

Date of dispatch to the parties: December 17, 2003

International Centre for Settlement of Investment Disputes

**CDC GROUP PLC**  
(Claimant)

v.

**REPUBLIC OF THE SEYCHELLES**  
(Respondent)

Case No. ARB/02/14

**AWARD**

Tribunal

Sir Anthony Mason, AC KBE

Secretary of the Tribunal

Martina Polasek

Representing the Claimant

Mr. Stephen Jagusch  
Allen & Overy  
One New Change  
London EC4M 9QQ  
United Kingdom

Representing the Respondent

Mr. Anthony Francis Tissa Fernando  
Attorney-General of the Republic of  
the Seychelles  
President's Office  
Department of Legal Affairs  
PO Box 58  
National House  
Republic of the Seychelles

## **I THE PARTIES**

1. Claimant CDC Group plc ("CDC") is a public company incorporated under the Companies Act 1985 in England and Wales. At all material times CDC has been, and continues to be, a national of the United Kingdom.

2. Respondent is the Republic of the Seychelles ("the Republic").

## **II JURISDICTION**

3. The dispute between the parties arises out of two agreements which are the subject of these proceedings.

(i) an agreement dated November 6, 1990 between CDC and the Government of the Republic (the "1990 Guarantee"); and

(ii) an agreement dated March 17, 1993 between CDC and the Government of the Republic (the "1993 Guarantee").

4. Each Guarantee contains the following provisions:

"6.1 The Government [defined as the Government of the Republic of the Seychelles] and CDC hereby consent and agree to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes all disputes between them arising out of this Agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States (hereinafter called 'The Convention') and the parties recognise that CDC is a 'National of another Contracting State' for the purposes of Article 25 of the Convention.

6.2 Arbitration proceedings following a submission under this Section shall, if the appropriate arrangements can be made and agreements secured pursuant to Article 63 of the Convention, be held in London, England.

6.3 The International Centre for Settlement of Investment Disputes shall be entitled to publish the award rendered by, as well as the minutes and other records of, the arbitral tribunal constituted following any submission under this Section."

5. Both the United Kingdom (of which CDC is a national) and the Republic of the Seychelles are Contracting States to the ICSID Convention. The ICSID Convention

entered into force in the United Kingdom on January 18, 1967 and in the Republic of the Seychelles on April 19, 1978.

6. As the Republic ultimately withdrew its objection to jurisdiction (see paras 19 and 34 below) and did not contest the Tribunal's jurisdiction at the oral hearing, I find that the conditions in art. 25(1) of the ICSID Convention have been fulfilled and that the Tribunal has jurisdiction to arbitrate this dispute.

### **III THE DISPUTE**

7. CDC claims that the Republic is in breach of its obligations under the Guarantees.

8. CDC claims:

- (i) Under the 1990 Guarantee, the Republic guaranteed to CDC punctual payment of all principal monies and interest becoming due and payable by Public Utilities Corporation ("PUC"), a statutory corporation incorporated in the Republic of the Seychelles, to CDC under a Loan Agreement between PUC and CDC dated September 20, 1990 (as amended by letters dated January, 10 1991 and July 3, 1992) together the "1990 Loan Agreement". By that Agreement CDC agreed to lend £450,000 to PUC.
- (ii) Under the 1993 Guarantee, the Republic guaranteed to CDC the due and punctual payment of all principal monies and interest becoming due and payable by PUC to CDC under a Loan Agreement between PUC and CDC dated February 5, 1993 (as amended and re-scheduled by an amending and re-scheduling Agreement dated January 25, 1996) (together the "1993 Loan Agreement"). By the 1993 Loan Agreement, CDC agreed to lend £1,800,000 to PUC.

- (iii) PUC is in default of its obligations to CDC under the 1990 Loan Agreement and the 1993 Loan Agreement (together the "Loan Agreements") in the manner specified in CDC's letter to the Republic dated January 2, 2002 (to which was attached CDC's letter to PUC dated December 17, 2001 on the same subject).
- (iv) The Republic has failed to meet CDC's demands for the Republic to honour the Republic's obligations under the Guarantees.

