's case* (Moore's Digest of International Law 4878-4915 (1905)); the *Affaire des Chemins de Fer Zeltweg-Wolfsberg* (UN Reports of International Arbitral Awards, vol. 3, 1795, at 1808 (1934)); *Kuwait v. Aminoil* (66 International Law Reports 518, 613 (1982)).

⁵⁶ *Norwegian Shipowners' Claims* (UN Reports of International Arbitral Awards, vol. 1, 307, at 341 (1922)); and the observations of Max Huber in *Great Britain v. Spain (Spanish Zone of Morocco)* (UN Reports of International Arbitral Awards, vol. 2, 615, 650 (1924)).

⁵⁷ Iran-US Claims Tribunal Reports, vol. 8, 298.

the successful claimant would have been in a position to have earned if he had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source”.⁵⁸ The late Dr. F.A. Mann has made the following telling comment on this passage: “It is not certain whether the Tribunal realized that investment in six-month certificates of deposit involves earning compound interest”.⁵⁹

101. Fourthly, there are the views of writers of high authority. Dr. Mann concluded the article just cited as follows: “...it is submitted that, on the basis of compelling evidence, compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals”.⁶⁰ The Tribunal does not consider that the expression by Dr. Mann of his conclusion in terms of “damages” renders it inapplicable in the present case. While it is true that the taking by Costa Rica of the Claimant’s Property was not initially unlawful, so that no question of damages then arose, the fact remains that there is no substantive distinction to be drawn, so far as the Claimant is concerned, between an entitlement to damages and his entitlement to compensation. CDSE is entitled to the full present value of the compensation that it should have received at the time of the taking. Conversely, the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.
102. Finally, reference may be made to the scholarly treatment of the subject by Professor Gaetano Arangio-Ruiz, Special Rapporteur of the UN International Law Commission on State Responsibility. After close consideration of the authorities he concluded as follows: “The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved

⁵⁸ Iran-US Claims Tribunal Reports, 13, 199.

⁵⁹ “Compound Interest as an Item of Damage in International Law”, *Further Studies in International Law* (1990), 380.

⁶⁰ *Ibid.*, p. 385.

that it is indispensable in order to ensure full compensation for the damage suffered by the injured State”.⁶¹

103. In other words, while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.
104. In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.
105. In the instant case, an award of simple interest would not be justified, given that since May 1978, i.e., for almost twenty-two years, CDSE has been unable either to use the Property for the tourism development it had in mind when it bought Santa Elena or to sell the Property. On the other hand, full compound interest would not do justice to the facts of the case, since CDSE, while bearing the burden of maintaining the property, has remained in possession of it and has been able to use and exploit it to a limited extent.
106. Consequently, Claimant is entitled to an award of compound interest adjusted to take account of all the relevant factors.
107. On the basis of the circumstances of the case, the Tribunal determines that the compensation payable to Claimant, comprising principal and interest to the date of the Award, shall be U.S. \$16,000,000.

⁶¹ Yearbook of the International Law Commission, 1989, Vol. II, Part 1, p. 30.

M. Costs

108. As noted above, further to a request from the Tribunal the parties submitted, after the oral hearing, their respective submissions with respect to attorneys' fees and other costs and expenses incurred by them in connection with the arbitration.
109. Taking into consideration the circumstances of the case, the Tribunal decides that each party shall bear the expenses incurred by it in connection with the arbitration, and that the costs of the proceeding, including the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the ICSID, shall be borne by them in equal shares.
110. Inasmuch as the parties have advanced to the ICSID equal deposits in respect of, and adequate to pay, the costs of the proceeding, no monetary award of costs is required.

N. Award

111. For all of the foregoing reasons, the Tribunal unanimously **DECIDES** :
1. Respondent, The Republic of Costa Rica, shall pay to Claimant, Compañía del Desarrollo de Santa Elena, S.A., the sum of U.S. \$16,000,000 by way of compensation for the expropriation of the Property that took place on 5 May 1978.
 2. Full payment of the amount of this Award shall be made by Respondent, in accordance with the terms set forth below, within 21 days of the date of this Award.
 3. In the event that full payment of the amount of this Award is not made within 21 days hereof, simple interest on the said sum of U.S. \$16,000,000 shall be payable by Respondent, at the rate of six percent per annum as of the date hereof until the date of payment.
 4. Full payment of the amount of this Award shall mean the payment by Respondent of the sum of U.S. \$16,000,000, with post-award interest thereon, if any, to Crestar Bank, 1445 New York Avenue, N.W., Washington, D.C. 20005 (bank routing number 054000522), for trust account of *Arnold & Porter for benefit of Compañía del Desarrollo de Santa Elena, S.A.*, and the confirmed receipt thereof by said Crestar Bank.
 5. Upon full payment of the amount of this Award, each of the

Claimant and Defendant shall take all measures necessary, including any type of protocolization that may be required, for the registration in the name of the Republic of Costa Rica of the 15,210 hectares of the Property on the basis of which the Property has been valued. Upon counsel for Claimant, Arnold & Porter, and counsel for Respondent, White & Case, each certifying in writing to Crestar Bank that the aforesaid measures have been taken, Crestar Bank shall release to CDSE the amount originally deposited to the benefit of CDSE, together with any interest thereon that has accrued while the amount has been held in the trust account. Thereafter, neither party shall have any further claim against the other in respect of the whole or any part of the Property or any matter relating thereto, in particular in respect of the approximately 5400 hectares in the northwest and approximately 590 hectares of the Property sold by CDSE or occupied by squatters which have not been valued in determining the compensation owed Claimant, and all issues or claims relating to compensation for the expropriation of the Property and the transfer of ownership thereof shall be considered to be fully and finally resolved.

6. Each party shall bear the expenses incurred by it in connection with the arbitration. The costs of the proceeding, including the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the ICSID, which have been covered by equal advance deposits by both parties, shall be borne by the parties in equal shares.

L. Yves Fortier, C.C., Q.C.
President

Sir Elihu Lauterpacht, C.B.E., Q.C.
Arbitrator

Professor Prosper Weil
Arbitrator