PCA CASE Nº 2010-13

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-

DUNKELD INTERNATIONAL INVESTMENT LIMITED

(the "Claimant")

-and-

THE GOVERNMENT OF BELIZE

(the "Respondent", and together with Claimant, the "Parties")

AWARD

Arbitral Tribunal

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

28 June 2016

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LIST OF DEFINED TERMS

2009 Act	Belize Telecommunications (Amendment) Act, 2009
2009 Amendment Order	Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order, 2009
2009 Order	Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009
2009 Orders	Together, the 2009 Order and 2009 Amendment Order
2011 Act	Belize Telecommunications (Amendment) Act, 2011
2011 Order	Belize Telecommunication (Assumption of Control over Belize Telemedia Limited) Order, 2011
Accommodation Agreement	The Government Telecommunications Accommodation Agreement concluded between the Government and BTL on 19 September 2005, with amendments
Accommodation Agreement Award	*Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award (18 March 2009)
Anti-Suit Injunction	Injunction granted by Steel J in the High Court of Justice of England and Wales (Commercial Court), Queen's Bench Division, dated 26 July 2010
Application for Change of Venue	The Respondent's application of 9 June 2014 to change the venue of the hearing
Appointing Authority	The Honourable Marc Lalonde, P.C., O.C., Q.C.
BCB	British Caribbean Bank Limited
BCB Transcript Application	The Respondent's application of 9 June 2014 to introduce the transcript of the British Caribbean Bank Proceedings
Belize-Austria BIT	*Agreement between the Government of the Republic of Austria and the Government of Belize for the Promotion and Protection of Investments*, signed on 17 July 2001
Belize-Netherlands BIT	*Agreement between Belize and the Kingdom of the Netherlands on Encouragement and reciprocal Protection of Investments*, signed on 20 September 2002
British Caribbean Bank Proceedings	The arbitration proceedings in British Caribbean Bank Ltd (Turks & Caicos) v. The Government of Belize (PCA Case No. 2010-18
BSDL	Belize Social Development Limited

BTL	Belize Telecommunications Limited
BVI	British Virgin Islands
Carlisle	Carlisle Holdings Limited
Carlisle Shares	The 52 percent shareholding of BTL owned by Carlisle as at 2001
CCJ	The Caribbean Court of Justice
Claimant	Dunkeld International Investment Limited
Companies	The corporate entities owned or controlled by Dunkeld, which in turn controlled Dunkeld's interest in Telemedia; see also the Registered Owners
DCF	discounted cash flow
Dunkeld	Dunkeld International Investment Limited
Dunkeld I	The arbitration proceedings in the present case, *Dunkeld International Investment Limited (Turks & Caicos) v. The Government of Belize (PCA Case No. 2010-13)*
Dunkeld I Injunction	Injunction granted by Awich J of the Supreme Court of Belize dated 10 February 2010
Dunkeld II Injunction	Injunction granted by Awich J of the Supreme Court of Belize dated 3 March 2011
Dunkeld II Proceedings	The arbitration proceedings in *Dunkeld International Investment Limited (Turks & Caicos) v. The Government of Belize (PCA Case No. 2010-21)*
Dunkeld II Tribunal	Mr John Beechey, Mr. Rodrigo Oreamuno, and Professor Albert Jan van den Berg, constituted as the tribunal in the Dunkeld II Proceedings
Eighth Amendment	Belize Constitution (Eighth Amendment) Act, 2011
First Constitutional Challenge	*British Caribbean Bank Ltd. v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Claim No. 874 of 2009); *Dean C. Boyce v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Claim No. 1018 of 2009): the constitutional challenge to the 2009 Act and Order commenced on 21 October 2009
Government	the Government of Belize
Government Shares	The 31 percent shareholding in BTL held by the Government as at 2001
GOB	the Government of Belize

Hayward	Hayward Charitable Belize Trust
ICC	Innovative Communication Corporation
LCIA	The London Court of International Arbitration
MFN	Most Favoured Nation
Motion to Bifurcate	The Respondent's application of 17 February 2015 to bifurcate the Government's preliminary objections
NERA Report	Quantum expert report by Respondent's expert, Mr. Richard Hern, dated 15 May 2014
PCA	Permanent Court of Arbitration
RBTT	Royal Bank of Trinidad and Tobago Merchant Bank Limited
Registered Owners	The corporate entities owned or controlled by Dunkeld, which in turn controlled Dunkeld's interest in Telemedia; *see also* the Companies
Respondent	the Government of Belize
Respondent's Document Requests	The Respondent's *Requests for Production of Documents* dated 10 June 2014
Rodney	Rodney Invest & Trade Inc.
Rosedale	Rosedale Overseas Holdings Limited
SCJA Act	Supreme Court of Judicature (Amendment) Act of 2010
Second Constitutional Challenge	The Claimant's constitutional challenge to the 2011 Act and Order commenced on 24 September 2011
Settlement Agreement	The Settlement Agreement dated 11 September 2015 between the Government of Belize and Dunkeld International Investment Ltd and the Trustees of the BTL Employees Trust
Settlement Deed	The Settlement Deed dated 22 March 2005 and amended on 21 June 2006 between BB Holdings Limited, the Government of Belize, the Attorney-General on behalf of the Sovereign Democratic State of Belize, and the Minister of Finance of Belize
Settlement Deed Award	*BCB Holdings Limited and The Belize Bank Limited v. The Attorney-General of Belize (on behalf of the Government of Belize)*, LCIA Arbitration No. 81169, Final Award (18 August 2009)
Sunshine	Sunshine Holding Limited

TCI	Turks and Caicos Islands
Telemedia	Belize Telemedia
TIL	Telemedia Investments Limited
Treaty	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
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in this arbitration is Dunkeld International Investment Limited ("**Dunkeld**" or the "**Claimant**"), a private company with limited liability, incorporated under the laws of the Turks and Caicos Islands, with its registered address at Box 97, No. 1 Caribbean Place, Leeward Highway, Providenciales, Turks and Caicos Islands. The Claimant is represented in these proceedings by Ms. Judith Gill QC, Ms. Lauren Lindsay, Mr. Alastair Campbell, and Ms. Shreya Aren of Allen & Overy LLP, One Bishops Square, London EC1 6AD, United Kingdom; by Ms. Angeline Welsh of Matrix Chambers, Griffin Building, Gray's Inn, London WC1R 5LN, United Kingdom; and by Mr. Eamon H. Courtenay, S.C. 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 Mr. Juan C. Basombrio, Esq. of Dorsey & Whitney LLP, 600 Anton Boulevard, Suite 2000, Costa Mesa, California 92626, United States; by Mr. James K. Langdon, Esq. of Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402; and by Mr. Denys Barrow, S.C. of Barrow & Co. Attorneys-at-law, 1440 Coney Drive, Belize City, Belize.

B. BACKGROUND OF THE DISPUTE

3. A dispute has arisen between Dunkeld 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 (the "**TCI**") 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 Belize Telemedia ("**Telemedia**"), a telecommunications company registered in Belize. In light, however, of the Parties' Settlement Agreement dated 11 September 2015, the present Award is restricted to matters of quantum in relation to the acquisition of Telemedia.

* * *

II. PROCEDURAL HISTORY

A. INITIATION OF THIS ARBITRATION AND EVENTS IN 2010

5. On 27 August and 24 September 2009, the Claimant wrote to the Respondent, notifying it that pursuant to Article 8(1) of the Treaty, Dunkeld intended to submit its claim to international arbitration.

6. As the Parties did not reach a settlement of their dispute within the three-month period called for by the Treaty following notification of the claim, the Claimant commenced these proceedings (PCA Case 2010-13 or "**Dunkeld I**") by way of a Notice of Arbitration served on the Respondent on 4 December 2009. In its Notice of Arbitration, the Claimant exercised 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 way of its Notice of Arbitration, the Claimant notified the Respondent of its appointment of Mr. John Beechey as the first arbitrator. Mr. Beechey's address is Oriel Cottage, Long Common, Shamley Green, Nr. Guildford GU5 0TG, United Kingdom.

8. On 27 January 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 11 February 2010, the Respondent wrote to the PCA, requesting that the Secretary-General of the PCA "stay all further action" with regard to the arbitration. The Respondent enclosed two interim injunction orders, dated 30 December 2009 and 10 February 2010, issued by the Supreme Court of Belize and directing the Claimant to refrain from further pursuing this arbitration (the "**Dunkeld I Injunction**"). 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.

10. On 19 February 2010, the Claimant requested the PCA to proceed with the designation of an appointing authority. Claimant emphasised that the Dunkeld I Injunction was not directed at the PCA or at any international tribunal. On 23 and 25 February 2010, the Parties exchanged further correspondence on the subject of the Dunkeld I Injunction.

11. On 25 February 2010, the Secretary-General of the PCA designated the Honourable Marc Lalonde, P.C., O.C., Q.C. as the appointing authority (the "**Appointing Authority**") for this arbitration.

12. On 15 March 2010, the Appointing Authority wrote to the Parties, indicating that he would appoint a second arbitrator in accordance with the Claimant's request. The Appointing Authority noted that the appointment would be without prejudice to any jurisdictional objections the Respondent might submit to the Tribunal, once constituted.

13. On 16 March 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.

14. On 1 April 2010, the Respondent enacted the Supreme Court Judicature (Amendment) Act 2010. This legislation created three new criminal offences relating to the breach of an injunction and established additional penalties.

15. On 13 April 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, Avenue Louise 480, bte9, 1050 Brussels, Belgium.

16. On 20 April 2010, the Tribunal informed the Parties that a preparatory conference would be held with the Parties on 15 June 2010 to determine the further conduct of the proceedings.

17. On 1 June 2010, the Claimant informed the Tribunal that the Belize Court of Appeal had allowed an appeal against the Supreme Court's Dunkeld I Injunction brought by seven individuals subject to the injunction (although not by Dunkeld itself). The Claimant stated its view that "[t]he logic of the Court of Appeal decision is that the Injunction will also fall away against Dunkeld, even though the formality of a further application to set aside may be required." By the same letter and subsequently by letter of 4 June 2010, the Claimant requested confirmation from the Respondent that it would not enforce the Dunkeld I Injunction against the Claimant, its officers or advisors for preparing for or participating in the preparatory conference.

18. On 8 June 2010, the Tribunal, upon the Claimant's request of the same day, vacated the preparatory conference scheduled for the 15 June 2010. The Claimant explained that the Respondent had not been forthcoming on Claimant's request to confirm that the Dunkeld I

Injunction would not be enforced against Claimant, its officers, or advisors, for taking part in the preparatory conference.

19. On 26 July 2010, the Tribunal informed the Parties that a new preparatory conference was scheduled for 26 August 2010.

20. On 27 July 2010, the Claimant informed the Tribunal that it would not attend the preparatory conference or pay any deposit as it was "unable to take any steps in the proceedings due to the combined effect of the injunction against it issued by the Supreme Court of Belize . . . and the Supreme Court of Judicature (Amendment) Act 2010."

21. From July 2010 until November 2013, these arbitration proceedings were suspended.

B. THE SECOND TREATY ARBITRATION, OR "DUNKELD II"

22. On 27 July 2010, the Claimant informed the Tribunal that it had commenced a second treaty claim against Belize (PCA Case No. 2010-21 or the "**Dunkeld II Proceedings**"), including a claim for the "expropriation of its right to arbitrate", and provided the Tribunal with a copy of the Request for Arbitration that had been served on the Respondent on 26 July 2010. The Claimant again appointed Mr. John Beechey as arbitrator.

23. In a separate letter dated 27 July 2010, Claimant informed the Tribunal that the Dunkeld II arbitration was subject to an injunction granted on 26 July 2010 by Justice David Steel of the High Court of Justice of England and Wales (Commercial Court), Queen's Bench Division, (the "**Anti-Suit Injunction**"), which restrained the Government 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 Government] under [the Treaty]".

24. The Respondent did not participate in the Dunkeld II Proceedings and the Secretary-General of the PCA appointed the Honourable Marc Lalonde, P.C., O.C., Q.C. as the Appointing Authority. By 29 October 2010, the tribunal for Dunkeld II was constituted (the "**Dunkeld II Tribunal**"), consisting of the same members as the present Tribunal.

25. On 1 December 2010, the Claimant notified the Dunkeld II Tribunal that despite the Anti-Suit Injunction, the Respondent had asked the Supreme Court of Belize to issue an injunction against the Dunkeld II arbitration.

26. On 17 December 2010, the Claimant submitted its Statement of Claim in the Dunkeld II proceedings with accompanying documents.

27. On 20 December 2010, the Dunkeld II Tribunal held a telephone conference to which both Parties were invited. Only the Claimant elected to participate. In response to a request from the Claimant, the Dunkeld II Tribunal issued Order Nº 1 on 21 December 2010, indicating that it neither approved nor disapproved the Claimant's wish to approach the English High Court for a continuation of the Anti-Suit Injunction. On 21 December 2010, the Claimant obtained an order from the English High Court to continue the Anti-Suit Injunction until further notice or until a final award was rendered.

28. On 10 January 2011, the Dunkeld II Tribunal circulated draft Order Nº 2 to the Parties for comment. The Order was issued on 17 January 2011, and among other matters fixed the place of arbitration as The Hague, the Netherlands. In Order Nº 3, dated 8 February 2011, the Dunkeld II Tribunal scheduled a hearing from 14-15 March 2011 and in Order Nº 4, dated 16 February 2011, the Dunkeld II Tribunal decided to continue with the proceedings pursuant to Article 28(2) of the UNCITRAL Rules despite the Respondent not taking part in the proceedings. Further in preparation of the hearing, the Dunkeld II Tribunal by Order Nº 5, dated 1 March 2011 and by Order Nº 7, dated 8 March 2011, allowed the Claimant to rely on documents produced after the Statement of Claim. Order Nº 6, dated 4 March 2011, laid out a schedule for the anticipated hearing.

29. On 7 March 2011, the Claimant informed the Dunkeld II Tribunal that the Supreme Court of Belize had granted an injunction against Dunkeld on 3 March 2011 in respect of the Dunkeld II proceedings (the "**Dunkeld II Injunction**").

30. On 10 March 2011, the Respondent wrote to the Dunkeld II Tribunal. It requested the Tribunal to stay the proceedings in light of the Dunkeld II Injunction. The Respondent drew attention to the penalties applying under the Supreme Court of Judicature (Amendment) Act 2010 to all persons directing, aiding, facilitating, or encouraging the violation of an injunction issued by the courts of Belize.

31. On 11 March 2011 the Claimant requested the Dunkeld II Tribunal to postpone the scheduled hearing, explaining that it would be unable to participate in light of the Dunkeld II Injunction. By e-mail of the same day, the Dunkeld II Tribunal granted the request for postponement.

32. On 14 April 2011, the Claimant informed the Dunkeld II Tribunal that it anticipated receiving a decision from the Belize Supreme Court in relation to the Dunkeld II Injunction on 3 May 2011

and had given an undertaking not to take further steps in respect to the Dunkeld II proceedings pending that decision. In the event that no injunction was continued, the Claimant hoped to have the Dunkeld II hearing held in early May 2011.

33. On 15 April 2011, the Dunkeld II Tribunal informed the Parties that, in light of the Claimant's letter of 14 April 2011 and the undertaking referenced therein, the hearing tentatively contemplated for early May 2011 was suspended *sine die*.

C. THE RESUMPTION OF THE DUNKELD I AND II ARBITRATIONS IN 2014

34. On 20 November 2013, the Claimant informed the Tribunal that the Belize Court of Appeal had set aside the injunctions against both treaty arbitrations on 1 November 2013.

35. On 16 December 2013, the Claimant asked the Tribunal to resume the proceedings and to schedule a procedural hearing.

36. On 17 December 2013, the Respondent informed the Tribunal that it had decided to participate in the Dunkeld I and II proceedings and advised the Tribunal and the Claimant of the counsel it had retained to represent it.

37. On 20 December 2013, the Tribunal wrote to the Parties, inviting them to make themselves available for a joint procedural telephone conference, in respect of both arbitrations, on 7 January 2014.

38. On 31 December 2013, the Tribunal postponed the procedural conference further to a request from the Respondent for additional preparation time and the Claimant's comments thereon.

39. On 10 January 2014, the Tribunal confirmed the date of 27 January 2014 for the procedural conference.

40. On 27 January 2014, the Parties and the Tribunal held a joint procedural telephone conference in the present case and in the Dunkeld II Proceedings. On the basis of the discussions during the conference, the Parties agreed that these proceedings would continue, while the Dunkeld II proceedings would be provisionally suspended. The Parties also agreed on a procedural timetable for these proceedings.

41. On 6 February 2014, the Dunkeld II Tribunal issued Order Nº 8, which suspended the Dunkeld II Proceedings until further notice. The Dunkeld II Proceedings remain suspended to this day.

42. Also on 6 February 2014, the present Tribunal issued **Order Nº 1**, which in relevant parts and as agreed by the Parties, ordered as follows:

> 1. PCA Case Nº 2010-21 (Dunkeld International Investment Ltd v. The Government of Belize) is suspended.
>
> 2. The Claimant shall indicate in its Statement of Claim whether PCA Case N° 2010-21 may be dismissed in its entirety or continue to remain suspended until further notice.
>
> 3. The deposit held by the PCA in relation to PCA Case Nº 2010-21 shall be used in connection with this arbitration.
>
> 4. As regards transparency, for the time being the procedural orders, decisions and awards issued and rendered by the Tribunal shall be published on the website of the Permanent Court of Arbitration, subject to redactions based on confidentiality of commercially or politically sensitive or privileged matters as requested by either Party. To the extent that information is produced or discussed during the arbitration proceedings which a Party considers to be commercially or politically sensitive or privileged, that Party may request that the Tribunal deems it confidential.
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> 5. The operative portions of Order No. 2 in PCA Case Nº 2010-21 are adopted in these arbitration proceedings, subject to the following amendments and additions. It is enclosed to this Order No. 1 as Annex A.
>
> [. . .]
>
> 10. The hearing scheduled for 5-9 November 2014 will be held in Miami, Florida. The Tribunal will determine the venue for the hearing in due course.

43. The Tribunal's Order Nº 1 adopted by reference Order Nº 2 from the Dunkeld II Proceedings (originally issued on 17 January 2011 in that case (see paragraph 28 above)), which stipulated that the UNCITRAL Arbitration Rules of 1976 apply, that the place of arbitration is The Hague, the Netherlands and that English is the language of the arbitration.

44. On 28 February 2014, the Claimant submitted its **Statement of Claim** together with the Witness Statements of Mr. Dean Boyce and Ms. Angela Entwistle and the Expert Report of Mr. Alastair Macpherson of PricewaterhouseCoopers LLP.

