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65] *(b)* the model of specific provisional measures which would use as a pivotal point the premise of notoriety and which would be in line with the necessity of seeking a peaceful solution to the civil war in Bosnia-Herzegovina, on the one hand, and the undertaking of all measures which could contribute to the prevention of any commission, continuance or encouragement of the heinous international crime of genocide, on the other.

The specific provisional measures could be indicated either alternatively or cumulatively in relation to the general provisional measure.

In view of the fact that the provisional measures indicated in the Order differ substantially, it is with regret that I avail myself of the right to express a dissenting opinion.

(Signed) Milenko KREĆA.

[Report: *ICJ Reports 1993,* p. 325]

Arbitration — Arbitration between government and foreign company — UNCITRAL Rules — Composition of Tribunal — Failure of party to appoint arbitrator—Nomination of appointing authority by Secretary-General of Permanent Court of Arbitration — Procedure — Jurisdiction of Tribunal — Jurisdiction confined to matters covered by agreement to arbitrate—Whether including claim for violation of human rights — Award — Binding nature — Whether Tribunal can reconsider first award at behest of party — Costs — Award of costs to successful party

Expropriation—Indirect expropriation—Nature of expropriation —Series of acts constituting expropriation of investment—Arrest and deportation of investor — Compensation for expropriation of investment in going concern

Damages — Compensation for expropriation — Expropriation of investment in going concern — Standard of compensation — Whether to include loss of future profits — Discounted cash flow

method of calculating future profits — Lack of evidence on which to base assessment of future profits — Restitution of original investment — Currency in which compensation to be payable — Whether requirement that currency be convertible — Date at which rate of conversion to be determined — Interest

BILOUNE AND MARINE DRIVE COMPLEX LTD *v.* GHANA INVESTMENTS CENTRE AND THE GOVERNMENT OF GHANA

Arbitration Tribunal

(Judge Schwebel, *President*; Wallace and Leigh, *Arbitrators*)

Award on Jurisdiction and Liability. 27 *October* 1989

Award on Damages and Costs. 30 *June* 1990[1]

SUMMARY:[2] *The facts*:—The dispute arose out of certain investments made by the claimant, Antoine Biloune, a Syrian national, involving the development of a hotel resort complex on Marine Drive in the city of Accra, Ghana. Although Mr Biloune had been a resident of Ghana for many years, his investments were made under a framework established by the Ghana Investments Centre ("GIC"), a government entity charged with the encouragement of foreign investment in Ghana. The investment agreement between Mr Biloune and the Ghana Investments Centre (as well as the underlying investment law) included an arbitration clause which referred to the UNCITRAL arbitration rules.

Mr Biloune formed a joint venture with another governmental entity for the development of the Marine Drive resort complex. Remodelling and construction work had proceeded substantially to completion when government officials issued an order to stop work, citing the lack of a building permit. A few days later, the city authorities demolished part of the project. At the same time, Mr Biloune and other investors were subjected to financial scrutiny by a "National Investigations Committee" charged with investigating alleged improprieties in connection with the project. After Mr Biloune had submitted a required assets declaration form he was arrested, held in custody for thirteen days without charge, and then deported from the country. The Government thereafter issued a notice stating that the site of the project was closed except for access by security forces. Mr Biloune was not permitted to return to Ghana or to carry out any further work on the project, which remained uncompleted.

[1] Delivered to the Parties on 16 July 1990.

[2] The Summary is largely drawn from a Note prepared by Mr Mark Davis, of Counsel at Steptoe and Johnson, Washington, D. C. Mr Davis served as Registrar of the Arbitration Tribunal. The text of the two awards is taken from the public record of the enforcement action in *Biloune* v. *Ghana Investments Centre*, filed in 1990 in the United States District Court for the District of Columbia.

Mr Biloune and Marine Drive Complex Ltd ("MDCL") commenced arbitration proceedings against GIC and the Government of Ghana. Mr Biloune alleged that the respondents interfered with his investment in MDCL and, by various means, including his arrest and deportation, effectively expropriated the assets of MDCL. He claimed damages for expropriation, denial of justice and violation of human rights. The respondents denied that they had expropriated or unnecessarily interfered in Mr Biloune's investment in MDCL and asserted that Mr Biloune's arrest and deportation were for reasons unrelated to the investment and were justified under the law of Ghana. The respondents also contended that the Tribunal lacked jurisdiction over the human rights claim and that the claim for denial of justice had been rendered moot by their participation in the arbitration.

Composition of the Arbitral Tribunal

The respondents initially declined to respond to Mr Biloune's notice of arbitration and declined to appoint the second arbitrator, as required under the UNCITRAL rules. In such a situation, the rules empowered the Secretary-General of the Permanent Court of Arbitration to designate an "appointing authority" to appoint the missing arbitrator. This provision was invoked and the Secretary-General designated Dr Ibrahim Shihata of the International Centre for the Settlement of Investment Disputes as the appointing authority. Dr Shihata selected Mr Monroe Leigh, of Steptoe and Johnson in Washington, D. C., as the second arbitrator. Mr Leigh and the claimant's selected arbitrator, Professor Don Wallace, Jr, of Georgetown University, named Judge Stephen Schwebel of the International Court of Justice as the third and presiding arbitrator.

Procedure

According to the Tribunal's authority under the UNCITRAL rules, the arbitration panel ordered an exchange of briefs on general and specific issues and convened a hearing in Washington, D. C., at which witnesses and representatives of both sides appeared. Since the parties had not otherwise agreed, the tribunal selected English as the language of the arbitration and designated Washington, D. C. as the place of arbitration.

Award on Jurisdiction and Liability (27 October 1989)

Held:—(1) An arbitration panel had no power to decide any dispute except that which the parties had agreed to submit to arbitration. In the present case, in addition to the investment dispute, the claimant sought recovery for various alleged violations of his human rights by the Government of Ghana, including his arbitrary detention and expulsion from the country. The alleged actions could constitute a violation of international standards governing the treatment of foreign nationals as well as fundamental human rights. However, the Tribunal lacked the jurisdictional power to address these claims and had to limit its decision to the investment dispute which the parties had agreed to arbitrate.

(2) The UNCITRAL rules treated amendments of a statement of claim in a permissive way, permitting a claimant to amend, unless undue delay or prejudice would result. In the present case, the claimant had originally failed to name the Government of Ghana as a respondent, but later sought to amend the claim to include the Government. There was no reason to forbid the amendment, since it was clear that the Government was aware of, and had been actively participating in, the defence of the suit from its inception.

(3) The Tribunal was faced with conflicting claims as to the calculation of the value of the investment, which turned largely on the accuracy of accounting records. The contemporaneous books and records of a company regularly kept in the normal course of business should be presumed to be accurate, subject to proof to the contrary by the opposing side. While there were allegations of accounting errors and inaccuracies in the company's books, there was not sufficient evidence to reverse the presumption in favour of the contemporaneous company records.

(4) The respondents objected that their investment agreement with the claimant obligated the Government to refrain only from an explicit expropriation by a positive act of law, rather than the constructive expropriation which the claimant alleged. They argued that a claim based on such a constructive expropriation was not arbitrable. There was no justification, however, for drawing a distinction between explicit expropriation and constructive expropriation. There was no basis for permitting a government to expropriate indirectly what it had undertaken not to expropriate directly.

(5) A series of actions by a number of governmental agencies had prevented the claimant from pursuing the project. These actions amounted to a constructive expropriation of the claimant's investment. The Government's explanations for the various actions were not sufficiently probative or convincing to constitute a non-expropriatory justification for the actions.

(6) The agreement with GIC specified that it should be construed according to the laws of Ghana. However, neither party had pleaded any principle of Ghanaian law that was particular to the understanding of the issues in this case or argued that Ghanaian law on the central issue of expropriation diverged from customary principles of international law. Thus the central issue of expropriation was decided by the application of international law.

(7) Although the exact amount of compensation would have to be determined in a subsequent award, the principle of international law regarding standard of compensation for expropriation, i.e., that a claimant whose property had been expropriated was entitled to prompt, adequate, and effective compensation, would be applied. This standard required an award in the amount of the fair market or actual value of the property at the time of expropriation, and paid in a form that could be freely repatriated.

Award on Damages and Costs (30 June 1990)

Held:—(1) The respondents had asked the Tribunal to reconsider and annul the first award. UNCITRAL rules did not, however, permit such reconsideration, since all awards were considered to be final and binding when made. The Tribunal had an inherent power to take cognizance of

credible evidence that its earlier award had been obtained by fraud, forgery or false testimony but no evidence of such misconduct had been adduced.

(2) An accurate measure of the fair market value of an expropriated going concern had to take into account future profits. The use of the discounted cash flow method of valuation was appropriate in this respect but sufficient information on profitability had not been provided. The award would therefore be based on the historical investment value of the project. The claimant was thus awarded restitution of the amounts he actually invested in the project with no award for lost profits.

(3) Part of the investment had been made in Ghanaian cedis, a non-convertible currency. The claimant had asserted that full compensation required an award in US dollars (or other convertible currency), converted at the rate prevailing on the date of the original investment. It was true that these amounts awarded had to be freely convertible. However, the appropriate conversion rate was that prevailing at the date of the award. To require conversion at the rates applicable on the date of the investment would amount to requiring the Government to insure foreign investors against depreciation of the local currency. Investments made in dollars, deutsche marks or sterling would be awarded in those same currencies.

(4) Interest from the date of expropriation was required in order fully to compensate the claimant for the delay in payment. Interest would therefore be awarded from the date of the expropriation at the London Interbank Offered Rate.

(5) The respondents should pay the fees of the arbitrators and other costs of the arbitration. Given the relatively small amount at issue, the Tribunal would moderate its fees and expenses to the extent possible. The claimant was also entitled to the full amount of lawyers' fees incurred in prosecuting the case.

The text of the award on damages and costs, delivered on 30 June 1990, commences at p. 211. The following is the text of the award on jurisdiction and liability, delivered on 27 October 1989:

Award on Jurisdiction and Liability

1. INTRODUCTION

This dispute arises out of the business activities in Ghana of the Claimants, Antoine Biloune and Marine Drive Complex Ltd ("MDCL"), a Ghanaian corporation of which Mr Biloune is the principal shareholder. Mr Biloune alleges that the Ghana Investments Centre ("GIC") and the Government of Ghana ("Government") have interfered with his investment in MDCL and that by various means, including Mr Biloune's arrest and deportation from Ghana, the Respondents effectively expropriated the assets of MDCL. Mr Biloune claims damages for expropriation, denial of justice and violation of human rights. The Respondents deny that they expro-

priated or unreasonably interfered in Mr Biloune's investment in MDCL. They assert that Mr Biloune's detention and deportation were for reasons unrelated to the investment and were justified under the law of Ghana. Moreover, the Respondents maintain that the question of denial of justice has been mooted by their participation in this arbitration and that the claim of violation of human rights is beyond the jurisdiction of this Tribunal.

II. PROCEDURAL HISTORY

On February 10, 1988, the Claimants, by counsel, wrote to the Chief Executive of GIC setting forth their allegations, and informing GIC that the Claimants were thereby requesting arbitration in accordance with the UNCITRAL rules. In so doing, the Claimants invoked Article 15 of the Agreement dated November 18, 1986 between MDCL and GIC ("GIC Agreement"), which article provides:

> (1) Where any dispute arises between the foreign investor and the Government in respect of the enterprise, all efforts shall be made through mutual discussions to reach an amicable settlement.
>
> (2) Any dispute between the foreign investor and the Government in respect of an approved enterprise which is not amicably settled through mutual discussions may be submitted to arbitration;
>
> (a) In accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law . . .

Having received no response from the Respondents, on March 11, 1988, the Claimants' counsel notified the Respondents by telex of the Claimants' nomination of Professor Don Wallace, Jr as sole arbitrator, or requesting GIC's nomination of its arbitrator to a three-judge panel.

On April 20, 1988, having received no response from the Respondents, the Claimants' counsel wrote to Mr Jacob Varekamp, Secretary-General of the Permanent Court of Arbitration in The Hague, who is also, by virtue of that position, the "designating authority" under the UNCITRAL Rules. In the letter, the Claimants requested, pursuant to Article 7 of the UNCITRAL Rules, that he designate an appointing authority to select the arbitrator for the Respondents.

On May 18, 1988, Mr. Varekamp wrote GIC, requesting their views on the matter. In a response dated June 7, 1988, Respondent GIC acknowledged receipt of the Notice of Arbitration of February 10, 1988 and stated that it was "liaising with Government agencies" regarding the dispute.

In the absence of the appointment of the second arbitrator by the Respondents, on July 13, 1988 Mr Varekamp designated Dr Ibrahim F. I. Shihata, Secretary General of the International Centre for

Settlement of Investment Disputes, as appointing authority. Mr Shihata's office informed the Parties of his acceptance of the appointment on August 30, 1988. Having received from the Respondents no response, on September 15, 1988 Dr Shihata designated Monroe Leigh, Esq as the second arbitrator.

