

PCA CASE N° 2010-18

IN THE MATTER OF  
AN ARBITRATION PURSUANT TO  
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE  
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND  
AND THE GOVERNMENT OF BELIZE  
FOR THE PROMOTION AND PROTECTION OF  
INVESTMENTS OF 30 APRIL 1982

BEFORE  
A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH  
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW OF 1976

-between-

BRITISH CARIBBEAN BANK LIMITED (TURKS & CAICOS)

(“Claimant”)

-and-

THE GOVERNMENT OF BELIZE

(“Respondent”, and together with Claimant, the “Parties”)

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AWARD

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Arbitral Tribunal

Professor Albert Jan van den Berg  
Mr. John Beechey  
Mr. Rodrigo Oreamuno

19 December 2014

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## LIST OF DEFINED TERMS

<b>2009 Act</b>	Belize Telecommunications (Amendment) Act, 2009
<b>2009 Amendment Order</b>	Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order, 2009
<b>2009 Order</b>	Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009
<b>2009 Orders</b>	The 2009 Order and the 2009 Amendment Order
<b>2011 Act</b>	Belize Telecommunications (Amendment) Act, 2011
<b>2011 Order</b>	Belize Telecommunication (Assumption of Control over Belize Telemedia Limited) Order, 2011
<b>Accommodation Agreement</b>	An agreement between Telemedia and the Government dated 19 September 2005
<b>Anti-Arbitration Injunction</b>	The injunction issued by the Supreme Court of Belize on 7 December 2010
<b>Anti-Suit Injunction</b>	The injunction issued by the High Court of Justice of England and Wales on 4 May 2010
<b>Appointing Authority</b>	The Honourable Marc Lalonde, P.C., O.C., Q.C.
<b>BCB</b>	British Caribbean Bank Limited
<b>British Caribbean Bank</b>	British Caribbean Bank Limited
<b>BTL</b>	Belize Telecommunications Limited
<b>CCJ Judgment</b>	The Caribbean Court of Justice's Judgment of 25 June 2013
<b>Claim 360</b>	The Respondent and Telemedia's lawsuit against the Claimant, commenced on 3 June 2011
<b>Claimant</b>	British Caribbean Bank Limited
<b>Dunkeld Proceedings</b>	The arbitration proceedings in <i>Dunkeld International Investment Limited (Turks &amp; Caicos) v. The Government of Belize (PCA Case No. 2010-13)</i>
<b>Eighth Amendment</b>	Belize Constitution (Eighth Amendment) Act, 2011
<b>Employees Trust</b>	Belize Telecommunications Ltd Employees Trust
<b>First Constitutional Challenge</b>	The Claimant's constitutional challenge to the 2009 Act and Order commenced on 21 October 2009
<b>Government</b>	the Government of Belize

<b>GOB</b>	the Government of Belize
<b>Motion to Strike</b>	The Respondent's application of 8 April 2014 to strike certain spreadsheets from the Claimant's Post-Hearing Memorial
<b>PCA</b>	Permanent Court of Arbitration
<b>Preparatory Conference</b>	The Preparatory Conference in this arbitration held in Washington, DC on 26 August 2010
<b>Respondent</b>	the Government of Belize
<b>Respondent's Application for Further Submissions</b>	The Respondent's application of 3 June 2014, seeking leave to introduce into the record the Court of Appeal's decision, to submit "supplemental briefing with respect to the effect of the Court of Appeal decision," and to introduce additional evidence identified in relation to the Dunkeld Proceedings
<b>Respondent's Document Requests</b>	The Respondent's <i>Requests for Production of Documents</i> dated 28 September 2013 and the <i>Schedule of Definitions to GOB's Requests for Production of Documents</i>
<b>Second Constitutional Challenge</b>	The Claimant's constitutional challenge to the 2011 Act and Order commenced on 24 September 2011
<b>Second Motion to Strike</b>	The Respondent's application of 23 April 2014 to strike the Claimant's claim for legal fees in respect of the Anti-Suit Injunction
<b>Sunshine</b>	Sunshine Holding Limited
<b>Telemedia</b>	Belize Telemedia
<b>TIL</b>	Telemedia Investments Limited
<b>Treaty</b>	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 1976

## I. INTRODUCTION

### A. THE PARTIES

1. The Claimant in this arbitration is British Caribbean Bank Limited (“**British Caribbean Bank**”, “**BCB**” or the “**Claimant**”), a private company with limited liability, incorporated under the laws of the Turks and Caicos Islands, with its registered address at Governor’s Road, Leeward, Providenciales, Turks and Caicos Islands. The Claimant is represented in these proceedings by Judith Gill QC, Matthew Gearing QC, Ms. Angeline Welsh, Mr. Rishab Gupta, and Mr. James Neill of Allen & Overy LLP, One Bishops Square, London EC1 6AD, United Kingdom, and by Eamon H. Courtenay, S.C. and Ms. Ashanti Arthurs Martin of Courtenay Coye LLP, Attorneys-at-Law, No. 15 ‘A’ Street, Belize City, Belize.
2. The Respondent in this arbitration is the Government of Belize, a sovereign State (the “**Government**,” “**GOB**,” or the “**Respondent**”). The Respondent is represented in these proceedings by Juan C. Basombrio, Esq. of Dorsey & Whitney LLP, 600 Anton Boulevard, Suite 2000, Costa Mesa, California 92626-7655, United States; Denys Barrow, S.C. of Barrow & Co., Attorneys-at-law, 1440 Coney Drive, Belize City, Belize; and Gian C. Gandhi, S.C., Barrister at Law and Legal Counsel for and on behalf of the Government of Belize, Sir Edney Cain Building, Belmopan, Belize.

### B. BACKGROUND OF THE DISPUTE

3. A dispute has arisen between British Caribbean Bank and the Government in respect of which the Claimant commenced arbitration pursuant to the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982* (the “**Treaty**”). The Treaty was extended to the Turks and Caicos Islands by an Exchange of Notes in 1985.
4. The subject matter of this dispute concerns the Government’s compulsory acquisition of the Claimant’s interest in certain loan and security agreements concluded with Belize Telemedia (“**Telemedia**”), a telecommunications company registered in Belize, and Sunshine Holdings Limited (“**Sunshine**”), a company registered in Belize that holds shares in Telemedia. The acquisition in question took place in the context of the Government’s compulsory acquisition of Telemedia and Sunshine themselves.

## II. PROCEDURAL HISTORY

5. By letters dated 4 December 2009 and 13 January 2010, the Claimant notified the Respondent pursuant to Article 8(1) of the Treaty of the claims it intended to submit to international arbitration.
6. As the Parties did not reach a settlement of their dispute within the three-month period from the date of the notification of claim, the Claimant served a Notice of Arbitration on the Respondent on 4 May 2010, exercising its option to select arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the “**UNCITRAL Rules**”) in accordance with Article 8(2) of the Treaty.
7. By its Notice of Arbitration dated 4 May 2010, the Claimant notified the Respondent of its appointment of Mr. John Beechey as the first arbitrator. Mr. Beechey’s address is ICC International Court of Arbitration, 33-43 avenue du Président Wilson, 75116 Paris, France.
8. On 11 June 2010, pursuant to Article 7(2) of the UNCITRAL Rules, the Claimant wrote to the Permanent Court of Arbitration (the “**PCA**”), requesting that the Secretary-General of the PCA designate an appointing authority to appoint the second arbitrator.
9. On 30 June 2010, the Secretary-General of the PCA appointed The Honourable Marc Lalonde, P.C., O.C., Q.C. as the appointing authority (the “**Appointing Authority**”) to appoint the second arbitrator.
10. On 15 July 2010, the Appointing Authority appointed Mr. Rodrigo Oreamuno as the second arbitrator. Mr. Oreamuno’s address is Facio & Cañas, Barrio Tournon, PO Box 5173-1000, San José, Costa Rica.
11. On 20 July 2010, at the request of the co-arbitrators, the PCA wrote to the Parties informing them that, pursuant to Article 7(1) of the UNCITRAL Rules, the co-arbitrators had selected Professor Dr. Albert Jan van den Berg as the Presiding Arbitrator. Professor van den Berg’s address is Hanotiau & van den Berg, IT Tower, 9th Floor, 480 Avenue Louise, B.9, 1050 Brussels, Belgium.
12. By letter dated 26 July 2010, the Tribunal directed that a Preparatory Conference would be held with the Parties on 26 August 2010 to determine the further conduct of the proceedings.
13. On 26 August 2010, the Tribunal held a Preparatory Conference in Washington D.C. to address the procedural conduct of the arbitration proceedings (“**Preparatory Conference**”). Although duly notified of the Preparatory Conference, the Respondent did not appear, and the Tribunal

determined that in the absence of good cause for this failure it would proceed with the arbitration.

14. Following the Preparatory Conference, the Tribunal circulated a draft Order N° 1 to the Parties on 31 August 2010 for their comments. On 6 September 2010, after receiving comments from the Claimant, the Tribunal issued **Order N° 1**.
15. On 29 September 2010, pursuant to the procedural timetable set out in Order N° 1, the Claimant submitted its **Statement of Claim**.
16. By letter dated 17 November 2010, the Claimant requested leave to submit a limited quantity of additional documentary evidence by 3 December 2010, which are “likely to consist of submissions and documents that have recently been filed in . . . domestic proceedings in Belize in which the Parties are involved, official correspondence issued by the United Kingdom concerning the validity of the Treaty, and documents relating to recent developments in Belize affecting the Claimant’s investments”. In its letter, the Claimant submitted that these documents relate to the Tribunal’s jurisdiction and to the alleged expropriation of the Claimant’s investments.
17. By letter dated 23 November 2010, the Tribunal requested that the Respondent comment on the Claimant’s request of 17 November 2010, on or before 30 November 2010. No comments were forthcoming from the Respondent.
18. On 29 November 2010, the Tribunal issued **Order N° 2**, which noted that the Respondent had not indicated whether it wished to provide a Statement of Defence in the proceedings and that on the date fixed by the Tribunal for the service of a Statement of Defence, no such submission had been received from the Respondent. Accordingly, pursuant to Article 28(1) of the UNCITRAL Rules, the Tribunal ordered that the proceedings continue.
19. On 3 December 2010, the Tribunal issued **Order N° 3** in which it (i) noted that the Respondent had not commented on the Claimant’s request of 17 November 2010; (ii) found that the documents identified by the Claimant appeared to be relevant and material; and (iii) granted the Claimant’s request.
20. On 7 December 2010, the Claimant submitted the documentary evidence referred to in Order N° 3.
21. By letter dated 10 December 2010, the Claimant informed the Tribunal that the **Supreme Court of Belize** had issued an injunction on 7 December 2010 restraining the Claimant from taking

further steps in the arbitration proceedings. It also stated that it was considering the avenues of appeal in the Belize courts to set aside the order and requested the Tribunal to adjourn the arbitral hearing until further notice.

22. By letter dated 13 December 2010, the Tribunal took note of the developments in the Supreme Court of Belize and of the Claimant's request, and notified the Parties that the hearing was adjourned until further notice.
23. Between December 2010 and June 2013, the Parties engaged in litigation in the courts of Belize and other fora.
24. On 27 June 2013, the Claimant notified the Tribunal that the **Caribbean Court of Justice**, the highest appellate court for Belize, had discharged the injunction against the Claimant's pursuit of these proceedings.<sup>1</sup> The Claimant requested that the Tribunal schedule a procedural hearing with the Parties for the purpose of determining the next steps in the arbitration proceedings.
25. By e-mail correspondence dated 2 July 2013, the Respondent notified the Tribunal and the PCA that, as a result of the decision of the Caribbean Court of Justice, the Government of Belize had decided to participate in the arbitration proceedings.
26. On 10 July 2013, a procedural telephone conference was held by the Tribunal and the Parties. On the same day, the Tribunal circulated a draft timetable for the arbitration proceedings for the Parties' comments and completion.
27. On 16 July 2013, the Claimant submitted an **Amended Statement of Claim** and accompanying documents.
28. On 25 July 2013, the Tribunal issued **Order N° 4**, in which it set out the revised procedural timetable for the arbitration proceedings.
29. On 13 September 2013, pursuant to the revised procedural timetable, the Respondent submitted its **Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence**, together with accompanying documents.
30. On 28 September 2013, pursuant to the revised procedural timetable established by the Tribunal, the Respondent submitted its *Requests for Production of Documents* to the Claimant,

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<sup>1</sup> *British Caribbean Bank Limited v The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, [2013] CCJ 4 (AJ), Judgment of 25 June 2013, available at <<http://www.caribbeancourtjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf>>.



along with a *Schedule of Definitions to GOB's Requests for Production of Documents* (“**Respondent's Document Requests**”).

31. By letter dated 11 October 2013, the Claimant notified the Tribunal of the Parties' agreement to extend the deadline for the production of documents phase by one week.
32. On 18 October 2013, the Claimant submitted its objections to the Respondent's Document Requests.
33. On 8 November 2013, the Respondent submitted its Reply to the Claimant's Objections to the Respondent's Document Requests.
34. On 15 November 2013, the Claimant submitted its response to the Respondent's Reply of 8 November 2013.
35. By letter dated 6 December 2013, the Claimant sought an extension of time until 9 December 2013 for the service of its Reply and Answer to Jurisdictional Objections, and a consequential extension of time until 13 January 2014 for the service of the Respondent's Rejoinder and Reply to Jurisdictional Objections. On the same day, the Tribunal noted the Parties' request and stated that the changes were acceptable to the Tribunal.
36. On 9 December 2013, the Claimant submitted its **Reply and Answer to Jurisdictional Objections** along with accompanying documents.
37. On 18 December 2013, the Respondent submitted a request to stay the deadline for filing its Rejoinder on the Merits and Reply regarding Jurisdictional Objections until five weeks after the Tribunal rules on the Respondent's Document Requests.
38. By letter dated 19 December 2013, the Tribunal invited the Claimant to submit its comments on the Respondent's request of 18 December 2013 by 20 December 2013.
39. By letter also dated 19 December 2013, the Tribunal issued its decision on the Respondent's Document Requests, clarifying that due to a technical miscommunication its decision was not transmitted to the Parties earlier, and inviting the Respondent to indicate by 23 December 2013 whether any of the matters raised in the Respondent's letter of 18 December 2013 remained relevant in light of the Tribunal's decision on the Respondent's Document Requests.
40. By letter dated 23 December 2013, the Respondent wrote to the Tribunal, requesting (i) that the Tribunal set a deadline for the Claimant to produce the documents for the document requests granted by the Tribunal; (ii) an extension of its deadline for its Rejoinder on the Merits and

Reply on Jurisdictional Objections until 31 January 2014; and (iii) that the Tribunal reconsider its decision with respect to several document requests that had not been granted.

41. On 30 December 2013, the Claimant replied to the Respondent's letter of 23 December 2013 and objected to all of the Respondent's requests.
42. On 31 December 2013, the Claimant provided the "documents responsive to the Document Requests that were granted by the Tribunal".
43. Also on 31 December 2013, the Tribunal issued **Order N° 5**, in which it set out a revised procedural timetable for the arbitration proceedings and denied the Respondent's request for reconsideration of its decision on document requests.
44. On 22 January 2014, the Respondent submitted its **Rejoinder on the Merits and Reply in support of Preliminary Objections and Request to Dismiss or Stay**.
45. On 11 February 2014, a pre-hearing telephone conference was held by the Tribunal and the Parties.
46. On 14 February 2014, the Tribunal issued **Order N° 6** regarding the arrangements for the conduct of the hearing.
47. From 17 March to 19 March 2014, the Tribunal convened a Hearing on the Merits at the facilities of the Inter-American Court of Human Right in San José, Costa Rica. The following persons attended the Hearing:

**Claimant**

Mr. Philip Osborne  
Mr. Stewart Howard  
Mr. Jose Alpuche  
*British Caribbean Bank Limited*

Ms. Judith Gill QC  
Ms. Angeline Welsh  
*Allen & Overy LLP*

Mr. Eamon Courtenay, S.C.  
*Courtenay Coye LLP*

**Respondent**

H.E. Ambassador Lois Young  
Mr. Joseph Waight  
Ms. Magalie Perdomo  
*The Government of Belize*

Mr. Juan Basombrio  
Ms. Kate Santon  
*Dorsey & Whitney LLP*

Mr. Denys Barrow, S.C.  
*Barrow & Co., Attorneys at Law*

**Fact Witnesses**

Mr. Philip Osborne  
Mr. Joseph Waight  
Mr. Stewart Howard  
Mr. Andrew Ashcroft  
Mr. Dean Boyce  
Mr. Lyndon Guiseppi

**Registry**

Mr. Garth Schofield  
Ms. Hyun Jung Lee  
*Permanent Court of Arbitration*

**Court Reporters**

Ms. Diana Burden  
Ms. Laurie Hendrix

**Observer**

Mr. Carlos Oreamuno

48. On 7 April 2014, the Parties each submitted a **Post-Hearing Memorial**.
49. On 8 April 2014, the Respondent wrote to the Tribunal, applying to strike certain spreadsheets from the Claimant's Post-Hearing Memorial on the grounds that their "inclusion in the record at this late date violates this Tribunal's procedural orders and is highly prejudicial to GOB now that the hearing has been concluded, and GOB can no longer cross examine about [them]" (the "**Motion to Strike**").
50. On 10 April 2014, the Claimant wrote to the Tribunal, providing an update from the Belize Court of Appeal regarding the anticipated timing of its decision in *The Attorney General of Belize and the Minister of Public Utilities v. The British Caribbean Bank Limited et al. (Civil Appeal No. 18 of 2012)* (part of the "**Second Constitutional Challenge**," see paragraph 106 below).
51. On 14 April 2014, the Claimant wrote to the Tribunal, opposing the Respondent's Motion to Strike and stating, *inter alia*, that "the spreadsheets merely update what has been previously submitted" insofar as they simply provide interest calculations updated to the date of the Post-Hearing Memorials.
52. On 14 and 16 April 2014, the Parties wrote further to the Tribunal regarding the Respondent's Motion to Strike.
53. On 16 April 2014, the Parties each submitted a **Reply** to the Post-Hearing Memorial submitted by the other.
54. On 22 April 2014, the Parties each submitted a **Costs Submission**.
55. On 23 April 2014, the Respondent wrote to the Tribunal, applying to strike Claimant's claim for legal fees in respect of the Anti-Suit Injunction on the grounds that such costs were not claimed in the Claimant's Amended Statement of Claim (the "**Second Motion to Strike**").

56. On 28 April 2014, the Tribunal issued **Order N° 8**, denying the Respondent's Motion to Strike and noting that the spreadsheets appear to be "based directly on the spreadsheets enclosed in Exhibit C-122 to the Claimant's Amended Statement of Claim" and that "the Respondent has not identified any discrepancy between the calculations contained in the two spreadsheets."
57. On 30 April 2014, the Claimant wrote to the Tribunal, opposing the Respondent's Second Motion to Strike.
58. On 7 and 14 May 2014, the Parties wrote further to the Tribunal regarding the Respondent's Second Motion to Strike (addressed at paragraph 326 below).
59. On 15 May 2014, the Belize Court of Appeal rendered its decision in the Second Constitutional Challenge.
60. On 3 June 2014, the Respondent wrote to the Tribunal, seeking leave to introduce into the record the Court of Appeal's decision, to submit "supplemental briefing with respect to the effect of the Court of Appeal decision," and to introduce additional evidence identified in relation to the ongoing proceedings in *Dunkeld International Investment Limited (Turks & Caicos) v. The Government of Belize (PCA Case No. 2010-13)* (the "**Respondent's Application for Further Submissions**").
61. On 9 June 2014, the Claimant wrote to the Tribunal, indicating that it did not object to the introduction of the Court of Appeal Decision, subject to admission into the record of a resolution of the Bar Association of Belize regarding the circumstances of the re-appointment of Awich JA to the Belize Court, and opposing the Respondent's requests for further briefing and the introduction of additional evidence.
62. Also on 9 June 2014, the Respondent wrote to the Tribunal, requesting permission to use the transcript of the March 2014 hearing in this arbitration in the proceedings in *Dunkeld International Investment Limited (Turks & Caicos) v. The Government of Belize (PCA Case No. 2010-13)* (the "**Dunkeld Proceedings**").
63. On 9 and 11 June 2014, the Parties wrote further to the Tribunal concerning the Respondent's Application for Further Submissions.
64. On 16 June 2014, the Tribunal issued **Order N° 9**, granting the Parties' requests to introduce the Court of Appeal's decision and the resolution of the Bar Association of Belize, and denying the remainder of the Respondent's Application for Further Submissions

65. On 19, 25, and 30 June 2014, the Parties exchanged further correspondence regarding the Respondent's application to use the transcript of the March 2014 hearing in the Dunkeld Proceedings.
66. On 21 July 2014, the Tribunal issued **Order N° 10**, granting the Respondent's application to use the transcript in the Dunkeld Proceedings.

### **III. THE FACTUAL RECORD**

#### **A. THE CORPORATE ENTITIES**

67. British Caribbean Bank was incorporated on 8 September 1998 as The Belize Bank (Turks & Caicos) Limited. On 9 February 2009, its name was changed to British Caribbean Bank Limited. At the time of the events giving rise to the Parties' dispute, British Caribbean Bank was wholly owned, through a series of intermediary corporations, by BCB Holdings Limited, a Belizean public investment company.
68. Telemedia was incorporated in Belize on 14 September 2006 and is the statutory successor to Belize Telecommunications Limited ("BTL") pursuant to the Telecommunications Undertaking (Belize Telecommunications Limited Operations) Vesting Act of 2007. BTL was itself incorporated in Belize in 1987.
69. Sunshine is a company incorporated in Belize. Prior to August 2009, the shares of Sunshine were held by the Belize Telecommunications Ltd Employees Trust (the "**Employees Trust**") on behalf of the employees of Telemedia.

#### **B. DRAMATIS PERSONAE**

70. During the course of these proceedings, the Tribunal received testimony from the following individuals having knowledge of the events giving rise to the Parties' dispute:
  - (a) Mr. Philip Osborne is Company Secretary of British Caribbean Bank and its representative in these proceedings, as well as the Company Secretary and a Director of BCB Holdings Limited. Mr. Osborne also served as the corporate representative of several of the corporate directors of Telemedia between 8 June 2007 and 25 August 2009, during certain of the events in question in these proceedings.
  - (b) Mr. Joseph Waight is the Financial Secretary of the Government of Belize and its representative in these proceedings.

- (c) Mr. Stewart Howard is and has been a Managing Director of British Caribbean Bank since 2012. Prior to this, he was a Senior Risk Manager at British Caribbean Bank and briefly a Senior Risk Manager at the Belize Bank in Belize.
- (d) Mr. Andrew Ashcroft is a Managing Director of British Caribbean Bank and a director of Waterloo Investment Holdings. He was previously a director of Dunkeld International Investment Limited, and a director of BCB Holdings Limited.
- (e) Mr. Dean Boyce was chairman of the Executive Committee of the Board of Directors of Telemedia until 25 August 2009. Mr. Boyce is presently a management consultant and accountant working for BCB Holdings Limited.
- (f) Mr. Lyndon Guiseppi is the Chief Executive Officer and a director of BCB Holdings Limited, a position he has held since July 2008. He was previously a director of The Belize Bank Limited and a Managing Director of RBTT Merchant Bank Limited.

## C. LOAN AND SECURITY AGREEMENTS

### 1. The Contractual Relationship between British Caribbean Bank and Sunshine

- 71. The **Sunshine Facility** is a syndicated loan agreement concluded by Sunshine on 19 September 2005 with The Belize Bank (Turks & Caicos) Limited (the predecessor of the Claimant) and another corporation named Caedman Limited, which acted as a lender under the agreement and is not a Party to these proceedings. Pursuant to the Sunshine Facility, The Belize Bank (Turks & Caicos) Limited and Caedman Limited agreed to jointly provide Sunshine with US\$10,000,000, to be repaid in 20 instalments. Sunshine entered into the Sunshine Facility at the same time that it entered into agreements with the Government and with the Social Security Board of Belize to provide a further BZ\$10,000,000 each.<sup>2</sup>
- 72. Under clause 11.1.18 of the Sunshine Facility, Sunshine undertook “that it will use the Loan only for the purpose of acquiring the BTL Shares.”<sup>3</sup> The BTL Shares are defined in the agreement as “the 7,375,038 ‘C’ ordinary shares in the capital stock of Belize Telecommunications Limited (‘BTL’) held by the Borrower (representing 20% of the entire issued share capital of BTL).”

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<sup>2</sup> First Witness Statement of Joseph Waight at paras. 25-26; Minutes of a Special Meeting of the Board of Directors of the Social Security Board (9 September 2005) (**Exhibit C-60**).

<sup>3</sup> Sunshine Facility, clause 11.1.18 (**Exhibit C-4**).

73. Clause 7 of the Sunshine Facility provides:

All amounts payable by the Borrower to the Lenders hereunder shall be secured by the grant by the Borrower to the Lenders (or to the Agent or other nominee acting on behalf of the Agent or the Lenders) of a fully perfected first priority legal charge and mortgage over the BTL Shares and together with and including any and all dividends or other distributions approved by the shareholders of BTL or paid or distributed by BTL after the date of this Agreement on these BTL Shares until such time as the Loan is repaid in full and all obligations owed by the Borrower under this Agreement and the Security Documents have been fully satisfied.<sup>4</sup>

74. Among the conditions precedent to the Sunshine Facility was the provision by Sunshine of the following:

the executed Security Documents and other Security Documents (including the share certificates for the BTL Shares) required by the Lenders and the Agent in order to secure or partially secure or promote the payment of the obligations and liabilities of the Borrower to the Lenders under this Agreement and the subsequent confirmation in a form acceptable to the Lenders and the Agent of the recording, registration, and completion of the Security Documents in accordance with their terms;<sup>5</sup>

75. The **Sunshine Security** is an agreement between Sunshine and The Belize Bank (Turks & Caicos) Limited concluded on the same day as the Sunshine Facility. Pursuant to the Sunshine Security, Sunshine granted The Belize Bank (Turks & Caicos) Limited a first legal mortgage over the 7,375,038 “C” ordinary shares in BTL owned by Sunshine and a first fixed charge on its interest in the shares. The Sunshine Security provides that it would become enforceable upon an event of default as defined by the Sunshine Facility.<sup>6</sup>

76. The **Sunshine Overdraft Facility** is an agreement pursuant to which The Belize Bank (Turks & Caicos) Limited extended Sunshine and the Employees Trust a facility of US\$1,000,000. Clause 5 of Sunshine Overdraft Facility provides in relevant part as follows:

All amounts payable by the Borrower [Sunshine] to the Bank hereunder shall be secured by a first priority legal mortgage to be granted in favour of the Bank by the holders of the two (2) issued ordinary shares which they own in the share capital of the Borrower.<sup>7</sup>

77. The **Sunshine Mortgage of Shares** is a pair of agreements concluded on 19 May 2006 between The Belize Bank (Turks & Caicos) Limited and, respectively, (i) the Trustees of the Employees Trust, and (ii) Dean Boyce, pursuant to which each of the latter parties granted The Belize Bank

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<sup>4</sup> Sunshine Facility, clause 7 (**Exhibit C-4**).

<sup>5</sup> Sunshine Facility, clause 2.1.6 (**Exhibit C-4**).

<sup>6</sup> Sunshine Security (**Exhibit C-5**).

<sup>7</sup> Sunshine Overdraft Facility, para. 5 (**Exhibit C-6**).