9. CDC claims that the total amount due and owing to CDC under the Loan Agreements as at December 4, 2001 was £2,103,379.32.

10. CDC has sought resolution of the dispute and payment of its claims over a long time.

#### **IV PROCEDURAL HISTORY**

11. CDC lodged with ICSID its request for arbitration dated August 22, 2002, as supplemented by its letter of October 17, 2002, of its dispute with the Republic.

12. On November 7, 2002, pursuant to Art. 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and Rules 6(1)(a) and 7(a) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration proceedings, the Secretary-General of ICSID registered the request in the Arbitration Register. A certificate of registration was issued on the same day and the parties were invited to constitute an Arbitral Tribunal.

13. Pursuant to Rule 2 of the ICSID Arbitration Rules, CDC proposed and the Republic agreed to the Secretary-General of ICSID appointing a Sole Arbitrator.

14. On December 19, 2002 I accepted appointment by the Secretary-General as Sole Arbitrator. The Tribunal was deemed to have been constituted and the proceedings to have begun on that day. The Secretary-General informed the parties on the same day that Ms Martina Polasek, Counsel, ICSID would serve as Secretary of the Tribunal.

15. The first session of the Tribunal was held, with the parties' agreement, in Sydney, Australia, on February 10, 2003. The parties confirmed that they had no objection to the proper constitution of the Tribunal. It was agreed that, in accordance with the contractual provisions between the parties, the place of proceeding be London, without prejudice to the Sole Arbitrator holding sessions with the parties at any other venue as may be convenient, after consultation with the parties.

16. It was agreed that CDC's request for arbitration be treated as its Memorial on the merits. The parties agreed on the following timetable:

- (i) the Republic to file its Counter-Memorial on the merits and any objections to the jurisdiction of the Tribunal by Monday, March 24, 2003.
- (ii) CDC to file a Reply by Thursday, April 17, 2003; and
- (iii) the Republic to file a Rejoinder by Thursday, May 15, 2003.

The parties agreed with the Sole Arbitrator's proposal that a hearing on the merits and jurisdiction be held in London on July 22-23, 2003.

## **V CDC'S INVESTMENTS IN THE SEYCHELLES**

17. CDC's activities are commercial in substance and nature. CDC's investments in the Seychelles related to the expansion of the capacity of the Baie Ste Anne Power Station on the Island of Praslin and the upgrading of Victoria A Power Station on the Island of Mahé. These investments were made on a commercial basis.

18. CDC claims that each of the Loan Agreements and each of the Guarantees amount to an "investment" within the meaning of Art. 25(1) of the ICSID Convention which provides that

"[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment".

19. Although the Republic initially contested CDC's claim that the Loan Agreements and Guarantees were "investments" within the meaning of Art. 25(1), the Republic subsequently withdrew its objection to jurisdiction at the oral hearing which took place on 22-23 July 2003.

## **VI RELIEF SOUGHT BY CDC**

20. By its Request for Arbitration, CDC sought from the Arbitral Tribunal an award including:

- (i) an order that the Republic shall pay to CDC the sum of £2,103,379.32 being the total amount due and owing to CDC under the Guarantees as at 4 December 2001;
- (ii) an order that the Republic shall pay to CDC the further amounts due and owing to CDC under the Loan Agreements (and, hence, the Guarantees) from 5 December 2001 to the date of the Award (as to which CDC will provide calculations and such further evidence as is necessary, in the course of the proceedings);
- (iii) an order that the Republic shall make payment to CDC of all legal and other expenses incurred by CDC in connection with this arbitration, including fees and expenses of its counsel and its solicitors, fees and

- expenses of ICSID, fees and expenses of the Arbitral Tribunal and any other expenses howsoever incurred in connection with this arbitration; and
- (iv) an order for such further or other relief as to the Arbitral Tribunal seem just or appropriate.