45. On 23 April 2014, the Parties communicated to the Tribunal their agreement to revise the timetable, including extending the deadline for submission of the Respondent's Statement of Defence until 23 May 2014. The Tribunal approved the extension of time on 25 April 2014.

46. On 21 May 2014, further to a request from the Respondent and the Claimant's comments, the Tribunal issued **Order Nº 2**, which extended the deadline for the Respondent's Statement of Defence for one week and revised the procedural timetable.

47. On 22 May 2014, the Parties agreed to deadlines for the notification of witnesses and the final deadline for filing additional documents, and to a date for a pre-hearing teleconference. The Tribunal approved these dates on 22 May 2014.

48. On 30 May 2014, the Respondent submitted its **Statement of Defence**, together with the Witness Statements of Mr. Joseph Waight and Mr. Nestor Vasquez and the Expert Report of Dr. Richard Hern of NERA Economic Consulting.

D. PROCEDURAL APPLICATIONS

49. On 9 June 2014, the Respondent requested to change the hearing venue for the hearing scheduled from 5-9 November 2014 (the "**Application for Change of Venue**"). The Respondent proposed The Hague, the Netherlands as hearing venue instead of Miami, Florida (the venue agreed by the Parties and recorded in the Tribunal's Order Nº 1 (see paragraph 42 above). Alternatively, the Respondent proposed the Inter-American Court of Human Rights in San Jose, Costa Rica. The Respondent argued that

> if the venue remains in Miami, issues may arise, under the New York Convention, whether Florida courts have primary jurisdiction over, and whether United States arbitration law applies to, these proceedings. Further, by arbitrating in the United States, GOB may be subject to an argument that it has waived its sovereign immunity in the United States.

50. Also on 9 June 2014 and again on 25 June 2014, the Respondent requested leave to introduce into these proceedings the record of the hearing held in *British Caribbean Bank Ltd. (Turks & Caicos) v. The Government of Belize* (PCA Case Nº 2010-18, the "**British Caribbean Bank Proceedings**") from 17-19 March 2014 (the "**BCB Transcript Application**"). The Respondent argued that the factual matrix of both matters overlapped and that "testimony taken in the BCB [British Caribbean Bank] Arbitration merits hearing is directly relevant to the Dunkeld Arbitration."

51. On 16 June 2014, the Claimant opposed the Respondent's Application for Change of Venue. The Claimant argued that irrespective of whether the hearing were to be held in Miami, Florida or elsewhere, "the Dutch courts have supervisory conduct and Dutch procedural law is applicable as a consequence of the fact that the seat of the arbitration is The Hague."

52. On 17 and 23 June 2014, the Parties exchanged further correspondence regarding the Respondent's Application for Change of Venue. The Respondent requested the Tribunal to note that "GOB has not agreed to arbitration in the United States."

53. On 19 June 2014, the Claimant opposed the Respondent's BCB Transcript Application and noted that the Respondent had previously opposed efforts to coordinate the two arbitrations. The Claimant also saw difficulties with regard to the status of the transcript and the risk that the transcript would be used out of context.

54. On 25 and 30 June 2014, the Parties exchanged further correspondence regarding the Respondent's BCB Transcript Application.

55. On 2 July 2014, the Tribunal issued **Order Nº 3** in respect of the Respondent's Change of Venue Application and ordered that

> 1. The dates reserved for the hearing in this matter shall remain 5-9 November 2014.
> 2. The venue for the hearing in this matter shall remain Miami, Florida.
> 3. Nothing in this order shall be construed as altering the fact that the legal place of this arbitration is The Hague, the Netherlands, as decided in ¶ 5 of Order No. 1 in conjunction with ¶ 4.1 of Annex A to Order No. 1, and that the courts of the Netherlands accordingly have supervisory jurisdiction over this arbitration.

In its Order Nº 3, the Tribunal explained that the Inter-American Court of Human Rights facilities in San José, Costa Rica were not available during the reserved hearing dates of 5-9 November 2014 and that a change to a European venue would not permit the Tribunal to maintain the hearing dates.

56. On 21 July 2014, the Tribunal issued **Order Nº 4** in which it granted the Respondent's BCB Transcript Application. The Tribunal noted that in both proceedings the Parties were represented by the same counsel, the tribunals were identical and thus the Parties and the Tribunal were already effectively aware of the content of the hearing transcript. The Tribunal concluded that the Respondent's request would neither prejudice Claimant nor would it be procedurally unfair.

E. THE PRODUCTION OF DOCUMENTS PHASE

57. On 10 June 2014, the Respondent submitted to the Claimant its Requests for Production of Documents (the "**Respondent's Document Requests**").

58. On 10 June 2014, the Claimant wrote to the Tribunal stating that it was not in a position to file its request for production of documents due to the fact that the Respondent had not been forthcoming in exhibiting documents in connection with its quantum expert report dated 15 May 2014 (the "**NERA Report**") or identifying documents with regard to which it claimed confidentiality. The Claimant reserved its right to request document production at a later stage.

59. On 18 June 2014, the Claimant submitted four requests for documents to the Respondent. The Respondent disclosed all requested documents to the Claimant by 27 July 2014.

60. On 24 June 2014, the Claimant submitted its **Objections to the Respondent's Document Requests,** alongside an index of documents that were disclosed to the Respondent on the same day. The Claimant disclosed further documents the following day.

61. On 8 July 2014, the Respondent submitted its **Reply to the Claimant's Objections to the Respondent's Document Request.** In the accompanying letter to the Tribunal, the Respondent complained that the Claimant "stonewalled" its Document Requests and only provided 33 documents in response to 139 requests.

62. On 11 July 2014, the Claimant submitted a **Response to the Respondent's Reply to the Claimant's Objections to the Respondent's Document Request.** In the accompanying letter to the Tribunal, the Claimant complained that the Respondent's Document Requests in their majority did not comply with the IBA Rules on the Taking of Evidence since they were overbroad and irrelevant. Many of the documents requested were the Respondent's own documents or documents that were already on the file. The Respondent replied by e-mail to the Tribunal indicating that it saw no need to respond to the Claimant's letter unless requested to do so.

63. On 18 July 2014, the Tribunal issued its **Decision on the Respondent's Document Requests**.

F. THE PARTIES' FURTHER SUBMISSIONS AND THE HEARING

64. On 20 August 2014, the Claimant submitted its **Reply on the Merits** together with the second Witness Statements of Mr. Dean Boyce and Ms. Angela Entwistle and a further Expert Report by Mr. Alastair Macpherson.

65. On 3 October 2014, the Respondent submitted its **Rejoinder on the Merits** together with a further Expert Report by Dr. Richard Hern.

66. On 10 October 2014, the Parties identified the witnesses they wished to call for cross-examination during the anticipated November 2014 hearing.

67. On 14 October 2014, the Respondent wrote to the Tribunal, requesting that it "continue the hearing scheduled to begin on November 5, 2014 for a period of four months and to a date that is convenient to the Tribunal" in light of emergency medical conditions rendering the Respondent's counsel unable to prepare for, or participate in, the hearing.

68. On 16 October 2014, the Claimant wrote to the Tribunal, opposing the Respondent's request for a continuance and arguing that other members of the Respondent's counsel team could adequately represent the Respondent in the hearing and that the Claimant would be prejudiced by the delay and costs involved in finding alternative dates.

69. On 17 October 2014, the Tribunal issued **Order Nº 5**, adjourning the hearing for a period of approximately four months and suspending all remaining deadlines pending the identification of

new hearing dates. On 18 October 2014, the Tribunal wrote to the Parties, identifying 7 to 11 April 2015 as dates for the re-scheduled hearing;

70. On 17 February 2015, the Respondent submitted a Motion to Bifurcate GOB's Preliminary Objections (the "**Motion to Bifurcate**"), noting the issuance of an award in *Renée Rose Levy de Levi and Gremcitel S.A. v. Republic of Peru*,[1] which the Respondent considered to be "dispositive of GOB's preliminary objection on the grounds of abuse of process and illegitimate treaty shopping."

71. On 20 February 2015, the Claimant submitted its **Response to the Motion to Bifurcate**, opposing the Respondent's request.

72. On 24 and 27 February 2015, the Parties exchanged a **Reply** and **Rejoinder** in respect of the Motion to Bifurcate.

73. On 3 March 2015, the Tribunal issued **Order Nº 6**, denying the Respondent's Motion to Bifurcate on the grounds that bifurcation is dependent upon whether it will bring increased efficiency to the proceedings and that in light of the timing of the Respondent's Motion, no efficiency would be added in this case.

74. On 5 March 2015, the Parties both wrote to the Tribunal, identifying the witnesses and experts they wished to cross-examine during the hearing and requesting to introduce additional documents into the record.

75. Also on 5 March 2015, the Tribunal provided the Parties with a draft agenda for the pre-hearing telephone conference and invited the Parties to confer and complete the agenda in advance of the conference.

76. On 10 March 2015, the Parties wrote jointly to the Tribunal setting out their respective positions on the issues identified in the Tribunal's draft agenda. Later the same day, the Tribunal held a pre-hearing teleconference with the Parties.

77. On 11 March 2015, the Tribunal issued **Order Nº 7**, recording the matters agreed in the course of the pre-hearing teleconference.

78. On 25 March 2015, the Respondent wrote to the Tribunal, requesting leave to introduce a letter from Dunkeld to the Government dated 9 June 2009, immediately following Dunkeld's migration

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1 *Renée Rose Levy de Levi and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/10/17, Award of 9 January 2015.

to the TCI (the "**Application to Introduce the Letter of 9 June 2009**"). According to the Respondent, the letter had only recently been discovered in the files of the Government's counsel.

79. On 27 March 2015, the Claimant wrote to the Tribunal, opposing the Respondent's Application to Introduce the Letter of 9 June 2009.

80. On 30 March 2015, the Tribunal issued **Order Nº 8**, denying the Respondent's Application to Introduce the Letter of 9 June 2009 and noting that "the Tribunal does not see that the Respondent could not reasonably have located the document in question earlier", in advance of the cut-off imposed by Order Nº 7.

81. From 7-11 April 2015, the Tribunal convened a Hearing in Miami, Florida. In addition to the Tribunal, the following persons attended the Hearing:

Claimant	**Respondent**
Ms. Angela Entwistle *Dunkeld International Investment Limited*	Mr. Joseph Waight Ms. Magalie Perdomo *The Government of Belize*
Judith Gill QC Ms. Angeline Welsh Ms. Lauren Lindsay Mr. Alastair Campbell *Allen & Overy LLP*	Mr. Juan Basombrio (by video link) Mr. James Langdon Ms. Katherine Santon *Dorsey & Whitney LLP*
Eamon Courtenay, S.C. *Courtenay Coye LLP*	Mr. Arjun Dasgupta
Mr. Jose Alpuche Mr. Philip Osborne Mr. Cledwyn Jones Mr. Jagan Rao	

Fact Witnesses

Mr. Dean Boyce
Ms. Angela Entwistle
Mr. Joseph Waight

Expert Witnesses

Mr. Alastair Macpherson
Dr. Richard Hern

Registry

Mr. Garth Schofield
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82. On 20 April 2015, the Parties wrote to the Tribunal, conveying their agreement to add the three witness statements of Mr. Philip Osborne in the British Caribbean Bank Proceedings, as well as one document disclosed in the course of document production, into the record of these proceedings.

G. POST-HEARING SUBMISSIONS AND THE PARTIES' SETTLEMENT AGREEMENT

83. On 8 May 2015, the Parties each submitted **Post-Hearing Memorials**, in accordance with the agreed timetable.

84. On 23 May 2015, the Parties each submitted their respective Costs Submissions, in accordance with the agreed timetable.

85. On 28 August 2015, the Tribunal issued **Order No. 9**, recalling the Respondent's Application to Introduce the Letter of 9 June 2009 and the Tribunal's decision in Order No. 8, noting that during the hearing and in their post-hearing memorials both Parties had effectively relied upon the letter of 9 June 2009 (by way of its description in the letter of 27 August 2009), notwithstanding the decision taken in the Tribunal's Order No. 8, and observing that "in light of the Parties' respective arguments, the Tribunal considers it to be artificial to maintain the fiction that the letter of 9 June 2009 does not form part of the factual matrix of these proceedings". Order No. 9 accordingly admitted the letter of 9 June 2009 into the record and granted the Parties until 11 September 2015 to supplement their arguments concerning the letter of 9 June 2009, should they consider it necessary to do so.

86. On 11 September 2015, the Parties wrote jointly to the Tribunal, informing it that they had entered into a settlement with respect to some of the matters in dispute in these proceedings. Pursuant to a Settlement Agreement dated 11 September 2015 (the "**Settlement Agreement**"), the Parties agreed that the Tribunal has jurisdiction over the dispute, that there was an expropriation of Dunkeld's property by the Government, and that the Tribunal may determine the amount of compensation for Dunkeld's former interest in Telemedia. The Parties also agreed that any portion of the per-share value of Telemedia attributable to the Accommodation Agreement should be paid (less liabilities) into a special account to be used by the Government, with Dunkeld's consent, to fund projects to help the people of Belize. To implement this settlement, the Parties requested that the Tribunal issue a Consent Order.

87. On 16 September 2015, the Tribunal issued **Order No. 10 (by consent)**, which provided in full as follows:

CONSIDERING:

(A) The Settlement Deed dated 11 September 2015, entered into by inter alia the Claimant and the Respondent (the Settlement Deed).

(B) The Claimant's letter of 11 September 2015, confirming that, pursuant to the terms of the Settlement Deed, the Claimant and the Respondent (together, the Parties) have agreed that:

(i) the Respondent shall withdraw any and all of its objections to the Tribunal's jurisdiction and the merits of the Claimant's claims;

(ii) the Arbitral Tribunal has jurisdiction under the Treaty to determine the quantum of the compensation to be awarded to the Claimant (including any issues relating to the Accommodation Agreement in so far as they relate to quantum) and, should it be necessary, the Parties shall submit to the jurisdiction of the Arbitral Tribunal on an ad hoc basis;

(iii) accordingly, the issues set out in Section 2.1(a) and 2.1(b) of the Claimant's Post-Hearing Brief no longer require determination by the Arbitral Tribunal;

(iv) the Arbitral Tribunal may proceed to determine the quantum of the compensation to be paid to the Claimant, which the Parties agree shall include the fair market value of the Claimant's interest in the Telemedia shares at 25 August 2009 (plus costs, expenses and interest) (see paragraph 228 of the Claimant's Post-Hearing Brief and paragraph 121 of the Respondent's Post-Hearing Brief);

(v) the remaining issues to be determined by the Arbitral Tribunal are consequently limited to the issues set out in Section 2.1(c) of the Claimant's Post-Hearing Brief (as articulated in Section 8 of the Claimant's Post-Hearing Brief and Sections 4.2 (excluding para114), 5, 7 and 8 of the Respondent's Post-Hearing Brief, together with the related pre-hearing submissions, evidence and submissions on costs).(Remaining Issues);

(C) The Respondent's e-mail communication of 11 September 2015, confirming its agreement to the terms of the Claimant's letter.

THE ARBITRAL TRIBUNAL HEREBY ORDERS THE FOLLOWING BY CONSENT:

1. Pursuant to the terms of the Settlement Deed, the Respondent has withdrawn any and all of its preliminary objections to jurisdiction. The Parties have further confirmed that the Tribunal has jurisdiction to determine the Remaining Issues. Accordingly, the Parties have agreed specifically to confer on the Arbitral Tribunal jurisdiction to determine the Remaining Issues alone.

2. Pursuant to the terms of the Settlement Deed, the Respondent has withdrawn any and all of its objections to the merits of the Claimant's claims under the Treaty. The Respondent has expropriated the Claimant's interest in the Telemedia shares. The Respondent has not yet paid compensation to the Claimant in respect of that expropriation, as required by Article 5(1) of the Treaty.

3. The Arbitral Tribunal will proceed to determine the Remaining Issues in a Final Award.

4. The terms of this Order by Consent will be recorded in the Final Award.

5. No further written submissions shall be made by the Parties in relation to the Allen & Overy letter dated 9 June 2009 as envisaged in paragraph 2 of Procedural Order No. 9.

88. In its cover letter accompanying Order No. 10, the Tribunal noted as follows:

> The Tribunal understands that the impact of the Settlement Deed on this arbitration is set out in Clauses 3.2 and 3.3 and Schedule 2 of that instrument and that the Parties are agreed that the Tribunal is authorized to apply these provisions of the Settlement Deed to the extent that such application is required to resolve the Remaining Issues and any issue connected therewith.
>
> In the event that the Tribunal considers that any interpretation of these provisions is required, the Tribunal will allow the Parties an opportunity to address the provision further with the goal of clarifying the provision by agreement. In the absence of agreement, the interpretation of the provision would become a matter for the Tribunal to decide.

89. On 29 October 2015, the Parties wrote jointly to the Tribunal, noting as follows:

> On 18 September 2015, the Telecommunications Acquisition (Settlement) Act 2015 and the General Revenue Supplementary Appropriation (2015/2016) (No. 3) Act 2015 were gazetted in Belize and made law. This legislation validated the Government's authority to enter into the Settlement Agreement and the payment of funds to Dunkeld pursuant to the terms of the Settlement Agreement.

90. The Parties noted further that "On 26 October 2015 the Caribbean Court of Justice issued a Consent Order joining Dunkeld as a party to the appeals before it relating to the First and Second Nationalisations of Belize Telemedia Limited and staying those proceedings save for enforcing the terms of the Settlement Agreement" and requested the Tribunal to admit the following documents into the record:

(a) Telecommunications Acquisition (Settlement) Act 2015 as Exhibit C-648;

(b) General Revenue Supplementary Appropriation (2015/2016) (No. 3) Act 2015 as Exhibit C-649; and

(c) Caribbean Court of Justice Consent Order dated 26 October 2015 as Exhibit C-650.

91. The Tribunal wrote to Parties the same day, admitting the requested documents.

92. On 16 February 2016, the Tribunal wrote to the Parties, seeking clarification regarding the scope of the Parties' Settlement Agreement and the content of the Remaining Issues with respect to the Claimant's claim regarding the substantive breach of Article 8 of the Treaty.

93. On 26 February 2016, the Claimant wrote to the Tribunal, setting out the Parties' agreement on the scope of the Settlement Agreement with respect to the Article 8 claim. The Respondent confirmed its agreement with the Claimant's understanding the same day.

