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CERTIFICATE

MARION UNGLAUBE
AND
REINHARD UNGLAUBE

v.

REPUBLIC OF COSTA RICA

(ICSID CASE NO. ARB/08/1)

(ICSID CASE NO. ARB/09/20)

I hereby certify that the attached document is a true copy of the Arbitral Tribunal's Award dated May 16, 2012.

Meg Kinnear
Secretary-General

Washington, D.C., May 16, 2012

International Centre for Settlement of Investment Disputes
Washington, D.C.

Marion Unglaube
and
Reinhard Unglaube
(Claimants)

v.

Republic of Costa Rica
(Respondent)

(ICSID Case No. ARB/08/1)
(ICSID Case No. ARB/09/20)

AWARD

Members of the Tribunal

Mr. Judd Kessler, President
Sir Franklin Berman, Arbitrator
Dr. Bernardo Cremades, Arbitrator

Secretary of the Tribunal:
Anneliese Fleckenstein

Representing Mr. and Mrs. Unlgaube:

Ms. Sabine Konrad
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c/o
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Representing the Republic of Costa Rica:

Mr. Luis Adolfo Fernández
Ms. Mónica Fernández (until 7 October 2011)
Mr. Esteban Agüero Guier (until 1 July 2010)
Ministerio de Comercio Exterior
Edificio Centro de Comercio Exterior
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Apartado Postal 297-1007
San José, Costa Rica
and
c/o Mr. Stanimir Alexandrov
Ms. Marinn Carlson
Mr. Patricio Grané (until 7 August 2009)
Sidley Austin LLP
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Washington, D.C. 20005
United States of America

Date of Dispatch to the Parties: May 16, 2012

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I. Procedural History

1. On January 25, 2008, the Acting Secretary-General of ICSID registered a Request for Arbitration submitted by Mrs. Marion Unglaube, a national of Germany, against the Republic of Costa Rica. The dispute concerns an investment in the ecotourism industry in Costa Rica through the acquisition of land for the development of a tourism project and its subsequent alleged expropriation by the Costa Rican Government. The Request was submitted on the basis of the Treaty, signed on September 13, 1994 and entered into force on March 24, 1998, between Costa Rica and Germany concerning the Encouragement and Reciprocal Protection of Investment ("the BIT" or "the Treaty").

2. On April 8, 2008, the Claimant appointed Sir Franklin Berman, a national of the United Kingdom, as arbitrator. On April 23, 2008, the Respondent appointed Dr. Bernardo Cremades, a national of Spain. On June 3, 2008, the Chairman of the ICSID Administrative Council appointed Mr. Judd Kessler, a U.S. national, appointed by Honduras to the ICSID Panel of Arbitrators as President of the Tribunal.

3. By letter of June 12, 2008, the Parties were notified by the Centre that, in accordance with ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules") Rule 6(1), the Tribunal was deemed to have been constituted for ICSID Case No. ARB/08/1 and the proceeding to have begun on that date. The Parties were also notified that Mr. Tomás Solís, ICSID, would serve as Secretary of the Tribunal.

4. A First Session of the Tribunal was held by telephone conference on August 1, 2008. The Tribunal considered certain procedural aspects of the proceeding, as reflected in the parties' joint letter of July 25, 2008, as well as in the parties' respective communications of that same date. Subsequently, a preliminary procedural consultation meeting with the Tribunal and the parties, with the President being present in person and the co-arbitrators participating via

video-link, was held at the seat of the Centre in Washington D.C. on September 5, 2008. Present at the meeting were: Mr. Judd Kessler, President; Sir Franklin Berman and Dr. Bernardo Cremades, for the Tribunal; and Mr. Tomás Solís, Secretary of the Tribunal. For the Claimant: Mrs. Marion Unglaube and Mr. Reinhard Unglaube; and Mr. Eric Schwartz and Dr. Sabine Konrad from the law firm Dewey & LeBouef. Representing the Respondent: Messrs. Esteban Agüero Guier and Juan Carlos Quirce of the Ministerio de Comercio Exterior of Costa Rica; and Messrs. Stanimir Alexandrov and Patricio Grané, from the law firm Sidley Austin LLP.

5. On November 5, 2008, the Claimant, in accordance with the agreed schedule, filed its Memorial on the Merits.

6. On January 23, 2009, the Respondent filed Preliminary Objections pursuant to ICSID Arbitration Rule 41, together with a request to deal with the objections to jurisdiction as a preliminary matter. On March 9, 2009 the Claimant filed observations on the Respondent's request to deal with the objections to jurisdiction as a preliminary matter. On April 6, 2009, the Respondent filed a response to the Claimant's observations of March 9, 2009. On April 27, 2009, the Claimant filed a reply to the Respondent's response of April 6, 2009.

7. On June 11, 2009, the Tribunal issued a Decision on the Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41, joining the Objections to the merits of the case and taking note of certain proceedings taking place in the courts of Costa Rica.

8. On July 27, 2009, Marion and Reinhard Unglaube and the Respondent submitted a Procedural Agreement by which the parties agreed, among other matters, that i) Mr. Reinhard Unglaube would submit a Request for Arbitration with regard to his share of the investment in Costa Rica; ii) once the Request was registered, and provided that there were no preliminary

objections to be raised, the parties would ask for the consolidation of both arbitrations; iii) Mrs. Marion Unglaube would amend her claim in light of the decision by the Constitutional Court of Costa Rica of December 16, 2008, and Costa Rica would not object to such amendment but reserved its rights to challenge the merits of the amended claims.

9. On August 26, 2009, the Claimant filed an agreement to amend her claim in light of a decision of the Constitutional Court of Costa Rica dated December 16, 2008, and subsequent acts. Claimant alleged that the Court's decision ordered SETENA i) to undertake a study of the environmental impact of development within a 500 meter buffer zone of the Park; ii) to suspend environmental permits for properties within the buffer zone and the processing of such permits pending completion of the study, and iii) to consider whether properties within the buffer zone should be expropriated. In light of this decision and SETENA's compliance with it, Claimant argued that her properties in the buffer zone had been impaired. On October 14, 2009, the Respondent filed observations on the Claimant's amendment. Specifically, the Respondent informed the Tribunal that on October 1, 2009, SETENA informed the Constitutional Court that it had completed the required study and had determined that it was not necessary to expropriate any properties within the buffer zone. The Respondent argued that due to this development the amendment filed by the Claimant was mooted and that it looked forward to the withdrawal of the request. On October 26, 2009, the Claimant filed a response to the Respondent's observations, arguing that the study was but a step in the right direction but did not satisfy the Claimant's claims and therefore maintained the requested amendment to her claim.

10. On November 11, 2009, the Secretary-General of ICSID registered a Request for Arbitration submitted by Mr. Reinhard Hans Unglaube, a national of Germany, against the Republic of Costa Rica. Similarly, the dispute concerns an investment in the ecotourism industry

in Costa Rica through the acquisition of land acquired for the development of a tourism project and its subsequent alleged expropriation by the Costa Rican Government. The Request was also submitted on the basis of the Treaty. The case was registered as ICSID Case No. ARB/09/20.

11. By letter of December 29, 2009, the Parties were notified by the Centre that, in accordance with ICSID Arbitration Rule 6(1), the Tribunal for ICSID Case No. ARB/09/20 was deemed to have been constituted and the proceeding to have begun on that date. The Parties were also notified that Mrs. Anneliese Fleckenstein, Legal Counsel, ICSID, would serve as Secretary of the Tribunal for this case.

12. By letter of January 15, 2010, the Tribunal was informed that, due to the departure of Mr. Solís from the Centre, Mrs. Anneliese Fleckenstein, would also serve as Secretary to the Tribunal for Mrs. Unglaube's case.

13. Pursuant to the request of the Secretariat of December 22, 2009, the parties confirmed their desire to consolidate the two cases and to have them heard by the same Tribunal. As a result, Marion Unglaube and Reinhard Unglaube are referred to hereafter as the "Claimants."

14. On February 4, 2010, the Tribunal held a first session of the consolidated cases by telephone conference. During the conference the Tribunal discussed the parties' Procedural Agreement submitted on January 21, 2010.

15. On April 30, 2010, the Claimants, in accordance with the agreed schedule, filed their Memorial on Liability and Damages.

16. On July 19, 2010, the Respondent filed a request for production of documents.

17. On August 16, 2010, the Respondent filed a Counter-Memorial on the merits.

18. On September 10, 2010, the Claimants filed a request for production of documents. On September 17, 2010, the Respondent filed observations on the Claimants' request for production of documents.

19. On September 24, 2010, the Claimants filed a further request for production of documents. On September 27, 2010, the Respondent filed observations on the Claimants' further request for production of documents. On October 1, 2010, the Tribunal issued Procedural Order No. 1 concerning the production of documents.

20. On October 15, 2010, the Claimants filed a Reply on the merits.

21. On December 14, 2010, the Tribunal issued Procedural Order No. 2 pursuant to ICSID Arbitration Rule 37(1) concerning a site visit scheduled to take place on December 18-19, 2010. In its Order, the Tribunal resolved pending matters of the procedure to be followed during the site visit.

22. On December 16, 2010, the Respondent filed a Rejoinder on the merits.

23. Between December 18 and 19, 2010, the Tribunal and the parties participated in a site visit to the Guanacaste region in Costa Rica, pursuant to ICSID Arbitration Rule 37(1). Present during the visit were, for the Tribunal, Mr. Judd Kessler, President; Sir Franklin Berman and Dr. Bernardo Cremades; Mrs. Anneliese Fleckenstein, Secretary of the Tribunal. Representing the Claimants: Mr. and Mrs. Unlagube; Dr. Sabine Konrad and Mr. Marcus Birch from the law firm of K&L Gates; and Claimants' expert Mr. Thomas Kabat and his assistant Mr. Carl Dietz. Representing the Respondent: Ms. Marinn Carlson and Mr. Stanimir Alexandrov from the law firm of Sidley Austin LLP; Ms. Mónica Fernández and Mr. Giulio Sansonetti from the Ministerio de Comercio Exterior of Costa Rica; and

Respondent's expert Mr. Brent Kaczmarek. Respondent's witness Mr. Rotney Piedra participated during the beach visit.

24. On February 21-23, 2011, the Tribunal held a hearing on the merits in Washington, D.C. Present at the hearing were, for the Tribunal, Mr. Judd Kessler, President; Sir Franklin Berman and Dr. Bernardo Cremades; Mrs. Anneliese Fleckenstein, Secretary of the Tribunal. Representing the Claimant: Mr. and Mrs. Unlagube; Dr. Sabine Konrad, Mr. Marcus Birch, Ms. Lisa M. Richman and Mr. Wojciech Sadowski from the law firm of K&L Gates; and Messrs. Gonzalo Rojas and Elias Shadid from the law firm of FSV Law. Representing the Respondent: Ms. Mónica Fernández and Messrs. Giulio Sansonetti and Alan Thompson from the Ministerio de Comercio Exterior of Costa Rica; Mr. José Carlos Quirce and Ms. Laura Dachner from the Embassy of Costa Rica; and Ms. Marinn Carlson, Mr. Stanimir Alexandrov, Ms. Adriana Andrade and Mr. Gavin Cunningham from the law firm of Sidley Austin LLP.

25. On April 11, 2011, the parties filed simultaneous submissions on costs.

26. On April 3, 2012, the Tribunal declared the proceeding closed.

II. Applicable Law

27. In their July 27, 2009, agreement, the parties established that ICSID Case No. ARB/08/1, instituted by Ms. Marion Unglaube and ICSID Case No. ARB/09/20, instituted by Mr. Reinhard Unglaube, would be treated in a consolidated manner. The parties, accordingly, filed consolidated memorials and both cases were heard by the Tribunal in single hearing held at the seat of the Centre on February 21 through February 23, 2011.

28. In accordance with the parties' agreement and, for reasons of judicial economy, the Tribunal renders this sole Award, in which it disposes of all the claims submitted by Mrs. and Mr. Unglaube. When the Tribunal refers in this Award to "parties" it should be understood that

it is referring to Claimants, Ms. Marion and Mr. Reinhard Unglaube, and Respondent, the Republic of Costa Rica.

29. The Parties have not differed regarding which bodies of law apply to this matter. The ICSID Convention requires that the Tribunal "decide a dispute in accordance with such rules of law as may be agreed by the parties."[1]

30. Article 10 of the Germany-Costa Rica BIT[2] establishes procedures for submitting disputes involving investments in one nation by nationals of the other to arbitration under the ICSID Convention. Specifically, Article 10(3) provides that:

> The arbitration tribunal shall decide a dispute in accordance with this Treaty and such other agreements as may be applicable between the Contracting Parties and the national laws of the Contracting Party in whose territory the investment is situated, including rules of private international law, and the general principles of international law.

31. Article 31(1) of the Vienna Convention on the Law of Treaties requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

32. Therefore, while any given issue may require the application of particular provisions of Costa Rican law or, alternatively, may involve application of terms of the Treaty (which have also been incorporated into the law of each of the signatory parties), this dispute shall be governed by Costa Rican law and international law.

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1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965, Article 42(1). Furthermore, "[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

2 Treaty between the Federal Republic of Germany and the Republic of Costa Rica concerning the Encouragement and Reciprocal Protection of Investments, dated September 13, 1994.

III. Burden Of Proof

33. ICSID Arbitration Rule 34(1) states that the Tribunal shall be the judge of the admissibility as well as the probative value of any evidence. However, neither the Convention nor the Rules provide formal rules of evidence. They also do not specify which Party carries the burden of proof in disputes brought before an ICSID tribunal. However, there is a nearly universal practice among international arbitration tribunals to require each party to prove the facts which it advances in support of its own case.[3] Exceptions to his general rule only apply to obvious or notorious facts.[4]

34. The degree or standard of proof is not as precisely defined. Whichever party bears the burden of proof on a particular issue and presents supporting evidence "must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof."[5] The degree to which evidence must be proven can generally be summarized as a "balance of probability,"[6] "reasonable degree of probability"[7] or a preponderance of the evidence.[8] Because no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.[9]

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3 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, § 6-67 (4th ed. 2004).

4 *Id.*

5 *See Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990), ¶ 56 (citing Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 329-331 (1987)).

6 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, § 6-67 (4th ed. 2004).

7 MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 323 (1996).

8 Some claims in international arbitration such as corruption will require a heightened showing of "clear and convincing evidence." *See EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2009), ¶ 221.

9 *See* MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 325 (1996).

35. A claimant ultimately cannot prevail without meeting these minimum thresholds of proving his or her claim.[10] Similarly, a claim that the international responsibility of a State is engaged requires proof.[11]

36. Therefore, Claimants must present evidence sufficient to demonstrate that Respondent's conduct towards Claimants' investment has breached the Treaty. The burden may then shift to the Respondent to establish that its conduct was permitted under the Treaty or international law.

IV. Factual Background

37. In broad terms, this dispute concerns certain properties owned by the Claimants, either individually or jointly, which are located in the vicinity of Playa Grande in the municipality of Santa Cruz, a district of Cabo Velas, Guanacaste Province, Costa Rica. Playa Grande itself, is a picturesque beach on Costa Rica's Pacific coast. It is also an important site on which female Leatherback Turtles lay their eggs. Given the endangered status of these large turtles, and Costa Rica's well-known reputation as an eco-tourism destination, the Government of Costa Rica has taken steps intended to protect this nesting habitat. Costa Rica has, therefore, as early as 1991, announced its intention to create a national park in this particular area to be known as Las Baulas National Marine Park (hereafter "the Park") and has pursued this objective through a succession of legal, administrative, and court-ordered measures whose stated purpose was to bring the Park into existence.

38. Playa Grande forms the western perimeter of a narrow peninsula on a portion of which have been constructed, with the full consent of governmental authorities, low-density

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[10] Mojtaba Kazazi & Bette E. Shifman, *Evidence before International Tribunals – Introduction*, 1 INT'L L.F. D. INT'L 193, 196 (1999).

[11] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990), ¶ 56 (internal citations omitted).

residential housing, several hotels and other commercial locations. None of these buildings is more than two stories tall. On the opposite perimeter of this narrow peninsula (the side away from the Playa Grande beach) there lies a mangrove swamp and the Tamarindo estuary which flows into the ocean just south of the beach at Playa Grande and just north of the more densely-constructed town of Tamarindo and its beaches. The area covers approximately 63 hectares (width and length). A visual depiction of the outlines of the area and approximate locations of the properties of Claimants appears at p. 12.

39. This dispute involves a long history and a complex set of facts. The Claimants, Marion and Reinhard Unglaube, and the Respondent, the Republic of Costa Rica, appear to be in agreement, at least in principle, concerning the worthiness of protecting the nesting area for the leatherback turtles and regarding the need for environmentally sensitive development. The Parties do diverge sharply, however, concerning (1) the rights and protections available to owners of property in Costa Rica (as those rights may be affected by the Germany-Costa Rica Bilateral Investment Treaty) and (2) on the scope of the rights of the Costa Rican government to either take property of private owners or to regulate their use of certain properties.

V. Properties Of The Claimants

40. It is not disputed that the Claimants are now owners of certain properties on the Playa Grande peninsula. It is important that these properties and, to some degree, the history of their ownership be clearly described and understood. The land involved includes two contiguous areas. The first of these (referred to hereafter as "the Phase I Property") consists of 29.5 hectares. It had been owned until 1987 by a Panamanian company known as Palm Beach S.A. which made an investment in urbanizing the land (i.e., providing roads, drainage, etc.) with an eye toward constructing a low-density, ecologically responsible development on this portion of

the peninsula.[12] Their concept was originally referred to as the Tamarindo Beach Project and is now referred to as "Palm Beach Estates."

41. In 1987, the Claimants, through a Panamanian company named Unicaribbean, S.A. (owned 60% by Marion Unglaube and 40% by Reinhard Unglaube) acquired a 50% ownership interest in Palm Beach S.A. (also a Panamanian corporation). Urbanization of the Phase I property was eventually completed and, in 1993, pursuant to plans approved by Costa Rica's National Institute of Housing and Urban Development ("INVU") the property was divided into lots and sold to private buyers between 1993 and 2004. The approved Phase I plans provided for 161 residential lots, 16 commercial units and two "reserved zones."[13] The Claimants, Marion and Reinhard Unglaube, became owners, individually or jointly, of the following Phase I Properties: Lots 147 and 148 (upon which now stands the Hotel Cantarana) and Lots 19-23.

42. In addition, the Claimant, Marion Unglaube, owns an area of 3.5 hectares which is contiguous to the northern-most perimeter of the Phase I Property, and which includes one boundary, measuring approximately 100 meters, immediately abutting the Playa Grande Beach. This property, which will be referred to hereafter as the "Phase II Property" was owned, until 1994, by Tamarindo Beach Club International Corporation (hereafter "Tamarindo Beach Club Intl.") which in turn was owned by Mr. Rolf Jestaedt, a German national. In 1994, this property was acquired by Claimants, again through Unicaribbean, S.A. In 1998, the Claimant, Marion Unglaube, personally, became the sole owner of the Phase II Property. For purposes of this case,

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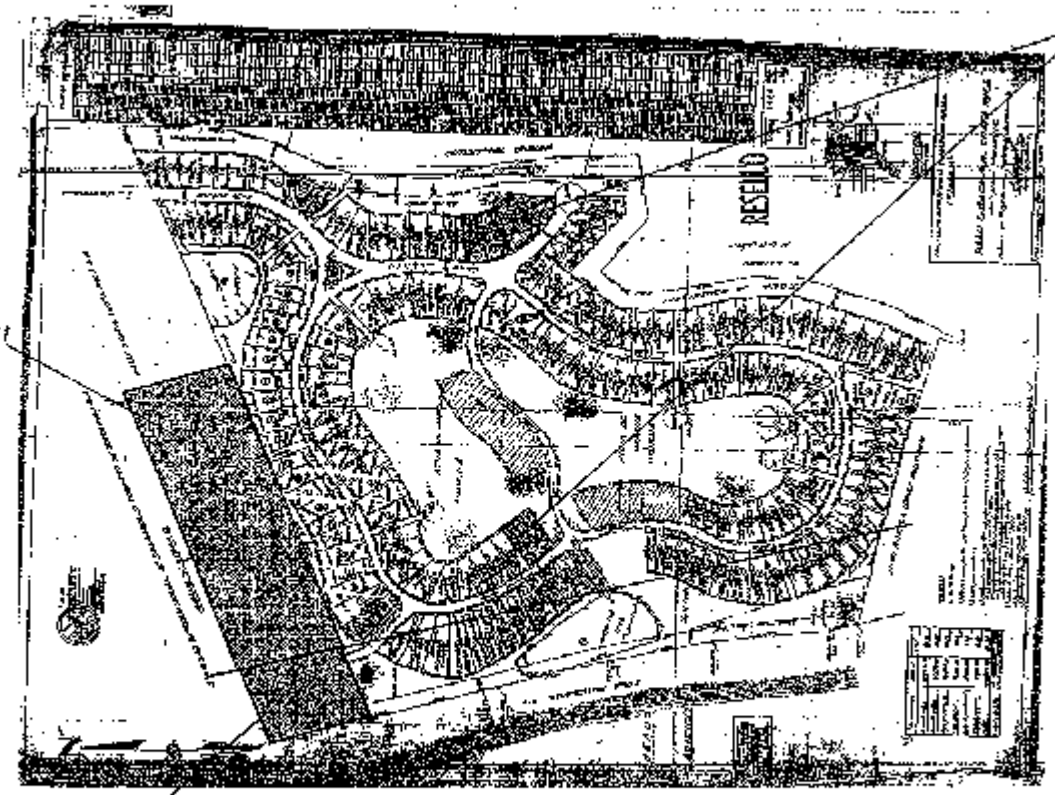
12 Claimants' Memorial on Liability and Damages [hereafter "CM"], CM ¶ 51.

13 CM ¶ 54; Exhibit [hereafter "Exh." followed by C-[#] for Claimants' Exhibits or R-[#] for Respondent's Exhibits], C-11.

the terms “the Project” or “the Investments” shall be used to describe the combination of the Phase I and Phase II properties.

1988 Plan (Ex. C-11) *



* This annotated copy of Exh. C-11 is included solely to assist the reader in achieving a visual understanding of the area in question. Annotations (1) (3) have been added by the Tribunal.

VI. Overview of the Positions of the Parties

A. Position of the Claimants[14]

43. Claimants indicate that they are and have always been responsible owners who have sought to use their properties to create an ecologically-sensitive, low-density, tourism development. Environmental studies were commissioned by the owners as early as 1985, followed by another study in 1988, which included a specific plan for improving the turtle nesting habitat in the area. These studies were submitted to the relevant government authorities at the time for their approval.[15]

44. According to Claimants, plans for the Project were included in a detailed plan showing the initially-intended land use of Phases I and II, which was stamped as signed and approved by INVU on December 15, 1988.[16] With respect to the Phase I Property, this plan contemplated 161 lots for residential development houses, 16 lots for commercial units, and two "reserved zones." These latter zones, Claimants indicate, were intended to be open space/green zones/protected zones, both on the side bordering the Playa Grande Beach and on the opposite perimeter which borders the Tamarindo estuary. The Project plan also showed a 50-meter "inalienable public zone" bordering the Pacific Ocean.[17]

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[14] All references to the views or position of the Claimants – or either of them – refer to written or oral presentations by counsel for Claimants, supported by documentary and witness evidence presented in this proceeding. The Claimants themselves have chosen not to submit witness statements. Therefore, they have also not presented oral testimony and have not been subjected to cross-examination. However, Mrs. Unglaube did make a personal statement after the closing statement of her counsel. This statement, while appreciated, could not be and has not been considered as "fact evidence" by the Tribunal.