The first two arbitrators met pursuant to Article 7 of the UNCITRAL Rules, and on October 5, 1988 selected Judge Stephen M. Schwebel of the International Court of Justice as Presiding Arbitrator. Judge Schwebel accepted the appointment on October 6, 1988, thus constituting the Tribunal.

The Tribunal communicated to the Parties its decisions on a number of preliminary matters on October 12, 1988, including selection of Washington, D. C. as the place of arbitration and designation of English as the language of Tribunal proceedings, pursuant to Articles 16 and 17 of the UNCITRAL Rules. Mark David Davis was appointed Registrar of the Tribunal.

As requested by the Tribunal, on November 15, 1988, the Claimants submitted their Statement of Claim to the Respondents and to the Tribunal. On December 2, 1988, Dr Kobena G. Erbynn, Chief Executive of GIC, wrote to the Registrar objecting that arbitration was premature because consultations aimed at amicable settlement had not been held between the Parties, as required by the arbitration clause in the GIC Agreement. The Tribunal requested the Claimants' Comments on this objection, which were received on December 15, 1988. The Respondents were given an opportunity to respond to those Comments by December 22, 1988.

By a communication to the Registrar dated December 20, 1988, Ms Ruth Nyakotey, Secretary to the GIC Board, informed the Tribunal that GIC had not yet received the Claimants' Comments of December 15, 1988. In response the Tribunal requested the Claimants to deliver a copy of their Comments to the Embassy of Ghana in Washington, D. C. for forwarding to the Respondents, and extended the deadline for the Respondents' observations thereon to January 25, 1989.

In messages to the Registrar dated January 26 and 30, 1989, signed by the Solicitor General of Ghana, Mr C. H. A. Tettey, the Government of Ghana requested additional time to respond to the Claimants' Comments on the Respondents' procedural objection, and to obtain the advice of counsel in Washington D. C. The Tribunal extended the time to March 2.

On March 6, 1989 the Tribunal received from GIC a letter dated March 2, 1989, stating that its Statement of Defense was attached. (The Statement of Defense itself was delivered March 10.) In that letter, GIC requested an additional extension of the time to respond to the Claimants' Comments on the procedural objection, stating that "owing to unavoidable circumstances we have not been able to

engage Counsel to represent us in Washington D. C.''. This request was reiterated in a telegram dated March 8, 1989.

Since the Statement of Defense purported to maintain the Respondents' preliminary procedural objection to the Tribunal's jurisdiction, while advancing substantive defenses to the Claimant's claims, the Tribunal decided, by order of March 14, 1989, to join consideration of the jurisdictional objection to the merits. In that Order the Tribunal also declined to grant any further extension for the Respondents' response to the Claimants' Comments on the procedural objection, but rather granted both Parties an opportunity to submit any further argument or evidence on any issue in the case. The Tribunal posed a number of specific issues on which it wished the Parties to provide additional information or clarification.

On April 10, 1989, the Tribunal was informed by Samuel V. Goekjian, Esq that his firm, Kirkpatrick and Lockhart, had ''just been retained as counsel by the Government of Ghana and the Ghana Investments Centre to represent them in connection with the above arbitration proceedings''. He therefore requested an extension of two weeks to file the additonal submission. The Tribunal extended the deadline to May 1, 1989, but before that deadline was reached, the Tribunal was informed of the hospitalization of Mr Goekjian. An extension to May 15 was requested and granted. On April 26, 1989, an attorney at the firm of Kirkpatrick and Lockhart wrote to the Registrar informing the Tribunal that Mr Goekjian's illness required an additional extension to June 15, 1989. On May 9, 1989, the Tribunal granted the request for extension to June 15, with the observation that it considered the firm of Kirkpatrick and Lockhart, and not Mr Goekjian, as the Respondents' counsel.

The Claimants' Additional Comments and the Respondents' Supplemental Statement of Defense were submitted on June 15, 1989.

A hearing was held in Washington, D. C. on September 19 and 20, 1989, at which both Parties appeared and presented witnesses. Appearing as witnesses for the Claimants were Mr Antoine Biloune, the Claimant; Mr E. D. Kom, the Claimants' solicitor in Ghana; and Mr Able Edusei, former Managing Director of Ghana Tourist Development Company. The Respondents presented as witnesses Dr Kobena G. Erbynn, Chief Executive of GIC; Mr C. H. A. Tettey, Solicitor-General of Ghana; and Mr Samuel Denu, Commerical and Trade Counselor, Ghana Mission to the United Nations. At the Tribunal's invitation, the Parties submitted Post-Hearing Briefs on October 18, 1989.

Except as otherwise noted, the recounting of facts set out in the succeeding paragraphs of this Award is based upon the uncontested record before the Tribunal, as contained in the written pleadings and oral submissions at the hearing.

III. THE PARTIES

A. *The Claimants*

Antoine Biloune is a Syrian national who from 1965 to 1987 resided and carried on business in Ghana. His wife and children are Ghanaian citizens. He was deported from Ghana on December 24, 1987 and is now in London.

Marine Drive Complex Ltd ("MDCL") is a corporation incorporated in Ghana for the purposes of investment and tourist promotion. Incorporated August 27, 1984 as "Class Living Ltd", its name was thereafter changed to Marine Drive Complex, Ltd. Mr Biloune purchased a 60 percent share in MDCL on September 17, 1984; the other 40 percent was stated to be owned by a Ghanaian national, Gilbert Michigan Awoonor. The Claimants explain that in fact Mr Biloune provided 99.2 percent of MDCL's capital, while Mr Michigan Awoonor contributed only 0.8 percent.

B. *The Respondents*

GIC is an agency of the Ghanaian Government, the function of which is to encourage and regulate investments in Ghana. It was originally the sole Respondent.

The Government of Ghana introduced itself as a respondent in letters to the Tribunal and through counsel. It was not originally named in the Statement of Claim, but in its Additional Comments of June 15, 1989 the Claimant amended the claim to add the Government formally as a respondent. The Respondents' counsel objected at the hearing to the inclusion of the Government as a party.

C. *Other Entities*

Ghana Tourist Development Company ("GTDC") is a corporation owned by the Ghanaian Government formed to operate tourist facilities. GTDC concluded a Lease Agreement with MDCL on November 5, 1985 ("GTDC Lease Agreement") for the development of the facilities here at issue. It also was not named a respondent in the Statement of Claim, but was so described in the Claimants' Comments of June 15, 1989. The Respondents' counsel also objected to this amendment.

The Accra City Council ("ACC") is the municipal government of Accra, the site of the project. While the ACC is not named a respondent, the Claimants allege that the ACC, directly and through its Land Department and Town Planning Committee, took some of the actions claimed to constitute the expropriation.

IV. FACTS AND ALLEGATIONS

A. *The Facilities at Issue*

The "Marine Drive Complex" is a parcel of 15.63 acres in Accra, owned by the Government of Ghana. It is bordered by the ocean beach, by Independence Square, and by the grounds of the Osu (or Christianburg) Castle, the seat of the Ghanaian Government. In the late 1960's, the former President of Ghana, Kwame Nkrumah, is understood to have caused a restaurant structure to be built on a 2.95 acre portion of the land. On March 9, 1978, the Government of Ghana leased the entire parcel to GTDC for a 50-year term. GTDC operated the restaurant, through a sublease of the 2.95 acre parcel to an entity called Palm Beach Holiday Resorts Ltd.

B. *The Joint Venture*

Over time the restaurant declined and fell into disrepair, and in 1985, Palm Beach Holiday Resorts Ltd was liquidated. MDCL and GTDC concluded the GTDC Lease Agreement on November 5, 1985. (This sub-lease to MDCL was ratified by the Lands Commission on January 13, 1986.) The Lease Agreement provided for a ten-year lease to MDCL of the 2.95 acre parcel and the restaurant complex, with a five-year renewal option, at a rate of 30,000 cedis per month. Under the Lease Agreement, MDCL was to renovate and manage the restaurant. GTDC wished to have the renovations completed in time for a tourism fair to be held in Accra in November 1986. The Claimants allege that prior even to the conclusion of the formal lease, GTDC issued a letter of intent, granting MCDL (or Class Living, as it was then called) permission to enter the premises and begin renovation work. The Respondents contest the existence of a letter of intent.

At some point in time, which the record does not precisely establish, the nature of the Parties' relationship was modified. The Claimants assert that in place of the lease/operation contract, the parties to the lease negotiated the terms of a joint venture. Minutes of meetings between MDCL and GTDC held in April 1986 show agreement that MDCL's share of the venture was to be fixed at 49 percent, GTDC's at 51 percent; that MDCL was designated manager of the venture; and that a new company would be formed "to hold the property in proportion to the shareholding percentages arrived at". This new company was apparently to be known as "Tourist Company Ltd" , but was never actually formed. The Respondents agree that negotiations were held on the terms of a joint venture, but deny that final agreement was reached. The Claimants allege that MDCL's and GTDC's lawyers were entrusted with the duty of reducing the agreement to writing, but

failed to do so. Both sides agree that there is no written joint venture agreement.

In early 1986, MDCL commissioned a feasibility study for the expansion of the facilities by the firm of Lambrise Industrial and Commercial Management. This study was completed in April 1986. It contemplated an expansion of the original scope of the project from simply renovating the existing restaurant to the construction of an extensive new 4-star hotel resort complex. The project, when completed, was to include 19 "chalets" or guest houses, restaurants, a cabaret, pool, gym, shops and various services.

It is common ground between the Parties that after the work was commenced certain questions about the project were raised by the Provisional National Defence Council ("PNDC"), the national Government of Ghana, whose headquarters are at Osu Castle, adjacent to the project side. These questions involved possible security risks caused by development of the project so close to the castle—particularly since the only paved access road to the site passed directly in front of the Castle. The Claimants allege that a compromise was reached whereby MDCL would construct a security wall along the road between the Castle grounds and the project site and the Government would build a new access road to redirect traffic away from the road near the castle. The Claimants allege that MDCL in fact constructed the wall, and submitted a map in evidence of that claim, but the Government failed to build the new road. The Respondents concede that construction of a new road was considered, and it appears that meetings between MDCL and various Ghanaian authorities took place in this regard. However, at the Hearing, the Respondents maintained that if the road had been constructed it would have been at MDCL's expense. At the Hearing, the Respondents denied any knowledge of the existence of a security wall.

C. *The GIC Agreement*

In April 1986, MDCL applied to GIC to obtain for the expanded project certain benefits available to joint ventures between foreign and Ghanaian partners under the Ghana Investments Code of 1985. The application showed Mr Biloune as 60 percent owner of MDCL and Mr Michigan as 40 percent owner; it also specified that the amount to be paid for such shares by Mr Biloune was 24.7 million cedis, and by Mr Michigan, 150,000 cedis. MDCL submitted the April 1986 Lambrise study as part of the application process.

On July 16, 1986, GIC's Investment Services Division reported favourably on the project. The GIC Report noted that much of the construction had already been started, with the exception of the chalets, which were expected to be begun in August 1986. GIC

approved the investment, granting the requested investment concessions. These concessions included an Establishment/Manufacturing License, approval of a 60 percent foreign shareholding, a customs exemption, accelerated depreciation/capital allowance, certain tax holidays, an immigration allowance, and certain guarantees as to foreign currency convertibility and repatriation. This arrangement was formalized in the GIC Agreement of November 18, 1986. The Agreement also contained the arbitration clause quoted above at paragraph 2 and the following provisions:

> 22. Subject to the provisions of the Code:
> (a) no enterprise approved under the Code shall be expropriated by the Government.
> (b) no person who owns, whether wholly or in part, the capital of an enterprise approved under the Code shall be compelled by law to cede his interest in the capital to any other person.

D. *MDCL's Activites*

At the outset of the project MDCL hired an architectural firm, Dewger, Gruter, Brown and Partners ("DGB") and also an engineer, Anthony Moore, to oversee the planned renovations to the facilities. When the project's scope was expanded, the same firm was retained to prepare plans and get Accra city planning approval for construction of the additional buildings and the swimming pool. According to the Claimants, GTDC had previously retained the same consultants for other projects, and recommended them to MDCL.

The engineering/architectural consultants prepared a building permit application dated June 2, 1986, which was certified as "received" by the Accra Town Planning Committee on August 27, 1986. The Claimants maintain that, before the building permit was obtained (or even sought), GTDC obtained the ACC's assurances that approval would be forthcoming and instructed MDCL to proceed with the work without the permit. The Respondents deny that any such assurances or instructions were or could be given.

The Respondents allege further that, as stated in affidavits of representatives of the ACC and the Planning Committee, the application for a building permit submitted by DGB for the project was not approved because it was incomplete, lacking "detailed drawings, sections and elevations". The Respondents submitted in evidence to the Tribunal a copy of the application; plans and drawings were not attached to the copy submitted to the Tribunal, but that application states that they were attached. The Claimants maintain that plans and drawings were attached to the application form and that, in any event, if they were not submitted with the application, they were submitted soon thereafter. The Claimants submitted in evidence a copy of a site

plan titled "General Layout of the Complex", dated September 15, 1986, which shows in detail the physical orientation of the project.