(Turks & Caicos) Limited a mortgage over one share of Sunshine “as security for all of the obligations of Sunshine (as Borrower) under the Agreement [the Sunshine Overdraft Facility].”<sup>8</sup>

## 2. Contractual Arrangements between British Caribbean Bank and Telemedia

78. The **Telemedia Facility** is an agreement concluded on 10 July 2007 between The Belize Bank (Turks & Caicos) Limited and Telemedia, Telemedia Investments Limited (“TIL”), Belize Telecommunications Limited of the British Virgin Islands, Belize Telecommunications (Overseas) Limited, BTL International Inc., Business Enterprise Systems Limited, BTL Mobile Services Limited, and BTL Digicel Limited. Pursuant to the Telemedia Facility, the predecessor of the Claimant agreed to make banking facilities available to Telemedia in the amount of US\$22,500,000. The other Parties to the Telemedia Facility are defined as Security Companies to guarantee “the proper and punctual performance by the Borrower [Telemedia] of all its obligations and liabilities under or pursuant to this Agreement.”<sup>9</sup>

79. Paragraph 1(b) of the Telemedia Facility sets out the purposes of the financing as follows:

(i) The Term Loan Amount shall be used for a loan by the Borrower to its subsidiary Telemedia Investments Limited (“TIL”) to enable TIL to purchase 9,219,181 shares in Belize Telemedia Limited (the “Shares”), from RBTT Merchant Bank Limited (“RBTT”) as attorney in fact for Belize Telecom Limited by virtue of a stock power; (ii) the Term Loan Amount shall be used for the purchase and installation of equipment for the provision of telecommunications services in Belize and (iii) the Term Loan Amount shall be used for general working capital.<sup>10</sup>

80. Paragraph 5 of the Telemedia Facility sets out the security documents, the provision of which would form a condition precedent to the operation of the agreement, including:

(i) a first priority legal mortgage, in a form approved by the Bank, made by TIL [Telemedia Investments Limited] in favour of the Bank over all of the Shares;

(ii) a first priority legal debenture, in a form approved by the Bank, made by the Borrower [Telemedia] in favor of the Bank;<sup>11</sup>

81. Other security documents included a series of mortgages on real property held by Telemedia, as well as the following:

a guarantee to be issued by each Security Company, in the Bank’s required form, for the benefit of the Borrower and in favour of the Bank, covering all debts and liabilities owed by the Borrower to the Bank under or pursuant to this Agreement;<sup>12</sup>

<sup>8</sup> Sunshine Mortgage of Shares, para. 2 (**Exhibit C-13**).

<sup>9</sup> Telemedia Facility, para. 6(a) (**Exhibit C-2**)(**Exhibit R-8**).

<sup>10</sup> Telemedia Facility, para. 1(b) (**Exhibit C-2**)(**Exhibit R-8**).

<sup>11</sup> Telemedia Facility, para. 5 (**Exhibit C-2**)(**Exhibit R-8**).

<sup>12</sup> Telemedia Facility, para. 5(xi) (**Exhibit C-2**)(**Exhibit R-8**).



82. The **Telemedia Mortgage** is an agreement dated 31 December 2007 between Telemedia and The Belize Bank (Turks & Caicos) Limited, pursuant to which Telemedia granted The Belize Bank (Turks & Caicos) Limited a charge in the amount of US\$22,500,000 over the following:

- Firstly- The fixed plant, machinery and equipment of the Mortgagor [Telemedia];
- Secondly- The Mortgaged Properties referred to in the Schedule hereto and all and singular the premises comprised therein, and any proceeds of sale of the Mortgaged Properties, including fixed plant, machinery and fixtures (including trade fixtures) from time to time thereon and the benefit of any covenants for title given or entered into by any predecessor in title of the Mortgagor and any money paid or payable in respect of such covenants;
- Thirdly- All other (if any) freehold and leasehold property and other security assets of the Mortgagor both present and future and any proceeds of sale of that freehold and leasehold property and security assets including all equipment Fixed plant, machinery and fixtures (including trade fixtures) from time to time thereon and the benefit of any covenants for title given or entered into by any predecessor in title of the Mortgagor and any money paid or payable in respect of such covenants;
- Fourthly-
  - (i) the present and future interests of the Mortgagor in all its stocks, shares, debentures, bonds or other securities and uncalled capital;
  - (ii) all book and other debts and other monies due, owing, payable or incurred to the Mortgagor and the benefit of all rights, securities and guarantee of any nature whatsoever now or at anytime enjoyed or held by the Mortgagor in relation thereto; and
  - (iii) all monies standing to the credit of the Mortgagor and held with the Mortgagee and the debt represented thereby;
- Fifthly- The goodwill, undertakings and all other properties and assets of the Mortgagor whatsoever and wheresoever both present and future.<sup>13</sup>

#### **D. THE PURCHASE OF TELEMEDIA SHARES BY TELEMEDIA INVESTMENTS LIMITED**

83. On 10 July 2007, the Board of Directors of Telemedia authorized its subsidiary, Telemedia Investments Limited to purchase 9,219,181 shares in Telemedia held by a third party and provided TIL with US\$22,500,000 in credit in relation to the purchase. The Parties are in dispute as to whether these funds were wholly derived from those received from the Claimant pursuant to the Telemedia Facility. The shares were transferred to TIL the same day.<sup>14</sup>

84. On 27 August 2007, Telemedia held its first Annual General Meeting and resolved to issue its shareholders “a cash dividend of 26.5 cents per ordinary share and a dividend in specie of ordinary shares in the Company on the basis of two ordinary shares for every five ordinary shares held.”<sup>15</sup> The shares purchased by TIL were among those distributed as a dividend.

<sup>13</sup> Telemedia Mortgage, para. 4 (**Exhibit C-3**).

<sup>14</sup> Transfer of Shares (**Exhibit JW-11**).

<sup>15</sup> Minutes of the First Annual General Meeting of Belize Telemedia (**Exhibit JW-14**).

**E. THE ACQUISITION OF TELEMEDIA AND SUNSHINE**

85. On 24 August 2009, the National Assembly of Belize passed the *Belize Telecommunications (Amendment) Act, 2009* (the “**2009 Act**”). Section 63(1) of the 2009 Act provides as follows:

Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where a licensee ceases operations or loses control of operations, or where the Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of the Minister of Finance, by Order published in the *Gazette*, acquire for and on behalf of the Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, and every such order shall be *prima facie* evidence that the property to which it relates is required for a public purpose.<sup>16</sup>

86. On 25 August 2009, the Minister responsible for telecommunications issued the *Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009* (the “**2009 Order**”). The preamble to the 2009 Order provided as follows:

[ . . . ]

AND WHEREAS, after a careful consideration of all the facts and circumstances, I consider that control over telecommunications should be acquired for a public purpose, namely, the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment;<sup>17</sup>

87. The 2009 Order provided that “[t]he property specified in the Schedule to this Order is hereby acquired for and on behalf of the Government of Belize for the public purpose aforesaid.” The schedule to the 2009 Order listed the following property:

**PART I****A - SHARES IN BELIZE TELEMEDIA LIMITED**

The following shares in Belize Telemedia Limited (“Telemedia”) held by the persons shown in the statutory return for 2008 filed by Telemedia in the Belize Companies and Corporate Affairs Registry on or about the 5 January 2009, or held by any transferees of the said shares in the event of any transfers taking place since the said date of filing:

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
1. BB (or BCB) Holdings Limited	P. O. Box 1764, Belize City	1,234,859
2. BTL International Inc.	P.O. Box 71, Tortola, BVI	895,552
3. BTL Investments Limited	BTL, St. Thomas Street Belize City	750,000

<sup>16</sup> Belize Telecommunications (Amendment) Act, 2009, s. 63(1) (**Exhibit C-7**).

<sup>17</sup> Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2009 Statutory Instrument No 104 of 2009 (**Exhibit C-8**).

4. ECOM Limited	P.O. Box 1764, 212 North Front St., Belize City	15,178,488
5. Mercury Communications Limited	P.O. Box 1764, 212 North Front St., Belize City	4,768,230
6. New Horizons Inc.	212 North Front St. Belize City	20,581
7. Sunshine Holding Limited	P.O. Box 1258 212 North Front St., Belize City	11,092,944
8. Thiermon Limited	212 North Front St., Belize City	12,886,959
<b>Total number of Shares acquired</b>		<b>46,845,513</b>

**B - SHARES IN BTL DIGICELL LIMITED**

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

**C - SHARES IN BUSINESS ENTERPRISE SYSTEMS LIMITED**

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

**D SHARES IN TELEMEDIA (FREE ZONE) LIMITED**

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

**E SHARES IN SUNSHINE HOLDINGS LIMITED**

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
Dean Boyce	212 North Front St. Belize City	1
Trustees of the Belize Telecommunications Ltd Employees Trust	212 North Front St. Belize City	1

**F SHARES IN TELEMEDIA INVESTMENTS LIMITED**

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

**PART II****OTHER PROPERTY ACQUIRED**

All proprietary and other interest held by **The Belize Bank (Turks and Caicos) Limited** in Belize Telemedia Limited and its subsidiaries under a Mortgage Debenture dated the 31<sup>st</sup> December, 2007 (including any amendments thereto) executed between Belize Telemedia Limited as the Mortgagor and The Belize Bank (Turks and Caicos) Limited as the Mortgagee, and registered in the Companies and Corporate Affairs Registry, Belmopan, on or about the 8<sup>th</sup> February 2008.<sup>18</sup>

88. On 27 August 2009, the Finance Ministry of Belize issued a Notice of Acquisition, which identified the same property set out in the 2009 Order and declared that it had “been acquired by the Government for a public purpose, namely, the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment”.<sup>19</sup>
89. On 14 October 2009, the Claimant wrote to Telemedia and Sunshine, indicating that British Caribbean Bank considered each of the Telemedia Facility, Sunshine Facility, and Sunshine Overdraft Facility to be in default as a result of the change in ownership of Telemedia and Sunshine and requiring repayment in full by 23 October 2009.<sup>20</sup>
90. On 24 November 2009, the Claimant wrote again to both Telemedia and Sunshine, reiterating that it considered the loan agreements to be in default, noting that no repayment had been received pursuant to its letter of 14 October 2009, and indicating that in the absence of full repayment by 15 December 2009, British Caribbean Bank “would take appropriate steps pursuant to the Companies Act to recover the sums owed . . . without further reference to you.”<sup>21</sup>
91. On 4 December 2009, the Minister responsible for telecommunications issued the *Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order, 2009* (the “**2009 Amendment Order**” and together with the 2009 Order, the “**2009 Orders**”). The preamble to the 2009 Amendment Order provided as follows:

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<sup>18</sup> Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2009 Statutory Instrument No 104 of 2009 at p. 4 (**Exhibit C-8**).

<sup>19</sup> Notice of Acquisition (**Exhibit C-19**).

<sup>20</sup> Notification letters from BCB to Telemedia and to Sunshine (**Exhibit C-21**)

<sup>21</sup> Letter from BCB to Telemedia (**Exhibit C-32**); Letter from BCB to Sunshine (**Exhibit C-33**).

[ . . . ]

AND WHEREAS, I consider that for the avoidance of doubts it is necessary to clarify the scope of the property acquired under the said Order [the 2009 Order] and to acquire certain other related property to give Poll effect to the public purpose aforesaid:<sup>22</sup>

92. The 2009 Amendment Order then added to the list of property identified in the 2009 Order in the following terms:

2. The Schedule to the principal Order is hereby amended in Part II thereof captioned “Other Property Acquired”, by the addition of the following property in the said Part, which is hereby acquired for the public purpose aforesaid:

“All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), under a Facility Agreement dated the 6<sup>th</sup> July 2007 executed between The Belize Bank (Turks and Caicos) Limited and Belize Telemedia Limited et al;

All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), The Belize Bank Limited and CAEDMAN Limited under a Syndicated Loan Agreement dated September 19, 2005 executed between The Belize Bank (Turks and Caicos) Limited, The Belize Bank Limited, CAEDMAN Limited and Sunshine Holdings Limited;

All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), under a Security Agreement dated September 19, 2005 executed between The Belize Bank (Turks and Caicos) Limited and Sunshine Holdings Limited;

All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), under a Facility Agreement dated the 19<sup>th</sup>, May 2006 executed between The Belize Bank (Turks and Caicos) Limited, Sunshine Holdings Limited and the Trustees of the Belize Telecommunications Ltd Employees Trust.”<sup>23</sup>

93. On 7 December 2009, the Finance Ministry of Belize issued a second Notice of Acquisition in respect of the property identified in the 2009 Amendment Order.<sup>24</sup> Both Notices of Acquisition requested “[a]ll interested persons who may have claims to compensation for the acquisition of any property specified in the Schedule” to submit claims to the Ministry of Finance, by 15 October 2009 in respect of the first notice, and by 15 January 2010 in respect of the second.

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<sup>22</sup> Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order 2009 Statutory Instrument No 130 of 2009 (**Exhibit C-9**).

<sup>23</sup> Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order 2009 Statutory Instrument No 130 of 2009 at para. 2 (**Exhibit C-9**).

<sup>24</sup> Notice of Acquisition (**Exhibit C-20**).

**F. CIRCUMSTANCES OF THE ACQUISITION OF TELEMEDIA AND SUNSHINE**

94. In connection with the adoption of the 2009 Act, the Prime Minister of Belize made the following statement to the Parliament, which the Tribunal considers to warrant quotation at length:

The questions will of course be asked: why this move, and why now? In answering these questions I need to rehearse for the house and the nation a fair amount of background. Mr. Speaker, Belize Telecommunications Limited was incorporated in 1987 during the first UDP [United Democratic Party] administration. At that time the purpose was to Belizeanize telecommunications, replacing the control of the foreign entity Cable and Wireless with a national company. It was always the UDP government's intention that the new BTL would be majority owned by the citizens of Belize, not by the government. That first privatization worked wonderfully well and has remained one of the proudest accomplishments of the 84 - 89 UDP administration. We made sure then to insert particular safeguards into the company's Articles of Association to protect the national interest in BTL. And history has recorded what a fabulous success story that whole enterprise was. In the years immediately after 1987 BTL returned record profits to the many Belizeans that invested in the company. A 20% return on investment was the order of the day, and there were years when BTL paid a dividend yield of as much as 30%.

All remained well until February 1992 when the predatory designs of one man were facilitated by the greed and hunger for cash of the then PUP [People's United Party] administration. At that time the PUP began to sell shares in BTL to Michael Ashcroft at a rate and in a manner that was counterintuitive and counter nationalistic. Under the UDP Articles of Association there was a 25% cap on the shares that could be sold to any one person or entity. This was so that no single individual could dominate the company and in order to make the ownership as widely Belizean as possible. In violation of this Article, the PUP presided over an ever increasing transfer of shares to Ashcroft. This process was interrupted by the 93-98 UDP return to power, but restarted as soon as the PUP became the government again. It culminated in March 2004 with the infamous sting operation perpetrated by then Prime Minister Said Musa, which leveraged almost 94% of BTL shares into the control of Lord Ashcroft. Since then the PUP double dealing in which they screwed Glenn Godfrey for Ashcroft, then Ashcroft for Prosser, then Prosser for Ashcroft again, has produced litigation after litigation. Between 2005 and 2006 alone, there were at least 6 BTL cases in Belize, England, the US and Canada. In the end Ashcroft prevailed and cemented his total control.

But, he was not satisfied. Between 1998 and 2005 BTL's profits were 20 cents for every dollar invested. Nevertheless, and perhaps as payback for the PUP support, however fleeting, of Jeffrey Prosser, Ashcroft wanted more. And he got it from the PUP in 2006 after he had regained supreme control of BTL. This came by way of the infamous secret Accommodation Agreement, in which the PUP government guaranteed the Ashcroft group a minimum rate of return of 15%. According to that Agreement and under that guarantee, Ashcroft could in any year declare that BTL had not made that 15%; declare how much the shortfall was; and simply not pay his taxes until the so-call shortfall had been recovered. This is exactly what happened in 2007, so that thereafter Ashcroft's Telemedia ended up paying no business tax, no customs duties, no interest of any kind. In addition, the Accommodation Agreement stipulated that the PUC could not regulate Telemedia's rates, leaving the consumers at their mercy. But it still did not stop there. All other existing Telecoms licenses (excepting Speednet's - about which more later) had to be revoked. Voice Over Internet Protocol, which we all know gives consumers the cheapest option, is outlawed. Telemedia is able to refuse interconnection to any and everyone, including internet service providers. And the PUC cannot, for any cause and no matter what the complaint, in any way touch or alter Telemedia's license. Finally, the Accommodation Agreement binds each government department, agency, or associated body, to use only Telemedia's services at onerous pre-arranged rates until 2015, and thereafter for successive 3 year renewal periods.

Now, Mr. Speaker, this is where the new government of the United Democratic Party came in. As soon as we discovered this Accommodation Agreement and the fact that it had been secretly signed and secretly implemented by the PUP, we came to the Belizean public and denounced it. Lord Michael Ashcroft is an extremely powerful man. His net worth may well be equal to Belize's entire GDP. He is nobody to cross and the new government could well have chosen the path of least resistance; to cower in the face of the certain wrath of this potentate; to continue in the PUP style with business as usual; to betray, in other words, all that we had campaigned for, all that we had promised, and all that is basic and decent and straight forward if there is to be any ounce of trust left in public office. But betrayal of the people is not in my nature, and not, I am surpassingly proud to say, in the nature of the United Democratic Party.

And so we took counsel among ourselves and to a man the UDP cabinet voted, in the name of the Belizean people, to resist this treasonous Accommodation Agreement at all costs. Belizean Law and Belizean dignity would be upheld; Belizean pride and Belizean patriotism and Belizean patrimony vindicated.

And, of course, resisted we have. Now no one can doubt the justice of our stand. But, as we always knew, it has been costly. Michael Ashcroft had Telemedia invoke[] arbitration in London to enforce the Accommodation Agreement. And he obtained a judgment of 38.5 million dollars and a court – mandated requirement that government now begin to honor the Accommodation agreement.

Well, I have said that as God is my witness I will never pay that award. But it doesn't stop there. In April of 2009 Telemedia informed the government of further claims they will make to the London Court of International Arbitration, and that the size of a new award "could pale the current award of 38 million into insignificance".

Mr. Speaker, Members, fellow Belizeans: this is intolerable. I, and the United Democratic Party Government, in the name of the people will put up with it no longer. That an agreement so patently illegal, so patently immoral, so patently anti-Belize, should continue to torture us, to bleed us, to subject us to this death by a thousand cuts, cannot for one second more be countenanced. This is our House, this is our country. Here we are masters, here we are sovereign. And with the full weight of that sovereignty we must now put an end to this disrespect, to this chance taking, to this new age slavery. There will thus be no more Telemedia awards against us; no more Telemedia court battles; no more debilitating waste of government's energies and resources; and there will be no more suffering of this one man's campaign to subjugate an entire nation to his will. After long and sufficient consideration, therefore, and in the exercise of that national power that is ours by Constitution and inalienable right, this government will now acquire Telemedia.

Think on it Mr. Speaker. Telecommunications uses the airwaves as its medium. But these airwaves constitute a God-given natural resource of Belize, just like our sun, our sea, our rivers, our forests. These things together help to make up the patrimony of the Belizean people, and the exploitation of that patrimony must always be consistent with the interests of Belizeans. When those that come to partner with us demonstrate beyond all doubt that they will upend equitability, upend reasonableness, that they will, infamy upon infamy, beat us about our heads with our own inheritance, the very blood coursing through our Belizean veins obliges us to act.

Just as fundamental, though perhaps a little more prosaic, telecommunications – information and communications technology – is a critical part of the development apparatus of any modern society. Indeed, as has been officially recognized by our regional integration movement CARICOM, it is an indispensable tool in that restructuring of developing countries' economies that, in the face of the global crisis, must begin to take place now. Accordingly, unregulated monopoly control and abuse of the sector cannot be permitted. Yet, that is precisely what the Accommodation Agreement mandates.

This is especially so in view of the fact that even the very limited mobile phone so-called competitor to Telemedia is owned by Telemedia. That is right and I have the documents to prove it. 77.38% of Speednet is owned by three companies – Callerbar Limited, Riddermark Ventures Limited, and Heaver Holdings Limited. These three companies are headquartered at the Belize City Cork Street premises of Michael Ashcroft, and controlled by two of the now notorious Trusts owned by Michael Ashcroft.

And so Mr. Speaker let no one be in any doubt as to why we are doing what we are doing today. Let no one confuse or misunderstand our purpose. This is not ideology, this is not triumphalism. This is a country in particular circumstances reaching the end of its patience and doing a singular, necessary, righteous thing to protect its national interest. It is not part of any pattern, part of no new philosophy. It is plain and simple a special measure for a special case. We make no apologies for it, but we also do not seek to elevate it. As must be clear from the developments in even the global bastions of super capitalism and private property, this is what countries do to protect themselves. It is an article of faith and a cardinal rule of statecraft that a nation will act in any way necessary to preserve its national interest. That national interest, in these circumstances, now absolutely demands our present course of action.

So there you have it, Mr. Speaker, the government's brief from the heart. In the days to come, the dissection and the deconstruction, both at home and abroad, will of course take place. But no matter which way you look at it, ours is a straightforward case and a compelling case. We will move ahead not unaware of the difficulties that will be thrown up, but with a confidence that is both supreme and serene because we know we are right.

Before I conclude, just let me spend a little time telling you what will happen as we proceed. First of all, you will see that the Bill makes every provision for fair and proper compensation to be paid to the owners of the shares we will acquire. This is not, I repeat, some cowboy action but something done in the full plenitude of, and compliance with, our Constitution. As well, we are only acquiring the 94% or so of Telemedia that is controlled by the Ashcroft interests. The shareholding owned by Belizeans will be left intact. The actual acquisition will be done by way of an order made by the Minister of Telecommunications, who will in that same order appoint a new Board of Directors. As soon as practicable after, an extraordinary general meeting will be held and new Articles of Association adopted. The new Articles will essentially be the Articles of the successful BTL that was launched in 1988. In other words, the safeguards to protect Belizean shareholders will be re-established, including protection of the special share and the limitation on the amount of single ownership. As well, and perhaps most importantly, the articles will guarantee that dividends will be paid to shareholders at the rate of 40% of the yearly profits.<sup>25</sup>

95. In connection with the 2009 Amendment Order, the Prime Minister of Belize made the following observations in the course of a radio interview:

[ . . . ] what government has done is to step into the shoes of the creditor not of the debtor. The government has taken away from the creditor the creditor's rights to go against the debtor, which is Telemedia. And government had to do that because that loan, and the rights that it believes Bank Turks and Caicos had, meant that in fact the assets of Telemedia were caught by the mortgage debenture and if government had not done what it did, if it had fairly acquired Telemedia but leaving the assets exposed to our enemies it would have rendered the entire taking nugatory. So government went on to complete the circle and to say, insofar as there is this debt from Telemedia to Belize Bank Turks and Caicos, government is assuming the debt from the point of view of the creditor [ . . . ] There is nothing that the government has to hide here. I will not allow what I insist is a splendid act of nationalism, is an act of determined national resolve, is part of a continuing fight to

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<sup>25</sup> Transcript of the Speech of the Honourable Prime Minister of Belize, Dean Barrow, to the House of Representatives (24 August 2009) (**Exhibit C-17**).



ensure that Michael Ashcroft will never break the will of this government or of the people of Belize, I will not allow all that to be pissed away, if you will excuse my language, as a consequence of misunderstandings that can so very easily be cleared up, and I will never do anything to flout any of the laws of this country.

[. . .]

If they're saying they will never stop. Well I am saying, as I indicated to you earlier today, they are not going to break my will. They are not going to break the will of the Belizean people. And I think we operate now from a position of strength because I will tell you, I am prepared to say to them "oh you think you're clever, you're going to try to make a distinction between a mortgage debenture and original facility letter. Well I'm going to go and acquire the first facility letter as well. I don't think I need to because I think the acquisition that we did do clearly talks about the whole ball of wax, but since you think you're clever, fine". Look man, this is a government that in this regard, as you say subject always to keeping the people informed right along, this is a government that has the support of the people on this issue. This is the people of Belize against the Ashcroft interests and I will never relent in the same way as he is indicating he will never relent.<sup>26</sup>

#### **G. CLAIMS FOR COMPENSATION AND CHALLENGES TO THE ACQUISITION OF TELEMEDIA AND SUNSHINE**

96. On 15 October 2009, the Claimant submitted a first claim for compensation to the Ministry of Finance, followed by a second claim on 14 January 2010. In late 2009 and early 2010, the Parties exchanged correspondence in relation to the Claimant's statutory claim, but without resolution. As of the present date, the Respondent has not provided compensation.
97. Following the 2009 Orders, the Parties engaged in a series of legal actions in the courts of Belize. Under the judicial system of Belize, the Supreme Court of Belize is a court of general original jurisdiction. From the Supreme Court, appeals may be brought to the Court of Appeal. As from 1 June 2010, appeals from the Court of Appeal may be brought to the Caribbean Court of Justice. The Parties have initiated the following legal actions:
- (a) On 21 October 2009, the Claimant began a constitutional challenge to the 2009 Act and 2009 Orders (the "**First Constitutional Challenge**"). On 30 July 2010, the Supreme Court of Belize dismissed the claim and ordered the Financial Secretary "to comply with section 65(1) of the Belize Telecommunications Act as amended."<sup>27</sup> The Claimant appealed this decision on 25 August 2010.
  - (b) On 20 November 2009, the Claimant commenced two lawsuits against Telemedia (Claim No. 942) and Sunshine (Claim No. 941) in the Supreme Court of Belize to recover the funds advanced under the Telemedia Facility and the Sunshine Overdraft Facility,

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<sup>26</sup> Unofficial transcript of an interview with the Prime Minister of Belize on Wake Up Belize (25 November 2009) (**Exhibit C-90**).

<sup>27</sup> Judgment of the Honourable Legall J. at para. 162, *Claim No 874 of 2009* (30 July 2010) (**Exhibit C-28**).

respectively. In the course of this litigation, Telemedia and Sunshine argued that the 2009 Amendment Order deprived the Claimant of its interests under the loan agreements. In February 2010, the Claimant discontinued these claims.

- (c) On 3 June 2011, the Respondent and Telemedia commenced a lawsuit (“**Claim 360**”) against British Caribbean Bank in the Supreme Court of Belize, seeking as follows:
- (i) A Declaration that the Loan Facility Agreement and Mortgage Debenture entered into between Belize Telemedia Limited and the Defendant on 6 July 2007 and 31 December 2007 respectively are *ultra vires* the Memorandum of Association of Belize Telemedia Limited and contrary to the provisions of the Companies Act, Chapter 250 of the Laws of Belize, R.E 2000;
  - (ii) A Declaration that the Loan Facility Agreement of 6 July 2007 together with the Mortgage Debenture of 31 December 2007 are void;
  - (iii) A Declaration that the Government of Belize is not liable to compensate the Defendant in respect of the said Loan Facility and the Mortgage Debenture acquired by the Government of Belize on 4 December 2009 and 25 August 2009, respectively; and
  - (iv) A Declaration that the Loan Facility Agreement of 6 July 2007 together with the Mortgage Debenture of 31 December 2007 are not valid and binding as against Belize Telemedia Limited.<sup>28</sup>

The Claimant sought to stay these proceedings “pending the determination of the Second Constitutional Challenge”<sup>29</sup> on the following grounds:

[ . . . ] the issue as the validity of the Loan Facility Agreement and the Mortgage Debenture and whether the Government is required to compensate the Defendant for the acquisition of its property should only be determined once the validity of the 2011 Act, the 2011 Order and the Eighth Amendment have been finally determined by the CCJ in CV6 of 2011 or in Claim 597 and any appeal therefrom.<sup>30</sup>

On 23 October 2012, with the Respondent’s agreement, the Supreme Court of Belize ordered as follows:

[ . . . ] the claimants and the defendant having agreed that the matter be stayed  
BY CONSENT the court ORDERS that the claim in this matter and all applications in relation to the claim are stayed pending further order of the court with liberty to all parties to apply to remove the stay.<sup>31</sup>

98. On 24 June 2011, the Court of Appeal allowed the appeal in the First Constitutional Challenge.<sup>32</sup> The Court of Appeal’s judgment reasoned in relevant part as follows:

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<sup>28</sup> *Claim No. 360 of 2011*, Claim Form filed on behalf of the Government (**Exhibit C-112**).

<sup>29</sup> The Claimant’s Amended Statement of Claim, para. 102.

<sup>30</sup> *Claim No. 360 of 2011*, Application Notice of 20 January 2012 (**Exhibit JW-23**).

<sup>31</sup> *Claim No. 360 of 2011*, Order of the Supreme Court, 23 October 2012 (**Exhibit C-116**).

**Issue (i) - is the Acquisition Act in conformity with section 17(1) of the Constitution?**

[ . . . ]

[107] I would therefore conclude on this issue, in agreement with the appellants, that the Acquisition Act is in contravention of section 17(1) of the Constitution, in that it:

- (i) does not prescribe the principles on which reasonable compensation is to be paid within a reasonable time;
- (ii) does not secure to a person claiming an interest or right over the acquired property a right of access to the courts for the purpose establishing his interest or right; and
- (iii) does not secure to a person who has been awarded compensation a right of access to the courts for the purpose of enforcing his right to compensation.

[ . . . ]

**Issue (ii) - were the compulsory acquisitions duly carried out in accordance with the stated public purpose?**

[ . . . ]

[150] For all of these reasons, I do not think that, on the evidence, the compulsory acquisitions were duly carried out for the stated public purpose, either on the bases advanced by the Minister in his 25 August Order, or on any of the other bases identified by the judge in his judgment.