94. On 11 April 2016, the Tribunal wrote to the Parties, noting that it had reached a conclusion on the value of Telemedia and proposing, in light of the fact that the Tribunal had not adopted either Party's valuation in its entirety, that the Parties' experts be given a chance to verify the accuracy of the Tribunal's calculations.

95. On 18 April 2016, the Parties wrote jointly to the Tribunal, agreeing to the Tribunal's proposed approach to check the accuracy of its calculations and committing not to seek to re-litigate issues of substance decided by the Tribunal.

96. On 22 April 2016, the Tribunal wrote to the Parties, providing a copy of its draft valuation and associated calculations.

97. On 13 May 2016, the Parties wrote to the Tribunal, setting out their respective comments on the Tribunal's draft valuation.

98. On 15 May 2016, the Tribunal wrote to the Parties, inviting the Respondent's comments on one issue raised in the Claimant's letter of 13 May 2016.

99. On 23 May 2016, the Respondent wrote to the Tribunal in response to the Claimant's letter. On 26 May 2016, the Parties exchanged further correspondence on this matter.

* * *

III. THE FACTUAL RECORD

A. THE CORPORATE ENTITIES

100. This case concerns the ownership of Telemedia, which passed through the hands of a variety of corporate entities before its acquisition by the Government in August 2009. The various corporate actors in these events are set out chronologically as follows, based on the timing of their involvement in the changing ownership of Telemedia.

101. Telemedia itself 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 May 2007.[2] BTL was incorporated in Belize in 1987.

102. Belize Social Development Limited ("**BSDL**") is a company related to Telemedia and incorporated in the British Virgin Islands (the "**BVI**"). Once incorporated, all shares in BSDL were allotted to Telemedia, which in turn transferred all BSDL shares to Telemedia's shareholders.[3]

103. In the early 2000s, 52 percent of the shares in BTL, as Telemedia was then known, were owned by Carlisle Holdings Limited ("**Carlisle**"), a Belize corporate entity that is now known as **BCB Holdings Limited**. The majority shareholder of **BCB Holdings Limited** is Lord Michael Ashcroft. In addition to the interest held by Carlisle, other shares in Telemedia were held by the Government.

104. In March 2004, the ownership structure of BTL was changed and Innovative Communication Corporation ("**ICC**"), a company owned by Mr. Jeffrey Prosser, agreed to purchase a majority of BTL shares from the Government, which in turn agreed to acquire and then transfer Carlisle's shares to ICC. Ultimately, ICC was unable to pay for the shares (see the discussion at paragraph 112 below for greater detail).

105. In connection with the failed ICC transaction, the Royal Bank of Trinidad and Tobago Merchant Bank Limited ("**RBTT**") exercised its security over 25 percent of BTL's shares when ICC defaulted. Subsequently, RBTT sold its shares in BTL (by then, Telemedia) to Telemedia Investments Limited ("**TIL**"), a wholly-owned subsidiary of Telemedia.[4] This transaction was

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2 The Claimant's Statement of Claim, para. 17.

3 First Witness Statement of Dean C. Boyce, para. 71 (28 February 2014).

4 Second Witness Statement of Dean C. Boyce, paras. 68–9 (19 August 2014).

facilitated by a loan from British Caribbean Bank ("**BCB**") and was the subject of the dispute in the British Caribbean Bank Proceedings. BCB, itself, was incorporated on 8 September 1998 as The Belize Bank (Turks & Caicos) Limited and, on 9 February 2009, changed its name to British Caribbean Bank Limited. At the time of the events giving rise to the Parties' dispute, BCB was wholly owned, through a series of intermediary corporations, by BCB Holdings Limited, a Belizean public investment company and the successor to Carlisle.

106. Following the failed ICC transaction, the majority of the shares in BTL were transferred indirectly to Dunkeld, which was incorporated in the BVI on 1 June 2004 and migrated to the TCI on 8 June 2009.[5] Dunkeld, in turn, is a wholly owned subsidiary of the Hayward Charitable Belize Trust ("**Hayward**"), which is a trust established under the laws of the TCI.[6] Hayward's mission is to "seek to enrich the quality of life for the people of Belize and of Belizean origin by providing grants to not-for-profit organizations in Belize and across the Caribbean region that seek to strengthen their educational, spiritual and cultural base in creative and sustainable ways."[7]

107. Dunkeld wholly owns or controls via bare trust a number of corporate entities ("**the Companies**" or the "**Registered Owners**") through which Dunkeld held its interest in Telemedia. Dunkeld owns 100 percent of **Thiermon Limited**, while three other entities—**Ecom Limited**, **Mercury Communications Limited**, and **New Horizons, Inc**.—are held on bare trust[8] for Dunkeld by two other entities, **Northtown Limited** and **Southtown Limited**. Additionally, BCB Holdings Limited held its interest in Telemedia on bare trust for Dunkeld.[9] Taken together, the structure of Dunkeld's interest in Telemedia through these corporate entities as at August 2009 may be represented graphically as follows:

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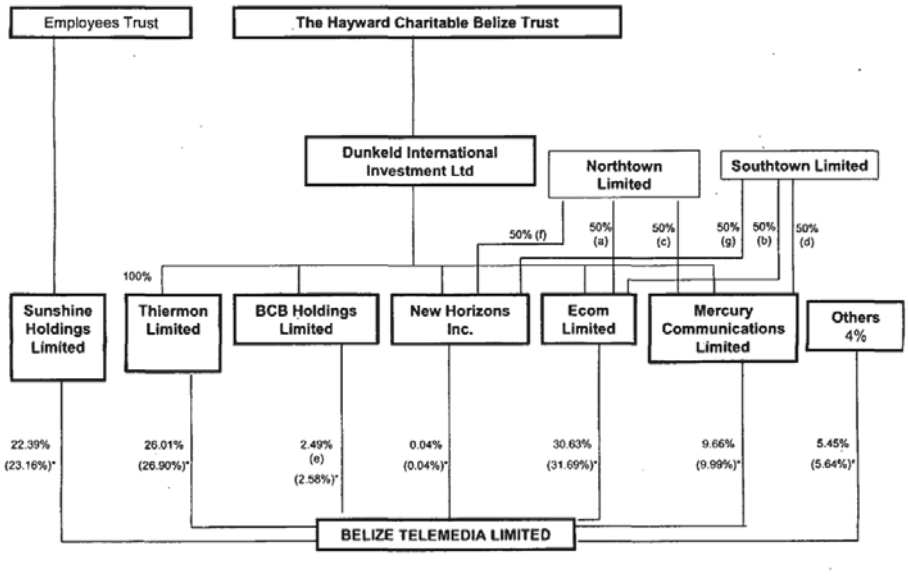
5 *See* Certificate of Continuation Issued by the Registrar of Companies of the Turks and Caicos Islands (8 June 2009)(**Exhibit C-7**).

6 The Claimant's Statement of Claim, para. 16; Operative Terms of the Hayward Charitable Belize Trust (**Exhibit C-38**).

7 Website, Hayward Charitable Belize Trust (**Exhibit R-60**).

8 A trust in which the trustee has no further duty to perform except to convey the property to the beneficiary on demand and, for so long as the property is held, to exercise reasonable care over it and to act in the manner directed by the beneficiary.

9 Declaration of Trust by BB Holdings Limited (1 December 2007)(**Exhibit C-25**).



Source: Exhibit C-207

108. As set out in the above chart, a portion of the shares of Telemedia were also held, prior to August 2009, by **Sunshine Holdings Limited**, a company incorporated in Belize. Sunshine itself was owned by the **Belize Telecommunications Ltd Employees Trust** on behalf of the employees of Telemedia.[10] Sunshine's interest in Telemedia was also acquired in connection with a loan from BCB and formed part of the dispute in the British Caribbean Bank Proceedings.

B. DRAMATIS PERSONAE

109. 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) Ms. Angela Entwistle is presently a director of Dunkeld. Ms. Entwistle is also a trustee of Hayward.

(b) Mr. Joseph Waight is the Financial Secretary of the Government of Belize.

(c) 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. Between its establishment in 2005 and 29 March 2010 Mr. Boyce was an adviser to Hayward, a position he resumed in August 2012. Finally, Mr. Boyce was a director of Dunkeld form October to December 2009, a director

[10] First Witness Statement of Dean C. Boyce, para. 28 (28 February 2014).

of Ecom from January 2005 to 27 August 2009, a corporate representative of Shire Holdings Limited, and a corporate director of Telemedia.

(d) Mr. Nestor Vasquez is presently the Chairman of Telemedia.

C. DUNKELD'S ACQUISITION OF BTL

110. The Government wholly owned BTL at the time BTL was incorporated in 1987. In 1988, the Government offered to the public 49 percent of "B" and "C" shares in the company and sold a portion of those shares.[11]

111. In February 1992 and early 1995, Carlisle bought shares in BTL. By 2001, Carlisle owned or controlled around 52 percent of the shares of BTL (the "**Carlisle Shares**").[12]

112. Around the same time, the Government held around 31 percent of the shares of BTL (the "**Government Shares**").[13] The Government bought Carlisle's shares of BTL and, in March 2004, agreed to sell both the Carlisle and Government Shares to ICC, a company owned by Mr. Jeffrey Prosser.[14] The Parties disagree in respect of the terms on which the Government purchased the shares from Carlisle, and a dispute between Carlisle and the Government on this question was settled by way of a Settlement Deed dated 22 March 2006 and amended on 21 June 2006 (the "**Settlement Deed**")(this would be the subject of subsequent litigation between the Government and BCB Holdings, see paragraphs 130-132 below).[15] The Parties also disagree with respect to the consideration provided by ICC, but agree that ICC proved ultimately to be unable to pay for the shares.[16]

113. In February 2005, the Government exercised its security over the Carlisle Shares and re-acquired control over BTL.[17] In March 2005, the Government sold 15 percent of the shares in BTL to Ecom Limited. Following the signing of the Accommodation Agreement between BTL and the

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11 Witness Statement of Joseph Waight, para. 12 (23 May 2014).

12 Witness Statement of Joseph Waight, paras. 14-16 (23 May 2014).

13 Witness Statement of Dean C. Boyce, *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, para. 3.8 (**Exhibit C-52**).

14 Master Agreement between the Government and Innovative Communications Corporation (22 March 2004)(**Exhibit C-233**).

15 Settlement Deed, BB Holdings Limited and the Government of Belize (22 March 2005; amended 21 June 2006)(**Exhibit C-293**).

16 *Compare* Second Witness Statement of Dean C. Boyce, paras. 27-33 (19 August 2014) *with* Witness Statement of Joseph Waight, paras. 18-26 (23 May 2014).

17 Witness Statement of Dean C. Boyce, *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, para. 3.11 (**Exhibit C-52**).

Government (see paragraphs 116-122 below), the Government sold its remaining shares in BTL to Thiermon Limited (2.5 percent), Sunshine Holdings Limited (20 percent), The Belize Bank Limited (5 percent), and, again, to Ecom (10 percent). This sale brought Ecom's holdings in BTL up to 25 percent.[18]

114. Following ICC's default, the Government Shares were also sold. In November 2005, a subsidiary of BTL acquired 6 percent of BTL's shares.[19] RBTT Merchant Bank then exercised its security further to a promissory note on which ICC had defaulted and acquired the remaining 25 percent of BTL. On 10 July 2007, RBTT sold those shares to TIL, a subsidiary of Telemedia.[20] On 28 August 2007, these shares, along with others held by subsidiaries of Telemedia were redistributed to the shareholders of Telemedia as a dividend in specie in a transaction that was the subject of the award in the British Caribbean Bank Proceedings.[21] The amount of this dividend in specie was two ordinary shares for every five ordinary shares held.[22]

115. By 25 August 2009, Dunkeld had acquired an interest in what the Claimant calculates as 71.2 percent of Telemedia's shares. Dunkeld held its interest through Thiermon Limited, New Horizons Inc., Ecom Limited, Mercury Communications Limited, and BCB Holdings Limited, as follows:[23]

(a) Dunkeld is the sole shareholder of Thiermon Limited.[24] As of 18 September 2007, Thiermon Limited held 12,886,959 shares in Telemedia, giving Dunkeld legal title to 12,886,959 shares in Telemedia.[25]

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18 Witness Statement of Dean C. Boyce, *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, paras. 3.15 (**Exhibit C-52**).

19 Second Witness Statement of Dean C. Boyce, para. 67.

20 Witness Statement of Dean C. Boyce, *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, paras. 3.16 (**Exhibit C-52**); Second Witness Statement of Dean C. Boyce, paras. 68-69 (19 August 2014).

21 *British Caribbean Bank v. Belize*, PCA Case No. 2010-18, Award of 19 December 2014, paras. 83-84, 148-149.

22 Second Witness Statement of Dean C. Boyce, para. 71.

23 Witness Statement of Angela Entwistle, paras. 14-15 (28 February 2014).

24 Share Certificate, Dunkeld (**Exhibit C-43**).

25 Share Certificate, Thiermon Limited (**Exhibit C-22**); Witness Statement of Angela Entwistle, para. 15 (28 February 2014).

(b) As of 18 September 2007, BCB Holdings Limited held 1,234,859 shares of Telemedia.[26] BCB Holdings Limited held these shares of Telemedia on bare trust for Dunkeld, in which BCB Holdings Limited was required to deal with and dispose of the shares of Telemedia as Dunkeld directs.[27]

(c) As of September 2007, Ecom Limited, Mercury Communications Limited, and New Horizons Inc. held, respectively, 15,178,488; 4,786,230; and 20,581 shares in Telemedia.[28] Two BVI companies, Northtown Limited and Southtown Limited, jointly own Ecom Limited, Mercury Communications Limited, and New Horizons Inc.[29] Together, Northtown Limited and Southtown Limited hold the entire issued share capital of Ecom Limited, Mercury Communications Limited, and New Horizons Inc. on bare trust for Dunkeld, pursuant to which Northtown Limited and Southtown Limited must deal with and dispose of the shares of Ecom Limited, Mercury Communications Limited, and New Horizons Inc. as Dunkeld directs. [30]

D. THE ACCOMMODATION AGREEMENT

116. On 19 September 2005, the Government entered into an agreement with BTL under which BTL agreed to buy certain properties from the Government for BZ$19.2 million. In return, the Government was to provide certain structured incentives. This agreement and amendments together form the Government Telecommunications Accommodation Agreement (the "**Accommodation Agreement**").[31] The agreement was as follows:

> **SECTION 4**
> **AGREEMENT**
>
> BTL hereby agrees to acquire from the Government certain properties more fully described in Schedule 1 hereto (the "Properties") and in the manner provided for in Section 5 of this Agreement, in order to better accommodate the Government's telecommunications needs and other requirements (the "Accommodation"), and in consideration for the acquisition by BTL of the Properties and the Accommodation, the Government hereby grants and affords to BTL

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26 Share Certificate, BB Holdings Limited (18 September 2007)(**Exhibit C-24**); Certificate of Change of Name, BCB Holdings Limited (26 May 2009)(**Exhibit C-23**); Witness Statement of Angela Entwistle, para. 15 (28 February 2014).

27 Declaration of Trust by BB Holdings Limited (1 December 2007)(**Exhibit C-25**).

28 Share Certificates in favour of Ecom Limited, Mercury Communications Limited, and New Horizons Inc. (**Exhibit C-26**); Witness Statement of Angela Entwistle, para. 15 (28 February 2014).

29 Share Certificates, Northtown Limited and Southtown Limited (**Exhibit C-27**).

30 Declarations of Trust by Northtown and Southtown in favour of Dunkeld (22 March 2005 & 1 December 2007)(**Exhibit C-28**).

31 Government Telecommunications Accommodation Agreement (19 September 2005)(**Exhibit C-9**); Deed (21 November 2005)(**Exhibit C-10**); Deed (15 December 2006)(**Exhibit C-11**); Deed (7 January 2008)(**Exhibit C-12**).

the benefits, covenants and undertakings provided for herein, the receipt and sufficiency of which are acknowledged by both parties.[32]

117. Under the Accommodation Agreement, BTL agreed to purchase from the government four pieces of property for the sum of BZ$19,200,000.[33] In consideration for BTL's acquisition of the properties, the Government undertook twelve obligations, including the following:

SECTION 6.1

GOVERNMENT COVENANTS AND UNDERTAKINGS

6.1 In consideration for the acquisition of the Properties by BTL and the Accommodation, the Government covenants and undertakes as follows:

(i) Authority, Permits and Licenses – to take all necessary steps to procure to the satisfaction of BTL that: (a) within 90 days of the date of the execution of this Agreement no persons other than BTL and Speednet Communications Limited ("Speednet") will hold an Individual License (within the meaning of the Telecommunications (Licensing Classification, Authorization and Fee Structure) Regulations 2002 (the "Regulations")) granted pursuant to the Belize Telecommunications Act, 2002; (b) no persons other than BTL, Speednet, and those persons who hold Class Licenses issued pursuant to the Regulations, have or will have or be granted any authority, permit or license in Belize to legally carry on, conduct or participate in the telecommunication business, or provide any telecommunication services; (c) no person other than BTL and Speednet have or will have or be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunication services involving or allowing the provision or transport of voice services, and (d) no holder of any Class License has or will have or be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunication services involving or allowing the provision or transport of voice services.

(ii) Return on Capital Investment – to take all necessary steps to procure to the satisfaction of BTL that with effect from June 30, 2005 and going forward, BTL is able to charge to its subscribers and customers rates and charges which enable BTL to fully achieve the Minimum Rate of Return ("MROR") as provided for and calculated in accordance with Schedule 2. (Rate of Return: Determination).

(iii) Management Services - in the event that BTL engages any company to render any management services, to take all necessary steps to procure that BTL is able to pay to them fees and foreign currency in such amounts as the Board of Directors of BTL shall approve and to procure that the repatriation of such fees and foreign currency and the receipt of such fees and foreign currency by any manager are not subject to currency restrictions, withholding taxes or other similar taxation by the Government, but subject to any applicable business tax.

(iv) Foreign Exchange Controls - to permit BTL without restriction, to make payments in foreign currency to international correspondents; creditors of BTL of debt denominated in foreign currency; suppliers of imported supplies of equipment, materials and services used and needed by BTL's operations, and to any Belizean or foreign entity or person by way of dividends declared on BTL shareholdings or other sums due from BTL.

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[32] Government Telecommunications Accommodation Agreement, Section 4 (19 September 2005)(**Exhibit C-9**).

[33] Government Telecommunications Accommodation Agreement, para. 5.1 & Schedule I (19 September 2005)(**Exhibit C-9**).

(v) Tax. - to procure that the payment and repatriation of BTL dividends to any person, and the payment of interest on debt denominated in foreign currency by BTL, is not subject to withholding tax or any other tax of any other kind or character.

