

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED
IN ACCORDANCE WITH THE UNITED STATES-DOMINICAN REPUBLIC-
CENTRAL AMERICA FREE TRADE AGREEMENT, SIGNED AUGUST 5, 2004
("CAFTA-DR")**

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

- 1. TCW GROUP, INC.**
- 2. DOMINICAN ENERGY HOLDINGS, L.P.**

"Claimants"

- and -

THE DOMINICAN REPUBLIC

"Respondent"

(and together with the Claimants, the "Parties")

Procedural Order No. 2

Date: August 15, 2008

By the Arbitral Tribunal

**Prof. Juan Fernández-Armesto
Prof. Thomas Wälde
Prof. Karl-Heinz Böckstiegel (President)**

This Procedural Order No. 2 puts on record the results of the discussion and agreement between the Parties and the Tribunal at the 1st Procedural Meeting held on July 30, 2008, at the offices of Paul, Hastings, Janofsky & Walker LLP, Park Avenue Tower, 75 East 55th Street, New York, New York:

1. Attendance

The names of the attendees at the Procedural Meeting are as follows:

- The Tribunal: Professor Juan Fernández-Armesto
Professor Thomas Wälde
Professor Karl-Heinz Böckstiegel (President)
- For the Claimants: Mr. Christopher F. Dugan (Paul, Hastings, Janofsky & Walker LLP)
Mr. Joseph R. Profaizer (Paul, Hastings, Janofsky & Walker LLP)
Mr. Robert L. Vitale (Managing Director and General Counsel, TCW Energy Partners, LLC)
- For the Respondent: Mr. John J. Kerr, Jr. (Simpson Thacher & Bartlett LLP)
Ms. Janet Whittaker (Simpson Thacher & Bartlett LLP)
Ms. Julissa Reynoso (Simpson Thacher & Bartlett LLP)
Ms. Emma Lindsay (Simpson Thacher & Bartlett LLP)
Ms. Leidilyn Contreras (Ministry of Industry and Commerce)
Dr. Miguel Alexis Payano (Corporación Dominicana de Empresas Electricas Estatales)
Mr. Mariano Germán Mejía (Germán Mejía y Asociados)
- Tribunal Secretary: Mr. Brooks W. Daly (Permanent Court of Arbitration)

2. Earlier Rulings

2.1. Earlier Rulings of the Tribunal remain valid unless changed expressly. The Tribunal recalls in particular the following sections of **Procedural Order No. 1** and includes any additions and changes made at the Procedural Meeting:

2.2. 7. *Communications*

Following the Procedural Meeting, paragraph 7.1 of Procedural Order No. 1 has been deleted and this section renumbered.

7.1. *The Parties shall not engage in any oral or written communications with any member of the Tribunal ex parte in connection with the subject matter of the arbitration.*

7.2. *The Parties shall address communications directly to each member of the Tribunal by e-mail and confirmed by courier, with a copy to the counsel for*

the other Party. Confirmation may be made by fax instead of courier if it does not exceed 15 pages.

- 7.3. *Copies of all communications shall be sent to the Registry.*
- 7.4. *To facilitate citations and word processing, Memorials and other larger submissions shall be in Windows Word and preceded by a Table of Contents.*
- 7.5. *Submissions of documents shall be submitted unbound in ring binders separated from Memorials and preceded by a list of such documents consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimants; R-1, R-2 etc. for Respondent). As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word, otherwise in Acrobat).*
- 7.6. *All written communications shall be deemed to have been validly made when they have been sent to:*

Claimants: to the addresses of counsel as above.

Respondent: to the addresses of counsel as above.

The following addressees are added to Counsel for Respondent (New York office) in paragraph 1 of Procedural Order No. 1:

Julissa Reynoso, e-mail: jreynoso2@stblaw.com

Karen Abravanel, e-mail: kabravanel@stblaw.com

Emma Lindsay, e-mail: elindsay@stblaw.com

Tribunal: to the addresses as above.