[15] CM, ¶ 52.

[16] CM, ¶ 54; *see also* Exh. C-13.

[17] CM, ¶ 54; *see also* Exh. C-70.

45. In the early 1990's, Claimants indicate that they learned of a proposal to include some land in the Playa Grande in a new national park. Claimants state that they supported this idea, but were also concerned as to the potential impact on the development of their properties – including how it might affect approvals and permits already granted.

46. Claimants state that, therefore, Mr. Unglaube arranged to meet with Costa Rican authorities in order to seek a possible agreement of mutual benefit. Specifically, he met with the vice-minister of the Ministry of Natural Resources and Mines ("MIRENEM") to discuss the potential impact of the Park on the Project.

47. In a letter following the meeting, Mr. Unglaube indicated that Palm Beach S.A. was willing to consider donating land to assist in formation of the Park. As related by Claimants, he, writing on behalf of Palm Beach S.A., made the offer subject to certain conditions including, principally, that the Ministry formally reaffirm its approval of the Project following the presentation of modified plans.[18]

48. On July 9, 1991, the President of Costa Rica and MIRENEM issued a decree ("the 1991 Decree") that announced the intention of the government to create Las Baulas National Marine Park in order to protect the endangered giant leatherback sea turtles that nested in the area. In the 1991 Decree, the government also indicated its intention to acquire private properties located in the area, for which funds were to be sought in the 1992 budget.

49. Following the issuance of the 1991 Decree, Mr. Unglaube, as a representative of Palm Beach S.A., continued negotiations with MIRENEM. Claimants relate that then, on November 29, 1991, Mr. Unglaube again wrote to the Ministry repeating his offer to donate land

[18] CM, ¶ 58; *see also* Exh. C-74.

to the Park, and attaching a proposed modified plan to take account of the donation and to establish certain "green zones" within the Project area.

50. According to Claimants, on December 16, 1991, MIRENEM replied – agreeing to the donation, confirming that the project had been approved, and welcoming Mr. Unglaube's proposal for a modified project plan. The reply also expressed MIRENEM's willingness to communicate its approval of the project to the municipality of Santa Cruz and other authorities. Finally, the Vice Minister asked Mr. Unglaube to propose a date for a meeting with the President of Costa Rica in order to "make sure that your generous and valuable donation to the Government of Costa Rica receives the full appreciation of our country and the appreciation it deserves."[19]

51. Claimants further state that these arrangements were formalized on March 24, 1992 (the "1992 Agreement") which recorded Palm Beach S.A.'s donation of part of the Project land to Costa Rica, as well as its commitment to create "green corridors." In Article 3 of the Agreement, the owners undertook to comply with a number of "guidelines" in relation to permissible construction and environmental management. In exchange, Claimant notes that the Ministry agreed not to build any structures on the donated land and to inform administrative authorities of the Municipality of Santa Cruz and other authorities of its approval of the modified Project plan.

> "[I]ts approval and agreement of the aforementioned donation of land, as well as the acceptance of [Palm Beach, S.A.] with respect to the recommendations contained herein, which will allow an urban/tourist development to coexist with a highly fragile ecosystem . . ."[20]

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19 CM, ¶ 61.

20 CM, ¶¶ 63-64.

52. Claimants indicate that the 1992 Agreement was publicly announced at a meeting between Mr. Unglaube and the President of Costa Rica held on March 24, 1992.

53. According to Claimants, Palm Beach donated over 10 hectares of land on the understanding that Costa Rica would, in exchange, reaffirm its approval of the Project and prevent any difficulties from arising in the permitting process. Claimants further state that the Project owners have complied with all of their other obligations under the 1992 Agreement.[21]

54. Claimants protest, however, that while Costa Rica initially complied with its side of the agreement – including permitting the construction in Phase I of the Project over the next decade – in 2003, Costa Rican authorities began to act contrary to the commitments entered into in the context of the 1992 Agreement.

55. Claimants indicate that the urbanization of the Phase I Property was substantially completed in 1993. The lots in Phase I were then all sold over the next 10 years. As a result, the Phase I Property now includes over 70 bungalows, four small hotels, three restaurants, and a supermarket. It has contributed to economic growth in Guanacaste, and dozens of jobs have been created.

56. As the Phase I sales were progressing, the Costa Rican parliament, on July 10, 1995, passed Law No. 7524 entitled, "Creation of Las Baulas de Guanacaste National Marine Park (hereafter "National Park Law"). In defining the boundaries of the Park, the law included, *inter alia*, the following language:

> "sigue por una línea recta hasta alcanzar una línea imaginaria paralela a la costa, distante ciento veinticinco metros de la pleamar ordinaria aguas adentro."
>
> As translated by the Tribunal this provision reads as follows:

[21] CM, ¶ 67.

> "The limit continues in a straight line until reaching an imaginary line parallel to the coast, one-hundred twenty-five meters seaward ("*aguas adentro*") from the ordinary high tide line."[22] (Parenthesis added.)

57. Article 2 of the National Park Law states as follows:

> "The private lands included in that delimitation shall be subject to expropriation and considered part of the Las Baulas National Marine Park until they are acquired by the state through purchases, donations or expropriations; in the interim, owners shall enjoy full exercise of their ownership rights."[23]

58. For the next eight years, the government made no effort to expropriate land to create the Park. Claimants indicate that they, and others, who owned land in the Playa Grande area believed that they were not affected by the law. They, therefore, acted in reliance on that understanding and continued to develop their land.

59. According to Claimants, Costa Rica's first attempt to expropriate some of the properties began in 2003. This action, Claimants indicate, came as a surprise, especially because Claimants considered that these actions ran directly counter to the understandings so recently confirmed in the 1992 Agreement and in the revised development plans submitted and approved pursuant thereto. As indicated previously, the Claimants, by then, had sold off most of the lots in Phase I. They maintain that they intended to commence development of Phase II in late 2003.

60. Claimants then maintain that in November 2003, the Costa Rican Ministry of the Environment and Energy ("MINAE"),[24] published a resolution ("Resolution No. 375") declaring it to be in the public interest to expropriate the land on which Phase II was to be built. Resolution No. 375 stated as follows:

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22 CM, ¶ 71; *see also* Costa Rican Law No. 7524 entitled Creation of the Las Baulas de Guanacaste National Park, effective on August 16, 1995 [hereafter "National Park Law'], Article I.

23 CM, ¶ 72; National Park Law, Article 2. Unofficial translation as provided by Claimants.

24 MINAE was the successor to MIRENEM.

> Of the property in question, only six thousand meters are located within the boundaries of the Las Baulas de Guanacaste National Marine Park, but since the Executive Branch agrees that the rest of the land would remain as enclaved land, it decides to expropriate the entire property so as not to harm the owner, for which reason all the property will be acquired.[25]

61. Resolution 375 purported to expropriate not only the additional 75-meter by 100-meter strip (hereafter the "75-Meter Strip") which was adjacent to the "inalienable zone," but the entire Phase II Property. Claimants argue, however, that it was and is evident from the express wording of the National Park Law that no part of the Phase II property lay within the Park. Claimants emphasize that the National Park Law's language makes it clear that the Park commences at the mean high tide line and extends 125-meters seaward. Claimant Marion Unglaube, therefore, challenged Resolution No. 375 before MINAE.

62. While this challenge was pending, Claimants state that work on development of Phase II of the Project continued – focusing on improvement of the roads. However, on March 17, 2004, the Municipality of Santa Cruz suspended Marion Unglaube's municipal construction permit.[26] Finally, however, MINAE revoked Resolution No. 375, finding that only the 75-Meter Strip was within the Park.[27]

63. Claimants indicate that then, on August 17, 2004, Costa Rica began a second attempt to expropriate the Phase II Property by conducting an administrative appraisal of the value of the 75-Meter Strip – which Claimant insists does not lie with the Park. On November 8,

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[25] "Que del inmueble indicado únicamente seis mil metros se encuentran dentro de los límites del Parque Nacional Marino Baulas de Guanacaste, pero que el Poder Ejecutivo consciente en que el resto del terreno quedaría como fundo enclavado, decide expropiar la totalidad con el fin de no perjudicar a la propietaria, por lo que se adquirirá la totalidad de la finca".

[26] CM, ¶ 86; Exh. C-18.

[27] The concept of the "75-Meter Strip" originates from the 125-meter strip contemplated by the National Park Law (as clarified) with the subtraction of the 50-meter strip of public land designated as inalienable under Costa Rican law.

2004, MINAE issued Resolution No. 421, declaring expropriation of the 75-Meter Strip to be a matter of public interest and instructing the relevant authorities to proceed with the acquisition of the strip.[28] This attempted expropriation, Claimant notes, was halted by a Costa Rican Attorney General (*Procuraduría General*) because the law requires a declaration of public interest to precede an administrative appraisal, not the reverse.[29] Counsel for Mrs. Unglaube did file with the Prosecutor certified copies of documents filed with the *Tribunal Fiscal Administrativo* (Administrative Tax Tribunal) objecting to the administrative appraisal of the property.

64. Despite the legal uncertainty arising from these attempted expropriations, Claimants note that Marion Unglaube continued to try to develop her land. Though she believed that she already had received all government approvals necessary to proceed with development of the Phase II Property, on January 12, 2005, she did file an Environmental Impact Assessment Request with the Costa Rican National Environmental Technical Secretariat ("SETENA"), a subordinate agency within MINAE. This study related to the whole of the Phase II property. Claimants point out, however, that before SETENA could even begin to process this request, MINAE, by means of Decree No. 305, ordered SETENA and other administrative authorities, to reject any request for development permits which included property declared to be part of the Las Baulas National Marine Park.[30]

65. According to Claimants, this step marked a change in strategy on the part of MINAE, away from formal attempts to expropriate their land to, instead, establishing a freeze on development in the area by interfering with and stalling the permitting process. While Claimants

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28 Exh. C-39.

29 Exh. C-21.

30 "Cualquier zona declarada como Parque Nacional Marino Las Baulas." Exh. C-22.

maintain that this action by MINAE lacked any basis in fact or law, they protest that it did, in fact, have a direct impact on Claimants' property.

66. On March 9, 2005, the Constitutional Chamber of the Supreme Court of Costa Rica (in an *amparo* case brought against MINAE and others by a private individual) directed:

> "that SETENA issue the necessary guidelines and draft the relevant orders, within the scope of [its] jurisdiction and powers, to assure that the municipal permits and environmental viability permits, that are granted must guarantee that the species known as the leatherback turtle, and the beaches where they nest, are not affected."[31]

67. Claimants note that on the following day, March 10, 2005, MINAE directed SETENA to cease processing environmental permits for projects on land located partly within the Park. In carrying out this directive, SETENA, wrongfully in Claimants' view, declared that Marion Unglaube's 75-Meter Strip was within the Park and thus suspended processing for all of the Phase II property.

68. On August 30, 2005, SETENA invoked a "precautionary" resolution through which it suspended all future and ongoing environmental assessment procedures for projects inside the Park.[32] A specific legal provision invoked by SETENA in support of its "precautionary" action limited the effect of such measures to one year with an automatic expiration at the end of the one-year period.[33] However, Claimants point out that this measure has now remained in force for more than four and one-half years.

69. Further, Claimants note that even though it was a separate, unrelated *amparo* petition which gave rise to the temporary suspension, that *amparo* was decided in April 2008 –

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31 CM, ¶ 98; Exh. R-57.

32 CM, ¶ 101.

33 Article 4 Costa Rican Law on Expropriations, Law No. 7495 of May 3, 1995 [hereafter "Expropriations Act"]; *see* Exh. R-30.

and though the guidelines required by the court have already been issued, the suspension with respect to Claimants' properties remains in place and SETENA shows no sign of lifting it.[34]

70. Claimants protest that they have been put to great effort and expense in an attempt to vindicate their legal rights both under Costa Rican law and under the Treaty. In the most recent challenge, Marion Unglaube argued that SETENA was, *inter alia*, violating the principle of legality, her right to petition and answer, her property rights, and her right to due process – and that the indefinite freezing of development rights has prevented her from the full use and enjoyment of her property. She also complained that the one-year limitation on SETENA's suspension, which is established by law, had been violated and requested that the court assess damages for the delay. Finally, she asked the court to set aside SETENA's "temporary" suspension resolution and to direct SETENA to cease the ongoing injury to her property rights.

71. Claimants report that Marion Unglaube's efforts were rewarded on May 27, 2008 when the Supreme Court sharply criticized MINAE:

> "[F]or having delayed more than ten years the processing of the procedures for expropriation of the private property located within the Las Baulas National Marine Park, in terms of Law No. 7524 from 10 July 1995. With respect to SETENA, the appeal is admitted for violation of the principle of swift and complete justice, because of the delay . . ." (in ruling on Claimant's motion for reconsideration).
>
> The Court continued:
>
> The State is ordered to pay costs and damages for the freeze to which the property belonging to the party being granted protection was subjected, for failing to define the expropriation procedures within a reasonable period of time.[35]

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[34] CM, ¶ 105.

[35] CM, ¶ 110; Exh. C-28, C-41.

72. While Claimant maintains that the Supreme Court erred in finding that any portion of her property is located within the Park, she did, without prejudice to her other rights, file, in June 2009, an application for enforcement of this last aspect of the Supreme Court's ruling. The Tribunal involved (Treasury Court) on August 18, 2010, denied this application and a further appeal has been filed by Mrs. Unglaube. Notwithstanding the above, Claimants object that the State has not, as of the present date, either determined the amount owing for the delay, nor has it made any payment to her in this regard.

73. Claimant further notes that in the same decision of May 27, 2008, the Supreme Court ordered MINAE either to proceed with the expropriation of Marion Unglaube's property within the Park within a reasonable period of time, or if there were not funds available to do so, to grant the permits or authorizations to the private owners "so that they can in fact exercise their property rights once they have obtained the necessary environmental impact study and the environmental permits that rule out the possibility" of further endangerment of the leatherbacks.[36]

74. Claimants point out that, to date, more than three years later, the State still has not purchased Marion Unglaube's property – nor has it granted the necessary permits to allow her to exercise and enjoy her property rights.[37]

75. Claimant, Marion Unglaube, then through her legal counsel attempted to negotiate a way forward with MINAET,[38] SETENA, and the Costa Rican Foreign Trade Ministry ("COMEX"), and the National System of Conservation Areas ("SINAC"). These discussions led

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[36] CM, ¶ 113; Exh. C-41.

[37] CM, ¶¶ 114-115.

[38] MINAET was the successor agency to MINAE.

to the so-called Road Map agreement (hereafter "Road Map") of October 16, 2008.[39] Claimant states that pursuant to this Agreement, MINAET was to write to SETENA stating that the intent of MINAET was not to call a halt to the process of environmental review in the area and therefore to urge SETENA to proceed to complete its review of the assessments for the whole of Phase II of the Project so that, once approved, Phase II of the Project could proceed.

76. Once the formal assessment process was reopened by SETENA and it had issued a formal request to Marion Unglaube to file an environmental impact study ("EIS"), she submitted the EIS on January 22, 2009. Despite being required to complete a ruling on the assessment within 30 days, Claimants relate that SETENA has still not ruled on the assessment and, more than two years later, Claimants still have no positive information as to its status. Claimants consider that the Road Map has led to a dead end.

77. Claimants' description, thus far, of acts and omissions of the Respondent has been targeted only on the 75-Meter Strip and the rest of the Phase II Property. But on December 16, 2008, according to Claimants, the interference was also expanded to include the Phase I property.

78. On December 16, 2008, the Constitutional Chamber of the Supreme Court issued a decision on yet another *amparo* petition brought by members of a non-governmental organization consisting of private parties who were "neighbors" of the Park. This organization had been concerned that the measures taken to date by SETENA and other governmental bodies had not been sufficient to assure protection of the endangered leatherback turtle.

79. Claimants point out that the response of the Court to this petition was to order SETENA to conduct a comprehensive study of the potential impact of construction, tourism and

[39] Exh. R-43.

urban development in the Park's buffer zone ("*zona de amortiguamiento*") described by the Court as all properties located within 500 meters of the boundaries of the Park. This study was directed to be completed within six months. The Court ordered SETENA to suspend and defer the validity of the Environmental Viability Permits for properties situated inside the buffer zone until the study was completed. The court also ordered SETENA to stop processing applications for Environmental Viability Permits for properties situated inside the buffer zone as well as to suspend, defer and withdraw all building permits granted by the Municipality of Santa Cruz for properties within the zone until the study is completed.

80. Finally, the Court ordered that all Environmental Viability Permits granted to properties inside the Park be withdrawn and directed MINAET to continue with the immediate expropriation of these properties.

81. With regard to these rulings by the Court, Claimants again protest strongly. Regarding properties "within the Park," Claimants first reiterate that despite the words of the 1995 National Park Law, Respondent has, since 2003, treated the 75-Meter Strip as if it is inside the Park. Of course, that portion of the Phase II property is therefore directly affected. Claimants protest that this is wrongful and illegal because no part of the Phase II property is within the Park, and that, in the absence of a statutory basis, any expropriation based on the order would constitute a breach of the Treaty.

82. Second, with regard to properties in the "buffer zone," Claimants maintain first that the description of "a strip of 500 meters" does not even provide a precise description of the location of the buffer zone, so much so that even SETENA had found it necessary to request clarification from the Court.

83. But, in addition, Claimants protest that the rulings with respect to the buffer zone expand the state's interference both to all of Phase II as well as, for the first time, the Phase I Properties. The freeze of permits in the buffer zone makes Claimants' Phase I properties undevelopable and, in effect, unsellable.[40]

84. Claimants point out that SETENA did not comply with the court's six-month deadline from December 2008 for completing the study. In fact, the study was not completed until October 2009. Claimants' view is that, despite the recent suggestion from MINAET that SETENA should lift the suspensions of processing regarding properties in the buffer zone, the reality is that the ruling of the Supreme Court put a final stop to any exercise of property rights on any part of the Project.[41]

85. In addition to the above problems, Claimants see the December 16, 2008 ruling of the Supreme Court as directly conflicting, in part, with the same Court's ruling of May 27, 2008. Whereas the former appeared to indicate that Marion Unglaube and other landowners had the right to carry out environmental impact assessments on their properties, the later ruling ordered that such assessments (or at least state consideration of such assessments) must cease.

86. More specifically, the December 2008 ruling also had a direct impact on properties in Phase I – (1) by means of an express freeze on development and (2) because it constitutes, in Claimants' view, the first act expressly threatening an illegal expropriation of all of their properties – both Phase I and Phase II.

87. This December 2008 ruling impacts the Hotel Cantarana directly because on April 27, 2009 Unirana S.A., the company through which Claimants own the hotel, filed with

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40 CM, ¶ 139.

41 CM, ¶ 140.

SETENA a sworn statement of environmental commitments and an environmental management plan regarding the proposed extension of the hotel,[42] but the hotel extension project was placed on hold indefinitely.

88. Lots 19 to 23 are even farther from the beach (approximately 300 meters from the mean high tide line. On May 22, 2009, Reinhard Unglaube filed an application regarding the proposed construction of a swimming pool, lounge and outbuildings to serve these lots. Though the study has long-since been completed, these activities have also apparently been placed on hold indefinitely.

89. With respect to Lots 19 and 20, Claimants indicate that Reinhard Unglaube has intended to construct extensions to the Hotel in the form of two further guest houses and swimming pools. Mr. Unglaube, based on SETENA's refusal to act on the Hotel Extension Project has no expectation that his applications will be dealt with expeditiously, or at all. All of these circumstances have clearly affected the legal status (and therefore, the commercial value) of these properties.

90. Finally, with respect to the December 16, 2008 decision, the Supreme Court, at a minimum, raised the spectre of possible expropriation to all properties within the buffer zone, if the resulting study found such action of importance to the effectiveness of the buffer zone. While such an expropriation, according to Claimants, would be illegal and constitute a violation of the Treaty, the threat of such an expropriation, even if it is never carried out, makes it impossible for the Claimants to fully use or sell the Properties and amounts to a continuing present expropriation.[43] The Claimants urge that they are unable to develop their properties or to

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[42] Exh. C-48.

[43] CM, ¶ 155.

deal freely with them and have therefore been deprived of the present and future value of those properties.[44]

91. Claimants also point out that, with respect to the 75-Meter Strip, that as of June 2009, while the Study was still pending, MINAET again decided to attempt to expropriate the 75-Meter Strip, using the same *contra legem* interpretation of the 1995 Park Law – relying, in part on the December 2005 opinion of the Attorney General's office and the May and December 2008 decisions of the Supreme Court. For this attempt, MINAET ordered that the National Registry place a freeze on the title to the entire Phase II property (not just the 75-Meter Strip).[45] MINAET issued Resolution No. 023, purporting to amend the earlier Resolution No. 421 – which had been part of Respondent's second attempt to expropriate, but which had been halted by the Attorney General's office due to "irremediable" procedural irregularities.[46] Claimants maintain that this is impermissible and illegal because the new proposed expropriation cannot rely on an earlier declaration of public interest (subsequently halted on grounds of illegality) and for other reasons, including that Resolution No. 023 was not published until September 25, 2009 and was not notified to Marion Unglaube until November 13, 2009.

92. Claimants further note that when the Study was finally published in October 2009, it did not reach the conclusion that expropriation of property in the "buffer zone" was required. Rather, it found that development and human presence in the buffer zone did not present environmental problems provided that they were within the context of proper regulation.

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44 CM, ¶ 156.

45 CM, ¶ 159.

46 CM, ¶ 157; Exh. C-86.

93. The Study also concluded that development of the buffer zone properties should "allow the owners to make use of their properties by proposing designs that are closely in keeping with the characteristics of the region, as has already been done in the area."[47]

94. The conclusions of the Study resulted, nevertheless, in new and more restrictive guidelines for development of the area. Also, while the results of the Study and the adoption of new guidelines should have permitted SETENA to start processing applications again, there is, according to Claimants, no evidence that it has done so. And even if SETENA were to recommence processing of permits, Claimants state that there is no way for Claimants to know what further obstacles would be put in their way in terms of being allowed to develop and/or deal with their properties.[48]

95. Claimants point out that after the publication of the Study, from December 2009 to February 2010, the Costa Rican *Contraloría General* intervened, initially by pointing out deficiencies in describing the boundaries of the buffer zone as well as regarding the process used by the Municipality of Santa Cruz in the processing of building controls and permits by the Municipality. It also raised questions concerning whether the administrative authorities which had granted certain titles (in areas where clarification of the boundaries of the Park and the buffer zone had now been achieved) actually had legal authority to issue such titles.[49] The *Contraloría* subsequently ordered MINAET to take a number of steps including: (1) to replace certain zone markers and create an official map of the Park; (2) to assess by August 31, 2010 the legal position of certain titles in the area; (3) to take possession of the public areas in the Project

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47 Quoted at CM, ¶ 166 (emphasis supplied by Claimants).

48 CM, ¶ 175.

49 CM, ¶ 188.

donated to the Municipality and the public area between Phase I and Playa Grande donated by Palm Beach S.A.; and (4) by June 30, 2010 to take all actions necessary to cancel the 1992 Agreement with Palm Beach S.A.