(vi) Offshore Accounts - to permit and not restrict BTL's ability to maintain financial accounts offshore (including in countries other than Belize).

(vii) Disposition of the Interconnectivity and Infrastructure Sharing Issues - to take all necessary steps to procure that in the event BTL is required to provide interconnection services to, or to share infrastructure with, any person other than Speednet, any interconnectivity and/or infrastructure sharing between BTL and such person is achieved in such a manner that charges for BTL's interconnection services and/or infrastructure facilities reflect BTL's costs based upon a total system costs allocation (including indirect and common costs) and will include a return on capital employed after tax of 15% per annum.

(viii) Shareholder and Employee Suits - that the Belize Social Security Board: withdraws Case No. 557/2002 against BTL.

(ix) Foreign Nationals - in the event that BTL is of the opinion that it is not able to find the appropriate personnel in Belize, to procure the grant of all necessary visas and work permits to enable BTL to employ foreign nationals in Belize (including the grant of visas to their family members) to carry on BTL activities and to enable foreign nationals to serve as directors of BTL. This paragraph shall apply whether such visas and work permits are permanent or temporary in nature.

(x) Non-Renewal of Individual License - in the event that the Government and the Public Utilities Commission do not renew BTL's Individual License upon the expiration of its term, to acquire all the assets and rights of BTL for their fair market value using a valuation as if the license had been renewed (on the same terms and conditions) and BTL remained as a going concern. If the Government and BTL can not agree upon the valuation, then they agree to enter into binding arbitration pursuant to the provisions of this Agreement. Notwithstanding anything herein to the contrary, if the prospective renewal of the license is not upon terms and conditions acceptable to BTL, then BTL shall be entitled to the same treatment as if the license had not been renewed.

(xi) No changes to terms of Individual License - to take all necessary steps to procure that no changes are made to the terms of BTL's Individual License without the prior written agreement of BTL.

(xii) No undermining of material guarantee - to take all necessary steps to procure that the Public Utilities Commission does not undermine any guarantee, undertaking, covenant or assurance given by the Government to BTL in this Agreement.[34]

118. Section 11 of the Accommodation Agreement provided BTL with a minimum rate of return. According to the terms of the Agreement, if the Government failed to timely pay a shortfall that occurred when this minimum return was not met, then BTL had the right to set-off this shortfall amount against taxes and other obligations owed to the Government. Section 11 also provided Telemedia with a guarantee on its tax rate, a prohibition on the use of voice-over-internet-protocol

[34] Government Telecommunications Accommodation Agreement, para 6.1(i-ii)(19 September 2005)(**Exhibit C-9**).

("VoIP") except by license from Telemedia, and an exemption from paying import duties, among other benefits:

SECTION 11

POST COMPLETION OBLIGATIONS AND OTHER OBLIGATIONS

[. . .]

11.3 The GOB Post Closing Obligations are as follows:

(i) the Government undertakes to procure that for the duration of BTL's Individual License or for a minimum term of 15 years, which ever is the longer period:

(a) Voice Over Internet - (a) no Class License holder is able to use or permit the use of "voice over internet" for any telecommunications traffic originating or terminating within Belize; (b) no user or customer of a Class License holder is able to make use of "voice over internet" services, and (c) any user or customer of an Individual License holder is only able to make use of "voice over internet" services with the written approval of the Individual License holder concerned.

(b) No Competing Individual License Holder Other than Speednet - Other than the Individual License held by Speednet, BTL shall be the sole Individual Licensee for the the duration of its license of for a minimum term of 15 years, which ever is the longer period.

(c) Rate Setting - For the purpose of agreeing to rates or setting rates: (i) a cost based approach shall be adopted by BTL and the Public Utilities Commission which fully utilizes all charges (including all taxes) incurred: by BTL, projected on a forward looking basis plus a profit mark-up, and (ii) no rate setting proceeding shall be permitted that has the effect of suspending BTL requested rates for more than six (6) months.

(d) No Duty to Share Facilities or Infrastructures Other than with Speednet - BTL shall have no duty or obligation to share facilities or infrastructure other than with Speednet.

(e) Rate of Return: Methodology - the methodology to determine BTL's rate of return shall be in accordance with Schedule 2 (Rate of Return: Determination).

(f) Business Tax – the tax treatment of BTL shall be no less favorable than that afforded to other telecommunication licensees in Belize. To enable telecommunications service providers to lower the rates to their subscribers the Government undertakes by no later than April 1, 2008 to adjust the rate of the Business Tax applicable to telecommunications services so that the amount of the Business Tax payable does not exceed the amount of income tax otherwise payable by them.

(g) Import Duties – BTL and its subsidiaries shall be exempt from any tax, duty, levy or impost upon goods, materials, equipment and machinery of every type or description imported for their own use. No exemption shall be granted for goods imported for immediate (within 6 months) resale as new goods in the normal course of business to third parties.

(h) Resale Of Services - BTL is able to restrict the resale of its services in accordance with Section 25 of the Belize Telecommunications Act 2002 (including any obligation to provide indirect access to BTL's telecommunications network) but shall be obligated to provide interconnection services to Speednet.

(i) Service Provision - BTL shall not be under any obligation to provide any service within any denned timescale, other than as is commercially agreed between BTL and its customers.

(ii) Recognition of Properties - the Government undertakes to procure the receipt.by BTL within 2 weeks of the date of Completion of written confirmation in a form acceptable to BTL that all Properties acquired by BTL hereunder will be recognized by the Government and the Public Utilities Commission as constituting part of the "Rate Base" for the purposes of the rate of return determinations set out in Schedule 2 hereto.

11.4 In the event that BTL fails to achieve, in any given financial year during the duration of BTL's Individual License, an Achieved Rate of Return (as defined [in] Schedule 2. hereto) greater than or equal to the Minimum Rate of Return (as defined in Schedule 2. hereto), then the Government hereby irrevocably undertakes to monetarily compensate BTL to the full extent of any shortfall in Earnings (as defined in Schedule 2 hereto), so that the Achieved Rate of Return is equal to the Minimum Rate of Return in the financial year under consideration. Any shortfall shall be demonstrated by reference to BTL's group audited accounts for the relevant financial year and a capital rate of return statement to be prepared by BTL in accordance with its normal accounting procedures and the terms of this Agreement (the "Capital Rate of Return Statement"). The Government shall be informed by BTL of the amount of any such shortfall (the "Shortfall Amount") and provided by BTL with a copy of the group audited accounts together with the Capital Rate of Return Statement for the relevant financial year no later than 6 months following the end of BTL's financial year (the "Delivery Date"). The Government agrees to pay BTL the Shortfall Amount in full no later than 3 months following the Delivery Date (the "Deadline Date"). The Government further agrees that should the Shortfall Amount not have been paid to BTL in full by the Deadline Date then any unpaid amount shall bear interest at the base rate as quoted by The Belize Bank Limited from time to time plus 1 ½ % per annum which shall accrue from the Deadline Date up to and including the date of payment in full to BTL of such unpaid amount and all such outstanding interest. In the event that payment to BTL of a Shortfall Amount (including all accrued interest) has not been made in full by the third anniversary of the Deadline Date then such unpaid amount may be set-off by BTL against the amount of any taxes (including Business Tax, Sales Tax or other similar taxes) payable by BTL to the Government.[35]

[. . .]

119. Schedule 2 to the Accommodation Agreement provided for the determination of the minimum rate of return as follows:

RATE OF RETURN: DETERMINATION

For the purposes of this Agreement between the Government of Belize and BTL, the parties agree that this Schedule 2 and the Agreement records their mutual understanding and agreement as to the formula, methodology, definitions and prescribed meanings to be used in relation to the calculation of the Achieved Rate of Return and the Minimum Rate of Return.

Achieved Rate of Return

The Achieved Rate of Return ("AROR") for each financial year of BTL shall be calculated according to the method set out below:

AROR shall mean the percentage achieved by dividing earnings after tax and interest received ("Numerator") by book equity plus long term debt ("Denominator") (as recorded in the consolidated audited group accounts of BTL for the financial year under consideration) and then expressing the product in hundredths.

[35] Government Telecommunications Accommodation Agreement, paras.11.3(f-g), 11.4 (19 September 2005)(**Exhibit C-9**).

> The Numerator (also referred to in this Schedule and the Agreement as "Earnings") shall be calculated by adding together:
>
> a. Operating Income after deducting all taxes, plus
>
> b. interest income, as drawn from the consolidated audited group accounts of BTL for the year under consideration.
>
> The Denominator (also referred to in this Schedule and the Agreement as the "Rate Base"), shall be calculated by adding together:
>
> a. total shareholders' equity (including capital and revenue reserves), plus
>
> b. long term debt, plus
>
> c. current portion of long-term debt, as drawn from the closing balances of the consolidated audited group accounts of BTL for the financial year under consideration.
>
> "Operating Income" means all revenue earned by BTL net of all charges levied against revenue by BTL, including, but not limited to, all operational and other charges such as staff costs; travel costs; distribution costs; corporate management costs; professional fees (including legal, accounting and technical fees); sales and marketing expenses; depreciation and amortization charges; licence and frequency fees; bad debt charges, provisions and write-offs; asset write-offs; currency exchange charges; bank charges; interest charges on short term debt; cost of sales, and interconnection fees.
>
> **Minimum Rate of Return**
>
> The Minimum Rate of Return (MROR) per annum is 15%. This is the agreed minimum rate of return that BTL must achieve in each financial year. The consequential value to be obtained by BTL in applying the MROR in each financial year under consideration is the sum achieved by multiplying the MROR against the Rate Base in the given financial year.
>
> **Acquired Assets and Payments Incurred**
>
> For the avoidance of doubt, any assets acquired and payments incurred by BTL in the performance of this Agreement, or in subsequent financial years through the normal course of business, shall be included as part of the "Rate Base", for the purposes of calculating the monetary value of the AROR and MROR.

120. The Accommodation Agreement was amended through three amendment deeds executed on 21 November 2005, 15 December 2006, and 7 January 2008, respectively.

121. The Parties concluded the second amendment deed after there had been a shortfall in the minimum rate of return during the previous fiscal year. The second amendment deed gave the Government more time to pay the shortfall for the fiscal year ending on 31 March 2006 and provided that, if the Government failed to timely pay the shortfall, "then such unpaid amount may be set-off by BTL against the amount of any taxes or any other payments or obligations due and payable by BTL to the Government."[36] The second amendment deed also clarified as follows with respect to taxation pursuant to the Accommodation Agreement:

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[36] Deed, paras. 2.1-2.2 (15 December 2006)(**Exhibit C-11**).

> **3. TAXATION ISSUES**
>
> 3.1 The Government agrees that it will confirm to the Income and Business Tax Department BTL's exemption in relation to withholding tax (as provided for in clause 6.1 (v) of the Original Agreement) and provide BTL with a copy of this confirmation within 90 days of the date of this deed.
>
> 3.2 The Government agrees that it will confirm to the relevant fiscal departments that all goods, material, equipment and machinery imported for BTL's own use (whether before or after the date of this deed) are free from import duties and General Sales Tax and provide BTL with a copy of this confirmation within 90 days of the date of this deed.
>
> 3.3 The Government agrees to reimburse BTL the sum of BZ$1,169,373.70 within 90 days of the date of this deed for taxation paid on goods, material, equipment and machinery imported for BTL's own use since 19 September 2005. The Government further agrees that in the event that it fails to reimburse BTL for this sum in full by this date then such unpaid amount may be set-off by BTL against the amount of any taxes or any other payments or obligations due and payable by BTL to the Government.
>
> 3.4 The Government hereby confirms for clarity and for the avoidance of doubt that the tax treatment of BTL shall be no less favourable than that afforded to other telecommunication licencees in Belize. The Government acknowledges that internet services provided by Class Licensees are currently taxed at 1.75%, whereas BTL is obligated to pay 19% in tax on its internet services, and agrees to procure to BTL's satisfaction that the disparity between the tax treatment of Class Licencees and BTL is rectified by 31 March, 2007 so that BTL is taxed on its internet services at the same rate as that at which the Class Licensees are currently taxed and, on such rectification, BTL shall waive its entitlement to be reimbursed for the difference in the amount paid in tax pursuant to the unequal terms of its licence between 19 September 2005 (the date of the Original Agreement) and 31 March 2007.
>
> 3.5 The parties hereby agree that clause 11.3(f) of the Original Agreement shall be amended as follows:
>
> > "Business Tax - the tax treatment of BTL shall be no less favourable than that afforded to other telecommunication licensees in Belize. To enable telecommunications services providers to lower the rates to their subscribers the Government undertakes by no later than April 1, 2008 to adjust with immediate legal effect and force the rate of Business Tax applicable to telecommunications services so that the amount of Business Tax payable by BTL does not exceed the amount of Income Tax that would be paid by BTL if it was assessed for Income Tax by applying an Income Tax rate for companies at 25% (companies being persons other than employed persons for the purposes of the Income and Business Tax Act)."[37]

122. In the third amendment deed, Telemedia (as successor to BTL) and the Government agreed on the following related provision:

> **2. RETURN ON CAPITAL INVESTMENT**
>
> 2.1 In accordance with clause 2 of the First Settlement Deed, if full payment of the Shortfall Amount of BZ$7,075,000 (the 2006 Shortfall Amount) was not paid by the Government to BTL (or its successor, Telemedia) by 31 October 2007, the further provisions of clause 2.2 of the First Settlement Deed are to apply. The Government has not yet paid the 2006 Shortfall Amount.

[37] Deed, paras. 3.1-3.5 (15 December 2006)(**Exhibit C-11**).

2.2 In addition, BTL achieved less than the Minimum Rate of Return in the financial year ended 31 March 2007 and pursuant to section 11.4 of the Original Agreement, Telemedia formally notified the Government of the Shortfall Amount of BZ$11,628,000 (the "2007 Shortfall Amount") on 23 August 2007 and provided the Government with a Capital Rate of Return Statement setting out the basis for calculation of the 2007 Shortfall Amount. Full payment of the 2007 Shortfall Amount was due and payable by no later than 23 November 2007.

2.3 Certain additional and final assessments to taxation have been made by taxation authorities in Belize against BTL for the period ending 31 March 2005, including, but not limited to, assessments concerning general intercompany cross charges; intercompany charges for pre-paid cards; management fees; receipts by board members of BTL and of BTL associated companies and affiliates; international settlements; internet and data revenues, and assessments concerning all other BTL business activities, and including all accrued penalties, arrears interest or other interest thereon (together, the Assessments) amounting to BZ$4,000,000. As successor to BTL, Telemedia has, subject to the provisions of clause 2.7 assumed this liability.

2.4 In accordance with clause 2.2 of the First Settlement Deed, the unpaid taxes due and owing as set out in clause 2.3 above shall be set-off against the 2006 Shortfall Amount and the Government hereby acknowledges and agrees that:

(a) in respects of all financial periods of BTL (and/or Telemedia as the case may be) up to and including the period ending on 31 March 2007, all taxation assessments made on BTL (and/or Telemedia as the case may be) have been made and that no further tax assessments for these periods will be made by any taxation authority in Belize on BTL (and/or Telemedia as the case may be); and

(b) this set-off constitutes full and final settlement of all liabilities to taxation assessed by any taxation authority in Belize owed by BTL and/or Telemedia in respects of all financial periods of BTL (and/or Telemedia as the case may be) up to and including the period ending on 31 March 2007, and no further tax shall be due or payable by BTL (or Telemedia as the case may be) for such financial periods and that there are no other payments or obligations due and payable by BTL (and/or Telemedia as the case may be) to the Government.

2.5 Following the set-off described in clause 2.4 above, the balance of BZ$3,075,000 plus the 2007 Shortfall Amount will be due and owing to Telemedia by the Government together totalling BZ$14,703,000 (the "Balance Amount") and the Government agrees that Telemedia shall be entitled with effect from 1 February, 2008, and at its sole discretion, to set off the Balance Amount against monthly-based tax liabilities including, but not limited to, business tax as they fall due and owing until the Balance Amount has been extinguished.

2.6 The Government hereby acknowledges and agrees that, in the event the Government fails to pay to Telemedia, in accordance with section 11.4 of the Original Agreement, any Shortfall Amount arising in respect of Telemedia's financial year ending on 31 March 2008 or any subsequent financial years of Telemedia, on or by the relevant Deadline Date for each such financial year, Telemedia shall be entitled to set-off any such future Shortfall Amounts against the amount of any taxes or other payments or obligations due and payable by Telemedia to the Government.

2.7 The Government hereby acknowledges and agrees that any set-off made by Telemedia in accordance with any of clauses 2.4 to 2.6 above shall be made without prejudice to Telemedia's right to challenge the validity, basis of calculation or amount of:

(a) any of the Assessments (to the extent that Telemedia is unable to set-off the 2006 Shortfall Amount in accordance with this clause 2); or

(b) any future assessments made in relation to financial periods subsequent to the financial period ending on 31 March 2007.

2.8 Telemedia hereby confirms that the business tax payable by the company for the months of October 2007 (BZ$1,460,338.71) and November 2007 (BZ$1,540,228.29) together totalling BZ$3,000,568 have been fully paid to the Income Tax Department.

3. RATE OF BUSINESS TAXATION

3.1 In relation to the Government's undertaking in section 11.3 (f) of the Original Agreement (as amended by clause 3.5 of the First Settlement Deed), to the extent that the Government does not comply in full with or implement such undertaking by 1 April 2008, Telemedia shall be entitled at its sole discretion from 1 April 2008 to calculate the amount of business tax it pays as set out in clause 3.5 of the First Settlement Deed and the Government hereby agrees that the payment by Telemedia of such amounts so calculated by Telemedia shall be in full and final settlement of Telemedia's liability to pay business tax in respect of any period.[38]

E. THE DISPUTE OVER THE ACCOMMODATION AGREEMENT

123. In February 2008, there was a change in Government in Belize. Thereafter, according to the Claimant, "the Government became increasing hostile to Telemedia" and began aggressively seeking to collect business tax from the company.[39] On 9 May 2008, Telemedia commenced arbitral proceedings (the "**Accommodation Agreement Proceedings**") against the Government in the London Court of International Arbitration ("**LCIA**"). The Government did not take part in the proceedings.