## **VII WRITTEN PROCEDURE AND EVENTS PRECEDING ORAL HEARING**

21. By its Counter-Memorial dated March 17, 2003, the Republic objected under Rule 41 of the Arbitration Rules read with Art. 25 of the Convention that the legal dispute, if any, between the parties was not one "arising directly out of an investment" between CDC and the Republic, as the investments were with PUC and not the Republic and the guarantees were not an investment within the meaning of Art. 25(1) of the Convention.

22. By its Counter-Memorial, the Republic further pleaded that, by reason of the poor performance and ultimate abandonment of the 4MW gas turbine generator purchased under the 1993 Loan Agreement relating to the Victoria A Power Station in the Island of Mahé, the capacity of PUC to supply electricity to its customers from 1994 to 1999 was severely affected and resulted in widespread disruption to the economy and loss of revenue to PUC and the Republic. The cost of the gas turbine generator and the cost of its replacement by four mobile generator sets had a drastic effect on the Republic's foreign exchange reserves and affected its ability to meet its commitment under the 1993 Guarantee. The Counter-Memorial did not contest the enforceability of the 1990 Loan Agreement and Guarantee relating to the Baie Ste Anne project.

23. The Republic also pleaded that the project set out in Schedule 1 to the 1993 Loan Agreement was "thoroughly appraised by" CDC and that the clause in the Guarantee

which makes the guarantee unconditional was "an unfair contract term in view of the circumstances of the case and the emerging jurisprudence in relation to International Trade and Investments between developed and developing countries".<sup>1</sup>

24. The Republic therefore sought dismissal of the claim on the basis of its objection to jurisdiction and, if not, dismissal of the claim on the ground that CDC should bear its share of the responsibility for the failure of the project and the consequential damage to the Seychelles economy.

25. By letter dated March 26, 2003, to the Tribunal, CDC's solicitors requested that the Tribunal suspend the procedural calendar agreed on at the first session and instead convene an early meeting of the parties to address the Republic's objection to jurisdiction and the Republic's defence on the merits. According to CDC's solicitors, the objection to jurisdiction was unarguable and the defence on the merits was without substance because there was no contractual obligation which imposed any responsibility on CDC for the success of the project. The facts pleaded by the Republic constituted no defence in law, so CDC's solicitors contended.

26. By a Decision dated April 17, 2003, the Tribunal ruled that the Republic's Counter-Memorial did not comply with the directions given by the Tribunal at its first session in that it was not accompanied by written statements of witnesses and expert reports on which the Republic intended to rely. The Tribunal ordered the Republic to provide promptly such statements and reports.

27. By the Decision, the Tribunal also ruled that the parties should have a further opportunity to address submissions on the question whether there should be a preliminary hearing to determine the questions of law and gave the Republic an opportunity to present

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<sup>1</sup> p. 4 of the Counter-Memorial

further submissions to show that why its defence on the merits was a good defence in law.

28. By its Reply dated April 17, 2003, CDC submitted that the Republic's objection to jurisdiction was misconceived and that the Republic's failure to comply with the directions given at its first sessions prevented CDC from presenting a Reply that fully complied with those directions. Nevertheless the CDC's Reply presented arguments why the Republic's defence on the merits was not a good defence in law and contended that CDC should not be required to present an answer on the facts to this defence when the Republic failed to comply with the Tribunal's directions as to witness statements and expert reports.

29. By its Rejoinder dated May 13, 2003, the Republic re-stated its objection to jurisdiction and its defence on the merits. As to the defence on the merits, the Rejoinder stated:

"The Respondent would be relying for its defence on the principles of equity, contractual fairness, inequality of bargaining power, contributory negligence and the emerging jurisprudence in relation to international trade and investments between developed and developing countries."<sup>2</sup>

30. As to CDC's request for a preliminary hearing, the Rejoinder stated:

"The Respondent has no objection to a preliminary hearing in London on the 22<sup>nd</sup> and 23<sup>rd</sup> of July 2003 on the two issues raised by the Claimant in its letter dated 26<sup>th</sup> March 2003 and depending on the determination to be made at such hearing proceeding to a hearing on the merits on a subsequent date to be agreed by the parties and the sole arbitrator."<sup>3</sup>