The April 1986 Lambrise study was updated in May 1987. The consultants reported that 80 percent of the remodeling of the existing restaurant structure was complete by May 1987, and work on most of the new structures had reached "some construction level stage". However, construction of the 19 "chalets" had still not yet begun. It is contended by the Claimants that, by September 1987, virtually all of the project—excluding the chalets—was completed, except for the furnishings. The Respondents contend that the major part of the work remained to be done.

E. *Interruption of the Project*

According to the Claimants, on August 28, 1987 (one year after the building permit application was received), the Chairman of the Accra City Council, Mr Enoch T. Mensah, visited the site, asked to see the building permit and, when no building permit could be produced, caused a Stop Work notice to be issued. The notice, addressed to GTDC as "Owner or Developer", required GTDC, "on or before the 4th day of September 1987", to "show cause" why the construction in progess "should not be STOPPED and DEMOLISHED". On September 3 (a day before the deadline), the ACC ordered demolition of the project, which in some measure was carried out. The Respondents accept the foregoing claims, except they deny that Mr Mensah himself visited the site.

Mr Biloune immediately informed GTDC of the demolition. Thereupon GTDC's Acting Managing Director, Lt Col C. B. Yaache, delivered a letter dated September 3, 1987 to the ACC, stating as follows:

> 3. In partnership with a group of entrepreneurs (Marine Drive Complex Limited) we planned to refurbish the project . . .
>
> . . .
>
> 5. The relevant application for a building permit to cover the extension works envisaged was submitted to the Accra City Council through the Accra Town Planning Committee on 27th August 1986 . . .
>
> 6. We started the construction of some of the new structures before the issue of the necessary permit because:
>
> (a) We were assured by Town Planning Department that there would be no difficulties in securing the said permit even though it would take sometime.
>
> (b) It was assumed that ACC would readily grant approval since it was for extension work and not a new building project.
>
> (c) We needed to start the extension works early to be able to finish early enough for Inter-Tourism 86 . . .

6. [sic] In view of the foregoing, it is please requested that you review the decision to demolish the structure starting 4th September, 1987. It is please intimated that actual demolition work started on 3rd September, one clear day before the deadline given us.

Some days later, on September 10, 1987, GTDC wrote a letter to P. V. Obeng, who was "Chairman of the Committee of PNDC Secretaries" —apparently effectively the Prime Minister of Ghana—and who was also Chairman of the Board of GIC. Lt Col Yaache repeated several of the same points as in the letter of September 3, but added that GTDC's negotiations with MDCL "result[ed] in an agreement" on the construction of the project, including "a security wall around the premises". According to Lt Col Yaache's letter to Mr Obeng:

It was also agreed that:
(a) Regardless of the levels of investment of the two partners, [GTDC] would remain the majority shareholder with 51 percent shares.
(b) [GTDC] would exercise control and supervision over the project.
(c) [GTDC] would monitor all Investment Concessions to [MDCL] in respect of matters related to the property.
(d) [MDCL] would manage the complex for an initial period of 10 years with an option of renewal.

Lt Col Yaache further wrote:

7. Construction of some of the new structures started before the issue of the necessary permit because of several reasons, including the following:
(a) the project was approved by the Investment Centre and an agreement signed accordingly.
(b) We were assured by the Town Planning Department that there would be no difficulties in securing the said permit even though it was going to take some time.
(c) It was assumed that Accra City Council would readily grant the permit since it was for extension works and not a new building project.
(d) There was need to start the works early to be able to finish early enough for Inter-Tourism 86. Incidentally this deadline could not be met due to unforseen circumstances.

He noted in addition that "the project is 51 percent owned by the Government and not a privately owned venture". He requested that Mr Obeng "take the necessary action to save the project from destruction and enable us [to] proceed with the construction works". Finally, Lt Col Yaache concluded: "It is the view of this Company that there is something more to the reaction of the Accra City Council than the reason of 'failure to obtain a Building Permit' ".

The Claimants rely upon these letters of Lt Col Yaache as proof of the existence in fact of the joint venture and of GTDC's acceptance of

responsibility for ordering MDCL to start work before the permit was secured. The Respondents state that after receipt of Lt Col Yaache's letter of September 3, no further demolition occurred. It is common ground that the permit was never granted.

The explanation offered in the hearing by Mr Edusei, former Managing Director of GTDC, was that the permit could not be issued because the Planning Committee were not able to locate the original permit for the initial construction of the restaurant on the Marine Drive site. Testimony was offered to the effect that there was no such original permit because the building had been constructed on the personal orders of former President Nkrumah, whose instructions were not subject to examination.

On September 3, 1987, the *People's Daily Graphic* contained the following notice:

> TO REPORT
>
> The following persons who have connection with a company called Marine Drive Complex Ltd are to report to the National Investigations Committee at the former Border Guards Headquarters today, September 3, at 10 a.m.
>
> They are Antoine Biloune, Gilbert Awoonor-Williams, alias Michigan, Commander (Rtd) J. W. K. Arthur and Nana Prah.

The Claimants assert that the same announcement was also made over Government-controlled radio on September 2. As ordered, Mr Biloune and the other named MDCL officers reported to the National Investigations Committee where they were given "assets declaration forms" and ordered to fill them out within 14 days. In addition, they were ordered to report to the National Investigations Committee twice a week.

On September 7, 1987, Mr Biloune wrote to GIC a letter in the following terms:

> It has come to our notice after an inquiry by the Accra City Council that we have been carrying out construction works without permit. The procuring of the permit is the sole responsibility of our Consultants namely Messrs Anthony Moore/Deweger Gruter Brown and Partners. Although these Consultants submitted the application to the Town and Country Planning on 27th August, 1986, they failed to follow it up.
>
> On 28th August, 1987, Accra City Council gave us a Demolition Notice which expired on the 4th of September, 1987. On the 3rd of September, 1987, Accra City Council moved in and destroyed part of the new construction works.
>
> Ghana Tourist Development Company Limited who is the majority shareholder of this project was contacted. They made several efforts to plead for extension of the date line but failed. [sic]

On the 2nd of September, 1987, an announcement on the radio requested myself, Nana Prah who is the Ag. Managing Director, and other persons to report to the National Investigations Committee (NIC) at 10 a.m. the following day. We reported accordingly and after providing our personal particulars in writing, we were served with Assets Declaration Forms to be completed within 14 days and we were told to report twice a week to the office of the NIC.

I have so far invested over $700,000 in the project made up of both local and foreign currency. We are in constant touch with both local and foreign investors who have shown considerable interest in the project. (Please find attached copies of correspondence to this effect).

In view of these unusual developments, and absence of security clearance from the government for the project as well as lack of serious consideration for alternate road from behind the Independence Square, it seems to me that the Government may not be interested in the project after all. I can not and do not intend to oppose the wishes of the Government.

I therefore appeal to you to use your good offices to clarify the position regarding Government support for the project, the provision of security clearance for the project and the construction of the alternate road to the site. The result of this clarification will assist me and other foreign investors to decide whether to continue with the project or direct our efforts elsewhere.

Yours faithfully,

Antoine Biloune (Chairman of Board of Directors of Marine Drive Complex Ltd and main Investor (signed))

On September 17, 1987, Mr Biloune wrote to GIC explaining that one of the persons ordered in the September 3 announcements to report to NIC, Comdr J. W. Arthur, had no connection with MDCL. On September 26, 1987, members of GTDC board were replaced, including the Acting Managing Director, Lt Col Yaache, who was "redeployed"—apparently returned to military service. The Respondents stated at the Hearing that Lt Col Yaache now serves as Director of State Lotteries.

F. *Suggestion for Arbitration*

On October 19, 1987, NIC referred the MDCL case to the Office of Revenue Commission. On November 5, 1987, Mr Biloune wrote to GTDC's new Managing Director, requesting its intervention and assistance.

On November 18, 1987, Mr Biloune wrote again to GTDC, complaining of its lack of response. He reported accumulating heavy losses, and stated his intent to "seek arbitration under the UNCITRAL Rules 'as our project and investment is guaranteed under the Investment Code'." Copies of this letter were sent to the Provisional National Defence Council, and to the Ghana Investments Centre.

Also on November 18, 1987, Mr Biloune wrote to GIC (with a copy to the PNDC), inviting GIC to nominate an arbitrator for the matters "to be inquired into"—or to submit the matter to arbitration. The Claimants maintain that the reference to an arbitrator for an "inquiry" was an invitation to informal conciliation, prior to formal arbitration.

On November 24, 1987, Mr Biloune wrote to GTDC (with copies to GIC and the PNDC) that he was handing over the affairs of MDCL to Mr E. D. Kom, his solicitor, and Messrs Osei-Wiredu and Associates, his accountants, as "Administrators", pending settlement of the dispute. According to Mr Kom's testimony before the Tribunal, he, as administrator, was charged with conserving the assets of the enterprise and suspending the construction work. He released and paid the construction employees and other personnel and put the tangible assets, such as construction materials, into storage. The Respondents characterize the appointment of the administrators as an abandonment of the project.

G. *Arrest and Detention*

Mr Biloune or his accountants requested and obtained a number of extensions of the deadline to file his assets declaration form. Ultimately, on December 10, 1987, after his accountants requested an extension to that date (apparently not granted), Mr Biloune submitted the assets declaration form.

On December 11, 1987, Mr Biloune was arrested and held in custody for thirteen days without charge. Mr Biloune testified that he was arrested late at night by plain-clothes para-military police. The Respondents dispute this, asserting his arrest was during daylight, as required by law.

On December 15, 1987, a deportation notice was issued, signed by Nii Okaija Adamafio, Acting Secretary for the Interior for the Provisional National Defence Council. The order stated that the "presence in Ghana of ANTONNE BILLOUNE [sic] is not conducive to the public good". The notice ordered Mr Biloune to leave Ghana that same day, *i.e.*, "on 15th day of December, 1987". Mr Biloune states that he was not informed of the notice until his actual deportation over a week later. The Respondents assert that Mr Biloune was ordered deported because he failed to submit his assets declaration form on time, and had at least twice before been involved in illegal financial dealings. On December 18, 1987, a noticed appeared in the *People's Daily Graphic*, to the effect that:

> The general public is informed that with effect from today, December 18 the area behind the Independence Square, covering the distance from the

Old Palm Court Restaurant up to the Labour Point along the beach, is closed to the public except Security Forces. The public is hereby warned not to trespass this area until further notice.

The Claimants allege that this closing, which blocked public access to the Marine Drive project site, was unprecedented. They charge that the closing of access was intended to and did prevent resumption of work at the site. The Respondents assert that the closing had nothing to do with the MDCL project, but was to permit preparation for a New Year's parade. They deny, in any case, that the area closed prevented construction access to the restaurant site, since an unpaved road remained available.

On December 24, 1987, Mr Biloune was deported from Ghana to Togo. He visited the United States, where he and counsel sought assitance from the Ghanaian Ambassador to the United States. He later applied for political asylum in the United Kingdom. The Respondents stated in the course of the hearings that Mr Biloune will not be permitted to return to Ghana.

V. JURISDICTIONAL ISSUES

As a preliminary matter, this arbitral Tribunal must satisfy itself that it has jurisdiction to hear the dispute placed before it and that it has the power to adjudicate the rights and obligations of the Parties before it. That is, the Tribunal must find that the dispute falls within a valid and binding arbitration clause.

A. *Prerequisite of Efforts at Amicable Settlement*

The Respondents' initial communication to the Tribunal raised the preliminary objection that the arbitral proceedings were instituted before opportunity for reconciliation or consultation. This assertedly is in violation of the arbitration clause at Article 15 of the GIC Agreement, which requires that before arbitration is commenced, "all efforts shall be made through mutual discussions to reach an amicable settlement". The Tribunal previously deferred this issue to the merits phase of the proceedings, and it is now addressed.

1. *Respondents' Contentions*

The Respondents object that the Claimants commenced arbitration prematurely, because the "preliminary part of the dispute-settlement mechanism established [by the Code and GIC Agreement] has not yet been exhausted". The Respondents represented that "since the matter came to our notice . . . we have been continuing in our efforts

at consultations in order to enhance the possibility of reaching an amicable settlement between the Centre and the Company".

In a letter to the Claimants' counsel dated December 2, 1988, the Respondent GIC stated the following:

> We are surprised by the impression [in the Notice of Arbitration of February 10, 1988] that all efforts to resolve the issue amicably had failed. Since your client brought his grievances to our notice, we have been liaising with the relevant agencies of Government to help resolve the problem as part of our efforts to help resolve the issue amicably.
>
> . . .
>
> We have been able to secure necessary assurance from the Accra City Council and the Ghana Tourist Development Company Limited of the willingness to assist in resolving the issue amicably.
>
> . . .
>
> The Centre (and indeed the Government of Ghana) is committed to resolving this matter amicably in accordance with laid-down rules and procedures.
>
> We are by this letter extending an invitation to the Company and to you or any other representative of Mr Biloune's choice to join us in Ghana to discuss the matter.