**Issue (iii) - was the Minister's response to the problems of the telecommunications industry proportionate in the circumstances?**

[ . . . ]

[160] [ . . . ] Applying this principle [of proportionality], therefore, I would conclude that in this case the Minister's response to the problems of the telecommunications industry were not proportionate in the circumstances.

**Issue (iv) - were the actions of GOB/the Minister arbitrary and/or discriminatory in the circumstances?**

[ . . . ]

[171] So the question which remains is whether the appellants' contention that the judge erred in his conclusion that the compulsory acquisitions in this case were not arbitrary and were carried out for a legitimate purpose. In the light of my conclusion that the evidence in this matter has failed to justify the compulsory acquisitions as having been necessary to promote or further the stated public purpose and that the compulsory acquisitions were not a proportionate response to the requirements of the stated public purpose, coupled with the clear evidence that the compulsory acquisition had, as an explicit, dominant objective, the bringing to an end of "this one man's campaign to subjugate an entire nation to his will" ("a special measure for a special case"), I cannot but conclude that, in carrying out the compulsory acquisitions, GOB acted for an illegitimate purpose, and thus breached the appellants' constitutional right to protection from arbitrary deprivation of their property.

[ . . . ]

**Issue (v) - did the appellants or either of them have a right to be heard by the Minister before the Acquisition Orders were made?**

[ . . . ]

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<sup>32</sup> Judgment of the Court of Appeal of 24 June 2011, *Civil Appeal No. 30 of 2010 and Civil Appeal No. 31 of 2010 (Exhibit C-98)*.

[199] I have therefore come to the view that in the instant case, in which the Minister's decision to compulsorily acquire their property plainly and prejudicially affected their protected constitutional rights, the appellants were entitled to be heard by the Minister before the Acquisition Orders were issued.

[. . .]

### **Disposal**

[203] For all of the reasons stated in this judgment, at, I fear (and for which I apologise), far too great length, I would therefore grant the relief sought by the appellants by making the following orders:

- (a) Civil Appeal No. 31 of 2010 is allowed.
- (b) Paragraphs (1) and (3) of the Order of Legall J dated 24 August 2010 in Claim No. 1018 of 2009 is set aside.
- (c) Civil Appeal No. 30 of 2010 is allowed.
- (d) Paragraphs (1) and (3) of the Order of Legall J dated 18 August 2009 in Claim No. 874 of 2009 is set aside.
- (e) It is hereby declared that the Acquisition Act and Orders are inconsistent with the Constitution and are unlawful, null and void.
- (f) The respondents are to pay the appellants' costs in this court and in the court below, to be taxed if not sooner agreed.

99. Following the Court of Appeals Judgment, the earlier Board of Telemedia attempted to re-assume control of the company. According to the testimony of Mr. Osborne:

while the Government initially allowed the directors of Telemedia appointed prior to nationalisation to re-enter the premises, it subsequently implemented a physical takeover of Telemedia's headquarters and property and prevented the former board from continuing in possession of those premises.<sup>33</sup>

The contemporaneous press release issued by the Government describes these events as follows:

As a consequence of that decision Mr Dean Boyce, one of the successful appellants, went to Telemedia's headquarters on St Thomas street in Belize City and purported to take back the company. Government then got immediate legal advice as to the full import and consequence of the Court of Appeal decision. On the basis of that advice Government concluded that it was not open, without more, to Mr Boyce to assume control of the company. The Court of Appeal judgment is declaratory in nature, and by itself does not deprive Government of its de facto possession of the company. For that to happen the appellant Boyce would have to go back to court for an enforcement order telling Government to give up possession. Government thus instructed its appointee, the Executive Chairman and the Telemedia Board, to continue in command of the company unless presented with a court order specifically placing the appellant Boyce in control.<sup>34</sup>

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<sup>33</sup> Second Witness Statement of Phillip Osborne, para. 2.5.

<sup>34</sup> Government of Belize Press Release on the Court of Appeal decision regarding Belize Telemedia Ltd. (25 June 2011) (**Exhibit C-100**)

## H. THE RE-ACQUISITION OF TELEMEDIA AND SUNSHINE

100. On 4 July 2011, ten days after the judgment of the Court of Appeal in the First Constitutional Challenge, the National Assembly of Belize passed the *Belize Telecommunications (Amendment) Act, 2011* (the “**2011 Act**”).<sup>35</sup> The 2011 Act introduced modifications into Sections 63-74 of the Telecommunications Act that had been added to the statute by the 2009 Act. The principal changes introduced by the 2011 Act were to remove the provision that “every such order shall be *prima facie* evidence that the property to which it relates is required for a public purpose” and to elaborate more detailed provisions for compensation in respect of acquired property. The 2011 Act also empowered the Financial Secretary to acquire property with retrospective effect, and introduced additional provisions on the service of papers outside of Belize.
101. Also on 4 July 2011, the Ministry of Finance issued the *Belize Telecommunication (Assumption of Control over Belize Telemedia Limited) Order, 2011* (the “**2011 Order**”). The preamble to the 2011 Order provided as follows:

[ . . . ]

AND WHEREAS; after a careful consideration of all the facts and other circumstances, I consider that control over telecommunications should be acquired for the following public purposes, namely, (a) to restore the control of the telecommunications industry to Belizeans; (b) to provide greater opportunities for investment to socially-oriented local institutions and the Belizean society at large; and (c) to advance the process of economic independence of Belize with a view to bringing about social justice and equality for the benefit of all Belizeans;<sup>36</sup>

102. The 2011 Order then provided that “[t]he property specified in the First Schedule to this Order is hereby acquired for and on behalf of the Government of Belize for the public purpose aforesaid.” The First Schedule to the 2011 Order listed the same property as the schedules to the 2009 Order and 2009 Amendment Order.
103. On 22 July 2011, the Governor General of Belize assented to the *Belize Constitution (Eighth Amendment) Act, 2011* (the “**Eighth Amendment**”). The Eighth Amendment added a new Part XIII to the Constitution of Belize, which provided as follows:

### PART XIII

#### GOVERNMENT CONTROL OVER PUBLIC UTILITIES

143. For the purposes of this Part:-

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<sup>35</sup> Belize Telecommunications (Amendment) Act, 2011 (**Exhibit C-102**).

<sup>36</sup> Belize Telecommunication (Assumption of Control over Belize Telemedia Limited) Order, 2011 (**Exhibit C-103**).

“**public utilities**” means the provision of electricity services, telecommunication services and water services;

“**public utility provider**” means—

- (a) Belize Electricity Limited, a company incorporated under the Companies Act, or its successors by whatever name called;
- (b) Belize Telemedia Limited, a company incorporated under the Companies Act, or its successors by whatever name called; and
- (c) Belize Water Services Limited, a company incorporated under the Companies Act, or its successors by whatever name called;

“**Government**” means the Government of Belize;

“**Government shareholding**” shall be deemed to include any shares held by the Social Security Board;

“**majority ownership and control**” means the holding of not less than fifty one per centum (51 %) of the issued share capital of a public utility provider together with a majority in the Board of Directors, and the absence of any veto power or other special rights given to a minority shareholder which would inhibit the Government from administering the affairs of the public utility provider freely and without restriction.

144. (1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider; and any alienation of the Government shareholding or other rights, whether voluntary or involuntary, which may derogate from Government’s majority ownership and control of a public utility provider shall be wholly void and of no effect notwithstanding anything contained in section 20 or any other provision of this Constitution or any other law or rule of practice:

Provided that in the event the Social Security Board (“the Board”) intends to sell the whole or part of its shareholding which would result in the Government shareholding (as defined in section 143) falling below 51% of the issued stock capital of a public utility provider, the Board shall first offer for sale to the Government, and the Government shall purchase from the Board, so much of the shareholding as would be necessary to maintain the Government’s majority ownership and control of a public utility provider; and every such sale to the Government shall be valid and effectual for all purposes.

(2) Any alienation or transfer of the Government shareholding contrary to subsection (1) above shall vest no rights in the transferee or any other person other than the return of the purchase price, if paid.

145. (1) For the removal of doubts, it is hereby declared that the acquisition of certain property by the Government under the terms of the—

- (a) Electricity Act, as amended, and the Electricity (Assumption of Control Over Belize Electricity Limited) Order, 2011 (hereinafter referred to as “the Electricity Acquisition Order”); and
- (b) Belize Telecommunications Act, as amended, and the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2011, (hereinafter referred to as “the Telemedia Acquisition Order”), was duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property.

(2) The property acquired under the terms of the Electricity Acquisition Order and the Telemedia Acquisition Order referred to in subsection (1) above shall be deemed to vest absolutely and continuously in the Government free of all encumbrances with effect from the date of commencement specified in the said Orders.

(3) Nothing in the foregoing provisions of this section shall prejudice the right of any person claiming an interest in or right over the property acquired under the said Acquisition Orders to receive reasonable compensation within a reasonable time in accordance with the law authorising the acquisition of such property.<sup>37</sup>

## I. CIRCUMSTANCES OF THE RE-ACQUISITION OF TELEMEDIA AND SUNSHINE

104. In connection with the adoption of the 2011 Act, the Prime Minister of Belize made the following statement to the Parliament on 29 July 2011:

As Honourable Members know, the Court of Appeal delivered its judgment in the Telemedia nationalization matter on Friday, June 24, 2011. To our chagrin, the Court declared unconstitutional the law we had passed on August 25, 2009 to assume control over telecommunications in the public interest. This was on the ground that it was inconsistent in certain respects with section 17 of the Constitution relating to protection of property. The Court also declared the Order made by the Minister of Public Utilities under the said Act to be unconstitutional for the same reasons.

Mr. Speaker, with due respect to the Court of Appeal we do not agree with its decision. We are therefore filing an appeal to the Caribbean Court of Justice.

Meantime, though, the former owners of Telemedia have gone on a campaign that has terrorized workers, upset the citizenry, and sought to cripple the operations of the company. This was on the basis that the judgment of the Court of Appeal entitled them to the immediate reassumption of control, notwithstanding clear legal authority to the contrary.

Government's position of resistance to this has now been vindicated by the legal system, even though it was vilified by the appellants and their fellow travelers.

But the confusion and chaos sowed in just a few days, made clear that Government could waste no time in settling this matter once and for all. This is not about personalities, it is about principles: principles of public welfare, principles of cultural advance, principles of national security; principles that make clear that in all the circumstances control of telecommunications, via the dominant provider, must be in the hands of Government. We have therefore come to the House today to fix the law, to clarify and expand certain provisions that the Court of Appeal said were inadequate.

I hasten to add, Mr. Speaker, that by proposing to amend the Act we passed in August of 2009 we are in no way giving up our right to challenge the findings of the Court of Appeal. We still believe that the Law was in substantial compliance with the Constitution, and will thus maintain our recourse to the CCJ.

As for the clauses of this new Bill, Mr. Speaker, the amendments we are making today are fully consonant with the requirements according to the Court of Appeal. Of particular note is the new section 71, which deals with the payment of compensation. The Bill both details the scheme for satisfying compensation awards, and reinforces the right to enforcement. Access to court for the purpose of establishing a claimant's interest in acquired property as well as his entitlement to compensation, have been amplified in the new section 63. Altogether, the amendments proposed appear to us to satisfy every concern expressed by the judgment.

Therefore, Mr. Speaker, as soon as the Bill is passed we intend to reacquire the same property that was taken in August 2009. This will reassure all Belize that the Government is in full control because we would have done everything legally necessary to retain ownership of Belize Telemedia Limited.

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<sup>37</sup> Belize Constitution (Eighth Amendment) Act, 2011 (**Exhibit C-108**).

I want to point out here, Mr. Speaker, that the Court of Appeal completely accepted the position that the state has every right to acquire private property in the public interest, for a public purpose. There was never any issue joined over this, and how could there be? After all, such a proposition is self-evident. It is a right of democratic nation states that has been both recognized and practiced since antiquity. And it is enshrined in the Belize Constitution. For the Constitution doesn't protect against deprivation of private property. It protects against arbitrary deprivation of private property: deprivation that is not done properly for a public purpose; or that is done under a law or in a manner that fails to assure proper access to the courts or proper provisions for the payment of reasonable compensation within a reasonable time.

I lay stress on what I've already said should be self-evident, only because of the position taken by some private sector entities and especially the Belize Chamber of Commerce. They act as though Government's acquisitions are in and of themselves aberrant, that this is deviant behavior. Nothing could be farther from the truth; and that kind of declaration reveals the Chamber Executive to be wearing the worst sort of ideological blinders. The slightest degree of reflection, or the sketchiest amount of research, would have shown them that public acquisition of private property is today a commonplace tool of statecraft and government practice.

Of course, the pre-requisite is that this type of acquisition be carried out in strict compliance with the Constitutional markers. And that is where, according to the Court of Appeal, we went wrong. Our objective of nationalizing BTL in the public interest was fine. But the procedural steps by which we carried this out were flawed.

That distinction is critical for today's exercise. The decision to nationalize was both legitimate and imperative when we first took it. And nothing has changed in that regard. If anything, last week's threats to workers and the efforts to injure the economy and disrupt the provision of an essential service, show that the circumstances demanding nationalization have become even more exigent. So it is entirely right and proper that we correct the mis-steps and do over what the national interest required on August 25, 2009, and still requires now.

This Bill that I am introducing therefore fixes the defects in the original law and does so with retrospective effect. But there will then be the Order that the Minister will have to make under the law. The first time around, as the Court of Appeal acknowledged, there was nothing wrong with the public purposes that the Minister set out as the bases for his acquisition Order. But the Court was not satisfied that the evidence the Minister adduced as justification for triggering those public purposes, was sufficiently compelling. Even if the Court was right, there was always an overwhelming number of reasons in existence that could prove the public purposes. It was just that, according to the Judges, the Minister did not select the right ones. I am certain that, in making his new Order, the public purpose choices of the Minister now will be rooted in circumstances and references of a nature that will still the doubts of even the most censorious of courts.

So, Mr. Speaker, we have reloaded and are ready to go. And what we are doing is the essence of compliance with the rule of law. We don't agree with the Court of Appeal but we are bound by it. We therefore act now in accordance with those Court of Appeal dictates.

This is, of course, in the proper, irresistible tradition of our democracy. But there are those that say that this very fixing of matters in order to implement the Court of Appeal decision is a negation of the rule of law. What we are really to do, by their reasoning, is simply to give back BTL to the former majority owners and be done with it.

These are the same people that also charged us with violation of the rule of law when, after the position became clear as a bell, we refused – in the absence of the required enforcement court order – to allow Dean Boyce to last week take control of Telemedia. And these are the same people that have neglected now to apologize or even acknowledge they were wrong. This is so even though the Registrar of the Court of Appeal has confirmed in writing to Boyce's attorney that a consequential relief order subsequent to the decision of June 24, should, as we said all along, have been sought in new proceedings before the Supreme Court.



But these people are a combination of the misguided and the malicious. There is no hope for the very plentiful political opportunists among them. But I would urge the others, the ones that have merely been carried away by what they mistakenly believe to be correct neo-liberal orthodoxy, to recant. I repeat that even the most cursory survey of global practice and law shows their position to be ill-informed. To hold on to it now is to run the risk of being accused of anti-nationalism, and no true blooded Belizean can want that. And so I make clear again that governments are expected to correct a state of affairs found to be wrong by a court decision. And the Belize Constitution allows laws to be passed with retroactive effect. This is therefore what we are doing today and it is meet and right so to do.

When this Bill is passed and the consequential acquisition Order made, neither the sky nor the investment climate will fall. But this Administration would have complied with the overarching requirement of its mandate: to protect and promote at all times and in all circumstances and no matter what the cost, the national interests of Belize. The national interests of Belize: words simple and straightforward, but importing the highest possible duty, the most solemn commitment, the most ineffable trust.<sup>38</sup>

## J. CLAIMS FOR COMPENSATION AND CHALLENGES TO THE RE-ACQUISITION OF TELEMEDIA

105. On 30 August 2011, the Claimant submitted a claim for compensation to the Financial Secretary under the 2011 Act. Although the Parties have exchanged correspondence in relation to this claim, as of the present date no compensation has been paid to the Claimant.
106. Following the adoption of the 2011 Act and 2011 Order, the Parties engaged in a series of legal actions in the courts of Belize. As stated above,<sup>39</sup> the Supreme Court of Belize is a court of general original jurisdiction. From the Supreme Court of Belize, appeals may be brought to the Court of Appeal:
- (a) On 2 September 2011, the Respondent and Telemedia amended Claim 360 against the Claimant (see above at paragraph 97(c)) to refer to the 2011 Act and 2011 Order.
  - (b) On 24 September 2011, the Claimant began a challenge to the constitutionality of the 2011 Act and 2011 Order in the Supreme Court of Belize (the “**Second Constitutional Challenge**”). On 16 November 2011, after the passage of the Eighth Amendment, the Claimant amended this claim to include a challenge to the constitutionality of the Eighth Amendment. On 11 June 2012, the Supreme Court of Belize granted the following orders:
    - 1. A declaration is granted that sections 2(a) and (b) of the Belize Telecommunications Amendment Act 2011, (the 2011 Act) are unlawful null and void.
    - 2. A declaration is granted that sections 2 (c) (d) (e), 3, 4, 5, and 6 of the 2011 Act are valid.

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<sup>38</sup> Prime Minister’s comments when introducing the 2011 Act to the National Legislature, 29 July 2011 (**Exhibit C-105**)

<sup>39</sup> See paragraph 97 above.

3. A declaration is granted that the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011, No. 70 of 2011, (the 2011 Order) is unlawful, null and void.
4. A declaration is granted that sections 2 (2), 69(9), 145(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act 2011 are contrary to the separation of powers and the basic structure doctrine of the Constitution and are unlawful, null and void. Section 145(3) is declared meaningless.
5. A declaration is granted that section 143 of the Constitution as inserted by the Eighth Amendment is valid.
6. A declaration is granted that the following portion of section 144(1) of the Constitution is valid, namely “From the commencement of the Belize Constitution (Eighth Amendment) Act 2011, the government shall have and maintain majority ownership and control of a public utility provider.”
7. A declaration is granted that the remaining portions of section 144(1) of the Constitution, beginning from the words “and any alienation” to the words “rule of practice” (both inclusive) are null and void and severed from the subsection. Section 141 (2) is therefore declared useless or meaningless.
8. The claims by the claimants in both claims for declarations and orders to the effect that the government shall not have and maintain majority ownership and control of BTL and for consequential reliefs are dismissed.
9. The claims for damages and injunctions are dismissed.
10. A declaration is granted that from the commencement of the Belize Constitution (Eighth Amendment) Act 2011 the Government shall have and maintain majority ownership and control of Belize Telemedia Limited.
11. The claimants in both claims and the defendants in both claims, along with such other persons as the claimants and the defendants may think fit, shall meet and enter into discussions, commencing from 1<sup>st</sup> August, 2012, with respect to any matter relevant to the case, including the payment of reasonable compensation to the claimants within a reasonable time for the properties of the claimants in the ownership and control of the Government.
12. All parties to bear their own costs.<sup>40</sup>

Both the Claimant and the Respondent appealed to the Court of Appeal in relation to portions of the judgment of 11 June 2012.

107. On 15 May 2014, the Court of Appeal allowed in part the Respondent’s appeal in the Second Constitutional Challenge.<sup>41</sup> Mr. Justice Sosa, President, summarized the holding of the majority as follows:

For reasons which I shall hereinafter identify, I have arrived at the following determinations:

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<sup>40</sup> *Claim No. 597 of 2011*, Judgment of the Supreme Court at para. 85 (**Exhibit C-111**).

<sup>41</sup> *(1) The Attorney General of Belize & (2) The Minister of Public Utilities v. The British Caribbean Bank Limited (Civil Appeal No 18 of 2012); (1) The Attorney General of Belize & (2) The Minister of Public Utilities v. (1) Dean Boyce & (2) Trustees of the BTL Employees Trust (Civil Appeal No 19 of 2012); Fortis Energy International (Belize) Inc v. (1) The Attorney General of Belize & (2) The Minister of Public Utilities (Civil Appeal No 21)*; Judgment of the Court of Appeal of 15 May 2014.

- (i) in Civil Appeal No 18 of 2012, I would allow the appeals of the Attorney General and the Minister of Public Utilities ('the Minister'), but only with the qualification that the compulsory acquisition is valid and took effect as from 4 July 2011, rather than as from 25 August 2009 ('the qualification'), and I would reject the contentions of the British Caribbean Bank Limited ('British Caribbean'), under its respondent's notice, for variation of the decision of the court below;
- (ii) in Civil Appeal No 19 of 2012, I would allow the appeals of the Attorney General and the Minister, but only with the qualification, and I would reject the contentions of Dean Boyce ('Mr Boyce') and the Trustees of the BTL Employees Trust ('the Trustees'), under their respondents' notice, for variation of the decision of the court below;

[ . . . ]

In arriving at my determinations stated at (i) and (ii) above, I have concluded that, inter alia:

- (i) both the Belize Telecommunications (Amendment) Act 2011, being Act No 8 of 2011 ('Act No 8 of 2011'), and the Belize Telecommunications Act (Assumption of Control over Belize Telemedia Limited) Order 2011 ('the 2011 BTL acquisition Order'), being Statutory Instrument No 70 of 2011, are valid and constitutional and took effect as from 4 July 2011, rather than as from 25 August 2009;
- (ii) in particular, section 2(a) and (b) of Act No 8 of 2011 was operative and effectual and, accordingly, prospectively amended the provisions of section 63(1) of the Belize Telecommunications Act, Chapter 229 of the Laws of Belize ('the principal Act'), which provisions, together with the remainder of Part XII of the principal Act, it also re-enacted;
- (iii) the so-called basic structure doctrine is not a part of the law of Belize and does not apply to the Belize Constitution ('the Constitution');
- (iv) the power of the National Assembly to alter the Constitution is limited only by the provisions of such constitution, which, as relevant, are contained in its section 69;
- (v) The Belize Constitution (Eighth Amendment) Act 2011, being Act No 11 of 2011, ('the Eighth Amendment') is valid and constitutional and, while commencing and taking effect as from 25 October 2011, it retrospectively confirmed the validity of Act No 8 of 2011 and the 2011 BTL acquisition Order as from 4 July 2011;
- (vi) in particular, the Eighth Amendment effectually inserted into the Constitution its new sections 2(2), 69(9) and 145(1) and (2), which are, accordingly, all lawful and valid;
- (vii) it was only up to 4 July 2011 that the relevant property of British Caribbean, Mr Boyce and the Trustees remained the subject of an unlawful, null and void compulsory acquisition purportedly effected under (a) the principal Act, as purportedly amended by the Telecommunications (Amendment) Act 2009, and (b) the two Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Orders 2009, being Statutory Instruments Nos 104 and 130 of 2009, which Act and Orders were all declared unlawful, null and void by this Court in Civil Appeals Nos 30 and 31 of 2010;
- (viii) Mr Boyce and the Trustees are not entitled to the return of their former shares in Belize Telemedia Limited ('Telemedia') and their relevant loan interests nor to the return of the business undertaking of Telemedia but are entitled to compensation for the compulsory acquisition effected by the 2011 BTL acquisition Order;
- (ix) compensation for the lawful compulsory acquisition of the relevant respective properties of British Caribbean, Mr Boyce and the Trustees should, respectively, be in an amount equal to the value of the relevant property of British Caribbean on 4 July 2011, in an amount equal to the value of the relevant property of Mr Boyce on 4 July 2011 and in an amount equal to the value of the relevant property of the Trustees on 4 July 2011;

- (x) the parts numbered 1, 3, 4 and 7 of the Order made by Legall J on 11 June 2012 and signed by the Deputy Registrar of the Court below on 22 June 2012 should be set aside.<sup>42</sup>

108. The decision included the dissenting opinion of Mr. Justice Mendes, who parted company with the majority and summarized his conclusions as follows:

In the premises, I would have made the following declarations:

- i) The compulsory acquisition of the property of the British Caribbean Bank Limited, Dean Boyce and the Trustees of the BTL Employees Trusts identified in the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011 is unconstitutional and void;
- ii) The Belize Communications (Assumption of Control Over Belize Telemedia Limited) Order 2011 is unconstitutional, ultra vires and void;
- iii) The compulsory acquisition of the property of Fortis Energy Investment (Belize) Inc. identified in the Electricity (Assumption of Control Over Belize Electricity Limited) Order 2011 is unconstitutional and void.
- iv) The Electricity (Amendment) Act 2011 and the Electricity (Assumption of Control Over Belize Electricity Limited) Order 2011 are unconstitutional and void;
- v) Section 145 of the Belize Constitution (Eight Amendment) Act 2011 is unconstitutional and void.

Even though I have held that section 145 has not had the effect of validating the unlawful acquisition of the complainant's properties, given my finding that it is in any event in violation of section 17(1) of the Constitution, I thought it appropriate to order accordingly.<sup>43</sup>

#### K. LEGAL ACTIONS RELATING TO THESE ARBITRAL PROCEEDINGS

109. In connection with these arbitral proceedings, the Parties engaged in a series of lawsuits in the Courts of Belize and England.

110. On 4 May 2010, the Claimant applied to the High Court of Justice of England and Wales, seeking an injunction restraining the Respondent from taking action in the Courts of Belize to inhibit these arbitral proceedings. On the same day, the High Court issued an order (the “**Anti-Suit Injunction**”) restraining the Respondent as follows:

the Defendant acting by itself or by its officers, employees or agents or in any other way, is restrained from commencing, pursuing, progressing or taking any steps before the Courts of Belize or elsewhere to enjoin or restrain the Claimant and/or the Tribunal from commencing or taking any steps in an anticipated arbitration against the Defendant under the “Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments”.<sup>44</sup>

<sup>42</sup> *Ibid.* at paras. 3-4.

<sup>43</sup> *Ibid.* at paras. 295-296.

<sup>44</sup> Order of Hamblen J of the High Court of Justice of England and Wales, 4 May 2010 (**Exhibit C-37**).

111. On 3 September 2010, the Anti-Suit Injunction was continued “until further order of the Court or the date of issue of the final award of the arbitral tribunal now constituted.”
112. On 16 August 2010, the Respondent began proceedings in the Supreme Court of Belize to restrain the Claimant from pursuing these arbitral proceedings. On 7 December 2010, the Court issued an order (the “**Anti-Arbitration Injunction**”) as follows:
- (1) An injunction is granted to the claimant restraining the defendant, whether by itself or by its officers, servants, or agents, subsidiaries, assignees or other persons or bodies under its control, from taking any or any further steps in the continuation or prosecution of the arbitration proceedings, commenced by the defendant by notice of arbitration dated 5<sup>th</sup> May, 2010 under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 and pursuant to the treaty or agreement made on 30<sup>th</sup> April, 1982 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize and extended to the Turks and Caicos Islands, until the hearing and determination of the local claims for compensation made on 15<sup>th</sup> October, 2009 by the defendant, and until any subsequent proceedings in the local courts in relation to the said local claims are heard and determined.
  - (2) After the completion of hearing and determination of the local claims, and any subsequent proceedings, mentioned at (1) above for compensation, the defendant may, if it thinks fit, continue or commence arbitration proceedings under the above mentioned treaty or agreement for such compensation or other remedies as it thinks fit.
  - (3) Each party to bear its own costs.<sup>45</sup>
113. On 10 December 2010, the Claimant informed the Tribunal of the Anti-Arbitration Injunction and requested that the Tribunal adjourn the hearing in this matter scheduled for 20 and 21 December 2010. On 13 December 2010, the Tribunal granted the Claimant’s request and adjourned the hearing until further notice.
114. The Claimant unsuccessfully appealed the Anti-Arbitration Injunction to the Court of Appeal. Thereafter, the Claimant appealed to the Caribbean Court of Justice. On 25 June 2013, the Caribbean Court of Justice upheld the Claimant’s appeal in respect of its challenge to the Anti-Arbitration Injunction (the “**CCJ Judgment**”). The Caribbean Court of Justice reasoned in relevant part as follows:

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<sup>45</sup> *Claim No. 558 of 2010*, Judgment of the Supreme Court, 7 December 2010 (**Exhibit C-123**).

