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

QUADRANT PACIFIC GROWTH FUND L.P. AND CANASCO HOLDINGS INC.
(Claimant)

v.

REPUBLIC OF COSTA RICA
(Respondent)

ICSID Case No. ARB (AF)/08/1

ORDER OF THE TRIBUNAL TAKING NOTE OF THE DISCONTINUANCE OF THE PROCEEDING AND ALLOCATION OF COSTS

Members of the Tribunal
Professor Alejandro Garro, President
Professor Andreas Lowenfeld, Arbitrator
Dr. Bernardo Cremades, Arbitrator

Secretary of the Tribunal
Dr. Sergio Puig

Washington, D.C., October 27, 2010

I. THE PARTIES AND THEIR REPRESENTATIVES

1. Claimants are Quadrant Pacific Growth Fund L.P. ("Quadrant Pacific") and Canasco Holdings, Inc. ("Canasco") (hereinafter identified as the "Claimants"), Canadian companies whose main place of business is in the province of British Columbia, Canada. Canasco is the general partner of Quadrant Pacific, which controlled investments in five orange plantations in the Canton of "Los Chiles", located on the northern border of Costa Rica. The five plantations were owned and operated by "Aprel S.A." ("Aprel") and are collectively known as "the Aprel lands."[1]

2. The Claimants were represented by Mr. Allen McCullock, Claimants' president and Mr. Barry Appleton, Esq., from the law firm Appleton & Associates International Lawyers, 77 Bloor Street West, Suite 1800, Toronto, ON M5S11M2, Canada.

3. The Respondent Government of the Republic of Costa Rica ("Costa Rica") is represented by Mr. Marco Vinicio Ruiz, Minister of Foreign Trade, Mr. Esteban Aguero Guier, Director of International Commercial Negotiations, Ministerio de Comercio Exterior, Costa Rica and by Mr. Stanimir A. Alexandrov, Ms. Jennifer Haworth McCandless, and Ms. Marinn Carlson, Esq. from the law firm Sidley Austin LLP, 1501 K St., N.W., Washington, D.C. 20005.

4. On November 6, 2009, the same day on which the Secretariat asked the parties for an advance payment to meet the costs of the proceedings during the next three to six months, including the hearing on the merits, and only one week before the hearing was scheduled to begin, the law firm Appleton & Associates informed the Tribunal that they were withdrawing as counsel for the Claimants in this arbitration. Since then, Claimants have been represented in this proceeding exclusively by Mr. Allen McCullock.

II. THE CLAIMS BROUGHT BEFORE THIS TRIBUNAL

5. Claimants allege that Respondent failed to take reasonable steps to address the continuing illegal trespass on Claimants' citrus farm holdings located in Costa Rica. They allege that Costa Rica's failure to enforce its own laws for the protection of private property caused damages to their farm landholdings in violation of the Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments concluded on March, 18, 1998 (hereinafter "the Canada-CR BIT," "FIPA", or simply the "Treaty").

[1] Claimants' Memorial of March 16, 2009 ("Claimants' Memorial"), Para. 2 ("…*Aprel owned four of the five plantations directly, and indirectly owned the fifth plantation through a wholly-owned subsidiary company*.").

6. More specifically, Claimants' alleged breach of the Canada-CR BIT rests on Costa Rica's failure to provide "fair and equitable treatment" (Treaty, Art. II(2)(a)) and "full protection and security" (Treaty, Art. II(2)(b)) to the Claimants and their investments.[2] Claimants also allege that Costa Rica failed to provide these Canadian investors with treatment equivalent to that provided to investments by Costa Rican investors or equivalent to the best treatment provided to investors of a third state (Treaty, Art. IV(b)).[3]

7. Respondent's position is that the Government of the Republic of Costa Rica, including its security forces, administrative agencies, prosecutors, courts, and other enforcement mechanisms, reacted reasonably under the circumstances and within the limited resources available in the rural territory along Costa Rica's northern border.[4] Respondent also argues that Claimants were well aware, at the time they decided to invest in Costa Rica, how the nation's legal system operates within the constraints of due process. It is also Respondent´s position that Claimants' own actions and inactions are responsible for the damages suffered on their property.[5]