31. Having considered the pleadings and further correspondence between the parties and the Tribunal, the Tribunal, on June 5, 2003, issued its Second Decision, directing that a preliminary hearing be held in London on July 22-23, 2003 to determine the Republic's

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<sup>2</sup> p. 4 of the Rejoinder

objection to jurisdiction and whether the Republic's defence on the merits is capable of constituting a defence in law to CDC's claim or is otherwise capable of providing a basis in law for the Tribunal to order the Republic to pay a reduced sum in satisfaction of CDC's claims. The Tribunal stated that, if the parties wished to have both questions and the hearing on the merits dealt with on July 22-23, 2003, the Tribunal was prepared to deal with the matter on that basis.

32. By its Second Decision, the Tribunal directed the Republic to provide full and detailed particulars of

" 'the principles of equity, contractual fairness, inequality of bargaining, contributory negligence and the emerging jurisprudence in relation to international trade and investment between developed and developing countries' on which it proposes to rely at the preliminary hearing both by way of defence and by way of reduction of the amount to be awarded in satisfaction of Claimant's claim."

33. By its Addendum to the Rejoinder, the Republic sought to provide the particulars required in para. 30. The Addendum alleged that the Republic

"gave an unconditional guarantee to the Claimant in view of the representation made by the Claimant to the Respondent that they made a thorough appraisal of the project proposals in connection with the loan that was granted to PUC. It implied that the 4 MW gas turbine generator being purchased from the loan would be suitable and viable for PUC".<sup>4</sup>

This was the first specific mention in the pleadings of a case based on misrepresentation.

The Addendum went on to allege that the representation was an unambiguous representation of fact which the Republic was intended to act upon and did act upon to its detriment. The Addendum further alleged that CDC owed the Republic and PUC a duty to take reasonable care that the representation was accurate knowing that the Republic would act upon it in view of the fact that the knowledge of PUC and the Republic of this

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<sup>3</sup> *Id.*

<sup>4</sup> p. 1 of the Addendum to the Rejoinder

type of generator was extremely limited. The Addendum also alleged that the facts gave rise to a situation of inequality of bargaining power.

### **VIII THE ORAL HEARING**

34. The oral hearing took place in London on July 22 and 23, 2003. The oral hearing was confined to the second of the two questions of law, the Republic having indicated that it wished to call witnesses to substantiate its defence on the merits. The Republic had indicated shortly before the oral hearing that it withdrew its objection to jurisdiction. The Republic called three witnesses. CDC called no witnesses as the question for determination was whether the Republic's defence on the merits was capable of constituting a good defence in law. CDC reserved its right to call witnesses at a hearing on the merits, should such a hearing prove necessary.

35. The first witness was Mr Morin, an electrical engineer, who is the managing director of PUC and had worked with PUC since 1973. He was a member of the PUC negotiating team that dealt with CDC in relation to the 1993 Loan Agreement and Guarantee. He was the only witness who participated in those negotiations. He gave evidence that PUC requested CDC to fund the Victoria A power project involving the installation of a gas turbine. In connection with that application, PUC prepared and delivered to CDC an analysis of the project. Mr Morin said that a sum of £22,500, being 1.25% of the amount of the loan, was paid to CDC to make an analysis of the project.

36. According to Mr Morin, PUC and its engineers had no experience of gas turbine generators. They did not engage expert consultants. CDC and its engineers had more experience in power turbine technology than PUC. PUC relied on CDC as PUC did not have the resources to engage independent consultants. Mr Morin said that if CDC had

not done an appraisal of the project, PUC would not have bought the turbine from EGT. He described CDC variously as a "partner", "assessor" and "adviser" in relation to the project. He also stated that PUC and CDC were unequal in bargaining power, CDC being well resourced while PUC was under-resourced and desperately in need of additional power generation to satisfy the growing demand for power in the Seychelles.