23. The courts of Belize do have and retain the jurisdiction to restrain international or foreign arbitral proceedings which are oppressive, vexatious, inequitable, or would constitute an abuse of the legal process. [ . . . ] In this sense there is no unqualified or indefeasible right to arbitrate. Equally, however, there is no requirement to exhaust local remedies before exercising the right to arbitration. Under the doctrine of *kompetenz-kompetenz*, the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the court to decide, in relation to an injunction to restrain international arbitration, whether a particular dispute falls within the scope of the arbitration agreement. [ . . . ] An expropriation that is perfectly lawful under the national law could nonetheless trigger a successful investment claim under the investment treaty. Any condition to strive for an amicable settlement before initiation of arbitration cannot include an obligation to litigate the constitutionality of the expropriation. There is therefore no requirement that domestic remedies be exhausted before arbitration can be engaged. Whether the arbitrators choose to stay the arbitral proceedings properly brought before them whilst related domestic proceedings are in train is entirely a matter for them under the doctrine *kompetenz-kompetenz* and the circumstance that arbitrators may do so cannot form an appropriate basis for the domestic court to restrain the arbitration.<sup>46</sup>

115. The Caribbean Court of Justice went on to examine the litigation in the courts of Belize invoked by the Respondent as the rationale for the Anti-Arbitration Injunction, before concluding as follows:

45. In the case before us there are many advantages to BCB to pursue the arbitral proceedings because the relief it seeks for breach of the BIT is qualitatively different from the relief it could obtain from the domestic courts. The fact that it may be inconvenient or expensive for GOB to litigate before the arbitral tribunal is not an issue that could justify a finding of vexation or oppression.<sup>47</sup>

#### IV. RELIEF REQUESTED

##### *The Claimant's Request*

116. In its Amended Statement of Claim, the Claimant requests the following relief:

- (1) a declaration that the Government has violated Articles 2, 3 and 5 of the Treaty, as well as its obligations under general international law;
- (2) an order that the Government make full reparation to BCB for the injury or loss to its investment arising out of the Government's violation of the Treaty, and applicable rules of international law, such full reparation being US\$45,170,733.86 as at 12 July 2013, and include interest thereon from the date of the award;
- (3) an order that the Government pay the costs of these arbitration proceedings including the costs of the Tribunal, as well as the legal and other expenses incurred by BCB including but not limited to the fees of their legal counsel as well as BCB's own employees on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal; and

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<sup>46</sup> *British Caribbean Bank Limited v The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, [2013] CCJ 4 (AJ), Judgment of 25 June 2013 at para. 23, (**Exhibit C-121**).

<sup>47</sup> *British Caribbean Bank Limited v The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, [2013] CCJ 4 (AJ), Judgment of 25 June 2013 at para. 45, (**Exhibit C-121**).

- (4) any alternative or other relief the Tribunal may deem appropriate in the circumstances.<sup>48</sup>

117. In its Post-Hearing Memorial, the Claimant further requests the Tribunal to record the following order in its award:

on the full and effective payment of the prescribed compensation, the Claimant shall take all necessary steps to assign its rights in the loans to the Government or its nominee.<sup>49</sup>

*The Respondent's Request*

118. In its Statement of Defence, the Respondent requests the following relief:

that BCB's Amended Statement of Claim be denied in its entirety and either (a) that these arbitration proceedings be severed and dismissed or stayed based on the aforementioned preliminary objections, or (b) that a final award be rendered against BCB and in favor of GOB on all claims herein, denying any relief whatsoever to BCB under the Amended Statement of Claim, and awarding to GOB its actual attorneys' fees and all costs incurred in the defense of these arbitration proceedings.<sup>50</sup>

## V. THE TRIBUNAL'S CONSIDERATIONS

119. The Tribunal has given careful consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, which the Tribunal has generally found to be of assistance. In this Award, the Tribunal addresses the arguments of the Parties that it considers most relevant for its decisions. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed in the Tribunal's considerations. The Tribunal's reasons address what the Tribunal considers to be the determinative factors required to decide the issues arising in this case.

### A. THE TRIBUNAL'S JURISDICTION AND APPLICABLE LAW

120. The Tribunal's jurisdiction has been invoked by the Claimant pursuant to the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982*, i.e., the Treaty.<sup>51</sup> The Respondent agrees that the Bilateral Investment Treaty at issue is the Treaty.<sup>52</sup>

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<sup>48</sup> The Claimant's Amended Statement of Claim, p. 83.

<sup>49</sup> The Claimant's Post-Hearing Memorial, para. 105.

<sup>50</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 330.

<sup>51</sup> The Claimant's Amended Statement of Claim, para. 123.

<sup>52</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 200.

121. The applicable law for the interpretation of this Treaty is public international law. The Tribunal considers the relevant rule on the interpretation of treaties to be embodied in Article 31 of the Vienna Convention on the Law of Treaties. The supplementary means of interpretation of treaties is set out in Article 32 of the Vienna Convention on the Law of Treaties.<sup>53</sup> Articles 31 and 32 provide as follows:

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

122. As a result of the Tribunal's application of public international law, the results it reaches in the interpretation and application of the treaty may differ from the results that would be reached through the application of municipal law in the courts of Belize. In this respect, the Tribunal notes with approval the observation of the Caribbean Court of Justice in the CCJ judgment that:

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<sup>53</sup> Vienna Convention on the Law of Treaties Vienna, 23 May 1969, 1155 U.N.T.S 331. Although Belize is not a party to the Vienna Convention, the Tribunal agrees with the well-established view that articles 31 and 32 of that Convention are representative of customary international law. *See, e.g., Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 at p. 46, para. 65.



The very purpose of the arbitration contract created or generated by the arbitration clause in the investment treaty was to provide for the protection of the investments of foreign investors, among other things, by providing them with a right to pursue disputes about their investments through international and neutral arbitration as an alternative to submitting themselves to the national courts. The standards by which expropriations of investment are to be judged are the standards set out in the investment protection agreement and international law principles and not necessarily those set out in the domestic system of the host State. An expropriation that is perfectly lawful under the national law could nonetheless trigger a successful investment claim under the investment treaty.<sup>54</sup>

123. Where the Parties have raised questions regarding the loan and security agreements at issue in these proceedings, however, the Treaty itself requires the Tribunal to evaluate these agreements by reference to the municipal law pursuant to which they were concluded. On these issues, therefore, the Tribunal will be called upon to interpret and apply the municipal law of Belize.

## **B. THE VALIDITY OF THE LOAN AND SECURITY AGREEMENTS**

124. The Parties differ regarding the validity of the Telemedia Facility, Telemedia Mortgage, Sunshine Facility, Sunshine Security, Sunshine Overdraft Facility, and Sunshine Mortgage of Shares (collectively, the “**Loan and Security Agreements**”) at issue in this arbitration. The Claimant submits that all of the Loan and Security Agreements were valid and lawful contracts, whereas the Respondent is of the view that these agreements were, without exception, illegal under Belizean law and therefore invalid. As the Respondent has challenged validity of these agreements as an objection to jurisdiction, as a defence on the merits, and as a factor in the calculation of quantum, the Tribunal considers it appropriate to address the question of validity as an initial matter, setting out the Respondent’s position first.

### **1. The Validity of the Telemedia Facility and the Telemedia Mortgage**

#### *The Respondent’s Position*

125. The Respondent submits that the Claimant is “not entitled to any relief under the Treaty, because the Telemedia Facility and Mortgage Debenture are illegal under Belizean law.”<sup>55</sup>
126. According to the Respondent, because Telemedia acted “to finance the purchase of its own shares, merely using its subsidiary TIL as a vehicle, [the directors] acted *ultra vires* in the execution of the Telemedia Facility, and the resulting share purchase was *ultra vires* and

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<sup>54</sup> *British Caribbean Bank Limited v The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, [2013] CCJ 4 (AJ), Judgment of 25 June 2013 at para. 23 (**Exhibit C-121**).

<sup>55</sup> The Respondent’s Post-Hearing Memorial, para. 63.

void.”<sup>56</sup> The Respondent relies upon *Trevor v. Whitworth*<sup>57</sup> for the proposition that the Respondent characterizes as follows: “a limited liability company is precluded from purchasing its own shares, and/or from financing the purchase of its own shares.”<sup>58</sup> In the Respondent’s view, “*Trevor v. Whitworth* also establishes that it is a reduction of share capital when a company finances the purchase of its own shares and that it is unlawful to do so unless authorized by and in strict compliance with the Companies Act.”<sup>59</sup> The Respondent notes that it is undisputed that the Claimant did not seek to comply with section 48 of the Belize Companies Act (relating to the reduction of share capital).<sup>60</sup> It further argues that “[i]t is settled law that there is a reduction in capital whenever the funds (including borrowed money) or the assets of the company that should be available to pay creditors are reduced by way of paying over to shareholders the proceeds of such funds or assets.”<sup>61</sup>

127. In the Respondent’s view, the illegality of the transaction does not change as the result of the purchase of shares having been made by TIL, rather than directly by Telemedia. First, the Respondent disputes as a matter of fact that the funds received through the Telemedia Facility were ever on-loaned to TIL or that the purchase of shares was indeed made by TIL. According to the Respondent, “[t]here is no evidence or documentation related to the alleged on-loan”. The Respondent notes the testimony of Messrs. Osborne and Ashcroft in support of the position that no loan agreement was ever concluded.<sup>62</sup> Moreover, the Respondent argues, “the loan proceeds were transferred by BCB to RBTT (not to TIL) for the purchase.”<sup>63</sup> Thereafter, “Telemedia declared a dividend and distributed the shares as a dividend in specie to Telemedia’s shareholders. The practical effect of the transaction was that TIL was a redundant entity and a pass-through straw man.”<sup>64</sup>
128. Under Belizean company law, the Respondent submits, a subsidiary may purchase shares in its parent company “only if the company did not provide the consideration or funds for the

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<sup>56</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 112.

<sup>57</sup> *Trevor v Whitworth*, [1887] 12 App Case 409.

<sup>58</sup> The Respondent’s Post-Hearing Memorial, para. 65.

<sup>59</sup> The Respondent’s Post-Hearing Memorial, para. 66.

<sup>60</sup> The Respondent’s Post-Hearing Memorial, paras. 67-72.

<sup>61</sup> The Respondent’s Post-Hearing Memorial, para. 74.

<sup>62</sup> The Respondent’s Post-Hearing Memorial, paras. 82-83.

<sup>63</sup> The Respondent’s Post-Hearing Memorial, para. 84.

<sup>64</sup> The Respondent’s Post-Hearing Memorial, para. 84.

purchase, and that was not the case here.”<sup>65</sup> As a result, the Respondent argues, “even if TIL was the purchaser, the transaction was nevertheless illegal.”<sup>66</sup> The Respondent distinguishes *Durack & Others v. West Australian Trustee Executor & Agency Company Limited*<sup>67</sup> (hereinafter “*Durack*”) as authority for the proposition that a loan by a company to finance the purchase by a third party of its shares is outside the purview of *Trevor v. Whitworth*. In the Respondent’s view, when the loan is made to a subsidiary, the holding in *Durack* no longer follows. While a loan to a third party would leave the company with an asset in the form of the loan, in the present circumstances,

TIL did not borrow funds from Telemedia to purchase shares that it would keep. In fact, there was no real transaction in which TIL was involved. . . . The effect of this transaction is a net loss in the capital of Telemedia (the debt from the Telemedia Facility with none of the assets purchased with the debt) whereas the effect of the *Durack* transaction would likely be a net gain—assuming the company was charging the director interest on the loan it disbursed to the director. The present situation is precisely the situation that Trevor and the Companies Act, Section 48, are seeking to prevent.<sup>68</sup>

129. The Respondent similarly distinguishes *DE Shaw Oculus Portfolios, LLC & Others v. Orient-Express Hotels Limited & Others*<sup>69</sup> (hereinafter “*Orient-Express Hotels*”) as authority for the proposition that a subsidiary may hold shares in its parent without reducing the share capital of the company. According to the Respondent, the distribution of the shares as a dividend in specie establishes that Telemedia was effectively dealing in its own shares and creates “precisely the situation that invokes the protections of *Trevor* and the Companies Act.”<sup>70</sup> In the Respondent’s view:

allowing BCB to bypass these legal requirements on the baseless ground that the transaction was conducted by Telemedia’s wholly-owned subsidiary rather than Telemedia itself would defeat the purpose of these laws enacted with the goal of “preventing a company from dealing in its own shares and thereby artificially influencing the share price [and] also . . . preventing an unauthorized reduction of capital.”<sup>71</sup>

130. According to the Respondent, the fact that the Central Bank of Belize granted authorization to borrow foreign currency only for the purpose of acquiring “certain shares” was such that the purchase of shares by TIL was in fact the only purpose for which the Telemedia Facility could

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<sup>65</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 114.

<sup>66</sup> The Respondent’s Post-Hearing Memorial, para. 85.

<sup>67</sup> *Durack & Others v West Australian Trustee Executor & Agency Company Limited*, (1944) 72 CLR 189.

<sup>68</sup> The Respondent’s Post-Hearing Memorial, para. 96.

<sup>69</sup> *DE Shaw Oculus Portfolios, LLC & Others v Orient-Express Hotels Limited & Others*, [2010] SC (Bda) 25 Com.

<sup>70</sup> The Respondent’s Post-Hearing Memorial, paras. 97-98.

<sup>71</sup> The Respondent’s Post-Hearing Memorial, para. 88, quoting *Trevor v. Whitworth*, *supra* note 57.

have been used, notwithstanding broader language in the loan itself.<sup>72</sup> Moreover, the Respondent submits that “GOB did not expressly approve of the transaction with knowledge of its illegalities” and cannot therefore be precluded from raising objections to the Tribunal’s jurisdiction.<sup>73</sup> According to the Respondent, the Government’s approval of the Telemedia Facility was “based on the information that was artfully presented by BCB and Belize Telemedia at the time, which gave absolutely no indication of the illegal nature of the transaction.” In particular, Telemedia’s application to the Central Bank did not specify that the “certain shares” that TIL intended to acquire were shares in Telemedia.<sup>74</sup> In any event, the Respondent argues, a party cannot be estopped at common law from arguing that a transaction was *ultra vires*.<sup>75</sup>

131. The Respondent also submits that the Telemedia Facility was invalid because it formed part of a series of “sham transactions whereby BCB simply shifted money from BCB to the investors of Belize Telemedia . . . , and the recipients of those funds in the form of stock (the investors) incurred no liability whatsoever.”<sup>76</sup> According to the Respondent, the dividend in specie of the shares purchased by TIL was part of the same overall transaction as the Telemedia Facility and was “orchestrated by BCB and persons employed by BCB Holdings.”<sup>77</sup> In the Respondent’s view, “the fact that the distribution of the dividend in specie took place six weeks later rather than on the same day of the Telemedia Facility has no bearing on the legality of the Telemedia Facility”<sup>78</sup> as “BCB knew of and actively participated in the illegal transaction, including the distribution.”<sup>79</sup> Taken as a whole, the Respondent considers this sham transaction to be void as a matter of equity:

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<sup>72</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 116-119.

<sup>73</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 80.

<sup>74</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, paras. 83-84.

<sup>75</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 82.

<sup>76</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 182; *see also* The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 111.

<sup>77</sup> The Respondent’s Reply to Claimant’s Post-Hearing Memorial, para. 92.

<sup>78</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 137.

<sup>79</sup> The Respondent’s Reply to Claimant’s Post-Hearing Memorial, para. 95.

the BCB group's breaches of fiduciary duty, conflicts of interest, and failure to heed contractual formalities resulted in an abuse and pillaging of Telemedia. BCB should not get the benefit of its scheme to abuse Telemedia's corporate form and deprive the company of its share capital to the injury of creditors.<sup>80</sup>

132. According to the Respondent, British Caribbean Bank had knowledge of all aspects of the transaction and “actively participated in the illegal transaction with Telemedia.”<sup>81</sup> In the Respondent's view, the Claimant “was at all material times aware that the Telemedia Facility was for Belize Telemedia to finance the purchase of its own shares and therefore was *ultra vires* and carried out in breach of the Companies Act.”<sup>82</sup> The Respondent points to the overlapping membership of the boards of the different companies, and in particular to the status of Mr. Phillip Osborne as “a director of each of the three companies which are respectively parent companies in the chain above BCB” and to his presence, on behalf of two corporate directors, in the board meetings of Telemedia. The Respondent also emphasizes that British Caribbean Bank disbursed the loan for the purchase of the shares—directly to RBTT—before the Telemedia board had even voted to approve the loan, something only conceivable in light of overlapping control. In effect, the Respondent argues, by disbursing the loan “BCB made the decision for Telemedia that the funds would be used only for the purchase from RBTT of the Telemedia shares.”<sup>83</sup>

133. In response to the Claimant's arguments, the Respondent argues that British Caribbean Bank cannot be entitled to compensation under a theory of unjust enrichment. The Respondent relies on *Sea-Land Service Inc. v. Islamic Republic of Iran* for the proposition that:

In order for an international tribunal to apply the principles of unjust enrichment, there must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available.<sup>84</sup>

134. In the present case, the Respondent observes, the loans were made to Telemedia—not to the Government. According to the Respondent, “the ultimate beneficiaries of the Telemedia Facility who were actually and concretely ‘enriched’ by the same were the shareholders of Telemedia, including BCB's parent company BCB Holdings Limited.”<sup>85</sup> Additionally, the Respondent

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<sup>80</sup> The Respondent's Reply to Claimant's Post-Hearing Memorial, para. 94.

<sup>81</sup> The Respondent's Post-Hearing Memorial, para. 100.

<sup>82</sup> The Respondent's Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 127.

<sup>83</sup> The Respondent's Post-Hearing Memorial, para. 105.

<sup>84</sup> *Sea-Land Service Inc. v. Islamic Republic of Iran*, 6 Iran-U.S. C.T.R. 149, 169 (1984).

<sup>85</sup> The Respondent's Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 154.

submits that “[t]here is no valid obligation on Telemedia to repay a loan made for such unlawful purposes.” Relying on *Holmes v. Newcastle-Upon-Tyne Freehold Abattoir Company*<sup>86</sup> and *Re Halt Garage*,<sup>87</sup> the Respondent submits that “any repayment of money must be made by those who were directors at the time or the shareholders to whom the benefits were given.”<sup>88</sup>

135. Finally, the Respondent submits that “[t]he Telemedia Mortgage that was provided in connection with the illegal Loan is also illegal and unenforceable.”<sup>89</sup> In this respect, the Respondent relies upon *Fisher v. Bridges* for the proposition that “as the law would not enforce the original illegal contract so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.”<sup>90</sup>

#### *The Claimant’s Position*

136. The Claimant submits that the Telemedia Facility is a valid and lawful contract. According to the Claimant, “[t]he Government has argued its case on invalidity on the basis of English legal principles, without paying any regard to the fact that in certain respects English and Belize law are different.”<sup>91</sup>

137. The Claimant first emphasizes that the funds made available under the Telemedia Facility were loaned to Telemedia’s subsidiary, TIL. Accordingly, the Claimant argues, the Respondent’s reliance on *Trevor v. Whitworth* is inapposite as that decision relates only to a company’s purchase of its own shares at common law, and not to a purchase by a subsidiary.<sup>92</sup> In attempting to extend *Trevor v. Whitworth* to the present circumstances, the Claimant submits that the Respondent misconstrues the concept of share capital. According to the Claimant:

share capital is a familiar concept in company law. It “connotes the value of the assets contributed to the company by those who subscribe for its shares.”

Put simply, it refers to the number of shares at a given nominal value into which the capital of a company has been divided in its memorandum of association. In the case of Telemedia, the authorised share capital was 100,000,000 ordinary shares of BZ\$1 par value as at 31 March 2008. Of this amount, Telemedia had, at the relevant time, issued some 49,551,652

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<sup>86</sup> *Holmes v. Newcastle-Upon-Tyne Freehold Abattoir Company*, (1875) 1 Ch. D. 682 at 688.

<sup>87</sup> *Re Halt Garage* (1964) Ltd., [1982] 3 All. E.R. 1016 at 1044.

<sup>88</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para 155.

<sup>89</sup> The Respondent’s Post-Hearing Memorial, para. 129.

<sup>90</sup> The Respondent’s Post-Hearing Memorial, para. 130, quoting *Fisher v. Bridges*, (1854) 3 El & Bl 642 at p. 649.

<sup>91</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 111.

<sup>92</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 112.

ordinary shares. The evidence reveals that after the acquisition of the shares by TIL from RBTT, there was, as a matter of fact, no change in the number of issued shares. There was a simple share transfer. These shares were not cancelled, extinguished or surrendered.<sup>93</sup>

138. As the Claimant considers that Telemedia's share capital was not reduced, it submits that the provisions of the Belize Company Act setting out the steps to be followed for a company to reduce its share capital are irrelevant.<sup>94</sup>
139. Second, the Claimant argues that "[t]here are no statutory, common law or other legal restrictions in Belize prohibiting a subsidiary from buying or holding shares in its parent company."<sup>95</sup> The Claimant relies upon *Orient-Express Hotels* for the proposition that the rule in *Trevor v. Whitworth* does not extend to the holding or acquisition of shares by a subsidiary.<sup>96</sup> Although the English Companies Act was amended in 1948 to include such a prohibition, no similar change was made to the Belize Companies Act, which was enacted on 23 April 1914.<sup>97</sup>
140. Third, the Claimant submits that there is no rule that would have prevented Telemedia from financing, by way of the on-loan, TIL's acquisition of the Telemedia shares. According to the Claimant, no prohibition can be found at common law and *Durack* establishes that "[a] loan by a company, falling within the investment clauses of its memorandum of association, to a person to purchase its shares is not within the purview of the rule in *Trevor v. Whitworth*."<sup>98</sup> Instead, the "rules relating to financial assistance in these circumstances are derived from statute," and "nowhere in the Belize Companies Act," the Claimant notes, "is there a provision preventing a company from financing the purchase of its own shares."<sup>99</sup>
141. Fourth, the Claimant submits that the Telemedia Facility included no binding provisions on the purposes for which the funds could be used and that there was no violation of the authorization granted by the Central Bank of Belize under the Belize Exchange Control Regulations. According to the Claimant, the terms used to describe the purpose of the loan in Article 1(b) of the Telemedia Facility "do not evidence an intention by the parties that there should be contractual liability in respect of the accuracy of the statement and therefore are non-binding

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<sup>93</sup> The Claimant's Post-Hearing Memorial, paras. 115-116 (emphasis in original).

<sup>94</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 112.

<sup>95</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 114.

<sup>96</sup> The Claimant's Post-Hearing Memorial, para. 122.

<sup>97</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, paras. 111, 114.

<sup>98</sup> The Claimant's Post-Hearing Memorial, para. 125, quoting *Durack*, *supra* note 67 at p. 202.

<sup>99</sup> The Claimant's Post-Hearing Memorial, para. 127.

statements of intent.”<sup>100</sup> At the same time, the Claimant argues, “Telemedia was full and frank in its disclosure to the Central Bank,”<sup>101</sup> and “the Central Bank permission did not limit the use of the Telemedia Facility solely to fund the purchase of shares by TIL.”<sup>102</sup>

142. The Claimant further submits that the Respondent is precluded from contesting validity insofar as it approved the transaction contemplated under the Telemedia facility. In this respect, the Claimant draws the Tribunal’s attention to the letter of 10 July 2007 from the Central Bank of Belize<sup>103</sup> and the letter of the same date from the Solicitor-General of Belize.<sup>104</sup> Relying on the reasoning adopted by the arbitral tribunals in *Fraport v. Philippines*,<sup>105</sup> *Desert Line v. Yemen*,<sup>106</sup> and *Kardassopoulos v. Georgia*,<sup>107</sup> the Claimant submits that “a host State which, despite being aware of a legal situation, tolerated it for some time is precluded from arguing later that the investor is not entitled to treaty protections because the situation was unlawful.”<sup>108</sup>
143. Fifth, the Claimant submits that even if the transaction were illegal, British Caribbean Bank “cannot be deemed to have participated in this alleged unlawful purpose so as to invalidate the Telemedia Facility.”<sup>109</sup> According to the Claimant, the applicable standard was set out in *Anglo Petroleum Limited v. TFB (Mortgages) Limited*<sup>110</sup> and is that “nothing short of active participation in the alleged illegality is sufficient to render the transaction void.”<sup>111</sup> Either the transaction must be “bound to involve illegality” or British Caribbean Bank must have entered into it “with an illegal purpose in mind.”<sup>112</sup> With respect to the nature of the transaction, the Claimant argues both that the Telemedia Facility had multiple purposes and that, even if it had been made for the purpose of Telemedia purchasing its own shares, there is a procedure for this through judicial approval under section 48 of the Belize Companies Act. Accordingly, the

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<sup>100</sup> The Claimant’s Amended Statement of Claim, para. 169.

<sup>101</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 120.

<sup>102</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 121.

<sup>103</sup> Letter from Central Bank dated 10 July 2007 (**Exhibit R-6**).

<sup>104</sup> Letter from Attorney General’s Ministry to Companies Registry dated 10 July 2007 (**Exhibit C-142**).

<sup>105</sup> *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, Award, 16 August 2007, para. 346.

<sup>106</sup> *Desert Line Projects LLC v Republic of Yemen*, Award, 6 February 2008, para. 118.

<sup>107</sup> *Ioannis Kardassopoulos v Georgia*, Decision on Jurisdiction, 6 July 2007.

<sup>108</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 98.

<sup>109</sup> The Claimant’s Post-Hearing Memorial, para. 138.

<sup>110</sup> *Anglo Petroleum Ltd v TFB (Mortgages) Ltd*, [2006] EWHC 258; [2007] BCC 407.

<sup>111</sup> The Claimant’s Post-Hearing Memorial, para. 139.

<sup>112</sup> The Claimant’s Post-Hearing Memorial, para. 142, quoting *Anglo Petroleum*, *supra* note 110 at para. 65.



Claimant contends, this could not have been an illegal transaction *per se*.<sup>113</sup> With respect to the Bank's intention in agreeing to the loan, the Claimant submits that, even in the event that the transaction was unlawful,

it was "*far from obvious to a lawyer*", let alone a party in the position of the Claimant, that the proposed use of the loan would amount to a breach of the statutory provision in question. The Telemedia Facility was a loan that was funding a transaction that on its face was perfectly legitimate, was of a kind that the Government itself clearly countenanced and which was not expressly prevented by [the] Belize Companies Act.<sup>114</sup>

144. With respect to the Respondent's argument that the dividend in specie renders the Telemedia Facility invalid or a "sham", the Claimant emphasizes that, having been undertaken seven weeks later, the dividend was "not part of the same transaction" and was not contemplated at the time the Telemedia Facility was concluded.<sup>115</sup> The Claimant notes that there was no mention of the dividend in the loan agreement and that, on the contrary:

[t]he very fact that the Telemedia Facility itself shows that when the loan was entered into it was contemplated that the Claimant would be given security over the TIL shares, as well as security over other assets of Telemedia, evidences that it was not considered at the time that the shares would be distributed.<sup>116</sup>

145. The Claimant relies on the testimony of Mr. Boyce to the effect that several options were under consideration for the shares at the time the Telemedia Facility was concluded. The Claimant also refers to the testimony of Mr. Osborne that "[w]hen the shares were acquired from RBTT, no one had decided at that stage to distribute them by dividend in specie."<sup>117</sup> In any event, the Claimant argues, the dividend in specie was not itself illegal and also did not result in the reduction of the share capital of Telemedia. In the Claimant's view, the Government has failed to identify any specific legal consequences that follow from its argument that the loan and dividend were linked and "the allegations of a sham take the Government's case no further."<sup>118</sup>
146. Finally, the Claimant argues that, even if the Telemedia Facility were illegal (which it denies), it would be entitled to restitution on the basis of unjust enrichment. According to the Claimant, "[i]t is well established that a mistaken payment, whether of fact or law, grounds an unjust enrichment claim where the payer demonstrates that he would not have made the payment had

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<sup>113</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 129.

<sup>114</sup> The Claimant's Post-Hearing Memorial, para. 150.

<sup>115</sup> The Claimant's Reply to Government's Post-Hearing Memorial, para. 50.

<sup>116</sup> The Claimant's Post-Hearing Memorial, para. 48.

<sup>117</sup> The Claimant's Post-Hearing Memorial, para. 49, *quoting* Hearing Tr. 300:4-6.