III. PROCEDURAL STEPS LEADING TO AN EVIDENTIARY HEARING

A. Initial steps taken by Claimants to seize ICSID of this dispute

8. On December 28, 2006, Mr. Alan McCulloch, president of "Aprel S.A.," filed a "*Notice of Intent to Submit a Claim for Damages Under the Arbitration Rules of the Agreement Between the Government of Canada and the Government of Costa Rica For the Promotion and Protection of Investments*" ("Notice of Intent"). The Notice of Intent was filed pursuant to Article XII(1) of the Canada-CR BIT, requiring Claimants to give notice to the government responsible for the measures

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[2] Canadian-CR BIT, Art. II(2) reads thus: "*Promotion and Protection of Investments. …(2) Each Contracting Party shall accord investments of the other Contracting Party: (a) fair and equitable treatment in accordance with the principles of international law; and (b) full protection and security.*"

[3] Canadian-CR BIT, Art. IV ("Treatment of Established Investment. *With respect to investments and the enjoyment, use, management, conduct, operation, expansion, and sale or other disposition thereof, each Contracting Party shall accord treatment no less favorable than that which, in like circumstances, it grants in respect of: (a) investments in its territory of investors of a third State; (b) investments in its territory of its own investors.*"). It is noteworthy that in the Notice of Intent filed on December 28, 2006, Claimants also alleged they suffered losses "due to armed conflict" and that they were subject "to measure[s] having an effect equivalent to expropriation". Notice of Intent, Para. 3, at 2. See Canadian-CR BIT, Art. VII, addressing compensation due to an investor's loss "*because their investments in the territory of the other Contracting Party are affected by an armed conflict…*". See also Canadian-CR BIT, Art. VIII (1), providing that "*Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting State, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation…*".

[4] Respondent's Counter-Memorial on the Merits, filed on June 15, 2009 ("Counter-Memorial") at 3.

[5] Counter-Memorial at 3, Para. 8.

allegedly taken by Respondent in breach of the Treaty as well as notice of the loss or damage incurred by Claimants arising out of that breach. In the Notice of Intent, Claimants alleged they suffered damages of "not less than US$20,000,000" resulting from Respondent's failure to comply with its obligations under the Canada-CR BIT.[6]

9. On December 21, 2007, Claimants filed a request for arbitration (the "Request for Arbitration") against the Government of the Republic of Costa Rica. In the Request for Arbitration,[7] Claimants sought access to the Additional Facility ("Additional Facility") of the International Centre for the Settlement of Investment Disputes ("ICSID" or "Centre"), consenting to the application of the ICSID Arbitration Additional Facility Rules ("Additional Facility Rules" or "AF Rules"). [8] Claimants also alleged that Respondent's consent to arbitration had been properly given under the terms of the Treaty[9] and that in the Notice of Intent filed on December 28, 2006, Claimants gave Respondents proper notice to the government of the measures allegedly resulting in Claimants' losses, without having reached an amicable settlement of the dispute.[10]

10. On March 5, 2008, the Secretariat of the ICSID ("Secretariat") requested that Claimants identify the measure allegedly taken by the Government of Costa Rica said to have harmed their property;[11] to show fulfillment with the requirements that no more than three years have elapsed from the time Claimants knew or should have known of the alleged breach;[12] and to show that no judgment had been rendered by a Costa Rican court regarding the measure in question.[13]

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[6] See Notice of Intent at 6 ("*By not adequately and vigorously enforcing the law as regards private property rights while acknowledging and, in certain instances, defending the rights of illegal squatters, the Claimant has, by the Respondent's actions, been subjected to measures having an effect equivalent to creeping expropriation insofar as denying the Claimant's use and operation of its citrus grove investment.*").

[7] See Request for Arbitration, paras. 11-12.

[8] Treaty, Art. XII(3)(a) (*An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: (a) the investor has consented in writing thereto*…).

[9] Treaty, Art. XII(5) (*Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article*).

[10] Treaty, Art. XII(2) (*If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4)*…).