37. Mr Morin then stated that the gas plant never operated properly, that it was plagued with numerous problems, that it was not used after 1999 and was replaced by four small generator sets at substantial extra cost. The breakdown and the incapacity of the plant had a very significant adverse impact on the tourist industry and was detrimental to the Seychelles economy. When asked whether there was anything about the loan which was unfair or unreasonable, leaving aside the problems with the turbine, Mr Morin's answer was "No".

38. Mr Morin has never seen an appraisal of the project by CDC. No such appraisal was produced by the Republic at the hearing, nor has anyone seen a copy of a CDC appraisal of the project in PUC files. In fact, Mr Morin did not know whether CDC made an appraisal or not. In cross-examination, Mr Morin was asked

"... are you saying one of them" [officers of CDC] said to one of you that they were appraising the project in terms of its suitability or viability, or did they merely tell [you] that they were conducting their own assessment of the project?"

His answer was

"They were conducting their own assessment of the project."

He was then asked

"Other than to subsequently grant the loan, was there any indication from CDC as to the outcome of its own assessment of the project?"

His answer was "No" but he went on to say that the contract stated that they were going to carry out an appraisal of viability (which it did not) and that PUC thought that CDC would have told us if they considered the project was not viable. He referred to the earlier relationship of partner and adviser assumed by CDC.

39. Mr Morin said that he was not aware that PUC had ever made a claim against CDC in connection with the project before CDC made its request for arbitration. He also said that PUC had not taken action against EGT, the supplier of the gas turbine, on account of the expense involved. It seems that PUC had decided on a gas turbine, though not an EGT turbine, before PUC sought finance from CDC. Mr Morin stated in re-examination that CDC had "not directly" ever represented to PUC the quality and suitability of the turbine. He was not aware that it had ever been asked to do so.

40. The Republic's second witness was Mr Francis Chang-Leng, Governor of the Central Bank of the Seychelles and the Principal Secretary of the Ministry of Finance. He has been working for the Ministry since 1991. He gave evidence of other earlier projects in which the Republic and CDC had been involved, including the Reef Hotel in which they were partners. He said that the Republic relied on CDC's appraisal of the Baie St Anne and the Victoria A projects. He regarded the relationship between the Republic and CDC as one of partnership in relation to the two projects and as one to be distinguished from the ordinary relationship between a borrower and a bank. Like Mr Morin, Mr Chang-Leng relied on the fact that CDC had appraised the Victoria A project and would not have proceeded with it but for CDC's appraisal. He gave evidence of the loss suffered by PUC and the Republic in consequence of the flawed performance of the gas turbine.

41. In cross-examination, Mr Chang-Leng admitted that he had no involvement in the negotiation of the 1992 Loan Agreement with CDC and that he was relying on the antecedent general relationship between the parties in expecting CDC to carry out due diligence on the project and an appraisal for viability.

42. The Republic's third witness was Mr JG Dilliway, an engineer with experience as a specialist power consultant. Mr Dilliway considered that a gas turbine, particularly a liquid fuel gas turbine of the type supplied by EGT, was unsuitable for the Seychelles. It was an unproven type of turbine when supplied and it required clean quality fuel and back up which PUC was not in a provision to provide. He was surprised that CDC had made a favourable appraisal. Had he been in CDC's position, he would not have approved the loan because he would have regarded the project as "high risk" because the turbine was "first off" and the implementation of the project involved difficulties. Mr Dilliway had discussions with PUC and EGT from 1996 onwards in an endeavour to resolve difficulties when PUC complained that the turbine was poorly designed and deficient and EGT complained that the problems were due to poor fuel and inadequate maintenance. There was substance, he thought, in the complaints made by each party. He was, however, in no doubt that the EGT turbine was not the right equipment for the Seychelles.

## **IX THE APPLICABLE LAW**

43. Clause 7.8 of the Amending and Rescheduling Agreement provides:

"This Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of England ..."

Although the Republic made reference in its Rejoinder to

"the emerging jurisprudence in relation to international trade and investments between developed and developing countries",

no argument based in such jurisprudence was presented to the Tribunal. The submissions presented by the parties proceeded on the footing that CDC's claim was to be resolved in accordance with English law.