96. In sum, Claimants believe that these actions of the *Contraloría* and the responses of MINAET have created further uncertainty over the future treatment of their properties by Costa Rican authorities. As a result of all of the above, Claimants' position is that there is now direct interference not only with the 75-Meter Strip of Phase II, but also with the remainder of the Phase II property and the properties in Phase I. Since this arbitration has begun, instead of rectifying past injustices, Respondent has made the situation of Claimants worse and committed even more serious breaches.

97. Claimants allege that in view of the facts described, and the ongoing unlawful interference with Claimants' property rights, Costa Rica has violated five separate provisions of the Treaty. The essence of Claimants' arguments identifying each of these alleged Treaty violations is set forth below:

a. Breach of obligation under Article 4(2) of the Treaty not to expropriate, nationalize or subject to any other measures the effects of which would be tantamount to expropriation or nationalization except for the public benefit and against compensation in compliance with the standards set out in the Treaty.

b. Breaches of Article 7(2) of the Treaty by failing to observe obligations assumed with regard to the Project in the 1992 Agreement and in 2008 under the so-called Road Map Agreement.

c. Breaches of Article 2(1) of the Treaty by treating the Claimants investments unfairly and inequitably. These alleged violations result from:

    i. failure to provide the Unglaubes with a transparent, consistent and predictable legal and business environment and frustrating their legitimate expectations arising out of the National Park Law;

    ii. preventing the development of the Properties without basis in law and in violation of Claimants' reasonable expectation that only lawful restrictions on development would be applied;

iii. failure to provide Claimants with an effective legal remedy against the government's unlawful conduct and the delays of its courts;

iv. subjecting Claimants to a denial of justice by failing to make available to Claimants the protections of a formal and duly regulated expropriation process; and

v. frustration of investors' legitimate expectations based on agreements entered into with the State.

d. Breach of Article 4(1) of the Treaty by failing to grant full protection and security to the Claimants and their Investments by:

i. failing to provide to Claimants effective legal redress for its authorities' illegal interference with the Properties; and

ii. creating a climate of legal and commercial uncertainty and insecurity surrounding the Project and the Properties.

e. Breach of Article 2(3) of the Treaty and impairing the administration, management, use or enjoyment of investments by arbitrary or discriminatory measures including:

i. the extension of the boundaries of the Park by illegal means and expropriating the Phase II property by that extension;

ii. by freezing development of the Properties for extended periods without justification after previously having approved the development of both Phases of the project; and

iii. by discriminatory action against the Claimants, namely granting to parties other than the Claimants the right to own and use property within the 75-Meter Zone.

98. Claimants urge that they are therefore entitled to be compensated for the losses they have incurred as a result of the alleged Treaty violations including:

a. The value of the Phase II Property, effectively expropriated since November 2003;

b. The value of the Hotel Cantarana, which has been effectively expropriated since December 2008;

c. The value of Lots 19, 20 and 23, which have been effectively expropriated since December 2008;

d. The value of Lots 21 and 22 which have been subject to threat of expropriation since December 2008; and

e. The value of the donated properties – which were donated to Costa Rica in the context of the 1992 Agreement, which has since been breached by Costa Rica.

99. Claimants also urge that they should be awarded the following:

a. compensation for legal and other expenses incurred in legal proceedings related to breaches of the Treaty;

b. pre-award interest;

c. post-award interest until date of payment; and

d. an order from the Tribunal directing the government of Costa Rica to reimburse Claimants for all of their costs of the arbitration including legal fees and expenses, expert valuation fees and expenses, the fees and expenses of the Tribunal and the fees of the Centre.

B. Position of the Respondent

100. Respondent, the Republic of Costa Rica, takes a very different view of the events related by Claimants. Costa Rica rejects all allegations of Treaty violation and asks the Tribunal to dismiss all claims against it. It further asks that it be reimbursed for all costs and fees, including attorneys' fees, it has incurred in this arbitration.

101. Respondent emphasizes the important role of Costa Rica in protecting the leatherback turtle and its critical nesting sites on Costa Rica's Nicoya Peninsula, which includes the location of Claimants' properties on Playa Grande. To further this objective, Costa Rica, in 1991, announced the creation of Las Baulas National Marine Park.

102. According to Respondent, one of the main reasons for the sharp decline in leatherback populations is beachside development. Nesting sites must be protected against human activity that destroys the beaches' suitability for nesting and activity that directly harms the turtles or their eggs.

103. Respondent maintains that all of its actions in the affected area have involved the *bona fide* exercise by the sovereign government of Costa Rica of its powers and responsibilities to protect the natural environment for its citizens as well as the seriously endangered leatherback

turtle (such obligations having been enshrined both in Costa Rica's Constitution as well as the Inter-American Convention for the Protection and Conservation of Sea Turtles).[50]

104. Respondent emphasizes that the problematic language of the National Park Law regarding the western boundary of the Park – "*aguas adentro*" or seaward – was an obvious error – which, because of the factual context as well as other language in the 1991 Decree and Article I of the National Park Law itself, could only have been intended to cover a strip of land 125 meters beyond the median high tide line, that is, in the opposite direction from the ocean.

105. In any event, this interpretation has long since been ratified both by Costa Rica's Attorney General (*Procuraduría*) and by the Constitutional Chamber of Costa Rica's Supreme Court. This interpretation is, therefore, the law of Costa Rica and must be respected.

106. With regard to the historical development of the Project, Respondent rejects the allegations of Claimants that both Phases I and II of the Project had received final approvals from the government.

107. Respondent points out that a Panamanian entity known as Palm Beach Estates, S.A. acquired property in Playa Grande that has since become known as Phase I.[51] Claimants – through another Panamanian Company, Unicarribean, S.A. – first owned 50% of Palm Beach Estates, S.A., and therefore owned 50% of the Phase I Property as a whole, but, since 1994, have owned only certain specific properties in Phase I.[52] Claimants, through Unicaribbean S.A.,

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50 Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, 2164 U.N.T.S. 31.

51 Respondent's Counter-Memorial [hereafter "RCM,"], ¶ 44. Palm Beach Estates S.A. appears to be the same entity referred to by the Claimants as Palm Beach S.A. In either case, "Palm Beach Estates" is the more common name for the entire Phase I property and is used herein to refer to the property, not the legal entity by a similar name.

52 RCM, ¶ 44.

acquired the Phase II Property in 1994, until it was acquired by Marion Unglaube, personally, in 1998.

108. Respondent rejects Claimants' assertion that they received all the necessary approvals to proceed with both Phases I and II, first in 1988-9 and then in 1992. Respondent also disputes Claimants' contentions that, in 1988-9 or 1992 (before Marion Unglaube even acquired an interest in the Phase II property), she already possessed all of the necessary approvals to commence construction, subdivision, and sale of the Phase II property and that such approvals remained valid in 2004.

109. Respondents urge that Claimants have not demonstrated by evidence in this proceeding that plans for development of Phase II were ever approved, referring to the law and regulations governing the process for dividing a parcel of undeveloped land into an urbanized property suitable for residential subdivision and development. Respondent maintains that a two-step process is required.[53] In the first stage, the developer must submit a site design including roads and public spaces, drainage and utilities. Once this design is approved, the developer must complete this work within one year or pursuant to any extensions of that deadline as might be granted. Once that work is inspected and approved, ownership of the roads and public areas is then transferred to the Municipality (here Santa Cruz). Only then, according to Respondent, does the developer have the legal right to divide the property and sell or otherwise make use of such lots for residential or commercial development.[54]

110. In the case of Palm Beach Estates, Respondent notes that the earliest plans which appear in INVU files are dated March 18, 1987 and are stamped approved by INVU on June 14,

[53] RCM, ¶ 47.

[54] RCM, ¶ 47.

1987. According to Respondent, this initial approval is important, but is only the first of several approvals by national and local government entities required before a construction permit may be granted by the applicable Municipality.[55]

111. In any event, Respondent urges, the 1987 plans approved by INVU related only to Phase I of Palm Beach. They did not include plans for the development of Phase II. Also, Respondent notes that the 1987 plans included the same interior undeveloped "public area" that Claimants now identify as the "Park Zone" and which Claimants represent that they transferred to Costa Rica as part of a bargain struck with the government in 1992.[56]

112. Respondent is critical of Claimants' assertion that their documentary evidence (especially Exhibit C-11) contains the plans on the basis of which all necessary approvals were obtained. Respondent points out that this particular exhibit consists of, first, a plat map dated December 8, 2005 indicating only the outer boundaries of Marion Unglaube's property, and second, a single page "Etapa A" (Stage A) of what appears to be a set of plans involving several pages. Respondent argues that the said documents – because of the date indicated – could not possibly have received approval from INVU or any other agency in 1988 or 1989.[57]

113. Despite a careful search, Respondent indicates that the page marked "Etapa A" has not been located in INVU's archives. Respondent also notes that the copy of Claimants' possession does not bear an INVU date stamp. But even if this document is authentic, it does not include the kind of detail for Etapa B (Stage B) as contained in Etapa A. Moreover, no evidence has been presented by Claimants that the Etapa B plan was submitted to INVU together with

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55 RCM, ¶ 49.

56 RCM, ¶ 50.

57 RCM, ¶ 51.

Etapa A – or that it was ever approved by INVU either on December 15, 1988 or at any other time. Other documents presented by Claimants to provide further evidence of approval by INVU also suffer from similar problems of ambiguity or lack of a sufficient paper trail. The burden of proof here remains with the Claimant and, according to Respondent, it has not been met.

114. Respondent points out that there was a later set of plans for Palm Beach Estates that were considered and apparently approved by INVU on December 22, 1992.[58] Respondent argues that to the extent that Claimant had obtained approvals for either Phase I or Phase II, it is these plans in Exhibit R-103[59] – and not those relied on by Claimants in Exhibit C-11– which are authentic.

115. Respondent points out that the 1992 version of Phase II outlines only 8 lots (6 residential and 2 commercial) rather than the 18 lots outlined in the 1988 version. This version also recognized a 50-meter strip (not the 75-Meter Strip) running from the State's 50 meter "inalienable zone" westward i.e., further inland. Even if both pages of Exhibit R-103 were, in fact, approved by INVU, such approval related only to the 1992 version, rather than the version shown by Claimants in Exhibit C-11 (1988).

116. According to Respondent, Claimants have also inaccurately claimed that the 1992 Agreement signed between Palm Beach Estates, S.A. and MIRENEM represented a firm and unchangeable approval by Costa Rica with regard to the Project. Specifically, Claimants allege that the 1992 Agreement involved a *quid pro quo* whereby Palm Beach S.A. donated a certain portion of the property to Costa Rica, in return for (a) Costa Rica's reaffirmation of its approval of both phases of the project and (b) Costa Rica's pledge "to prevent any difficulties in the

[58] RCM, ¶ 55.

[59] RCM, ¶ 55; Exh. R-103.

permitting and development process,"[60] meaning, in their view, that Costa Rica had committed to maintain [previously granted] permits and approvals and not to reverse or suspend their effects.

117. Costa Rica disputes this interpretation of the 1992 Agreement and denies that Costa Rica breached that Agreement by enacting *bona fide* laws and regulations (e.g., the 1995 National Park Law, SETENA's new (1996) environmental impact permitting requirements, or the new SETENA Guidelines for the development of properties near the Park). According to Respondents, the 1992 Agreement offers no such immunity from future *bona fide* laws and regulations.

118. Respondent maintains that the portion of Phase I that Claimants refer to as a park zone donated to Costa Rica under the 1992 Agreement had never been slated for development because, according to Cost Rican law since 1968, developers of residential projects have been required to reserve a minimum percentage of the developed property as open or green space. They are also required to transfer those public areas (e.g., parks, roads, etc.) to the Municipality as a condition precedent to receiving permission to subdivide and sell the individual residential lots.

119. According to Respondent, the 1992 Agreement simply promises public recognition of the donation but does not guaranty the issuance of particular permits. It also does not promise a stabilization of Costa Rica's land use or environmental laws, nor does it immunize the Claimants from the future application of such laws. Finally, Respondent notes that Claimants have presented no evidence that they actually made the one land donation that was spelled out specifically in the 1992 Agreement, so they never fulfilled their end of the 1992 Agreement.

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[60] CM, ¶ 66.

120. Costa Rica acknowledges that Palm Beach S.A. obtained the necessary approvals in 1992 for the development of Phase I as a residential property development and therefore it was authorized to develop the required roads, drainage, utility connections, etc. for Phase I. Palm Beach S.A. then, in February and April 1994, transferred the required public areas for Phase I to the Municipality of Santa Cruz, and thereafter properly proceeded to subdivide and sell the Phase I properties according to the approved plans.[61]

121. But, Respondent maintains, the 1992 Agreement did not constitute approval to carry out construction on any given piece of property since those who wanted to build and subdivide residential lots were required to obtain their own construction permits – in accordance with such land use regulations as were in effect at that time – and as the Claimants actually did in March 2001 when they built their house on Lot 22, as well as the Hotel Cantarana.[62]

122. Respondent also urges the Claimants have failed to prove that Palm Beach S.A. obtained the necessary approvals, in 1992, for the development and subdivision of Phase II. But even if Phase II approvals had been obtained in 1992, which Respondent denies, they could not have remained operative until 2003. Respondent points in this regard to Article VI.3.5 of the INVU regulations which indicates that such approvals, when issued, are valid for one year – though within that period the developer may apply for an extension, which may be approved or denied.[63] Respondent states that there is no evidence that such extensions were applied for regarding Phase II by any of the property's past and current owners, Tamarindo Beach Club International Corp., Unicarribean S.A. and Marion Unglaube.

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61 RCM, ¶ 76.

62 RCM, ¶ 77.

63 RCM, ¶ 79.

123. Even if adequate approvals had been provided at the time, they would not insulate the properties from approval requirements established at a later date, such as the SETENA environmental viability assessment which is now one of the most significant steps in the process of obtaining approval for any kind of land development in Costa Rica.

124. As a result, Respondent insists that it was entirely proper for the Park Administrator and the Environmental Administrative Tribunal to halt any effort by Marion Unglaube to proceed with Phase II road works until she obtained an environmental viability permit from SETENA. Indeed, Respondent urges, a property owner always holds land subject to the State's applicable land use and environmental regulations, as the same may evolve as part of the proper functioning of the State.[64]

125. Regarding the property within the Park, Costa Rica has attempted, since 2003, to expropriate this 75–Meter Strip pursuant to Article 2 of the National Park Law. That effort has been challenged every step of the way by the Claimant Marion Unglaube. However, the State has already designated an initial amount of 434,675,160 colones (approximately US $786,000) for payment to Mrs. Unglaube. According to Respondent, these initial funds may be collected by her immediately, without prejudice to the outcome of ongoing court proceedings which could arrive at a higher value. If that is the result, Respondent indicates that she will receive the additional amount with interest. Thus Respondent maintains that it has recognized and is fulfilling Mrs. Unglaube's right to be compensated for the value of her land which is subject to expropriation.[65]

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64 RCM, ¶¶ 83–4.

65 RCM, ¶ 85.

126. In addition, Respondent indicates that the Supreme Court has determined that Marion Unglaube must be compensated for the government's delay in expropriating and compensating her for the 75-Meter Strip, though the precise amount due to her has not yet been determined.

127. In any event, Respondent urges, there can be no question of Costa Rica's right to expropriate private property – namely her property within the Park – in the service of a clear public interest, namely the protection of a critically endangered species by creating a zone of state-owned, development-free property bordering the beaches on which the leatherback sea turtle nests.[66]

128. Respondent points out that the rights of private property owners are protected by Costa Rica's Constitution as well as its Expropriations Act and its well-developed legal system. Respondent indicates that Costa Rican law is detailed, fairly administered and provides property owners with extensive due process protections. Indeed, the Supreme Court has already provided preliminary decisions in Marion Unglaube's favor.

129. Pursuant to these laws, Respondent states, Costa Rica twice (in 2003 and 2004) took steps to expropriate Claimant's land within the Park – but Marion Unglaube objected formally and her rights were respected.

130. Regarding the suspension of permits for development of properties within the Park, from 2005–2009, Respondent states that before a further expropriation process could be launched, Mrs. Unglaube attempted to press ahead with development of the entire Phase II property. This effort followed previous similar efforts in 2004, which were stopped by complaints of the Park Administrator, as well as a precautionary order of the Environmental

[66] RCM, ¶ 87.

Administrative Tribunal. Respondent states that this latter proceeding was settled after she agreed not to proceed with any construction until she had obtained the necessary environmental viability permit from SETENA.[67]

131. Respondent acknowledges that SETENA suspended all environmental assessment proceedings in August 2005 for properties within the Park, including Claimant's property. Respondent maintains that this action was not taken arbitrarily but rather, pursuant to a conservatory measure ordered by the Supreme Court and several other governmental institutions. This suspension was upheld by the Supreme Court in its decision on Mrs. Unglaube's *amparo* action but that same court later, in its May 27, 2008 ruling, upheld her right to damages for the delay in expropriating her property within the Park and ordered that properties within the Park be expropriated immediately and expeditiously.[68]

132. Respondent also urges that since August 8, 2008, MINAE and SETENA have taken the position that SETENA is now prepared to proceed with review of the environmental assessment but only with regard to the property outside the Park. MINAET then, on October 18, 2008, undertook to clarify to SETENA that there was no objection to processing the environmental assessment of Claimant's project, though at no time was it stated that the result of this review would be favorable. Because the Court had already ordered that land within the Park be expropriated, Marion Unglaube should reasonably have expected that an assessment request which included all of the Phase II property would create difficulty for SETENA. Respondent notes that she did nevertheless, submit an assessment covering the entire Phase II property on January 25, 2009.

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[67] RCM, ¶ 113.

[68] RCM, ¶ 124.

133. But by that date, Respondent indicates that SETENA had been barred from processing assessments for properties within the Park by another Supreme Court ruling of December 16, 2008.[69] This ruling foreclosed an option left open by the May 27, 2008 Supreme Court ruling which appeared to permit processing even of assessments including property within the Park. Therefore, Costa Rican authorities by issuance of a Declaration of Public Interest, on June 30, 2009, again began the formal expropriation process with regard to the 75-Meter Strip. Marion Unglaube, once again, has objected to this proceeding, first because it was based on Respondent's allegedly *contra legem* interpretation of the National Park Law – though this interpretation had now been endorsed by the Dictamen of the Attorney General dated December 23, 2005 and the Supreme Court decision of May 23, 2008.

134. Respondent acknowledges that the new Declaration of Public Interest – though issued on June 30, 2009 – was not published until September 25, 2009.[70] Despite Claimant's protests of impropriety regarding this delay, Respondent argues that there is no evidence that Mrs. Unglaube was disadvantaged in any way by this delay.

135. Respondent notes that a new administrative appraisal of the 75-Meter Strip was completed on January 4, 2010, valuing the property provisionally at approximately US$ 786,500. Mrs. Unglaube has filed a formal objection to this appraisal. Even while her protest is pending, Respondent indicates that this is a sum which is available immediately to Mrs. Unglaube, without prejudice to her objections, while the court proceeds to definitively determine the value of the property.[71]

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69 *See* ¶ 76-77, *supra*.

70 RCM, ¶ 132.

71 RCM, ¶ 135.

136. As part of this proceeding, at Mrs. Unglaube's request, the court agreed to appoint an independent expert to perform another valuation of her claimed damages. Though the expert completed his valuation as of April 19, 2010, the matter has still not been resolved.

137. In summary, Respondent urges that since at least 2003, Costa Rica has sought to expropriate the 75-Meter Strip. There is no question of the government's right to do so. Though this process has been long delayed, in part due to the vehement opposition of Mrs. Unglaube, that process is near an end and it will fairly determine the amount due to Mrs. Unglaube for the property within the Park, as well as for the court-ordered compensation for delay.[72]

138. Regarding property outside Las Baulas National Marine Park, Respondent protests that the situation is entirely different. According to Respondent, essentially the only restrictions on the properties – other than those of Claimants' own making – are the 9-month suspension of SETENA permit processing (from December 2008 to September 2009) and the new Guidelines that SETENA is now applying to properties adjacent to the Park, as a result of the court-ordered September 2009 environmental study.

139. Respondent states that these are reasonable, *bona fide* regulations in the public interest. Respondent further urges that none of Costa Rica's measures have had the catastrophic impact Claimants suggest and that none represents a significant impairment of Claimants' use or enjoyment of their properties outside the Park.[73]

140. In summary, Respondent maintains that it has, at all times, acted in good faith to regulate the land in and around the Park in the public interest, in order to protect the leatherback

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72 RCM, ¶ 143.

73 The Tribunal elects to defer setting forth the considerable additional details of Respondent's allegations regarding the properties outside the Park until the substance of those issues is dealt with below.

turtles. Respondent asserts that many, even most, of Claimants' difficulties with the laws of Costa Rica are of their own making.

141. Respondent urges that Claimants have enjoyed, if anything, an abundance of due process and have been vindicated in their challenges by Costa Rican courts and government agencies on numerous occasions.

142. Respondent emphasizes that Claimants did not and could not have any vested rights to develop their properties and that any approvals that had been duly obtained had lapsed. In addition they have failed to comply with their own critical legal obligations. Respondent further urges that Claimants' legal claims apply differently to the specific pieces of property involved: e.g., Phase II property within the Park, Phase II property outside the Park, and finally, Phase I properties, which, according to Respondent, have hardly been affected at all.[74]

143. Regarding the Phase II property within the Park, Costa Rican courts have pressed the government to expeditiously expropriate this property. Despite vehement legal efforts by Claimants to oppose this action, the courts are close to resolution of the amounts due to Claimant. Costa Rica has therefore not violated the Treaty – and any claims regarding inadequate compensation are premature.[75]

144. Regarding the Phase II property outside the Park, Costa Rica has never sought to expropriate any portion of said property– and none of Costa Rica's measures that may have affected such properties constitute *de facto* or indirect expropriation. Respondent further stresses that a *bona fide* exercise of a State's regulatory authority is entitled to great respect – and is

[74] RCM, ¶ 187.

[75] RCM, ¶ 208.

unlikely to be found expropriatory – especially where a clear and important public interest is at stake.

145. With regard to the Phase I properties specifically, Respondent argues that Claimants claim of *de facto* expropriation is without foundation. First Respondent states that until the Supreme Court decision of December 2008 – which temporarily suspended processing of environmental permits (for 9 months), none of the Phase I properties had been affected in any way by any of the measures raised in this case and that the suspension was lifted on September 30, 2009. The Study required by that decision concluded that no expropriations were needed and SETENA promulgated the Guidelines memorializing the Study's recommendations. SETENA has since resumed processing permit applications and is asking applicants to bring their proposed projects into conformity with the Guidelines.[76]

146. With respect to Lots 19 and 20, the Supreme Court's decision had no impact at all because Mr. Unglaube has not presented evidence that he had any development plans for the properties which were interrupted at the time.

147. Regarding the proposed expansion of the Hotel Cantarana on Lots 147 and 148, and the proposed construction of a swimming pool and additional hotel rooms on Lot 23, any delay resulting from the Supreme Court decision would have been effective for only 5 and 4 months respectively. Since Respondent states that SETENA has now resumed processing permits, there are no constraints on his ability to pursue those plans. Respondent argues that while Claimants include a claim of *de facto* expropriation of the Hotel Cantarana, their calculation of damages deals only with deprivation of "development rights necessary for the expansion" – while still retaining the ownership of the hotel and land.

[76] RCM, ¶ 221.