[11] Treaty, Art. XII(1) (*Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.).*

[12] Treaty, Art. XII(3)(c) (*(3) An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:….(c) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage…).*

[13] Treaty, Art. XII(3)(d) (*(3) An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:….(d) in cases where Costa Rica is a party to the*

11. Referring to the terms of their Request for Arbitration (para. 14), Claimants indicated that the measure at issue rests on "*the Costa Rican government's failure to take reasonable steps to address the illegal trespass on the Investors' citrus farm landholdings and the destruction of property and damages resulting from it.*" [14] Claimants characterized the illegal trespassing and damage to their property as a continuing course of action "*that began as early as February 2003 and did not cease until September 2005*," indicating that "*no more than three years have elapsed since the measure in question in the Investor's Request for Arbitration ceased in September 2005*."[15] They also confirmed having brought no claim regarding the measure in question before a Costa Rican court.

12. On March 21, 2008, ICSID registered Claimants' Request for Arbitration.

B. Constitution of the Tribunal

13. On May 12, 2008, the parties agreed that the arbitral tribunal ("Tribunal") in this case would consist of three arbitrators, each party appointing one arbitrator, and the third, who shall be the president of the Tribunal, to be appointed by agreement of the parties.

14. On June 19, 2008, the Claimants proposed the appointment of Professor Andreas Lowenfeld, a national of the United States of America, as its party-appointed arbitrator. On June 25, 2008, Respondent proposed Professor Bernardo Cremades, a national of Spain, as its party-appointed arbitrator. Both party-appointed arbitrators accepted their appointments on July 2, 2008.

15. The parties were unable to agree on the president of the Tribunal. On August 29, 2008, Claimants requested the Chairman of the ICSID Administrative Council to appoint the president of the Tribunal pursuant to Article 6(4) of the Additional Facility Rules. On September 3, 2008, ICSID's Acting-Secretary General communicated to the parties the intention of the Chairman of ICSID's Administrative Council to appoint Professor Alejandro Garro, a national of Argentina, as the third and presiding arbitrator.

16. On September 12, 2008, Respondent expressed no objection to the appointment of Professor Garro as the presiding arbitrator. On the same day, Claimants expressed their reservations to this appointment due to Professor Garro's prior involvement as an expert witness before U.S. courts on matters of Costa Rican law, as well as appearances by Professor Garro and Professor Lowenfeld as experts on Ecuadorean law appointed by the opposing parties to the case.

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dispute, no judgment has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement.).

[14] Claimants' letter dated March 11, 2008.

[15] Claimants' letter dated March 11, 2008.

17. October 2, 2008, the Chairman of the ICSID Administrative Council appointed Professor Alejandro M. Garro as the third, presiding arbitrator, an he accepted his appointment on October 17, 2008. Claimants did not insist on their request for the resignation of Professor Garro.

18. On October 17, 2008 the Tribunal was constituted and Dr. Sergio Puig was designated as Secretary of the Tribunal (the "Secretary").

C. First session of the Tribunal and the setting of a provisional agenda

19. Pursuant to Article 21(1) of the Additional Facility Rules, the Tribunal scheduled its first session within 60 days of its constitution. After extensive exchanges, the members of the Tribunal and the parties agreed to meet on Tuesday, December 16, 2008, at the International Monetary Fund, located at 700 19th Street, N.W., Washington, D.C. 20431. Audio-recording and interpretation services from and into English and Spanish were arranged for the session.

20. On October 29, 2008, the Tribunal sent to the parties a provisional agenda with a detailed list of procedural matters to discuss at the first session. On that date, the Tribunal invited the parties to make every effort to reach an agreement, to the extent possible, on the procedural issues listed in the provisional agenda, reporting back to the Tribunal no later than November 21, 2008.

21. On November 19, 2008, responding to the Tribunal's invitation to comment on the agenda, Respondent reported it had engaged in discussions with Claimants. Not having reached an agreement by the deadline set for the Tribunal, Respondent stated its position with regard to the procedural items listed in the provisional agenda. Claimants proceeded to do likewise in a letter dated November 21, 2008, setting out detailed procedural observations as well as other aspects not included in the Tribunal's provisional agenda.

