

ARBITRATION UNDER THE UNCITRAL RULES

PCA CASE NO. 2010-21 / DUN-BZ II

DUNKELD INTERNATIONAL INVESTMENT LTD (CLAIMANT)

v.

THE GOVERNMENT OF BELIZE (RESPONDENT)

ORDER NO. 2

17 JANUARY 2011

CONSIDERING:

- (A) The draft Agenda for the Preparatory Conference regarding the conduct of the present arbitral proceedings sent to the Parties on 15 November 2010;
- (B) The comments by Claimant on the draft Agenda of 1 December 2010;
- (C) Claimant's letter of 10 December 2010, (i) suggesting that the preparatory conference scheduled for Monday, 20 December 2010 at 4:00 p.m. in The Hague be held by telephone conference on that day; and (ii) requesting that such telephone conference be held at an earlier time;
- (D) The Arbitral Tribunal's letter of 16 December 2010, inviting Respondent to comment on Claimant's letter of 10 December 2010, referred to Recital (C) above;
- (E) The lack of comments by the Respondent on the draft Agenda and, more generally, the absence of any communication from Respondent to the Arbitral Tribunal regarding the present arbitral proceedings;
- (F) The Preparatory Telephone Conference held on Monday, 20 December 2010 at 2:00 p.m., the audio recording of which has been sent to the Parties on 21 December 2010;

- (G) Respondent's failure to participate in the Preparatory Telephone Conference referred to in Recital (F) above;
- (H) Article 28(2) of the UNCITRAL Arbitration Rules of 1976 (the "**UNCITRAL Rules**"), providing: "If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration";
- (I) The fact that Respondent has been aware of all correspondence by the Arbitral Tribunal, as evidenced by the read receipts and delivery receipts of emails as well as by facsimile transmission reports of facsimiles;
- (J) The fact that Respondent has not shown sufficient cause for the failure to participate in the Preparatory Telephone Conference of 20 December 2010;
- (K) The Arbitral Tribunal's invitation to the Parties to submit comments by 14 January 2011 on the proposed draft of this Order No. 2, which was transmitted to the Parties by the Arbitral Tribunal on 10 January 2011; and the Claimant's comments received on 14 January 2011 in response to such invitation.

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. Party Representation

- 1.1 The details of the representation of Dunkeld International Investment Ltd. ("**Claimant**") are as follows:

Allen & Overy LLP
1 Bishops Square
London E16AD, UK
Tel: +44 (0) 20 3088 0000
Fax: +44 (0) 20 3088 0088

Attention: Judith Gill / Matthew Gearing / Angeline Welsh / Laura Brierly /
Henrietta Jackson-Stops

Judith Gill, QC
judith.gill@allenoverly.com
Tel: +44 (0)20 3088 3779

Matthew Gearing
matthew.gearing@allenoverly.com
Tel: +852 2974 7177

Angeline Welsh
angeline.welsh@allenoverly.com
Tel: +44 (0)20 3088 4093

Laura Brierly
Laura.brierly@allenoverly.com
Tel: +852 2974 7158

Henrietta Jackson-Stops
henrietta.jackson-stops@allenoverly.com
Tel: +44 (0)20 3088 2614

- 1.2 According to Claimant, the details concerning the Government of Belize (“Respondent”) are:

The Honourable Dean Barrow
Prime Minister and Minister of Finance
Office of the Prime Minister
Belmopan City
Cayo District
Belize
Fax: +501 822 0898
Email: secretarypm@opm.gov.bz

The Honourable Bernard Q.A. Pitts
The Attorney General of Belize
The Attorney General's Ministry
2nd Floor
East Block Building
Belmopan City
Belize
Fax: +501 822 3390
Email: agministrybze@yahoo.com

2. Arbitral Tribunal

- 2.1 The details of the Arbitral Tribunal are as follows:

Mr. John Beechey, Arbitrator
Strictly private and confidential – addressee only
ICC International Court of Arbitration
38 cours Albert 1er
75008 Paris
France

Telephone: +33 1 49 53 28 21
Facsimile: +31 1 49 53 29 33
E-mail: john.beechey@iccwbo.org

Mr. Rodrigo Oreamuno, Arbitrator
Facio & Cañas
Barrio Tournon
PO Box 5173-1000
San José
Cost Rica

Telephone: +506 2256 555
Facsimile: +506 2255 2510
E-mail: roreamuno@fayca.com

Professor Dr. Albert Jan van den Berg, Presiding Arbitrator
Hanotiau & van den Berg
IT Tower, 9th Floor
480 Avenue Louise, B.9
1050 Brussels
Belgium

Telephone: +32 2 290 3913
Facsimile: +32 2 290 3942
E-mail: ajvandenberg@hvdb.com

3. Applicable Version of the UNCITRAL Rules

3.1 The applicable version of the UNCITRAL Rules shall be the version of 1976.

4. Place of Arbitration

4.1 Pursuant to Article 16(1) of the UNCITRAL Rules, the Tribunal has determined that The Hague, The Netherlands, is the place of this arbitration.