The line “CEPMLP/University of Dundee” is deleted from Prof. Wälde’s address in paragraph 3.1.1 of Procedural Order No. 1

Registry: to the address as above.

- 7.7. *The Parties shall send copies of correspondence between them to the Tribunal only if it pertains to a matter in which the Tribunal is required to take some action, or be apprised of some relevant event.*
- 7.8. *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 Tribunal to all other addressees referred to in paragraphs 1, 3 and 5.*

2.3. **8. *Language of the arbitration***

After consultation with the Parties at the Procedural Hearing, the Tribunal shall determine the language or languages to be used in the proceedings in accordance with Article 17(1) of the UNCITRAL Rules.

After the discussion at the Procedural Meeting the following is decided:

8.1. English shall be the official language of the arbitration.

8.2. Communications by the Tribunal (including orders, decisions and awards) and all submissions and communications by the Parties shall be in English, including translations in full of any witness statements prepared in Spanish and translations in relevant part of documentary evidence and legal authorities in a language other than English.

8.3. Spanish translations of all writings referred to in paragraph 8.2 that are not already in Spanish shall be submitted or communicated with the writings or as soon as possible thereafter, but in no event later than two weeks after their submission or communication, except that the Spanish translation of any award may be submitted up to six weeks after such award is made.

8.4. All oral proceedings shall be simultaneously interpreted into English and Spanish. The PCA as Registry will make the necessary arrangements in this regard.

2.4. **9. *Place of arbitration***

After consultation with the Parties at the Procedural Hearing, the Tribunal shall determine the place of arbitration in accordance with Art. 10.20 § 1 CAFTA-DR and Article 16(1) of the UNCITRAL Rules.

9.1 At the Procedural Meeting the Parties agreed that the place of arbitration shall be New York, New York, U.S.A.

9.2 It is envisaged that hearings will be held in New York, but it is recalled that, according to UNCITRAL Rule 16.2, hearings or Tribunal meetings may be held at other venues.

3. Timetable

Taking into account the Parties' proposed timetable submitted with the Claimants' e-mail of July 27, 2008, and the discussions at the Procedural Meeting, the timetable shall be as follows:

3.1. There shall be a **bifurcation** of the proceedings with a separate 1st stage dealing only with the issue of jurisdiction.

3.2. According to Article 10.16 § 4(c) CAFTA-DR, the Notice of Arbitration shall be submitted together with the Statement of Claim. The Tribunal notes that Claimants' Amended Memorial of June 17, 2008, indeed combines both.

3.3. By Friday, October 24, 2008,

Respondent submits a Memorial on Jurisdiction together with all evidence (documents, as well as witness statements and expert statements, if any) Respondent wishes to rely on regarding the issue of jurisdiction in accordance with the sections on evidence below.

3.4. By Friday, January 16, 2009,

Claimants submit a Counter-Memorial on Jurisdiction together with all evidence (documents, as well as witness statements and expert statements, if any) Claimants wish to rely on regarding the issue of jurisdiction in accordance with the sections on evidence below.

3.5. By Friday, February 20, 2009,

Any "non-disputing Party" as provided in Article 10.20 § 2 CAFTA-DR may make a written submission and notify the Tribunal if it wishes to make an oral submission regarding interpretation of CAFTA-DR and relevant to the issue of jurisdiction at the Hearing on Jurisdiction. Any submission or notice under this paragraph shall be made in accordance with paragraph 7 of Procedural Order No. 1, as amended in paragraph 2.2 of this Order.

3.6. By Friday, February 20, 2009,

3.6.1. Any person that wishes to file a written *amicus curiae* submission under Article 10.20 § 3 CAFTA-DR and relevant to the issue of jurisdiction may apply for leave from the Tribunal to file such a submission. The applicant for leave shall attach the submission to the application.

3.6.2. The application for leave to file an *amicus curiae* submission shall:

- (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
- (b) be no longer than 5 typed pages;
- (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
- (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;

- (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
- (f) specify the nature of the interest that the applicant has in the arbitration;
- (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
- (h) explain, by reference to the factors specified in paragraph 3.6.5, why the Tribunal should accept the submission;
- (i) be made in a language of the arbitration; and
- (j) comply with paragraph 7 of Procedural Order No. 1, as amended in paragraph 2.2 of this Order.