22. The first session of the Tribunal ("First Session") was held on December 16, 2008. With the assistance of the Secretary, the Tribunal went over the provisional agenda with the parties, confirming some of the issues on which the parties had reached consensus as well as discussing and deciding on other procedural matters listed in the provisional agenda circulated on October 29, 2008. A few days thereafter, a certified copy of the minutes of the First Session (the "Minutes") was delivered to the parties.

23. On December 24, 2008, the Tribunal issued Procedural Order No. 1 ("P.O. No. 1"), providing further directives regarding the procedure and provisional calendar to be followed in this arbitration. Thus, it was decided that this arbitration shall be conducted under the Arbitration AF Rules of the Centre and, with regard to evidentiary issues not settled by the Arbitration AF Rules, the Tribunal adopted

the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration" ("IBA Evidence Rules"), unless the parties otherwise agree or the Tribunal decides otherwise (P.O. No. 1, Para. 1). This procedural order also listed the number, sequence and time-limits for the filing of requests to produce documents or interrogatories, pleadings, the form in which documentary evidence was to be produced, the production and examination of witnesses and experts, and the dates for the main evidentiary hearing ("Evidentiary Hearing").

24. The hearing on the merits was tentatively scheduled for November 13 through 17, 2009, to be preceded by a pre-hearing telephone conference scheduled to take place on Monday, November 2, 2009.

D. Claimants' request for provisional relief

25. On January 8, 2009, Claimants alleged that senior police officers of the Republic of Costa Rica "harassed" or "intimidated" Mr. Fabio Morales and Mr. Timoteo Souza, former employees of the Claimants. Claimants sought provisional relief under Article 46 of the Arbitration AF Rules for the purpose of enjoining Costa Rica from "*using any agent or instrumentality of the state in a manner not consistent with the evidence gathering procedures set out to the Tribunal's Procedural Order No. 1*." Respondent answered the next day, denying any unlawful or improper conduct, asking the Tribunal to reject Claimants' request for provisional relief. Further exchanges between the parties followed on January 13 and 15, 2009.

26. On January 16, 2009, the Tribunal rejected Claimants' request for provisional relief, asking Respondent to provide further explanations about the circumstances reported in Claimants' plea for provisional relief. Respondent complied with this request in a letter dated January 30, 2009. In its ruling of February 20, 2009, the Tribunal held that the actions of the Costa Rican police did not suggest intimidation or harassment of potential witnesses, thus dismissing Claimants' request for provisional relief and bringing this matter to a close.

E. Disputes over Discovery

27. The parties exchanged requests to produce documents and interrogatories, as scheduled in P.O. No. 1 and the applicable IBA Evidence Rules. Thus, on January 15, 2009, Claimants submitted 42 requests to produce documents and 42 requests to answer interrogatories.

28. On January 30, 2009, Respondent objected to Claimants' request for a substantial number of documents and a significant number of interrogatories, claiming that such request failed to meet the requirements set forth in P.O. No. 1 and the IBA

Evidence Rules. Respondent attached annexes with specific objections to Claimants' requests to produce documents and answer interrogatories.

29. On February 6, 2009, pursuant to P.O. No. 1, Claimants provided comments on Respondents' refusal to produce certain documents, attaching a "Redfern Schedule" and setting out Specific Information Requests, Respondent's objections, and Claimant's response addressing the alleged relevance and necessity of each request.

30. The parties exchanged additional communications on February 9, 2009. On February 16, 2009 the Respondent decided to submit the documents in respect of which it had no objection, also allegedly providing answers to all of the written interrogatories.

31. The next day, on February 17, 2009, Claimants alleged Respondent had "refused to produce documents in response to all but one" of the documents requests, also claiming that Respondent had failed to provide adequate and responsive answers to some of the interrogatories. Claimants sought to obtain an extension of the deadline for filing its memorial, which was scheduled to be filed on March 16, 2009. On February 19, 2009, Respondent expressed its objection to any extension of Claimants' deadline for the filing of its memorial.

32. On February 20, 2009, the Tribunal ruled that Respondent had satisfied Claimants' requests to answer written interrogatories, reserving Claimants' right to ask additional questions on any issue the Tribunal may find relevant and material as the case progressed. As to Claimants' request to produce documents, Respondent was directed to produce, on or before March 4, 2009, specific documents in response to Claimants' inquiries relating to policing, trespass, squatting and related complaints, as well as damages to Claimants' property.