148. According to Respondent, Costa Rica has not breached any obligations assumed with respect to Claimants' investments. While Claimants point to two possible sources of such violations, the 1992 Agreement and the "Road Map" agreed to with MINAET in October 2008, Respondent objects that no breach of Article 7(2) exists with respect to either one.

149. Respondent argues that these obligations were undertaken by government officials at various levels – including municipalities – and not by the State itself as required by the Treaty. Respondent argues that agreements protected by Article 7(2) include only those made by the State to the Investor to induce them to invest, *i.e.*, to deliberately undertaken obligations of the Contracting Party itself.[77] Neither of these agreements qualifies as such.

150. In addition Respondent rejects Claimants' attempts to extract promises from the texts of these agreements, which Respondent alleges are not there.

151. With regard to the 1992 Agreement, Respondent argues that it involves nothing more than a public acknowledgement of Palm Beach S.A.'s offer to donate land and to abide by the applicable guidelines in developing and managing their property. It contains no promise by MIRENEM to approve the proposed residential development or to approve all future applications of the owners for future development of the property by Palm Beach S.A., or the eventual individual lot purchasers.[78]

152. MIRENEM has complied with all of its obligations under the 1992 Agreement, namely: (1) to refrain from building structures on the donated land and (2) to publicize to other government agencies its approval of the property donation and Palm Beach S.A.'s agreement to abide by the property management recommendations adopted by Palm Beach S.A. By contrast,

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[77] RCM, ¶ 234.

[78] RCM, ¶ 238.

Respondent alleges that Claimants have not provided evidence that Palm Beach S.A. actually carried out the specific donation which the 1992 Agreement was meant to publicize. In addition, according to Respondent, the *Contraloría* discovered a number of apparent irregularities in the agreement and recommended that it therefore be annulled; nevertheless, to date, no action has been taken in this regard.[79]

153. Regarding the October 2008 "Road Map," Respondent also rejects Claimants' allegations of several breaches including: (1) MINAET's statement that it would advise SETENA that it could resume consideration of the Phase II permit application; (2) that it would advise Mrs. Unglaube to submit an environmental impact study for that permit application; and (3) that SETENA would evaluate and give its determination about the viability of the Phase II project within 30 days of receiving the study from Mrs. Unglaube. Respondent indicates that Claimants acknowledge fulfillment of the first two items. Regarding the third, Respondent points out the intervening ruling of the Supreme Court which forbade it to take the action referred to.[80]

154. Respondent further maintains that it has, in all respects, accorded Claimants fair and equitable treatment as required by Article 4(1) of the Treaty. All of Claimants' allegations in this regard reflect either their own role in obstructing the process or the operations of a modern state whose institutions act with appropriate regard for procedure, due process and individual rights. In addition, agencies from other branches of government, such as the courts

[79] RCM, ¶ 241.

[80] RCM, ¶¶ 243-4.

are involved – so that expectations of uninterrupted, linear action on a particular project do not comport with a more complicated reality.[81]

155. Respondent also rejects allegations that Costa Rica has failed to provide a stable and predictable legal environment or that such uncertainty has frustrated legitimate expectations of the Claimants on which they based their investments. In particular Respondent disputes Claimants' charges regarding the alleged "*contra legem*" interpretation of the National Park Law regarding the definition of the Park's boundaries on Playa Grande. Respondent further denies Claimants' allegations concerning the alleged shift of Costa Rican authorities in ceasing to perform their obligations under the 1992 Agreement.[82] In further defense of its actions, Costa Rica maintains that its actions have all been carried out under law, that Claimants have not been denied "full protection and security," and that Costa Rica has not impaired Claimants' Investments by means of arbitrary or discriminatory measures.

156. Respondent further reiterates its objection on the grounds of admissibility to Marion Unglaube's claims with regard to the alleged *de facto* expropriation of that portion of the Phase II property inside the Park. Respondent argues that this claim is moot because the Costa Rican legal system already recognizes the State's responsibility to pay (1) the value of her property and (2) any damages associated with the delay in expropriation of her property. Even if the Tribunal should find *de facto* expropriation in violation of the Treaty, Respondent urges that the Tribunal not assign liability to Costa Rica for it because Mrs. Unglaube has already been awarded the right to compensation for such claims.[83]

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81 RCM, ¶ 247.

82 RCM, ¶ 248.

83 RCM, ¶ 285.

157. In addition, Respondent urges that any claim by Mrs. Unglaube as to the inadequacy of compensation is clearly premature – since the amounts have not yet been determined by the courts.

158. Finally, claims regarding the alleged *de facto* expropriation of the Phase II property that is outside the Park – as well as with respect to the Phase I properties – are also inadmissible because they are premature. Respondent denies that a "freeze" exists on the processing of permits by SETENA. Any delay in this process, at this point, is due to Claimants' failure to comply with the Guidelines which resulted from the Supreme Court's December 16, 2008 decision. Until the Claimants have presented their revised applications as now required by the Guidelines, SETENA cannot consider them and there is no way for the Tribunal to know whether or not Claimants have any justified claims to a right to develop their property. Such claims are therefore premature.[84]

159. For the reasons indicated, Respondent maintains that Claimants have not suffered any violations of the Treaty and therefore are not entitled to compensation with regard to their properties. Also, should the Tribunal nonetheless determine that compensation is due to Claimants in this case, any amounts received by Claimants in domestic legal proceedings must be offset against the award.

160. In addition, with regard to the remedy of restitution – sought by Claimants especially with respect to their residence on Lots 21 and 22 in Phase I – Respondent argues that the Claimants claim, and then forego, this remedy with respect to all of the Phase I properties except their residence. Respondent strongly urges that nothing presently impairs the Claimants'

[84] RCM, ¶ 287.

"rights to possess, use and develop" their house and the land on which it sits.[85] Alternatively, to the extent that this claim of "restitution" constitutes a forward-looking requirement that the State take "all steps to re-establish and support their rights to possess, use and develop their land,"[86] or that it declare for Claimants a form of immunity from future regulation, such a claim is inappropriate and has no legal basis under the terms of the Treaty.[87]

161. Respondent therefore asks that the Tribunal dismiss all claims and to award to Respondent all costs and fees, including attorneys' fees it has incurred in this arbitration.

VII. Considerations Of The Tribunal

A. Introduction

162. The present case involves a number of unusual and remarkable circumstances. As indicated above, it relates to several alleged Treaty violations by Costa Rica regarding ecotourism properties owned either individually or jointly by the Claimants, Marion and Reinhard Unglaube.

163. The properties in question are located on or close to the Playa Grande beach – one of the world's most important nesting sites for the highly endangered leatherback turtle – i.e., where these large female leatherback come out of the sea, dig a substantial hole in the sand, typically deposit some 56-60 large eggs, cover them and depart. The offspring, when they hatch some 60 days later, have few capabilities and are easy prey for sea birds or other animals. They are especially vulnerable if they hatch during the day – and even at night it has been demonstrated that they may become easily disoriented by bright lights on the shore which cause

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85 RCM, ¶ 294.

86 CM, ¶ 382.

87 RCM, ¶¶ 295-297.

the hatchlings to move toward the land instead of expeditiously moving toward the sea where their chances of survival improve significantly.

164. The statistics concerning the sharp decline in leatherback populations are reflected quite dramatically in the vastly reduced numbers of females nesting at Playa Grande in recent years. There is considerable debate, however, concerning the reasons for this decline.[88]

165. Because of the desirability of gaining a greater understanding of the particular area, the Tribunal agreed to the request of counsel for the Parties and, together with the Claimants and some representatives of the government, traveled to Costa Rica and took part in a visit to the site on December 21-22, 2010.[89] Surely, none of us will forget the spectacle of Playa Grande Beach, lit by a full moon at about 1:00 A.M. on December 22, where a large female leatherback (roughly 2 meters in length and 1 meter in width) finished digging her nest, deposited some 50 soft eggs somewhat larger than tennis balls, and began to cover them. She eventually, of course, returned to the sea.

166. Despite having been involved in a long history of bitter conflict with the government concerning their property rights, the Claimants do not question the authority of the sovereign government of Costa Rica to expropriate land, pursuant to Costa Rican law provided that such action and its effects are also in conformity with Costa Rica's obligations under the Treaty. Certainly this Tribunal is not empowered, nor does it have any intention, to question or weaken the appropriate use of this authority by the government – an authority which has long been established and recognized by international law.

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88 *See, e.g.*, Claimants' Reply, ¶ 80 [hereafter "CReply"].

89 This was an opportunity to examine the property involved. It was not a "hearing." The Tribunal, therefore, in Procedural Order No. 2, required that all communication by the Parties with the Tribunal, be conducted exclusively through their respective counsel.

167. While the subject of the protection of endangered species is an important one, the Tribunal finds that the crucial elements of this dispute involve more mundane issues of fact and law as they relate to the legality of the actions in dispute between the Parties. Finally, of course, the Tribunal must determine whether one or more violations of the Treaty have occurred, whether compensation is, therefore, due to the Claimants and, if so, in what amount.

B. Major Legal Issues Raised By The Claimants

168. As indicated in the overview of their position (*see* ¶¶ 41–97 *supra* for additional detail), Claimants have alleged five separate categories of Treaty violations, as follows:

a. Breach of Obligation under Article 4(2) of the Treaty not to expropriate, nationalize or subject to any other measures the effects of which would be tantamount to expropriation or nationalization except for the public benefit and against compensation in compliance with the standards set out in the Treaty;

b. Breaches of Article 7(2) of the Treaty by failing to observe obligations assumed with regard to the Project in the 1992 Agreement and in the 2008 Road Map Agreement;

c. Breaches of Article 2(1) of the Treaty by treating Claimants' investments unfairly and inequitably;

d. Breach of Article 4(1) of the Treaty by failing to grant "full protection and security" to the Claimants and their investments; and

e. Breach of Article 2(3) by impairing the administration, management, use or enjoyment of investments by arbitrary or discriminatory measures.

169. The Tribunal has analyzed and considered each of these categories of alleged Treaty violation – as well as the testimony and related exhibits, oral and written presentations of both sides. The Tribunal believes that for the sake of both clarity and brevity, it is desirable first to deal with the issues raised by Claimant regarding the 1992 Agreement and the 2008 Road Map Agreement. The Tribunal will then move to the issues focused on the alleged expropriation of Claimants' properties – dealing first with the 75-Meter Strip of Phase II ("within the Park"), then

to the remainder of the Phase II Property and finally the Phase I Properties. Finally the Tribunal will consider each of the other alleged Treaty violations.[90]

C. Analysis of the Facts and Law

1. Alleged breaches of Article 7(2) of the Treaty by failing to observe obligations assumed with regard to the Project in the 1992 Agreement and in the 2008 Road Map Agreement.

170. The Parties do not differ regarding certain important elements of the "timeline" of the evolution of the dispute. For example, they do not dispute that the widely differing interpretations of the 1992 Agreement did not surface until at least 2003, when the government first moved to expropriate. As to many other matters relating to the significance of the 1992 and Road Map Agreements, the parties hold very disparate understandings. Claimants have chosen not to provide testimony in this matter.[91] That is their right. But as a result, the Tribunal must attempt to determine the scope and meaning of the 1992 Agreement and the Road Map Agreement from the texts themselves, as well as other documentary evidence in the record. The burden of proof as to the content of the 1992 and Road Map Agreements – as well as the alleged violation of Article 7(2) of the Treaty – lies with the Claimants.

(a) Did the 1992 Agreement reflect final approval for the development of Phase II of the project?

171. Claimants maintain that the plans for Phase II were clearly indicated in the 1988 plans shown in Exhibit C-11 on which, Claimants maintain, all necessary approvals had been

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90 The following analysis and conclusions result from the Tribunal's careful study of all of the evidence presented by the two sides, together with their oral and written presentations. While the Tribunal has not considered it necessary to respond to each and every argument in detail, the Tribunal has nonetheless considered all of them in reaching its final conclusions.

91 Because neither of the Claimants has testified, all affirmations of fact and other positions of Claimants, unless specifically introduced through documentary evidence or the testimony of other witnesses, should be understood as having their origin in authorized statements and arguments put forward by counsel on Claimants' behalf.

obtained. Respondent replies that the earliest plans which appear in INVU files are those dated March 18, 1987, which were approved by INVU in June 1987. These plans, however, did not include plans for the development of Phase II.

172. Regarding Exhibit C-11, Respondent has noted that the plat map which appears in that Exhibit shows only the outer boundaries of the Phase II Property. It is dated December 8, 2005. Respondent has also noted, *inter alia*, a number of other alleged deficiencies in those documents – especially that they do not reflect evidence of an INVU approval in 1988.

173. Regarding the February 3, 1998 Resolution of the Council of the Municipality of Santa Cruz (Exhibit C-14), that Resolution contains only a single line of text approving "[t]he urban development project called Palm Beach S.A." But this language does not allow the Tribunal to determine, with any degree of certainty, to which set of plans the approval in the Resolution was referring – or if the approval granted included Phase II. Further complicating the matter, Exhibit C-11, on which Claimants place reliance, refers to the Phase II Property with only the inscription: "Sociedad Internacional de Desarrollo Turistico de Costa Rica S.A. Ampliación Etapa B."[92]

174. The ambiguities referred to above perhaps leave room for considerable doubt concerning whether plans for the Phase II Property had been approved, but the Tribunal finds that there is additional evidence which clarifies the situation.

175. By Claimants' admission, the Phase II Property was not acquired by Marion Unglaube until March 31, 1998. It was owned by Tamarindo Beach Club Intl., whose 100% beneficial owner was Rolf Jestaedt, until June 10, 1994 when it was acquired by Unicaribbean

[92] "International Association of Tourism Development of Costa Rica S.A., Enlargement or Extension, Stage B" (Translation by Tribunal).

S.A. which is owned 60% by Marion Unglaube and 40% by Reinhard Unglaube. The Tribunal considers that this evidence concerning the chain of ownership of the Phase II Property must be understood to indicate that whatever approval might have been obtained by Palm Beach S.A. in 1988, could not have included final approvals for the Phase II Property.[93]

176. The Tribunal has also studied the plans offered in evidence as Exhibit R-103 introduced by Respondent and which have been referred to by the Parties as the "1992 Plans" or the "Proposed Plans." Claimants have relied heavily on the language of the 1992 Agreement[94] which indicates, in Article 2 thereof, that plans conforming to the requirements of the Agreement were to be attached to the Agreement. The Agreement was executed in two originals – but if such plans were attached, as the Agreement recites, Claimants have not demonstrated that this occurred nor have they introduced the said plans as evidence in this proceeding.

177. The 1992 Plans bear an INVU approval stamp of December 22, 1992,[95] a date which is very close to the INVU approval date shown in the confirmation of receipt of the modified plans for the "Resid. Tamarindo Beach" by Architect Luis Acuña, Chief of the Construction Permit Reception Office.[96]

178. Claimants have rejected the 1992 Plans as inauthentic and unauthorized. But because the plans were signed by Claimants' architect, Julia Van Wilpe, and had been submitted to and approved by INVU, the Tribunal considers it unlikely that these plans found their way to INVU without Claimants' knowledge and approval.

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93 Claimants might, perhaps, have attempted to demonstrate that Mr. Unglaube was also authorized to represent Tamarindo or Mr. Jestaedt, but no such evidence is in the record.

94 Exh. C-15.

95 Witness Statement of Mora Protti: (1), ¶ 19.

96 Included in Exh. C-15.

179. In addition, the Tribunal notes that the 1992 Agreement, in Article 3, contains detailed guidance concerning how the modified project was to be carried out. Among these guidelines, number 17 states that the project is to have a limited number of access points to the beach at Playa Grande, located not less than 200 meters apart and that these pathways are to be "S"-shaped. The Tribunal notes that the 1992 Plans are the only documents in the record showing "S"-shaped access points to the beach.

180. However, even if the Tribunal were to put aside the above discussion of Exhibit R-103 and the 1992 Plans, we must conclude that Claimants have not borne the burden of demonstrating which plans relating to Phase II, if any, were approved by Respondent, or how such approval could have been negotiated by Mr. Unglaube in 1992, when the Phase II Property was still owned by Tamarindo Beach with its sole shareholder as Mr. Jestaedt.

(b) Did the 1992 Agreement constitute a commitment by MINAE and Respondent that construction of the Phase I Property was finally approved so that any additional regulation of, or interference with, the Phase I project would constitute a breach of the 1992 Agreement?

181. The Parties are in agreement that the urbanization of the Phase I Property was completed, without incident, in 1993.[97] Once this work had been completed and approved, the individual lots were all sold by some point in 2004. Phase I was successful. It created employment and attracted tourism.

182. Claimants, however, have objected vehemently that Respondent later interfered with their rights to develop their properties in Phase I, including the planned expansion of the Hotel Cantarana, and that such interference constituted a breach of the 1992 Agreement and as well as a violation of Article 7(2) of the Treaty and other Treaty provisions.

[97] The term "urbanization" refers to the completion of roads, drainage, utilities, etc., on the Property.

183. Specifically Claimants have objected to the suspension of environmental and construction permits from 2005 to 2008 – as well as the threatened expropriation of their Phase I Properties after the second Supreme Court *amparo* decision of December 15, 2008 and the related suspension of environmental assessments until at least October 2009. Claimants have described such interferences with their property rights as elements of a new strategy by which Respondent sought to achieve indirectly what it had failed to achieve directly in the expropriation efforts of 2003 and 2004.

184. Suffice it to say that the Tribunal is not persuaded by these arguments. Each of the suspensions which affected Claimants' Phase I Properties resulted principally from *amparo* petitions brought to the courts by private individuals or groups from among Costa Rica's active and assertive environmentalist movement. There is no evidence before this Tribunal that any agency or ministry of Costa Rica's government was involved in these *amparo* actions or any suggestion that they exerted influence on the Supreme Court's decisions. The Tribunal will have occasion, below, to deal with certain issues of concern raised by the court proceedings. Such unplanned delays occasioned by citizens in exercise of their legal rights are a common occurrence in democracies with independent court systems. Thus, while the Tribunal may readily understand the frustration which Claimants and others experienced during these delays, the Tribunal finds no basis on which to conclude that the language of the 1992 Agreement or the provisions of the Treaty somehow foreclosed private citizens from seeking to stop the Project through action in Costa Rica's courts or that the said delays constituted a breach of the Agreement or the Treaty by Respondent.

(c) Did Respondent fail to comply with the terms of the Road Map Agreement of 2008?

185. Claimants have demonstrated that the Road Map Agreement was set forth in MINAET's letter of October 16, 2008.[98] The Tribunal finds that the content of this Agreement (and the correspondence between the Parties prior to the signing of the Agreement),[99] indicates an effort by MINAET and Claimants to resolve outstanding issues regarding the Phase II Property and to find a way forward. The body of the Road Map letter indicates that SETENA would invite Mrs. Unglaube to submit an environmental assessment request and that this request would relate to the entire area of the Phase II Property. It further provides that once SETENA received this request from Mrs. Unglaube, SETENA would be responsible for studying the assessment and providing its conclusions regarding the viability of the Project within 30 days. However, it is also clear, especially from the earlier correspondence between the Parties, that the issue of the proper boundaries of the Park – including whether or not it included a portion of the Phase II Property – remained very much in dispute. In this regard, the final paragraph of the Road Map Agreement reads as follows:

> "MINAET agrees to make all necessary efforts to seek, as soon as possible, a complete resolution with regard to that portion of [the Phase II] property which is located within the Las Baulas National Marine Park."[100]

186. Clearly, this language indicates that MINAET believes that some portion of the Phase II Properties is located within the Park. But the position of the Claimant, Marion Unglaube, is, and has been, that because of the terms of the 1995 National Park Law (and

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98 Exh. R-43.

99 Exhs. R-40 to R-42.

100 "Road Map Agreement" Exh. R-43.

especially its problematic description of the Park's boundaries), no portion of her Phase II Property is included within the Park's boundaries.

187. The Parties do agree that Marion Unglaube's environmental assessment request was presented in December 2008, and that SETENA did not conduct its analysis and provide the results within 30 days. According to Respondent, SETENA did not meet this prescribed deadline because it was prohibited from doing so by the Supreme Court decision of December 16, 2008.[101]

188. Without attempting to analyze, at this point, the process which led to the December 16, 2008 Decision of the Supreme Court, it is clear that the court ordered:

- the annulment of all environmental assessment approvals previously provided for areas lying within the Park (and directed MINAET to proceed immediately to expropriate them);
- that SETENA immediately cease processing of any new assessments involving property within the Park;
- that SETENA, MINAET and other responsible State agencies conduct a comprehensive study of the 500-meter buffer zone and determine whether the properties contained therein should be expropriated – or, if not, to provide appropriate guidance for the types and intensity of development to be permitted;
- that already approved assessments and construction permits must be suspended until the study was completed; and
- that SETENA cease processing pending or new assessments until the study was completed.

189. The Tribunal has already noted the unresolved confrontation between the parties concerning whether or not a portion of the Phase II Property was located within the Park. Given that ongoing dispute – and the Vice Minister's explicit recognition of it in the Road Map Agreement – the Tribunal concludes that this aspect of the Road Map Agreement was, at a

[101] RCM, ¶¶ 243-5; *see also* Exh. R-34; Exh. C-83.

minimum, conditional – since the Ministry is obviously required to comply with Costa Rican law and because it is not within the purview of MINAET to make authoritative interpretations of the National Park Law. In addition, the Tribunal finds that the Road Map does not contain – either expressly or by implication – an undertaking by MINAET or SETENA to comply with all commitments set forth in the Agreement if such actions would place these governmental entities in direct violation of a Decision of the Supreme Court.

190. In view of the above, the Tribunal concludes that the failure of SETENA to process Claimant's environmental assessment (which included the entire Phase II Property) did not constitute a breach of the Road Map Agreement – first, because of the conditionality of the commitment and the intervening ruling of the Supreme Court; and second, because, as correctly argued by Respondent, the legality of actions of Respondent are a matter which must be resolved under the laws of Costa Rica. Here, Claimants have not established by persuasive evidence that – as a matter of Costa Rican law – Respondent or its agents acted in breach of the Road Map Agreement. Without having established such a breach, Claimants cannot succeed in establishing a violation of the Treaty obligation to "observe any other obligation it has assumed with regard to investments by nationals or companies of the other contracting party."[102]

191. Thus, regarding the alleged violations of Article 7(2) of the Treaty, the Tribunal concludes that no such violations have been demonstrated by Claimants.

2. Has Respondent expropriated Claimants' property in violation of Article 4(2) of the Treaty or otherwise subjected Claimants to measures the effects of which are tantamount to expropriation?

192. As is often the case where allegations of expropriation are present, there is considerably less disagreement between the Parties regarding certain major factual milestones

[102] Treaty Article 7(2).

than there is regarding the interpretation and significance of those events. What cannot be doubted is that the roots of this dispute date back at least to the promulgation of the 1991 Decree in which Respondent first formally announced its intention to establish the Las Baulas National Marine Park.

193. Regarding events taking place after the 1991 Decree, the Tribunal will not repeat here the rather detailed and complex allegations, but instead has included a visual timeline provided by Claimants attached as Appendix 1 of this Award.[103]

194. Article 4(2) of the Treaty reads, in relevant part, as follows:

> (2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. These measures must be authorized by statute. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or similar measure has become publicly known. . . Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of compensation shall be subject to review by due process of law.[104]

195. To compress, rather brutally, the complex and layered arguments on both sides, the Claimants indicate that after the 1991 Decree, Mr. Unglaube entered into negotiations with Respondent pursuant to which the 1992 Agreement was struck. The description of the Park boundary in the Decree included the addition of 75-meters of land to the existing 50-meter inalienable zone. If implemented in accordance with that description, the Decree clearly would have impacted both phases of the Palm Beach Estates Project. Under the 1992 Agreement,

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103 *See* Appendix 1. Originally provided as Appendix C to CReply.