3.6.3. The *amicus curiae* submission filed by the applicant shall:

- (a) be dated and signed by the person filing the submission;
- (b) be concise, and in no case longer than 20 typed pages, including any appendices;
- (c) set out a precise statement supporting the applicant's position on the issues;
- (d) only address matters within the scope of the dispute; and
- (e) comply with paragraph 7 of Procedural Order No. 1, as amended in paragraph 2.2 of this Order.

3.6.4. The Tribunal will set an appropriate date by which the disputing parties and any non-disputing Parties may comment on the application for leave to file an *amicus curiae* submission.

3.6.5. In determining whether to grant leave to file an *amicus curiae* submission, the Tribunal will consider, among other things, the extent to which:

- (a) the *amicus curiae* submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the *amicus curiae* submission would address matters within the scope of the dispute;
- (c) the *amicus curiae* has a significant interest in the arbitration; and
- (d) there is a public interest in the subject-matter of the arbitration.

3.6.6. The Tribunal will ensure that:

- (a) any *amicus curiae* submission avoids disrupting the proceedings; and
- (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

3.6.7. The Tribunal will render a decision on whether to grant leave to file an *amicus curiae* submission. If leave to file an *amicus curiae* submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the *amicus curiae* submission.

- 3.6.8. The granting of leave to file an *amicus curiae* submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file an *amicus curiae* submission does not entitle the applicant that filed the submission to make further submissions in the arbitration. *Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their submissions must be limited to allegations, without introducing new evidence.
- 3.7. The Tribunal takes it that, for the procedure on jurisdiction, no procedure on the **production of documents** is required. However, as the Parties are not able to exclude the possibility that document requests will be made from either side, the following procedural steps are included:
- 3.7.1. By Friday, January 23, 2009, the Parties may request disclosure of documents from the other Party (with a copy to the Tribunal).
- 3.7.2. By Friday, February 6, 2009, the receiving Party either produces the requested documents or replies by a reasoned objection to the other Party (with a copy to the Tribunal).
- 3.7.3. By Friday, February 13, 2009, the Parties try to agree regarding disclosure of the documents to which objections have been made.
- 3.7.4. By Friday, February 20, 2009, insofar as they cannot agree, the Parties may submit reasoned applications to the Tribunal in the form of a so-called *Redfern Schedule* to order production of the documents.
- 3.7.5. By Friday, February 27, 2009, the Tribunal decides on such applications.
- 3.7.6. By Friday, March 6, 2009, the Parties produce documents as ordered by the Tribunal.
- 3.8. By Friday, April 17, 2009,
- Respondent submits a Rebuttal Memorial on Jurisdiction, together with all further evidence (documents, as well as witness statements and expert statements, if any) Respondent wishes to rely on in accordance with the sections below, but only in rebuttal to the 1st round Memorial of Claimants.
- 3.9. By Friday, May 29, 2009,
- Claimants submit a Rebuttal Memorial on Jurisdiction, together with all further evidence (documents, as well as witness statements and expert statements, if any) Claimants wish to rely on in accordance with the sections below, but only in rebuttal to the 2nd round Memorial of Respondent.

- 3.10. On Tuesday, September 15, 2009,

One day **Hearing on Jurisdiction** in New York City; should examination of witnesses or experts be required, this hearing may be extended to up to three days if found necessary by the Tribunal after consultation with the Parties, and be held September 15-17, 2009.

- 3.11. As soon as possible after the Hearing on Jurisdiction, but no later than January 31, 2010, the Tribunal will decide on how it will address the question of jurisdiction and inform the Parties by award, order, or otherwise. At the Procedural Meeting the Parties agreed that Article 10.20 § 9(a) CAFTA-DR does not apply to any decision or award the Tribunal may make on jurisdiction.