33. Respondent submitted the requested documents but, alleging that some of those documents were too voluminous, provided a link to a web site (URL) from which Claimants were directed to download such documents.

34. On March 5, 2009, Claimants submitted that Respondent had failed to comply with the Tribunal's request. Alleging the need for more time to review the documents in order to complete various expert reports, Claimants insisted that Respondent produce paper copies of the documents, seeking an extension of the deadline to file Claimants' memorial on the merits. This was followed by an additional exchange of correspondence by the parties on March 9-10, 2009.

35. The Tribunal denied Claimants' request for an extension, reminding the parties that during the second round of pleadings, they remained entitled to include relevant documentation arising from the disclosure. The Tribunal also reminded the parties of its power to request, up to the time of rendering the award, the

production of any additional document the Tribunal finds relevant to the outcome of this arbitration.

E. The parties' exchange of written submissions

36. Pursuant to the chronology of submissions fixed at the outset by the Tribunal, Claimants filed their memorial on March 16, 2009, followed by Respondent's counter-memorial filed on June 15, 2009.

37. Claimants' reply was filed on August 14, 2009, followed by Respondent's rejoinder filed on October 13, 2009.

IV. CLAIMANTS´ COUNSEL WITHDRAW ON THE EVE OF THE HEARING

A. Preparatory steps to the Hearing

38. In preparation for the hearing on the merits scheduled for November 13 through 17, 2009, the Tribunal asked the parties to make their best efforts towards reaching an agreement on how they wished such hearing to be conducted.

39. On October 29, 2009, less than a month before the hearing scheduled a year in advance, Claimants requested a postponement of the hearing, alleging the need for additional time in order for their witnesses to obtain visas to travel to the United States. Claimants also objected to the admissibility of three witness reports attached to Respondent's rejoinder ("rebuttal reports"). Further exchanges between the parties failed to reach an agreement as to how they wished to conduct the hearing.

40. At the pre-hearing telephone conference call held on November 2, 2009, the Tribunal sought to engage the parties on how they wished the hearing to be conducted. On the same day, the Tribunal ruled in favor of admitting the rebuttal reports attached to Respondent's rejoinder, fixing a deadline for listing the other party's witnesses and experts they wish to cross-examine.

41. Responding to the Tribunal's request, Claimants submitted a list of fact witnesses and experts (including Respondent's legal and damages experts), requesting them "to present themselves before the tribunal for examination." Respondent asked for the cross-examination of Mr. Alan McCullock and reserved the right to call other of Claimants' witnesses or experts. Claimants rejected Respondent's conditional reservation as to additional witnesses, whereas Respondent rejected Claimants' request to examine those witnesses and experts not otherwise called by Respondent for cross-examination.

B. Claimants´ counsel withdraw

42. On November 6, 2009, the Secretariat asked the parties for an advance payment of US$300,000, so as to enable the Centre to meet the costs of the proceedings during the next three to six months. On the same day, one week before the hearing was scheduled to begin, counsel for the Claimants, the law firm of Appleton and Associates, informed the Tribunal that they had withdrawn as counsel in this arbitration, providing the address of Claimants' president, Mr. Allen McCullock. All subsequent notifications in these proceedings were addressed to Mr. McCullock.

43. Mr. Allan McCullock confirmed that Claimants were without counsel and, while taking steps to find a successor counsel, Claimants would not be available to appear at the hearing.[16] The same day, November 9, 2009, Respondent expressed its availability to hold the hearing on the merits, asking the Tribunal to dismiss the case and award Respondent all costs and attorneys' fees. [17]

C. Claimants´ opposition to discontinuance under Art. 50 of the AF Rules

44. In light of the abrupt withdrawal of Claimants' counsel and its inability to appoint a successor counsel in due course, the Tribunal had no alternative but to postpone the hearing scheduled for November 13 through 17, 2009.