124. Part of the dispute before the LCIA concerned Telemedia's setting-off of shortfalls pursuant to the amended Accommodation Agreement. From 1 February 2008, Telemedia had filed tax returns with the Government in which Telemedia had set-off its taxes against the shortfall amount, but the Government had refused to accept the returns and had issued to Telemedia monthly tax assessment notices, including penalties and interest.[40] Telemedia, in turn, refused to accept the tax assessment notices. In order to compel Telemedia to pay the assessed taxes, the Government issued judgment summonses at the Magistrate's Court. On 24 June 2008, the Magistrate's Court ordered Telemedia to pay the Government in settlement of the judgment summonses.[41] On 27 June 2008, Telemedia appealed the decision. On 4 July 2008, the Government issued a warrant for the arrest of Mr. Boyce, and on the same day, Telemedia made a tax payment. On 8 July 2008, Telemedia petitioned the Belize Supreme Court for declaratory relief, but the Supreme Court

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38 Deed, paras. 2.1-3.1 (7 January 2008)(**Exhibit C-12**).

39 First Witness Statement of Dean C. Boyce, para. 64 (28 February 2014).

40 *See Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award, paras. 49-50 (18 March 2009)(**Exhibit C-15**). See also Telemedia's tax returns for March to July 2009 and the Government's Notices of Assessment, discounting the credits attributable to the accommodation agreement. Notice of Assessment for Business Tax (March-April 2009)(**Exhibit C-582**); Business Tax Returns of Telemedia (March-July 2009)(**Exhibit C-583**).

41 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award, paras. 49-50 (18 March 2009)(**Exhibit C-15**).

rejected Telemedia's application. Telemedia then made further tax payments. Telemedia filed a public law action, seeking declaratory relief, but that application also was denied.[42]

125. On 18 March 2009, the LCIA rendered an award in favour of Telemedia (the "**Accommodation Agreement Award**"), finding that the Accommodation Agreement was valid and binding on the Government and awarding Telemedia declaratory relief and money damages as follows:

> VIII. THE TRIBUNAL'S AWARD
>
> 341. For the reasons already set out in the Award, the Tribunal is not prepared to issue Orders for Injunctive Relief against the Respondent Government. However, the Tribunal now HEREBY GRANTS the following Declaratory Relief to the Claimant:
>
> (1) The Accommodation Agreement is binding on the Government and accordingly:
>
> (i) The Assessment Notices, any Magistrate Court proceedings for the enforcement of the May judgment summonses and any further judgment summons should not have been issued.
>
> (2) Telemedia is entitled to set off payments due under the Loan Note against amounts due in Business Tax;
>
> (3) Telemedia and its subsidiaries, BTL Digicell Limited and Business Enterprises Systems Limited, are entitled pursuant to the terms of the Accommodation Agreement to elect to set off the Shortfall Amounts and the contractual interest accruing thereon as they fall due against Business Tax and/or such other payments or obligations due and payable by Telemedia to the Government;
>
> (4) Telemedia is entitled to apply the Agreed Rate to its Business Tax liabilities pursuant to the terms of the Accommodation Agreement;
>
> (5) Telemedia is entitled to an exemption from import duty on the terms set out at Section 11.3(1)(g) of the Original Accommodation Agreement;
>
> (6) Telemedia is entitled, pursuant to the terms of the Accommodation Agreement, to the use of the frequencies 2.496 Ghz to 2.69 Ghz inclusive;
>
> (7) The Government has agreed to procure the following in respect of VOIP services:
>
> (i) that no person including any holder of a Class Licence other than the current Individual Licence Holders, Telemedia and SpeedNet, has been or will be granted any authority, permit or licence in Belize to legally carry on, conduct, or provide telecommunications services in Belize involving or allowing the provision of or transport of VOIP services;
>
> (ii) that no user or customer of a holder of a Class Licence is able to make use of VOIP services;
>
> (iii) that a user or customer of an Individual Licence Holder is only able to make use of VOIP services with the written permission of the relevant Individual Licence Holder; and
>
> (iv) that the CANTO guidelines are implemented in Belize.
>
> (8) Telemedia is entitled to implement the tariff changes detailed in Telemedia's communication to the Public Utilities Commission dated 10 August 2007, a copy of which is annexed to the Third Amendment Deed.

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42 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award, paras. 49-57 (18 March 2009)(**Exhibit C-15**).

342. The Tribunal also HEREBY ORDERS the Government to pay Telemedia damages as follows:

(1) BZ $15,973,621 as the amount of the outstanding net Shortfall Amount due to Telemedia including interest at 16% per annum to 27 February 2009 and after giving effect to set-offs for Business Tax and Loan Note payments;

(2) BZ $9,797,879 in respect of the Government's failure to apply the Agreed Rate of Business Tax including interest at 15% per annum to 27 February 2009;

(3) BZ $1,738,777 as compensation for penalties and interest wrongly applied by the Government to 27 February 2009 following Telemedia's efforts to assert its set-off rights;

(4) BZ $1,119,600 as compensation for loss of the use by Telemedia of the sums wrongly paid to the Government on account of Business tax, improperly assessed and interest, penalties and fees related thereto including interest at 15% per annum to 27 February 2009;

(5) BZ $1,176,083 in respect of the Government's failure to refund General Sales Tax including interest at 15% per annum to 27 February 2009;

(6) BZ $912,781 as compensation for sums wrongly paid to the Government by way of import duty including interest at 15% per annum to 27 February 2009;

(7) BZ $4,696,686 as compensation for lost profits caused by the Government's breach of its VoIP obligations including interest at 15% per annum to 27 February 2009; and

(8) Simple interest on each of the above amounts from 27 February 2009 until payment in full, at the rate applied to such amount up to 27 February 2009.

343. The Tribunal also HEREBY ORDERS the Government to pay the following sums to Telemedia:

(1) BZ $2,785,937.99 in respect of Telemedia's legal costs with simple interest on such amount accruing at the rate of 8% from the date of this Award until payment; and

(2) £157,909.54 in respect of the costs of the arbitration plus £4,949.90 of additional hearing expenses, with simple interest on the total amount of £162,859.44 accruing at the rate of 8% from the date of this Award until payment.

344. All other claims are dismissed.[43]

126. On 20 March 2009, Telemedia assigned the benefit of the Accommodation Agreement Award to Belize Social Development Limited.[44] However, the Government obtained an interim injunction on 7 April 2009 that restrained BSDL and Telemedia "from enforcing or causing to be enforced the 'Final Award' issued on the 18th March 2009 by the Arbitration Tribunal constituted by the London Court of International Arbitration [. . .]."[45] The Supreme Court of Belize granted part of

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43 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award, paras. 341-344 (18 March 2009)(**Exhibit C-15**).

44 Deed of Assignment, Telemedia and BSDL (20 March 2009)(**Exhibit C-16**).

45 *Attorney General of Belize v. Belize Telemedia Limited and Belize Social Development Limited*, Claim No. 317 of 2009, Order (Supreme Court of Belize, 7 April 2009)(**Exhibit C-59**).

the interim injunction in a decision of 20 July 2009.[46] Much later, on 11 December 2013, BSDL would obtain from the United States District Court of the District of Columbia an order for enforcement of the Accommodation Agreement Award.[47]

127. From March to July 2009, Telemedia filed tax returns with the Government. The Commissioner of Income Tax made tax assessments for those same months at a different tax rate than the rate established in the Accommodation Agreement and did not apply a set-off. The Commissioner also levied penalties and interest on the total sum of tax due.[48] Telemedia paid, under protest, the tax assessed for the months of May through July 2009.[49]

128. Between 3 March and 18 August 2009, Telemedia paid import duties to the Government but noted upon each payment, as it did in a letter of 3 March 2009, that

> [w]hilst Telemedia reserves all of its rights pursuant to an Accommodation Agreement between Telemedia and the Government of Belize (the Government) dated 19 September 2005, as subsequently amended, it will now make additional payments totalling $14,535.02 in order to limit losses caused by the Government's continuing breach of its obligations in respect of the grant of import duty exemptions. This payment is made without prejudice to Telemedia's position in LCIA Arbitration 81079 and Telemedia reserves the right to seek reimbursement of this, and other, amounts from the Government.[50]

129. On 24 August 2009, Allen & Overy LLP, acting as counsel for Telemedia, wrote a letter on behalf of Telemedia to the Government, communicating that Telemedia chose to consider the Government in repudiatory breach and the Accommodation Agreement as ended, because the Government would neither comply with the Accommodation Agreement nor with the Accommodation Agreement Award.[51]

F. THE DISPUTE OVER THE SETTLEMENT DEED BETWEEN BCB HOLDINGS LIMITED AND THE GOVERNMENT

130. On 16 October 2008, BCB Holdings and the Belize Bank Limited initiated arbitration before another LCIA tribunal concerning the Government's alleged breach of a Settlement Deed that it

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46 *Attorney General of Belize v. Belize Telemedia Limited and Belize Social Development Limited*, Claim No. 317 of 2009, Decision (Supreme Court of Belize, 20 July 2009)(**Exhibit C-63**).

47 *Belize Social Development Limited v. The Government of Belize*, Civil Case No. 09-2170 (RJL), Order (U.S. District Court for the District of Columbia, 11 December 2013)(**Exhibit C-201**).

48 Notice of Assessment for Business Tax (March-April 2009)(**Exhibit C-582**); Business Tax Returns of Telemedia (March-July 2009)(**Exhibit C-583**).

49 Business Tax Returns of Telemedia (March-July 2009)(**Exhibit C-583**).

50 Letter from Debbie Lozano to Office of the Financial Secretary (3 March 2009)(**Exhibit C-580**).

51 Letter from Allen & Overy LLP to Government of Belize (24 August 2009)(**Exhibit C-18**).

had concluded with Carlisle during the period after the failed acquisition by ICC.[52] On 20 August 2009, the tribunal in that case issued an award, finding that the Settlement Deed was valid and binding on the Government. The tribunal awarded damages of BZ$40,843,272.34 (the "**Settlement Deed Award**") and pronounced the Settlement Deed terminated due to the Government's repudiatory breach.[53]

131. On 21 August 2009, BCB Holdings Limited and the Belize Bank Limited made an application to the Belize Supreme Court for enforcement of the Settlement Deed Award.[54] On 22 December 2010, the Supreme Court ordered enforcement of the Settlement Deed Award.[55] However, on 8 March 2011, a stay of execution was ordered until the next sitting of the Court of Appeal.[56] On 8 August 2012, the Court of Appeal partially reversed the Supreme Court's order, finding that the statutory ground on which the Claimants sought enforcement was void.[57]

132. Thereafter BCB Holdings appealed the matter to the Caribbean Court of Justice ("**CCJ**"). On 26 July 2013, the CCJ found that the Settlement Deed as amended was void on the grounds of public policy, reasoning that the terms of the Settlement Deed could not be implemented without parliamentary approval. In the light of the relevance of this decision to the matters at issue in this Award, the Caribbean Court of Justice's decision merits quotation at length:

> **The Public Policy Point**
>
> [. . .]
>
> *Executive prerogative and the Separation of Powers*
>
> [. . .]
>
> 43. Section 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country's revenue laws. Counsel for the Companies submitted that the Deed merely resolved "uncertainties and ambiguities" in the law, but the Executive Branch, whether for the

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52 Settlement Deed, BB Holdings Limited and the Government of Belize (22 March 2005; amended 21 June 2006)(**Exhibit C-293**); *BCB Holdings Limited and The Belize Bank Limited v. The Attorney-General of Belize (on behalf of the Government of Belize)*, LCIA Arbitration No. 81169, Request for Arbitration (16 October 2008)(**Exhibit C-456**).

53 *BCB Holdings Limited and The Belize Bank Limited v. The Attorney-General of Belize (on behalf of the Government of Belize)*, LCIA Arbitration No. 81169, Final Award (18 August 2009)(**Exhibit C-541**).

54 *BCB Holdings Limited and The Belize Bank Limited v. Attorney General of Belize*, Claim No. 743 of 2009, Fixed Date Claim Form (Supreme Court of Belize, 21 August 2009)(**Exhibit C-543**).

55 *BCB Holdings Limited and The Belize Bank Limited v. Attorney General of Belize*, Claim No. 743 of 2009, Judgment (Supreme Court of Belize, 22 December 2010)(**Exhibit C-557**).

56 *BCB Holdings Limited and The Belize Bank Limited v. Attorney General of Belize*, Claim No. 743 of 2009, Decision (Supreme Court of Belize, 8 March 2011)(**Exhibit C-558**).

57 *Attorney General of Belize v. BCB Holdings Limited and The Belize Bank Limited*, Civ. App. No. 4 of 2011, Judgment (Court of Appeal of Belize, 8 August 2012)(**Exhibit C-566**).

purpose of "settling" claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the parliament and the courts. Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the State, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.

44. There is and must continue to be a healthy relationship among the arms of government. The State certainly cannot function effectively with its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each Branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one Branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the Executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the Minister to implement the promises recorded in the Deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.

45. There is a more fundamental reason why the Minister's authority to make and implement the promises given in the Deed cannot be justified on the basis of prerogative power. This is because, as was noted by Lord Bridge in Williams Construction v Blackman27, it is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded. While the statute remains in force, the function can only be exercised in accordance with its provisions. Since it is being put forward also that the Minister's authority sprang from his powers under section 95 of the Income and Business Tax Act28 , prerogative power is ousted and it is to the statute that one must turn to discover whether (a) section 95 authorised the Minister to do what he did and (b), assuming such authorisation, the Minister acted within the scope of the authority given.

Section 95 of the Income and Business Tax Act

46. The constitutionality of section 95 was challenged by counsel for the State. It is unnecessary now to rule on that challenge. Suffice it to say that, assuming its constitutional validity, the section must be interpreted in light of the Constitution. The Belize Constitution, like other Anglophone CARICOM Constitutions, places a specific and extremely high value on legislation dealing with taxation. Any Bill dealing with the imposition, repeal, remission, alteration or regulation of taxation is in the Constitution referred to as a "Money Bill". Money Bills are not enacted in the ordinary way. Sections 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly exercised, the accompanying safeguards must be scrupulously observed.

47. Section 95 cannot properly be interpreted as being capable of granting the Minister the power to do what the Deed here purported to do. In particular, we fail to see how, in one fell swoop, the Minister could possibly "remit" tax payable in respect of business activity to be conducted over an indefinite time in the future. The Tribunal expressed a different view on this issue. The Tribunal also likened remission of tax to the cancellation or extinguishment of all or part of a financial obligation whether past or future. In our opinion there is a substantial difference between the remitting tax

payable and extinguishing an obligation to pay tax. If the Minister was authorised by section 95 to do the former he certainly had no power whatsoever to promise the latter.

48. Since the Minister is not the only official upon whom is conferred a power of remission, it is instructive to reason by analogy. Section 52(1)(d) of the Constitution confers on the Governor-General the power to "remit the whole or any part of any punishment imposed on any person for any offence…" If the Tribunal's views on remission are correct, then the Governor-General would be acting within the scope of the power if he/she remitted all the future sentences likely to be imposed upon a known recidivist. This would be an absurd interpretation of the Governor-General's power.

49. In the exercise of the statutory power to remit, section 95 imposes upon the Minister the obligation to comply with two rather weak safeguards. Failure so to conform would impugn and automatically render void the exercise of the power. Here, the Minister flouted both measures. Firstly, the Minister's power under the section is constrained to the extent that the Minister needs to satisfy himself, on objective criteria, that it is just and equitable to remit tax payable. Fore-knowledge of the actual tax payable (which may be remitted in whole or part) constitutes a crucial, if not indispensable, factor informing the Minister's exercise of discretion. Just as it would be perverse for the Governor General (whose discretion is not ostensibly limited by what is "just and equitable") to remit punishment when no crime has as yet been committed, far less a sentence imposed, so too the Minister cannot properly satisfy himself of the justice or equity in remitting tax payable by a company where the business activity upon which the tax may or may not accrue has not yet commenced and there is no knowing whether the company would even be in business for the period the tax is supposedly "remitted". Apart from its absurdity, to construe the power to remit tax as capable of being exercised in respect of tax that may or may not become payable throughout the lifetime or existence of the taxpayer, evades section 95"s first safeguard and easily opens the door to the arbitrary and unlawful exercise of the power delegated.

50. Section 95 also required Notices of any remission to be published in the Gazette. Given the cloak of confidentiality that surrounded the making and implementation of the Deed, it is reasonable to conclude that there was never an intention on the part of the Minister to publish the required Notice. At any rate, the Minister had two years to fulfil this statutory obligation and no attempt was made to comply with it during that time. The trial judge accepted the Tribunal's view that the requirement of publication is merely "an administrative formality" and that publication may lawfully be done at any time. In light of the importance the Constitution attaches to the remission of tax, we disagree. Parliament in its wisdom has decreed publication in the gazette so that the Minister's decisions on remission are open to public scrutiny. This might be a mild, after-the-fact legislative safeguard. But to strip it of all its content, to render it devoid of any force only emphasises the grave danger to public policy that flows from interpreting the first limb of section 95 in the manner in which the Companies suggest.

51. Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of taxation.30 Even if one assumes that the Minister was entitled, by section 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of "remitting tax payable" includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament's revenue laws. In essence, the framers of the Deed conceptualised and designed a whole new tax policy for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly.

52. It is not the Court's function in this case to assess the wisdom of this special tax policy. The Government does of course have the power to settle, and to settle in confidence

> if it so desires, and on terms it considers prudent, claims made against it. But transforming the policy conceived here, effectively into the status of a Money Bill, necessitated the intervention of the National Assembly so that legislation consistent with the imperatives of the Constitution could be enacted to give force to it.
>
> 53. Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy. No court can afford to encourage the spread of such cancer. In our judgment, implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize. In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement.
>
> *Should the Award be enforced?*
>
> [. . .]
>
> 59. The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value. So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception. The Committee on International Commercial Arbitration has endorsed "tax laws" as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award. In our judgment, especially as the underlying agreement was to be performed in Belize, the balance here undoubtedly lies in favour of not enforcing this Award. This is a case where the Court actually has a duty to invoke the public policy exception.
>
> 60. We have considered whether, notwithstanding all of the above, we should still enforce the Award because if we did not, the State of Belize may be unjustly enriched. There are powerful factors that weigh against this view. As mentioned above at [47], we have no evidence of the strength of the Companies" claims relating to the prior dispute between the parties. There is therefore only a tenuous basis for presuming any unjust enrichment. Even assuming there could conceivably be some unjust enrichment, there is no way of assessing its likely quantum. It is also significant that the Companies are not foreign entities. They are Belizean companies cognizant of and constrained by the public policy of special tax rates, exemptions and concessions being granted by Parliament. The Companies themselves are currently the beneficiaries of tax concessions which were obtained, not from the Minister but through the National Assembly.
>
> 61. The public policy contravened in this case falls well within the definition of "international public policy" recommended by the ILA that might justify the non-enforcement of a Convention Award. If this Court ordered the enforcement of this Award we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this. Responsible bodies, including the Attorney General, have a right and duty to draw attention to and appropriately challenge attempts to undermine the Constitution.[58]

[58] *BCB Holdings Limited and The Belize Bank Limited v. Attorney General of Belize*, CCJ Appeal No CV 7 of 2012, Judgment, [2013] CCJ 5 (AJ) (Caribbean Court of Justice, 26 July 2013)(**Exhibit R-98**).