5. Language of Proceedings

5.1 English is the language of this arbitration.

5.2 Any document submitted to the Tribunal which is not in English shall be accompanied by a translation into English.

5.3 Witnesses or experts called to testify at any hearing before the Tribunal may give their evidence in English or in their principal language. In the event the

witness or expert testifies in his or her principal language, the Parties and the Tribunal shall make arrangements for interpretation services.

6. Mode of Communication, Written Submissions and Notifications

- 6.1 The Parties shall file written submissions both in hard copy and electronic form (in word searchable PDF format, where possible) on CD ROM or flash drive, by courier, together with any supporting exhibits, including documents, witness statements, expert reports, and legal authorities. The Tribunal has a preference for the A5 format (“mini-bundle”) for the hard copy. The Party making the submission shall dispatch one hard copy to the Representatives of the opposing Party; two hard copies to the Presiding Arbitrator; one hard copy to each of the co-arbitrators; and one hard copy to the Permanent Court of Arbitration (“PCA”).
- 6.2 The Parties shall also file the electronic version of written submissions (excluding documentary evidence) by email.
- 6.3 All written communications shall be deemed to have been validly made when they have been sent to:
- Parties: to the addresses set forth in paragraph 1 above;
 - Tribunal: to the addresses set forth in paragraph 2 above;
 - PCA: to the addresses set forth in paragraph 15.4 below.
- 6.4 Any change of name, description, address, telephone number, facsimile number, or e-mail address shall immediately be notified by the Party or member of the Arbitral Tribunal concerned to the Arbitral Tribunal, Counsel for the Parties, and the PCA for onward communication. Failing such notification, communications sent in accordance with this section shall be valid.
- 6.5 A written submission shall be considered to have been submitted in a timely fashion if the submission is dispatched in electronic form on or before the applicable deadline, followed by hard copy of the submission dispatched by courier on the next business day.
- 6.6 The Parties shall file written notifications electronically by email (in word searchable PDF format, where possible) and in hard copy by facsimile.

- 6.7 The Parties and the Tribunal shall transmit short messages by email only.
- 6.8 In the event no email address is provided by a Party, the submissions, notifications and messages may be transmitted by facsimile only.

7. Schedule for Submitting Statements

- 7.1 The sequence and timing of the proceedings shall be the following:
- a) Claimant's Statement of Claim has been filed on 18 December 2010.
 - b) Respondent to indicate by 21 January 2011 whether or not it wishes to provide a Statement of Defence.
 - c) Failing any such positive indication by Respondent, a two day hearing for consideration of all aspects of Claimant's claims shall take place on 14-15 March 2011.
 - d) In the event that Respondent wishes to serve a Statement of Defence referred to in paragraph 7.1b) above, the further sequence and timing of the proceedings shall be the following:
 - e) Respondent's Statement of Defence to be served by 14 February 2011.
 - f) Claimant's Statement of Reply to be filed by 21 March 2011.
 - g) Respondent's Statement of Rejoinder to be filed by 25 April 2011.
 - h) A five day hearing for consideration of all aspects of Claimant's claims and Respondent's defences shall take place on 2-6 May 2011.
 - i) The question whether Post-Hearing Memorials and/or Costs Submissions are required, and any ensuing timetable, shall be decided by the Tribunal at the hearing, unless the Parties otherwise agree.

8. Documentary Evidence

- 8.1 All evidence shall be submitted together with the written submissions referred to in paragraph 7 above.
- 8.2 The Parties will include with any second written submission only additional written witness testimony, expert opinion testimony, and documents or other

evidence as is necessary to respond to or rebut the matters raised in the other Party's immediately previous written submission.