45. On November 10, 2009, the Tribunal requested that the Claimants inform the Tribunal of its successor counsel by November 25, 2009. In response, Respondent moved for the discontinuance of the proceeding pursuant to Article 50 of the Arbitration AF Rules, expressly requesting an award for all costs and attorneys' fees.

46. Claimants were unable to appoint a successor counsel by the date fixed by the Tribunal.[18] On December 1, 2009, Claimants were asked to state within the next

[16] Letter of Mr. Alan McCullock of November 9, 2009 (*"We are writing to confirm that the Claimants are presently without counsel and do not have a replacement at this time. Therefore, we are not in a position to be available for the hearing on the merits scheduled for November 13-17, 2009. We will be taking steps to find successor counsel and will advise your offices at such time as we have secured legal representation to continue with this arbitration."*).

[17] In that letter of Noviember 9, 2009, Respondent alleged that Claimants failed to act in good faith by actively participating in prehearing preparations, while seeking to postpone the hearing alleging the unavailability of time to process visas for their witnesses. See Respondent's letter of November 9, 2009 (*"…Claimants have not acted in good faith with respect to preparations for the hearing. Claimants argued vigorously that they did not have enough time to prepare for the hearing. They also argued that they were unable to obtain visas necessary for their Costa Rican witnesses to travel to the United States. Rather than raising legitimate issues, it now appears that Claimants made these arguments requests that the Tribunal dismiss the above-mentioned case and award Respondent all costs and attorneys' fees…"*

[18] Letter of Mr. Alan McCullock of November 25, 2009 (*"…I am writing to inform you that the Claimant is still without legal representation. At such time as I have been able to secure new counsel I will notify the Tribunal."*).

seven days whether they opposed the discontinuance requested by Respondent, renewing the Tribunal's request for the appointment of a successor counsel.

47. Claimants informed the Tribunal that they formally opposed the discontinuance of the proceedings. Pursuant to Article 48 of the AF Rules, the Tribunal ordered for the continuance of the proceedings, tentatively rescheduling the hearing on the merits for February 4 through 8, 2010. (Procedural Order No. 2).

V. CLAIMANTS' FAILURE TO PAY THE SECOND ADVANCE, LEADING TO A STAY OF THE PROCEEDINGS

48. Article 14(3) of the Centre's Administrative and Financial Regulations provides in detail for advance payment by the parties to enable the proceeding to go forward. Accordingly, each party is to pay half of every advance, subject to contrary agreement of the parties and without prejudice to the Tribunal's final decision on the division of costs between the parties.

49. On October 22, 2008, the Secretary of the Tribunal communicated to the parties that each should pay to the Centre the amount of US$100,000 for the purpose of meeting the costs of the proceeding during the next three to six months, including the costs of the Tribunal's First Session. Both parties complied with the first advance requested by the Centre.

50. On November 6, 2009, the Secretary of the Tribunal communicated to the parties that each should pay to the Centre the amount of US$150,000 for the purpose of meeting the costs of the proceeding during the next three to six months, including the costs of the Tribunal's hearing on the merits.

51. The Respondent paid $150,000, representing its share of the second advance payment.

52. Whereas Respondent timely paid its share of the second advance payment requested by the Centre, Claimants failed to pay their share and failed to appoint a successor counsel to represent them in this arbitration.

53. After the expiration of the 30-day period since the request for the second advance had been made, on December 7, 2009, the Tribunal invited either party, once again, to pay the outstanding balance of the second advance.

54. The Centre's request for the payment of the second advance was reiterated on January 8, 2010.

55. The requested payment was still outstanding as of January 25, 2010, at which time the Secretary-General of ICSID asked the Tribunal for a stay of the

proceedings. Accordingly, as of the date of this order, Claimants advanced $100,000, whereas Respondent advanced $250,000.

56. Not having received the balance of the advance payment from either party, the Tribunal decided to cancel the hearing scheduled for February 4 though 8, 2010 and to stay the proceedings pursuant to Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations and Rule 51 of the Arbitration AF Rules.