<sup>118</sup> The Claimant's Reply to Government's Post-Hearing Memorial, para. 56.

he known of his mistake at the time it was made.”<sup>119</sup> If British Caribbean Bank was mistaken about lawfulness of the Telemedia Facility, the application of the Companies Act of Belize, or Telemedia’s ability to enter into the facility or perform its obligations, it would not otherwise have entered into the transaction.<sup>120</sup> In the Claimant’s view, the Respondent’s arguments against this basic point fall short. Relying on *Haugesund Kommune and another v. Depfa ACS Bank*,<sup>121</sup> the Claimant submits that a “lender under a loan contract which was void because it was *ultra vires* could recover the sum lent in a restitutionary claim at law from the borrower.”<sup>122</sup> Nor, the Claimant argues, is this merely a matter between it and Telemedia. By acquiring “all proprietary and other rights and interests whatsoever” held by British Caribbean Bank in the Telemedia Facility, the Claimant argues, the Government also acquired the Claimant’s restitutionary rights.<sup>123</sup> Even if it did not, however, the Claimant submits that the Government exercises *de facto* control over Telemedia.<sup>124</sup>

#### *The Tribunal’s Considerations*

147. As set out above, the Parties differ sharply on the validity of the Telemedia Facility and Telemedia Mortgage and even on the appropriate scope of the Tribunal’s enquiry in reaching this decision. The Claimant would have the Tribunal focus narrowly on whether the particular steps taken in the acquisition of the Telemedia shares were or were not in compliance with Belize law. The Respondent, in contrast, asks the Tribunal to look at the overall nature of what it terms a “sham” transaction and considers the distribution of the shares as a dividend in specie to be directly relevant to the validity of the Telemedia Facility.
148. In the Tribunal’s view, the record does not support the conclusion that the distribution of the Telemedia shares as a dividend in specie was contemplated at the time the Telemedia Facility was concluded or formed part of a single transaction. In reaching this conclusion, the Tribunal observes the following:
- (a) There is no reference in the Telemedia Facility to the distribution, or other disposition, of the Telemedia Shares following their acquisition by TIL. The purpose clause of the loan agreement refers simply to the use of the loan “to enable TIL to purchase 9,219,181

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<sup>119</sup> The Claimant’s Amended Statement of Claim, para. 200.

<sup>120</sup> The Claimant’s Amended Statement of Claim, para. 200.

<sup>121</sup> *Haugesund Kommune and another v Depfa ACS Bank*, [2012] EWCA Civ 579 at paras. 87–88.

<sup>122</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 143.

<sup>123</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 146.

<sup>124</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, paras. 146-147.

shares in Belize Telemedia Limited (the ‘Shares’), from RBTT Merchant Bank Limited.’<sup>125</sup>

- (b) The first reference in the record to the distribution of the dividend in specie occurs in the Minutes of the First Annual General Meeting of the shareholders of Belize Telemedia on 28 August 2007 at which the dividend was approved.<sup>126</sup>
- (c) The dividend in specie was not specific to the shares in Telemedia held by TIL, which were not referenced in the decision to approve the dividend, and the ultimate dividend involved the distribution of shares from other sources in excess of those held by TIL.
- (d) During the hearing, Mr. Boyce testified as follows with respect to the disposition of the shares:

There were several options available to us, which included selling the company, which would have involved selling all of the shares -- speaking on behalf of Sunshine, if we'd have found a really good buyer that would have given us cash in hand that we could have satisfied to service the debts and given a good return to the employees, that would have been a good deal. And at the same time, right, these shares here would have then been -- could have been acquired by a new entity, a new total entity.

Alternatively, we could have sold them for cash. We could have just put them out in the market and sold them. So there are actually a lot of different options.<sup>127</sup>

- (e) During the hearing, Mr. Osborne testified as follows:

The dividend in specie was a separate decision. When the shares were acquired from RBTT nobody had decided at that stage to distribute them by dividend in specie.

Mr. Osborne was then questioned further as follows:

THE CHAIRMAN: Because the question I have is is there here a clear connection between the dividend in specie and the shares purchased from RBTT by TIL?

MR OSBORNE: The only connection is that the shares purchased from RBTT were used to partly satisfy the dividend in specie. There was never any intent at the time RBTT shares were purchased to distribute them to shareholders at that time.

149. On the basis of this record, the Tribunal sees no grounds to assume that British Caribbean Bank was aware of a contemplated dividend in specie at the time the Telemedia Facility was concluded or that the dividend was even contemplated at the time by the Telemedia board. Accordingly, whether the distribution of the dividend in specie was proper or improper—a

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<sup>125</sup> Telemedia Facility, s. 1 (**Exhibit C-2**).

<sup>126</sup> Minutes for Annual General Meeting of Belize Telemedia (**Exhibit R-14**).

<sup>127</sup> Hearing Tr., 509:4-18.

subject on which the Tribunal expresses no view—it does not bear on the validity of the Telemedia Facility.

150. Turning to the Telemedia Facility itself, the Tribunal is of the view that the fundamental difference between the Parties concerns the concept of share capital and the meaning of a reduction in share capital. The Respondent posits that share capital is reduced whenever the assets of a company are paid over to shareholders and argues that the acquisition of the RBTT shares reduced the share capital of Telemedia. The Claimant understands share capital to be the notional value contributed to the company in exchange for its issued shares, irrespective of the company's actual assets and liabilities at any given point. On this basis, the Claimant considers that Telemedia's share capital was unaffected by any of the transactions in question.
151. On this fundamental point of companies law, the Tribunal finds the Claimant's understanding to be correct. The share capital of a company constitutes the par value of its issued shares, together with any premium paid for such shares upon issue. Share capital is increased or reduced not by the acquisition or disbursement of a company's assets (even in the event that a company's assets fall below the level of share capital), but by issuing additional shares, by withdrawing and cancelling issued shares, or otherwise in accordance with statutory provisions such as section 48 of the Belize Companies Act.
152. *Trevor v. Whitworth* sets out the rule that a limited company may not purchase its own shares and thereby reduce its share capital.<sup>128</sup>
153. In the present case, the share capital of Telemedia on 29 May 2007 (the date on which the issued shares in Belize Telecommunications Limited were exchanged for shares in Telemedia) was 41,334,927 ordinary shares at a BZ\$1 par value, with BZ\$19,885,000 in share premium arising from the 2001, 2003, and 2006 issues.<sup>129</sup> On 31 March 2008, following the transactions in question, the share capital of Telemedia stood at 49,551,652 ordinary shares at a BZ\$1 par value, with an additional BZ\$15,273,595 in share premium as a result of the July 2007 issue of additional shares.<sup>130</sup> It is apparent from these records that no overall reduction in share capital that would implicate the rule in *Trevor v. Whitworth* occurred as a result of the acquisition and distribution of the RBTT shares in Telemedia. Indeed, Telemedia's share capital increased during the period in question.

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<sup>128</sup> *Trevor v. Whitworth*, *supra* note 57.

<sup>129</sup> Telemedia's Consolidated Financial Statements at p. 11 (4 June 2007) (**Exhibit C-152**).

<sup>130</sup> Telemedia's Consolidated Financial Statements at p. 11 (24 July 2008) (**Exhibit R-15**).

154. The remaining questions are whether the acquisition of the RBTT shares by TIL had the effect of constructively reducing the share capital of Telemedia insofar as the shares were held by a subsidiary between 10 July and 28 August 2007, and whether either the holding of shares by a subsidiary or the financing of the transaction by Telemedia were otherwise prohibited by Belize law. On the issue of shareholding by a subsidiary, the Tribunal finds *Orient- Express Hotels* to be persuasive authority for the proposition that, at common law, there is no prohibition on a subsidiary holding shares in its parent and, as the capital of the subsidiary is distinct from the capital of the parent, that the acquisition by a subsidiary of shares in its parent does not amount to a reduction of the share capital of the parent that would implicate *Trevor v. Whitworth*. The Tribunal further understands the Parties to be in agreement that no statutory prohibition on such shareholding by a subsidiary exists in Belize.
155. With respect to financial assistance, the Tribunal accepts the reasoning set out by Justices Rich and Williams in *Durack* that excludes the provision of financial assistance by a company to a third party for the purpose of acquiring its shares from the common law prohibition in *Trevor v. Whitworth*.<sup>131</sup> The rationale behind this distinction is that the concern in *Trevor v. Whitworth* was not simply with the use of the assets of the company to purchase its own shares, but with the acquisition (and, implicitly, cancellation) of the shares and the corresponding reduction in the share capital that creditors could reasonably expect to draw on. As described by Lord Herschell, “the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result.”<sup>132</sup> Where financial assistance is provided to another party to purchase a company’s share, however, no reduction in the share capital results.
156. While there may be good reason to prohibit such transactions by statute, as English law has done, the Parties agree that no such provision is to be found in the law of Belize. Although the Respondent suggests that the reasoning in *Durack* should not apply in the case of financial assistance to a subsidiary, the Tribunal does not see why this would be the case. *Durack* distinguished *Trevor v. Whitworth* on the basis that the provision of financial assistance by a company to a third party for the purpose of acquiring its shares does not reduce the share capital of that company. Having already found, on the basis of the reasoning in *Orient- Express Hotels*, that shareholding by a subsidiary does not result in the reduction of the share capital of the parent, the Tribunal sees no reason why the provision of financial assistance—which similarly does not reduce the share capital of the parent—would place the present circumstances any

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<sup>131</sup> *Trevor v. Whitworth*, *supra* note 57.

<sup>132</sup> *Trevor v. Whitworth*, *supra* note 57 at p. 416.

closer to the ambit of *Trevor v. Whitworth*. The Tribunal also notes that the question of whether financial assistance had been provided by the parent was argued, but not considered dispositive, in *Orient-Express Hotels*.<sup>133</sup>

157. On this point, the Respondent advances *Kirby v. Wilkins*<sup>134</sup> for the proposition that “a company may have its subsidiary or other nominee purchase the company’s shares, . . . only if the company did not provide the consideration or funds for the purchase.”<sup>135</sup> The Tribunal, however, finds this case inapposite. *Kirby v. Wilkins* dealt with a situation in which an outside party transferred certain shares to a director of the company for no consideration whatsoever and held that such a transfer was unobjectionable. While the court speculated *obiter dictum* that payment for the shares by the company on its director’s behalf would have raised the same concerns identified in *Trevor v. Whitworth*, there is no suggestion to be found that a loan to the director (the situation in fact arising in *Durack*) would produce an equivalent result.
158. Turning to the Telemedia Mortgage, the Tribunal notes that the Respondent contends that as the Telemedia Facility is illegal, the Telemedia Mortgage is necessarily illegal, too, as it supports the Telemedia Facility.<sup>136</sup> The Tribunal agrees with the Respondent that the validity of the Telemedia Mortgage is dependent on the validity of the Telemedia Facility. Accordingly, as the Tribunal has concluded that the Telemedia Facility is valid, it follows that the dependent Telemedia Mortgage is valid, too. The Tribunal does not see any further grounds to question the validity of the Telemedia Mortgage.
159. For the foregoing reasons, the Tribunal concludes that both the Telemedia Facility and the Telemedia Mortgage were valid and enforceable contracts. Having found no issue with the purpose and use of the loan, the Tribunal considers it unnecessary to address the Parties’ arguments regarding the degree of British Caribbean Bank’s knowledge of and involvement in the purchase of the RBTT shares, or the question of unjust enrichment.

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<sup>133</sup> *Orient-Express Hotels*, *supra* note 69 at para. 5.

<sup>134</sup> *Kirby v Wilkins*, [ 19291 2 Ch 444.

<sup>135</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 254.

<sup>136</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections and Request to Dismiss or Stay, para. 108.

## 2. The Validity of the Sunshine Agreements

### *The Respondent's Position*

160. According to the Respondent, the “Sunshine Loans are invalid and unenforceable on the grounds that BCB abused its position of control and acted in bad faith.”<sup>137</sup> The Respondent examines the structure and argues that the “BTL Employees Trust was controlled by BCB, BCB’s parent company and individuals that control BCB.”<sup>138</sup> As a result of this structure, the Respondent concludes that “at the time the Sunshine Loans were entered into, Sunshine Holdings was wholly under the control of BCB.”<sup>139</sup>
161. In the Respondent’s view, the Claimant “abused its position of control”<sup>140</sup> by allocating the dividends it earned on its shares in Telemedia only to the repayment of the loan from BCB, at the expense of loans provided by the Government. According to the Respondent, “[a]lthough GOB and the Social Security Board together had loaned an equal amount to Sunshine Holdings, neither received any money from the dividends earned by Sunshine Holdings on the shareholding.”<sup>141</sup> The result, the Respondent submits, is that “[e]quity mandates denial of the BCB’s claim.”<sup>142</sup>
162. With respect to the Sunshine Security, the Respondent argues that “it suffices to say that if the underlying documents are unenforceable, that also renders the securities unenforceable.”<sup>143</sup>
163. Finally, the Respondent argues that “the Sunshine Overdraft Facility was not made for any valid purpose” as Sunshine “was not engaged in any other business [than holding shares in Telemedia] and there was no reason for it to have an overdraft facility.”<sup>144</sup>

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<sup>137</sup> The Respondent’s Reply to Claimant’s Post-Hearing Memorial, para. 107.

<sup>138</sup> The Respondent’s Reply to Claimant’s Post-Hearing Memorial, para. 103.

<sup>139</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 100.

<sup>140</sup> The Respondent’s Post-Hearing Memorial, para. 189.

<sup>141</sup> The Respondent’s Reply to Claimant’s Post-Hearing Memorial, para. 104.

<sup>142</sup> The Respondent’s Post-Hearing Memorial, para. 189.

<sup>143</sup> Hearing Tr. 179:6-9.

<sup>144</sup> The Respondent’s Post-Hearing Memorial, para. 187.

*The Claimant's Position*

164. The Claimant rejects the Respondent's suggestion (i) that it had effective control over the BTL Employees Trust (and thereby over Sunshine); (ii) that it acted improperly in the repayment of the loan; and (iii) that there is any issue with the purpose of either the Sunshine Overdraft Facility or the other Sunshine loans and securities. Moreover, the Claimant argues, "the government has made no effort to explain how either contention [i.e., in relation to the purpose of the loan or control of the Trust] would render the Sunshine loans invalid or why either would entitle it to refuse to pay compensation to the Claimant."<sup>145</sup>
165. According to the Claimant, the Social Security Board Minutes in relation to the establishment of the BTL Employees Trust confirm "that there would be one Government appointed trustee and one trustee appointed by the Belize Bank."<sup>146</sup> The Claimant contends that trustees have independent obligations to their beneficiaries. It further submits that there is "no evidence to suggest that the management of Telemedia was acting under the control of the Claimant or to suggest that either [of the individual trustees'] roles at Telemedia influence their decisions as Trustees of the BTL Employees Trust."<sup>147</sup>
166. With respect to the repayment of the loans from Sunshine and the Government, the Claimant argues that "the terms of the [Social Security Board] loan were that there would be a moratorium on repayments until October 2010." Accordingly, the Claimant submits, "the terms were such that no repayments were expected before Sunshine was nationalised."<sup>148</sup>
167. Finally, the Claimant contends that "the contemporaneous minutes from the [Social Security Board] demonstrate exactly what purpose the funds were to be used for: namely, for Sunshine to buy shares in BTL on behalf of the BTL Employees Trust."<sup>149</sup> In the Claimant's view:

If the Government genuinely believed that the Claimant's loans to Sunshine had no apparent purpose or were unlawful, it would have taken the same position in relation to the Government and SSB loans. However, not only did the Government not condemn these other loans, it formally acknowledged and relied on the validity of them to deny compensation to the BTL Employees Trust.<sup>150</sup>

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<sup>145</sup> The Claimant's Post-Hearing Memorial, para. 108.

<sup>146</sup> The Claimant's Post-Hearing Memorial, para. 27.

<sup>147</sup> The Claimant's Reply to Government's Post-Hearing Memorial, para. 27.

<sup>148</sup> The Claimant's Post-Hearing Memorial, para. 110.

<sup>149</sup> The Claimant's Post-Hearing Memorial, para. 109.

<sup>150</sup> The Claimant's Post-Hearing Memorial, para. 109.



*The Tribunal's Considerations*

168. With respect to the repayment of the Sunshine Facility, the Tribunal notes that section 6 of the loan agreement provides for the repayment of the loan as follows:

Subject to the provisions of this Agreement, the Loan shall be repaid in full by 20 equal installments on each of the Repayment Dates occurring during the period commencing on the fifth anniversary of the date of the Advance and expiring on the Termination Date.<sup>151</sup>

169. The Sunshine Facility was concluded on 19 September 2005, such that the earliest date of the fifth anniversary would have been 19 September 2010.

170. Although the terms of the loans provided to Sunshine from the Government and the Social Security Board are not in the record, the minutes of the Social Security Board Meeting detail the anticipated repayment terms as follows:

The Chairman explained that the loan was for \$10 Million over a 15 year period and carries an interest rate of 8.5% per annum. All interest would be capitalized up to July 2010. Interest payments would commence until October 2010. The principal would be repaid on July 31<sup>st</sup> 2020.<sup>152</sup>

171. The reasons for the five year moratorium on payments were further detailed as follows:

- i. Why was a 5 year moratorium in-built in the repayment schedule?

The Prime Minister responded by saying that the business model takes into account the worst case scenario which could take up to 5 years for dividends to be paid. If dividends were paid during the 5 year moratorium period, it would be in the best interest of the Employees to pay their loan earlier.<sup>153</sup>

172. Based on the foregoing, the Tribunal concludes that Sunshine was under no duty to make payments under either loan agreement prior to the nationalization of the Sunshine Facility in December 2009. Insofar as the Parties are in agreement that Sunshine did repay the majority of the Sunshine Facility before this date, the Tribunal observes that the Facility provides for prepayment. Therefore, it declines to find any impropriety in Sunshine's decision to pay off one loan in advance of the other.

173. With respect to control over Sunshine, the Tribunal is of the view that the Respondent has not made out a case for how the Claimant's alleged effective control over the BTL Employees Trust

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<sup>151</sup> Sunshine Facility at s. 6 (**Exhibit C-4**).

<sup>152</sup> Minutes of a Special Meeting of the Board of Directors of the Social Security Board at pp. 1-2 (**Exhibit C-60**).

<sup>153</sup> Minutes of a Special Meeting of the Board of Directors of the Social Security Board at p. 3 (**Exhibit C-60**).

would render the loan agreements invalid. Accordingly, the Tribunal considers it unnecessary to determine whether such control existed.

174. Finally, the Tribunal considers the purpose of the Sunshine Loan and Security Agreements, including the Overdraft Facility, to be well set out in the record. The Respondent has not shown that the use of a loan to finance the purchase of shares in Telemedia by Sunshine on behalf of the BTL Employees Trust was illegal under the law of Belize.

175. Accordingly, the Tribunal concludes that the Sunshine Facility, the Sunshine Security, the Sunshine Overdraft Facility, and the Sunshine Mortgage are valid and enforceable agreements.

### **C. THE RESPONDENT'S PRELIMINARY OBJECTIONS**

176. The Respondent raises a series of objections to the Tribunal's consideration of the merits of the Parties' dispute. First, the Respondent argues that the Claimant's claims are inadmissible or unripe and should be stayed or dismissed pending the resolution of the two lawsuits presently ongoing before the courts of Belize.<sup>154</sup> Second, the Respondent submits that the Tribunal lacks jurisdiction as the loans and securities in question fail to meet the definition of an investment under the Treaty, as no investment was made in Belize, and as there was no expropriation. The Claimant rejects all of these objections and submits that the Tribunal both has jurisdiction to—and should—proceed to render a decision on its claims.

#### **1. Admissibility**

##### *The Respondent's Position*

177. The Respondent submits that the Tribunal should stay or dismiss these proceedings as unripe or inadmissible in light of the actions proceeding before the courts of Belize.<sup>155</sup>

178. In the Respondent's view, the significance of the CCJ Judgment is that it left to this Tribunal the question of whether these arbitral proceedings should continue in parallel with proceedings in the courts of Belize. According to the Respondent:

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<sup>154</sup> Claim 360 (see above at paragraphs 97(c) and 106(a)) and the Second Constitutional Challenge (see above at paragraphs 106(b), 107, and 108).

<sup>155</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 137.

it is clear that the CCJ decided that it is this Tribunal that should decide whether these arbitration proceedings should be stayed pending the final adjudication of the Belizean judicial proceedings. The CCJ did not hold that these proceedings should not be stayed. It simply held that that is a decision for this Tribunal and not for the Belizean court.<sup>156</sup>

179. The Respondent relies on *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* for the basic proposition that in a situation of parallel proceedings, “in the interests of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.”<sup>157</sup> The Respondent further refers to the decisions of the Tribunals in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*<sup>158</sup> and *The Mox Plant Case (Ireland v. United Kingdom)*<sup>159</sup> when faced with parallel proceedings.<sup>160</sup>
180. With respect to the present case, the Respondent argues that efficiency favours the stay or dismissal of this arbitration. In the Respondent’s view, not one but two actions in the courts of Belize bear upon the Tribunal’s decision of how to proceed. The Court of Appeal in the Second Constitutional Challenge has held that the re-acquisition of the Loan and Security Agreements by way of the 2011 Act and 2011 Order was lawful and in keeping with the Constitution of Belize. According to the Respondent, it is common ground between the Parties that only the courts of Belize have jurisdiction to address the constitutional aspects of the acquisition of the Loan and Security Agreements.<sup>161</sup> A final judicial resolution of the constitutional question is not only beneficial to the Tribunal, but necessary as, according to the Respondent:

a judicial finding that the expropriation will stand, now that it has been challenged judicially by BCB is a “factual prerequisite” to the adjudication by this Tribunal of BCB’s claims. Without the determination of that fact that the expropriation stands - it is impossible for this Tribunal to adjudicate BCB’s claims.<sup>162</sup>

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<sup>156</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 148.

<sup>157</sup> *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (hereinafter *SPP v. Egypt*), Decision on Jurisdiction, 3 ICSID Rep. 101, 129 (27 November 1985)

<sup>158</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (hereinafter *SGS v. Philippines*) Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/06 (29 January 2004).

<sup>159</sup> *The MOX Plant Case (Ireland v. United Kingdom)* (hereinafter *MOX Plant*) Order No. 3, Permanent Court of Arbitration (24 June 2003).

<sup>160</sup> See also The Respondent’s Post-Hearing Memorial, paras. 30-35.

<sup>161</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 163.

<sup>162</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 168.

181. Second, the outcome of the Respondent's suit in Claim 360 may hold that the Loan and Security Agreements at issue in this case were illegal and invalid.<sup>163</sup> In the Respondent's view, the significance of this case is two-fold. First, although the Respondent acknowledges that the Tribunal would have jurisdiction to consider the validity of the Loan and Security Agreements, the Respondent submits that the Tribunal should defer to the Belize courts insofar as the issue would be dispositive in these proceedings and is already being litigated by the same parties in the courts of Belize<sup>164</sup> and to proceed would introduce a risk of conflicting judgments.<sup>165</sup> More importantly, however, the Respondent argues that the Claimant's successful application to stay further consideration of Claim 360 pending the resolution of the constitutional issues amounts to an admission that the constitutionality of expropriation must be determined before other issues.<sup>166</sup> Relying on *State of New Hampshire v. State of Maine*,<sup>167</sup> *OJSC Oil Company Yugraneft (in liquidation) v. Roman Arkadievich Abramovich, Millhouse Capital UK Limited, Boris Berezovsky*,<sup>168</sup> *Marvin Feldman v. Mexico*,<sup>169</sup> *Pan American Energy LLC et al. v. The Argentine Republic*,<sup>170</sup> and *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*,<sup>171</sup> the Respondent submits that the Claimant is estopped from now arguing that this arbitration should proceed without waiting for the final resolution of the Second Constitutional Challenge.<sup>172</sup>
182. Finally, the Respondent argues that the stay or dismissal of these proceedings is necessary in light of the risk of double recovery, a concern that it notes was also recognized by the Caribbean Court of Justice. In the Respondent's view, the undertaking offered by the Claimant to offset any recovery in these proceedings is insufficient and would "allow[] BCB to reap the benefit of

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<sup>163</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 152.

<sup>164</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 152.

<sup>165</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 173.

<sup>166</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 164.

<sup>167</sup> 532 U.S. 742, 750-51 (2001).

<sup>168</sup> High Court of Justice Queen's Bench Division Commercial Court Case No. 2007 FOLIO 1545 [2008] EWHC 2613 (Comm) at 429 (29 October 2008)

<sup>169</sup> Award, ICSID Case No. ARB(AF)/99/1 at 59 (16 December 2002).

<sup>170</sup> Decision on Preliminary Objections, ICSID Case No. ARB/03/ 13 at para. 144 (27 July 2006).

<sup>171</sup> Award, ICSID Case No. ARB/09/02 at para. 193 (31 October 2012).

<sup>172</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 165; The Respondent's Post-Hearing Memorial, paras. 27-29.

winning in the local courts before it has prevailed.”<sup>173</sup> As between a stay and dismissal, the Respondent argues that “the more reasoned choice is to dismiss these proceedings now without prejudice, and BCB will be free in the future to start a new arbitration in the event that it does not prevail in the Belizean court.”<sup>174</sup>

*The Claimant’s Position*

183. The Claimant submits that the Tribunal should reject the Respondent’s request for a stay or dismissal of the proceedings.
184. In the Claimant’s view, the key issue is that “this Tribunal is the only forum that has jurisdiction over BCB’s BIT claims. If the Tribunal were to stay this arbitration in favour of domestic proceedings in Belize, BCB will not be able to pursue its BIT claims in any forum.”<sup>175</sup> Relying on *Azurix Corp. v. Argentine Republic*<sup>176</sup> and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*,<sup>177</sup> the Claimant argues that, to the extent the doctrine of *lis pendens* is even applicable as between a national court and an international tribunal, it cannot apply to the present proceedings as the Claimant’s cause of action under the Treaty differs from that in the Second Constitutional Challenge.<sup>178</sup>
185. The Claimant distinguishes each of the cases identified by the Respondent as examples of a Tribunal exercising restraint in the face of the parallel proceedings. In *SGS v. Philippines*, the Claimant notes, the Parties’ treaty dispute also involved a contract that vested exclusive jurisdiction in the courts of the Philippines. In *MOX Plant*, the European Court of Justice had exclusive jurisdiction over the subject matter of the dispute. And in *SPP v. Egypt*, the parallel proceedings concerned the question of whether a valid arbitral award had already resolved the entire dispute.<sup>179</sup> Far from favouring a stay, the Claimant submits that the long delay in the present proceedings and the lengths to which the Respondent has gone to impede this arbitration call for the Tribunal to provide effective redress.<sup>180</sup> Moreover, according to the Claimant,

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<sup>173</sup> The Respondent’s Post-Hearing Memorial, para. 38.

<sup>174</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 176.

<sup>175</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 45.

<sup>176</sup> ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, para. 88.

<sup>177</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1132.

<sup>178</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, paras. 47-48.

<sup>179</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 50.

<sup>180</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, paras. 52-53.

neither of the cases pending in the courts of Belize would dispense with the need for this arbitration. The Court of Appeal's decision in the Second Constitutional Challenge applies only to the post 2011 period, whereas "[t]he Claimant's assets were first expropriated in 2009, which the Court of Appeal found in its judgment in the First Constitutional Proceedings, to have been carried for an illegitimate purpose. That finding of the Court of Appeal remains unaffected by this latest Judgment."<sup>181</sup> Similarly, the Claimant submits, Claim 360 cannot render these proceedings moot as it relates only to the Telemedia Facility and Mortgage, and not to the Claimant's contractual relationship with Sunshine.<sup>182</sup>

186. With respect to the possibility of double recovery, the Claimant submits first that "the risk of double recovery is not a jurisdictional bar and is, at best, one of the factors that the Tribunal should take into account when deciding whether a stay is appropriate."<sup>183</sup> In any event, however, the practical way forward in such circumstances was clearly identified by the tribunals in *Ronald S. Lauder v. Czech Republic* and *CME Czech Republic BV v. Czech Republic* and is simply that the "second deciding court or arbitral tribunal could take this fact [of an earlier award of damages] into consideration when assessing the final damage".<sup>184</sup> The same cases, the Claimant submits, also addressed the issue of inconsistent decisions, noting there—as here—that the causes of action were different and that different causes of actions may reasonably produce different results.<sup>185</sup> In the present case, the Claimant requests as follows:

should the Tribunal find for the Claimant, it may also wish to record the following order in its award: "on the full and effective payment of the prescribed compensation, the Claimant shall take all necessary steps to assign its rights in the loans to the Government or its nominee".

In this way, should the Claimant's rights be reinstated as a result of any on-going litigation in Belize, the Government would be entitled to seek recovery of the loans from Telemedia and Sunshine.<sup>186</sup>

#### *The Tribunal's Considerations*

187. The Tribunal observes that, generally, treaty disputes are legally different from disputes in domestic courts as treaty disputes involve the provisions regarding investment protection contained in the treaty. The Tribunal further notes that it is not uncommon for proceedings

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<sup>181</sup> The Claimant's Letter to the Tribunal dated 9 June 2014.