- 8.3 If any new and material evidence comes to the knowledge of a Party after the filing of its last written submission, or any new facts or issues arise since the date of a witness or expert's last signed statement, that Party shall address such evidence, facts or issues in its subsequent written submission. If such a submission is not scheduled or if the matter is of an urgent nature, the Tribunal, upon a reasoned written request from a Party and after receiving comments on the request from the other Party, may admit such new evidence or allow a witness or expert to submit an additional witness or expert statement before the hearing. If the Tribunal admits new evidence or additional witness or expert statements into the record, it shall grant the other Party an opportunity to submit evidence or witness or expert statements in rebuttal.
- 8.4 The Parties may timely request documents from each other during the proceedings. Correspondence or documents exchanged in the course of this process shall not be sent to the Tribunal.
- 8.5 To the extent that the totality of these requests is not satisfied, the Parties are allowed to submit for decision by the Tribunal one request for production of documents after the first round of written pleadings.
- 8.6 After the Parties have exchanged their respective demands as outlined above, this request shall take the form of a joint submission in tabular form, the template of which will be provided to the Parties in due course.
- 8.7 For its decision on document requests, the Tribunal will be guided by the relevant provisions of the IBA Rules of Taking Evidence in International Commercial Arbitration of 2010, and in particular its Articles 3 and 9.2.
- 8.8 If additional documents are needed by a Party, leave to submit a further disclosure request to the Tribunal must first be sought. The Parties are urged to seek leave in exceptional cases only and to avoid document disclosure requests on a rolling basis.
- 8.9 Demonstrative exhibits shall be authorised at the hearing subject to timely advance notice being given, and no new documentary evidence being introduced.

- 8.10 Claimant's documentary evidence shall be numbered consecutively "C-", and Respondent's documentary evidence "R-" and be provided in both electronic and hard copy format (preferably A5).
- 8.11 Authorities cited by the Parties shall be numbered consecutively "CA-" by Claimant and "RA-" by Respondent and be provided in both electronic and hard copy format.
- 8.12 Questions relating to a Joint Chronological List of Exhibits and Common (Core) Bundle of Documents shall be determined by the Tribunal at a later date prior to the hearing, in consultation with the Parties.

9. **Evidence of Witnesses**

- 9.1 Without prejudice to the power of the Tribunal to request or allow the Parties to produce further evidence at any stage of the proceedings, all written witness statements and expert reports shall be submitted together with the Parties' written pleadings and shall constitute the direct testimony of each factual or expert witness, respectively.
- 9.2 Each witness statement and expert report shall:
- (a) reflect whether the witness is a witness of fact or an expert witness;
 - (b) contain the name and address of the witness and a description of his or her qualifications;
 - (c) contain his or her relationship to any of the Parties in this arbitration;
 - (d) contain the substance of the evidence that the Party will present through the testimony of that witness at the Hearing; and
 - (e) be signed by the witness and give the date and place of signature.
- 9.3 There shall be no direct examination of witnesses or experts at the hearing by the Party presenting the witness or expert, save that there may be limited direct examination of witnesses or experts in respect of new facts or issues that arose since the date of the witness or expert's last signed statement.

- 9.4 Prior to the oral procedure and within time limits agreed by both Parties or established by the Tribunal, each Party or the Tribunal may call upon the other Party to produce at the oral procedure for cross-examination any witness or expert whose written statement has been advanced by the requested Party with the written submissions. Any witness or expert so called shall be subject to cross-examination at the oral procedure.
- 9.5 Subject to the provisions of paragraph 9.3 above, during the direct examination, Counsel should avoid asking leading questions to the witness.
- 9.6 Re-direct examination shall be limited to matters arising out of cross-examination.
- 9.7 If a witness or expert called by a Party or the Tribunal does not appear without a valid reason at the oral procedure, the Tribunal shall disregard that witness's or expert's statement or opinion. If a witness or expert is unable to attend the Hearing in person, the Tribunal may provide for examination by videoconference or other means.
- 9.8 Subject to paragraph 9.7 above, a decision by either Party not to call a witness or expert to appear for cross-examination at a hearing shall not be considered a concession as to the substance of the written statement of the witness or report of the expert.
- 9.9 Witnesses and experts shall be examined by each Party under the control of the Presiding Arbitrator. Before giving evidence, witnesses shall make a declaration that "I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth", and experts a declaration that "I solemnly declare upon by honour and conscience that my statement will be in accordance with my sincere belief".
- 9.10 During the examination of a fact witness, other fact witnesses shall not be present in the hearing room until his or her examination has been completed. Such sequestration does not apply to experts.

10. Hearing(s)

- 10.1 The hearing shall take place at the dates mentioned in paragraph 7.1c) or 7.1h) above.

- 10.2 A Pre-Hearing Telephone Conference shall be scheduled at the convenience of the Parties and the Tribunal, preferably two weeks prior to the hearing.
- 10.3 Questions relating to the organization of the hearing shall, to the extent not agreed by the Parties, be determined by the Tribunal at the Pre-Hearing Telephone Conference.
- 10.4 The Hearing shall proceed as follows:
- (a) Opening Statement by Claimant;
 - (b) Opening Statement by Respondent;
 - (c) Examination of Claimant's fact witnesses;
 - (d) Examination of Respondent's fact witnesses;
 - (e) Examination of Claimant's expert witnesses, if any;
 - (f) Examination of Respondent's expert witnesses, if any;
 - (g) Closing Statement by Claimant;
 - (h) Closing Statement by Respondent.
- 10.5 The principle of equal time shall apply.
- 10.6 The maximum length of the oral Opening Statements and oral Closing Statements shall be determined in consultation with the Parties at the Pre-Hearing Telephone Conference.
- 10.7 The hearing shall be held at a locale to be fixed by the Tribunal, in consultation with the Parties, outside the Turks and Caicos Islands and Belize. As provided in Article 16(2) of the UNCITRAL Rules and as contemplated by the Host Country Agreement between the Permanent Court of Arbitration and the Republic of Costa Rica, the Tribunal envisages as locale for the hearing the premises of the Inter-American Court of Human Rights, San Jose, Costa Rica, without prejudice to The Hague being the place of arbitration in the legal sense.