104 Official versions of the Treaty exist in German and Spanish. Therefore, all English quotations herein are unofficial translations as provided by the Claimants' translator in Exh. C-1.

however, Claimants have emphasized that land was donated to Costa Rica as consideration for a firm commitment by Respondent (1) to allow both Phases of the Palm Beach Estates Project to proceed, (2) to advise the municipality and other agencies that the project had been approved, and (3) to publicly announce the donation of the said property, appropriately thanking the donors for their generosity in assisting with the realization of the Park. Assuming that the 1992 Agreement so provided, issues regarding potential expropriation of any portion of the land involved in either Phase would have been averted.

196. In fact, several years passed without incident. The construction of the Phase I infrastructure was completed and the lots therein began to be sold to private owners. These sales were completed in 2004.

197. However, in 1995, when the National Park Law was enacted, it contained a description of the Park boundaries which was close to that contained in the 1991 Decree, but as to the 75-meter boundary on the ocean side it contained the term "seaward" – ("*aguas adentro*" in Spanish). Claimants argue that they were confident because of this statutory description of the Park boundary – in addition to the terms of the 1992 Agreement – that none of their land was affected.

198. Claimants maintain that it was not until the first effort to expropriate in 2003, that Respondent began to take a different position. From 2003 to the present Claimants protest that they have been subjected to an endless experience of illegality, unpredictability and unfair treatment. Despite the formal availability of Costa Rica's court system, they claim to have been deprived of their essential ownership rights in all of their properties (Phases I and II) illegally, without due process of law, and in violation of the terms of Article 4(2) of the Treaty. To this day Claimants indicate that they have received absolutely nothing by way of compensation.

199. Respondent maintains that the position of Claimants is without basis. The government of Costa Rica has done its best, openly and transparently, to create a national park for the purpose of protecting and nurturing the regeneration of the leatherback turtle. While Respondent recognizes the problems created by the "seaward" language in the National Park Law, Respondent maintains that this was an obvious error – which should readily have been recognized and accepted as such by the supposedly environmentally conscious Claimants – especially because it is not a matter of dispute that these endangered turtles lay their eggs on the beach, not in the ocean.

200. Respondent recognizes the delay and difficulty encountered in the expropriation process but places the blame squarely on the Claimants, who have fought the process tooth and nail in democratic Costa Rica's readily available court system. Claimants have continued to insist on the illegality of the boundary description in the 1995 National Park Law even after the error was recognized, and the "landward" scope of the park boundary was ratified by both the Costa Rican Attorney General and the Constitutional Division of the Supreme Court.

201. Respondent also urges that it is not at fault for permitting the delays between 2005 and 2008 and in 2009, resulting from *amparo* petitions brought by environmentally concerned private parties. In any event, Respondent maintains that all these matters have now been resolved. With regard to the 75-Meter Strip in Phase II, the Supreme Court has already chastised the government for the delay; has ordered that expropriation of this strip be concluded expeditiously; and has ordered that Claimant be compensated both for the value of the property itself and also for damages incurred due to the delay. Respondent has, in fact, already deposited a provisional amount of compensation which is available to Marion Unglaube at any time without prejudice to the ongoing consideration of the final amount payable. Respondent has also

urged in these arbitral proceedings, both at the First Session and subsequently, that any complaint by Claimants in this regard is therefore either moot or premature. As to the remainder of Phase II and all of Phase I, Claimants are free to develop and use them as they wish, subject only to approval pursuant to *bona fide*, legally established guidelines. The Tribunal will first examine these arguments as they relate to the 75-Meter Strip; will then proceed to the impact on the remainder of the Phase II Property; and finally, will deal with Claimants' Phase I Properties.

(a) Did Respondent Expropriate The 75-Meter Strip Of Marion Unglaube's Phase II Property?

202. Claimant, in her legal argument, has meticulously examined the Treaty requirements for accomplishing a "legal" expropriation (e.g., declaration of public purpose, authorization by statute, provision for compensation, etc.) and has found the actions of Respondent wanting. Though Costa Rica's highest legal authorities have endorsed, for example, the "correction" of the problematic language of the 1995 National Park Law, Claimant rejects such efforts at reinterpretation as violations of the separation of powers, creating a situation which cannot meet the standard required by international law for provisions having "the quality of law."[105]

203. The Tribunal has carefully considered all of these arguments and the answers of Respondent regarding whether or not Respondent has adequately complied with each of the Treaty requirements for a lawful expropriation. As stated in a leading treatise:

> "It is today generally accepted that the legality of a measure of expropriation is conditioned on three (or four) requirements. These requirements are contained in most treaties. They are also seen to be part of customary international law. These requirements must be fulfilled cumulatively:

[105] CM, ¶ 257.

- The measure must serve a public purpose. Given the broad meaning of 'public purpose,' it is not surprising that this requirement has rarely been questioned by the foreign investor. However, tribunals did address the significance of the term and its limits in some cases.[106]

- The measure must not be arbitrary and discriminatory within the generally accepted meaning of the terms.

- Some treaties explicitly require that the procedure of expropriation must follow principles of due process.[107] Due process is an expression of the minimum standard under customary international law and of the requirement of fair and equitable treatment. Therefore, it is not clear whether such a clause, in the context of the rule of expropriation, adds an independent requirement for the legality of the expropriation.

- The expropriatory measure must be accompanied by prompt, adequate, and effective compensation. Adequate compensation is generally understood today to be equivalent to the market value of the expropriated investment.[108]

204. As indicated above, "[t]hese requirements must be fulfilled cumulatively" or the expropriation will be considered to be in violation of customary international law.

205. Thus, while there can be no question concerning the right of the government of Costa Rica to expropriate property for a *bona fide* public purpose, pursuant to law, and in a manner which is neither arbitrary or discriminatory, the expropriatory measure must be accompanied by compensation for the fair market value of the investment.[109]

206. As indicated previously, the Costa Rica – Germany Treaty provides, that:

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106 *See, e.g., ADC v. Hungary, Award*, 2 October 2006, ¶¶ 429-433 [Note appears in original.].

107 *See, e.g.,* Article 6(1)(d) of the 2004 US Model BIT [Note appears in original.].

108 R. DOLZER AND C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 90-91 (Oxford Univ. Press 2008).

109 *Ibid*. at 91.

> ". . .Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation nationalization or similar measure has become publicly known. . . not later than the moment of the expropriation, nationalization or comparable measures, there shall have been put into effect, in proper form, arrangements designed to determine the amount of and to make payment of the compensation due. . ."[110]

207. With regard to when payment shall be made, the Treaty, including its protocol, provides considerable guidance. Article 5(2) of the Treaty states as follows:

> "The transfers of funds related to paragraphs 2 or 3 of Article 4. . . shall be made without delay at the prevailing exchange rate."[111]

208. Further clarifying language regarding timing of payment is found in paragraph number 4 of the Protocol to the Treaty which explains that for the purposes of Article 5, paragraph 2, "[a] transfer [of funds] shall be considered to have been made without delay when it has been made within the time period which is normally required to comply with the formalities of such a transfer. This time period, which in no case shall exceed two (2) months, shall begin to run at the moment that a request for such a transfer is duly presented."[112]

209. The Tribunal finds that Respondent, in the process of initiating expropriation of the 75-Meter Strip did not make timely arrangements to determine and make payment to Marion

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[110] Art. 4(2). ". . .La indemnización deberá responder al valor de la inversión inmediatamente antes de la fecha de hacerse pública la expropiación, nacionalización o medida equiparable efectiva o inminente. . . [a] más tardar en el momento de la expropiación, nacionalización o medida equiparable, deberán haberse tomado en debida forma disposiciones para fijar y satisfacer la indemnización. . ."

[111] "2. Las transferencias con arreglo al párrafo 2 ó 3 del artículo 4, al artículo 5 o al artículo 6 se efectuarán sin demora, al tipo de cambio vigente."

[112] Treaty Protocol ¶ 4 [Tribunal's translation]. Original Spanish text reads as follows:

"4. Ad Artículo 5

a) Se considerarà como realizada "sin demora" una transferencia en el sentido del párrafo 2 del artículo 5, cuando se ha efectuado dentro del plazo normalments necesario para el cumplimiento de las formalidades de transferencia. El plazo, que en ningún caso podrá exceeder de dos (2) meses, comenzará a correr en el momento de entrega de la correspondiente solicitud debidamente presentada."

Unglaube of the compensation required. As a result, the 75-Meter Strip of Phase II owned by the Claimant, Marion Unglaube, has been subjected to *de facto* expropriation – in the words of the Treaty, by "measure(s) tantamount to expropriation."

210. The narrow peninsula on which Claimants' land is situated is of obvious importance with regard to efforts to protect the endangered leatherback turtle. Costa Rica, which began establishing its National Park System in the 1970's (and therefore has extensive experience in the process), could readily have enacted legislation to expropriate all of this peninsula, including the Claimant's property. Assuming that compensation was properly provided for and paid, Costa Rica's legal position would have been unassailable and this dispute might never have occurred.

211. But that is not what has occurred. The 1991 Decree described the boundaries of the National Park so as clearly to include the 75-Meter Strip. Once having been identified for expropriation, the Tribunal considers that this strip was obviously impacted in terms of saleability and use, but no action was taken by the State at that point to seek the necessary funds or begin the process of expropriation.

212. Four years later, however, Respondent, in essence, ratified the plans announced in the 1991 Decree and restated its intention to proceed with the creation of the Park by enacting the 1995 National Park Law, though the Park Law clearly does include the problematic terminology "seaward" (or "*aguas adentro"*). Again, from 1995 to 2003 – a period of eight years – no further action was taken regarding expropriation of Claimant's property.

213. When Respondent finally did take direct action to expropriate, in 2003 and 2004, Claimants fought assiduously to protect their property from what they saw as an illegal expropriation. Respondent has blamed the years of ensuing delay on the intransigence of the

Claimants – as they made use of every option available by Costa Rica's democratic institutions, and due process of law, to block what Respondent describes as its evolving *bona fide* environmental protections.

214. But the Tribunal cannot accept this line of argument. Eleven years ago, the case of *Compañía de Desarrollo de Santa Elena, S.A. v. Costa Rica* (hereafter "*Santa Elena*") was brought to ICSID by aggrieved investors whose property, in this same Guanacaste Province, had been the subject of an expropriation decree in 1978 for the purpose of enlarging the already-existing Santa Rosa National Park (a haven for a wide variety of tropical wildlife).[113] Santa Elena, the development company involved in the dispute, did not question Costa Rica's right to expropriate but did dispute the adequacy of the compensation offered.

215. Paragraph 20 of the Award reads as follows:

> The approximately twenty-year period from the date of Respondent's 1978 Decree until the commencement of the present arbitration was marked by intermittent inactivity and intensive legal proceedings between the parties before the Courts of Costa Rica. . . Suffice it to say that each party blames the other for the very long delay in resolving the issue of compensation. In the opinion of the Tribunal, the issue of blame or fault on the part of one or other of the parties in this regard does not affect the outcome of the case and need not be addressed by the Tribunal. What is relevant is that, from the date of the expropriation until the commencement of the present proceedings, the amount of compensation to be paid for the Property remained unresolved.[114]

216. Then, as now, Costa Rican law included provisions which required, *inter alia*, that property expropriated for a public purpose must be dedicated to that purpose within 10 years, failing which the original owner may petition for its return.[115]

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113 *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000) (Fortier, Lauterpacht, Weil).

114 *Santa Elena*, ¶ 20.

115 *Santa Elena*, ¶ 22.

217. The *Santa Elena* Award continues at paragraph 72 as follows: "Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies. . ."

218. The tribunal continues:

> 77. There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property:
>
> *A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.*
>
> *While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.*"[Emphasis and italics added by the *Santa Elena* tribunal.][116]

219. As indicated above (*see, e.g.*, ¶ 201 *supra*), Article 4(2) of the Treaty enunciates well established international obligations of a Contracting Party that proposes to conduct a lawful expropriation. Not only has Respondent failed to act within the boundaries of Article 4(2), it also, as clearly determined by the Constitutional Chamber of the Supreme Court, on

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[116] *Santa Elena*, ¶ 77 n. 36 ("*Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA*, Award No. 141-7-2 (June 22, 1984), reprinted in 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1986), citing 8 Whiteman, *Digest of International* Law 1006-20; Christie, *What Constitutes a Taking Under International Law?* 38 Brit. Y.B. Int'l. Law 307 (1962); *Cf. also* the *Mariposa Development Company* case decided by the U.S.-Panama General Claims Commission (6 UNRIAA 390), where the tribunal observes that legislation may sometimes be of such a character that …its mere enactment would destroy the marketability of private property, render it valueless and give rise forthwith to an international claim.")

May 27, 2008, has not acted promptly and effectively to carry out the purposes and directives of its own 1995 National Park Law.[117]

220. As in *Santa Elena*, it is clear that, perhaps as early as 1991 – but without doubt, by 2003, the rights of the owner of the 75-Meter Strip had been seriously and negatively impacted. As stated by the Santa Elena tribunal:

> "As of that date [1978 Expropriation Decree] the practical and economic use of the Property by the Claimant was irretrievably lost, notwithstanding that CDSE [*Santa Elena*] remained in possession of the Property."[118]

221. The Tribunal finds that the Claimant's 75-Meter Strip was similarly affected. The Tribunal finds that it is Respondent who is responsible to provide for the adequacy and timeliness of the expropriation process, including the proper drafting of the relevant provisions of the National Park Law.[119]

222. Similar conclusions have been reached by the tribunal in another ICSID Award decided on April 22, 2009. In *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*[120] the tribunal dealt with a situation in which the State enacted legislation in 1992 directing compulsory expropriation of properties including those of the claimants. Though both the facts and the sophistication of the legal systems involved differ considerably, this process dragged, without compensation to the claimants, until at least 2005 (when new legal provisions immediately vested title to the properties in the government). The tribunal declared: "In fact,

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117 Exh. C-28; C-41.

118 *Santa Elena*, ¶ 81.

119 Had Respondent established that Claimants had a demonstrable role in having the "aguas adentro" language inserted in the legislation, a different conclusion might be reached. But no such evidence has been presented.

120 *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009).

however, the Claimants had all been effectively deprived of their properties at a much earlier date. . ."[121] Claimants have also correctly referred to the award in *Theodoraki and Others v. Greece*.[122]

223. The Tribunal finds, therefore, that by its actions, (1) the Respondent began, not later than July 22, 2003, to take actions which effectively deprived the Claimant Marion Unglaube of her normal rights of ownership of the 75-Meter Strip and (2) that Respondent, at that point, had not and did not subsequently, make provision for timely and adequate compensation to Mrs. Unglaube as required by the Treaty. The resulting amount of compensation payable to the Claimant, Marion Unglaube for the expropriation of the 75-Meter Strip of Phase II is decided in Section IX.C. below.

(b) Did Respondent Expropriate the Remaining Portions Of The Phase II Property And The Phase I Property?

i. Impact on the Remaining Phase II Property

224. With respect to the balance of the Phase II Property, the Tribunal considers that the relevant facts and resulting impact are quite different.

225. Claimant does not maintain that the 1991 Decree provided for the proposed expropriation of any land beyond the 75-Meter Strip. Similarly, the terms of the 1995 Park Law – assuming *arguendo* that the "seaward" language was erroneous and meant "landward" – would have had no effect on the remainder of Phase II Property beyond the 75-Meter Strip.

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[121] The Tribunal also notes that the publicly-available documents cited in footnote 42 of the *Santa Elena* decision make clear that the Santa Elena owners were among numerous others who had been effectively deprived of the ownership of their properties, while being subjected to inexcusable delay in completing the process and properly compensating the owners.

[122] *Theodoraki and Others v. Greece*, Evr. Ct. H.R. Application No. 9368/06, Judgment (Dec. 11, 2008), ¶¶ 60-63, 66.

226. It is certainly true that pursuant to its Resolution No. 375, issued on July 22, 2003, MINAE did, for a brief period, purport to expropriate the remainder of the Phase II Property. MINAE did so in the words of the Resolution, because "the rest of the land would remain as enclaved land, it decides to expropriate the entire property so as not to harm the owner, for which reason all of the property will be acquired."[123]

227. This error was revealed soon thereafter and, as a result, no further attempt was made formally to expropriate the remainder of the Phase II Property.[124] The Tribunal concludes that this short-lived attempt to expropriate the remainder of Phase II in late 2004 was temporary and ephemeral.

228. The Tribunal has also examined Claimants' additional allegations regarding the suspension of the permitting process between 2005 and 2008. In this regard, the evidence demonstrates that Mrs. Unglaube filed an Environmental Impact Assessment Request (hereafter "EIA Request") with SETENA on January 12, 2005 and that the Request related to the entire Phase II Property, including the 75-Meter Strip. It is also clear that MINAE's Resolution No. 2238[125] had suspended the processing of environmental permits for all properties within the Park.

229. At this point, the Parties have engaged in finger pointing regarding who is at fault for the processing delay which ensued. The Claimant Marion Unglaube refused to modify the EIA Request to excise the portion related to the 75-Meter Strip (perhaps because she maintained

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123 The original Spanish text reads as follows:

> Que del inmueble indicado únicamente seis mil metros se encuentran dentro de los límites del Parque Nacional Marino Baulas de Guanacaste, pero que el Poder Ejecutivo consciente en que el resto del terreno quedaría como fundo enclavado, decide expropiar la totalidad con el fin de no perjudicar a la propietaria, por lo que se adquirirá la totalidad de la finca. Exh. C-29.

124 RCM, ¶ 147; Resolution No. R-421-2004-MINAE (Exh. C-39 and R-17).

125 Exh. C-23.

her position that the expropriation of the 75-Meter Strip was illegal and invalid). MINAE, for its part, could have arranged to process the EIA only with respect to the property outside the Park, but it did not seek to move the process forward in that manner. The Tribunal is skeptical that Resolution No. 2238 actually prohibited such action by SETENA – but the Tribunal is not required to delve further into the mutual recriminations of the parties in this regard.

230. The burden of proof on this claim remains with the Claimant. The Tribunal concludes that the Claimant Marion Unglaube has not discharged the burden of proof regarding the cause of further delay in the processing of the EIA Request for property outside the Park. While SETENA may not have acted with good judgment, the Tribunal is persuaded that Mrs. Unglaube was free, at any time after Resolution No. 2238 was issued in August 2005, to submit and have processed a modified EIA Request dealing only with the Phase II Property outside the Park. [126]

ii. Impact On The Phase I Property

231. It remains for the Tribunal to examine the effects of the further delay occasioned by the Supreme Court's ruling of December 16, 2008. This further delay (until October 2009) resulted from the second *amparo* petition brought by private environmental activists. While these persons were properly exercising their legal rights, the actions taken by the Supreme Court raise serious and troubling questions for the Tribunal. This is so because despite a careful search, there is nothing in the evidence before this Tribunal regarding a technical or scientific basis for the Supreme Court's Decision, *i.e.*, for the establishment of a 500 meter "buffer zone."

[126] This situation pertained at least until the Supreme Court Decision of December 2008. The effects of that Decision is discussed below.

232. The language of the 1992 Agreement – though opaque in certain other respects – set forth in detail (Article 3) the environmental protections and construction limitations applicable to the development of Phase I. Clearly the Claimants and other owners in Phase I understood and relied on this guidance. From the evidence before this Tribunal the owners of plots in Phase I appear to have followed these rules carefully.

233. It therefore appears to the Tribunal surprising and puzzling that the Supreme Court suspended further development in the area lying within 500 meters of the Park apparently without any credible showing of a scientific or technical basis for such a delay and without any apparent attempt to obtain evidence or comment from the affected landowners.

234. Notwithstanding the above, however, after a delay of nine-months, a consultant proposed and the Court endorsed a new set of Guidelines which (1) closely resembled those found in the 1992 Agreement and (2) did not call for any action on the part of existing landowners to make *post facto* modifications to existing structures. Thus, the Tribunal concludes that the revised Guidelines resulted in nine months of delay, but in very little change. Claimants may, understandably, consider this aspect of the process objectionable on grounds of needless inconvenience and delay, but the Tribunal concludes that as of October 2009, Claimants and other landowners in the buffer zone (including the remainder of Phase II and all of Phase I), were free to own, develop, or sell their properties very much as they had been prior to the December 16, 2008 decision.[127] The Tribunal concludes, therefore, that neither the remainder of the Phase II Property nor Claimants' ownership interests in the Phase I Property have been subjected to expropriation within the meaning of the Treaty or of applicable international law.

[127] The Tribunal finds no evidence in this dispute to indicate that the modified guidelines precluded Claimants from developing their properties as they wished though the proposed construction of a swimming pool on Lot 23 would be affected to some extent in terms of design and cost.

3. Alleged Violations of Article 2(1) of the Treaty by Treating Claimants' Investments Unfairly and Inequitably

(a) Summary of Claimants' Position

235. Claimants allege that Respondent has violated Article 2(1) of the Treaty by treating the Claimants' investments unfairly and inequitably by:

(a) "failing to provide the Unglaubes with a transparent, consistent and predictable legal and business environment and frustrating their legitimate expectations arising out of the National Park Law;"[128]

(b) "by preventing the development of the Properties without basis in law and in violation of Claimants' reasonable expectation that only lawful restrictions on development would be applied;"[129]

(c) "failing to provide Claimants with an effective legal remedy against the government's unlawful conduct and the delays of its courts;"[130]

(d) "a denial of justice in failing to make available to Claimants the protections of a formal and duly regulated expropriation process;"[131] and

(e) "frustration of the investors' legitimate expectations based on agreements entered into with the State."[132]

236. In addition to these five categories of alleged violations of Article 2(1), Claimants also urge the Tribunal to look beyond the individual alleged violations to appraise the cumulative effect of such actions on the investor(s). According to Claimants, this "is a story of a disorganized, chaotic and internally incoherent series of actions taken by various authorities apparently acting independently of each other and in an unpredictable manner, which taken

128 CM, ¶¶ 282-300.

129 CM, ¶¶ 301-307.

130 CM, ¶¶ 308-335.

131 CM, ¶¶ 336-338.

132 CReply, ¶¶ 312-317.

together have had the effect of depriving the Unglaubes of their investments and of frustrating their legitimate expectations."[133]

237. Thus, Claimants urge that even if none of the specific actions or decisions of Respondent constituted a violation of the fair and equitable treatment standard, this congeries of actions by Respondent, viewed together, constitutes a violation of Article 2(1) of the Treaty which has deprived Claimants of their investments.

238. In Claimants' words, ". . . the Tribunal should undertake a full, objective assessment of the facts of this case, taking into account both the conduct of the State and its impact on the investors."[134]

(b) Summary of Respondent's Position

239. Respondent maintains that Claimants' investments were treated fairly and equitably and offers the following defenses:

(a) "Claimants rely on exaggerated claims of legal instability and unfounded expectations;"[135]

(b) "Costa Rica's actions have been carried out under the law;"[136]

(c) "Costa Rica has provided effective legal remedies and has not denied justice to Claimants;"[137]

(d) "Claimants do not have an automatic denial of justice claim if they experienced an expropriation;"[138] and

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133 CReply, ¶ 309.