**X THE REPUBLIC'S CASE THAT CDC REPRESENTED THAT THE PROJECT WAS VIABLE AND SUITABLE**

44. The Republic's first submission is that there was an implied representation by CDC to both PUC and the Republic arising from the appraisal which it carried out of the Victoria A project that the project as well as the product (the EGT gas turbine) was suitable and viable for PUC. It is not in dispute that CDC conducted an appraisal. The Republic says that CDC was paid £22,500 for doing so in accordance with cl. 15(1) of the 1993 Loan Agreement.

45. According to counsel for the Republic, the implied representation arises from the following circumstances:

- (1) that the making of the loan application by PUC to CDC, accompanied by PUC's analysis of the project;
- (2) the making of an appraisal by CDC;
- (3) the charging of a fee under cl. 15(1);
- (4) the approval by CDC of the loan; and
- (5) the inference to be drawn from the communication of that approval that the appraisal was that the project was suitable and viable for PUC.

46. Clause 15(1) appears under the heading "SECTION 15 - NEGOTIATION FEE" and is in these terms:

"15.1 By way of recompense for the time spent and expenses incurred by CDC in considering proposals for the Project and in negotiating the terms and conditions of the Agreement, the Borrower shall within thirty days after the date hereof or, if earlier, upon the making of the first advance by CDC hereunder pay to CDC twenty-two thousand five hundred pounds sterling (£22,500)."

47. Clause 15(1) makes no mention of CDC making an appraisal of the project. The clause imposes no obligation on CDC to make an appraisal for the benefit of PUC or the Republic or at all. The absence of such an obligation indicates that an appraisal, if it was to be made, was to be for the benefit of CDC so as to enable it to determine whether the loan proposal was a viable transaction from its perspective, not to determine whether the project was suitable and viable for PUC. As appears from cl. 15(1), the sum of £22,500 was payable for time spent and expenses incurred by CDC in considering the proposals and in negotiating the terms and conditions of the 1993 Loan Agreement; in other words, to compensate CDC for the time and expense incurred in deciding whether it would make the loan which the Republic sought. The heading to the clause, in describing the charge as "Negotiation Fee", makes this clear. In this respect, the clause is consistent with the common practice of lenders in charging for time spent and expenses incurred in connection with the investigation and processing of applications for loans.

48. Whether an appraisal was to be made was a matter for CDC to determine in its own interests. There is nothing in cl. 15(1) to suggest that the fee was charged for giving advice to PUC, let alone the Republic, or for giving advice on which either of them could rely. Nor is there anything in the clause or in the 1993 Loan Agreement to suggest that CDC was assuming the role of adviser, assessor or partner in relation to the loan or the Victoria A Power Station Project.

49. Nor is there any evidence that PUC or the Republic ever requested CDC to make an appraisal for their benefit or to enable PUC to decide whether it should proceed with the Victoria A project or to give advice in relation to the project. Likewise there is no evidence that CDC represented to PUC or the Republic that CDC would make an appraisal of the project for their benefit.

50. Indeed, there is a remarkable absence of evidence on the subject of CDC making an appraisal or feasibility study of the project. There is no evidence that CDC delivered to the Republic a copy of such an appraisal or study or communicated the contents of an appraisal or study to the Republic. Absent evidence of this kind, there is no foundation for the implied representation on which the Republic relies.

51. The Republic has assumed, no doubt justifiably, that, in the ordinary course of considering the application for the loan, CDC made its own favourable assessment of the loan. The Republic then relied upon that assumed favourable assessment in proceeding with the project, purchasing the gas turbine and entering into the Loan Agreement and the Guarantee. But reliance without more does not establish that CDC made a representation of the kind alleged by the Republic.

52. There is a fundamental difference between a lender making an appraisal or study of a project for its own purpose in deciding whether it will make a loan and making an appraisal or study of a project for the benefit of the borrower. Indeed, it would be unusual for a lender to make an appraisal or study for the benefit of the borrower.