11. Post-Hearing Memorials

11.1 The need for Post-Hearing Memorials and any schedule for submission shall be determined by the Tribunal at the hearing, in consultation with the Parties.

12. Costs

12.1 The timing and form of Costs Submissions and the issuing decision shall be determined by the Tribunal at the hearing, in consultation with the Parties.

13. Award

13.1 The Tribunal shall endeavour to render the award as soon as practicably possible after the hearing or, in the event of Post-Hearing Memorials referred to in paragraph 11.1 above, as soon as practically possible after their filing.

14. Confidentiality and Privacy

14.1 The Tribunal adheres to the nowadays generally accepted principle of transparency of investment treaty arbitration, it being understood that each Party is at liberty to apply for measures regarding confidentiality and privacy of the proceedings as well as the publication of the award.

14.2 Claimant acknowledged that the existence of the case is public and indicated its consent to the public identification of the case on the PCA website.

14.3 Claimant indicated that it may request confidentiality in relation to the hearing itself and documentation filed in the proceedings, but suggested that this issue be revisited at the pre-hearing conference.

15. Administrative Secretary

15.1 It is confirmed that Ms. Niuscha Bassiri, associate with the law firm of the Presiding Arbitrator, shall act as the Administrative Secretary to the Tribunal. The remuneration of the Administrative Secretary shall be € 175 per hour. The fees and disbursements incurred by the Administrative Secretary shall be effected from the deposits made by the Parties as the Tribunal's disbursements.

15.2 The Permanent Court of Arbitration at the Peace Palace in The Hague shall provide registry services and administrative support to the present arbitration

proceedings in consultation with the Presiding Arbitrator, which will be charged in accordance with the PCA Schedule of Fees.

- 15.3 The PCA will, if requested, make its hearing and meeting rooms in the Peace Palace in The Hague, or elsewhere, available to the Parties and the Tribunal at no charge. The costs of catering, court reporter services, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the Parties in equal shares, without prejudice to the final decision of the Tribunal as to which Party shall ultimately bear those costs.
- 15.4 The contact details of the PCA are as follows:

Permanent Court of Arbitration
Attn: Mr. Garth Schofield
Attn: Mr. Hugh Meighen
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Telephone: +31 70 302 4165
Facsimile: +31 70 302 4167
E-mail: gschofield@pca-cpa.org
hmeighen@pca-cpa.org

16. Fees and Deposits

- 16.1 The time of each member of the Tribunal shall be remunerated at a rate of € 500 per hour.
- 16.2 The PCA at the Peace Palace in The Hague will act as fund holder for the advance on costs referred to in Article 41 of the UNCITRAL Rules. The PCA does not charge any fees for the holding of the deposit as such, but any transfer fees or other bank charges will be charged to the account. No interest will be paid on the deposit.
- 16.3 All payments to the Tribunal shall be made from the deposit, and the Members of the Tribunal shall submit periodic invoices in respect of their fees and expenses in no less than quarterly intervals. The fees and expenses of the PCA (as air courier costs and bank transfer fees) shall be paid in the same manner as Tribunal fees and expenses.

16.4 The Parties shall defray the expenses of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to allocation of costs. In the event of default in the proceedings by one of the Parties, the other Party shall defray the expenses of the proceedings in full, without prejudice to the final decision of the Tribunal as to allocation of costs.

17. **Relevance of the Order of the English Commercial Court dated 26 July 2010**

17.1 Claimant's application, requesting the Tribunal to indicate whether it would be content for Claimant to make an application to the English Commercial Court for a continuation of the Order of the English Commercial Court dated 26 July 2010 has been dealt with by the Tribunal in Order No. 1, issued on 21 December 2010.

18. **Other Topics**

18.1 Claimant confirmed that it had no further topics for discussion.

19. **Status of Orders**

19.1 Any Order of the Tribunal may, at the request of a Party or at the Arbitral Tribunal's own initiative, be varied if the circumstances so require for the proper conduct of these proceedings.

On behalf of the Arbitral Tribunal,



Albert Jan van den Berg,
Presiding Arbitrator