In essence, the Respondents object that they were never given an opportunity to settle the dispute amicably, but that they and all other relevant entities and Government agencies were—in December 1988—and now are ready to begin discussions.

2. *Claimants' Contentions*

The Claimants reject the Respondents' suggestion that the Respondents had no opportunity to engage in settlement. The Claimants point to several attempts at reaching a settlement with the Respondents before commencing the arbitration. These efforts include the letters MDCL wrote to GIC and GTDC in September and November 1987 (see paras. 40, 42-44, *supra*), requesting their intervention, and subsequently giving notice of the Claimants' intention to seek arbitration. The Claimants also point to Mr Biloune's visit to the Ghanaian Ambassador in Washington in January 1988 inviting negotiations or agreement to ICSID arbitration, as well as his correspondence in February and March 1988 to the Respondents, formally beginning this arbitration.

3. *Analysis*

The Tribunal believes that the Claimants have made a clear showing of their efforts to reach an amicable settlement. On more than

one occasion the Claimants invited negotiations with the Respondents on this matter. GIC failed to make any response to those invitations. GIC and the Government were fully informed by the Claimants, by the Designating Authority under the UNCITRAL Rules, Mr Varekamp, by the Appointing Authority, Dr Shihata, and by this Tribunal of the establishment and composition of the Tribunal. The Respondents had ample opportunity to negotiate an amicable settlement. GIC did not respond to the Claimants' request for an inquiry into the situation. Nor did the Respondents object to the establishment of the Tribunal until well after proceedings had begun and the Claimants had already prepared and served their Statement of Claim and their evidence concerning the Claim to the Respondents. Although the minutes of GIC board meetings submitted in evidence show that extensive consideration was given to the MDCL problem, including requests for its settlement or arbitration, the fact and content of those deliberations were not communicated to the Claimants until the pleadings were filed in these proceedings.

In the light of these findings, the Tribunal holds that the legal and contractual prerequisite to arbitration—failure of attempts at amicable settlement—was satisfied by the Claimants' efforts and the Respondents' inaction.

B. *Jurisdiction over the Dispute*

The arbitration clause contained at Article 15 of the GIC Agreement is broad, providing for arbitration of "[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise". The Agreement contains an explicit guarantee against expropriation by the Government. There can be no question that a claim that the Government has interfered with and expropriated the Claimants' interest in the venture with GTDC gives rise to a dispute "in respect of an approved enterprise" under the Agreement.

The same cannot be concluded as to the other causes of action alleged, that is, the claim for denial of justice and the claim for violation of Mr Biloune's human rights. As to the first, the Claimants based their claim on the initial failure of the Respondents to submit to arbitration under Article 15 of the Agreement. The Tribunal need not decide whether such a claim could form the basis of a separate claim under the arbitration clause, because that claim is moot. While the Respondents did not participate in the constitution of the Tribunal, and for some time left unclear the question of their participation in the arbitration, they eventually did obtain counsel and took part fully in the proceedings, filing briefs and documentary evidence, appearing at the hearing, and providing their share of the expenses of the Tribunal. Thus no continuing "dispute" between the Parties, over which the

Tribunal could exercise its jurisdiction, exists as to the alleged denial of justice for failure of the Respondents to participate in the arbitration.

In the final cause of action asserted, the Claimants seek recovery for alleged violation by the Government of Ghana of Mr Biloune's human rights. The Claimants assert that the Government's allegedly arbitrary detention and expulsion of Mr Biloune and violation of his property and contractual rights constitute an actionable human rights violation for which compensation may be required in a commercial arbitration pursuant to the GIC Agreement. They assert that the Tribunal should consider this portion of the claim because this is the only forum in which redress for these alleged injuries may be sought.

Long-established customary international law requires that a State accord foreign nationals within its territory a standard of treatment no less than that prescribed by international law. Moreover, contemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights (which, in the view of the Tribunal, include property as well as personal rights), which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights.

This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes "in respect of" the foreign investment. Thus, other matters —however compelling the claim or wrongful the alleged act—are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.

C. *Jurisdiction over the Parties*

The Tribunal must also establish that each claimant before it has a right, under the arbitration clause, to assert a claim and, likewise, that each respondent against which a claim is asserted is a person bound by and subject to the arbitration clause.

MDCL was the foreign investor that entered the Agreement with the Ghana Investments Centre seeking investment concessions from GIC. Mr Biloune was and is the majority shareholder and Chairman of MDCL. The Respondents have not disputed the right of either MDCL or Mr Biloune to appear as Claimants. The Tribunal finds that MDCL

is entitled to invoke arbitration under the GIC Agreement and that Mr Biloune, as MDCL's Chairman and principal shareholder, may assert MDCL's claims. The Tribunal also finds that, in the circumstances of this case, and particularly having regard to GIC's knowledge of Mr Biloune's role of financing and directing the project, Mr Biloune, though not a party to the GIC Agreement, may assert his own claims arising out of his investment in MDCL. The Respondents have not disputed this conclusion, which finds support in Article 22 of the GIC Agreement. The first paragraph of that article prohibits expropriation of an approved enterprise, and the second expressly protects a "person who owns, whether wholly or in part, the capital" of such an enterprise.

GIC is the entity originally named as the Respondent in this arbitration. As signatory to the GIC Agreement, GIC is clearly bound by it and its arbitration clause.

As noted above, the Government of Ghana was not originally named a Respondent in the Statement of Claim. The Claimants sought to add the Government by an amendment in their Additional Comments submitted to the Tribunal on June 15, 1989. Counsel for the Respondents objected to the amendments at the beginning of the hearing.

Under the UNCITRAL Rules, Article 20, a claimant may amend his claim at any time, unless such factors as undue delay or prejudice suggest that such amendment is inappropriate, or the amended claim would fall outside the arbitration clause. In the present case, the amendment was made in the Claimants' first submission on the merits following the Statement of Claim, and in any case confirmed the obvious conclusion. From the outset of these proceedings, it was clear to all concerned that the claim was addressed in large part to alleged acts and omissions of the Government of Ghana. Indeed, several responses to the Tribunal's communications and Orders were submitted not by GIC itself (although some were) but by the Solicitor General of the Government of Ghana. Moreover, the first communication of the Respondents' Washington counsel to the Tribunal introduced counsel as representing both GIC and the Government. Given these clear indications of the Government's awareness of and participation in the proceedings prior to the Claimants' amendment, no prejudice appears.

Of course, in order to be subject to the Tribunal's jurisdiction, the Government must have consented to the arbitration, either now or previously. We need not consider the possibility that the Government's participation in the proceedings might constitute consent, despite counsel's later objection to the Government's inclusion as a party. This is because the Agreement with GIC, an agency of the Government of Ghana, clearly binds the Government; indeed, the Agreement

speaks explicitly of disputes between the investor "and the Government", and the expropriation clause expressly prohibits expropriation "by the Government". Thus the relevant clauses both engage the Government of Ghana, and contemplate claims against it.

The Claimants also sought to add GTDC as a respondent. They refer in addition to the acts of a number of other entities, such as the ACC and its subdivisions, alleged to be controlled by or part of the Government. The Parties differed as to whether, under the current governing law of Ghana, such entities are legally and factually independent of the Government, or whether they should instead be considered as subdivisions or agents of the Government. The Tribunal decides that it need not determine whether these entities, because of their alleged relationship to the Government, could be considered party to the arbitration. No relief is sought against these entities and they need not be parties to this arbitration for their acts to be relevant and considered by this Tribunal in determining the obligations of those entities which are Parties to the arbitration.

D. *Validity of the GIC Agreement*

The final jurisdictional issue is whether the GIC Agreement, which contains the operative arbitration clause, remains in effect and is binding on the Parties. The Respondents have asserted that the GIC Agreement should be held inapplicable because MDCL and Mr Biloune do not qualify as foreign investors as required by the GIC Agreement. They allege that GIC approved the Marine Drive venture for investment concessions on the basis of a 60 percent - 40 percent shareholding between Mr Biloune and Mr Michigan in MDCL. According to the Respondents, the fact that over 99 percent of the financing for the venture was in fact provided by Mr Biloune constituted a misrepresentation which, under Article 20 of the GIC Agreement, permits GIC to cancel its approval.

The Respondents argue in addition that because MDCL obtained GIC approval as a foreign/Ghanaian joint venture, it was required to make a minimum $60,000 foreign currency investment in MDCL, in cash or capital goods. They point out further that if MDCL had sought approval as a venture wholly owned by Mr Biloune, as a foreign national he would have been required to invest $100,000. The Respondents assert that the foreign currency investment advanced by the Claimants as satisfying this requirement—largely a shipment of building materials needed for the construction work worth £47,000—was too little to satisfy the minimum required for an enterprise wholly owned by a foreign investor. The Respondents argue in the alternative that the investment was not registered with the appropriate governmental office, as allegedly required to prove foreign investment in any amount.

The Tribunal does not find these objections sufficient to deprive the GIC Agreement of validity. As to the alleged misrepresentation in describing the capital basis of MDCL, the Tribunal notes that the application submitted to GIC clearly states both that the shares would be split 60 percent - 40 percent between Mr Biloune and Mr Michigan and that Mr Biloune would provide 24.7 million cedis of MDCL's capital compared to only 150,000 cedis for Mr Michigan. This disclosure of the proposed capital arrangements eliminates any basis for the defense of misrepresentation as now alleged. Thus, if in fact such an arrangement is not normally contemplated by GIC, GIC's approval of the application must be considered a waiver of this defense and an acceptance of a modification of the norm. Moreover, it may also be relevant to note that the project at issue was carried forward by what Lt Col Yaache described as a partnership between GTDC (whose shares are wholly owned by the Ghanaian Government) and MDCL.

Much the same can be said about the allegation of insufficient foreign currency investment. The Respondents' defense is deficient in two respects. First, it does not appear that any time limit was imposed within which full foreign currency contributions must be in place. Second, there is no indication in the record that GIC was concerned at the time that MDCL's foreign currency requirements were being implemented too slowly, or that, if it was, that the Agreement was voided as a result. On the contrary, the Parties consistently acted in accordance with the terms of the GIC Agreement, treating it as in force. During the difficulties experienced by Mr Biloune at the end of 1987, it was never suggested that the Agreement was invalid. Accordingly, the Tribunal determines that the Respondents have failed to establish their contention that the GIC Agreement should be considered invalid. This does not mean that issues as to the amounts actually invested in, and paid out by, the enterprise, may not be relevant to the ultimate determinations of this Tribunal. Given the Tribunal's determination of the validity of the GIC Agreement, it need not decide whether, if the Agreement were adjudged invalid, the arbitration clause would nevertheless be separable and provide sufficient basis for this Tribunal's jurisdiction. Nor need it decide whether there is an independent basis for arbitration under Article 20 of the Ghana Investment Code of 1985.

The Respondents have also argued that the expropriation clause in the contract does not apply to a constructive expropriation such as that alleged here, but only to expropriation by act of positive law. There is no basis for such a distinction in the contract, and certainly one cannot reasonably read the Agreement—or customary international law—to permit the Government to expropriate indirectly what it has undertaken not to expropriate directly.

For all the above reasons, the Tribunal holds that it has jurisdiction to decide the claim of expropriation as here presented.

VI. APPLICABLE LAW

The rights and obligations of the parties to the GIC Agreement are governed by the provisions of that Agreement. Article 24 of the Agreement requires the Tribunal to "construe" the Agreement "according to the laws of Ghana". The provisions of Ghanaian law which have been brought to the Tribunal's attention do not relate to the construction of the Agreement. Neither Party pleaded the particulars of the legal principles or provisions of the law of Ghana that should guide the Tribunal's decision on the main contractual issues and, in particular, it was not argued how any provision of the Agreement should be construed in accordance with the law of Ghana. Specifically, neither Party brought to the attention of the Tribunal any interpretation of the GIC Agreement, or of the Parties' rights and obligations under the Agreement, including the prohibition of expropriation, peculiar to the law of Ghana. Moreover, there is no indication that Ghanaian law diverges on the central issue of expropriation from customary principles of international law. On the contrary, both Parties explicitly treated those principles as governing the issue of expropriation.

VII. THE TRIBUNAL'S DECISIONS

The fundamental outlines of the relevant events are clear. Where differences between the Parties on the facts remain, the Tribunal has had recourse to the principle recorded in the UNCITRAL Rules that each party has the burden of proving the facts upon which it relies for its claim or defense. (UNCITRAL Rules, Art. 24.)