G. THE ACQUISITION OF TELEMEDIA

133. 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.[59]

134. 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:

> 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;[60]

135. 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:

> **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:

Name of Shareholder	Address	No. of Shares Acquired
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 St. Belize City	750,000
4. ECOM Limited	P.O. Box 1764 212 North Front St., Belize City	15,178,488

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59 Belize Telecommunications (Amendment) Act, 2009, s. 63(1)(**Exhibit C-2**).

60 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2009 Statutory Instrument No. 104 of 2009 (**Exhibit C-3**).

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
Total number of Shares acquired		**46,845,513**

B - SHARES IN BTL DIGICELL LIMITED

Name of Shareholder	Address	No. of Shares Acquired
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

C - SHARES IN BUSINESS ENTERPRISE SYSTEMS LIMITED

Name of Shareholder	Address	No. of Shares Acquired
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

D - SHARES IN TELEMEDIA (FREE ZONE) LIMITED

Name of Shareholder	Address	No. of Shares Acquired
Rocky Reef Ventures Limited	212 North Front St. Belize City	1

E - SHARES IN SUNSHINE HOLDINGS LIMITED

Name of Shareholder	Address	No. of Shares Acquired
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

Name of Shareholder	Address	No. of Shares Acquired
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 31st 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 8th February 2008.[61]

136. 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 . . . ."[62]

H. CIRCUMSTANCES OF THE ACQUISITION OF TELEMEDIA

137. 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 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 percent return on investment was the order of the day, and there were years when BTL paid a dividend yield of as much as 30 percent.
>
> 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 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 percent 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 percent 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.

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61 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2009 Statutory Instrument No. 104 of 2009 at pp. 4-5 (**Exhibit C-3**).

62 Notice of Acquisition (27 August 2009)(**Exhibit C-21**).

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 percent. According to that Agreement and under that guarantee, Ashcroft could in any year declare that BTL had not made that 15 percent; 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 modem 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 percent 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 percent 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 percent of the yearly profits.[63]

I. THE COMPANIES' CLAIMS FOR COMPENSATION AND THE GOVERNMENT'S OFFERS

138. On 27 August 2009, after the acquisition of Telemedia pursuant to the 2009 Act and 2009 Order, Mr. Joseph Waight, the Financial Secretary of Belize, issued a Notice of Acquisition and requested that "[a]ll interested persons who may have claims to compensation for the acquisition of any property specified in the Schedule are asked to submit their claims, together with proof of ownership and other supporting documents, if any, to the Financial Secretary [. . .]."[64]

139. On 14 October 2009, the Companies sent demands for payment to Mr. Waight. These entities included BCB Holdings Limited, Ecom Limited, Mercury Communications Limited, New Horizons Inc., and Thiermon Limited. In their notices of claim for compensation, the entities made demand for payment:

> . . . strictly without prejudice to
>
> 1. any claims of Dunkeld and Hayward arising under the UK-Belize Bilateral Investment Treaty;
> 2. any claims in respect of the unconstitutionality of the Act or of the Statutory Instrument No. 104 of 2009 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order; and
> 3. any claims it may have to assert and enforce any other rights in connection with ownership of the Shares.[65]

140. On 19 October 2009, Mr. Waight responded in letters to each entity and requested that the Companies provide the Government with "[t]he precise nature and proof of Hayward's and Dunkeld's interest in the shares formerly held by [each Company] in Belize Telemedia Ltd."[66] On 12 November 2009, Courtenay Coye LLP, on behalf of the Companies, responded to Mr. Waight, arguing that "[t]he information and documents you have requested are not required to verify [a Company's] claim or to prove its ownership of the shares."[67]

141. On 26 August 2010, Mr. Waight wrote to the Companies, noting that they "had refused to supply" the information that he had requested on 19 October 2009. "In order that we may have meaningful

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63 Transcript of the Speech of the Honourable Prime Minister of Belize, Dean Barrow, to the House of Representatives (24 August 2009)(**Exhibit C-19**).

64 Notice of Acquisition (27 August 2009)(**Exhibit C-21**).

65 Letters from Courtenay Coye LLP to Mr. Joseph Waight (14 October 2009)(**Exhibit C-71**).

66 Letters from Mr. Joseph Waight to Courtenay Coye LLP (19 October 2009)(**Exhibit C-72**).

67 Letters from Courtenay Coye LLP to Mr. Joseph Waight (12 November 2009)(**Exhibit C-73**).

and productive negotiations for the payment of compensation to your Client," Mr. Waight informed the Companies that each should:

> (i) quantify its claim, setting forth the basis on which the amount claimed has been calculated;
>
> (ii) cause Dunkeld and Hayward to withdraw their claims for compensation for the same shares and discontinue all arbitration and other proceedings to enforce such claims;
>
> (iii) as a pre-condition for the payment of compensation, indemnify and hold harmless the Government of Belize against all claims of Dunkeld, Hayward and any person arising out of or relating to the acquisition of the said shares by the Government; and
>
> (iv) unreservedly accept the constitutionality of the Acquisition Act and the Acquisition Order, as determined by the Supreme Court in Claim No. 874 of 2009 (British Caribbean Bank Ltd v. Attorney General at al) and Claim No. 1018 of 2009 (Dean Boyce vs Attorney General et al), and undertake not to impugn the said legislation in any other proceedings.[68]

142. On 9 November 2010, Courtenay Coye LLP replied to Mr. Waight on behalf of the Companies, asking the Government "to urgently make an appropriate offer and to provide a copy of the 'expert assessment' and all information upon which it is based," reflecting the Companies' belief that "the Government is in a far better position to provide the 'facts and figures' which are needed to compensate our client."[69]

143. On 8 December 2010, Mr. Waight replied to Courtenay Coye LLP's letter of 9 November, stating that the Government had "determined that a reasonable compensation for the acquisition of your Client's shareholding in Telemedia would be BZ$1.46 per share." The total compensation offered to each entity was:

(a) to BCB Holdings, BZ$1,802,894.14;

(b) to Thiermon Limited, BZ$18,814,960.14;

(c) to Ecom Limited, BZ$22,160,592.48;

(d) to New Horizons Inc., BZ$30,048.26; and

(e) to Mercury Communications Limited, BZ$6,987,895.80.

144. The Government placed a number of pre-conditions on these offers of compensation, namely that "your Client should arrange with Dunkeld and Hayward that they withdraw their claims for compensation for the same shares, and discontinue all arbitral and other proceedings to enforce such claims." Another pre-condition was that the entities "must indemnify and hold harmless the

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68 Letters from Mr. Joseph Waight to Courtenay Coye LLP (26 August 2010)(**Exhibit C-120**).

69 Letters from Courtenay Coye LLP (9 November 2010)(**Exhibit C-131**).

Government of Belize against all claims of Dunkeld, Hayward or any other person, arising out of or relating to the acquisition of the said shares by the Government [. . .]." The offers were made on the additional pre-condition that the entities "unreservedly accept the constitutionality of the Acquisition Act and the Acquisition Order, as determined by the Supreme Court [. . .]." The Government also pre-conditioned that "any arrears of taxes, duties, charges or other sums which are due or payable to the Government from your Client would be deducted from the amount of compensation," and it required the entities to "releas[e] the Government from all further liability in respect of its acquisition of the said shares [. . .]."[70]

145. On 4 December 2009, Dunkeld commenced this arbitration, initiating a sequence of litigation that will be discussed subsequently (see paragraphs 165-181 below).

146. On 20 December 2010, Courtenay Coye LLP wrote to Mr. Waight, rejecting the offers of 8 December 2010. In the letter,[71] Courtenay Coye pointed out that the valuation of BZ$1.46 per share was not consistent with the price of BZ$5.00 per share that, in 15 September 2010, the Government had offered to the public in a prospectus.[72] Courtenay Coye also observed that Prime Minister Barrow had publicly stated that even that price was below market.[73]

Courtenay Coye LLP closed its letter by asking the Government to justify the valuation of BZ$1.46, offering to exchange Dunkeld's expert report on valuation for the Government's expert report "in order that the respective positions can be more properly considered."[74] According to the Claimant, the Government did not respond to this offer.[75]

J. THE CONSTITUTIONAL CHALLENGE TO THE 2009 ACT AND 2009 ORDERS

147. In parallel with the Companies' efforts to secure compensation, British Caribbean Bank—whose loans to Telemedia and Sunshine had been the subject of the 2009 Order, as well as the *Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order, 2009* of 4 December 2009 (the "**2009 Amendment Order**" and together with the 2009

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70 Letters from Mr. Joseph Waight to Courtenay Coye LLP (8 December 2010)(**Exhibit C-133**).

71 Letter from Courtenay Coye LLP to the Financial Secretary re claim for compensation, 20 December 2010 (**Exhibit C-136**).

72 Offer for Sale of Ordinary Shares (15 September 2010)(**Exhibit C-125**).

73 Letter from Courtenay Coye LLP to the Financial Secretary re claim for compensation, 20 December 2010 (**Exhibit C-136**); *see also* Channel5Belize.com, "Telemedia Shares Go on Sale" (15 October 2010)(**Exhibit C-127**), *quoting* Prime Minister Barrow.

74 Letter from Courtenay Coye LLP to Mr. Joseph Waight (20 December 2010)(**Exhibit C-136**).

75 Witness Statement of Angela Entwistle, para. 67 (28 February 2014).

Order, the "**2009 Orders**")—began a constitutional challenge to the 2009 Act and 2009 Orders on 21 October 2009. On 8 December 2009, Mr Dean Boyce brought a similar claim in respect of his share in Sunshine and corresponding interest in Sunshine's holding of Telemedia shares (together with BCB's claim, the "**First Constitutional Challenge**").

148. On 30 July 2010, the Supreme Court of Belize dismissed both claims and ordered the Financial Secretary "to comply with section 65(1) of the Belize Telecommunications Act as amended."[76] BCB appealed this decision on 25 August 2010.

149. On 24 June 2011, the Belize Court of Appeal ruled on the First Constitutional Challenge by BCB. The Court of Appeal's judgment reasoned in relevant part as follows:

> **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.

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[76] *British Caribbean Bank Ltd. v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Claim No. 874 of 2009); *Dean C. Boyce v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Claim No. 1018 of 2009), Judgment (Supreme Court of Belize, 30 July 2010)(**Exhibit C-118**).

> **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?**
>
> [. . .]
>
> [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.[77]

150. Following the judgment of the Court of Appeal, the earlier Board of Telemedia attempted to re-assume control of the company. According to the testimony of Mr. Boyce, Chairman of the Executive Committee of the Board of Directors of Telemedia, "We were able to freely enter the Telemedia premises. The reinstated Board of Directors held a meeting in the boardroom at the

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[77] *British Caribbean Bank Ltd. v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Civil Appeal No. 30); *Dean C. Boyce v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Civil Appeal No. 31), Judgment (Court of Appeal of Belize, 24 June 2011)(**Exhibit C-151**).

corporate headquarters at St Thomas Street on that day."[78] Things quickly changed, as Mr. Boyce testified:

> However, this attempt at an orderly transition of power was impeded by the actions of the Government later that night. At around 11pm, I received a call informing me that there were armed police at the Telemedia premises and that members of the "interim" board of directors (i.e. the board of the Government-controlled Telemedia) may possibly be on the property. I was concerned that there was a danger that Telemedia property and records may be destroyed or removed by members of the interim board and I contacted my lawyer. We arranged to meet at the Telemedia premises and we arrived there just before midnight. We attempted to enter the Telemedia premises but we were prevented from doing so by police.[79]

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.
>
> [. . .]
>
> Finally, the Government of Belize thanks the Belizean people for what Government is certain will be the continuing solidarity with, and support for, the entirely just and necessary struggle against Billionaire arrogance and disrespect for national pride and national sovereignty.[80]

K. THE RE-ACQUISITION OF TELEMEDIA

151. On 4 July 2011, ten days after the judgment of the Court of Appeal**,** the National Assembly of Belize passed the *Belize Telecommunications (Amendment) Act, 2011* (the "**2011 Act**").[81] 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.

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78 First Witness Statement of Dean C. Boyce, paras. 126 (28 February 2014).

79 First Witness Statement of Dean C. Boyce, paras. 126, 128 (28 February 2014).

80 Government of Belize Press Release on the Court of Appeal decision regarding Belize Telemedia Ltd. (25 June 2011)(**Exhibit C-153**).

81 Belize Telecommunications (Amendment) Act, 2011 (**Exhibit C-157**).

152. 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 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;[82]

153. The 2011 Order 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 purposes aforesaid." The First Schedule to the 2011 Order listed the same property as the schedules to the 2009 Order and 2009 Amendment Order.

154. 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:-
>
> "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 percent) 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.

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[82] Belize Telecommunication (Assumption of Control over Belize Telemedia Limited) Order, 2011 (**Exhibit C-158**).

144. (1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 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 percent 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.[83]

L. CIRCUMSTANCES OF THE RE-ACQUISITION OF TELEMEDIA

155. 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.

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83 Belize Constitution (Eighth Amendment) Act, 2011 (**Exhibit C-168**).

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.

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.[84]

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[84] Prime Minister's comments when introducing the 2011 Act to the National Legislature, 29 July 2011 (**Exhibit C-160**).

M. THE COMPANIES' RENEWED CLAIMS FOR COMPENSATION

156. Following the re-aquisition of Telemedia in 2011, the Government again offered compensation to Dunkeld. On 5 July 2011, Mr. Waight issued a Notice of Acquisition. This notice required parties with claims to compensation for property acquired by the Government to submit those quantified claims by 31 August 2011.[85]

157. BCB Holdings, Ecom Limited, Mercury Communications Limited, New Horizons Inc., and Thiermon Limited all filed claims. The claims were based on a valuation of BZ$10.23 per share, a valuation determined by PricewaterhouseCoopers LLP in its report of 17 December 2010.[86] The claims submitted by each company were as follows:

(a) For BCB Holdings, which held 1,234,859 shares in Telemedia: BZ$12,632,607.57 plus accrued interest from 25 August 2009 to the date of any award;[87]

(b) For Ecom Limited, which held 15,178,488 shares in Telemedia: BZ$155,275,932.24 plus accrued interest from 25 August 2009 to the date of any award;[88]

(c) For Mercury Communications Limited, which held 4,786,230 shares in Telemedia: BZ$48,963,132.90 plus accrued interest from 25 August 2009 to the date of any award;[89]

(d) For New Horizons Inc., which held 20,581 shares in Telemedia: BZ$210,543.63 plus accrued interest from 25 August 2009 to the date of any award;[90] and

(e) For Thiermon Limited, which held 12,886,959 shares in Telemedia: BZ$131,833,590.57 plus accrued interest from 25 August 2009 to the date of any award.[91]

158. On 12 October 2011, the Government made offers of compensation to the Companies.[92] The Government again based its offers on a valuation of BZ$1.46 per share, a figure that the

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85 Notice of Acquisition (5 July 2011)(**Exhibit R-62**).

86 Expert Report of Alastair Macpherson (17 December 2010)(**Exhibit R-68**).

87 Notice of Claim for Compensation, BCB Holdings (30 August 2011)(**Exhibit R-63**).

88 Notice of Claim for Compensation, Ecom Limited (30 August 2011)(**Exhibit R-64**).

89 Notice of Claim for Compensation, Mercury Communications Limited (30 August 2011)(**Exhibit R-65**).

90 Notice of Claim for Compensation, New Horizons Inc. (30 August 2011)(**Exhibit R-66**).

91 Notice of Claim for Compensation, Thiermon Limited (30 August 2011)(**Exhibit R-67**).

92 BCB Holdings Ltd. Offer of Compensation (12 October 2011)(**Exhibit R-69**); Ecom Limited Offer of Compensation (12 October 2011)(**Exhibit R-70**); Mercury Communications Limited Offer of Compensation (12 October 2011)(**Exhibit R-71**); New Horizons Inc. Offer of Compensation (12 October 2011)(**Exhibit R-72**); Thiermon Limited Offer of Compensation (12 October 2011)(**Exhibit R-73**).

Government noted was "supported by" the Fair Market Valuation Report prepared by NERA Economic Consulting of London.[93] In each offer, the Government required as pre-conditions that each entity "should arrange with Dunkeld and Hayward that they withdraw their claims for compensation for the same shares, and discontinue all arbitral and other proceedings to enforce such claims" and that each entity "must indemnify and hold harmless the Government of Belize against all claims of Dunkeld, Hayward or any other person, arising out of or relating to the acquisition of the said shares by the Government [. . .]." Another precondition required that "any arrears of taxes, duties, charges or other sums which are due or payable to the Government from your client would be deducted from the amount of compensation," and a final precondition compelled the entities to "releas[e] the Government from all further liability in respect of its acquisition of the said shares [. . .]." The Government's offers of compensation were identical to its previous offers of 8 December 2010.[94]

159. In 2011 and 2012, the Parties exchanged a series of letters in which each Party disputed the valuation relied on by the other Party.[95]

160. On 15 January 2013, the Government made another offer to the Dunkeld entities, again basing the offer on a valuation of BZ$1.46 per share.[96] On 30 January 2013, Courtenay Coye LLP responded on behalf of the entities, stating that the Government's offer was significantly lower than PricewaterhouseCooper's valuation of $10.23 per share. Courtenay Coye LLP noted that the Dunkeld entities would only accept such an offer subject to ten conditions, which included the condition that acceptance of the offers would be "without prejudice to the rights of the shareholders to seek full compensation for the acquisition of their shares in Telemedia," as well as the condition that the offers would "not constitute a full discharge for the liability of the Government to the shareholders."[97]

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93 NERA Economic Consulting, Fair Market Value Assessment of Telemedia (December 2010)(**Exhibit C-132**).

94 *See, e.g.*, Offer of Compensation to BCB Holdings (12 October 2011)(**Exhibit R-69**).

95 *See generally* Letters from Courtenay Coye LLP to the Financial Secretary re offer of compensation (20 December 2011)(**Exhibit C-170**); Letters from the Financial Secretary to Courtenay Coye LLP re claim for compensation (29 December 2011)(**Exhibit C-171**); Letter from Courtenay Coye LLP to the Financial Secretary re offer of compensation (3 February 2012)(**Exhibit C-174**); Letter from the Financial Secretary to Courtenay Coye LLP re offer of compensation (5 March 2012)(**Exhibit C-178**).