134 CReply, ¶ 311.

135 RCM, ¶¶ 248-258.

136 RCM, ¶¶ 259-264.

137 RCM, ¶¶ 265-273.

138 Respondent's Rejoinder [hereafter "RRejoinder"], ¶¶ 226-227.

(e) "Claimants cannot claim a legitimate expectation of compliance with obligations that did not exist in the 1992 Agreement and October 1998 [sic] Road Map."[139]

(c) Considerations of the Tribunal

240. Article 2(1) of the Treaty states: "Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord investments fair and equitable treatment."

241. This formulation is less complicated than that found in other treaties, where some further effort is made to describe the scope of the standard.[140] The language of the Preamble in this Treaty is also brief. It refers, simply, to the intent of the Contracting Parties "to create favorable conditions for investment" stating that "the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations."

242. Whether the fair and equitable treatment requirement is viewed in terms of customary international law as urged by Respondents or, as Claimants have argued, by a somewhat more inclusive standard,[141] the responsibility of this Tribunal is clear. It is not the Tribunal's role, having appraised the evidence presented, to decide based on its own judgments of fairness. It is, instead, to assess whether investors have been subjected to arbitrary or discriminatory treatment, to legal arrangements which violate due process, and, in particular,

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139 RRejoinder, ¶¶ 228-230.

140 *See, e.g.*, *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), ¶ 313; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶ 324.

141 RCM, ¶¶ 248-258.

whether the legitimate expectations of the investor (*i.e.*, expectations reasonably held by the investor at the time the investment was made) have been duly respected.

243. In view of the array of claims presented regarding fair and equitable treatment, it is especially important to review the specific treaty language as well as the standards applicable to each category of allegations.

244. As stated by the *Siemens* Tribunal:

> "There is no reference [in the Treaty] to international law or to a minimum standard. However, in applying the Treaty, the Tribunal is bound to find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used."[142]

245. The contours of the fair and equitable standard have, of course, been carved out by numerous tribunals. The Parties have, by and large, made reference to and based their arguments on several leading cases on the subject, including *Saluka*,[143] *Duke Energy*,[144] *Azurix*,[145] *LG&E*[146] and *Biwater Gauff*.[147]

246. These and other leading authorities indicate that to prove a breach of the standard, a claimant must show more than mere legal error. Instead, as stated by the *Saluka* Tribunal, the evidence must establish actions or decisions which are "manifestly inconsistent, non-transparent,

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142 *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), ¶ 291.

143 *Saluka Investments BV v. Czech Republic*, PCA Ad hoc – UNCITRAL Arbitration Rules, Partial Award (17 Mar. 17, 2006), ¶¶ 292-3.

144 *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008).

145 *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006).

146 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006), ¶¶ 127-130.

147 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), ¶ 602.

[or] unreasonable (*i.e.*, unrelated to some rational policy). . .[148] Where, however, a valid public policy *does* exist, and especially where the action or decision taken relates to the State's responsibility "for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states,"[149] such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders.[150]

247. This deference, however, is not without limits. Even if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory.[151] As Judge Higgins noted in her separate opinion in the *Oil Platforms Case*, "[t]he key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are *legal terms of art* well known in the field of overseas investment protection. . ."[152] [Emphasis added.]

248. Finally, as indicated above, Claimants emphasize that the fair and equitable treatment standard requires that the receiving State maintain and make available a stable legal and business framework.[153] As stated by the tribunal in *LG&E v. Argentina*,[154] ". . . the stability

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148 *Saluka*, ¶ 309.

149 RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES (1987).

150 *S.D. Myers, Inc. v. Gov't of Canada*, Ad hoc – UNCITRAL Arbitraction Rules, Partial Award (Nov. 13, 2000), ¶ 263.

151 ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 358 (2009) [hereafter "NEWCOMBE & PARADELL"]; SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 281-88 (2009) [hereafter "MONTT"].

152 *See Oil Platforms* (*Iran v. U.S.)* [1996] ICJ Rep. 803, 858 (Judge Higgins, Separate Opinion); *see also* NEWCOMBE & PARADELL, *supra* note 152 at 246–252; MONTT, *supra* note 152 at 281–288.

153 CM, ¶ 284.

of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law."[155]

249. Further, as stated by the Tribunal in *Duke Energy*:

> The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment.[156] The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.[157]

(d) Preliminary Matters

250. To avoid possible misunderstanding, the Tribunal believes that it is useful to review and disaggregate a number of repetitive and overlapping issues. First, to the extent that the alleged violations of Article 2(1) depend upon "frustration of investors' legitimate expectations based on agreements entered into with the State,"[158] the Claimant bears the burden of proof regarding the existence and content of such agreements, and, particularly, of those

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(Footnote continued from previous page.)

154 *LG&E Energy Corp. et al. v. Argentine Republic*, ¶ 125.

155 *See also Duke Energy v. Republic of Ecuador*, note 145 *supra*, ¶¶ 337-340.

156 *See Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 154; *see also Occidental Exploration and Production Company v. Ecuador*, Final Award, LCIA Case No. UN 3467 (July 1, 2004), ¶ 185; *LG&E*, ¶ 127 [note appears in original].

157 *See Southern Pacific Properties (Middle East) and Southern Pacific Properties Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), ¶ 82; *LG&E*, ¶¶ 127-130; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ¶ 154.

158 ¶ 233(e), *supra*.

specific obligations of Respondent which Claimant maintains have been ignored or violated. The Tribunal has already found, however, that the evidence presented does not support Claimants' contentions regarding either (1) final approval of Claimants' development plans for Phase II, or (2) a firm commitment, pursuant to the terms of the 1992 Agreement with regard to Claimants' development rights as private owners of the lots in Phase I.[159] In addition, the Tribunal has determined that the Respondent's suspension of the processing of Claimants' environmental assessment in mid-December 2008, did not constitute a violation of the 2008 Road Map Agreement.[160] Thus to the extent that Claimants' argument[161] on fair and equitable treatment revisits this same factual ground, the Tribunal reiterates its finding: namely, that the precondition for any alleged failure to abide by an agreement with the State (whether couched in terms of Article 7(2) or, as here, Article 2(1) of the Treaty) is and must be the presentation by Claimants of evidence sufficient to prove the concrete content of the legal obligation upon which such allegations are based. Here, that burden has not been satisfied.

(e) Did Respondent Violate Article 2(1) By Failing To Provide A Stable And Predictable Legal And Business Environment And By Frustrating The Investor's Legitimate Expectations?[162]

251. Claimants maintain that Respondent has failed to provide a "stable and predictable legal and business environment" and has frustrated Claimants' reasonable expectations on several specific grounds. Claimant asserts first that it was illegal and improper for Costa Rica to have created uncertainty regarding the legal status of Claimants' properties

159 *See* ¶¶ 168-189, *supra*.

160 ¶¶ 183-189, *supra*.

161 *See*, ¶ 233(e), *supra*.

162 CReply, ¶ 306.2.

(1) by the *contra legem* interpretation of the 1995 National Park Law which unlawfully extended the boundaries of the Park; (2) by introducing the concept of a "buffer zone" as part of the December 2008 Supreme Court decision (since the National Park Law provides no authorization for a buffer zone); (3) by the decisions of various administrative and judicial authorities from 2003 to the present; and (4) by Costa Rica's decision to cease performance of its obligations under the 1992 Agreement and, instead, shifting from supporting to obstructing the Project.[163]

252. In presenting these positions, Claimants do not maintain that the term "stable legal environment" refers to a fixed or "stabilized" legal environment.[164] They also do not impugn the power of Respondent to modify land use regulations from time to time for environmental protection purposes. But they do insist that such regulatory action must be compatible with the Treaty. In Claimants' words: "(it) is the choice of interventions and the manner of their execution that has caused unfair treatment."[165]

253. The Tribunal does not agree. The Tribunal has already found in Claimants' favor with regard to the 75-Meter Strip on grounds of *de facto* expropriation. In reaching that conclusion, the Tribunal was not required to undertake a detailed discussion of the interpretation of the problematic language of the 1995 National Park Law. Had such discussion been required, however, the Tribunal would, without hesitation, have found that, under the Constitution and laws of Costa Rica, it is the Attorney General and the Supreme Court who are empowered to give authoritative and final interpretation of the law.[166] The construction of the 1995 National

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163 CReply, ¶ 320.

164 CReply, ¶ 322.

165 CReply, ¶ 324.

166 RCM, ¶ 35.

Park Law is a matter of Costa Rican law, and it is not appropriate for this Tribunal to substitute an opinion of its own or make any finding of liability unless the Attorney General and the Court are found to have acted in a manner which is arbitrary, discriminatory or otherwise shocking to the conscience. The Tribunal does not find in the reasoning of the Attorney General or the Supreme Court any such abuse of their responsibilities.

254. However, even if we were to assume, for the sake of argument, that the Supreme Court's interpretation of the National Park Law was improper, the 1995 National Park Law (as interpreted by Claimants) would have affected only Marion Unglaube's Phase II Property "within the Park." It would not, by its own terms, have affected the remainder of Phase II or Claimants' Phase I properties. As indicated earlier, while the 2003 attempt to expropriate did, briefly, seek to take the entire Phase II property, government officials soon discovered their error and took no further action against the portion of Phase II "outside the Park."[167]

255. If we proceed to examine Claimants allegations regarding the concept of a buffer zone, which suddenly appeared in a Supreme Court decision of December 2008,[168] the Tribunal finds, as Claimants have noted, that the National Park Law makes no mention of a buffer zone. There is also no evidence that the introduction of a buffer zone had ever been considered or endorsed by MINAE or SETENA. This Tribunal has expressed its concerns regarding the December 16, 2008 Supreme Court decision and the lack of a scientific or technical foundation for the concept of buffer zone.[169] To this extent, the Tribunal has expressed significant reservations regarding whether the 90-day delay imposed by the Supreme Court was properly

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167 RCM, ¶¶ 105-107; 209.

168 ¶ 77, *supra*.

169 *See* ¶ 231, *supra*.

justified. However, the resulting Guidelines which resulted from that process, are, in fact, very similar to those set forth in the 1992 Agreement which Claimants had approved and signed. Thus, the Tribunal is not persuaded that the new Guidelines or the delay involved, significantly impeded or interfered with their property rights.

256. Claimants' also make another more general objection to the decisions of various Costa Rican administrative and judicial authorities from 2003 to the present.[170] In this regard, Claimants have been quite explicit in calling on the Tribunal to look beyond the individual alleged violations by Respondent to appraise the cumulative impact of all of these disruptions and delays on the Investors, which, Claimants allege, deprived them of their investments and frustrated their legitimate expectations.

257. To the extent that the actions and decisions of Respondent related to that portion of Phase II "within the Park," the Tribunal has already ruled that those actions of Respondent amounted to *de facto* expropriation. That violation of the Treaty might, alternatively, have been explained in terms of violations of the fair and equitable treatment standard, since, as is well known, expropriation may result from a variety of potential causes. Among these are included situations where violations of the fair and equitable treatment standard and their consequences are so severe that they result in a taking of an investor's property.[171]

258. But with regard to the other Claimants' properties (*i.e*. the remainder of Phase II and Phase I Lots 19 - 23), the Tribunal does not find convincing evidence of a violation of the

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170 *See* ¶ 234, *supra*.

171 ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 494-5 (Sweet & Maxwell, 2004); *see generally* MONTT, *supra* note 152, at 253–73; W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation,* 74 BRITISH Y.B. INT'L. L. 115–50 (2003); *see also Starrett Housing Corp. v. Islamic Republic of Iran,* 4 Iran-U.S. C.T.R. 122, 154, Partial Award (Dec. 19, 1983); Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and State,* 8.5 J. World Investment & Trade 723 (Oct. 2007); *see generally* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1 (2005).

fair and equitable treatment standard. As intelligent and experienced investors, Claimants were, of course, required, as part of their due diligence, to become familiar with Costa Rican law and procedure.[172] The Tribunal understands that the workings of the courts and administrative agencies of Costa Rica surely involve noticeable differences from those with which Claimants may be more familiar. But, because governments are accorded a considerable degree of deference regarding the regulation/administration of matters within their borders,[173] such differences are not significant, insofar as this Tribunal is concerned, unless they involve or condone arbitrariness, discriminatory behavior, lack of due process or other characteristics that shock the conscience, are clearly "improper or discreditable" or which otherwise blatantly defy logic or elemental fairness. The Tribunal finds no evidence, here, that these boundaries have been approached, much less surpassed.

259. There is no evidence, for example, of any government incitement of, or involvement in, the initiation of the *amparo* petition in 2005. The private petitioners in that case were exercising their legal rights under Costa Rican law and the Tribunal finds no evidence of arbitrariness or abuse of its powers by the Supreme Court. Further, the Tribunal does not encounter evidence suggesting that the August 2005 decision of SETENA to suspend processing of environmental assessments on properties outside the Park was in any way violative of

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172 *Plama Consortium Ltd v. Bulgaria (Plama II)*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008) at ¶ 220; *GAMI v. Mexico*, Award, (Nov. 15, 2004), 44 ILM (2005) at ¶ 93; *S.R. Myers v. Canada*, Second Partial Award, (Oct. 21, 2002); *Feldman v. Mexico*, Award, (Dec. 16, 2002), 18 ICSID Review – FILJ (2003), 388 at ¶ 93; *see also Mondev v. USA*, Award, (Oct. 12, 2002), 42 ILM (2003) 85 ¶ 156; *see generally* RUDOLF DOLZER AND CHRISTOPHE SCHREUER, PRINCIPLES OF INTERNATIONAL LAW at 133-135 (Oxford U. Press, 2008).

173 *S.D. Myers v. Government of Canada*, UNCITRAL Partial Award, (Nov. 13, 2000) at ¶ 263; *see also* Restatement (Third) of the Law of Foreign Relations of the United States (1987) Section 712g.; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 [hereinafter "Tecmed"], Award (29 May 2003), ¶ 122. *See also Saluka Investments v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Final Award (17 March 2006), ¶¶ 253–65.

established Costa Rican law or procedure – or that the conservatory measure established by the Supreme Court in its preliminary ruling of Mar. 9, 2005 was arbitrary, discriminatory or otherwise improper pursuant to international law standards. On the contrary, the Tribunal finds that by not later than May 27, 2008, Claimants were free to submit requests for assessments for their properties outside the Park. The Tribunal is not persuaded that the delays occasioned by the two *amparo* petitions to the Supreme Court or the Supreme Court's processing of them, constituted actions which may properly be characterized as arbitrary, discriminatory or otherwise violative of the fair and equitable treatment standard set forth in Article 2(1) of the Treaty. Based on the evidence presented the Tribunal is not persuaded that Claimants are not free to manage, profit from and, if desirable, seek expansion or further development of their properties "outside of the Park." Likewise, this finding applies to Claimants assertion that they were prevented from developing these properties without a basis in law and that only lawful restrictions would be applied.[174]

(f) Did Respondent Violate Article 2(3) Of The Treaty By Impairing The Administration, Management, Use Or Enjoyment Of Claimants Investments By Arbitrary Or Discriminatory Measures?

260. The Tribunal has also studied Claimants' arguments concerning two instances of alleged discriminatory action by Respondent. The first of these relates to the evidence presented regarding the understanding reached by Respondent with the environmental non-governmental organization known as the Leatherback Trust.[175] This Trust continues to own and make use of an existing building which is located within the Park (*i.e.* within the 75-Meter Strip which also

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174 *See* ¶ 233(b) *supra*.

175 CReply, ¶¶ 395-399.

encompasses some of Mrs. Unglaube's property). Claimants note, correctly, that, to date, this property has not been expropriated. In addition, Claimants provide documentary evidence indicating that Respondent has not even begun proceedings to expropriate some 40% of the other properties which, according to Respondent, are located within the Park.[176] Referring to the language of Article 2(3) of the Treaty, Claimants argue that this information provides clear evidence that Claimants, or at least Mrs. Unglaube, have been subjected to discriminatory treatment.[177]

261. In making this argument, Claimants maintain that if there is a difference, for example, between the treatment of property of the Claimants and that of other owners of undeveloped property (or, as in the case of the Leatherback Trust, the owners of property on which a building already exists), then Costa Rica must bear the burden of proving that such different treatment is justified. In Claimants' words:

> The inclusion of the word '*unjustified*' . . . cannot be read as recognizing, much less granting, any discretion to the State. The inclusion of that word merely clarifies that Article 2(3) does not prohibit any and all differential treatment of investors. It requires the Tribunal to assess whether or not differential treatment applied by the State is justified, and to evaluate the State's purported justifications for its actions. That is an objective assessment. Article 2(3) only permits the State to apply differential treatment if there is justification. Here there is none.[178] (Original emphasis).

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176 CReply, ¶ 396 (*citing* RCM, ¶ 283 together with Exh. R-32 and C-92).

177 Article 2(3) of the Treaty reads as follows:

> Neither Contracting Party shall in any way impair by arbitrary measures or unjustified discriminatory treatment the management, maintenance, use, or enjoyment of investments in its territory of nationals or companies of the other Contracting Party.
>
> (*Una Parte Contratante no perturbará de ninguna manera mediante medidas arbitrarias o un trato desigual injustificado la administración, utilización, uso o aprovechamiento de las inversiones de nacionales o sociedades de la otra Parte Contratante en su territorio.*)

178 CReply, ¶ 398.

262. The Tribunal does not agree. As indicated previously, the words "arbitrary or discriminatory" are legal terms of art which are well known in the field of overseas investment protection.[179] In order to prevail regarding an allegation of discriminatory treatment, a Claimant must demonstrate that it has been subjected to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation. As stated by the Tribunal in *LG&E v. Argentine Republic*:

> "[A] measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect."[180] (Emphasis added).

263. While evidence of discriminatory intent may be relevant, and may reinforce such a finding, it is the fact of unequal treatment which is key.[181] In examining Claimants' allegations of discriminatory treatment in this case, the Tribunal must ask "Compared to whom?" and must consider carefully which group must be looked to for this comparison.[182] For example, in *Nykomb v. Latvia*[183] and *Saluka v. Czech Republic*[184] tribunals compared the treatment of several companies in the same area of endeavor (electricity generation/distribution in *Nykomb* and banks of similar size and market position in *Saluka*). In each of these cases, one company from a small and homogeneous group received markedly less favorable treatment than the others, without

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179 *See* ¶ 245 and note 153 *supra.*

180 *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 146; *see also* Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, in THE FUTURE OF INVESTMENT ARBITRATION 183 (Roger P. Alford & Catherine A. Rogers eds., 2009) [hereafter "Schreuer"].

181 Schreuer, op. cit., at 183.

182 *Ibid.*

183 *Nykomb Synergetics Tech. Holding AB v. Latvia*, Award (Dec. 16, 2003), STOCKHOLM INT'L. ARB. REV. 2005:1, 53.

184 *Saluka*, *see* note 144 *supra* at ¶¶ 314-347, 466.

explanation or justification. Such treatment was found to be discriminatory. No evidence of intent was found or was considered to be required. In these and other cases,[185] Claimants have been required, at a minimum, to prove facts which, on their face, suggest discriminatory or less favorable treatment. If they are successful in doing so, further examination may be called for.

264. Returning to the two specific allegations of the Claimants, the first relates to the failure of the Respondent to initiate expropriation of the land and building which serves as headquarters for the operations of the Leatherback Trust and which is located very close to Mrs. Unglaube's 75-Meter Strip. Claimants argue that this unequal treatment, in essence, speaks for itself. Claimants do not dispute, however, that the Leatherback Trust is an environmental non-governmental organization whose personnel are working closely with the government in the establishment of the Park and the protection of the turtles. Respondent, for its part, has presented evidence and argument to the effect that, given the role of the Trust personnel in assisting with the Park project, Respondent's decision not to proceed against the Trust property early in the process of formation of the Park should be easily understood.[186] Clearly, Claimants' do not agree, but they have presented no evidence to suggest that the decision not to proceed against the property of the Leatherback Trust at this point in the Park Project provides *prima facie* evidence of discriminatory treatment against the Claimants.

265. On the second allegation, Claimants have noted that many properties marked for inclusion within the boundaries of the Park have not yet had any action taken against them. There is no dispute between the Parties that, in the process of carrying out Respondent's plans to

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185 *See, e.g., Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award (July 1, 2004). While this Award dealt principally with the Fair and Equitable Treatment language of the Bilateral Investment Treaty, the factual and legal analysis was very close to that in *Nykomb* and *Saluka*.

186 RCM, ¶ 283.

create the Las Baulas Park – the properties of approximately 100 land owners have been identified for expropriation. Respondent has begun expropriation proceedings against more than 60 of these properties, including the portion of the 75-Meter Strip owned by Marion Unglaube,[187] while leaving many properties still untouched. However, Claimants have presented no evidence to suggest either that Claimants themselves or this group of 60 landowners (including Claimants) have been subjected to discriminatory treatment. By way of contrast, in both *Nykomb* and *Saluka* a single company was found to have been the object of markedly inferior treatment from others in a limited homogeneous group. That evidence raised a logical inference of discrimination against the claimants in those cases. But even then, that inference might still have been overcome if the government in question had responded by providing persuasive evidence of another meritorious explanation. Here the evidence presented by Claimants provides no logical basis from which the Tribunal may infer that Respondent's actions, even *prima facie*, constitute discriminatory treatment. Without more, the fact that the Claimant Marion Unglaube's property has been included within the initial group of properties to be expropriated, does not, in the view of the Tribunal, create an inference of discriminatory treatment and certainly does not satisfy the Claimants' required burden of proof.

266. Finally, Claimants suggest that the presence of the Spanish phrase "*trato desigual injustificado*" or in German "*Ungleichbehandlung. . .nichtgerechtfertigte*" in Article 2(3) of the Treaty[188] essentially requires that the Tribunal must make an "objective assessment" of the

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187 *See* Letter from SINAC to the Ministry of Foreign Trade and Report of *Contraloría General de la República* (Exhs. R-32; *also* C-92 at ¶ 2.1.1).

188 Respondent has translated these phrases into the English "discriminatory treatment" – which as indicated above refers to unequal treatment where there is no reasonable basis for such disparate treatment.

situation and of Respondent's actions which Claimants allege were discriminatory.[189] In making this objective assessment, Claimant suggests that the Tribunal should no longer require Claimants to bear the burden of proof. Instead, the Respondent must bear the burden of justifying its actions. According to Claimants, Article 2(3) of the Treaty – when the Spanish and German texts of this provision are properly understood – "only permits the State to apply differential treatment if there is justification. Here there is none."[190]

267. The Tribunal has carefully considered these arguments of Claimants but is not persuaded by them. As indicated above, the Tribunal does not conclude that the alleged acts or decisions of Respondent, either individually or in combination, establish facts indicating a *prima facie* violation of Article 2(3) of the Treaty. So far as the Tribunal can discern, Claimants' argument regarding the proper meaning of the key language of Article 2(3) is not supported by the ordinary meaning of the language of the provision, or by interpretive evidence from the history of negotiation of the Treaty or otherwise. In the absence of such evidence, the Tribunal finds that these words, whether in German or Spanish, have been used repeatedly in German and Spanish language treaties; that they have a well established meaning in international law, and have been correctly translated as equivalent to the phrase "arbitrary or discriminatory treatment" in English. We thus find that the language of Article 2(3) does not remove the burden of proof from the Claimants. The Tribunal finds that Claimants have not borne the burden of proof on either of these allegations. Indeed, even if we were to adopt Claimants' approach and require the Respondent to come forward and justify its actions, the Tribunal encounters ample evidence in the record indicating that there were reasonable grounds both (1) for Respondent's decision not

189 CReply, ¶ 398.

190 *Ibid*.

to include the property of the Leatherback Trust in the first wave of expropriations and (2) for its decision to establish certain priorities among the 100 or so properties involved, rather than beginning expropriation of all of them at once. The Tribunal finds, therefore, that Claimants have not established by evidence in this proceeding that they have suffered arbitrary or discriminatory treatment in violation of Article 2(3) of the Treaty.