Having studied the written evidence presented, the testimony at the hearing, and the Parties' written and oral arguments, the Tribunal has concluded that Mr Biloune in fact owned and operated MDCL with the intention of renovating, expanding, and operating the restaurant/resort complex at Palm Court. It appears that MDCL began renovation work at the request of GTDC even before the Lease Agreement of November 5, 1985 between MDCL and GTDC was signed, formalizing their initial relationship. Although a formal joint venture agreement was not signed, it is clear from GTDC's statements and conduct at all relevant times that there was a *de facto* partnership or joint enterprise under which GTDC contributed the land and existing structure of the Palm Court, and MDCL was to finance and carry out the expansion and renovation. It is also clear that, in fact, MDCL accomplished substantial

work on the premises, although much remained to be done when work was interrupted.

The Tribunal finds in addition that MDCL began work before a building permit was applied for. It appears that GTDC considered the granting of a building permit to be a formality which would eventually be discharged, but which was not necessary prior to starting work. Indeed, the fact that the original Palm Court structure was constructed without a permit ever having been applied for or issued tends to indicate that a permit was not indispensable. Whether GTDC directed, requested or permitted MDCL to begin work without a permit, the Tribunal holds that MDCL was entitled to rely on the indications of GTDC, the long-term leaseholder of the premises, as well as an experienced government-affiliated entity, and to proceed with the work despite the absence of a permit. In this context, the Tribunal has regard especially to the fact that it appeared from the testimony of a witness for the Claimants (which was not contested) that the inability of the Planning Committee to act upon the application resulted from the absence of any prior permit authorizing the building of the original structure. While the letter of the law, as pleaded by the Respondents, supports the contention that extension works of the character contemplated could not go forward without a permit—or, if they did, would be subject to fine or demolition—nevertheless, the practice with regard to this site indicates an exception to the rule.

In late August 1987, a number of events transpired that resulted directly in the claim now asserted. A representative of the ACC ascertained that no permit had been obtained and served upon GTDC a stop work order, giving a deadline in which an explanation was required or GTDC faced demolition of the new construction. On September 3, one day before the deadline, the ACC ordered demolition to begin, and part of the new structure was destroyed. On that same day, MDCL's directors, publicly identified in the press and radio as such, were summoned to the NIC, required to return bi-weekly until further notice, and given assets declaration forms to fill out. Mr Biloune brought all these events to GIC's attention, and was told, he maintains, that his problems did not arise directly out of the lack of a building permit, but rather were "political". This opinion was sustained in substance by GTDC's Acting Managing Director, in the letter quoted above in paragraph 36. MDCL requested GIC to ascertain whether the Government had changed its mind about the project, inquiring in particular as to whether there were security concerns. It appears that the appeals of GIC and GTDC to the ACC resulted in the cessation of demolition, but the permit was never granted. Lt Col Yaache was replaced as Acting Managing Director of GTDC, and MDCL's requests for assistance from GTDC thereafter appear to have

gone unanswered. Board members and other personnel of GTDC were also replaced.

The record shows that Mr Biloune received no satisfactory assurances that the Government's reservations about his project were resolved. It appears that by mid-November, 1987, Mr Biloune concluded that the Government was not willing to permit the project to proceed. He accordingly placed the project in the hands of administrators, and the work force was discharged. Mr Biloune then suggested that GIC consider arbitration as provided in the GIC agreement, and so informed GTDC. Thereafter on December 11, 1987, the day after Mr Biloune submitted his assets declaration forms, he was arrested and detained without charge and, some two weeks later, was deported from Ghana.

This Tribunal must determine whether the above facts constitute, as the Claimants charge, a constructive expropriation of MDCL's assets and Mr Biloune's interest in MDCL. The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events.

The Respondents' defenses on this point are that the various events described above are independent and unrelated, and that their conjunction is coincidental. The Respondents maintain that the independent and unrelated reasons for Mr Biloune's detention and deportation essentially were that in 1985 he was found guilty of selling kerosene stoves above the price-regulated price, that he had been accused by a private Ghanaian party of involvement in a bank fraud scheme; and that the sources of his investment in MDCL had not been shown to the satisfaction of the National Investigations Commission to be in accordance with the currency regulations of Ghana.

The evidence submitted in support of these alternative explanations is not convincing for the following reasons. First, while Mr Biloune admtits that he was fined for an apparently minor price-control infraction in respect of kerosene stoves, that case was apparently

closed in 1985. The allegation of bank fraud is made only in a letter of a private individual which resulted in no indictment or other action by Ghanaian authorities. The sources of all of Mr Biloune's investment in MDCL, on the basis of the record now before the Tribunal, are unclear. But by the same token it is not established that they were in violation of whatever may be the governing currency regulations of Ghana. The Tribunal therefore finds that the Government has not succeeded in establishing that there were reasons for the NIC investigation and the arrest and deportation of Mr Biloune that were not connected to the MDCL project.

As for the failure to issue a building permit, and the partial demolition of the project (whether or not it was prompted by the lack of a building permit), the Respondents have not adequately explained these actions, in view of the history of the site, the time elapsed between the application and the issuance of the stop work order, the work actually carried out by MDCL, and the Claimants' justifiable reliance on GIC and GTDC as liaison with the relevent Governmental agencies. In particular, the Tribunal does not find credible that the authorities in Accra were ignorant of the existence for well over a year of construction activity on one of the most prominent sites in the city, and one which adjoins the seat of the Government of Ghana.

The Tribunal therefore holds that the Government of Ghana, by its actions and omissions culminating with Mr Biloune's deportation, constructively expropriated MDCL's assets, and Mr Biloune's interest therein, not later than December 24, 1987. The Claimants are therefore entitled to compensation.

VIII. QUANTIFICATION OF DAMAGES

In view of the Tribunal's holding that the Government of Ghana expropriated MDCL's assets and Mr Biloune's interest in MDCL, and in view of the provision in the GIC Agreement which binds the Government not to expropriate such interests, the Tribunal has concluded that the Government of Ghana is under an obligation, under the law of Ghana and international law, to compensate Mr Biloune. The Tribunal is satisfied that Mr Biloune suffered significant damage from the expropriation. However, the Tribunal is not prepared, on the basis of the present record, to quantify the damages sustained by Mr Biloune, pending further submissions from the Parties.

Accordingly, the Claimants shall, by the date established in a separate order, submit additional evidence on the matters specified therein.

While the record does not now permit a final calculation of damages, the essential principles that will inform the Tribunal's determination may be noted for the Parties' guidance. Under the

principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full—i.e., to prompt, adequate and effective—compensation. This generally means that such a claimant is to receive the fair market or actual value of the property at the time of the expropriation, plus interest, and that the compensation must be seasonably made and in a form that can be freely repatriated or otherwise satisfactorily deployed.

In the present case, the Claimants have requested "the book value or the fair value" of the enterprise. Pursuant to the foregoing principles, to the extent such value can be proved, the Tribunal will make an award of damages. Interest to the date of payment will be calculated to compensate for the delay in providing "prompt" compensation. Payment may be required, in whole or in part, to be made in foreign currency.

In addition the Tribunal notes that under the UNCITRAL Rules, Article 40, subject to the Tribunal's discretion, "the costs of arbitration shall in principle be borne by the unsuccessful party". Such costs include the expenses and fees of the arbitrators, expenses of witnesses, and, in some cases, legal fees. (UNCITRAL Rules, Arts. 38-40.) The Tribunal will determine how this rule shall apply to the present case after it has examined the Parties' further submissions on damages.

[The following is the text of the award on damages and costs, delivered on 30 June 1990:]

AWARD ON DAMAGES AND COSTS

I. INTRODUCTION

This is the second award of this Tribunal constituted to arbitrate an investment dispute between the Claimants Antoine Biloune and Marine Drive Complex Ltd ("MDCL") and the Respondents Ghana Investments Centre ("GIC") and the Government of Ghana. Following an exchange of memorials and documentary evidence, an oral hearing was held at which both sides introduced the testimony of witnesses and presented oral argument. The Tribunal issued its Award on Jurisdiction and Liability on October 27, 1989. In that Award the Tribunal held that the Government of Ghana, by its actions and omissions culminating in Mr Biloune's deportation, constructively expropriated MDCL's assets and Mr Biloune's interests therein on or before December 24, 1987. The Tribunal held that the Claimants are entitled to compensation and scheduled further briefings by the Parties on the issue of damages and costs.

On January 2, 1990 the Claimants submitted to the Tribunal a Brief on Quantification of Damages and Costs ("Claimants' Brief"), attaching two letters from Osei Wiredu and Associates, a firm of Ghanaian chartered accountants that originally prepared the books for MDCL, ("Claimants' accountants") purporting to describe MDCL's financial records and to explain the amounts and sources of Mr Biloune's investments in MDCL ("Wiredu Letters"). Also submitted to the Tribunal but not served upon counsel for the Respondents were the original books, accounts, and files of MDCL which were referred to in the Brief and the Wiredu Letters.

The Respondents subsequently sought and were given access to the books and accounts submitted to the Tribunal. The Respondents commissioned a Ghanaian firm of chartered accountants, Egala Ocansey and Associates ("Respondents' accountants"), to review the accounts of MDCL and to issue an opinion. On March 16, 1990 the Respondents submitted a post-hearing brief containing legal arguments, affidavits of Mr J. K. Adjei and Mr Idris Egala of the accounting firm, and 12 additional documentary exhibits ("Respondents' Brief").

The Claimants sought and were accorded an opportunity to respond to the Respondents' Brief. On May 16, 1990 the Claimants' submitted a reply brief on the quantification of damages and costs. Attached was an expanded report of Osei Wiredu and Associates ("Wiredu Report") responding to the statements of Mr Adjei and Mr Egala; together with 14 additional exhibits ("Claimants' Reply").

In response to the Claimants' Reply, counsel for the Respondents were invited to make a final rebuttal submission. This Reply, submitted to the Tribunal on June 15, 1990, contains rebuttal arguments and additional affidavits of Messrs Adjei and Egala ("Respondents' Reply").

None of the Parties requested an additional hearing. The Tribunal has determined that no further oral proceedings are necessary and has proceeded to decision on the record as it now stands.

The full procedural history and the background facts of the case are contained in the Tribunal's Award on Jurisdiction and Liability.

II. FACTS AND CONTENTIONS

In Procedural Order Number Ten, issued the same day as the Award on Jurisdiction and Liability, the Tribunal requested the Claimants to submit to the Tribunal a brief on the quantification of damages addressing the following issues:

The sums of foreign currency invested by Mr Antoine Biloune in MDCL including the currency and dates of such investments, the source of such investments, and if foreign sourced, the mode of import of such currency or its equivalent in kind into Ghana (by special unnumbered

licenses or otherwise), and the registration of such currency or imports in kind for the account of MDCL with appropriate Ghanaian authorities, to the extent required;

The application to the project of any imports in kind which were credited to MDCL;

The sums of Ghanaian currency invested by Mr Biloune in MDCL, including the provenance of such sums and the manner of investment in MDCL;

The expenditures of MDCL on the Marine Drive project as evidenced by receipts, bills, contracts, purchase orders, bank statements, and payroll documentation, etc.;

The differences, if any, between the damages suffered by MDCL by virtue of the expropriation of its contractual rights in the Marine Drive project, and the damages suffered by Mr Biloune by virtue of the loss of value of his shareholder interest in MDCL;

The percentage share recovery, if any, that would be payable to Mr Michigan as MDCL's other shareholder or to GTDC (Ghana Tourist Development Co) as MDCL's joint venture partner from any award for the expropriation of the Claimants' interest in the Marine Drive project.

The Parties' responses on each of these inquiries as well as their other submissions on damages and costs are summarized below.

A. *Foreign Currency Amounts Invested*

The Claimants assert that Mr Biloune invested $92,212.65 in direct foreign currency purchases and expenditures for the MDCL project. This amount is made up of sterling £50,025.85 in building materials and other supplies; sterling £740.00, in telephone, telex, entertainment and airport charges; DM 600.00 in transportation expenses, and US $8,115.66 in daily travel allowances for 54 days in Europe in 1987. The amounts claimed appear in a listing of investments attached to the Claimants' Brief.

The Respondents object that neither the existence nor the amount of the foreign currency investments alleged is proven. They assert that the proffered listing of investments in the Wiredu Letters was unsubstantiated by backup documents. They argue further that there is no proof that the sums allegedly expended were actually applied to the Marine Drive project.

The Respondents specifically allege that the MDCL documents submitted to the Tribunal do not show that the building materials were in fact shipped to MDCL and used on the Marine Drive project. They argue that, to the contrary, the documents show that although the materials were shipped from England by Mr Biloune and cleared through customs by Ghana Tourist Development Company

("GTDC"), they cannot be considered an investment in MDCL. The materials were not registered as an investment in kind, as allegedly required by Ghanaian law. Further, they argue, the materials were never used on the project. The Respondents allege that while the construction materials may have been purchased ostensibly for the account of MDCL, they were sold to third parties by Trader Vic Co, a company owned by Mrs Victoria Biloune (Mr Biloune's wife), with the proceeds going to Mr Biloune or to his wife's company.