<sup>182</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 55.

<sup>183</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 60.

<sup>184</sup> *Ronald S. Lauder v Czech Republic*, Final Award, 3 September 2001, para. 172. See also *CME Czech Republic B.V. v Czech Republic*, Final Award, 14 March 2003, para. 434.

<sup>185</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 70.

<sup>186</sup> The Claimant's Post-Hearing Memorial, paras. 105-106.

pursuant to an investment treaty to be initiated at the same time that aspects underlying the dispute between the parties are being litigated in the municipal courts of the host State. In the absence of a treaty provision requiring a claimant to select one forum over the other for the pursuit of certain claims, the mere existence of parallel proceedings does not go to the jurisdiction of an arbitral tribunal. The Tribunal accepts, however, that it has a measure of discretion with respect to the timing and conduct of the arbitration and that municipal judicial proceedings may sometimes need to be taken into account in the exercise of international comity. In the Tribunal's view, such discretion must be carefully exercised, and the Tribunal must not, in taking account of parallel proceedings, permit comity to frustrate a claimant's right to the arbitral forum and, potentially, to the relief offered by the bilateral investment treaty under which the arbitration proceedings were commenced.

188. In this respect, a significant difference exists between those cases in which a tribunal found that a stay was called for in light of an exclusive jurisdiction clause in a contract at issue (as in *SGS v. Philippines*) or where a provision of an applicable treaty vests another forum with exclusive competence (as in *MOX Plant*) and a situation in which a party merely argues that another forum would be preferable or should be allowed to pronounce first on the issues in dispute, assuming that they are similar. In the latter circumstance, an arbitral tribunal may well be advised to approach the request for a stay sceptically and not lightly to withhold the judgment called for by the Treaty.
189. In the present circumstances, the Tribunal considers that its determination of whether or not the acquisition of the Loan and Security Agreements at issue in these proceedings was a violation of the Treaty does not depend upon any decision by the courts of Belize. As the Caribbean Court of Justice correctly noted, “[a]n expropriation that is perfectly lawful under the national law could nonetheless trigger a successful investment claim under the investment treaty.”<sup>187</sup> The application of the Treaty to the Parties' dispute is not pending any action before the courts of Belize. The Tribunal does not see that, in considering this question, it is in any way trespassing on the jurisdiction of the Belizean Judiciary or their prerogative to evaluate the same facts by reference to the Constitution of Belize.
190. The Tribunal observes that the Respondent has raised a concern about the possibility of double recovery. In the Tribunal's view, however, the correct resolution of such an issue was accurately set out by the tribunal in *Ronald Lauder v. The Czech Republic*: “the amount of damages granted by the second deciding court or arbitral tribunal could take [the prior award of damages]

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<sup>187</sup> *British Caribbean Bank Limited v The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, [2013] CCJ 4 (AJ), Judgment of 25 June 2013 at para. 23.

into consideration when assessing the final damage.”<sup>188</sup> Here, the risk of double recovery is further mitigated by the Claimant’s undertaking that “upon receiving compensation from the Government it would either waive any local remedies or will assign any rights it may have in the loan and securities against Telemedia and Sunshine to the Government,”<sup>189</sup> as well as by the Claimant’s requested order.<sup>190</sup>

191. Accordingly, the Respondent’s objection to the admissibility of the Claimant’s claims is dismissed, and the Claimant’s undertaking is recorded.

## 2. Jurisdiction

### (a) *The existence of an investment*

192. Article 1(a) of the Treaty defines “investment” as follows:

“investment” means every kind of asset and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares, stock and debentures of companies or interests in the property of such companies;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights and goodwill;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

### *The Respondent’s Position*

193. The Respondent submits that the Tribunal lacks jurisdiction because the Claimant has not established that it made an investment falling within the definition set out in the Treaty. According to the Respondent, “the ‘loan’ transaction was a sham transaction designed simply to shift money between BCB and the shareholders of Belize Telemedia.”<sup>191</sup>

194. The Respondent contends that the amount of US\$22.5 million made available to Belize Telemedia under the Telemedia Facility was immediately used to fund the purchase on 10 July

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<sup>188</sup> *Ronald Lauder v The Czech Republic*, (UNCITRAL), Final Award of 3 September 2001, 9 ICSID Reports 66, at para. 172.

<sup>189</sup> Hearing Tr., 557:14-19.

<sup>190</sup> See paragraph 117 above.

<sup>191</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 181.



2007 (by Belize Telemedia’s subsidiary TIL) of the RBTT shares.<sup>192</sup> Thereafter, according to the Respondent, the same shares were distributed on 28 August 2007 as a dividend in specie to the shareholders of Belize Telemedia.<sup>193</sup> As set out in detail above (see paragraphs 125-135), the Respondent contends that this transaction was illegal under Belizean law and that, as a result, the loans and securities involved “cannot constitute an ‘asset’ under the Treaty.”<sup>194</sup>

*The Claimant’s Position*

195. The Claimant rejects the argument that the Telemedia Facility loan was illegal under Belizean law and submits that the legality of the investment is, in any event, a matter for the merits—not a question of jurisdiction.
196. The Claimant submits that it made an investment in Belize which falls within the “broad definition” of investment set out in the Treaty, which includes “every kind of asset”.<sup>195</sup> Were this not enough, the Claimant refers to Article (1)(a)(i) and contends that it expressly covers “any other property rights such as mortgages, liens or pledges.” Furthermore, the Claimant submits that Article 1(a)(iii) refers to “claims to money or to any performance under contract having a financial value.” Together, the Claimant considers that these provisions unequivocally include loans within the definition of investment.
197. With respect to legality, the Claimant contends that the Treaty—unlike many bilateral investment treaties—does not expressly require the investment to have been made “in accordance with the law.”<sup>196</sup> According to the Claimant, it has not been able to identify “a single case where the applicable treaty, like this Treaty, did not contain the legality requirement and yet the tribunal for lack of conformity with domestic law declined jurisdiction.”<sup>197</sup> Relying on *Plama v. Bulgaria*,<sup>198</sup> *Berschader v. Russia*,<sup>199</sup> and *Genin v. Estonia*,<sup>200</sup> the Claimant argues

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<sup>192</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, paras. 62-77.

<sup>193</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, paras. 78-84.

<sup>194</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 182.

<sup>195</sup> The Claimant’s Amended Statement of Claim, paras. 142-147.

<sup>196</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 84.

<sup>197</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 86.

<sup>198</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 126-139.

<sup>199</sup> *Vladimir Berschader and Moïse Berschader v Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, para. 111.

that where investment treaties have not expressly identified legality as a condition for jurisdiction, arbitral tribunals have dealt with such allegations in the course of the merits.<sup>201</sup>

198. The Claimant argues that, in any event, even if illegality were a jurisdictional issue, the burden of proof is on the Respondent and the threshold is a high one. In the Claimant's view, "[t]aken at their highest [the Respondent's allegations] concern breaches of domestic company law that, even if they could be made out, are simply not of the same level of magnitude required under international law."<sup>202</sup>

*The Tribunal's Considerations*

199. Irrespective of the question whether the legality of the investment is a jurisdictional issue, as submitted by the Respondent, or rather a matter to be determined in the course of the merits, as contended by the Claimant, the Tribunal has already decided that the Loan and Security Agreements are valid and enforceable contracts. Therefore, the Tribunal dismisses the Respondent's objection that the purported illegality of the agreements places them outside of the definition of investment set out in Article 1(a) of the Treaty.
200. Beyond the question of legality, the Tribunal considers that the inclusion of financial agreements and contracts, such as the Loan and Security Agreements, is expressly contemplated by the Treaty's illustrative references to "movable and immovable property and any other property rights such as mortgages, liens or pledges" and "claims to money or to any performance under contract having a financial value."<sup>203</sup> Accordingly, the Tribunal concludes that the Loan and Security Agreements constituted an investment within the meaning of Article 1(a)(i) and (iii) of the Treaty.

**(b) Whether the investment was "made in Belize"**

*The Respondent's Position*

201. The Respondent objects to the Tribunal's jurisdiction on the grounds that the "there was no 'investment' made 'in the territory' of Belize."<sup>204</sup> According to the Respondent, "Belize

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<sup>200</sup> *Alex Genin et al v Republic of Estonia*, Award, 25 June 2001, paras. 348-365.

<sup>201</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, paras. 86-87.

<sup>202</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 96.

<sup>203</sup> Treaty, Art. 1(a)(i), 1(a)(iii).

<sup>204</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 181.

Telemedia was merely a pass-through straw man left holding the liability resulting from the movement of money from BCB to the shareholders of Belize Telemedia.<sup>205</sup>

202. While the Respondent accepts that the location of a financial investment depends upon “where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid or transferred,” the Respondent submits that this is not in Belize.<sup>206</sup> According to the Respondent:

the ultimate beneficiaries of the Telemedia Facility were not the people of Belize or Belize’s telecommunications services and infrastructure, but rather the shareholders of Belize Telemedia, the majority of which were members of the Ashcroft group and included BCB, who received the shares that Belize Telemedia purchased using the Telemedia Facility, in the form of a cash dividend in specie.<sup>207</sup>

203. As a result, “as of this date, Belize Telemedia has not received any of the ultimate benefit of the funds at issue because the shares were distributed as dividends.”<sup>208</sup>

#### *The Claimant’s Position*

204. The Claimant agrees with the reasoning of the *Abaclat* tribunal and, noting the similar rulings in *Deutsche Bank v. Sri Lanka*<sup>209</sup> and *Ambiente Ufficio v. Argentina*,<sup>210</sup> submits that “the location of financial instruments as investments is not dependent on their physical location, but rather on the location of the benefit.”<sup>211</sup> According to the Claimant, however:

there is no doubt that funds were made available for use by Telemedia in Belize for the purposes set out on the face of the Telemedia Facility, including for working capital. It is undisputed that Telemedia chose to use some of those funds to make a loan to its subsidiary TIL. The ultimate benefit of that investment was clearly in Belize because Telemedia had the benefit of those funds. Funds were deposited in Telemedia’s current account before being transferred to RBTT. Furthermore, shares were acquired by TIL, a Belize-registered company.<sup>212</sup>

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<sup>205</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 181.

<sup>206</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 72, quoting *Abaclat v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 374.

<sup>207</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 73.

<sup>208</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 75.

<sup>209</sup> *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, Award, 31 October 2012, para. 291.

<sup>210</sup> *Ambiente Ufficio S.P.A. and Others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013.

<sup>211</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 104.

<sup>212</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 106.

205. What was subsequently done with the acquired shares, the Claimant argues, does not affect the question of whether there was an investment made in Belize, nor was it a matter over which British Caribbean Bank had control.<sup>213</sup>

*The Tribunal's Considerations*

206. The Tribunal has held (see above at paragraph 199) that the Loans and Security Agreements fall within the definition of investment set out in Article 1(a) of the Treaty, and understands the Parties to be in agreement that the location of a financial instrument is to be assessed on the basis of the location of the benefit of that investment. Where the Parties differ is in whether that benefit can be properly said to be located in Belize.
207. The Tribunal is of the view that the benefit of a loan agreement is to be found in the location to which the funds were disbursed. The record shows that with respect to the Telemedia Facility, Sunshine Facility, and Sunshine Overdraft Facility, the Claimant in each instance concluded a loan agreement with a company incorporated in Belize. The disbursements under the Loan and Security Agreements were thus for the benefit of a company in Belize. As the Claimant's interest concerns the loan itself, the Tribunal need look no further down the chain of how those funds were deployed by Telemedia and Sunshine.
208. For the sake of completeness, the Tribunal observes that the funds received under the Telemedia Facility were on-loaned to another company incorporated in Belize (TIL) and used to acquire shares in a company incorporated in Belize (Telemedia) that were distributed as a dividend in specie to the shareholders of Telemedia, at least some of whom were located in Belize.
209. In the case of the Sunshine Facility, the funds were used to acquire shares in a company incorporated in Belize (Telemedia) that, as far as the Tribunal is aware, were held by Sunshine in Belize until the point at which they were acquired by the Government of Belize.
210. In the case of the security agreements, pursuant to the Telemedia Mortgage, Sunshine Security, and Sunshine Mortgage, the Claimant acquired mortgages over, *inter alia*, the shares in Telemedia owned by Sunshine, a share of Sunshine itself, the fixed plant, machinery and equipment of Telemedia, and real property owned by Telemedia in Belize.
211. Accordingly, the Tribunal concludes that the Loan and Security Agreements allegedly affected were located in Belize. The Tribunal therefore holds that the locational requirements of Articles

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<sup>213</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 107.

2, 3 and 5 of the Treaty are satisfied with respect to the Claimant's claims. The Respondent's objection to the Tribunal's jurisdiction is accordingly dismissed.

*(c) The existence of an expropriation*

*The Respondent's Position*

212. The Respondent submits that because the validity of the expropriation of Belize Telemedia has not been adjudicated by the courts of Belize, this Tribunal lacks jurisdiction. In the Respondent's view, "[i]f the nationalization is invalidated in the court action filed by BCB in Belize, then a 'fact' required to establish the jurisdiction of this Tribunal under the Treaty would be missing – that is, the existence of a nationalization or expropriation."<sup>214</sup> The Respondent relies on the holding of the *MOX Plant* arbitration for the proposition that "the fact remains that until these issues are definitively resolved, there remain substantial doubts whether the jurisdiction of this Tribunal can be firmly established in respect of all or any of the claims in the dispute."<sup>215</sup>

*The Claimant's Position*

213. The Claimant submits that its "assets were expropriated in 2009 and 2011"<sup>216</sup> and otherwise addresses the possibility that the courts of Belize might invalidate the expropriation and return the Claimant's property in the context of preventing double recovery and of whether these proceeding should be stayed (see above at paragraph 186).

*The Tribunal's Considerations*

214. The Tribunal recalls that the Claimant's cause of action in these proceedings is different from the claims it has advanced in the courts of Belize.<sup>217</sup> As observed by the Caribbean Court of Justice,<sup>218</sup> it is perfectly possible for the Government's acquisition of the Loan and Security Agreements to be legal under the law of Belize and yet to constitute a violation of the Treaty. The converse is also true.

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<sup>214</sup> The Respondent's Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 68.

<sup>215</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 184, quoting *MOX Plant* para. 25.

<sup>216</sup> The Claimant's Post-Hearing Memorial, para. 85.

<sup>217</sup> See paragraph 189 above.

<sup>218</sup> See paragraphs 114-115, 189 above.

215. The Tribunal's power to determine in these proceedings whether an expropriation has occurred for the purposes of the Treaty does not depend upon any prior determination by the Belize courts. Although the possibility does exist that the courts of Belize could order the return of the Claimant's property after this Tribunal had already awarded compensation, the Tribunal considers this to be a practical issue to be addressed in the interest of preventing double recovery (see paragraph 297 below). It does not go to the Tribunal's power to address the question of expropriation in the first instance. The Respondent's objection to the Tribunal's jurisdiction is accordingly dismissed.

#### **D. THE MERITS OF THE ALLEGED BREACHES OF THE TREATY**

216. The Claimant submits that the Government has breached Article 5 of the Treaty relating to expropriation, as well as multiple aspects of Articles 2 and 3 of the Treaty, relating to fair and equitable treatment, full protection and security, and unreasonable and discriminatory measures. The Respondent denies any breach of the Treaty.

##### **1. Article 5 of the Treaty and Expropriation**

217. Article 5 of the Treaty provides as follows:

- (1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against just and equitable compensation. Such compensation shall amount to the fair market value of the investment expropriated before the expropriation or impending expropriation became public knowledge, shall include interest at the rate prescribed by law until the date of payment, shall be made without undue delay, be effectively realisable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
- (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee the compensation provided for in that paragraph in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

*The Claimant's Position*

218. The Claimant submits that, by way of the 2009 and 2011 Orders, the Government expropriated its rights under the Loan and Security Agreements.<sup>219</sup>

219. According to the Claimant, there is “no doubt that the rights embodied in a contract, such as in the Loans and Securities, may be expropriated.”<sup>220</sup> With respect to the Treaty, the Claimant argues that the Respondent’s actions violated three provisions of Article 5. According to the Claimant:

- (1) the Government did not act “for a public purpose related to the internal needs” of the Government;
- (2) the expropriation was not “against just and equitable compensation”; and
- (3) BCB has been denied “prompt review by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph”.<sup>221</sup>

220. The Claimant submits that the stated purpose of the 2009 Order was “the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment” and that the 2009 Act provided that mere notice was *prima facie* evidence of a public purpose. Relying on *ADC v. Hungary*, the Claimant argues:

In the Tribunal’s opinion, a treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the tribunal can imagine no situation where this requirement would not have been met.<sup>222</sup>

221. In the Claimant’s view, the stated public purpose for the 2009 Order does not accord with the substantial investments that Telemedia had been making in the telecommunications sector of Belize, or bear any relation to the acquisition of the Telemedia Mortgage, Sunshine Facility, or Sunshine Overdraft Facility.<sup>223</sup> The Claimant also emphasizes that the Belize Court of Appeal clearly found that the acquisitions under the 2009 Order were not carried out to fulfil a public purpose and were accordingly unlawful.<sup>224</sup>

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<sup>219</sup> The Claimant’s Amended Statement of Claim, para. 223.

<sup>220</sup> The Claimant’s Amended Statement of Claim, para. 222.

<sup>221</sup> The Claimant’s Amended Statement of Claim, para. 224.

<sup>222</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, Award, 2 October 2006, para. 432.

<sup>223</sup> The Claimant’s Amended Statement of Claim, paras. 229-230.

<sup>224</sup> The Claimant’s Amended Statement of Claim, paras. 235-238.

222. According to the Claimant, far from having been made for a public purpose, the 2009 Orders were undertaken (i) to eliminate an agreement between Telemedia and the Government dated 19 September 2005 (the “**Accommodation Agreement**”); and (ii) out of animus with regard to Lord Ashcroft’s position in the economy of Belize.<sup>225</sup> In this respect, the Claimant relies on the Prime Minister’s remarks on the adoption of the 2009 Act. The Claimant summarizes the lack of public purpose behind the 2009 Orders as follows:

The 2009 Orders were not passed for the reasons stated on the face of the Orders, as concluded by the Court of Appeal. They were passed because the Government was determined not to honour the arbitral award obtained by Telemedia against it, and specifically the Claimant’s property was taken because the Government did not want to make any payments to the Claimant whose ultimate majority owner . . . is Lord Ashcroft. As the Court of Appeal concluded, this is not a legitimate public purpose.<sup>226</sup>

223. According to the Claimant, the acquisition under the 2011 Order was equally divorced from its stated public purpose.<sup>227</sup> In the Claimant’s view, “[t]he very fact that the Government sought to reacquire precisely the same investments, from precisely the same date, purely in response to an adverse Court of Appeal decision less than a fortnight before, is evidence in itself that its motives and intent remain unchanged from August 2009.”<sup>228</sup> The Claimant continues:

The original illegitimate purpose continued to motivate the Government when it reacquired, with retrospective effect, Claimant’s assets in 2011. The 2011 nationalisation was passed for the same reason. Nothing had changed since the 2009 nationalisation save for the Court of Appeal finding that the 2009 nationalisation was unlawful and the Government wanting to reverse the effect of that decision. Again that is not a valid public purpose. Further, as the Belize Supreme Court has found, the 2011 legislation which effected the 2011 nationalisation was defective rendering the expropriation unlawful.<sup>229</sup>

224. Although the Claimant argues that both the 2009 and 2011 acquisitions of Telemedia lacked a public purpose, the Claimant emphasizes that “the Tribunal does not need to determine whether the nationalisation of Telemedia was for a public purpose. The Tribunal need only consider whether the Government’s expropriation of the Claimant’s rights was for a public purpose.”<sup>230</sup> On this more-specific point, the Claimant contends that the acquisition of the Loan and Security Agreements does not necessarily follow from the acquisition of Telemedia:

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<sup>225</sup> The Claimant’s Amended Statement of Claim, paras. 244-247.

<sup>226</sup> The Claimant’s Post-Hearing Memorial, para. 88(a).

<sup>227</sup> The Claimant’s Amended Statement of Claim, paras. 240-243.

<sup>228</sup> The Claimant’s Amended Statement of Claim, para. 249.

<sup>229</sup> The Claimant’s Post-Hearing Memorial, para. 88(b).

<sup>230</sup> The Claimant’s Post-Hearing Memorial, para. 91(b).



even if the nationalisation of Telemedia had been for a public purpose, it does not follow that the expropriation of the Claimant's rights was necessary in order to achieve this, or as the Government puts it "to give full effect" to the nationalisation. The Government could have simply paid the Telemedia Facility, or contested its validity in court proceedings. It does not follow that it was required to acquire the Telemedia Facility in order to avoid the Telemedia nationalisation being unravelled.<sup>231</sup>

225. In the Claimant's view, "the reason that the Claimant's rights were acquired is because the Claimant was majority owned ultimately by Lord Ashcroft, who the Government regarded as an 'adversary' and the Respondent did not want to make any payments to the Claimant."<sup>232</sup>
226. With respect to compensation, the Claimant notes that it has received no compensation and submits that "it seems clear that the Government has resolved not to pay BCB any compensation at all."<sup>233</sup> The Claimant also submits that the provisions on compensation under the 2009 and 2011 Acts fall short of the protection required by the Treaty by eliminating compensation related to the Accommodation Agreement and by providing for a staggered payment schedule and for payment in Belize Treasury Notes.<sup>234</sup>
227. With respect to the "prompt review" required by Article 5 of the Treaty, the Claimant argues that (i) it was not notified or consulted in advance of the expropriation; (ii) after the Belize Court of Appeal nullified the 2009 Order, the Government acted rapidly to re-nationalize the Claimant's investment; and (iii) the Government attempted to amend the Belize Constitution to insulate itself from judicial review.<sup>235</sup> As a result, the Claimant argues, "the Government has also breached the Treaty's 'due process' requirements."<sup>236</sup>

#### *The Respondent's Position*

228. The Respondent accepts that it sought to directly expropriate the Loan and Security Agreements,<sup>237</sup> but submits that the expropriation has not been completed in light of the Claimant's legal challenge in the courts of Belize. According to the Respondent "[i]f BCB had not decided to challenge the expropriation in the Belizean courts, then the expropriation would

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<sup>231</sup> The Claimant's Post-Hearing Memorial, para. 91(e).

<sup>232</sup> The Claimant's Post-Hearing Memorial, para. 91(b).

<sup>233</sup> The Claimant's Amended Statement of Claim, para. 255.

<sup>234</sup> The Claimant's Amended Statement of Claim, para. 255.

<sup>235</sup> The Claimant's Amended Statement of Claim, para. 257.

<sup>236</sup> The Claimant's Amended Statement of Claim, para. 256.

<sup>237</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 273.

stand and the parties could move on to valuation and other issues.”<sup>238</sup> The Respondent submits that there is either no expropriation or “[i]n the alternative, the issue whether the purported expropriation will stand remains unresolved.”<sup>239</sup>

229. In any event the Respondent denies that it has violated the Treaty.<sup>240</sup> Under the Treaty, the Respondent submits, “[t]he GOB has a right to expropriate.”<sup>241</sup> The acquisition of Telemedia was undertaken for a public purpose “because GOB determined that it would be in the public interest of the people of Belize to nationalize the telecommunications industry and open it up to competition, among other things.”<sup>242</sup> With respect to the question at issue in these proceedings the Respondent contends that “[t]he issue whether the expropriation of Belize Telemedia was for a public purpose is not before this Tribunal.”<sup>243</sup> Instead, the Respondent argues that “the Tribunal is required to assume that the expropriation of Belize Telemedia was for a public purpose and simply adjudicate whether the expropriation of the loan and security agreements was for a public purpose.”<sup>244</sup>

230. According to the Respondent, it was necessary for the Government to acquire the Loan and Security Agreements “[i]n order to give full effect to [the] expropriation [of Telemedia].”<sup>245</sup> The Respondent notes that the Claimant was empowered to declare a default under the Telemedia Facility and Mortgage in the event of either a failure to make timely payments or a change of control of the company.<sup>246</sup> In the Respondent’s view, Telemedia was already in default after having concluded an invalid verbal extension agreement in July 2009 and having failed thereafter to make payments on the loan.<sup>247</sup> Moreover, the Respondent argues, “BCB had the power to execute on its security agreements given the change in control and, thus, if Telemedia

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<sup>238</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 280.

<sup>239</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 281.

<sup>240</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, s. 7.1

<sup>241</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 276.

<sup>242</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 283.

<sup>243</sup> The Respondent’s Post-Hearing Memorial, para. 195.

<sup>244</sup> The Respondent’s Post-Hearing Memorial, para. 195.

<sup>245</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 283.

<sup>246</sup> The Respondent’s Post-Hearing Memorial, para. 198.

<sup>247</sup> The Respondent’s Post-Hearing Memorial, para. 201.

had continued to pay on the loan, BCB nevertheless could still have foreclosed on the Telemedia shares and assets.”<sup>248</sup> According to the Respondent, these actions were fully in keeping with the broad meaning of the “public purpose” requirement of the Treaty.<sup>249</sup>

231. With respect to the provision of compensation, the Respondent submits that the Claimant cannot establish that the expropriation was not made “against just and equitable compensation” as both the validity of agreements and the expropriation remain pending in the courts of Belize. According to the Respondent, the Government has not refused to compensate the Claimant, and will do so “should the expropriation be upheld in the Belizean courts, and assuming that the Loan and Securities are not declared to be unenforceable as contrary to Belizean law.”<sup>250</sup> Moreover, in the Respondent’s view, “[t]he only reason BCB has not received said compensation is because of the avalanche of litigation that BCB itself initiated against GOB, which has resulted in the parties’ various rights and obligations, including issues of compensation and payment, having remained unresolved and in a constant state of flux.”<sup>251</sup>
232. Finally, with respect to judicial review, the Respondent argues as follows:

GOB also has the right, and in fact the obligation, to seek a court adjudication of the legality of the Loan and Securities, before any payment is made to BCB, because there is a good faith basis to believe that the Loan and Securities violate Belizean law. Accordingly, GOB has done nothing to block “prompt review” of the compensation request. Rather, there has been no compensation decision because BCB is challenging the expropriation itself and GOB is acting in accordance with the trust deposited in it by the people of Belize.<sup>252</sup>

*The Tribunal’s Considerations*

233. The Respondent argues that it intended to expropriate the Loan and Security Agreements, but that in light of the Claimant’s choice to litigate that decision, the expropriation has not yet taken effect and the question of whether it will “stand” remains undetermined. The Tribunal is unconvinced by this suggestion. Within the structure of Article 5 of the Treaty, the requirement that the Respondent provide a prompt review of any decision to expropriate affords the

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<sup>248</sup> The Respondent’s Post-Hearing Memorial, para. 204.

<sup>249</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 283.

<sup>250</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 285.

<sup>251</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 169.

<sup>252</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 304.

Claimant additional rights and imposes an additional step if the Respondent is to avoid a breach of that Article. The completion of such review is not, however, a pre-condition to the existence of an expropriation, nor is there any requirement that the Tribunal await the completion of the judicial review process before proceeding to determine whether a breach of Article 5 has occurred. The possibility that another forum might, at some future point, order the return of the Claimant's property is not sufficient to prevent this Tribunal from assessing whether Article 5 has been complied with. The Treaty calls for the Tribunal to provide judgment, independently of the possibility that other fora might also be able to provide relief.

234. There is no dispute that the Respondent has directly acquired the Claimant's interest in the Telemedia Facility, Telemedia Mortgage, Sunshine Facility, Sunshine Security, Sunshine Overdraft Facility, and Sunshine Mortgage of Shares (see paragraphs 85-93, 100-103 above). It is also not in dispute that these acquisitions were against the wishes of the Claimant, which initiated substantial litigation to challenge the taking (see paragraphs 97 and 106 above).
235. Furthermore, the Telemedia Mortgage was acquired by the 2009 Order, which provided that the public purpose behind the acquisition was "the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunication services to the public at affordable prices in a harmonious and non-contentious environment."<sup>253</sup> The remaining Loan and Security Agreements were acquired by the 2009 Amendment Order "to give effect to the public purpose" of the earlier order. The stated public purpose of the two acquisitions was thus the same. In the course of these proceedings, the Respondent has explained the need to expropriate the Loan and Security Agreements entirely to "give effect" to, or to "protect" the acquisition of Telemedia. In the Respondent's own words:

to protect the expropriation of Telemedia, it was necessary to expropriate the Telemedia and Sunshine loans and security agreements. Otherwise, BCB would have been able to declare a default and take financial control of all assets and some shares of Telemedia.<sup>254</sup>

236. In the Tribunal's view, this justification falls close to a statement that the public purpose for the acquisition of the Loan and Security Agreements was to avoid or delay the repayment to which the Claimant was contractually entitled. While the Tribunal accepts that a State is entitled to broad latitude to devise its public policy as it sees fit, it does not accept that the mere avoidance of payment, without more, can serve as a legitimate public policy objective for the expropriation

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<sup>253</sup> Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2009 Statutory Instrument No 104 of 2009 (**Exhibit C-8**).