(g) Has Respondent in violation of Article 2(1): (1) Failed to provide Claimants with an effective legal remedy against the Government's unlawful conduct and the delays of its courts; (2) Engaged in a Denial of Justice in failing to make available to Claimants the protections of a formal and duly regulated expropriation process; and/or (3) Improperly frustrated the investors' legitimate expectations based on agreements entered into with the State?

268. The Tribunal has to this point dealt, separately, with several categories of Treaty violations alleged by Claimants. Here, the Tribunal finds certain common features among the three remaining sub-headings of Claimants' argument on alleged violations of the fair and equitable treatment standard. For reasons of efficiency and the avoidance of unnecessary repetition, the Tribunal will discuss these categories together.

269. Taking the last item first, the Tribunal has found that, for Claimants to be entitled to rely on "legitimate expectations based on agreements entered into with the State," they must first establish the existence and content of such agreements. They must then establish that they justifiably relied on such agreements in making their investment.[191]

270. As indicated at ¶ 248 *supra*, the Tribunal has determined that Claimants have failed to establish either (a) that Costa Rica had agreed that none of their property was within the Park or (b) that they had received final approval from the State to develop all of Phase II as well

[191] *Duke Energy*, note 145 *supra*, ¶ 235.

as the individual properties owned by them in Phase I. According to Claimants, the Respondent also (1) changed its interpretation of the 1995 National Park Law in an unlawful way, (2) reneged on approved final plans for development of Phase II, and (3) illegally, unreasonably and unpredictably interfered with Claimants' property development rights in Phase I. By these actions, according to Claimants, Respondent violated the Treaty and failed to carry out its obligations to Claimants under international law. However, for reasons previously set forth,[192] the Tribunal does not find that the evidence presented by Claimants established the existence of such commitments, without which Claimants cannot establish justifiable reliance on such agreements in making their investments. As indicated above, the unilateral expectations of a party, even if reasonable in the circumstances, do not in and of themselves satisfy the requirements of international investment law. To satisfy such requirements Claimants must demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group.[193] This they have not done.

271. Regarding the allegations that Respondent failed to provide an adequate legal remedy against the unlawful conduct of the State and the delays of its courts, or that Claimant has been subjected to a denial of justice or denial of protection of a formal and duly regulated expropriation process, the Tribunal also finds that these claims have not been substantiated in this proceeding.

272. In order to establish failure to provide an adequate legal remedy, Claimant must prove more than simply that a particular court or administrative tribunal arrived at the wrong

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192 *See* ¶¶ 168-189, *supra*.

193 NEWCOMBE & PARADELL, note 152 *supra*, at 281-282 (internal citations omitted).

result. They must demonstrate that the laws of Costa Rica, taken as a whole, did not afford them an adequate opportunity, within a reasonable time, to vindicate their legitimate rights. As stated by the tribunal in *ADC Affiliated Limited v. Republic of Hungary*,

> Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.[194]

273. Similarly, the test for denial of justice also looks principally to procedural fairness. In the words of a leading commentator:

> Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state's failure to provide a decent system of justice. They do not constitute international appellate review of national law.[195]

274. The Tribunal finds that the Claimants have not corroborated their allegations regarding the alleged expropriation of the remaining properties either (1) as a result of the absence of adequate and timely avenues of legal recourse to vindicate the rights they claim to possess or (2) due to a denial of justice. Claimants point to the dismissal of Marion Unglaube's July 2008 challenge to Resolution No. 2238 and to the Treasury Court's more recent failure to find for the Claimant in her damages claim against the State. But such negative outcomes, in

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194 *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 [hereafter "*ADC*"], Award (Oct. 2, 2006), ¶ 435.

195 JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 98(2005) [hereafter "PAULSSON"]; *see also id.* at 7 ("[I]nternational fora have no reason to recognize a category of substantive denials of justice. In international law, denial of justice is about due process, nothing else – and that is plenty.").

themselves, do not establish the absence of timely and meaningful legal remedies.[196] Obviously, Mrs. Unglaube has had several important victories along the way, including at least one in the Supreme Court.[197]

275. Indeed, it appears that the real essence of Claimants' position regarding lack of adequate legal recourse and/or denial of justice is that the entire legal system of Costa Rica has amounted to a charade. As stated by counsel, "to dwell on individual cases is to miss the point: the absence of legal redress is a continuing and pervasive state of affairs which characterizes the position."[198]

276. Claimant Marion Unglaube's position is that her Phase II Property has been "frozen" "unlawfully" since 2003; and that the failure of the Costa Rican legal system to remedy that injustice demonstrates that no adequate remedy was available. Furthermore, though the claims related to the property of Reinhard Unglaube arose from different causes, it is apparently his judgment that the experience of Mrs. Unglaube in a variety of legal proceedings from 2003 to 2008 demonstrates the inadequacy of the Costa Rican legal system and confirms that it would be irrational for him to believe that his experience before Costa Rican tribunals would be other than a frustrating and expensive waste of time.[199]

277. The Tribunal does not agree. Mrs. Unglaube succeeded, *inter alia*, in her legal actions to thwart both the 2003 and 2004 efforts to expropriate the 75-Meter Strip. She has not been successful in persuading Costa Rican courts or agency officials regarding the alleged

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196 CReply, ¶ 355.

197 Exh. C-21.

198 CReply, ¶ 355.

199 CReply, ¶¶ 355-358.

unlawfulness of suspending development activity between 2005 and late 2009. But these facts do not establish that, in these specific instances, (1) she, in fact, had a legitimate legal claim or (2) that the failure of the judicial system to find in her favor, amounts to "a decision so egregiously wrong that no honest or competent court could possibly have given it."[200]

278. Again, one may certainly study the actions of the Supreme Court in 2006, on two separate occasions in 2008, and in 2009 and find matters on which reasonable people may differ. In at least one of those cases,[201] this Tribunal was critical of the Court's initial decision – but the Tribunal concluded that the final outcome in October 2009, if not each step in the process leading up to it, was reasonable rather than arbitrary.

279. The Tribunal finds therefore that Claimants have not corroborated their claims of a violation of the fair and equitable treatment standard – either on grounds of (1) lack of an effective remedy or (2) denial of justice. The Tribunal also finds no such violation arising from improper frustration of Claimants' legitimate expectations based on agreements entered into with the State.

4. Has Costa Rica Breached Article 4(1) Of The Treaty By Failing To Provide Full Protection And Security To Claimants And Their Investments?

280. Treaty language concerning "full protection of security" has traditionally been interpreted as referring to government protection of the physical facilities and personnel related to an investment.[202] But, as Claimants have correctly noted, some distinguished Tribunals, such as those in *Biwater Gauff*[203] and *Siemens,*[204] have accepted a somewhat broader understanding of

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200 PAULSSON, note 196 *supra* at 98.

201 *See* ¶ 231 *supra*.

202 *See Saluka v. Czech Republic*, note 144 *supra*, ¶ 483.

203 *Biwater Gauff*, note 148 *supra*.

the government's obligation. The *Biwater* award, for example, makes reference to the award in *Azurix*[205] which adopted the somewhat broader standard. As stated in *Biwater*:

> "730. The Arbitral Tribunal also does not consider that the "*full security*" standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself. This is also implied by the term "*full*". . .[206] (Original emphasis).

Respondent has argued for a more limited scope of this obligation, though acknowledging at least some degree of inter-relationship between the obligations of "fair and equitable treatment" and "full protection and security."[207]

(a) Considerations Of The Tribunal

281. As with any complex legal standard stated in a brief phrase, the words "full protection and security" allow for a broad range of possible meanings. This Tribunal accepts, as urged by Claimants, that "full protection" may, in appropriate circumstances, extend beyond the traditional standard expressed by the *Saluka* tribunal. However, the Tribunal is not persuaded that this standard has been violated by Costa Rica based on the evidence presented in this case.

282. Indeed, the Tribunal finds that Claimants' case regarding violation of this standard consists principally of a repetition of the arguments made regarding alleged violations of the fair and equitable treatment standard, including lack of effective legal remedy,[208] and Claimants' assertion that Respondent has created a climate of intolerable legal uncertainty.[209]

(Footnote continued from previous page.)

204 *Siemens AG v. Argentina*, note 143 *supra*, ¶ 303.

205 *Azurix*, note 146 *supra*.

206 *Biwater Gauff*, note 148 *supra*, ¶¶ 729-30.

207 RCM, ¶¶ 274-279.

208 ¶¶ 269-277 *supra*.

209 CReply, ¶ 383.3

These positions of Claimant have previously been considered but have not been accepted by the Tribunal.[210]

283. In order to prevail on this issue, Claimants must demonstrate a causal connection between an improper action or failure to act of a State entity, or its agent, in violation of a legal obligation owed to Claimants, and to the detriment of Claimants or their investments. Claimants argue, correctly, based on the language of the *Biwater* case, that the damage or destruction alleged to the Claimant's business or assets need not require the physical destruction of the facilities. But the Tribunal finds that the facts in *Biwater* bear little relation to those presented here. In *Biwater*, the government was found to have physically occupied the investor's facilities, usurped the role of management taking over operations of the facility and also to have detained management through use of the police.[211]

284. Here the Tribunal finds that the State actions of which Claimants complain are principally proceedings before and decisions by Costa Rica's courts – especially the Supreme Court – and to a lesser extent decisions of administrative agencies. As previously noted, this Tribunal has already found in Claimants' favor with regard to the 75-Meter Strip, but this ruling was based not on an alleged violation of "full protection and security" but rather on the basis of *de facto* expropriation.

285. With respect to the rest of Claimants' properties, this Tribunal finds that Claimants have not established evidence sufficient to support an alleged failure to provide "full protection and security." The actions of Respondent which, according to Claimants, hindered their ability to develop the remainder of Phase II and their lots in Phase I were of two principal

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210 *See* ¶ 277 and 251 *supra*.

211 *Biwater Gauff*, ¶ 418.

varieties: (1) the proceedings related to the *amparo* petitions brought by two different groups of private environmental activists in 2005 and 2008; and (2) SETENA's actions regarding implementation of the Guidelines which were first established in 1992 and then modified to a modest degree in 2009. Claimants also object to the actions of the *Contraloría* which, *inter alia*, raised questions regarding whether certain properties in the Playa Grande area had been issued proper legal titles.

286. Claimants, understandably, have experienced frustration at the three-year delay occasioned by the 2005 *amparo* petition as well as the subsequent nine-month delay resulting from the 2008 *amparo* petition. However this Tribunal finds that both court proceedings were conducted in accordance with Costa Rican law. The Tribunal finds no evidence that either these court proceedings, or the actions of SETENA, involved impropriety, corruption or discrimination against the Claimants. Thus, the Tribunal concludes that Claimants have not demonstrated an improper failure of the Respondent to provide full protection or security to the Claimants.

287. Instead, the Tribunal finds that Claimants' general indictment regarding the alleged failure to provide full protection and security (as well as the allegations regarding legal uncertainty) is grounded principally on Claimants' insistence that their interpretation of the 1992 Agreement and, *inter alia* the 1995 National Park Law is the correct one. If Claimants had succeeded in establishing by appropriate evidence that they possessed certain specific development rights regarding the remainder of Phase II or their Phase I properties and that, as a result, the Respondent had assumed corresponding legal obligations, then failure of Respondent to accord protection to those rights might have constituted a valid claim based on failure to provide full protection and security under Article 4(1) of the Treaty. But, as indicated

previously, this Tribunal finds that the alleged rights and obligations regarding Claimants' remaining properties have not been proven in this proceeding.

288. To be sure, the Tribunal wishes to make clear that it does not accept Respondent's argument that the delay and frustration, of which Claimants complain, was caused in its entirety by Claimants' own strenuous and repeated recourse to administrative and judicial challenges. But neither does it find persuasive evidence that Respondent has failed to provide Claimants or their investments with full protection and security.

VIII. Respondent's Objections As To Admissibility

289. Following the First Session in Mrs. Unglaube's case conducted on August 1, 2008, Respondent urged that Claimant's Request for Arbitration be dismissed.[212] According to Respondent, Mrs. Unglaube's claim for expropriation of her Phase II Property within the Park was moot – since the Costa Rican legal system had already recognized the government's obligation to compensate Mrs. Unglaube for both the value of her property and for any damages incurred associated with delay in the expropriation of her property. Respondent further urged that even if this Tribunal were to find that her property has been subjected to *de facto* expropriation since 2003, it should decline to assign liability to Costa Rica on the ground that Respondent has already recognized her right to compensation both for the value of the property itself and for damages resulting from delay.[213]

290. In addition, according to Respondents, any claim regarding the adequacy of payment for the Phase II property within the Park is premature since the courts have not yet had

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212 These objections were first raised in Respondent's submissions dated Jan. 23, 2009 and Apr. 6, 2009 and were updated as of Aug. 16, 2010. *See* RRejoinder, ¶ 239.

213 RCM, ¶ 285.

an opportunity to determine the final amounts due – and therefore neither the Claimants nor the Tribunal can assess the adequacy of payment until it is awarded.[214]

291. Finally, Respondent has urged that claims regarding a freeze on development for Claimants' properties outside the Park are also premature because SETENA has not yet had the opportunity to grant or deny the permits. Claims of unfair and inequitable or arbitrary treatment are similarly premature because SETENA has not yet been presented with, nor been able to decide upon, Claimants' proposals to see whether they satisfy applicable legal and environmental standards.

292. The Tribunal did not accept or reject these arguments of Respondent at the First Session but instead decided to join these issues to the merits. It is therefore appropriate to rule on these arguments concerning admissibility at this time.

293. As Respondent has correctly noted, objections on the ground of admissibility are different in nature from objections to jurisdiction. Respondent has not maintained that the Tribunal may not properly rule on these matters, but that, it should not – both as a matter of prudence and in consideration of the ongoing deliberations of courts and administrative bodies in Costa Rica, which should be permitted to complete their functions without interference or interruption.

294. The Tribunal's decision to join these questions of admissibility to the merits was based in large measure on the inability of the Tribunal at the moment these objections were raised to master the complex history of the dispute or to discern whether separate and distinct rules and regulations might apply to one or more of Claimants' properties.

[214] RCM, ¶ 286.

295. Having now immersed itself in the complexities of the case, however, the Tribunal has determined that different aspects of the case must be treated differently. With respect to the Phase II Property within the Park, the Tribunal has ruled that Respondent's plea that the Tribunal decline to consider the question of expropriation and compensation should not be accepted. As indicated in Section VII.C.2.a. above, the Tribunal finds that Respondent has, long since, been in violation of the Treaty; that, not less than 8 years after this land was publicly targeted for expropriation, and despite the proffer of a provisional sum to Mrs. Unglaube, the courts and government of Costa Rica still have not determined what amount is due to Mrs. Unglaube and she has received nothing.[215] In these circumstances, the Tribunal considers that it would be inappropriate now to defer to Respondent's courts to determine the amounts due. The Tribunal will proceed, therefore, to determine the full amount due to Mrs. Unglaube together with interest payable on that sum, as appropriate. In doing so, it is the Tribunal's express intent that the determined amounts constitute full compensation to Mrs. Unglaube for the expropriation of the 75-Meter Strip of Phase II within the Park, and that payment of such compensation shall replace and be made in lieu of any and all amounts heretofore or hereafter determined to be due to Mrs. Unglaube as payment for expropriation of the said 75-Meter Strip.

296. However, with regard to the remaining properties of Claimants, consisting of the remainder of the Phase II Property (outside the Park) and the interests of Mr. and/or Mrs. Unglaube in the lots owned by either or both of them in Phase I, the Tribunal has determined, based on its careful review of the evidence, that these claims of alleged expropriation of such properties are premature. As indicated above at ¶ 232, the Tribunal finds that Claimants are free,

[215] The Tribunal has earlier acknowledged the deposit by Respondent of a provisional amount which is available to Mrs. Unglaube, but which she has, thus far, not agreed to accept.

within the parameters of the revised 2009 Guidelines, to submit development proposals and corresponding environmental assessments. Assuming that these do not include proposals for development on property within the Park – the Tribunal is persuaded that, under Costa Rican law, these petitions can be and should be processed promptly and in good faith. Accordingly, Claimants should, therefore, be able to optimize the beneficial use of such properties while still respecting the need for appropriate limitations on development of this environmentally-significant terrain.

297. This ruling signifies the Tribunal's conclusion that no expropriation of the property of either or both Claimants outside of the Park has taken place.

IX. Compensation

298. Having determined that compensation is due to the Claimant Marion Unglaube, for the *de facto* expropriation of the 75-Meter Strip of her Phase II property within the Park, the Tribunal is required to determine the applicable principles for assessing compensation and the amount payable when these principles are applied to the facts of the case.

A. Position Of Claimants

299. Claimants' approach to compensation begins with reference to the *Chorzów Factory* standard that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[216] Claimants urge, based on the report and testimony of their expert, Mr. Thomas Kabat, that the correct principle for valuation of the entire Phase II Property is an income capitalization approach based on the Property's highest and best use. Here, Mr. Kabat

[216] *The Factory at Chorzów* (*Germany v. Poland*), (Claim for Indemnity) (The Merits), Judgment of 13 September 1928, PCIJ, Ser. A., No. 17, 1928, p. 47; CM, ¶ 356.

posits that the highest and best use of the Phase II Property would be development of 32 single-family residential lots (five beachfront lots and 27 interior lots). Using references to the sales and listings of lots comparable to those of Phase II, he arrives at a total value of the Phase II Property at US$ 8,800,000. Of this amount, he allocates US$ 5,190,000 to the 75-Meter Strip and US$ 3,690,000 for the remainder of Phase II.[217] These values are based on a valuation date of July 1, 2006, the period during which the highest valuation levels were found.

B. Position Of Respondent

300. Respondent maintains that it has not breached the Treaty and that, therefore, no compensation should be paid. According to Respondent, the 75-Meter Strip has been expropriated lawfully, and Respondent is in the process of paying Mrs. Unglaube for that Property – having already deposited some three-quarters of a million dollars – which is available to her – as a provisional payment. Respondent also acknowledges that Mrs. Unglaube is entitled to whatever damages she can prove resulting from delay. Respondent further maintains that the process of determining the proper value of the 75-Meter Strip is ongoing, but that if this Tribunal should, nevertheless, find a breach of the Treaty by Respondent, any compensation required in this proceeding should be offset by payments made in the domestic proceeding.[218]

301. As to the proper measure of compensation, Respondent emphasizes the language of Article 4(2) of the Treaty which provides, in part:

> "Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has been publicly known. . . The compensation shall be paid without delay and shall carry average bank interest on deposits until the time of payment."

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217 CReply, ¶ 437-8; Expert Report of Thomas Kabat, p. 54.

218 RCM, ¶ 290.

302. On the assumption that the Phase II Property was expropriated *de facto* beginning in November 2003, Respondent's Expert, Brent Kaczmarek, values the properties as of late 2003 or early 2004, or, alternatively, as of the date on which the valuation report was submitted (2010).[219]

303. On this basis, Mr. Kaczmarek urges the Tribunal to make use of the Claimants' "own plans" for development of the whole of the Phase II Property – namely the 1992 Plan for 6 residential and 2 commercial lots. Instead of the "highest and best use" approach proposed by Claimants, Respondent would emphasize Claimants' own valuations made for previous court proceedings and earlier attempts to sell the property. On this basis, Mr. Kaczmarek appraises the proper value of the 75-Meter Strip at US$ 300,000 plus interest of US$ 63,118 for a total of US$ 363,118 (based on the 1992 plan) and US$ 1,321,562 (based on the 1998 plan).

C. Considerations Of The Tribunal

304. Before proceeding to resolve the amount of compensation payable, several threshold issues merit discussion. As indicated in ¶ 203, *supra* there can be no question concerning the right of the government of Costa Rica, pursuant to Article 4(2) of the Treaty, to expropriate the 75-Meter Strip for a bona fide public purpose.[220] That same Article, however, also establishes, as a necessary condition to the exercise of that right, that the government shall have made provision for the prompt determination and payment of the compensation due. Regarding the measure of compensation, Article 4(2) of the Treaty reads as follows:

> ". . . such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual

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219 Kaczmarek Report, ¶ 168 (with interest calculation corrected in Second Kaczmarek Report, ¶ 136).

220 *See* excerpted text of Article 4(2) at ¶ 204, *supra*.

> or threatened expropriation, nationalization or similar measure has become publicly known."

This language of Article 4(2) comes very close to restating what are already widely regarded as the requirements of customary international law.[221] Is the language of Article 4(2) applicable in determining quantum – or should the Tribunal be guided by customary international law? Does the choice of one measure of value over the other make any practical difference – and, if so, how?

305. In the present case, the conduct of the State did not conform to the terms of Article 4(2). Specifically, the violation of the Treaty that rendered Respondent's action internationally unlawful (both under the Treaty and under customary international law), was that adequate compensation, meeting the standards of Article 4(2), was not, in fact, paid to Mrs. Unglaube within a reasonable period of time after the State declared its intention to expropriate.[222] In these circumstances, the Tribunal cannot accept the arguments of Respondent, for purposes of determining the amount of compensation due, that the provisions of Article 4(2) alone must govern. Claimant argues, with some justice that:

> "Article 4(2) appears to set out the requirements that a Contracting Party must meet in order to effect a lawful taking of property; it does not set out the principles to be applied by an international tribunal in assessing damages for an illegal expropriation."[223]

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221 *See* SERGEY RIPINSKY, DAMAGES IN INTERNATIONAL LAW 88 (2008), § 4.1.3(d).

222 Prompt and adequate compensation is also, of course, a requirement of customary international law. In addition, Article 4(2) required that: "Provision shall have been made in an appropriate manner for the determination and payment of such compensation." Clearly this was not done in the present case.

223 CReply ¶ 422.

Persuasive as this argument is, however, it offers little concrete help to the Tribunal in a case like the present one, where what makes the expropriation illegal is the failure in the duty to pay compensation.

306. Were we to accept completely the approach urged by the Claimant, the Tribunal might look solely to the compensation standard under customary international law as defined by the International Court of Justice in the *Chorzów Factory* case and by subsequent international practice.[224] There is precedent supporting use of a broader customary international law standard where an expropriation is found to be wrongful,[225] though, as noted in the *Funnekotter* Award,[226] international legal opinion and case law are "not perfectly clear" in this respect. This Tribunal is neither empowered nor required to permanently resolve the differing views on this subject, though we concur with the Claimant's position that the measure of compensation set out in Article 4(2) is binding only with respect to a lawful taking of property.

307. Fortunately, however, as pointed out by a leading commentator, this is not a matter of great consequence regarding the case before us. Under both the *Chorzów Factory* approach and the reference to "value of the expropriated investment. . ." contained in the language of Article 4(2), the Tribunal finds that the applicable standard is fair market value. It is not surprising, therefore, that, generally, where an unlawful expropriation is found to have occurred, treaty-based compensation will often provide the same result as compensation based

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224 See also the International Law Commission's 2001 Draft Articles on State Responsibility, especially Articles 34-39.