The Respondents submit an affidavit of Mr Gilbert A. W. Michigan, who was Mr Biloune's associate in the project, together with a statement Mr Michigan made to the National Investigations Committee, to the effect that, soon after the arrival of the goods, over one-half of the goods were sold by Mr Biloune on the "open market" in Ghana. Specifically, according to Mr Michigan, in September 1986 a substantial portion of paint was sold by Mr Biloune to the Accra Public Works Departemnt ("PWD"). In evidence the Respondents show a listing of items allegedly sold, a letter of inquiry regarding 500 gallons of masonry paint sent by the PWD to MDCL, and vouchers for purchases of paint and other materials by PWD. In addition, they allege that what materials remained on the project site after Mr Biloune's expulsion were taken by Mr Biloune's step-son to a warehouse belonging to one of Mrs Biloune's companies in January 1988.

The Respondents similarly object that the existence of the business trip expenses, their relationship to the MDCL project, and their qualification as investments are all unproven. They argue further that neither the materials nor the travel expenses were considered to be an investment at the time, since the amounts allegedly invested were not shown as such in MDCL's statements of account until the statements were revised after Mr Biloune's deportation.

In response the Claimants deny that any of the construction materials imported for the project were improperly diverted to other uses. The Claimants reassert their claim that some of the construction materials imported for the project were applied to the project. They concede that the materials remaining on the site in January 1988 were transferred to Trader Vic's warehouse, but allege that they were removed from the project site for safekeeping by MDCL's administrators. The Claimants' accountants state that they recently inspected the goods at the warehouse, but that because the goods were badly deteriorated, they "wrote them off" as worthless.

The Claimants deny that any paint was ever sold from MDCL inventory to the Public Works Department, or to any other third parties. They allege that the goods imported for the project had been kept in the GTDC warehouse, and were not yet released from the warehouse at the time of the purchases referred to in the Respondents'

brief. Moreover, they argue that because the cartons were clearly marked for GTDC, it would not have been possible to sell the goods to a government agency.

The Claimants allege that in fact the goods sold to the Public Works Department were unrelated to MDCL's building materials. Rather, the sale evidenced by the Respondents' exhibits was part of Trader Vic's usual business. They attach documents showing Trader Vic's importation in 1985 of masonry paint, and the sale of the paint to the PWD in August 1986 out of Trader Vic's own stocks. Since the goods were supplied by Trader Vic out of its inventory, not from MDCL's, they assert that the PWD's note to MDCL inquiring about the possible purchase of paint is insufficient to show any sale of MDCL inventory.

The Claimants further rely on the Wiredu Report by the Claimants' accountants, who express their opinion that the amounts claimed were properly considered to be foreign currency investments by Mr Biloune in the MDCL project.

The Claimants further emphasize that the building materials were imported in GTDC's name and their release was authorized by Respondent GIC. They allege that there is no requirement for registration of direct foreign investment in kind. They argue that in any case GIC should be estopped from raising the argument now when it did not insist on registration at the time of investment.

As to the remaining foreign currency investments, the Claimants specify that the travel expenses were incurred by Mr Biloune during a visit in Europe in which he was actively attempting to obtain investment and loan participation in the MDCL project by European parties. They submitted MDCL board of directors meeting minutes describing Mr Biloune's trip to Germany and England and the outcome of the negotiations.

The Claimants explain that the travel expenses were not included in the October 1987 statement of accounts for MDCL because they were only incurred in the preceding three months. The Wiredu Report states that the building materials were not included in the 1985 statement of accounts of MDCL because they were imported in the name of GTDC, and held in a customs warehouse, and could not be debited to the MDCL project until the items were released to the company. The building materials do appear, however, in the company's first cash book under the entry for "Foreign Investment" dated September 27, 1985.

The Respondents in their Reply deny that the goods remaining in inventory should be considered worthless, arguing that in light of inflation, the goods still must be worth at least their original purchase price. They also reassert their claim that Ghanaian law requires the formal registration of investments in kind, arguing that the Claimants have analyzed the wrong provision of law.

Finally they allege that various items, including an amount of "stoneface" paint exceeding the quantity sold in 1986 to PDW, are missing from the MDCL inventory now stored in Trader Vic's warehouse. They dispute the statement that the paint sold to PWD was from Trader Vic's inventory on the ground that the paint Trader Vic had imported was gloss paint, not stoneface paint. Finally they argue that whatever may be the source of the PWD purchase of stoneface paint, some disposition has been made of some quantity of other MDCL inventory items which are no longer in the warehouse. Any proceeds of sales from MDCL's inventory must be accounted for, they argue.

B. *Investments in Ghanaian Currency*

The Wiredu Letters list Mr Biloune's Ghanaian currency investments totalling 46,790,983 cedis. According to the letters, the investments are represented by cash paid and cheques deposited by Mr Biloune in MDCL's bank accounts, and shown on the company's cash books, from which they were disbursed for the project.

The Respondents allege that the full local currency investment is not proven. They allege that there is no proof that any of the amounts shown as deposits in MDCL's bank accounts or entries in its cash books were related to the cash advances or other investments allegedly made by Mr Biloune. The Respondents concede that several million cedis were deposited in MDCL's accounts, but argue that because the cheques withdrawing those funds have not been submitted, there is no reason to believe that the funds were utilized for development of the Marine Drive project rather than for other trading and activities of Mr Biloune. The Respondents maintain further that cash investments should be supported by receipts or other documents showing Mr Biloune as the source of the funds. They reject the Wiredu Letters as lacking probative back-up documentation. They argue that without direct proof of the source of MDCL's operating funds, the fact that MDCL incurred expenditures does not support an inference that Mr Biloune invested the funds in the amounts necessary to cover the expenditures.

The Respondents also object that the source of the funds Mr Biloune allegedly contributed to MDCL is not clear. While it is stated that the funds are proceeds of Mrs Biloune's trading companies, the Respondents argue that there is no proof in the record that the goods imported by those companies were purchased by Mr Biloune in foreign currency, nor is there any evidence of the transfers of funds from the companies of Mrs Biloune to Mr Biloune. The Respondents thus cast doubt on the existence of the funds allegedly invested.

In their Reply the Claimants submit the Wiredu Report including a detailed schedule showing bank deposits of 20,294,910 cedis allegedly made by Mr Biloune into the four accounts maintained by the

company, and cash infusions into the company, as shown in the cash book, totalling 27,594,285 cedis (a total of 47,889,195 cedis, differing slightly from the totals the Claimants previously asserted). The Claimants' accountants maintain that the amounts in the books are accurate and audited. They state that no receipts for the investments were provided, besides the cash book entries, since this was not considered necessary, given Mr Biloune's position as the sole financier of the company.

The Claimants argue that the funds were provided to Mr Biloune from the earnings of his wife's trading companies on an informal basis, but assert that it makes no difference from what source Mr Biloune obtained the invested funds. They argue that so long as investments were correctly recorded in the company's audited books they should be considered valid local currency investments in the company.

In their Reply Brief, Respondents reassert their objection that the investments alleged are often supported by no more than cash book entries, with no further documentation.

C. *MDCL's Expenditures in the Project*

The Claimants originally asserted without elaboration that all expenditures made by MDCL were necessarily devoted to the Marine Drive project since that was MDCL's only project.

The Respondents object that the Claimants have not proven that any of MDCL's expenditures were related to the Marine Drive project. According to the Respondents the evidence merely shows that MDCL expended funds, but they argue that those expenditures were not necessarily for the Marine Drive project. They object to the absence of an analysis of expenditure showing how each expenditure was utilized for or related to the project.

Specifically, the Respondents point to a lack of inventory records, lack of contemporaneous cash records, lack of invoices and evidence of payment other than payment vouchers, and the existence of errors, omissions and discrepancies in the books, as identified in the affidavits of Mr Adjei. The Respondents reject the Claimants' reliance on the various financial statements of MDCL and other reports prepared by the Claimants' accountants. They argue that the certification of the Claimants' accountants should not be accepted because the accounts were not satisfactorily audited; because the Claimants' accountants had long assisted MDCL and were not independent auditors; and because the accountants' statements submitted to the Tribunal have not been notarized. The Respondents list a number of errors that are allegedly found in the company's books and argue that they render the books unreliable.

Finally, the Respondents argue that even if the expenditures were shown to exist, there is no proof to tie them to the Marine Drive project. Because the expenditures were often made in cash and often not supported by written and recorded contracts, the Respondents speculate that MDCL may have been used as a conduit for Mr Biloune's other business activities, and that the expenditures shown on the company's books may in fact have nothing to do with the Marine Drive project.

In the light of these shortcomings, the Respondents concede that a maximum of only 19,036,872 cedis can be considered to be both (a) clearly related to physical structures in the project and (b) supported by verifiable documents.

The Claimants counter with an analysis of MDCL's financial records, showing the expenditures on the project in five categories: contractor fees; construction materials; electrical supplies; furniture, tools and equipment; and salaries and wages. The expenditures are listed by date of payment in the Wiredu Report, which also lists, where available, the cheque number and voucher numbers for the expense. The Claimants affirm that all the expenses are noted in the company's books, and that backup documents, in the form of receipts, bills, contracts, purchase orders, bank statements, and payroll documentation, are included in the file and were certified by the Claimants' accountants.

In their Reply, the Respondents maintain that the more detailed explanation offered by the Claimants as to the identity of the alleged payees of various expenditures in the Wiredu Report is still supported for the most part only by vouchers and other internal records of MDCL, which the Respondents argue cannot stand as evidence.

D. *Comparison of Damages of MDCL and Mr Biloune*

Investment value: The Claimants allege that stated at historical cost (and converting cedis to dollars at the rate current at time of investment), the value of Mr Biloune's investment in MDCL amounted to $689,961. This is stated to be the value of the expropriated investment.

Lost Profits Value: The Claimants value the loss to MDCL of its contractual rights to develop and operate the Marine Drive Project based on its expected profits during the minimum ten year term of the joint venture agreement with GTDC. They allege expected profits based on the financial projections performed in 1986 by Lambrisi Industrial and Commercial Management Ltd and submitted to GIC. This report estimated a ten-year profit of 569,128,000 cedis. Dividing this profit with GTDC as its joint venture partner (see Award on Jurisdiction and Liability, at paragraph 25) the Claimants allege a lost profits

claim for MDCL for its 49 percent share of 278,872,720 cedis, or $1,584,502 at the dollar-cedi rate of exchange on December 24, 1987. Of that amount, Mr Biloune claims the right to 276,641,730 cedis, or $1,571,828, representing his 99.2 percent equity ownership of MDCL. (See *id.* at paragraph 18.)

The Respondents argue that neither the historical amounts invested nor the lost profits analysis is supported or valid. As noted above, they argue that the value of Mr Biloune's investment should be considered no greater than 19,036,872 cedis, the amount of MDCL expenditures they concede were substantiated and related to the project.

They reject the lost profits claim entirely. The Respondents allege that the Lambrisi report is not a proper basis for calculating future lost profits. They characterize it as more in the nature of a promotional document than an objective assessment of the project's real prospects.

The Respondents argue in addition that under the Claimants' own business plans, additional loans or investments would have been necessary to make any more progress on the project. In a loan proposal to a bank, the Claimants referred to projected additional equity participation of 45 percent. No such investments had yet been obtained. Since that progress on the project would have required such additional financial participation, the Respondents argue that any amounts allegedly recoverable as lost profits must be shared among such hypothetical shareholders as well. In addition, they argue that even were future profits payable, any award would have to be discounted to present value.

The Respondents also argue that there is no legal right to recovery of lost profits in this case, since there is no showing that Mr Biloune could have performed his part of the bargain to make the project work. Relying on English law (asserted to be identical to Ghanaian law) and US law, the Respondents argue that where there is such difficulty and uncertainty in proving future profits that any award would be speculative, recovery is limited to actual out-of-pocket investments.

In their reply the Claimants argue that the fact that the project was never completed or fully capitalized was due to the Respondents' expropriation of the project. They assert their right to the benefit of their bargain, which they claim would have included a minimum of ten years' profit under the lease agreement. They argue that the Lambrisi report was a reliable, professionally performed feasibility study, based on actual facts, and relied upon by GIC in approving the MDCL project. They also disagree that discounting for present value is appropriate where the local currency is continually devalued.

The Claimants deny that an allowance for potential additional investors should be made. While additional funds were needed, it was not decided whether these would be raised by inviting additional equity investors or through bank loans.

E. *The Relative Recovery of Mr Biloune and Mr Michigan*

The Claimants argue that although Mr Michigan was nominally owner of 40 percent of the stock, his actual investment in the company amounted only to 0.8 percent. They assert that therefore Mr Biloune is entitled to recovery of 99.2 percent of any recovery based on MDCL share ownership. They concede that 0.8 percent of such a recovery would be payable to Mr Michigan.

The Respondents argue that the Claimants cannot both rely on the 60 percent/40 percent equity split required by the Ghana Investment Code on the one hand, and then insist, on the other, on actual equity allocation of 99.2 percent and 0.8 percent for purposes of an award. They insist that any recovery to Mr Biloune be limited to his technical 60 percent stock ownership.