<sup>254</sup> The Respondent's Reply to Claimant's Post-Hearing Memorial, para. 43.

of property. This is particularly the case when expropriation under the Treaty requires the provision of just and equitable compensation.

237. While the Respondent has sought to present its actions in terms of the risk that British Caribbean Bank would seek to wind up or seize control of Telemedia in the course of collecting on the Loan and Security Agreements, the Tribunal does not see that this changes matters. In this respect, the Tribunal endorses the reasoning of the Belize Court of Appeal, which concluded in its judgment of 24 June 2011 as follows:

All that the evidence on the winding-up point suggests to me is that the Bank, mindful of its own interests, as any commercial lender, particularly of a substantial sum, must surely be entitled to be, was taking all necessary steps to protect its position, within the context of the rights given to it by the security documentation entered into freely by both parties, and within the laws of the country. The Bank's chairman, Mr Johnson, made a similar point (in his third affidavit) when he observed (at para. 18) that the recovery of money lent was "a normal part of any bank's business activities", and further, (at para. 23) that a claimant "is entitled to seek recovery by all lawful means". Not only have I been unable to discern any sinister intent in the Bank's actions in this regard, but, even more pertinently, I am unable to see the basis of [the trial court's] conclusion (at para. 101) that "the possibility of the winding up of the company provides reason for the Acquisition Orders . . . [and the] . . . winding up possibility is directly connected to the Stated Public Purpose".<sup>255</sup>

238. The Tribunal also observes certain statements made by the Prime Minister of Belize, The Honourable Dean Barrow, on the adoption of the 2009 Act as follows:

There will thus be no more Telemedia awards against us; no more Telemedia court battles; no more debilitating waste of governments' energies and resources; and there will be no more suffering of this one man's campaign to subjugate an entire nation to his will.<sup>256</sup>

239. Following the adoption of the 2009 Amendment Order, which related directly to the Loan and Security Agreements, the Prime Minister stated further as follows:

[ . . . ] if [the Government] had fairly acquired Telemedia but leaving the assets exposed to our enemies it would have rendered the entire taking nugatory.

[ . . . ]

This is the people of Belize against the Ashcroft interests and I will never relent in the same way as he is indicating he will never relent.<sup>257</sup>

240. To the Tribunal, these words suggest that the motivation for the 2009 Orders included a personal animus to Lord Michael Ashcroft that—whether justifiable or not—bears no identifiable relation to the ostensible public purposes of stabilizing and improving the

<sup>255</sup> *Civil Appeal No. 30 of 2010 and Civil Appeal No. 31 of 2010*, Judgment of the Court of Appeal at para. 146 (24 June 2011) (**Exhibit C-98**).

<sup>256</sup> Transcript of the Speech of the Honourable Prime Minister of Belize, Dean Barrow, to the House of Representatives (24 August 2009) (**Exhibit C-17**).

<sup>257</sup> Unofficial transcript of an interview with the Prime Minister of Belize on Wake Up Belize (25 November 2009) (**Exhibit C-91**).

telecommunications industry of Belize, or of providing reliable telecommunications services to the public.

241. The Tribunal considers that, for the purposes of Article 5 of the Treaty with which it is concerned, a defence that an expropriation was undertaken “for a public purpose related to the internal needs of [the] Party” requires—at least—that the Respondent set out the public purpose for which the expropriation was undertaken and offer a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfilment of that purpose. The Tribunal is of the view that the Respondent has not convincingly shown that the 2009 acquisition of the Loan and Security Agreements was undertaken for a public purpose.

242. Immediately following the judgment of the Court of Appeal in the First Constitutional Challenge, the Government adopted the 2011 Order which endeavoured to re-acquire the Loan and Security Agreements, setting out in the process a new public purpose:

namely, (a) to restore the control of the telecommunications industry to Belizeans; (b) to provide greater opportunities for investment to socially oriented local institutions and the Belizean society at large; and (c) to advance the process of economic independence of Belize with a view to bringing about social justice and equality for the benefit of all Belizeans;<sup>258</sup>

243. In the Tribunal’s view, this provision adds nothing to the Tribunal’s analysis. The Respondent’s stated reasons for the expropriation of the Loan and Security Agreements are no more linked to the stated purposes of the 2011 Order than they were to the 2009 Order. If anything, the circumstances surrounding the 2011 Order are even more troubling, insofar as the course of events suggests that the purpose of the Order was to reverse the Court of Appeal’s finding, only 10 days previously, that the 2009 acquisition lacked a public purpose.

244. It is to be noted that the Belize Court of Appeal recently decided in the Second Constitutional Challenge that the 2011 acquisition of the Loan and Security Agreements was indeed undertaken for a public purpose. Although that decision arises under a different cause of action and involves the application of different legal principles than the present Award, the Tribunal has given respectful consideration to the reasoning of the Court of Appeal. The Tribunal remains unconvinced by the conclusions of that Court. The majority in that decision engaged in a lengthy discussion of the public purpose behind the 2011 Order before concluding as follows:

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<sup>258</sup> Belize Telecommunication (Assumption of Control over Belize Telemedia Limited) Order, 2011 (**Exhibit C-103**).

there is benefit or advantage to the public in the stated public purposes, namely, to restore the control of telecommunications industry to Belizeans, (nationalisation), providing investment opportunities to socially-oriented institutions and advancing economic independence of Belize. There is no private and personal advantage from the purposes. The purposes in S.I. 70 of 2011 are public purposes and are not vitiated by reason that the purposes may share the same aim as the 2009 public purposes.<sup>259</sup>

245. The Court of Appeal made no effort to explain how this public purpose was furthered by the acquisition of the Loan and Security Agreements, rather than merely the acquisition of Telemedia itself. Despite a lengthy judgment reaching to nearly 200 pages, the majority addressed the link between the Loan and Security Agreements and the acquisition of Telemedia in a single sentence, stating only as follows:

the loan interests had some controlling effect over the business of BTL, a provider of a public utility, the loan interests owned by BCB would be a derogation on the nationalisation to some extent if it was not also compulsorily acquired.<sup>260</sup>

246. In the Tribunal's view, this conclusion adds little to the Respondent's argument in these proceedings that the expropriation of the Loan and Security Agreements was necessary to protect or give effect to the acquisition of Telemedia, which the Tribunal found insufficient.
247. Having found that the expropriation of the Loan and Security Agreements failed to comply with the public purpose requirement of Article 5 of the Treaty, the Tribunal considers it unnecessary to address whether the Respondent's decision to defer any compensation pending the resolution of its judicial challenge (together with Telemedia) to the validity of the Loan and Security Agreements (Claim 360, see above at paragraph 97) was in keeping with the requirement to provide just and equitable compensation, or whether the various legal actions in the courts of Belize have met the requirement to provide a prompt review of the expropriation. Having found that the Respondent violated Article 5 of the Treaty, the Tribunal does not see that its calculation of damages would be altered were it to find multiple violations of the same provision.

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<sup>259</sup> (1) *The Attorney General of Belize & (2) The Minister of Public Utilities v. The British Caribbean Bank Limited* (Civil Appeal No 18 of 2012); (1) *The Attorney General of Belize & (2) The Minister of Public Utilities v. (1) Dean Boyce & (2) Trustees of the BTL Employees Trust* (Civil Appeal No 19 of 2012); *Fortis Energy International (Belize) Inc v. (1) The Attorney General of Belize & (2) The Minister of Public Utilities* (Civil Appeal No 21); Judgment of the Court of Appeal of 15 May 2014, at para. 524.

<sup>260</sup> *Ibid.* at para. 462.

## 2. Quantum in respect of the Claimant's Expropriation Claim

### *The Claimant's Position*

248. The Claimant submits that compensation for an internationally wrongful act, such as the breach of the Treaty, is a matter of customary international law, as set out in the *Chorzów Factory* case and in the International Law Commission's Articles on State Responsibility.<sup>261</sup> Under this standard, an internationally wrongful act requires conduct "(i) attributable to the State under international law; and (ii) a breach of an international obligation of the State."<sup>262</sup>
249. Having set out the breaches of the Treaty in its arguments on the merits, the Claimant considers the causal link to be self-evident: "The Government's actions deprived BCB of the benefit of the Loans, being interest at the agreed rates and ultimately repayment of the principal. BCB was also deprived of the Securities, which in the event that any of the borrowers defaulted in repayment of the Loans, would have provided more than adequate recourse to the sums due and owing."<sup>263</sup>
250. Should the Tribunal find there to have been a lawful expropriation, the Claimant submits that compensation should be pursuant to the standard set out in Article 5(1) of the Treaty as follows:
- Such compensation shall amount to the fair market value of the investment expropriated before the expropriation or impending expropriation became public knowledge, shall include interest at the rate prescribed by law until the date of payment, shall be made without undue delay, be effectively realisable and be freely transferable.
251. Should the Tribunal form the view there to have been an unlawful expropriation, the Claimant should be compensated pursuant to the standard in customary international law. Relying on *Siemens v. Argentina*,<sup>264</sup> the Claimant argues that "the damages available in the event of unlawful expropriation are at least as high as the compensation standard typically associated with lawful expropriation."<sup>265</sup>
252. Under any approach, the Claimant argues that compensation should be "equivalent to the sums outstanding under the Loans," which it submits to have been as follows as at 4 April 2014:

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<sup>261</sup> The Claimant's Amended Statement of Claim, para. 308.

<sup>262</sup> The Claimant's Amended Statement of Claim, para. 309, *quoting* ILC Articles on State Responsibility, art. 2.

<sup>263</sup> The Claimant's Amended Statement of Claim, para. 311.

<sup>264</sup> *Siemens v. Argentina*, Award, 6 February 2007.

<sup>265</sup> The Claimant's Amended Statement of Claim, para. 315.



- (a) Under the Sunshine Facility (including interest): US\$3,454,748.59.
  - (b) Under the Sunshine Overdraft Facility (including interest): US\$1,570,504.11.
  - (c) Under the Telemedia Facility (including interest): US\$45,538,949.55.<sup>266</sup>
253. The Claimant further seeks outstanding interest as from 4 April 2014 at the rates specified in the loan agreements up to the date of the Award.<sup>267</sup>
254. Turning to the Respondent's objections on damages, the Claimant argues that the Respondent largely reiterates its merits objection that the loans were illegal and invalid.<sup>268</sup> With respect to the argument that it has failed to identify damages arising under distinct claims, the Claimant relies on *Metalclad Corporation v. The United Mexican States*,<sup>269</sup> for the proposition that damages may be the same under multiple treaty provisions where the effects of the breach are the same.<sup>270</sup>
255. The Claimant also disputes the argument that expert evidence is required to establish the fair market value of the Telemedia Facility. This is wrong as a matter of law, the Claimant argues, "[b]ecause in this case, put simply, the Government has acquired a debt instrument, the fair market value of that instrument is self-evidently the debt owed plus interest."<sup>271</sup>

#### *The Respondent's Position*

256. The Respondent submits that "[o]n the basis of the record before this Tribunal, BCB is not entitled to any compensation."<sup>272</sup> The Respondent raises five major objections to the Claimant's damages analysis:
- (a) First, the Claimant "improperly comingles the damages analysis under these distinct claims that are subject to different compensation jurisprudence, and BCB has totally

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<sup>266</sup> The Claimant's Post-Hearing Memorial, paras. 173-177.

<sup>267</sup> The Claimant's Amended Statement of Claim, para. 320.

<sup>268</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 169.

<sup>269</sup> *Metalclad Corporation v The United Mexican States*, Award, 30 August 2000, para. 113.

<sup>270</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 167.

<sup>271</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 171.

<sup>272</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 317.

failed to carry its burden of establishing what type of compensation is available for its different claims.<sup>273</sup>

- (b) Second, the Respondent considers the Claimant’s claims premature “because the issue whether the purported expropriation will stand has not been finally adjudicated in the Belizean court action.”<sup>274</sup> According to the Respondent, if the expropriation is not upheld by the courts of Belize, any claim for damages resulting from delayed payments would be against Telemedia and Sunshine—not against the Government.<sup>275</sup>
- (c) Third, according to the Respondent, the Claimant “has not established, nor even claimed, that the Loan and Securities actually had a ‘fair market value’ at the relevant time.”<sup>276</sup> Relying on *Anchor Savings Bank, FSB v. United States*<sup>277</sup> and *The Law Debenture Trust Corp, PLC v. Elektrim S.A.*,<sup>278</sup> the Respondent argues that expert evidence is required to establish fair market value.<sup>279</sup> In particular, the Respondent notes, “[t]he ‘fair market value’ of the Loans is not, as BCB claims, the face amount of the underlying notes plus interest, *because those amounts do not account for the risks of default or non-payment.*”<sup>280</sup> Indeed, in the Respondent’s view, the Claimant has not even established that a market for the loans existed prior to the 2009 Act.<sup>281</sup>
- (d) Fourth, in the Respondent’s view, the fair market value of the Loan and Security Agreements was zero, insofar as they were “invalid and illegal under Belizean law.”<sup>282</sup>

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<sup>273</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 317.

<sup>274</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 318.

<sup>275</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 318.

<sup>276</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 321.

<sup>277</sup> *Anchor Savings Bank, FSB v. United States*, 59 Fed. Cl. 126, 163 (2003).

<sup>278</sup> *The Law Debenture Trust Corp, PLC v. Elektrim S.A.*, 2009 WL 2173270 [2009] EWHC 1801 (Ch), at para. 1230, High Court of Justice Chancery Division.

<sup>279</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 321.

<sup>280</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 186 (emphasis in original).

<sup>281</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 187.

<sup>282</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 323.

(e) Fifth, according to the Respondent, the Claimant is not entitled to interest. If the courts of Belize find the expropriation to have been void, the date from which interest would run will never have occurred.<sup>283</sup> On the other hand, if the courts reject the Claimant's Second Constitutional Challenge, the delay in paying compensation will have been caused by the Claimant's decision to litigate.<sup>284</sup>

257. The Respondent accepts that its objections to compensation are in some ways repetitive to its objections to jurisdiction and its defences on the merits. Nevertheless, the Respondent argues, "even if the Tribunal were to reject the similar arguments that GOB has made as to jurisdiction or the merits – the Tribunal could nevertheless accept them as meritorious defences to compensation or damages."<sup>285</sup>

#### *The Tribunal's Considerations*

258. As set out above,<sup>286</sup> the Tribunal has found that the Respondent has violated Article 5 of the Treaty by expropriating the Claimant's interest in the Loan and Security Agreements without complying with the public purpose requirement. The Parties differ regarding the appropriate standard for compensation for such breach of the Treaty and, further, as to whether the Claimant can establish the value of the Loan and Security Agreements without recourse to expert evidence.

259. Article 5 of the Treaty sets out the standard for compensation for expropriation as follows:

Such compensation shall amount to the fair market value of the investment expropriated before the expropriation or impending expropriation became public knowledge, shall include interest at the rate prescribed by law until the date of payment, shall be made without undue delay, be effectively realisable and be freely transferable.

260. The Tribunal observes that at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation, as the Claimant attempts to imply into the reading of Article 5 of the Treaty, whatever might be the merits of the distinction between lawful and unlawful expropriation under customary international law. Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty.

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<sup>283</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 326.

<sup>284</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 327.

<sup>285</sup> The Respondent's Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 185.

<sup>286</sup> See paragraph 247 above.

261. Neither is the Tribunal convinced that the generally accepted fair market value standard was intended to apply only in cases of the so-called “lawful expropriation.” The language of Article 5 was specifically negotiated by the Parties of the Treaty: “compensation shall amount to the fair market value of the investment expropriated.” The use of the word “shall” is unambiguous in that there is no room for another method of evaluation of the compensation sought.
262. Accordingly, the Tribunal holds that Article 5 establishes that the standard of compensation to be provided in the event of a breach of that provision shall be the “fair market value of the investment expropriated before the expropriation or impending expropriation became public knowledge.”<sup>287</sup>
263. The Tribunal therefore turns to whether the Claimant has established the fair market value of the Loan and Security Agreements. On this, the Parties disagree as to the relationship between the market value and the face value of the loans and on the need for expert evidence. The Claimant argues that “[b]ecause in this case, put simply, the Government has acquired a debt instrument, the fair market value of that instrument is self-evidently the debt owed plus interest.”<sup>288</sup> In contrast, the Respondent argues that:
- The “fair market value” of the Loans is not, as BCB claims, the face amount of the underlying notes plus interest, because **those amounts do not account for the risks of default or non-payment**. BCB’s possession of security interests cannot be assumed to nullify the risks of default or non-payment because the value of the security interests may not have been sufficient to cover the value of the underlying obligations.<sup>289</sup>
264. In principle, the Tribunal observes, but declines to accept, the Respondent’s suggestion that expert evidence is necessary to establish the value of the Loan and Security Agreements. While expert evidence will commonly form part of the process of valuing an investment, the Tribunal does not see that this is an absolute requirement. Rather, the Tribunal considers that the only essential *per se* prerequisite for an award of damages based on fair market evaluation is that a claimant has submitted some form of market-based data in support of its claim. Having cleared that threshold, a claimant’s precise burden of proof will vary depending upon the nature of the expropriated asset and the clear terms of the applicable treaty.
265. In the present case, the Tribunal observes that the fair market value evaluation, as prescribed by Article 5 of the Treaty, has not been presented by the Claimant. The Claimant’s thinly supported

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<sup>287</sup> Treaty, Art. 5(1).

<sup>288</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 171.

<sup>289</sup> The Respondent’s Rejoinder on the Merits; Reply in Support of Preliminary Objections, and Request to Dismiss or Stay, para. 186 (emphasis in original).

assertion that the outstanding face value of the Loan and Security Agreements is equivalent to their fair market value does not suffice to meet the minimum threshold of evidence required to advance a claim for damages based on this methodology. Had the Claimant provided a market-based analysis in support of its claim for the face value of the Loan and Security Agreements, the Tribunal would be in a position to give due consideration to Respondent's allegation that those amounts do not adequately account for risks. As the Claimant has not carried out any such evaluation, the Tribunal cannot accept without doubt that the outstanding face value and the fair market value of the Loan and Security Agreements are equal for the purposes of granting compensation under Article 5 of the Treaty.

266. Accordingly, the Tribunal finds that while the Claimant has proven a case for expropriation, it failed to prove the compensation it seeks.

267. The Tribunal will now turn to other alleged violations of the Treaty.

### **3. Article 2 and Fair and Equitable Treatment**

268. Article 2(2) of the Treaty provides in relevant part:

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment . . .

#### *The Claimant's Position*

269. The Claimant submits that the Respondent's actions with respect to the loan and security agreements breach the Government's obligation to treat the Claimant's investment in a fair and equitable manner.<sup>290</sup>

270. With respect to the meaning of the Treaty provisions, the Claimant relies on *Saluka BV v. The Czech Republic*,<sup>291</sup> *Tecnicas Medioambientales Tecmed SA v. United Mexican States*,<sup>292</sup> *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*,<sup>293</sup> and *Azurix Corp v. Argentine Republic*<sup>294</sup> in support of its position that "the obligation to accord 'fair and equitable treatment' is an independent and autonomous standard, additional to general international law."<sup>295</sup> The

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<sup>290</sup> The Claimant's Amended Statement of Claim, para. 260.

<sup>291</sup> *Saluka Investments BV v. Czech Republic*, Decision on Jurisdiction, 17 March 2006.

<sup>292</sup> *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004), 10 ICSID Reports 134.

<sup>293</sup> *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, Award, 25 May 2004, 44 ILM 91 (2005).

<sup>294</sup> *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006.

<sup>295</sup> The Claimant's Amended Statement of Claim, para. 261.

Claimant adopts the description set out by the UN Conference on Trade and Development to the effect that “[w]here the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable.”<sup>296</sup> Drawing on a wide range of jurisprudence under investment treaties, the Claimant submits that core elements of the fair and equitable treatment standard include good faith, stability of the legal and business environment, and protection of the investor’s legitimate expectations, as well as due process and transparency.<sup>297</sup>

271. In the Claimant’s view, the fact that the Treaty provides a separate article on expropriation does not preclude its claim for fair and equitable treatment. Citing *CME Czech Republic B.V. v Czech Republic*,<sup>298</sup> *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*,<sup>299</sup> and *Ioannis Kardassopoulos v The Republic of Georgia*,<sup>300</sup> the Claimant argues that “[t]here are in fact numerous investor-State cases where tribunals have found the Government to have breached Treaty provisions on both expropriation and FET.”<sup>301</sup>
272. The Claimant submits that the Respondent failed to live up to the fair and equitable treatment standard. Specifically, the Claimant contends that its legitimate expectations were not upheld: “When BCB invested in Belize it expected to be able to conduct its business and issue loans without fear that its rights under these loans and related securities would be terminated arbitrarily.”<sup>302</sup> In the Claimant’s view, its legitimate expectations included that:
- (a) “BCB would be consulted before the acquisition of its rights.”<sup>303</sup>
  - (b) “Telemedia would be allowed to function as a private enterprise and not be brought under Government control.”<sup>304</sup>
  - (c) “The Government will comply with the decisions of the Belizean courts and BCB will receive effective redress in domestic courts.”<sup>305</sup>

<sup>296</sup> *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements, 1999.

<sup>297</sup> The Claimant’s Amended Statement of Claim, paras. 264-273.

<sup>298</sup> *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

<sup>299</sup> *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, Award, 24 July 2008.

<sup>300</sup> *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010.

<sup>301</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 158.

<sup>302</sup> The Claimant’s Amended Statement of Claim, para. 288.

<sup>303</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 159.

<sup>304</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 159.

(d) “BCB will be allowed to exercise its Treaty rights without any interference from or threats by the Government.”<sup>306</sup>

273. At the same time, the 2009 and 2011 Orders profoundly upset the Claimant’s business environment and were “without any warning or for any legitimate purpose.”<sup>307</sup> By adopting legislation and issuing the orders within a single day, the Government fell far short of acting in a “consistent, transparent and non-discriminatory manner.”<sup>308</sup> Finally, the Claimant argues, “the Government did not act in accordance with due process and procedural propriety.” British Caribbean Bank, in the Claimant’s view, has “not been accorded its right under Article 5 to ‘prompt review by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment’.”<sup>309</sup>

#### *The Respondent’s Position*

274. The Respondent denies that its actions deprived the Claimant of fair and equitable treatment.<sup>310</sup>

275. As an initial matter, the Respondent submits, “Article 2 of the Treaty is not applicable because this dispute is governed by the more specific Article 5 of the Treaty which expressly governs the subject of expropriations.”<sup>311</sup> While fair and equitable treatment may sometimes be used to fill gaps in the protection offered by an investment treaty, there is no need for such steps when specific treaty provisions are available.<sup>312</sup>

276. Even if the fair and equitable treatment standard were applicable, the Respondent argues, it has not been breached. In the Respondent’s view, international law accords a significant degree of deference to State action, and the threshold for violations of fair and equitable treatment is high. Relying on *SD Myers v. Canada*, the Respondent submits that “[a] violation of the [fair and equitable treatment] Standard ‘occurs only when it is shown that an investor has been treated in

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<sup>305</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 159.

<sup>306</sup> The Claimant’s Statement of Reply and Answer to Jurisdictional Objections, para. 159.

<sup>307</sup> The Claimant’s Amended Statement of Claim, para. 287.

<sup>308</sup> The Claimant’s Amended Statement of Claim, para. 289.

<sup>309</sup> The Claimant’s Amended Statement of Claim, para. 290.

<sup>310</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 293.

<sup>311</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 286.

<sup>312</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, paras. 290-292.

such an *unjust or arbitrary* manner that the treatment rises to the level that is unacceptable from the international perspective.”<sup>313</sup>

277. According to the Respondent, there is nothing unjust, arbitrary or lacking in good faith in the Government’s decision to nationalize Telemedia and the attendant loan and security agreements. In the Respondent’s words, “[t]here was nothing ambiguous or non-transparent about the expropriation. . . . This is not a situation where there has been an ‘indirect’ expropriation, which would raise issues of ambiguity and transparency.”<sup>314</sup> Having taken the decision to expropriate Telemedia, the Respondent argues, there was nothing inappropriate in the Government then defending itself from the judicial challenge brought by the Claimant.<sup>315</sup>
278. With respect to legitimate expectations, the Respondent emphasizes, the Claimant cannot reasonably have expected that its investment would not be expropriated. On the contrary, the investor’s only legitimate expectations with respect to expropriation are that the State will comply with the requirements set out in Article 5.<sup>316</sup> In the Respondent’s view, “there is no evidence that GOB has taken any actions, whether legislative or otherwise, to eliminate the legitimate expectations of investors – including BCB – under that provision of the Treaty.”<sup>317</sup> With respect to the manner in which the expropriation was carried out, the Respondent denies that the speed with which it was passed is relevant or that there was any violation of transparency or due process.<sup>318</sup> On the contrary, the Respondent alleges, the Claimant has had access to the full range of procedures of the courts of Belize in litigation that continues to play out.<sup>319</sup> Finally, the Respondent argues that many of the Claimant’s allegations relate, in fact, to the motives behind the expropriation of the shares in Telemedia and an alleged animus towards Lord Ashcroft. The Respondent denies the accuracy of these allegations, but also emphasizes

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<sup>313</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 296.

<sup>314</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 295.

<sup>315</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 297.

<sup>316</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, paras. 295, 301.

<sup>317</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 301.

<sup>318</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 303.

<sup>319</sup> The Respondent’s Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 304.



that even if true, they are irrelevant to the present arbitration and the question of British Caribbean Bank's interests under the loan and security agreements.<sup>320</sup>

*The Tribunal's Considerations*

279. The Parties disagree with respect to the applicability of the provisions of the Treaty relating to fair and equitable treatment, the applicable standard, and its application to the Government's actions with respect to Telemedia.
280. As an initial matter, the Tribunal does not accept that conduct violating one protection set out in the Treaty cannot also violate other provisions of the same treaty. The Treaty approaches the overall objective of "creat[ing] favourable conditions for greater investment" between the States parties through the protection of investments by articulating a series of standards of protection in more or less general terms. The protection set out in this manner is intended to be cumulative. Nothing in the Treaty supports the Respondent's allegation that the Treaty standards are alternatives to each other, such that a violation of any one precludes a violation of another. Rather, each of the standards set out in the Treaty expresses a particular aspect of the overall objective of protection of investments. Their potentially overlapping application reflects this complementarity.
281. Turning to the standard for fair and equitable treatment, the Tribunal observes that this aspect of the protection of investments has generally resisted the formulation of any comprehensive definition. Whether government conduct will be considered "fair" or "equitable" is an inherently contextual determination. While the protection against expropriation set out in Article 5 of the Treaty is principally focused on the property rights of the investor and defines a series of (relatively) objective requirements for a taking, fair and equitable treatment is focused more subjectively on the intent and context of governmental action, as well as on its effects. Without attempting to advance any comprehensive view of the meaning of fair and equitable treatment, the Tribunal is of the view that, as it emerges from the Parties' arguments, at least two strands of the standard bear upon the events in these proceedings.
282. First, fair and equitable treatment is frequently noted to include a prohibition on conduct that is "arbitrary," "idiosyncratic," or "discriminatory".<sup>321</sup> There is an inherent logic to this association.

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<sup>320</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 303.

<sup>321</sup> See, e.g., *SD Myers Inc v Government of Canada*, UNCITRAL, Award of 13 November 2000 at para. 263; *Waste Management, Inc v United Mexican States (No 2)*, ICSID Case No ARB(AF)/00/3, Award of 30 April 2004 at para. 98.

Conduct that is motivated by an improper purpose, by a purpose with no relation to the means adopted, or by no purpose whatsoever is difficult to characterize as either fair or equitable, whatever the actual effects may be. In the Tribunal's view, this is linked in the Treaty to the requirement that any taking be made for a public purpose. While governmental conduct can be unfair or inequitable and still be in service of a bona fide public purpose, it is difficult to imagine the converse, a situation in which the taking of an investment was not motivated by a public purpose and yet complied with the requirement of fair and equitable treatment.

