

ARBITRATION UNDER THE UNCITRAL RULES

PCA CASE NO. 2010-13 / DUN-BZ

DUNKELD INTERNATIONAL INVESTMENT LTD (CLAIMANT)

v.

THE GOVERNMENT OF BELIZE (RESPONDENT)

ORDER NO. 6

3 March 2015

CONSIDERING:

- (A) The initiation of these arbitration proceedings on 4 December 2009;
- (B) The Tribunal's communication of 8 June 2010, postponing, at the Claimant's request, the previously scheduled preliminary conference until further notice;
- (C) The Respondent's communication of 17 December 2013, indicating that in light of a judgment of the Court of Appeal of Belize, the Respondent had decided to participate in these arbitration proceedings and advising the Tribunal and the Claimant of the counsel retained by the Respondent to represent it;
- (D) The procedural telephone conference held between the Tribunal and the Parties on 27 January 2014 concerning, *inter alia*, the scheduling of these proceedings;
- (E) The Tribunal's Order No. 1 of 6 February 2014, fixing a schedule for these proceedings and the dates of 5-9 November 2014 for a hearing;
- (F) The Parties' e-mail correspondence of 21 and 22 May 2014, setting out the Parties' agreed dates for the procedural steps in advance of the scheduled hearing;
- (G) The Respondent's observation in its *Statement of Defence* of 30 May 2014 that "this Tribunal should *immediately* bifurcate the Preliminary Objections and dismiss Dunkeld's claims before GOB is forced to spend further *public* resources in responding to these frivolous claims" (*Statement of Defence*, paras. 9, 17, 176-180);
- (H) The Claimant's opposition to bifurcation in its *Reply* of 20 August 2014 (paras. 7(e), 11(i), 196-198);
- (I) The Respondent's observations on bifurcation set out in its *Rejoinder* of 3 October 2014 (paras. 9, 222-229);

- (J) The Respondent's letter of 14 October 2014, requesting that the Tribunal "continue the hearing scheduled to begin on November 5, 2014 for a period of four months and to a date that is convenient to the Tribunal", in light of emergency medical conditions rendering the Respondent's counsel unable to prepare for or participate in the hearing;
- (K) The Tribunal's Order No. 5, of 17 October 2014, adjourning the hearing for a period of approximately four months and suspending all remaining deadlines pending the identification of new hearing dates;
- (L) The Tribunal's e-mail communication of 18 October 2014, identifying 7 to 11 April 2015 as dates for the re-scheduled hearing;
- (M) The hearing on jurisdiction and the merits scheduled for 7 to 11 April 2015;
- (N) The Respondent's *Motion to Bifurcate the Government's Preliminary Objections from Liability and Damages* (the "**Motion**") of 17 February 2015, requesting "that the Tribunal decline to exercise jurisdiction over Dunkeld's claims, dismiss Dunkeld's Statement of Claim, and award GOB its costs and fees in defending itself herein," or "[i]n the alternative, the upcoming hearing should adjudicate this jurisdictional issue only and postpone adjudication of the liability and damages issues on the grounds that bifurcation would prevent waste of resources and preserve the efficiency of this proceeding" (*Motion*, p. 6);
- (O) The Respondent's argument that:
- [a] bifurcated and early ruling on GOB's preliminary objections is warranted because the existence of the facts relevant to that determination are largely undisputed and the Tribunal thus can make a ruling disposing of the objections as a matter of law.
- (*Motion*, p. 1)
- (P) The Respondent's contention that it had "already requested a bifurcated hearing in its Statement of Defense and Rejoinder," and its statement that "[t]he purpose of this motion is to reiterate that request and to direct the Tribunal's attention to a new case that is dispositive of GOB's preliminary objection on the grounds of abuse of process and illegitimate treaty shopping" (*Motion*, p. 2);
- (Q) The Respondent's argument that "Dunkeld has abused the investment treaty arbitration process by attempting to avail itself of the Belize-U.K. Bilateral Investment Treaty's ("BIT") protections at a time when the dispute was foreseeable" (the "**Migration Objection**") (*Motion*, p. 2);
- (R) The Respondent's contention that *Renée Rose Levy de Levi and Gremcitel v. Republic of Peru* (the "**Levy Decision**") "is directly analogous to this case," as "it illustrates that Dunkeld's migration was an abuse of process" (*Motion*, p. 3);