F. *Currency of the Award*

The Claimants have calculated their claim in US dollars. In calculating the amount of Mr Biloune's investment in local currency, they convert cedis to dollars as of the date of each investment. The lost profits claim is converted to dollars as of the date of the expropriation. The Claimants assert that the principle of prompt, adequate and effective compensation requires payment in dollars.

The Respondents insist that any award of damages must be made solely in the currencies originally invested. They particularly object to conversion to dollars at the exchange rate on the investment date, since, they suggest, this amounts to a guarantee against currency fluctuation that was not intended in the Ghana Investment Code. The Respondents argue further that there is no right under international law to demand conversion into dollars of an award for sums invested in cedis since only foreign capital and foreign investment earnings are guaranteed free transferability. The Respondents reject the Claimants' notion that all Mr Biloune's investments should be treated as foreign investments since they were allegedly earned from imports of goods purchased abroad in foreign currency.

They concede, nevertheless, that the requirement of prompt, adequate and effective payment of the value of expropriated property binds Ghana to ensure that any amounts awarded in cedis be freely convertible into dollars and transferable to the Claimants outside Ghana.

The Respondents also object to conversion of the lost profits claim to dollars on the date of expropriation. In addition, they argue that if a lost profits award is made, the amount of various debts owed by MDCL in Ghana must be deducted from the award.

In their Reply, the Claimants reassert their claim that effective

payment must be in a convertible currency. They also argue that no set-off against a lost profits award should be made for claims against MDCL by creditors, since as the successor to MDCL's assets, the Government of Ghana has succeeded as well to MDCL's liabilities.

G. *Request for Reconsideration*

The Respondents add a final request that the Tribunal reconsider the determinations made in the Award on Jurisdiction and Liability on the ground that its submissions in this phase show that Mr Biloune's testimony at the hearing was "tainted by perjury". The Respondents point primarily to three matters on which they claim Mr Biloune was not truthful: whether he had resold any of the goods imported for MDCL to third parties; whether local currency was generated by "SUL" imports involving his wife's trading companies; and the details of his arrest and detention. They argue that his untruthfulness or exaggeration in these matters requires the Tribunal to reject or excise his testimony and the conclusions based on it.

They also argue that reconsideration is appropriate because the Claimants' admissions and evidence in the present phase show that Mr Biloune knowingly violated Ghanaian law, and that therefore his expulsion from Ghana was justified.

The Claimants reject the claim of false testimony and insist that Mr Biloune's claims are fully supported by the evidence adduced in the present phase.

H. *Interest*

In case the award is based on amounts invested, the Claimants request interest on the amount of the award from the date of the constructive expropriation December 24, 1987, to the date of this Award. No interest request is made with respect to the lost profits claim (except to the extent that the claim for the undiscounted amount of lost profits calculated as of the date of expropriation implicitly includes interest). They also request interest from the date of this Award to the date of payment.

The Respondents request that if any amounts are awarded, interest be imposed only from the date of the Award.

I. *Costs*

The Claimants request that full costs of the arbitration, together with counsel fees in the amount of at least $100,000, be awarded to the Claimants.

The Respondents request that if their motion to annul the previous Award and to dismiss the claim is granted, they be awarded costs, as well as counsel fees of $100,000. Otherwise, they request that arbitration costs be evenly divided between the Parties, and that each Party bear its own counsel fees and expenses.

J. *Mode of Payment*

The Claimants request that payment of the Award be made into a bank account in Washington, D. C. The Respondents have not objected specifically to this request.

III. THE TRIBUNAL'S DECISION

A. *Reconsideration or Annulment of Award*

As provided in Article 32(2) of the UNCITRAL Rules, the Award on Jurisdiction and Liability this Tribunal issued on October 27, 1989 was and is "final and binding on the parties". The UNCITRAL Rules make no provision for reconsidering an award. Articles 35, 36 and 37 provide that within thirty days of an award a party may request "interpretation" of an award, may request correction of clerical or typographical errors, or may request an additional award covering issues omitted from the award. The present request for reconsideration was not made pursuant to any of these articles, and (apart from the fact that the request was first made more than thirty days after the original Award) none of these articles would seem to support the kind of reconsideration that has been requested.

Nevertheless, a court or tribunal, including this international arbitral tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious "fraud on the tribunal". See United States on behalf of *Lehigh Valley Railroad Company and Others* v. *Germany,*[3] ("*Sabotage* cases"), Mixed Claims Commission, United States and Germany, Opinions and Decisions from October 1, 1926 to December 31, 1932 (1933) at 967; *id.*, Report of the American Commissioner (December 30, 1933) at 7-8; *id.*, Opinions and Decisions in the *Sabotage* claims (June 15, 1939 and October 30, 1939). Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action. See the Statute of International Court of Justice, Article 61

[3] 8 *Ann Dig* 480.]

(permitting revision of an award upon the subsequent discovery of a new decisive fact); ICSID Convention, Article 51 (same); U.S. Arbitration Act, 9 U.S.C. § 10 (permitting judicial annulment of an arbitral award "procured by corruption, fraud or undue means").

The present Tribunal would not hesitate to reconsider and modify its earlier Award were it shown by credible evidence that it had been the victim of fraud and that its determinations in the previous Award were the product of false testimony. However, no such evidence has been adduced. As in many complex cases, this Tribunal has been required to weigh and resolve occasional inconsistencies in the evidence of both sides in this arbitration, and to come to its best determination of the relevant facts. Nevertheless, the Tribunal is satisfied that the material facts on which it based its previous Award on Jurisdiction and Liability, as well as the present Award on Damages and Costs, are sufficiently explained and proved by credible evidence.

The Tribunal has thus weighed the charges of untruthfulness and exaggeration made by the Respondents in their request for reconsideration. It is the opinion of the Tribunal that, while there are factual issues on which the Parties differ, there is no indication that any material determination regarding the establishment and existence of the Claimants' investment or the Respondents' subsequent constructive expropriation of it was based on, or the product of false testimony, fraudulent evidence, or otherwise of such a nature as to undermine the authority and finality of the previous Award. Accordingly, the Respondents' request for reconsideration is denied.

B. *Standard of Proof*

The central evidentiary issue in this stage of the arbitration is establishing the amounts invested by Mr Biloune in MDCL as well as the amounts expended by MDCL on the Marine Drive project. On both of these questions the Claimants have relied almost exclusively on the accounting records and books of MDCL and reports of their accounting consultants based on those records and books. The Respondents' primary defense has been to the effect that those books and records are not an accurate reflection of the real financial status and transactions of the company.

Under the UNCITRAL Rules, "Each party shall have the burden of proving the facts relied on to support his claim or defence". This Tribunal, governed by the UNCITRAL Rules, has proceeded in accordance with this principle. The Tribunal has reviewed the accounting records submitted to it, as well as the reports analyzing those records by both the Claimants' and the Respondents' accountants. The Tribunal holds that, in general, the contemporaneous books and records of a company regularly kept in the normal course of business

should be accorded substantial evidentiary weight. In the present case, it appears that a firm of Ghanaian chartered accountants, licensed to pursue their profession by the Government of Ghana, designed MDCL's accounting system and controls and periodically performed audits. This same firm has provided its opinion to this Tribunal that the company's books in fact accurately reflect MDCL's financial status. MDCL's records are thus accepted by the Tribunal as presumptively accurate, subject to proof to the contrary by the Respondents.

The Respondents and their accountants, also professional Ghanaian chartered acountants, have alleged certain shortcomings and irregularities in the design of MDCL's accounting system and the company's bookkeeping practice. They argue that a higher verification or confirmation standard should have been used by an auditor who was fully independent of the company's affairs, and they assert that many of the book entries could not be verified by their accountants' recent review of the records submitted to the Tribunal.

The Tribunal is not convinced, however, that difficulties in verifying every entry in books from admittedly incomplete files necessarily render the books unreliable and fundamentally erroneous. The Respondents have not demonstrated any instances of wrong recording (a few instances which they mentioned were satisfactorily explained by the Claimants and their accountants). In general, it appears to the Tribunal that the backup documents submitted adequately support the book entries.

C. *Foreign Currency Denominated Investments*

The Claimants' calculation of the foreign currency investments in the project is based on evidence in MDCL's accounting books of in-kind inputs in the form of building materials and certain communication and travel expenses. While the Respondents question whether all of the travel expenses claimed were incurred on behalf of the project, the minutes submitted, in the Tribunal's view, provide sufficient indication that the travel in the question was related to Mr Biloune's efforts to secure foreign financing for the project. Without more, the fact that Mr Biloune had other business interests in Europe is not sufficient to induce the Tribunal to regard the expenses as unrelated to the project. These travel and communication expenses are accepted in the amounts claimed.

The controversy over the building materials involves a dispute as to whether the materials admittedly imported for MDCL were actually sold in Ghana to other users, and whether, if so, the proceeds of such sales were diverted to the Trader Vic Company or to Mr Biloune himself.

The Respondents have presented the statement of Mr Michigan purporting to show that by September 1986 a substantial portion of the building materials had been sold, but the notations on the original import invoice produced in evidence of such sales do not indicate in any way when, to whom, at what cost, or even whether such alleged sales were made. The Respondents also obtained from one of MDCL's administrators in Ghana (the Osei-Wiredu firm) "waybills" showing the quantities of materials that were removed from the Marine Drive premises to warehouse in early 1988 after Mr Biloune's expulsion. The Respondents also submitted a survey of the remaining items in the Trader Vic warehouse as of February 1990 performed by the Respondents' accountants, purporting to show additional reductions in inventory. None of these documents proves that any items of MDCL's inventory were sold, however.

The only direct evidence adduced purporting to prove that MDCL sold some of its construction materials is the request to MDCL from the Public Works Department for 500 gallons of white masonry paint on August 26, 1986. This is submitted together with an undated hand-written notation which is said to show payment of 1,555,000 cedis for paint as well as several other items, and PWD payment vouchers.

On the basis of these documents, the Respondents allege that Mr Biloune was selling materials imported for the project. They thus allege that the materials cannot form part of Mr Biloune's investment.

As noted above, the Claimants counter that no improper diversion was made of any of MDCL's construction materials. They assert that at the time of the alleged sale of 500 gallons of paint in 1986, the paint imported for the project was still in customs warehouse. They provide board of directors' minutes stating that in August 1987, efforts were still underway to "secure the release of the paints" by GTDC.

They describe the sale of paint to PWD in August 1986 as an unrelated transaction of Trader Vic out of its own separate inventory. The Respondents' evidence shows that the request from PWD for 500 gallons of "white stoneface cementone masonry paint" was dated August 26, 1986. The Claimants' evidence shows that on that same day 500 gallons of "caring for masonry (white)" were delivered to Public Works Department from Trader Vic. They also provided shipping and import documents showing that Trader Vic had imported in October 1985 a shipment of paints, including 1785 "tins each 5 litres" of "caring paints" for masonry. (Five litres equals, roughly, one (imperial) gallon.) Finally, the evidence includes payment vouchers showing the sale of paint as part of other goods sold by Trader Vic to PWD in August and September 1986. The amount paid to Trader Vic for the paint and "rendatex" equals the 1,555,000 cedis amount shown on the undated list of payments submitted by the Respondents.

In the light of the analysis in the preceding four paragraphs, it is reasonable to conclude that the request for masonry paint had nothing to do with MDCL (except, perhaps to the extend PWD knew of Mr Biloune's relationship with both Trader Vic and MDCL) and that the order was filled entirely out of separate Trader Vic inventory. The Tribunal is therefore not prepared to assume that the sale was out of MDCL's inventory, rather than Trader Vic's, especially given the clear markings that the Claimants state (without contradiction) limited their use to a GTDC-authorized project.

Moreover, even if it could be shown that MDCL did sell some or most of the materials it originally imported for its own project, this does not necessarily result in the deduction of the value of those materials from the total investment by Mr Biloune. Unless the proceeds of such sales were wrongfully diverted from MDCL to third parties, the value of the goods at the time of their original importation would still constitute sums invested by Mr Biloune in MDCL. There is no evidence of such an unlawful diversion. Thus even had the Tribunal been able to find evidence of sales from MDCL's inventory, there would be no cause to reduce the value of Mr Biloune's foreign currency investment.

If, as the Claimants' accountants maintain, the remaining materials now in warehouse have deteriorated and are valueless, this loss of value does not negate the fact that the materials constituted a valuable material input when originally invested. However, it is possible that these materials or some of them still have value. Since the Tribunal has determined that all the assets of MDCL were constructively expropriated by the Respondents, it follows that title to these assets passed to the Respondents in December 1987. Accordingly, there is no ground for deducting the residual value, if any, of these assets from the Award.

The Respondents also argue that in any case the imported materials cannot be considered as investments because they were not registered as investments in kind. The Respondents state that under Section 42 of the Ghana companies law, all foreign goods invested in kind in Ghanaian entities require registration. Claimants deny that the companies law requires registration, but they discuss a different provision of the law.