53. The point was well made by Lord Millett in *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC Appeal No. 65 of 2002, 30 June 2003. His Lordship said (at para. 22):

"There is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound."

54. Although it was pleaded that CDC was aware that the Republic was relying upon its appraisal of the project, there was no evidence of CDC's awareness of that reliance or of any communication by PUC to CDC that PUC was relying on such an appraisal. And, accepting that a relationship of partner, associate, adviser existed at an earlier time between CDC and the Republic, the immediately antecedent transaction between the parties was the 1990 Loan Agreement and Guarantee. It was not suggested that it was other than a loan transaction.

55. Finally, on this point, it is necessary to refer to cl. 17.8 of the 1993 Loan Agreement and cl. 2.4 of the 1993 Guarantee. Clause 17.8 provides:

"The obligations of the Borrower to pay punctually all moneys from time to time falling due by it in accordance with the provisions of this Agreement are absolute and shall be in no way impaired or affected by reason of any failure or delay on the part of CDC to assert or enforce any of its rights or by reason of failure of the purpose of this Agreement or of impossibility to carry out the Project or any part thereof or for any other reason."

Clause 2.4 provides:

"There are no representations, collateral agreements or conditions with respect to this guarantee and affecting the liability of the Government hereunder other than those contained herein."

Clause 17.8 makes it clear that PUC's obligations under the Loan Agreement to carry out its terms are absolute while cl. 2.4 undermines the basis on which the Republic seeks to establish an implied representation. A provision such as cl. 2.4 may be ineffective to

exclude an express representation but its operation in excluding an implied representation, derived in part from provisions in the 1993 Loan Agreement and Guarantee, seems to be fair and reasonable.

**XI THE REPUBLIC'S CASE THAT CDC OWED A DUTY OF CARE TO THE REPUBLIC AND WAS IN BREACH OF THAT DUTY OF CARE**

56. On the same facts, the Republic submits that CDC owed a duty of care to PUC and the Republic to make an accurate appraisal of the project and that CDC was in breach of its duty of care because its appraisal was negligently made. CDC's first answer to this submission is that a lender who makes an appraisal of the viability of a loan for its own purposes as lender owes no duty of care to the borrower to make in relation to that appraisal. Mr Jagusch for CDC points to Lord Griffiths' citation of passages from the judgment of Kerr LJ in *Smith v Bush* as support for this proposition (see *Smith v Bush* [1988] QB 835 at 851-852; affd. [1990] 1 AC 831 at 864). So much may be acknowledged.

57. The position may, however, well be different where the lender makes a representation to the borrower that the appraisal shows that the proposed transaction is viable and suitable for the borrower or it appears that the lender is aware that the borrower is relying on the vendor's appraisal for its own purposes. As pointed out earlier in these reasons, the evidence does not establish that such a representation was ever made or that PUC or the Republic was relying on CDC's appraisal for their own purposes. The other matters called in aid by the Republic alleged antecedent relationship between the parties (CDC being a partner, adviser or assessor) and the imbalance between the parties' resources and expertise are insufficient to generate a duty of care on the part of CDC in the light of the relationship established by the 1993 Loan Agreement, in the absence of a

case, based on evidence, that CDC made a representation, express or implied, that the project was viable and suitable for the Republic's purposes as distinct from making an appraisal for CDC's own purposes.

## **XII THE REPUBLIC'S CASE THAT THERE WAS AN INEQUALITY OF BARGAINING POWER**

58. The Republic seeks to bring the case within the concept of "inequality of bargaining power", as formulated by Lord Denning MR in *Lloyds Bank v Lundy* [1975] 1 QB 326 at 339. Lord Denning stated that English law gives relief to a person who,

"without independent advice enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, pressures brought to bear on him by or for the benefit of the other".