- 3.12. As a precaution, the following timetable is established for the case that the Tribunal accepts jurisdiction over all or part of the case:

- 3.13. By Friday, March 26, 2010,

Claimants submit, updating their Statement of Claim submitted earlier, a 1st round Memorial on the Merits, together with all evidence (documents, as well as witness statements and expert statements if any) Claimants wish to rely on for the merits in accordance with the sections on evidence below.

- 3.14. By Friday, May 21, 2010,

Respondent submits a 1st round Memorial on the Merits, together with all evidence (documents, as well as witness statements and expert statements if any) Respondent wishes to rely on for the merits in accordance with the sections on evidence below.

- 3.15. By Friday, July 2, 2010,

Any “non-disputing Party” as provided in Article 10.20 § 2 CAFTA-DR may make a written submission and notify the Tribunal if it wishes to make an oral submission regarding interpretation of CAFTA-DR and relevant to the merits of the case at the Hearing on the Merits. By the same date, any person that wishes to file a written *amicus curiae* submission under Article 10.20 § 3 CAFTA-DR and relevant to the merits of the case shall apply for leave from the Tribunal to file such a submission. The applicant for leave shall attach the submission to the application. Any submission or notice under this paragraph shall be made in accordance with paragraph 7 of Procedural Order No. 1, as amended in paragraph 2.2 of this Order and, in the case of *amicus curiae* submissions, shall be made in accordance with paragraphs 3.6.2 to 3.6.8 of this Order.

- 3.16. As the Parties are not able to exclude the possibility that document requests will be made from either side regarding the merits, the following procedural steps are included:

3.16.1. By Friday, June 4, 2010, the Parties may request disclosure of documents from the other Party (with a copy to Tribunal).

- 3.16.2. By Friday, June 18, 2010, the receiving Party either produces the requested documents or replies by a reasoned objection to the other Party (with a copy to Tribunal).
- 3.16.3. By Friday, June 25, 2010, the Parties try to agree regarding disclosure of the documents to which objections have been made.
- 3.16.4. By Friday, July 2, 2010, insofar as they cannot agree, the Parties may submit reasoned applications to the Tribunal in the form of a so-called *Redfern Schedule* to order production of the documents.
- 3.16.5. By Friday, July 9, 2010, the Tribunal decides on such applications.
- 3.16.6. By Friday, July 16, 2010, the Parties produce documents as ordered by the Tribunal.
- 3.17. By Friday, September 3, 2010,
- Claimants submit a Rebuttal Memorial on the Merits with any further evidence (documents, as well as witness statements and expert statements, if any), but only in rebuttal to Respondent's 1st round Memorial on the Merits or regarding new evidence from the procedure for document production above.
- 3.18. By Friday, October 22, 2010,
- Respondent submits a Rebuttal Memorial on the Merits with any further evidence (documents, as well as witness statements and expert statements, if any), but only in rebuttal to Claimant's Rebuttal Memorial on the Merits or regarding new evidence from the procedure for document production above.
- 3.19. Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.
- 3.20. By Wednesday, November 3, 2010, the Parties submit
- * notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing,
 - * and a chronological list of all exhibits with indications as to where the respective documents can be found in the file.
- 3.21. On Wednesday, November 10, 2010, a Pre-Hearing Conference between the Parties and the Tribunal shall be held, if considered necessary by the Tribunal, either in person or by telephone.
- 3.22. As soon as possible thereafter, the Tribunal shall issue a Procedural Order regarding details of the Hearing on the Merits.

3.23. Hearing on the Merits

Dates: from December 6 to 10, 2010,
and, if found necessary by the Tribunal after consultation with the Parties, extended to
continue from December 13 to 15, 2010.

Place: New York City

3.24. By dates set at the end of the Hearing after consultation with the Parties, Parties shall
submit

- * Post-Hearing Briefs (no new documents allowed)
- * and Claims for Arbitration Costs.

4. Evidence

In addition to the following provisions, the Parties and the Tribunal may use, as an additional
guideline, the “IBA Rules on the Taking of Evidence in International Commercial
Arbitration”, subject always to changes considered appropriate in this case by the Tribunal.