96 Letter from Barrow and Co. LLP to Courtenay Coye LLP (15 January 2013)(**Exhibit C-194**).

97 Letter from Courtenay Coye LLP to Barrow and Co. LLP (30 January 2013)(**Exhibit C-195**).

N. THE CONSTITUTIONAL CHALLENGE TO THE 2011 ACT AND 2011 ORDERS

161. Following the adoption of the 2011 Act and 2011 Order, on 24 September 2011, BCB began a challenge to the constitutionality of the 2011 Act and 2011 Order in the Supreme Court of Belize. Mr. Dean Boyce began a similar challenge on 13 October 2011 (together with BCB's claim, the "**Second Constitutional Challenge**").[98] On 15 and 16 November 2011, after the passage of the Eighth Amendment, BCB and Mr. Boyce both amended their claims to include a challenge to the constitutionality of the Eighth Amendment.[99]

162. 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.
> 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.

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98 *(1) Dean Boyce and (2) Trustees of the BTL Employee Trust v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities, Information and Broadcasting*, Claim No. 646 of 2011, Fixed Date Claim Form (Supreme Court of Belize, 13 October 2011)(**Exhibit C-167**).

99 *(1) Dean Boyce and (2) Trustees of the BTL Employee Trust v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities, Information and Broadcasting*, Claim No. 646 of 2011, Amended Fixed Date Claim Form (Supreme Court of Belize, 15 November 2011)(**Exhibit C-169**).

> 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 1st 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.[100]

Both the applicants and the Government appealed to the Belize Court of Appeal in relation to portions of the judgment of 11 June 2012.

163. On 15 May 2014, the Court of Appeal allowed in part the Respondent's appeal in the Second Constitutional Challenge.[101] 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:
>
> (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');

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100 *British Caribbean Bank Ltd. v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Claim No. 597 of 2011); *(1) Dean Boyce and (2) Trustees of the BTL Employee Trust v. (1) The Attorney General of Belize and (2) The Minister of Public Utilities* (Claim No. 646 of 2011), Judgment, para. 85 (Supreme Court of Belize, 30 July 2010)(**Exhibit C-179**).

101 *(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 (Court of Appeal of Belize, 15 May 2014)(**Exhibit R-97**).

(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.[102]

164. 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.

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102 *Ibid*. at paras. 3-4.

> 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.[103]

O. LEGAL ACTIONS RELATING TO THESE ARBITRAL PROCEEDINGS

165. Following Dunkeld's initiation of these proceedings, the Prime Minister of Belize discussed the Notice of Arbitration in an interview on 9 December 2009 with a Belizean news agency in the following terms:

> That's all under the Belize UK Investment Treaty. That's the last, that's their last stand in so far as the litigation front are concerned. I don't want for people to get discouraged or to get excited where they put out press releases saying they are going to arbitration under the bilateral investment treaty. That is their right, there is a treaty.
>
> It will cost us because we are going to be represented but in terms of the result of those efforts, I am not worried. The investment protection treaty makes clear that people are entitled to remedies. Investors who have their properties taken away, if that property is taken away in consequence of an expropriation as opposed to a nationalization that is done for a public purpose and that provides for the payment of compensation. We made sure that we nationalized in the public interest and we made sure we provided for the payment for compensation.[104]

166. On 23 December 2009, the Government commenced proceedings in the Belize Supreme Court, seeking an injunction that would prevent Dunkeld and nine persons named as trustees of Hayward from proceeding with arbitration.[105]

167. On 29 December 2009, the Supreme Court of Belize issued the following *ex parte* interim injunction:

> [. . .]
>
> IT IS ORDERED THAT:
>
> 1. The 1st to the 9th Defendants, as Trustees of the Hayward Charitable Belize Trust, and the 10th Defendant, Dunkeld International Investment Ltd., whether by themselves or by their officers, servants, agents, subsidiaries, assignees, or other persons and bodies under their control, are hereby restrained until further order from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the 10th Defendant, Dunkeld International Investment Ltd., by Notice of Arbitration dated 4 December, 2009, under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 and the 1982 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, arising out of or relating to the acquisition of certain property by the Government of Belize under the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2009 (S.I. No. 104 of 2009), as amended by

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103 *Ibid*. at paras. 295-296.

104 Interview, "PM Barrow Plans to Chase Ashcroft out of Town," 7 News Belize (9 December 2009)(**Exhibit C-81**).

105 *Attorney General of Belize v. Jose Alpuche, et al*., Claim No. 1042 of 2009, Fixed Date Claim Form (Supreme Court of Belize, 29 December 2009)(**Exhibit C-85**).

> the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) (Amendment) Order, 2009 (S.I. No. 130 of 2009). [106]
>
> [. . .]

168. After a hearing on 26 and 27 January 2010, [107] the Supreme Court of Belize extended the interim injunction, now the Dunkeld I Injunction,[108] and on 10 February 2010, the Dunkeld I Injunction was perfected, restraining Dunkeld –

> from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the 10th Defendant, Dunkeld International Investment Ltd., by Notice of Arbitration dated 4 December, 2009, [. . .] arising out of or relating to the acquisition of certain property by the Government of Belize under the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2009 (S.I. No. 104 of 2009), as amended by the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) (Amendment) Order, 2009 (S.I. No. 130 of 2009).[109]

The Dunkeld I Injunction was to last until the Government's claims were determined.

169. On 1 April 2010, the Government enacted the Supreme Court of Judicature (Amendment) Act of 2010 ("**SCJA Act**"), which added the following provisions to the section of the Supreme Court of Judicature Act concerned with contempt of court:

> 106A. (1) Notwithstanding any other law or rule of practice to the contrary but without prejudice to the power of Court to punish for contempt in accordance with Part 53 of the Supreme Court (Civil Procedure) Rules 2005 by way of committal and seizure of assets, every person, whether in Belize or elsewhere, who disobeys or fails to comply with an injunction, or an order in the nature of an injunction, issued by the Court (whether such injunction was issued before or after the commencement of this Act), shall be guilty of an offence and shall be punished in accordance with the Summary Procedure of the Court, and in every such case, any rule of court relating to the unlimited jurisdiction of the Court shall apply.
>
> (2) A complaint for an offence under subsection (1) above may be laid by the Attorney General or the aggrieved party or a police officer not below the rank of Inspector.
>
> (3) A person guilty of an offence under subsection (1) above shall be punished on conviction—
>
> (i) in the case of a natural person, with a fine which shall not be less than fifty thousand dollars but which may extend to two hundred and fifty thousand dollars, or with imprisonment for a term which shall not be less than five years but which may extend to ten years, or with both such fine and term of imprisonment, and, in the case of a continuing offence, with an additional fine of one hundred thousand dollars for each day the offence continues;

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106 *Attorney General of Belize v. Jose Alpuche, et al.*, Claim No. 1042 of 2009, Order (Supreme Court of Belize, 29 December 2009)(**Exhibit C-86**).

107 *Attorney General of Belize v. Jose Alpuche, et al.*, Claim No. 1042 of 2009, Notes of Proceedings (Supreme Court of Belize, 26-27 January 2010)(**Exhibit C-100).**

108 *Attorney General of Belize v. Jose Alpuche, et al.*, Claim No. 1042 of 2009, Decision (Supreme Court of Belize, 5 February 2010)(**Exhibit C-94**).

109 *Attorney General of Belize v. Jose Alpuche, et al.*, Claim No. 1042 of 2009, Order (Supreme Court of Belize, 10 February 2010)(**Exhibit C-95**).

(ii) in the case of a legal person or other entity (whether corporate or unincorporate), with a fine which shall not be less than one hundred thousand dollars but which may extend to five hundred thousand dollars, and in the case of a continuing offence, with an additional fine of three hundred thousand dollars for each day the offence continues.

(4) Every person, whether in Belize or elsewhere, who—

(a) directly or indirectly, instigates, commands, counsels, procures, solicits, advises or in any manner whatsoever aids, facilitates, or encourages the commission of an offence under subsection (1) above; or

(b) knowing that an injunction has been issued by the Court, does any act the effect of which would be to disregard such injunction, whether such injunction was issued before or after the commencement of this Act,

shall be guilty of abetting the said offence and shall be punished in like manner as if he had committed that offence, and the penalties prescribed in subsection (3) above shall accordingly apply.

(5) Where an offence under this section is committed by a body of persons, whether corporate or unincorporate, every person who, at the time of the commission of the offence, acted in an official capacity for or on behalf of such body of persons, whether as shareholder, partner, director, manager, advisor, secretary or other similar officer, or was purporting to act in any such capacity, shall be guilty of that offence and punished accordingly, unless he adduces evidence to show that the offence was committed without his knowledge, consent or connivance.

(6) Notwithstanding anything to the contrary contained in any other law, the offences created by this section shall be investigated, tried, judged and punished by the Court regardless of whether the offences occurred in Belize or in any other territorial jurisdiction, or whether or not the offender was present in Belize or elsewhere, but without prejudice to extradition, where applicable, in accordance with law.

(7) For the avoidance of doubt, it is hereby declared that this section shall have effect regardless of whether the injunction referred to in this section was issued before or after the commencement of this Act.

(8) Without prejudice to the generality of the foregoing provisions, the Court shall have jurisdiction—

(i) to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings (whether sited in Belize or abroad), or an injunction against a party restraining it from commencing or continuing any proceedings for enforcement of an arbitral award (whether in Belize or abroad), where it is shown (in either case) that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process;

(ii) to void and vacate an award made by an arbitral tribunal (whether in Belize or abroad), in disregard of or contrary to any such injunction. [110]

(9) In addition to the modes of service prescribed in the Supreme Court (Civil Procedure) Rules 2005, notice of an injunction issued by the Court, or of an application for such injunction, or of any order associated therewith (whether such injunction or order was issued before or after the commencement of this Act), may be served by registered post, fax, courier service or a notice in the Belize Gazette (as may be appropriate in the circumstances of each case), regardless of whether the person against whom the injunction or order was issued or against whom the application for such injunction or order was made, be present or resident within or outside Belize, and for this purpose, no leave of the Court for serving the injunction, notice or order, as the case may be, outside Belize

[110] Supreme Court of Judicature (Amendment) Act (1 April 2010)(**Exhibit C-104**).

> shall be required notwithstanding anything to the contrary contained in any other law or rule of practice.
>
> (10) Where an offence created by this section was committed outside Belize, the information and complaint for such offence shall be laid in the Central District of the Supreme Court.
>
> (11) A person charged with an offence under this section may be tried in his absence if the Court is satisfied that such person was given at least 21 days notice of the charge and the date, time and place of the trial and that he had a reasonable opportunity of appearing before the Court but had failed to do so.
>
> (12) The notice referred to in subsection (11) above may be served personally, or by registered post, or by a notice in the Belize Gazette, as may be appropriate in the circumstances of each case.
>
> [. . .]

1. The Constitutional Challenge to the SCJA Act

170. On 16 April 2010, seven individuals—Mr. Phillip Zuniga, Mr. Dean Boyce, Mr. Keith Arnold, Lord Michael Ashcroft, Mr. Jose Alpuche, Mr. Phillip Osborne, and Mr. Ediberto Tesucum—initiated a challenge to the SCJA on the grounds that it was incompatible with the Constitution of Belize. On 23 April 2010, these individuals were joined as interested parties by the following individuals and entities: BCB Holdings Limited, The Belize Bank Limited, Mr. Phillip Johnson, Mr. Ken Robinson, Thanet Financial Services Limited, The Lawn at Westgate Limited, Jacdaw Investments Limited, Mr. Shaun Breeze, Mr. David Hammond, Mr. John Lambie, and Mr. Paul Biffen.[111]

171. On 22 December 2010, Justice Sir John Muria of the Supreme Court of Belize issued a judgment upholding in part and striking down in part the SCJA Act. That judgment reasoned in relevant part as follows:

> 60. I now tum to subsection (8). This provision in my view stands on a different footing than the rest of the provisions of section 106A. The subsection starts with the words, *"Without prejudice to the generality of the foregoing provisions"* and then proceeds to deal with arbitrations and arbitration proceedings both in Belize and abroad. The provision then confers power on the Court to issue injunction against a party or arbitrators from commencing or continuing arbitration proceedings or the enforcement of those arbitration proceedings. The provision also gives power to the Court to void and vacate an award made by arbitral tribunal, in Belize or abroad.
>
> 61. It is here that I must respectfully accept the submissions by Mr. Fitzgerald Q.C. and Lord Goldsmith Q.C. on the issues of *in personam* criminal legislation and improper purpose. Whilst the other provisions of the Amendment Act can be regarded as general in nature, subsection (8) cannot be so viewed. That provision is clearly directed at particular individual or group of individuals and specific types of existing proceedings, namely arbitration. This is a violation of the principle of separation of powers inherent in the Constitution of Belize. [. . .]
>
> [. . .]

---

111 *See Phillip Zuniga et al v. Attorney General*, Civil Appeal Nos. 7, 9 & 10 of 2011, Judgment, para. 4 (Court of Appeal of Belize, 3 August 2012)(**Exhibit C-183**).

> 67. In my judgment, subsection (8) of section 106A constitutes an impermissible *in personam* provision and passed for an improper purpose thereby violating the principle of separation of power under the Constitution. I find and hold that subsection (8) of section 106A is ultra vires the Constitution and ought to be struck down.
>
> 68. I come next to subsection (9) which provides for the modes of service of notice of injunction issued by the Court or of an application for an injunction. It will be observed that this provision links closely with subsection (8) which had already been considered above. When one looks at the modes of service of notice of injunction issued or applied for under subsection (8), the requirements of proper service are woefully inadequate. No time has been specified within which service is to be effected whether by registered post, fax, courier service or notice in the Belize Gazette and whether the person to be served is within Belize or abroad. It is also notable that the requirement of personal service on a person within the jurisdiction is omitted and no grounds have been given for effecting service on a person abroad by fax, courier service or notice in Belize Gazette.
>
> 69. Despite the circumstances recognized by the Civil Procedure Rules to be met when effecting service on a person out of the jurisdiction, subsection (9) simply does not permit any such procedure. I agree with Lord Goldsmith Q.C. that this is wholly unreasonable and contravenes the rights to fair hearing and right to access to the courts under section 6 of the Constitution. Accordingly it must be struck down as being ultra vires the Constitution.
>
> [. . .]
>
> 73. I shall now deal with subsection (12). The sting in this provision is not the length of notice but rather in the discretionary manner of giving notice to the offender. This provision in my view is plainly contrary to section 6 of the Constitution in that whereas section 6 of the Constitution makes it mandatory that adequate notice shall be given to an offender, whether he attends Court or not, of the charge, time and place, the obligation under this subsection to notify the offender of the charge, time and place of trial is discretionary. The service on an offender who lives abroad through publication in the Belize Gazette or even someone in the rural Belize can hardly be classified as adequate notice for the purpose the rights of an accused guaranteed under Section 6 of the Constitution. Subsection (12) is ultra vires the Constitution and should be struck down.
>
> **Conclusion**
>
> 74. Having anxiously considered the submissions on behalf of the parties in the circumstances of this case and for the reasons stated in this judgment, I make the following declarations:
>
> 1. I declare that the Supreme Court of Judicature (Amendment) Act 2010 is valid save for the following provisions subsections (8), (9) and (12) of Section 106A.
>
> 2. I declare that subsections (8), (9) and (12) of Section 106A of the Supreme Court of Judicature (Amendment) Act are ultra vires the Constitution and are herby struck down.
>
> 3. Each party to bear its own costs of these proceedings.[112]

Both the applicants and the Government appealed portions of Justice Muria's decision to the Court of Appeal.

172. On 3 August 2012, the Court of Appeal issued a judgment in which it reversed the Supreme Court with respect to sub-sections 8 and 9 of the SCJA Act, but found instead that sub-sections 3 and 5

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112 *Phillip Zuniga et al v. The Attorney General of Belize*, Claim No. 274 of 2010, Judgment (Supreme Court of Belize, 22 December 2010)(**Exhibit C-137**).

were incompatible with the Constitution. The Court of Appeal further found that the majority of the Act could not be severed from the invalid provisions. Judge Mendes, writing for a unanimous bench, reasoned in relevant part as follows:

> **Improper Purposes**
>
> 61. The evidence does indicate quite clearly that in proposing the Amendment Bill to Parliament, the Government of Belize had Dunkeld and the appellants within its sights. The Government had obtained an injunction against Dunkeld and the appellants, which Dunkeld proceeded to ignore. The Government's case was that the appellants were influential in Dunkeld's decision to take the dispute over the expropriation of its assets to arbitration. The Prime Minister stated publicly at a later date that it was the acts of Dunkeld and the appellants which prompted this legislation. Around that time as well, BSDL was in violation of an injunction prohibiting the taking or continuing of arbitration proceedings, BCBL was threatening arbitration under the Treaty, which, consistent with its actions in relation to Dunkeld, the Government was likely to take action to stop, and both BCB Holdings and the Belize Bank had obtained substantial arbitration awards which they were seeking to enforce.
>
> [. . .]
>
> 63. It might therefore be correct to characterize the Amendment Act as having been passed with the appellants and the interested parties in mind, with the intention of tipping the scales in favour of the Government in its disputes with persons who might enjoy the contractual or treaty right to arbitrate such disputes, and with the intention of deterring such persons from breaching any anti-arbitration injunction the Government might obtain, but it might be a bit of an exaggeration to say that the intention was to intimidate or deter such person from exercising their rights at all.
>
> 64. On the other hand, the Act is not expressed to apply to specific individuals, or to specific arbitrations, or to be applicable to any pending criminal or other proceedings. It is expressed in terms of general application. It is also common ground that the new offence of disobedience to a court order and the power to invalidate an arbitral award made in disregard of or contrary to an injunction issued under section 106A(8), do not apply to breaches occurring before the Act came into force, even though an offence against section 106A(1) may be committed in relation to an order issued before then. On the face of it, therefore, the new offence created applies to anyone and any order without restriction and is not limited to the breach of anti-arbitration injunctions or to the appellants or the interested parties or their associates or persons in similar positions to them.
>
> 65. Similarly, the power to issue anti-arbitration injunction applies to all arbitrations, whether in Belize or abroad, and whether pursued by the appellants, the interested parties or whomsoever. As such, the Government of Belize has armed itself with the wherewithal to stymie any arbitration, whether already commenced or to be commenced in the future, by applying for an anti-arbitration injunction, to initiate proceedings to punish disobedience of any order made restraining the pursuit or continuation of any such arbitration, and to apply to the Court to vacate or void any award made in violation of such order.
>
> [. . .]
>
> 78. Stripped to its essence, the appellants and the interested parties' real complaint is that it is unfair for the Government of Belize to use its control over the National Assembly to pass a law to provide it with additional tools to resist the submission of claims against it to international arbitration and the enforcement of any awards obtained in violation of anti-arbitration injunction. This is probably why they have cast their respective cases on the basis of an exercise of legislative power for an improper purpose. I have already said why I do not think that ground is sustainable. The consolation is that any advantage which the government may seek to obtain for itself through its influence in the legislature can only be achieved if the fundamental rights and freedoms and the fundamental principles on which the Constitution is based are complied with.
>
> 79. In the result, I would reject this ground of appeal and allow the cross-appeal against the trial judge's order declaring section 106(8) to be unconstitutional.