59. In *National Westminster Bank Plc v Morgan* [1985] AC 686 at 708, Lord Denning's general proposition was disapproved. In any event, neither the Loan Agreement nor the Guarantee fall within this statement of principle. There is nothing unfair in the terms of the Loan Agreement or the Guarantee. The Republic suggests that the provision for an "unconditional" guarantee was unfair. In the light of the provisions of the 1993 Loan Agreement, the Guarantee and the evidence, the unconditional guarantee was an appropriate commercial term for the protection of the lender. There is no suggestion of pressure brought to bear by CDC for its own benefit. The initiative for the transaction came from the Republic which wanted funding for the gas turbine which it wished to buy for the project. CDC was accommodating the Republic's wishes or commercial terms. On the evidence, CDC was not seeking to induce the Republic to enter into an improvident transaction for CDC's benefit.

60. In any event, neither CDC nor the Republic has sought at any time to rescind the 1993 Loan Agreement and the Guarantee on the ground of inequality of bargaining power or on any other ground. Indeed, PUC and the Republic entered into the 1996 re-scheduling Agreement with CDC after PUC and the Republic were well aware of the problems with the gas turbine.

### **XIII CONCLUSION**

61. For the foregoing reasons, the defences raised by the Republic do not amount to a good defence to CDC's claim based on the Guarantees. There should, accordingly, be orders that the Republic do pay to CDC principal and interest owing under the Guarantees. It is not contested that the amount of principal due and owing under the Guarantees is £1,771,096.75 (being £157,588.81 under the 1990 Loan Agreement and £1,613,507.94 under the 1993 Loan Agreement) and that interest is payable under the Loan Agreements at the rate of 9% per annum. The Agreements also provide that interest shall accrue from day to day and shall be payable at half-yearly intervals on February 15 and August 25 each year and that interest due for any period of less than a year shall be computed on the basis of a 360-day year of twelve 30-day months.

### **XIV INTEREST CALCULATION**

62. CDC asserts, without contradiction by the Republic, that from August 25, 2003 the amounts owing by the Republic are as follows:

<u>Outstanding amounts (£)</u>	<u>Principal (£)</u>	<u>Interest (£)</u>	<u>Premium (£)</u>	<u>Total (£)</u>
1990 Loan/Guarantee	157,588.81	<b>56,946.30</b>	-	214,535.11
1993 Loan Guarantee	1,613,507.94	<b>615,969.15</b>	2,689.18	2,232,166.27
<b>Total</b>	<b>1,771,096.75</b>	<b>672,915.45</b>	2,869.18	2,446,701.38

From August 25, 2003 interest continues to accrue at the daily rates of £53.63 per day and £557.37 per day on the 1990 Loan Agreement and Guarantee and the 1993 Loan Agreement and Guarantee respectively, making a total of £611.00 per day.

## **XV COSTS**

63. CDC seeks indemnity costs in the sum of £124,295.15. The Republic disputes this amount on the ground that it is excessive. Pursuant to Art. 61(2) of the ICSID Convention, I assess the costs to be paid by the Republic to CDC in the sum of £100,000.

## **AWARD**

In view of the foregoing, the Tribunal makes the following award:

- (1) an order that the Republic shall pay to CDC the sum of £1,771,096.75 being the total amount of principal due and owing to CDC under the Guarantees;
- (2) an order that the Republic shall pay to CDC the sum of £672,915.45 being interest due and owing to CDC under the Guarantees until August 25, 2003;
- (3) an order that the Republic shall pay interest to CDC from August 25, 2003 down to the date of this award at the daily rate of £611;
- (4) a declaration that the Republic is and remains liable to pay interest to CDC on the terms stated in Section 5 of each of the 1990 Loan Agreement and the 1993 Loan Agreement until the date of payment of the principal amounts due thereunder;
- (5) an order that the Republic shall make payment to CDC of £100,000 representing legal fees and disbursements incurred by CDC in relation to these proceedings; and

(6) an order that the Republic shall make payment to CDC of US\$40,000 in reimbursement of the fees and expenses of the Tribunal and of the Centre which have been paid by CDC.

DATED the 17th day of December 2003.

[*Signed*]

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Sir Anthony Mason, AC KBE  
Sole Arbitrator