5. Documentary Evidence

5.1. All documents (which shall include texts and translations into English of all law
provisions, cases and authorities) considered relevant by the Parties shall be submitted
with their Memorials, as established in the Timetable.

5.2. All documents shall be submitted in the form established above in the section on
communications.

5.3. New factual allegations or evidence shall not be permitted after the respective dates
for the Rebuttal Memorials indicated in the above Timetable unless agreed between
the Parties or expressly authorized by the Tribunal.

5.4. Documents in a language other than English shall be accompanied by a translation
into English.

5.5. Unless a Party raises an objection within two weeks after receiving a document, or a
late objection is found justified by the Tribunal,

- * a document is accepted as having originated from the source indicated in the
document;
- * a copy of a dispatched communication is accepted without further proof as
having been received by the addressee; and
- * a copy of a document and its translation into English, if any, is accepted as
correct.

6. **Witness Evidence**

- 6.1. Written Witness Statements of all witnesses shall be submitted together with the Memorials mentioned above by the time limits established in the Timetable and in the form established above in the section on communications.
- 6.2. In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

7. **Expert Evidence**

Should the Parties wish to present expert testimony, the same procedure would apply as for witnesses.

8. **Hearings**

Subject to changes in view of the further procedure up to the Hearings, the following is established for the Hearings:

- 8.1. The dates shall be as established in the Timetable above.
- 8.2. No new documents may be presented at the Hearings. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.
- 8.3. A live **transcript** shall be made of the Hearings and provided to the Parties and the Arbitrators. There shall be an English and a Spanish transcription of the Hearings. The PCA, as Registry, shall make the necessary arrangements in this regard.
- 8.4. **Hearing on Jurisdiction:**
 - 8.4.1. The Hearing shall be held at the offices of Simpson Thacher & Bartlett LLP in New York City on September 15, 2009, with the possibility of extension to be held September 15-17, 2009. The Parties shall work together and with the PCA to make appropriate arrangements for the Hearing.
 - 8.4.2. Assuming that no witnesses or experts have to be examined and the Hearing on Jurisdiction is restricted to one day, the **Agenda** shall be as follows:
 1. Short Introduction by Chairman of Tribunal.
 2. Opening Statement by Respondent of up to 1 hour.
 3. Opening Statement by Claimants of up to 1 hour.

4. Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.
5. 2nd Round Presentation by Respondent of up to 1 hour.
6. 2nd Round Presentation by Claimants of up to 1 hour.
7. Final questions by the Tribunal.
8. Discussion on whether Post-Hearing Briefs are deemed necessary and of any further issues of procedure.

Members of the Tribunal may raise questions at any time considered appropriate.

8.5. Hearing on the Merits:

- 8.5.1. Should a Hearing on the Merits become necessary, further details shall be established after the Hearing on Jurisdiction and after consultation with the Parties.
- 8.5.2. Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference.

9. Extensions of Deadlines and Other Procedural Decisions

- 9.1. Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.
- 9.2. Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after the event has occurred which prevents a Party from complying with the deadline.
- 9.3. The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.
- 9.4. Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone.

10. Transparency of the Proceedings

- 10.1. The procedure is subject to Article 10.21 CAFTA-DR.
- 10.2. In addition to that provision, the following shall apply:
 - 10.2.1. Documents to be made available to the public pursuant to Article 10.21 CAFTA-DR may be posted by the Respondent on the following website:

http://www.seic.gov.do/comercioexterior/DR_Cafta/Notificaciones.aspx.

With the agreement of the Parties, the PCA will also make information available to the public on its website: www.pca-cpa.org.

10.2.2. The Parties may request that the PCA forward copies of documents or other information to the non-disputing Parties to CAFTA-DR.

10.2.3. The PCA, in consultation with the Parties, shall make the necessary preparations for public attendance at hearings.

On behalf of the Tribunal,

A handwritten signature in black ink, appearing to read 'Böckstiegel', written in a cursive style.

Karl-Heinz Böckstiegel
President of Tribunal