225 ADC Award, ¶¶ 479-500 and especially ¶¶ 485 and 495; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12, Annulment Proceeding, Sept. 1, 2009 at ¶ 324; *Siemens A.G. v. Argentine Republic* Case No. ARB/02/08. Award Feb. 6, 2007 at ¶ 349.

226 Where the Tribunal was chaired by a former President of the International Court of Justice; at ¶ 110.

on customary international law. Under either approach, for example, where property has been wrongfully expropriated, the aggrieved party may recover (1) the higher value that an investment may have acquired up to the date of the award and (2) incidental expenses. Illegality of expropriation may also influence other discretionary choices made by arbitrators in the assessment of compensation.[227]

308. A number of the awards dealing with these issues including the ADC award[228] and other awards including *S.D. Myers,*[229] *Metalclad,*[230] and *Petrobart*[231] that refer extensively to the *Chorzów Factory* standard, do so in the context of profit-generating enterprises which had been expropriated by the respondent state. The aim of the tribunal in each of those cases was to find the way that would be appropriate in the specific circumstances to place the injured party in the same position, so far as possible, as if the illegal act had not occurred. Here the affected property is not "a going business concern," but, instead a plot of ocean-front beach property. The way in which this Tribunal seeks to accomplish the equivalent purpose in the circumstances of this case is discussed in paragraphs 309-326 below.

309. The central task presented in the assessment of the compensation due is the determination of the fair market value of the 75-Meter Strip as at an appropriate point in time. This is an objective on which the Parties do not differ – though the conclusions they reach vary widely. If, as Claimants' expert has suggested, it is appropriate, in determining fair market

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227 RIPINSKY, op. cit. at 88.

228 *ADC*, ¶ 253.

229 *S.D. Myers*, note 151 *supra*, ¶ 311.

230 *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 122.

231 *Petrobart Limited v. The Kyrgyz Republic*, SCC Case 126/2003, Award (Mar. 29, 2005), pp. 77-78.

value, to identify the *highest and best use* of this particular property, it seems plain to the Tribunal that that can only be the *highest and best use* subject to all pertinent legal, physical, and economic constraints.[232] In this case, it obviously should refer not to high density usage – appropriate to a large city or factory area – but rather to a usage appropriate to the environmentally-sensitive surroundings – including residential home construction, with a density comparable to that permitted by the guidelines set forth in the 1992 Agreement.[233]

310. Those guidelines (including the more recent variation adopted by the Supreme Court Constitutional Chamber in October 2009) provide *inter alia*, the following parameters for development of Phase I and II:

(a) a maximum density of 20 persons per hectare;

(b) a maximum building height of two floors; and

(c) a minimum setback from the street of 7 meters.[234]

311. These parameters are fully consistent with the conclusion of Claimants' Expert, Mr. Kabat, that the valuation of the 75-Meter Strip should be based on dividing it into five single family residential beachfront lots with frontage of approximately 20 meters each plus a portion of two interior lots.[235] Claimants' Expert explicitly recognizes the right of the government to impose such reasonable constraints, as well as to expropriate the property, provided however,

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232 Expert Reply Report of Thomas Kabat, p.4 (Appended to CReply).

233 *See* ¶ 49, *supra.*

234 C-15, p. C-185.

235 In approving this aspect of Mr. Kabat's determination regarding the reasonable use of the 75-Meter Strip, the Tribunal is not endorsing Mr. Kabat's suggestion that the highest and best use of Phase II should involve the construction of 32 separate residences.

that such restrictions and the expropriation process must be consistent with Respondent's obligations under the Treaty.[236]

312. Regarding the value of the 75-Meter Strip, it is not disputed that the area near Playa Grande is one of the few remaining areas in Costa Rica where it was and is still possible to obtain fee simple title to beachfront property. The beach's natural characteristics, together with its proximity to Liberia Airport (which regularly receives international flights), suggest a substantial value for the property.

313. The Parties are in agreement that real estate values in the region rose sharply until mid-2006, but then stabilized and declined substantially thereafter. The Kabat Report suggests that the property has been affected by governmental actions beginning, at least, with the July 22, 2003 Decree of MINAE publicly announcing the Ministry's specific intent to expropriate,[237] and continuing until the date of the Award (which he presumed to be December 31, 2010). But for these actions of Respondent, Mr. Kabat maintains, Marion Unglaube would have been free to sell the property in the most favorable market conditions, i.e., at the time of peak demand in July 2006. Using this approach, Mr. Kabat's valuation of the Strip, using both sales of comparable properties and an income capitalization approach, is US$ 5,190,000.

314. Respondent, with the support of the reports and testimony of Mr. Kaczmarek, has argued that the use of such a date would ignore the fact that Claimants had earlier (in 2003 and 2004) tried and failed to sell all of Phase II for US$ 1,000,000 and US$ 1,100,000 respectively. It also, Respondent suggests, would allow Mrs. Unglaube to benefit from a presumption of

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236 Kabat Report, p. 15, note 20.

237 *See* MINAE Decree R-274-2004 (Exh. C-16).

"perfect market-timing." As a result, Mr. Kaczmarek has valued the 75-Meter Strip at US$ 363,118 (based on the 1992 plan) or US$ 1,321,562 (based on the 1988 plan).[238]

315. Due to the lengthy and complicated evolution of this dispute, the Tribunal considers that the determination of a "date of expropriation" (and its use as "the date of valuation" of the 75-Meter Strip) presents a complicated and unsatisfactory set of choices. For example, if the Tribunal were to assume that the 75-Meter Strip was expropriated in 2003 ("First Attempted Expropriation"), the logical conclusion would be to value the property as of (or immediately prior to) the date of Resolution No. 375 (issued on July 22, 2003), and to then add appropriate interest from that date to the date of the Award. This is the date which, superficially at least, would seem to resemble the circumstances set forth in § 4(2), namely:

> ". . .immediately before the date on which the actual or threatened expropriation, nationalization or similar measure has become publicly known."

But Resolution No. 375 was successfully challenged by Mrs. Unglaube. It was then promptly revoked by MINAE after MINAE determined that only the 75-Meter Strip (rather than all of Phase II) was "within the Park". Thus, the Tribunal finds that Resolution No. 375 was a legal nullity. Later, on November 8, 2004, MINAE issued Resolution No. 421 ("Second Attempted Expropriation") – which was again withdrawn, due, at least in part, to another successful legal challenge by the Claimants. In this instance, the Costa Rican Attorney General found the process to be irredeemably flawed by procedural errors. In both of these challenges, Mrs. Unglaube was, obviously, exercising her right, under Costa Rican law and also anchored in the

[238] Kaczmarek Report, p. 60. Both figures assume a valuation date of 2003/4 and include interest on the basis of Article 4(2) of the Treaty. Interest was corrected in the Second Kaczmarek Report at ¶ 136 to reflect the figures indicated above.

Treaty, to challenge the expropriation of her property. Again, by the action of Respondent's own Attorney General, the process initiated by Resolution No. 421, was voided in its entirety.

316. As recounted previously, the winding trail of further proceedings, measures and partial steps toward expropriation which followed, is rather complicated. Along the way we have encountered, *inter alia*, the first *amparo* petition to the Supreme Court in 2005; the resulting order from the Court to cease processing environmental permits in the area (which remained in effect until April 2008); the December 23, 2005 Opinion of the Attorney General of Costa Rica (interpreting the National Park Law to include the 75-meter zone); and the subsequent Decisions of the Supreme Court essentially ratifying the interpretation of the Attorney General – ordering the State to expropriate the 75-Meter Strip promptly (and ordering the State to compensate Mrs. Unglaube for the delay). The fact remains, however, that as of the date of this Award, the 75-Meter Strip still has not been formally expropriated and compensation has not been paid as required by both Costa Rican law the Treaty. As a result, the Tribunal sees no rational basis for selecting any one of the dates referred to above as the "date of expropriation."[239] Similarly, even if the Tribunal, in determining compensation, were constrained by the literal language of Article 4(2), which we are not, the Tribunal considers that none of the above dates, in the Tribunal's judgment, may properly be described as ". . .the date on which the actual or threatened expropriation, nationalization or similar measure has become publicly known." Instead, the Tribunal considers that Mrs. Unglaube's ownership rights in the 75-Meter Strip have been seriously interfered with since at least 2003. Had Mrs. Unglaube's property not

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[239] *See*,REISMAN, W. MICHAEL AND SLOANE, ROBERT D., "Indirect Expropriation and its Valuation in the BIT Generation" (2004). Yale Law School Legal Scholarship Repository, *Faculty Scholarship Series*. Paper 1002 at pp. 130-133, http://digitalcommons.law.yale.edu/fss_papers/1002.

been burdened by the effects of the various ineffectual efforts to expropriate the 75-Meter Strip, she would have remained free to deal with or dispose of her property at whatever date she wished between July 2003 and the present date – including the peak period in July 2006 when prices were rising sharply and buyers were plentiful.

317. Accordingly, the Tribunal agrees to a significant degree with Mr. Kabat's analysis of the situation, but we cannot accept Mr. Kabat's conclusion, assessing at US$ 5,190,000 the loss of value in the Phase II property through the excision of the 75-Meter Strip. Were we to do so, we would also implicitly be accepting all of the assumptions and adjustments utilized by Mr. Kabat to reach that figure. The outcome would, in effect, as Mr. Kaczmarek has noted, credit Mrs. Unglaube with perfect judgment regarding a highly changeable real estate market as well as perfect market timing. It would also, as we have noted above, neglect, on the one hand, Costa Rica's entitlement in principle under the BIT to expropriate the 75-Meter Strip, and on the other, the manifest failure by Costa Rica to fulfil the condition to which that entitlement was subject.

318. The Tribunal believes that it is more reasonable, instead, to assume a sale of the property on January 1, 2006 – six-months before the market peak, and at a figure which gives some consideration to the normal fears and negative contingencies which are present in the minds of sellers and buyers making important investment decisions. On this basis, the Tribunal concludes that it is fair and reasonable to value the loss as of January 1, 2006 at US$ 3.1 million.[240]

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[240] The January 1, 2006 date falls within the mid-range of dates of the remaining events which contributed to the *de facto* expropriation of the Property. Coincidentally it falls close to the date of the Attorney General's opinion of 12/23/2005 validating Respondent's interpretation of the National Park Law, especially if we account for possible lags in publication, public holidays, etc. For this reason as well, the date constitutes a reasonable choice on which to determine fair market value under customary international law and is within the Tribunal's discretion.

319. In order to fully repair the injury to the Claimant, Marion Unglaube, for the harm which occurred to her investment, the Tribunal is also required to determine the interest owed on those damages from the assumed date of sale to the present. Given that the Tribunal's determination reflects the estimated values as of January 1, 2006, the appropriate interest rate is that which could readily have been earned on the proceeds if they had been invested favourably. Given the volatile recent nature of real estate prices in Costa Rica, and the fact that the Tribunal did not receive evidence concerning the prior earnings track record of the Unglaubes as real estate investors, the Tribunal considers that an appropriate interest rate should be a conservative one, *i.e.*, one which essentially conserves the value of the valuation decided upon by the Tribunal and which therefore assumes a medium-term investment involving low risk.

320. As explained previously, the Tribunal is not bound by the language of Article 4(2) for the calculation of compensation. However, as a point of reference, the interest rate contemplated under the Treaty is simply the "rate of average bank interest on deposits," without further definition.[241] Customary international law, as reflected in the ILC Articles, broadly indicates that the interest rate should be set to achieve the result of full reparation.[242]

321. One well-recognized approach to determining the applicable interest rate was established by the Iran-US Claims Tribunal in *Sylvania Technical Systems v. Iran*[243] where it focused on developing a rate "based approximately on the amount that the successful claimant would have been in the position to have earned if it had been paid in time and thus had the funds

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241 Treaty Art. 4(2). Additionally, the German Model BIT refers in the same section to the "usual bank interest rate." *See generally* SERGEY RIPINSKY, DAMAGES IN INTERNATIONAL LAW 366-73 (2008) (summarizing various considerations in deciding the interest rate to apply).

242 ILC Articles on Responsibility of States for Internationally Wrongful Acts, Art. 38(1).

243 *Sylvania Technical Systems v. Iran*, Award (Jun. 27, 1985), 8 Iran-US CTR 298.

available to invest in a form of commercial investment in common use in its own country."[244] Such an approach was also adopted in *Santa Elena*.[245]

322. The *Sylvania Technical Systems* tribunal ultimately decided to use the rate from six-month United States certificates of deposit. Similarly, in other cases such as *LG&E*[246] and *CMS v. Argentina*,[247] the interest rate used was that applicable to short-term United States Treasury Bills. Both instruments have been chosen by tribunals because they reflect conservative rates for essentially risk-free investments.[248] It is also worth noting that such rates have been used in cases, like *British Gas v. Argentina*[249] and *Siemens v. Argentina*,[250] which did not involve the U.S. government or U.S. companies.

323. Although some tribunals apply an interest rate based on the requirements of the host State's domestic law, this is not the prevailing practice under international law. Additionally, commentators maintain that, "[t]he host-country-law approach has been criticized on the basis that where State's international responsibility is engaged, the award of interest should follow the rules of international law" rather than domestic law.[251] Furthermore, in looking back to the investment alternatives approach from *Sylvania Technical Systems*, it is rational to

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244 *Id*. at 321.

245 *Santa Elena*, ¶ 104. However, no specific interest rate was not provided by that tribunal.

246 *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award (Jul. 25, 2007), ¶ 102.

247 *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 471.

248 SERGEY RIPINSKY, DAMAGES IN INTERNATIONAL LAW 369, n.42 (2008).

249 *BG Group Plc. v. Argentina*, UNCITRAL Arbitration Rules, Final Award (Dec. 24, 2007), ¶ 455.

250 *Siemens v. Argentina*, note 143 *supra*, ¶ 396.

251 SERGEY RIPINSKY, DAMAGES IN INTERNATIONAL LAW 371 (2008) (citing I Marboe, *Compensation and Damages in International Law: The Limits of "Fair Market Value"* (2006) 7 JOURNAL OF WORLD INVESTMENT AND TRADE 754-55).

conclude that an appropriate interest rate may be based on the "deposit rate… commonly used in the country of the currency in which payment is to be made."[252] Interest rates from such instruments reflect the risk-free investments that investors were impeded from making with their property as a result of the expropriation.[253]

324. For this purpose, we believe that the appropriate financial instrument is the 5-year Treasury Bill of the United States.[254] The interest on those instruments is calculated from January 1, 2006 to the present making use of the average interest rate on that date calculated by the Federal Reserve Bank of St. Louis, capitalized every six months.

325. The Tribunal has therefore applied to the base figure interest (para. 318) at the 5-year U.S. Treasury Bill rate, compounded semi-annually to the date of the award. The resulting total amount of interest payable by Respondent is US$ 965,900.33.

326. The same interest rate and related calculations shall apply from the date of the Award forward. This capitalization may perhaps offset any additional debt incurred by the Claimants which arose in connection with their involvement in this proceeding, and may constitute an incentive for prompt payment.

D. Allocation Of Costs And Expenses

327. In accordance with Article 61 of the Convention and ICSID Arbitration Rule 47, the Tribunal, in its award, must determine the expenses that the Parties have incurred in the

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252 SERGEY RIPINSKY, DAMAGES IN INTERNATIONAL LAW 373 (2008) (quoting J Gotanda, *Awarding Interest in International Arbitration* (1996) 90 AJIL 59).

253 SERGEY RIPINSKY, DAMAGES IN INTERNATIONAL LAW 373 (2008).

254 U.S. Federal Reserve, Selected Interest Rates (Daily) – H.15, Treasury Constant Maturities, 5 Year, available at http://www.federalreserve.gov/releases/h15/data.htm.

proceedings, decide the form of payment and the manner of distributing such payment, as well as the fees and expenses of the members of the Tribunal and the costs for use of the Centre.[255]

328. There is ample precedent in international tribunals for directing that the prevailing party should have its costs and expenses (including legal and expert fees) as well as its share of the cost of the proceeding, on those issues on which it has prevailed, paid by the opposing party.[256] In contrast, tribunals have also often determined that each party should pay its own expenses and that the fees and expenses of the members of the tribunal, as well as the costs for use of the Centre, should be divided evenly.[257]

329. In the present case, both Claimants and Respondent have requested that the other party pay its costs and expenses. Claimants have recorded costs and expenses in two alternate versions, but for present purposes the more easily calculated version comes to € 1,735,239.42 plus US$ 1,165,749.30. Respondents have claimed US$ 1,647,969.08. The total cost for fees and expenses of the arbitrators and the services of the Centre amounts to US$ 876,815.94.

330. In the present case, Claimants have prevailed on one claim out of many. Counsel for each party has zealously represented their clients, and they have, on the whole, cooperated with the Tribunal in expediting the process. The Tribunal does not find in the record other

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255 While the Arbitration Rules (Art. 44) suggest that these determinations are left to the discretion of the Tribunal, this discretion should be exercised in a justified manner.

256 *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009); *see also Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 183, available at http://www.state.gov/documents/organization/34643.pdf ("There is no rule in international arbitration that costs follow the event. Equally, however, the Tribunal does not accept that there is any practice in investment arbitration (as there may be, at least *de facto*, in the International Court and in interstate arbitration) that each party should pay its own costs. In the end the question of costs is a matter within the discretion of the Tribunal, having regard both to the outcome of the proceedings and to other relevant factors.").

257 *See Methanex Corp. v. United States of America*, Ad hoc – UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005); *International Thunderbird Gaming Corp. v. United Mexican States*, Ad hoc – UNICITRAL Arbitration Rules, Award (Jan. 26, 2006).

important facts or equities which would serve to influence our decision on costs and expenses strongly in favor of one side or the other.

331. The Tribunal therefore determines that each party shall bear its own costs and expenses – legal and otherwise, and that the Claimants and Respondent similarly shall share equally the fees and expenses of the members of the Tribunal as well as the costs for the use of the Centre in the amount of $ 876,815.94.

X. DECISION

332. Having carefully considered all of the evidence and arguments presented by the Parties, both in their written pleadings or other correspondence and in oral submissions, the Arbitral Tribunal, unanimously for the foregoing reasons:

1. Declares that Respondent, in breach of Article 4(2) of the Treaty, has taken the 75-Meter Strip (Phase II Property within the Park) of the Claimant Marion Unglaube by measures tantamount to expropriation;

2. Requires Respondent, as compensation for the said property, to pay to the Claimant, Marion Unglaube the sum of US$ 3,1 million plus interest to the date of the award in the amount of US$ 965,900.33 for a total amount payable of US$ 4,065,900.33, said amount to be paid to the account of the Claimant, Marion Unglaube, as chosen by her.

3. Declares that this compensation shall be in full satisfaction of all compensation due to the Claimant for the expropriation of the 75-Meter Strip and shall be accompanied by the transfer of the unencumbered ownership of the 75-Meter Strip to the Respondent or to its nominee.

4. Requires that each Party shall bear its own costs and counsel fees and that each shall bear half of the expenses common to both parties of the present case including the fees of the arbitrators and the costs of the Centre.

Dismisses all other claims of the Parties.

Done in English and Spanish, both versions being equally authoritative.

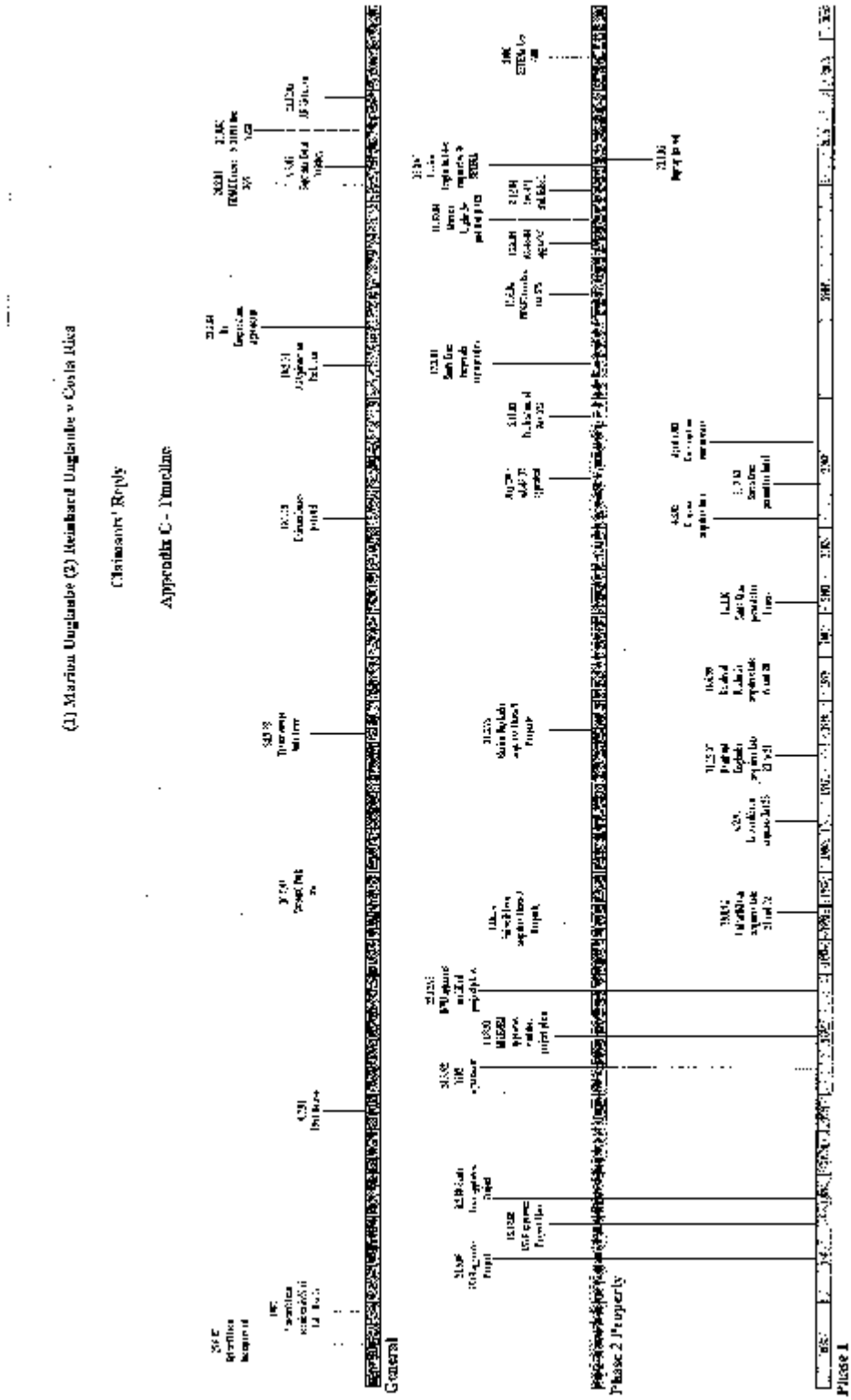
Judd Kessler
President of the Tribunal

Sir Franklin Berman, Q.C.
Arbitrator

Bernardo Cremades
Arbitrator

Date:
Washington, D.C.

APPENDIX 1


APPENDIX 1
(1) Marlon Uuglambe (2) Heimhard Uuglambe v Costa Rica
Claimants' Reply
Appendix C - Timeline
General
Phase 2 Property
Phase 1