VI. DISCONINUANCE OF THE PROCEEDINGS AFTER A STAY IN EXCESS OF SIX MONTHS OF INACTIVITY

57. Administrative and Financial Regulation 14(3)(d) provides that the Secretary-General of the Centre may, after notice to and as far as possible in consultation with the parties, move that the Tribunal discontinue the proceeding, if it has been stayed for non-payment of an advance for more than six months. [19] It is the Secretary-General's prerogative to request that the proceedings be discontinued. However, it remains for the Tribunal to issue an order taking note of the discontinuance of the proceedings.

58. On July 30, 2010, Respondent requested that the Secretary-General move to discontinue these proceedings. On August 2, 2010, the Acting Secretary-General communicated to the parties that if any part of the required advance payment was still outstanding by August 16, 2010, the Secretary-General would move that the Tribunal discontinue the proceedings pursuant to Regulation 14(3)(d) of the Administrative and Financial Regulations.

59. On August 17, 2010, after more than six months had elapsed since the stay of the proceedings and the second advance payment remaining outstanding, the Acting Secretary-General moved that the Tribunal discontinue the proceedings.

[19] See Administrative and Financial Regulation 14(3)(d) ("…[I]n connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. *If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding…").*

60. On August 23, 2010, the Tribunal invited the parties to inform within a week whether they had reached an agreement, or were engaged in negotiations, regarding the division of costs incurred in this arbitration. In the same letter, the Tribunal asked the Respondent to provide, in the absence of any agreement on costs, an itemized list of Respondent's costs in this arbitration, including expenses and attorneys' fees.

61. On August 30, 2010, Respondent confirmed that the parties did not reach any agreement regarding how to allocate the costs of the proceeding and that they were no longer in the process of negotiating how to divide the costs of the proceedings. In addition, Respondent provided details of the fees and costs incurred in this arbitration for work performed until January 1, 2010, asking the Tribunal to award Respondent attorneys' fees and other costs incurred in connection with this proceeding. Claimants failed to answer the Tribunal's invitation of August 23, 2010.

62. According to Regulation 14(3)(d) of the Administrative and Financial Regulations, the decision to stay or discontinue the proceedings as a consequence of non-payment is discretionary. Because the arbitral proceedings cannot go forward unless the parties make the required advance payments, and the parties have been given ample opportunity to make those payments, the Tribunal hereby takes note of the discontinuance of these proceedings.

VII. ASSESSMENT OF COSTS AND ATTORNEYS FEES TO THE RESPONDENT

63. In cases in which proceedings have been discontinued as a consequence of non-payment, the practice of ICSID has been to take note of the discontinuance in a procedural order,[20] a practice conformed with by this Tribunal.

64. It is not common practice, however, to include a decision on costs in such order, since this decision is normally included as part of an arbitral award.[21] Indeed, because an order providing for the discontinuance of the proceedings does not amount to an arbitral award,[22] it is appropriate for the parties to settle between themselves the costs incurred prior to the discontinuance.[23]

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[20] Phillip Gruslin v. Malaysia, Order of the *ad hoc* Committee for Discontinuance of the Proceeding Annulment Proceeding (ICSID Case No. ARB/99/3); Grad Associate v. Venezuela, Order of the *ad hoc* Committee for Discontinuance of the Proceeding (ICSID Case No. ARB/00/3).

[21] See ICSID Convention, Art. 61(2), prescribing that a decision on costs "*...shall form part of an award*."; 1968 ICSID Regulations and Rules, Art. 45 (providing that an order of discontinuance "*would not normally contain any provision regarding the division of expenses*.").

[22] 1968 ICSID Regulations and Rules, Art. 45, Note C.

[23] See generally, Schreuer, The ICSID Convention: A Commentary 1239, Par. 58 (Cambridge University Press, 2001).

65. However, in a case such as the present one, in which the parties have failed to agree on how the costs of the proceedings should be apportioned, and the Respondent seeking to recover what it paid in attorneys' fees and other costs incurred in connection with this proceeding, the Tribunal must decide whether it has the authority to issue a decision on costs in this order and, in this case, whether it should issue such an order.

66. According to Article 58(1) of the Arbitration AF Rules, an arbitral tribunal has the authority and discretion, "[u]nless the parties otherwise agree," to decide the question of costs. There is no "agreement otherwise" in this case, the parties having failed to negotiate the division of costs in this arbitral proceeding,[24] and nothing in the rules governing this proceeding preclude the Tribunal from deciding on the allocation of the advance payments and costs of this truncated proceeding.

