

ARBITRATION UNDER THE UNCITRAL RULES

PCA CASE NO. 2010-18 / BCB-BZ

BRITISH CARIBBEAN BANK LTD (CLAIMANT)

v.

THE GOVERNMENT OF BELIZE (RESPONDENT)

ORDER NO. 10

21 July 2014

CONSIDERING:

- (A) The initiation on 4 May 2010 of these arbitration proceedings;
- (B) The initiation on 4 December 2009 of arbitration proceedings between Dunkeld International Investment Limited and the Government of Belize;
- (C) Paragraph 13.1 of the Tribunal's Order No. 1 of 6 September 2010, which provided as follows:

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.

- (D) The hearing in these proceedings held in San José, Costa Rica from 17-19 March 2014;
- (E) The Respondent's letter of 9 June 2014, requesting permission to use the transcript of the March 2014 hearing in the proceedings in *Dunkeld International Investment Ltd. v The Government of Belize* on the grounds that (a) both matters involve "many overlapping factual and legal issues"; (b) introducing the transcript in the proceedings in *Dunkeld International Investment Ltd. v The Government of Belize* "is necessary for GOB to defend its rights and for *the truth* to be aired out"; (c) "various testimony taken in the BCB Arbitration merits hearing is directly relevant to the Dunkeld Arbitration"; (d) as the Claimant and Dunkeld are represented by the same counsel there is "no risk of unfair advantage or prejudice"; and (e) as the same Tribunal presides over both matters, it is "already aware of the facts that were presented at the hearing" (the "Request");

- (F) The Claimant's letter of 19 June 2014, in which it (a) opposes the Respondent's Request; (b) invokes Article 25(4) of the UNCITRAL Arbitration Rules; (c) submits that if the Request were permitted it would seriously prejudice Claimant and be procedurally unfair; (d) notes that the Respondent had previously opposed the Claimant's efforts to coordinate proceedings between the two arbitrations; and (e) argues that the introduction of the hearing transcripts would be unfair to the Claimant as the Respondent would be afforded a further opportunity to attack the testimony of the Claimant's witnesses without the Claimant having the opportunity to respond;
- (G) The Respondent's letter of 25 June 2014, in which it argues that Article 25(4) of the UNCITRAL Arbitration Rules "does not require confidentiality over the entire arbitration proceedings; rather, it relates to the public's ability to participate in the actual hearing" and elaborated on the arguments recorded in Recital (J) above in favour of permitting the use of the transcripts;
- (H) The Claimant's letter of 30 June 2014, in which it contends that Article 25(4) of the UNCITRAL Arbitration Rules requires the confidentiality of the transcripts of an *in camera* hearing in the absence of party agreement on their disclosure;
- (I) The Claimant's letter of 1 July 2010 to the Appointing Authority, in which it noted that "due to the factual similarities and the circumstances at issue in *Dunkeld International Investment Ltd. v The Government of Belize*, . . . it is the Claimant's position that the same Tribunal, if willing should sit in both cases";
- (J) That these proceedings and the proceedings in *Dunkeld International Investment Ltd. v The Government of Belize* are being heard by the same Tribunal and that the same Tribunal was constituted at the Claimant's request;
- (K) That the Claimant and the claimant in *Dunkeld International Investment Ltd. v The Government of Belize* are represented by the same counsel as is the Respondent in both matters;
- (L) That in the present circumstances, the Tribunal, the Respondent, and the claimant in *Dunkeld International Investment Ltd. v The Government of Belize* are already effectively aware of the content of the hearing transcripts in these proceedings;
- (M) The Claimant's letter to the Respondent of 28 June 2013, proposing "that the BCB and Dunkeld arbitrations be heard together on a concurrent basis" and noting that

[t]here is a large overlap between the legal and factual issues which arise in both the BCB and Dunkeld arbitrations. The claims in those arbitrations are advanced under largely the same provisions of the UK-Belize Bilateral Investment Treaty. They also arise out of the same underlying legislative measures. Moreover, the same arbitral tribunal presides over both arbitrations.

(N) Paragraph 4 of the Tribunal's Order No. 4 of 25 July 2013 which provides as follows:

¶ 13.1 of Procedural Order No. 1 is supplemented as follows. For the time being the procedural orders, decisions and awards issued and rendered by the Tribunal shall be published on the website of the Permanent Court of Arbitration, subject to redactions based on confidentiality of commercially or politically sensitive or privileged matters as requested by either Party. To the extent that information is produced or discussed during the arbitration proceedings which a Party considers to be commercially or politically sensitive or privileged, that Party may request that the Tribunal deems it confidential.

(O) Article 25(4) of the UNCITRAL Arbitration Rules, which provides that "Hearings shall be held in camera unless the parties agree otherwise";

(P) That Article 25(4) of the UNCITRAL Rules does not apply to the disclosure of hearing transcripts exclusively to individuals or entities with pre-existing actual or constructive knowledge of the content of such transcripts;

(Q) That in light of the foregoing, granting Respondent's Request would neither prejudice Claimant nor would it be procedurally unfair;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. The Respondent's Request to use the transcript of the hearing in these proceedings in the proceedings in *Dunkeld International Investment Ltd. v The Government of Belize* is **granted**.

On behalf of the Arbitral Tribunal,



Albert Jan van den Berg,
Presiding Arbitrator