283. Second, as set out in both Parties' discussion of the standard, fair and equitable treatment is generally linked to the concept of an investor's legitimate expectations. While it would be trite to state that an investor has a legitimate expectation in the fulfilment of the remainder of the Treaty, the Tribunal is of the view that an investor can at least legitimately expect that legislation to assume outright ownership of his or her investment will not be adopted except in the service of a public purpose.

284. Having already found (see paragraphs 241 and 243 above) that the Respondent's adoption of the 2009 Act and Orders and the 2011 Act and Order failed to meet the Treaty's requirement that any taking be made for a public purpose, the Tribunal concludes that the Respondent has also failed to accord the Claimant fair and equitable treatment.

#### **4. Quantum in respect of the Claimant's Fair and Equitable Treatment Claim**

##### *The Claimant's Position*

285. According to the Claimant, "[i]n the event that the Tribunal finds that there has been a[] . . . violation of the obligations in Article[] 2 . . . of the Treaty, the standard of damages is not provided for in the Treaty but is determined by customary international law as reflected in the ILC Articles on State Responsibility."<sup>322</sup> The Claimant thus argues that the standard of compensation in respect of Article 2 is the standard of full reparation set out by the Permanent Court of International Justice in the *Factory at Chorzów*.<sup>323</sup> In the Claimant's view, such full reparation is represented by compensation "equivalent to the sums outstanding under the Loans."<sup>324</sup>

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<sup>322</sup> The Claimant's Amended Statement of Claim, para. 308-313 and 315.

<sup>323</sup> The Claimant's Statement of Reply and Answer to Jurisdictional Objections, para. 171.

<sup>324</sup> The Claimant's Amended Statement of Claim, para. 316.

*The Respondent's Position*

286. As set out with respect to the violation of Article 5 (see paragraph 256 above), the Respondent argues that the Claimant is not entitled to compensation because the Loan and Security Agreements were illegal and invalid and because the legality of the Respondent's actions remains a matter before the Courts of Belize.

*The Tribunal's Considerations*

287. As set out above (see paragraph 284), the Tribunal has found that the Respondent has violated Article 2 of the Treaty by denying fair and equitable treatment to the Claimant's investment in the Loan and Security Agreements.

288. In contrast to Article 5 of the Treaty, Article 2 provides no standard for the compensation payable in the event of a violation of its provisions. In the absence of an applicable provision within the Treaty itself, establishing the standard of compensation as a matter of *lex specialis*, the applicable standard of compensation is that existing in customary international law, as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>325</sup>

289. Furthermore, Article 31 of the ILC Articles on State Responsibility provides that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act by a State.

290. Article 34 of the ILC Articles of State Responsibility provides that:

Full reparation of the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

291. Article 35 of the ILC Articles of State Responsibility provides that:

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<sup>325</sup> *Case Concerning the Factory at Chorzów, (Merits), PCIJ Series A – No 17, Judgment No 13 at p. 47 (13 September 1928).*

A State responsible for an internationally wrongful act is under an obligation to make full restitution, that is, to re-establish the situation that existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation.

292. The Tribunal further observes that customary international law (as governs compensation for the Respondent's breach of fair and equitable treatment) and Article 5 of the Treaty (as governs compensation for the Respondent's expropriation) present the Tribunal with different questions. As the Tribunal has already noted, Article 5 of the Treaty requires the Tribunal—upon finding that the Respondent has breached the Treaty's expropriation protections—to determine whether the Claimant has adequately demonstrated the fair market value of the investment. In its present inquiry, however, customary international law requires the Tribunal—upon finding that the Respondent has breached the Treaty's fair and equitable treatment protections—to evaluate the effects of the Respondent's actions.

293. In conducting this evaluation, the Tribunal recalls the Permanent Court's use of qualified language in defining the compensation standard at customary international law as “re-establish[ing] the situation which would, in all probability, have existed if that act had not been committed.”<sup>326</sup> To re-establish that situation, the Tribunal has reviewed the consolidated financial statements of Telemedia for the years 2008 and 2009 and has found no evidence that the company was at any risk of insolvency at the moment it was expropriated, was otherwise unable to meet the liability of full repayment when it came due, or that the value of the shares in Telemedia held by Sunshine were in jeopardy.

294. Considering all relevant circumstances, the Tribunal observes that the most probable outcome of the Claimant's investment, had the Respondent accorded it fair and equitable treatment, would have been payment in full. The Tribunal therefore finds that the Respondent is required to compensate the Claimant at the face value of the Loan and Security Agreements.

295. In reaching this conclusion, the Tribunal notes that its ‘but-for’ analysis arrives at the same result as would have been required by the default and acceleration provisions in each of the loan agreements. Under these provisions, the loans became payable, immediately and in full, upon the expropriation of Telemedia and Sunshine as a result of the change of ownership:

- (a) Paragraph 9 of the Telemedia Facility provides that

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<sup>326</sup> *Case Concerning the Factory at Chorzów, (Merits), PCIJ Series A – No 17, Judgment No 13 at p. 47 (13 September 1928)* (emphasis added).

All indebtedness and liability of the Borrower to the Bank shall become immediately due and payable, if any one or more of the following events of default occurs:

[ . . ]

- (f) any event constituting an event of default under any Security Document occurs.

Paragraph 9(9) of the Telemedia Mortgage, in turn, provides for an event of default “if the Mortgager changes its ownership structure or management without the consent of the Mortgagee.”

- (b) Clause 14 of Sunshine Facility provides:

14.1 If:

[ . . ]

14.1.2 the Borrower fails to observe or perform any of its other obligations under this Agreement (including any covenants or undertakings in clause 11) or the Security Documents or under any undertaking or arrangement entered into in connection herewith and, in the case of a failure capable of remedy, the same is not remedied within twenty-one days after the Borrower became aware of the failure, to the Agent’s or the Majority Lenders’ satisfaction;

[ . . ]

then or at any time thereafter, the Agent may, and upon the request of the Majority Lenders shall, by notice to the Borrower, declare the Loan to be immediately due and payable whereupon it shall become so due and payable, together with accrued interest thereon and any other amounts then payable under this Agreement.

Clause 11 of the Sunshine Facility provides in turn:

11.1 From the date hereof and until all its liabilities and obligations under this Agreement and the Security Documents have been discharged the Borrower undertakes and covenants with the Lenders:

[ . . ]

11.1.5 that it will not make any change nor procure any change to its corporate structure or ownership without the prior written approval of the Lenders;

- (c) Clause 1 of the Sunshine Facility provides in part:

[ . . ]

Notwithstanding the above Term, the Bank retains the absolute discretion at any and all times to demand the full repayment of the Overdraft Facility Amount, together with any interest accrued thereon.

Additionally, Clause 8 of the Overdraft Facility provides:

All indebtedness and liability of the Borrower to the Bank shall become immediately due and payable, if any one or more of the following events of default occurs:

[ . . ]

- (a) [ . . ] (iii) the Borrower fails to comply with any provision of this Agreement, or of the Security Documents; or any other agreement to which the Borrower and the Bank are parties; or

Clause 7 provides in turn:

During the operation of this Agreement:

[ . . . ]

- (e) the Borrower covenants that it will not make any change nor procure any change to its corporate structure or ownership, without the prior written approval of the Bank;

296. The Claimant wrote to Sunshine and Telemedia on 24 November 2009, triggering these provisions and indicating that the Loan Agreements were therefore immediately payable. Accordingly, the Tribunal considers that awarding the face value of the Agreements is not only an appropriate application of the *Chorzów Factory* principle and the ILC Articles on State Responsibility, but is also identical to the compensation which the Respondent would have otherwise paid pursuant to these provisions.

297. Having already found that the Loan and Security Agreements were valid and enforceable contracts, the Tribunal declines to consider the validity of the agreements as a factor in the compensation to be awarded. The Tribunal will, however, adopt the Claimant's proposed order in respect of double recovery.

298. The Tribunal calculates the amounts owing as follows:

- (a) In respect of the Telemedia Facility, as at 7 December 2009: US\$22,896,420.78.
- (b) In respect of the Sunshine Facility, as at 7 December 2009: US\$1,327,831.39, representing the amount owing to British Caribbean Bank on that date.

The Tribunal notes that the Claimant has claimed the full amount outstanding under Sunshine Facility, which was provided by two different lenders, British Caribbean Bank and Caedman Limited. On the basis of the Claimant's own evidence, the Tribunal accepts that the amount of US\$10,000,000 made available to Sunshine under the Facility was provided by the two lenders in equal shares of US\$5,000,000.<sup>327</sup> The Claimant's evidence also indicates that the amount outstanding on the loan was owed in equal shares to British Caribbean Bank and to Caedman Limited.<sup>328</sup> The Claimant has never, however, established any entitlement to recover on behalf of Caedman Limited nor, upon the Tribunal's examination, does such a right appear on the face of the Sunshine Facility

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<sup>327</sup> The Claimant's Post-Hearing Memorial, para. 176 ("The Claimant originally advanced US\$5 million . . .").

<sup>328</sup> See spreadsheet accompanying the Claimant's Post-Hearing Memorial.

itself. Accordingly, the Tribunal will limit its Award to the portion of the Sunshine Facility owed to the Claimant.

The Tribunal further observes that the Claimant's evidence indicates that a repayment of US\$262,080.19 was made on the Sunshine Facility in the period between 2 January and 31 March 2010, in other words, after the expropriation of the loan. This repayment has not been explained to the Tribunal, but the Tribunal understands that the Claimant has not claimed this amount and will adjust the amount of compensation accordingly in its calculation of interest.

(c) In respect of the Sunshine Overdraft Facility, as at 7 December 2009: US\$936,933.76.

299. Between 7 December 2009, the date of the expropriation, and the date of this Award, the Tribunal calculates the interest owing pursuant to the loan agreements themselves as follows:

(a) In respect of the Telemedia Facility, the loan agreement provides in paragraph 1(d) that

Interest will be charged monthly in arrears on amounts outstanding on the Term Loan Amount at the rate of twelve per centum (12%) per annum or such other rate as may be notified to the Borrower by the Bank from time to time in writing commencing on the Draw Down Date.

The loan agreement further provides in paragraph 10 for default interest in the following terms:

- (a) If the Borrower fails to pay any amount payable by it under this Agreement on the due date, then the period beginning on such due date and ending on the date upon which the obligations of the Borrower to pay such amount (the balance of which for the time being unpaid being referred to in this Paragraph 10 as the "Unpaid Sum") is discharged in full, shall be divided into successive periods, each of which (other than the first) shall start on the last day of the preceding such period and the duration of each of which shall be selected by the Bank.
- (b) During each such period referred to in Paragraph 10(a), an Unpaid Sum shall, upon written notification to the Borrower from the Bank bear interest at the default rate of 4% above the interest rate provided for in paragraph 1(d) herein (as well as after and before judgment) ("Default Interest"). Such Default Interest shall be compounded at the end of each such period.
- (c) Any Default Interest, which shall have accrued under Paragraph 10(b) in respect of an Unpaid Sum, shall be due and payable and shall be paid by the Borrower on the date on which the Unpaid Sum is actually paid.

The Claimant has sought the application of the higher penalty rate pursuant to the agreement. In the Tribunal's view, however, the approach it has taken in the application of the *Chorzów Factory* standard and the ILC Articles on State Responsibility to provide the Claimant with full reparation calls for the Tribunal to place the Claimant in the circumstances in which it would have found itself, but for the unlawful act. The Tribunal

considers that this logic leads to the application of the regular rate of interest under the contract, rather than the penalty rate. Accordingly, the Tribunal calculates the interest due pursuant to the Telemedia Facility from 7 December 2009 through the date of this Award at 12 percent, compounded monthly, or US\$18,876,675.26.

- (b) In respect of the Sunshine Facility, the loan agreement defines the “interest rate” as “the rate of interest per annum determined by the Agent to be the aggregate of the Margin plus the U.S. Prime Rate applicable to the Loan.” The Margin is defined as 4.75 percent and the U.S. Prime Rate is defined as:

the rate per annum determined by the Agent by reference to Bloomberg as the rate at which prime banks in the United States are offering deposits in U.S. Dollars in the period equal to the Interest Period at or about 11.00 a.m. on the first day of the period for which such rate is to be determined

Paragraph 5 of the loan agreement provides for the payment of interest as follows:

- 5.1 The period of the Loan’s existence shall be divided into Interest Periods which, subject to the provisions contained in the definition thereof, shall each be for a period of three months.
- 5.2 The rate of interest payable on the Loan for each Interest Period shall be the Interest Rate.
- 5.3 Interest under this Agreement shall accrue from day to day, be calculated on the Lender Basis and paid by the Borrower to the Agent for the account of the Lenders in arrears on each Interest Payment Date.
- 5.40 The Agent shall certify to the Borrower and the Lenders each rate of interest as soon as it is determined under this Agreement and any such certificate of the Agent shall, in the absence of manifest error, be conclusive and binding upon the parties hereto.
- 5.5 All interest shall be payable in Dollars.
- 5.6 If the Borrower shall fail to pay any amount in accordance with this Agreement, the Borrower shall pay interest on that overdue amount from the date of default up to the date of actual payment (as well after as before judgment) at the rate per annum which is certified by the Agent to be 3 per cent above the Interest Rate.

The Tribunal notes that the U.S. Prime Rate during the applicable period was and remains 3.25 percent, yielding an interest rate of 8 percent, compounded quarterly. As with the Telemedia Facility, the Tribunal declines to apply the penalty rate of interest. Accordingly, the Tribunal calculates the interest due pursuant to the Sunshine Facility from 7 December 2009 through the date of this Award at 8 percent, compounded quarterly, or US\$558,745.19.

The Tribunal recalls that an unexplained payment of US\$262,080.19 was made on the Sunshine Facility after the date of the expropriation which the Tribunal now deducts from



its calculation of interest. Following this payment, the remaining interest due on the Sunshine Facility is US\$296,665.00.

- (c) In respect of the Sunshine Overdraft Facility, the loan agreement provides in paragraph 1(d) that

Interest will be charged on the daily outstanding balance of the Overdraft Facility Amount at the US Prime Rate from time to time plus Four and Three Quarter percent, currently 12.5% per annum (the "Interest Rate"). Interest will be paid by the Borrower to the Bank and will be debited from the Borrower's current account with the Bank monthly in arrears, commencing from the date of the initial utilisation of the Overdraft Facility.

Paragraph 9 of the loan agreement provides for default interest which the Tribunal considers inapplicable for the reasons already stated.

Based on the U.S. Prime Rate of 3.25 percent, the above formula produces a regular interest rate of 8 percent, compounded monthly. Accordingly, the Tribunal calculates the interest due pursuant to the Sunshine Overdraft Facility from 7 December 2009 through the date of this Award at 8 percent, compounded monthly, or US\$462,916.67.

300. As from the date of this Award, the Tribunal considers that the obligation to pay interest remains an element of providing the Claimant with full reparation. With respect to post-Award interest, however, the Tribunal considers that the determination of just compensation affords it a measure of discretion and concludes that the interest payable on all outstanding amounts shall be the three month LIBOR rate, plus 2 percent, compounded annually from the date of this Award until the date on which payment is made.

##### **5. Other Alleged Breaches of the Treaty**

301. The Tribunal found that the Respondent has breached Article 5 of the Treaty and expropriated the Claimant's interest in the Loan and Security Agreements. The Tribunal has also found that the Respondent's taking of the Loan and Security Agreements without a public purpose failed to accord the Claimant's investment with fair and equitable treatment under Article 2 of the Treaty and has calculated the compensation owing in respect of this breach.
302. In its remaining claims, the Claimant seeks the equivalent of the sums outstanding on the loans, the amount the Tribunal has already awarded in respect of the Respondent's breach of Article 2. The Claimant reiterates that in relation to other alleged Treaty breaches by the Respondent

“irrespective of the standard breached, BCB’s loss remains the same (i.e. the value of the loan plus interest).”<sup>329</sup>

303. The Respondent objects that:

BCB’s discussion of the subject of compensation confuses the two different types of treaty claims that it seeks to invoke. In terms of its damages analysis, BCB fails to distinguish between its expropriation claim and the other claims based on various standards. BCB improperly comingles under these distinct claims that are subject to different compensation jurisprudence, and BCB has totally failed to carry its burden of establishing what type of compensation is available for its different claims of [e]xpropriation and alleged violation of the Fair and Equitable Treatment Standard, the Full Protection and Security Standard, and the Unreasonable and Discriminatory Measures Standard.<sup>330</sup>

304. The Tribunal does not consider that the Respondent’s submission impacts on the compensation sought by the Claimant. The Claimant sought and has received the equivalent of the value of the Loans plus interest. Accordingly, a finding of a breach of any other provision of the Treaty would not increase the compensation. Therefore, the Tribunal considers it unnecessary to address the Claimant’s remaining claims in relation to Articles 2 and 3 of the Treaty, full protection and security, or unreasonable and discriminatory measures.

## VI. COSTS

305. The Tribunal observes that the Treaty contains no provisions on the allocation of the costs of arbitration arising out of a difference or dispute. The provisions regarding the Tribunal’s decision in the matter of costs are therefore to be found in Articles 38 to 40 of the UNCITRAL Rules. Article 38 of the UNCITRAL Rules defines the “costs of arbitration” as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term ‘costs’ includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

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<sup>329</sup> The Claimant’s Statement of Reply, para. 167. *See also* paragraph 254 above.

<sup>330</sup> The Respondent’s Statement of Defence, para. 317.

306. The principle governing the awarding of the costs of arbitration, according to Article 40 of the UNCITRAL Rules, is that:

- (1) Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- (2) With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

307. In keeping with the division set out in the UNCITRAL Rules themselves, the Tribunal will address the costs of legal representation and assistance and other costs of arbitration separately.

#### **A. COSTS OF ARBITRATION**

308. The Parties deposited with the PCA a total of €540,000.00 (€330,000.00 by the Claimant; €210,000.00 by the Respondent) to cover the costs of arbitration.

309. The fees and expenses of Mr. John Beechey, the arbitrator appointed by the Claimant, amount respectively to €61,640.07 and €10,139.76.

310. The fees and expenses of Mr. Rodrigo Oreamuno, the arbitrator appointed on behalf of the Respondent, amount respectively to €87,000.00 and €2,341.00.

311. The fees and expenses of Professor Albert Jan van den Berg, the Presiding Arbitrator, amount respectively to €231,083.37 and €10,325.04.

312. Pursuant to the Tribunal's Order N° 1, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to €48,185.00.

313. Also pursuant to the Tribunal's Order N° 1, Ms. Niuscha Bassiri was appointed as Tribunal Secretary for these proceedings. Ms. Bassiri's fees amount to €16,872.93.

314. Other tribunal costs, including court reporters, interpreters, hearing room equipment, tribunal accommodation, bank charges, and all other expenses relating to the arbitration proceedings, amount to €37,911.73.

315. Based on the above figures, the combined tribunal costs, comprising the items covered in Articles 38(a) to (c) and (f) of the UNCITRAL Rules, total €505,498.90.

316. The Parties' respective portions of these tribunal costs, amounting to €252,749.45 for each Party, shall be deducted from the deposit. In accordance with Article 41(5) of the UNCITRAL Rules, the PCA shall return any unexpended balance to the Parties in proportion with their respective contributions to the deposit.
317. Turning to the application of Article 40(1) of the UNCITRAL Rules, the Respondent is the unsuccessful Party, and the Tribunal sees no grounds to depart from the principle that the costs of arbitration be borne by the unsuccessful party. Accordingly, the Tribunal decides that the Respondent shall pay to the Claimant the amount of €252,749.45 (corresponding to the Claimant's portion of the tribunal costs) and €56,166.54 (corresponding to the Respondent's portion of the tribunal costs, borne by the Claimant), for a total payment of €308,915.99 as reimbursement for the costs of the arbitration (other than legal representation and assistance).

## B. COSTS OF LEGAL REPRESENTATION AND ASSISTANCE

### *The Claimant's Position*

318. The Claimant seeks costs in respect of its legal representation and assistance in the following amounts:

Item	Cost
Allen & Overy LLP Legal Fees:	£1,471,829.83
Disbursements:	£94,692.99
Courtenay Coye LLP Legal Fees:	£43,135.17
Witness Travel and Accommodation:	£18,950.14
Costs of the Anti-Suit Injunction:	£194,729.26
<b>Total:</b>	<b>£1,823,337.39</b>

319. The Claimant submits that "if the Claimant prevails in its claims, it should be entitled to recover all of the costs it incurred in these proceedings pursuant to the 'loser pays' rule."<sup>331</sup>
320. The Claimant further argues that "the obstructionist tactics pursued by the Government, and the manner in which it has advanced certain aspects of its case, are relevant factors that support an award of costs in the Claimant's favour."<sup>332</sup> The Claimant points in particular to the Respondent's disregard of the Anti-Suit Injunction issued by the English High Court; its pursuit of the Anti-Arbitration Injunction in courts of Belize, which was ultimately struck down by the

<sup>331</sup> The Claimant's Costs Submissions, para. 9.

<sup>332</sup> The Claimant's Costs Submissions, para. 11.

Caribbean Court of Justice on 25 June 2013; and the passage in Belize of the Supreme Court of Judicature (Amendment) Act 2010, which provided for criminal punishment and heightened sanctions for violations of an injunction. According to the Claimant, the combined effect of these measures was to substantially delay the course of this arbitration and increase the Claimant's costs as the Claimant's counsel were forced to bring on additional attorneys and to respond to developments in Belize over an extended period.<sup>333</sup> Once the Respondent began participating in these proceedings, the Claimant argues that it "persisted in introducing and pursuing a plethora of spurious legal arguments that had the effect of significantly and unnecessarily expanding the scope of the arbitration," further increasing the Claimant's costs.<sup>334</sup>

321. With respect to the costs of the Anti-Suit Injunction, the Claimant argues as follows:

- (A) The Anti-Suit Injunction was obtained in support of this arbitration and therefore these costs qualify as "legal and other costs" incurred by the Claimant "in relation to the arbitration" (UNCITRAL Rules, Article 38(e)).
- (B) As explained above at paragraph 13, the Claimant decided to obtain this relief from the English Courts, as opposed to the Tribunal, because at the time the application was made on 4 May 2010, the Tribunal had not been appointed.
- (C) Whilst the Claimant has the liberty to apply to the English Courts for these costs, given that the Tribunal is considering the costs incurred in relation to the arbitration it would be more efficient and cost-effective to have the Claimant's costs of the Anti-Suit Injunction determined now.
- (D) For the avoidance of doubt, the Claimant does not seek double recovery of its legal costs. If the Claimant is awarded the costs it is seeking by the Tribunal, and provided the Government complies with the award within a reasonable time period, the Claimant undertakes to not seek from the English Courts the costs of obtaining the Anti-Suit Injunction.<sup>335</sup>

#### *The Respondent's Position*

322. The Respondent submits that the Claimant's request for costs "should be denied in its entirety."<sup>336</sup>

323. With respect to its own costs, the Respondent requested in its Statement of Defence "that a final award be rendered against BCB and in favor of GOB on all claims herein, denying any relief whatsoever to BCB under the Amended Statement of Claim and awarding to GOB its actual

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<sup>333</sup> The Claimant's Costs Submissions, paras. 16-17.

<sup>334</sup> The Claimant's Costs Submissions, paras. 21-24.

<sup>335</sup> The Claimant's Costs Submissions, para. 26(iv).

<sup>336</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 329.

attorneys' fees and all costs incurred in the defense of these arbitration proceedings.<sup>337</sup> In its Cost Submission, the Respondent presents its legal and other costs as amounting to US\$ 523,738.91.<sup>338</sup>

324. On 23 April 2014, the Respondent applied to the Tribunal to strike the Claimant's claim for legal fees in respect of the Anti-Suit Injunction on the grounds that such costs were not claimed in the Claimant's Amended Statement of Claim and that the Claimant has "improperly included this request for legal fees in its cost submission without seeking leave from this Tribunal to amend its claim."<sup>339</sup> According to the Respondent:

neither Article 38 of the 1976 UNCITRAL Rules nor Article 40 of the 2010 and 2013 UNCITRAL Rules provide that a party may recover legal fees from an entirely different legal proceeding. Nor do any of the cases cited by BCB in its cost submission support recovering legal fees from an entirely different legal proceeding.<sup>340</sup>

*The Tribunal's Considerations*

325. The Tribunal approaches the question of the costs of legal representation and assistance from the perspective that, although Article 40(2) of the UNCITRAL Rules affords the Tribunal a measure of discretion, the general principle should be that the "costs follow the event," save for exceptional circumstances. This conclusion is reinforced by the fact that both Parties in this case argued that the unsuccessful Party in this arbitration should have to bear the full amount of tribunal costs as well as the other Party's costs of legal representation. Having reached this conclusion as a matter of principle, the Tribunal considers it unnecessary to evaluate the Claimant's suggestions regarding the Respondent's conduct in the course of these proceedings and takes no view on that matter.
326. The Tribunal's conclusion does not, however, extend to the Claimant's request for the costs of securing the Anti-Suit Injunction from the English courts. The Tribunal does not consider that these costs fit into the provision of Article 38 that includes the "the costs for legal representation and assistance of the successful party." It is further of the view that, as a general matter, the costs of a proceeding in a particular forum are most appropriately assessed by that forum. Accordingly—and without categorically taking a view as to whether the costs of closely related judicial proceeding could ever properly be brought as a claim for costs pursuant to Article 38 or

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<sup>337</sup> The Respondent's Preliminary Objections, Request to Dismiss or Stay, and Statement of Defence, para. 330.

<sup>338</sup> The Respondent's Cost Submission, pp. 1-3.

<sup>339</sup> The Respondent's letter of 23 April 2014.

<sup>340</sup> The Respondent's letter of 7 May 2014.

otherwise—the Tribunal exercises the discretion available to it under Article 40(2) and declines to award the Claimant the costs relating to the Anti-Suit Injunction.

327. Pursuant to Article 38(e), the award of the costs of legal representation and assistance is contingent upon the Tribunal first finding that such costs were reasonable. The Tribunal so finds and decides that the Respondent shall pay to the Claimant the amount of £1,628,608.13 for the costs of its legal representation and assistance in the arbitration proceedings.

## VII. DISPOSITIF

328. For the foregoing reasons, the Tribunal:

- (a) DISMISSES the Respondent's objection to the admissibility of the Claimant's claims based on the existence of legal actions pending before the courts of Belize;
- (b) DISMISSES the Respondent's objections to the jurisdiction of the Tribunal based on the definition of investment or on the existence of an expropriation;
- (c) HOLDS that the present dispute is admissible and within the Tribunal's jurisdiction;
- (d) DECLARES that the Respondent has breached its obligations under Article 5 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982;
- (e) DECLARES that the Claimant has not proven the compensation sought in respect to the breach of Article 5 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982;
- (f) DECLARES that the Respondent has breached its obligations under Article 2 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982;
- (g) DECLARES that the Claimant has proven the compensation sought in respect to the breach of Article 2 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982;
- (h) ORDERS the Respondent to pay to the Claimant, in respect of the Telemedia Facility, the amount of US\$22,896,420.78, together with pre-Award interest in the amount of US\$18,876,675.26 for a total payment of US\$41,773,096.04.



- (i) ORDERS the Respondent to pay to the Claimant, in respect of the Sunshine Facility, the amount of US\$1,327,831.39, together with pre-Award interest in the amount of US\$296,665.00 for a total payment of US\$1,624,496.39.
- (j) ORDERS the Respondent to pay to the Claimant, in respect of the Sunshine Overdraft Facility, the amount of US\$936,933.76, together with pre-Award interest in the amount of US\$462,916.67 for a total payment of US\$1,399,850.43.
- (k) ORDERS that, on the full and effective payment of the prescribed compensation set out in sub-paragraphs (h), (i), and (j), the Claimant shall take all necessary steps to assign its rights in the Telemedia Facility, Sunshine Facility, and Sunshine Overdraft Facility to the Government or its nominee.
- (l) ORDERS the Respondent to pay to the Claimant the amount of €308,915.99 as reimbursement for the costs of the arbitration (other than legal representation and assistance);
- (m) ORDERS the Respondent to pay to the Claimant the amount of £1,628,608.13 for the costs of its legal representation and assistance in the arbitration proceedings;
- (n) ORDERS the Respondent to pay to the Claimant post-Award interest at the three month LIBOR rate, plus 2 percent, compounded annually on any outstanding amount starting from the date of this Award; and
- (o) REJECTS all other claims.

Done in The Hague, the Netherlands, the place of arbitration, on 19 December 2014



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**John Beechey**



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**Rodrigo Oreamuno**



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**Albert Jan van den Berg**  
**Presiding Arbitrator**