67. Although the termination of this arbitration cannot be understood in terms of success or failure for either side, the Tribunal may proceed to a decision on the allocation of costs on the basis of other factors, such in a case where a party's bad faith, lack of cooperation, dilatory or otherwise improper conduct justifies that the costs of the proceedings be assessed against such party.[25] The Tribunal thinks this is such a case.

68. After almost two years of adjudication and on the eve of the hearing on the merits, Claimants suddenly decided to abandon their claims. In the letter of November 6, 2009, counsel for the Claimants crisply stated, without further explanation: "*We are writing to inform you that we have withdrawn as counsel [for Claimants] in this arbitration*." Claimants sent this letter shortly after receiving the Tribunal's request for a second advance payment to meet costs to be incurred in the proceeding, including the costs of the hearing on the merits. A few days before withdrawing, Claimants' request to postpone the hearing had been dismissed by the Tribunal.

69. The Tribunal finds it implausible that Claimants' were unable to obtain visas for witnesses to travel to Washington D.C., to attend a hearing that had been scheduled months in advance. Given the previous and subsequent circumstances surrounding the sudden withdrawal of Claimants' counsel, it is plausible to question whether Claimants had thoughtfully considered the costs involved in this arbitration and whether they had been adequately advised on the matter before filing their claim. Indeed, Claimants' express opposition to the discontinuance of the proceedings under Article 48 of the Arbitration AF Rules, prompting the

[24] Letter by Respondent of August 30, 2010 ("…*Respondent confirms that no such agreement has been reached nor arte the parties currently negotiating the division of costs in this arbitral proceeding*…").
[25] See generally, 1968 ICSID Regulations and Rules, Art. 45; LETCO v. Liberia, 31 March 1986, 2 ICSID Reports 370; Schreuer, op. cit., at 1224-27, Pars. 16-25.

Tribunal to reschedule the hearing for February 4 through 8, 2010,[26] puts into question whether Claimants ever had a genuine intention to participate at that evidentiary hearing.

70. The Tribunal believes that much of Respondent's costs, those of the Centre administering this arbitration, as well as the time of the members of the Tribunal, could have been spared if Claimants had given timely and adequate consideration to the consequences of their action. Accordingly, the Tribunal finds that Claimants should bear responsibility for Respondent's costs.

71. In a situation such as the present one, where the proceedings are discontinued due to Claimants' inability to pursue their claim, to pay the advance requested by the Centre, and to appoint successor counsel, it is incumbent upon the parties to agree on how to divide the costs of the proceeding. However, in the absence of such an agreement, once the parties have been given ample opportunity to present their case, and considering Claimants' insistence or continuing this arbitration at a time and circumstance when they could have averted such procedural expenditure, Claimants cannot expect Respondent to carry the burden of the costs of defending claims that Claimants decided to abandon. Accordingly, equity and fairness mandate that Claimants should bear the expenses and costs incurred by the Respondent in this arbitration.

72. Close scrutiny of Respondent's itemized list of fees and expenses does not reveal figures that are out of the ordinary. Taking into account the advances already made by both parties to the Centre, Respondent's legal costs and associated expenses, as well as the fees of the members of the Tribunal and the Centre, Claimants shall pay the sum of US$730,000.00 to the Respondent.

VIII. ORDER OF DISCONTINUANCE AND ALLOCATION OF COSTS

For the reasons set forth above, the Tribunal decides:

73. Claimants shall pay the sum of US$ US$730,000.00 to the Respondent in respect of the fees and costs now claimed by the Respondent.

(continues on next page)

[26] Procedural Order No. 2, Para. II.

74. These proceedings are discontinued pursuant to Regulation 14(3)(d) of the Administrative and Financial Regulations of ICSID.

Alejandro M. Garro
Date:
President
October 20, 2010

Bernardo Cremades
Date:
Arbitrator
Oct. 13th 2010

Andreas Lowenfeld
Date: 10/18/10
Arbitrator

Issued in Washington D.C.