AD HOC ARBITRATION

ANTOINE BILOUNE AND MARINE DRIVE COMPLEX LTD. V. GHANA INVESTMENTS CENTRE AND THE GOVERNMENT OF GHANA

AWARD ON JURISDICTION AND LIABILITY

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27 October 1989

Tribunal:
Stephen M. Schwebel (President)
Don Wallace, Jr. (Appointed by the investor)
Monroe Leigh (Appointed by the Appointing Authority)

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Award on Jurisdiction and Liability

I. INTRODUCTION

[1]. 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 expropriated 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

[2]. 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.

[3]. 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.

[4]. 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.

[5]. 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.

[6]. 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.

[7]. 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.

[8]. 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.

[9]. 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.

[10]. 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 WashingtonD. C. The Tribunal extended the time to March 2.

[11]. 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.

[12]. 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.

[13]. 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.

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

[15]. 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. Tetley, Solicitor-General of Ghana; and Mr Samuel Denu, Commercial and Trade Counselor, Ghana Mission to the United Nations. At the Tribunal's invitation, the Parties submitted Post-Hearing Briefs on October 18, 1989.

[16]. 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*

[17]. 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 how in London.

[18]. 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*

[19]. 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.

[20]. 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*

[21]. 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.

[22]. 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*

[23]. 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*

[24]. 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.

[25]. 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.

[26]. 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.

[27]. 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 casde— 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*

[28]. 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.

[29]. 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 Activities*

[30]. 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.

[31]. 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.

[32]. 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.

[33]. 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*

[34]. 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.

[35]. 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.

[36]. 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'".

[37]. 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.

[38]. 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.

[39]. 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.

[40]. 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))

[41]. 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*

[42]. 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.

[43]. 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.

[44]. 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 ofthe dispute. According to Mr Korn'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*

[45]. 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.

[46]. 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.

[47]. 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.

[48]. 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

[49]. 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*

[50]. 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*

[51]. 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".

[52]. 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.

[53]. 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*

[54]. 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*

[55]. 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.

[56]. 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*

[57]. 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.

[58]. 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 ofjustice for failure of the Respondents to participate in the arbitration.

[59]. 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.

[60]. 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.

[61]. 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*

[62]. 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.

[63]. 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.

[64]. 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.

[65]. 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.

[66]. 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.

[67]. 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.

[68]. 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*

[69]. 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 misrepresèntation which, under Article 20 of the GIC Agreement, permits GIC to cancel its approval.

[70]. 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.

[71]. 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.

[72]. 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.

[73]. 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.

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

VI. APPLICABLE LAW

[75]. 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 "construle]" 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

[76]. 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.)

[77]. 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.

[78]. 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.

[79]. 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 September3, 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.

[80]. 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.

[81]. 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.

[82]. 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.

[83]. 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.

[84]. 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.

[85]. 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

[86]. 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.

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

[88]. 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.

[89]. 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.

[90]. 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.