

ARBITRATION UNDER THE UNCITRAL RULES

PCA CASE NO. 2010-18 / BCB-BZ

BRITISH CARIBBEAN BANK LTD (CLAIMANT)

v.

THE GOVERNMENT OF BELIZE (RESPONDENT)

**DECISION ON THE RESPONDENT'S MOTION
PURSUANT TO 1976 UNCITRAL
ARBITRATION RULES, ARTICLES 36 AND 37**

21 January 2015

CONSIDERING:

- (A) The Arbitral Tribunal's issuance of its Award on 19 December 2014;
- (B) Paragraph 4 of the Arbitral Tribunal's Order N° 4, which provided 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.
- (C) The Respondent's e-mail communication of 13 January 2015, indicating that the Respondent intended to make an application pursuant to the provisions of the UNCITRAL Arbitration Rules relating to the interpretation or correction of the award or to the issuance of an additional award;
- (D) Articles 36 and 37 of the UNCITRAL Arbitration Rules, 1976;
- (E) The Respondent's *Motion pursuant to 1976 UNCITRAL Arbitration Rules, Articles 36 and 37* (the "**Motion**"), submitted on 16 January 2015, requesting as follows:
 - 88. That pursuant to Article 36, the Tribunal correct the computation of Article 2(2) compensation in the Award and grant no compensation to the Claimant;

89. In the alternative, and pursuant to Article 37, the Tribunal adjudicate the Respondent's claim that, based on ADC Affiliate and like cases, the general rule in *Factory at Chorzów* does not apply, and grant no compensation to the Claimant under Article 2(2);
 90. As such, the Tribunal hold that the Respondent is the prevailing party and correct the Award to delete any award of interest, attorney's fees or costs in favor of the Claimant, and instead award to the Respondent its attorneys' fees and costs incurred in these proceedings;
 91. And requests such further relief as may be just and equitable.
- (F) The Respondent's argument, set out in its *Motion*, that "the use of a wrong method in the process of computing or calculating compensation clearly constitutes an 'error in computation'", such that the "Award may be corrected" to modify the Tribunal's reliance in the Award on the rule in *Factory at Chorzów* in calculating damages pursuant to Article 2(2) of the Treaty (Respondent's *Motion*, paras. 7-13);
- (G) The Respondent's argument that "the Tribunal's finding of a violation of Article 2(2) was based entirely on the finding of an unlawful expropriation of the Claimant's property rights", such that the Article 2(2) violation was dependent upon the finding of expropriation pursuant to Article 5 of the Treaty (Respondent's *Motion*, paras. 21-23);
- (H) The Respondent's argument that the Tribunal "erroneously found that there is an 'absence of an applicable provision within the Treaty itself,' [with respect to the compensation to be awarded for violations of Article 2(2) because the Treaty does mandate the fair market value method for both legal and illegal expropriations, and the Tribunal's finding of a violation of Article 2(2) was based solely on the finding of an illegal expropriation" (Respondent's *Motion*, para. 27);
- (I) The Respondent's argument that the decisions of other tribunals in investment treaty arbitrations, in particular *ADC Affiliate Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, "are overwhelmingly clear that compensation should have been computed only under the fair market value method, and the general rule in *Chorzów Factory* simply does not apply" (Respondent's *Motion*, para. 31; see generally, Respondent's *Motion*, paras. 31-62);
- (J) The Respondent's argument that in calculating compensation for the violation of Article 2(2), "the Tribunal conducted an *ex officio* examination of certain financial documentation about Telemedia, without providing the Respondent with any opportunity to respond", in respect of which expert testimony was

necessary and which the Tribunal lacked the information or expertise to assess (Respondent's *Motion*, paras. 65-79);

- (K) The Respondent's argument that –

the Tribunal did not rule on the issue whether, based on *ADC Affiliate* and like precedents, the general compensation rule in *Factory at Chorzów* cannot apply in the circumstances of this case discussed above, including because the Treaty is a *lex specialis*, the Treaty mandates compensation under the fair market value method for both legal and illegal expropriations, and/or the violation of the fair and equitable treatment standard is based on the finding of an illegal expropriation

and may therefore issue an additional award on this issue pursuant to Article 37 of the UNCITRAL Rules (Respondent's *Motion*, para. 84);

- (L) The Claimant's *Reply to Respondent's Motion pursuant to 1976 Arbitration Rules, Article 36 and 37* (the "**Reply**"), submitted on 19 January 2015, requesting that "that the Tribunal dismiss the Government's Application, with costs";