- (S) The Respondent’s argument that “Dunkeld has not disputed any of these facts” outlined by the Respondent, and “as a result, it is undisputed that Dunkeld migrated in anticipation of the nationalization of Telemedia so that Dunkeld could pursue international investment arbitration pursuant to a BIT previously unavailable to it” (*Motion*, p. 5);
- (T) The Claimant’s *Response to the Government’s Motion* of 20 February 2015, arguing that “the Tribunal should dismiss the Government’s Bifurcation Request” (*Response*, para. 1);
- (U) The Claimant’s argument that “[t]he Tribunal has discretion to rule on a jurisdictional issue either as a preliminary issue or in its final award (Article 21(4) of the 1976 UNICTRAL Rules)” (*Response*, para. 7);
- (V) The Claimant’s contention that the three-fold test in *Glamis Gold v. United States of America* is relevant, because of its guidance to the effect that:
- [f]irst, the Tribunal “should take the claim as it is alleged by the Claimant.” Secondly, “the ‘plea’ must be one that goes to the ‘jurisdiction’ of the tribunal over the claim.” This is a threshold question. Thirdly, that a tribunal may refuse to bifurcate a jurisdictional objection when “doing so [was] unlikely to bring about increased efficiency in the proceedings.”
- (*Response*, para. 7);
- (W) The Claimant’s argument that the Respondent’s “Migration Objection is an issue which goes to the merits of the dispute, not jurisdiction,” since it is a part of the Respondent’s counterclaim for “actual and exemplary damages,” and thus the “[d]etermination of the Migration Objection cannot therefore be dispositive of the case without engaging with the remaining significant issues in the arbitration” (*Response*, para. 9);
- (X) The Claimant’s argument that, in considering the effect on procedural efficiency, “the Tribunal must engage in a balancing act,” the result of which is the conclusion that “there will be no increased efficiency by bifurcating the Migration Objection at this late stage,” and “significant prejudice will be caused to the Claimant” (*Request*, paras. 10-17);
- (Y) The Claimant’s argument that, “[t]o the extent that the Tribunal considers that it should at this stage consider the Levy Decision, it is respectfully submitted that it does not assist the Government and also importantly does not establish any new jurisprudence which could in any way explain the untimely nature of the Government’s application” (*Response*, para. 18);
- (Z) The Respondent’s *Reply on Bifurcation* of 24 February 2015, disagreeing that the abuse of process issue should be considered as an argument on the merits (*Reply on Bifurcation*, p. 2);

(AA) The Respondent's argument that "it only makes sense that the Tribunal first address potentially dispositive jurisdictional issues," thereby "sav[ing] [...] substantial time and resources" (*Reply on Bifurcation*, p. 2);

(BB) The Claimant's *Rejoinder on Bifurcation* of 27 February 2015, noting that:

the Government had until very recently approached the issue of bifurcation in the Dunkeld Arbitration in the same way as in the BCB arbitration. In the BCB Arbitration, the Government merely raised the issue of bifurcation in its pleadings and did not make a freestanding application. The Tribunal therefore dealt with any jurisdictional issues together with the merits of the dispute in one final substantive hearing. Given that this arbitration involves the same Tribunal and the same legal representation, there could have been no reason to assume that the Tribunal would bifurcate any issues without a formal application. Had the Government wished this arbitration to proceed differently, it was well aware that it was incumbent on it to make a formal application.

(*Rejoinder*, para. 5);

(CC) The Claimant's observation that:

[t]he Claimant continues to harbour concerns regarding the Government's approach to this arbitration. When the November 2014 full substantive hearing was adjourned in late October 2014, a period of over four months was given to the Government so that it would be in a position to represent itself on all issues at the final hearing scheduled for April 2015. Through its Bifurcation Request, the Government appears to be using the additional time given to it not for the purpose for which it was given, but as a misguided opportunity to cause further delay. It is respectfully submitted that this behaviour should not be rewarded.

(*Rejoinder*, para. 12);

(DD) Article 21 of the UNCITRAL Arbitration Rules, 1976;

(EE) That a tribunal's decision on whether to rule on a plea concerning its jurisdiction as a preliminary question or in its final award is dependent upon whether bifurcation will bring increased efficiency to the proceedings;

(FF) That the schedule for these proceedings as set out in the Tribunal's Orders Nos. 1 and 5 was adopted in full consultation with the Parties;

(GG) That in light of the timing of the Respondent's *Motion*, the bifurcation requested by the Respondent would not add to the efficiency of these proceedings;

(HH) That the Tribunal's decision on the Respondent's *Motion* is entirely without prejudice to the Tribunal's eventual decision on the Migration Objection or on the other jurisdictional objections set out by the Respondent, which the Tribunal will consider in full;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. The Respondent's *Motion* is rejected;
2. The Arbitral Proceedings shall continue on the same schedule as ordered previously.

On behalf of the Arbitral Tribunal,

A handwritten signature in black ink, appearing to read 'A. J. van den Berg', with a long horizontal line extending to the right.

Albert Jan van den Berg,
Presiding Arbitrator