The Tribunal is of the opinion that in the present circumstance this issue does not determine the Claimants' recovery. Whether registered or not, Mr Biloune did in fact provide the materials as an in-kind investment. There is certainly no indication that failure to register works a forfeiture, even if there were a requirement of registration. Accordingly, the Tribunal finds the value of the materials imported for the MDCL project to constitute a foreign currency investment of Mr Biloune.

D. *Cedi Denominated Investments*

As noted above, the Tribunal is satisfied that MDCL's regular accounting books adequately identify the amounts of cedi investments made by Mr Biloune in MDCL. The Respondents' objection is that the investments should have been more formally receipted and documented, and that the source of the funds is not established.

The Tribunal believes that, while more sophisticated accounting controls may have been useful, the entries in the company's cash book, which was kept current in the ordinary course of business, adequately evidence the investments by Mr Biloune, especially since it is apparently conceded by the Respondents that Mr Biloune was the sole financier of the company.

It is true, as the Respondents contend, that the source of the funds Mr Biloune invested in MDCL is never shown with precision. The Claimants assert, as they did at the hearing, that Mr Biloune raised the funds largely through imports of goods financed by his outside trading companies and sold for Ghanaian currency within Ghana. Whether these imports usually or always involved Mrs Biloune's Ghanaian companies is not shown, however, and the Respondents object that the transfers of earnings from these companies to Mr Biloune are not documented.

The Tribunal accepts the explanation of the Claimants that to the extent Mrs Biloune's companies were involved, the funds were made available to Mr Biloune informally by his wife. In any event, the Tribunal does not find it necessary to determine the ultimate source of the cedi funds invested in MDCL. The issue is whether the funds were actually invested in MDCL by Mr Biloune, and on that issue the company's books are explicit. Thus, the Tribunal finds that Mr Biloune invested cedis in MDCL in the amounts and on the dates shown in the company's books.

E. *Application of Invested Funds to the Project*

The Tribunal is satisfied, in the absence of evidence to the contrary, that the funds invested in MDCL were used in furtherance of the project. Indeed, in most cases, the investment was made immediately as needed to cover an expenditure for project-related goods or services. The Tribunal has no reason to doubt that the sums invested by Mr Biloune were directed toward and incorporated in the Marine Drive project.

F. *Basis for Calculating Damages*

Having determined the amounts Mr Biloune invested in the Marine Drive project, the Tribunal must now determine the basis for

calculating the damages due the Claimants from the Respondents' constructive expropriation of that project. The Claimants have proposed two alternative methods for calculating damages: historical investment value or lost profits.

The standard for compensation in cases of expropriation is restoration of the claimant to the position he would have enjoyed but for the expropriation. This principle of customary international law is stated in many recent awards of international arbitral tribunals. See, e.g., *Texaco Overseas Petroleum* v. *Libya* ("TOPCO"),[4] (Dupuy, arb.), paragraphs 40-105, 17 ILM 28-35 (1977); *Sedco Inc* v. *The National Iranian Oil Co,*[5] Award No ITL 59-129-3, 10 Iran-Us Claims Tribunal Rep. 180, 184-89 (1986), 25 ILM 629, and separate of opinion of Judge Brower in *id*; *Amoco International Finance Corp* v. *Islamic Republic of Iran* ("Khemco"),[6] Award No 310-56-3, 15 Iran-US Claims Tribunal Rep. 189, paragraphs 183-209 (1987), 27 ILM 1320, 1391. This standard is also reflected in hundreds of bilateral investment treaties. The Respondents in this case have not challenged this principle, and indeed have explicitly "recognize[d] that there exists a generally accepted principle of international law that prompt, adequate and effective compensation be paid in case of expropriation". (Reply at 39.)

Normally, in cases of expropriation of a going concern, the most accurate measure of the value of the expropriated property is its fair market value, which in its nature takes into account future profits. The discounted cash flow method of valuation is often used to calculate the worth of the enterprise at the time of the taking. (*Starrett Housing Corp* v. *Islamic Republic of Iran,*[7] Award No 314-24-1, 16 Iran-US Claims Tribunal Rep. 112, paragraphs 279-80 (1987)).

The Claimants have made a compensation claim based on the future lost profits of MDCL. While the Tribunal accepts the validity of the principle that lost profits should be compensated it is not possible to make an award on that basis in this case. The Claimants have not provided any realistic proof of the future profits of the company. The Lambrisi Report purports to project profits, but the Tribunal agrees with the Reponsdents that this report was not an economic forecast of profits, but a projection intended to encourage potential investors. Moreover, at the time of the project's suspension and effective expropriation, the project remained uncompleted and inoperative. It was generating no revenue, still less profits. Thus, with no basis on which to calculate future profits, the Tribunal is required to consider an alternative methodology.

The Claimants have also requested that Mr Biloune be awarded the

[4 53 *ILR* 389.] [6 83 *ILR* 500.]
[5 84 *ILR* 483.] [7 85 *ILR* 349.]

historical investment value of the project. Given the nature of the project, and its early interruption by the Respondents, the Tribunal has concluded that the most appropriate method for valuing the damages to be paid will be to return to Mr Biloune the amounts he invested in MDCL, i.e., restitution.

Thus, Respondents are obligated to pay Mr Biloune the amounts shown to have been invested by him, i.e., sterling £50,765.85; DM 600.000; and US $8,115.66 for the foreign currency investment, and 46,790,982.85 cedis. (The Claimants set forth various totals for the total cedi investments with slight variations. Since the variations were not explained, the Tribunal has selected the lowest total claimed.)

Since this Award is based on amounts actually invested by Mr Biloune, no apportionment to allow for the interests of GTDC or Mr Michigan is appropriate. Thus, the Tribunal need not address allocation questions and other issues that might arise if the award were based on the going concern value of MDCL or of the Marine Drive project as a whole.

G. *Currency of the Award*

The Claimants have asserted that the principle of "prompt, adequate and effective" compensation requires that all sums be awarded in US dollars, converted from other currencies at the time of investment. The Tribunal does not wholly agree with this claim.

It certainly is right, as the Respondents have acknowledged, that amounts awarded must be paid promptly in a freely convertible currency and made available to the Claimants outside Ghana. The Respondents have indeed undertaken to permit the conversion and transfer required: "Once the amount of the damages are determined and awarded in cedis, the requirement of promptness and effectiveness would operate to ensure that the damages denominated in cedis be paid promptly, be freely convertible into foreign currencies and be transferable to Claimants outside Ghana". (Respondents' Reply at 39.)

The Tribunal holds that, under the applicable norms of international law, the Respondents were obligated to pay the amounts awarded in freely convertible, transferable currency on the date of the expropriation. The applicable cedi-dollar rate on that date was 175.43 (IMF International Financial Statistics (March 1988)). Accordingly, on this basis, the 46,790,982.85 cedis awarded are equivalent to $266,721.67. This latter amount, payable in dollars, shall be awarded.

The Tribunal notes that the Claimants maintain that they are entitled to a larger sum of $599,928.44 on the theory that cedis must be converted into dollars on the various dates on which cedis were

invested in the project. The Tribunal cannot accept this contention. It agrees with the Respondents that they did not insure foreign investors against depreciation of the cedi between the date of investment and the date of expropriation.

The amounts invested in pounds sterling, deutschmarks and US dollars will be awarded in those currencies.

IV. COSTS AND INTEREST

A. *Costs*

Under the UNCITRAL Rules, Article 38, the fees and costs of the arbitration are to be separately stated in the Award. The total costs of this arbitration are $84,781.14. This figure has been calculated as follows: The arbitrators have been compensated at a rate based on the current rate applied by the International Centre for Settlement of Investment Disputes ("ICSID"). This rate was chosen as an appropriately modest rate on which to base fees in a case with a small amount at stake. It is the more appropriate in light of the designation of Mr Ibrahim Shihata, Secretary-General of ICSID, as the appointing authority in this arbitration. On an actual hourly basis, the fees of each of the three arbitrators total $15,610.00. The President of the Tribunal has not found it appropriate to accept fees higher than those of the other arbitrators.

In addition, costs of the arbitration, including out-of-pocket expenses, secretarial and office expenses, hearing expenses, and the time of the Registrar total $37,951.14.

The Tribunal has assessed and received $20,000 from each side as a deposit against the costs of arbitration. The difference between the deposit of $20,000 already made by the Respondents and the costs and fees of the arbitration is $64,781.14. This amount is assessed against the Respondents, to be paid directly to the Tribunal's Registrar. Upon receipt of this payment, the Tribunal will transmit the deposit of $20,000 advanced by the Claimants to their counsel.

B. *Interest*

Interest is required to be awarded in order fully to compensate the victim of an expropriation for the delay in payment of the value of the expropriated property, calculated from the time of taking to the time of payment of the award. The Tribunal considers the London Interbank Offered Rate (LIBOR) to be the appropriate rate upon which to calculate interest. The average 6-month LIBOR rate between December 24, 1987 and June 30, 1990 was 8.6512 percent. Applying this rate over the 918 days between December 24, 1987 and June 30,

1989 to the sums awarded yields, on a simple interest basis an additional $59,800.16, £11,045.82 and DM 130.55, which will be included in the Award.

The amount of this Award shall be paid within thirty days of the date on which this Award is delivered to the Respondents' counsel ("delivery date"). Any amounts of the Award (including the above interest) unpaid as of that date will continue to bear interest at the current 6-month LIBOR rate until the Award is paid in full.

The Claimants have also requested counsel fees in an amount no less than $100,000. Particularly given the Respondents' request for an identical amount had they prevailed, the Tribunal deems that amount to be reasonable. Respondents shall pay such amount directly to counsel for the Claimants, and that amount shall be deducted from any gross sum of counsel fees chargeable by the Claimants' Counsel to the Claimants.

V. AWARD

For the foregoing reasons, the Tribunal awards as follows:

The Respondents Ghana Investments Centre and the Government of Ghana, jointly and severally, shall pay to the Claimant Mr Antoine Biloune the sums of US $334,637.49; sterling £61,811.67; and DM 430.55. These amounts shall bear interest at the current 6-month LIBOR rates, commencing thirty days after the delivery date of this Award (shown below) to the date of payment. Payment shall be made into such bank account as Mr Biloune shall designate to the Respondents or their counsel.

The Respondents Ghana Investments Centre and the Government of Ghana, jointly and severally, shall pay to the Registrar of the Marine Drive Complex/Ghana Arbitration the amount of $64,781.14, plus interest at the current 6-month LIBOR rate, commencing thirty days after the delivery date of this Award (shown below) to the date of payment. Payment shall be made by certified check delivered to the Registrar, or by wire transfer to: Marine Drive Complex/Ghana Arbitration, Account No. 3 486 001, First American Bank of Washington, (ABBA No. 054-0000-43), 1300 Connecticut Avenue, N. W., Washington, D. C. 20036.

The Respondents Ghana Investments Centre and the Government of Ghana jointly and severally, shall pay to Mr Fehmy Saddy, counsel for the Claimants, the amount of $100,000, plus interest at the current 6-month LIBOR rate, commencing thirty days after the delivery date of this Award (shown below) to the date of payment.

Copies of this Award, as well as the Tribunal's Award on Jurisdiction and Liability, shall be transmitted by the Registrar to the Parties and their counsel, and to the Secretary-General of the Inter-

national Centre for Settlement of Investment Disputes, as Appointing Authority for this arbitration, and to the Secretary-General of the Permanent Court of Arbitration, as Designating Authority under the UNCITRAL Rules.

[Report: Unpublished]

Human rights—Right to life—Inhuman and degrading treatment — Disappearances — Individual abducted by State agents for alleged political involvement, held incommunicado and tortured —Victim never reappearing—Authorities denying knowledge of whereabouts of victim—Legal attempts to secure release of victim unsuccessful—Whether State sponsored or tolerated practice of forced disappearances—Whether State responsible for violation of individual's rights to life, integrity of the person and personal liberty—American Convention on Human Rights, 1969, Articles 4, 5 and 7

State responsibility—Human rights violations—Disappearance of individuals — Whether carried out or tolerated by State authorities—Failure of State to act to stop practice or investigate disappearances—Whether State liable for violations of rights to life, integrity of the person and personal liberty—Whether State liable for breach of duty to ensure free and full exercise of individual's human rights—American Convention on Human Rights, 1969, Articles 1(1), 4, 5 and 7

International tribunals—Procedure—Inter-American Court of Human Rights—Contentious matters—Case referred by Inter-American Commission on Human Rights—Competence of Court to decide issues relating to interpretation and application of Convention and procedural rules not restricted by previous decisions of Commission in same case — Exhaustion of domestic remedies — Exhaustion of preliminary procedures — Friendly settlement

Damages—For human rights violations—Scope, basis and amount of compensation — Pecuniary and non-pecuniary damages — Emotional harm—Method of calculation—Relevance of national