- (M) The Claimant's argument, set out in its *Reply*, that "Article 36 applies to errors affecting the expression of the tribunal's decision, not an alleged error in the process of reasoning. Accordingly, and contrary to what the Government says, Article 36 does not extend to revising the methodology used by the arbitral tribunal to determine compensation" (Claimant's *Reply*, para. 7);

- (N) The Claimant's argument that the Respondent's *Motion* "is not seeking correction of any computational, clerical or typographical errors Rather, the basis for the Application is the Government's disagreement with the Tribunal's approach to determining the compensation owed to the Claimant"(Claimant's *Reply*, para. 10);

- (O) The Claimant's argument that –

the Tribunal's conclusion that the Government treated the Claimant's investments in an unfair and inequitable manner did not rest solely on its finding that the Government expropriated those investments for an illegitimate purpose. Instead, that was only one of the factors (albeit the primary factor) that led the Tribunal to conclude that the Government had acted in breach of Article 2(2) of the Treaty.

(Claimant's *Reply*, para. 19);

- (P) The Claimant's argument that "the adoption of a particular methodology in cases involving an expropriation and a non-expropriatory breach of international law is a matter of the tribunal's 'preference' based on the particular facts of the case" (Claimant's *Reply*, para. 21);

- (Q) The Claimant's argument that "[t]o make a finding on the financial position of Telemedia prior to expropriation, the Tribunal does not require expert evidence" and that "[t]here is no general principle under international law or the UNCITRAL Rules that require such evidence" (Claimant's *Reply*, para. 22);
- (R) The Claimant's argument that "Article 37 is intended to cover 'obvious cases of omission' in which the tribunal fails to render a complete award" and that "Article 37 thus 'obviously has no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the award'" (Claimant's *Reply*, para. 25);
- (S) The Claimant's argument that "both parties had made lengthy submissions on the *ADC v Hungary* case, which the Tribunal has clearly considered and ruled upon in its Award" and that "accordingly, the Government's request is barred by the rule that an additional award is not available where the underlying issue has been 'specifically addressed'" (Claimant's *Reply*, para. 27);
- (T) That Article 36 of the UNCITRAL Rules applies only to the correction of unintentional errors of a technical nature and does not extend to the revision of the reasoning or substance of a tribunal's award;
- (U) That the Tribunal's decision to apply the *Factory at Chorzów* standard to the calculation of damages for the Respondent's violation of Article 2(2) of the Treaty formed part of the Tribunal's reasoned decision in its Award and is therefore not eligible for correction pursuant to Article 36;
- (V) That Article 37 of the UNCITRAL Rules is limited to the issuance of an additional award in respect of matters not decided in a tribunal's award;
- (W) That the applicability of the *Factory at Chorzów* standard to the calculation of damages for the Respondent's violation of Article 2(2) of the Treaty was decided in the Tribunal's Award and is therefore not a matter eligible for an additional award pursuant to Article 37;
- (X) That, notwithstanding that the Tribunal's findings in (T) through (W) above suffice to dispense with the Respondent's *Motion*, the Respondent's *Motion* conflates the Tribunal's finding of a violation of Article 5 of the Treaty with the Tribunal's finding of a violation of Article 2(2);
- (Y) That, while the conduct giving rise to a finding of expropriation may also give rise to finding of a failure to accord fair and equitable treatment, the nature of the two violations of the Treaty is distinct;

- (Z) That, where the Tribunal has found both an expropriation and a failure to accord fair and equitable treatment, it is not limited to awarding compensation pursuant to the *lex specialis* standard applicable to expropriation;
- (AA) That the Tribunal would not revise its Award as requested by the Respondent were it empowered to do so by the UNCITRAL Rules;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. The Respondent's request that the Tribunal, pursuant to Article 36 of the UNCITRAL Rules, "correct the computation of Article 2(2) compensation in the Award" is **denied**.
2. The Respondent's request that the Tribunal, pursuant to Article 37 of the UNCITRAL Rules, "adjudicate the Respondent's claim that, based on ADC Affiliate and like cases, the general rule in *Factory at Chorzów* does not apply" is **denied**.
3. The Respondent's further requests concerning the prevailing Party, interest, and attorneys' fees and costs are correspondingly **denied**.
4. The Claimant's request for the costs incurred in responding to the Respondent's *Motion* is **denied**.

On behalf of the Arbitral Tribunal,



Albert Jan van den Berg,
Presiding Arbitrator