[. . .]

Separation of Powers – Selection of Sentence

89. [. . .] Where the police decide to prosecute under section 106A instead of section 269, therefore, there will inevitably be more of a selection of the penalty to be imposed on the particular defendant, than an attempt to match the seriousness of the conduct of the accused with the appropriate offence. The selection which the police are allowed to make by section 106A(8)(2) therefore amounts more to the exercise of a sentencing function than the exercise of prosecutorial discretion. For this reason, the separation of powers doctrine is infringed.

90. [. . .] in this case, it is section 106A(3) which creates the vice of permitting the executive to select the sentence to be imposed by mandating the Supreme Court to impose the minimum penalties provided for. It is this section which must accordingly be declared invalid.

Mandatory Penalty – An inhuman or degrading punishment

[. . .]

105. A BZ$50,000.00 fine would probably cripple thousands of Belizeans who do not earn close to that much on an annual basis. It is accordingly not hard to imagine a number of realistic situations where such a fine would cause disproportionate hardship on the average Belizean who, for good cause falling short of the requirements needed to establish say the common law defence of necessity, breaches an injunction but does not fall within the 'extenuating circumstances' category because of a previous conviction for an offence, however minor and however aged. The example of defiance exemplified by the conduct of Dunkeld and BSDL is therefore probably not representative of commonly imaginable instances of the offence. Indeed, it is no doubt precisely because it was not difficult to conceive of many situations where the average Belizean citizen or business might be financially destroyed by the minimum fine that it was thought necessary to create the 'extenuating circumstances' category which as it turns out appears to be too narrowly drawn. The 'extenuating circumstances' category is accordingly evidence itself of the harshness of the fixed penalties which the Supreme Court is mandated to impose.

[. . .]

107. But assuming that existing penalties are insufficient to induce compliance, no reason has been given as to why the simple expedient of increasing the maximum penalties which could be imposed and leaving it to the Court to select the penalty which fits the circumstances of the case would not have done just as well. Indeed, so great is the impulse to deter that an offender who might be financially destroyed by a minimum penalty of BZ$50,000.00 and who, though knowingly disobeying an order, can show that he was ignorant of the consequences of his action, would nevertheless be subjected to the BZ$50,000.00 minimum penalty because he had been convicted fifteen years ago of a traffic offence. But for that conviction, he would have fallen into the 'extenuating circumstances' category and been subject to the much lower minimum fine of only BZ$5,000.00. Members of society would undoubtedly be outraged by such a result and would view the vast disparity in such sentences, based upon an inconsequential differentiating factor, as wholly arbitrary.

108. I am therefore of the view that the mandatory penalties imposed by section 106A(3) are grossly disproportionate and so infringe section 7 of the Constitution.

[. . .]

The Right to Property

[. . .]

128. In my judgment therefore section 106A(8) does not infringe the right to property.

Taking stock

129. Thus far, I have found section 106A(3) to be inconsistent with the separation of powers doctrine and section 7 of the Constitution. Section 106A(3) imposes a mandatory penalty for the offence created by section 106A(1). It is clear that section 106A(3) is an important part of the scheme enacted by section 106A. If it falls, it follows that section 106A(1) and all other provisions connected with it would have to be declared invalid as well. That would leave only subsections (8) and (9) which can stand separate and apart from the criminal offence and its satellite provisions. Apart from subsection (9), therefore, which the trial judge struck down as violating the right to a fair hearing and the right of access to the court, it is strictly unnecessary to consider the separate challenges made to the other subsections. [. . .]

Reverse Burden

[. . .]

145. By virtue of section 106A(5) a person who was acting in an official capacity for or on behalf of a body of persons, whether corporate or incorporate, at the time that body committed the offence under section 106A(1) of knowingly disobeying or failing to comply with an injunction, is deemed to be guilty of the offence, unless he or she adduces evidence to show that the offence was committed without his or her knowledge, consent or connivance. As such, in order to establish criminal liability under subsection (5), the prosecution need prove only that the corporate or incorporate body has committed the offence and that the accused was acting or purporting to act in an official capacity at the time the offence was committed. The official capacity in which the person was acting may be either as a shareholder, director, manager, advisor, secretary or other similar officer, but is not limited to these categories, albeit they are collectively quite wide. What the prosecution must prove is that the accused was acting in an official capacity on behalf of the body at the time the offence was committed, whatever may be the designation of the post held. On the other hand, it is not necessary to prove that the accused was acting or purporting to act on behalf of the body in the commission of the offence itself. Otherwise, there would be no need to create the presumption of guilt. Thus, once the prosecution establishes these two factors, the burden shifts to the accused to adduce evidence of lack of knowledge of, consent to or inconvenience in the commission of the offence. If he fails to satisfy the presiding judge on a balance of probabilities of the non-existence of all three he will be found guilty of the offence of knowingly disobeying or failing to comply with an injunction. He will be found guilty, therefore, of an offence which requires a mental element but which the prosecution is relieved of the duty of establishing beyond a reasonable doubt. There is no requirement that the prosecution prove either that the accused knew of the injunction or in any way advised or counseled or participated in the commission of the offence, even though it is patent that the mens rea of the offence is the most important element.

[. . .]

149. In the result, the possibility is created that a person whose only "offence" was holding an official position on behalf of a company at the time it knowingly disobeyed an injunction, is in jeopardy of being held criminally responsible for the company's criminal conduct. In large companies which employ a number of persons acting on its behalf in official capacities which do not include as part of the job description the company's compliance with court orders, a number of persons would potentially be exposed to criminal charges and the possibility of conviction for doing no more than representing their employer in circumstances where, as a matter of contractual obligation, they had no choice in the matter. Even worse, given that in order to escape criminal liability an unsuspecting official of the errant company must establish not merely that she did not consent to or connive at the commission of the act, but also had no knowledge that the offence was being committed, the possibility exists that an employee acting in an official capacity, or purporting to do so, may be guilty of the company's offence simply because she knew that the offence was being committed, even if she attempted to prevent its occurrence.

[. . .]

151. There is accordingly an unfair imbalance in what the prosecution must prove to establish the offence and what the accused must prove, albeit at a lower standard, to escape criminal liability.

> [. . .]
>
> 156. In light of the above, I am satisfied that the legislature has indeed taken insufficient account of the right to be presumed innocent. Section 106A(5) infringes the right guaranteed by section 6(5)(a) of the Constitution and is not saved by section 6(10)(a).
>
> **Notice – Trial *in absentia***
>
> [. . .]
>
> 161. In this case there is no provision deeming service to have been properly effected by the particular method of service which the claimant selects. Indeed, by providing for a choice of four methods "as may be appropriate in the circumstances of the case", subsection 9 anticipates the exercise by the presiding judge of his powers of superintendence over the method of service used to ensure that the defendant is indeed informed of the court proceedings or orders which might affect his interests. I am accordingly of the view that subsection 9 does not infringe the right to a fair hearing or to access to court.
>
> [. . .]
>
> 166. [. . .] subsections 11 and 12 do not infringe section 6 of the Constitution.
>
> [. . .]
>
> **Disposition**
>
> 168. In the result, I would issue the following orders:
>
> i) It is declared that section 106A(3) violates the separation of powers doctrine and section 7 of the Belize constitution;
>
> ii) It is declared that section 106A(5) violates section 6 of the Belize constitution;
>
> iii) It is declared that Section 106A(1)–(7), (10)–(13) and (16) are invalid null and void and of no effect.
>
> Given that both the appeals and the cross appeal have been successful, I would order further i) that the appellants and interested parties shall have 75% of their costs, here and in the court below, certified fit for three counsel (including a Queen's Counsel and a Senior Counsel); and ii) that the respondent shall have 75% of his costs of the cross-appeal, certified as fit for three counsel (including two Senior Counsel), all costs to be taxed, if not sooner agreed. This order as to costs shall stand unless application be made for a contrary order within 7 days of the date of delivery of this judgment, in which event the matter shall be decided by the Court on written submissions to be filed within 15 days from the said date.[113]

Both the applicants and the Government appealed portions of the Court of Appeal's decision to the CCJ.

173. On 24 January 2014, the CCJ issued a judgment in which it held that the offences created by the SCJA Act were valid, but struck down the provisions on mandatory minimum sentences. The majority opinion reasoned in relevant part as follows:

> **The ad hominem point**
>
> [. . .]
>
> [45] [. . .] The Court of Appeal was right to reject the challenge to the legislation on this ground.
>
> **The section 68 and improper purpose point**

[113] *Phillip Zuniga et al v. Attorney General*, Civil Appeal Nos. 7, 9 & 10 of 2011, Judgment (Court of Appeal of Belize, 3 August 2012)(**Exhibit C-183**).

[. . .]

[47] It is unnecessary to spend a great amount of time on this limb of the submission. Much of the wind was taken out of its sails by the intimations contained in the judgment of this Court in *British Caribbean Bank Ltd v The Attorney General of Belize.* These proceedings were pending at the time we delivered that judgment and we were aware then that an interpretation of sub-section 8 was an issue in this appeal. We were nevertheless prepared then to accept the Court of Appeal's view that, to the extent that sub-section 8 empowered the court to restrain a party from proceeding with foreign arbitration proceedings on the ground that such proceedings would be oppressive, vexatious, inequitable, or would constitute an abuse of the legal or arbitral process, the sub-section merely codified pre-existing law which had never been regarded as being in conflict with the Constitution. This Court ruled that it was only in exceptional cases that an anti-arbitration injunction would be granted. The ruling effectively allayed much of the anxiety of the challengers that the Act could operate to undermine or frustrate their on-going and/or anticipated international arbitration proceedings. We have heard nothing in these proceedings to lead us to differ from the Court of Appeal's view of sub-section 8. As to the remainder of sub-section 8, while we see nothing *unconstitutional* in it, it is immediately difficult to envisage a circumstance in which a court in Belize would be justified in issuing an injunction against *arbitrators* to restrain them from commencing or continuing arbitral proceedings in light of the well-known principle of *Kompetenz-Kompetenz*.

[. . .]

The discretion of the Attorney General point

[. . .]

[55] In any event, it must be borne in mind that section 106(A) extends the power to lay a criminal information not only to the Attorney-General, but also to an aggrieved party and the police. It is quite a leap to suggest that the exercise of this power amounts to the selection of a penalty. As Appendix I to the second Amendment Act makes clear, a person who lays or files a criminal information and complaint in the High Court bypasses the preliminary inquiry process and begins a proceeding between the Crown and the named defendant. The Director of Public Prosecutions is required by his office to conduct the case for the Crown. The Director is obliged to make an independent decision as to whether and how to proceed. In our view, it is difficult to see how the right to lay a criminal information, with which the DPP may or may not proceed, amounts to the selection of a choice of penalty by the Attorney-General, the citizen or police officer laying the information. In all the circumstances we respectfully disagree with the Court of Appeal's treatment of this point.

The mandatory minimum sentence point

[. . .]

[62] Ultimately, it is for judges, with their experience in sentencing, to assess whether a severe mandatory sentence is so disproportionate that it should be characterised as inhumane or degrading punishment. In this case the mandatory minimum fines of $50,000 plus a daily rate of $100,000 are well beyond the ability of the average Belizean to pay and so are grossly disproportionate. Equally, the imposition of a mandatory minimum fine of $50,000.00 or a sentence of imprisonment for at least a stretch of five years on anyone convicted of any of the offences in question (save those whose sentences fall within mitigating criteria fashioned not by the court but by Parliament) is grossly disproportionate. It bears no reasonable relation to the scale of penalties imposed by the Belize Criminal Code for far more serious offences and for that reason it is also arbitrary. In our view, the mandatory minimum sentences here should indeed be characterised as being grossly disproportionate, inhumane and therefore unconstitutional for contravening section 7 of the Constitution. Later in this judgment we shall consider the consequences of this finding.

The protection of the law point

[. . .]

The Reverse Burden of Proof

[. . .]

[73] [. . .] Ordinarily, in cases of contempt of court the prosecution has the burden of proving conscious, deliberate disobedience of a court order. But here, the sub-section is framed in a manner so as to relieve the prosecution of the onus of proving *mens rea* which is the vital element of the offence targeted by sub-section 5. Usually, section 6(10)(a) comes into play with reference to ―offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.47 Here, the accused does not have to show some positive exculpatory act on his part but rather is put in the unenviable position of having to establish a negative, namely that he did not consent to or connive at the disobedience to the injunction. If the sub-section is to be construed in a manner that widens the blanket of guilt beyond those captured by sub-section 4, it comes perilously close to legislating guilt by association. We agree with the Court of Appeal that the sub-section contravenes section 6(3)(a) of the Constitution and is therefore invalid.

Trial in Absentia

[. . .]

[76] The Court of Appeal rightly rejected this attempt to construe the Constitution in this tabulated manner. [. . .]

Service of Proceedings

[. . .]

[79] For the reasons given by the Court of Appeal we hold that there is no merit in the submission that sub-sections 9 and 12 contravene section 6(3) of the Constitution.

The right to property point

[. . .]

[81] [. . .] Here too, our agreement with the Court of Appeal's construction of the jurisdiction conferred on the court by sub-section 849 as not going beyond the existing law, substantially, if not completely, undercuts the premise upon which the argument on this point was made. As the Government concedes, in practice it would now be exceptional for a court to issue an anti-arbitration injunction. [. . .]

[. . .]

[84] [. . .] Empowering the court to exercise a power does not oblige the court to wield that power or to wield it in an indiscriminate fashion. There is nothing inherently unconstitutional in the court being given a power to restrain an abuse of the legal or arbitral process or to vacate awards. [. . .]

[85] As to the power to void and vacate awards, the challengers concede that the exercise of this power is entirely unobjectionable so far as concerns *Belizean* awards. We fully expect that the court would be astute to take into account, before resorting to the impugned powers conferred, all the matters raised above that point towards the need for judicial restraint in favour of permitting the arbitral tribunal itself to control the arbitral process.

The consequence of the findings of this Court

[86] Like the Court of Appeal, this Court has found that the mandatory minimum penalties prescribed in sub-section 3 and all of sub-section 5 (the reverse burden sub-section) are invalid. The question now is what consequence ensues from this finding. [. . .]

[. . .]

[100] In our view therefore, the legislation is constitutionally valid save for i) the mandatory minimum penalty regime contained in sub-section 3; ii) the proviso to section 3 and also sub-section 3(a), and iii) sub-section 5 in its entirety. It follows that the Court should sever these provisions from section 106(A). We accordingly dismiss the appeal of the Attorney General and the cross appeals of both the Zuniga and BCB Holdings groups. For the avoidance of doubt, sub-section 3 shall be read in the following manner with the original words of the statute, which by this judgment have been invalidated, struck through and the words read in placed in bold lettering:

(*3) A person guilty of an offence under subsection (1) above shall be punished on conviction –*

(i) in the case of a natural person, with a fine which ~~shall not be less than fifty thousand dollars but which~~ may extend to two hundred and fifty thousand dollars, or with imprisonment for a term which ~~shall not be less than five years but which~~ may extend to ten years, or with both such fine and term of imprisonment, and, in the case of a continuing offence, with an additional fine ***which may extend to*** *~~of~~ one hundred thousand dollars for each day the offence continues;*

(ii) in the case of a legal person or other entity (whether corporate or unincorporated), with a fine which ~~shall not be less than one hundred thousand dollars but which~~ may extend to five hundred thousand dollars, and in the case of a continuing offence, with an additional fine ***which may extend to*** *~~of~~ three hundred thousand dollars for each day the offence continues.*

~~Provided that where a natural person who is convicted of an offence under this section shows that the extenuating circumstances (as described in subsection 3a below) exist in his case, a court may, in lieu of imposing the penalties specified above, impose a fine of not less than five thousand dollars and not more than ten thousand dollars, and in default of payment of such fine, a term of imprisonment of not less than one year and not more than two years.~~

~~(3a) For the purpose of the Proviso to paragraph (i) of subsection (3) above, the expression "extenuating circumstances: means where –~~

~~(a) the convicted person has previously been a law abiding person and has no criminal record; and~~

~~(b) the offence was committed through sheer ignorance of the consequences of his conduct; and~~

~~(c) the imposition of full penalties prescribed in subsection (3) above would cause grave hardship to him and his family."~~

[. . .]

THE ORDERS OF THE COURT

The Court accordingly orders that:

1. Both the appeal of the Attorney General and the cross-appeals of the Zuniga and BCB Holdings groups respectively be dismissed;

2. Section 106(A)(3) of the Supreme Court of Judicature Act as contained in the Supreme Court of Judicature (Amendment) Act, 2010 as amended by the Supreme Court of Judicature (Amendment) (No. 2) Act, 2010 is inconsistent with the Constitution of Belize to the extent that it provides for mandatory minimum sentences;

3. By majority decision, the said mandatory minimum sentences be severed from section 106(A)(3);

4. By majority decision, the proviso to section 106(A)(3) and sub-section (3a) be severed from section 106(A)(3);

5. Section 106(A)(5) of the Supreme Court of Judicature Act as contained in the Supreme Court of Judicature (Amendment) Act, 2010 is inconsistent with the Constitution of Belize and the same be invalidated in its entirety;

6. The Attorney General shall pay to the Zuniga group and the BCB Holdings group 75% of the costs of the State's unsuccessful appeal and the Zuniga group and the BCB Holdings group shall each pay to the Attorney General 100% of the State's costs incurred in responding to their respective unsuccessful cross-appeals.[114]

In a separate opinion, a minority of the Court set out their view that the invalid provisions of the Act could not reasonably be severed, noting that "we agree with the judgment of the Court save that we would dispose of the case by striking the entire Amendment Act and leaving a clear slate upon which Parliament would be free in its sovereign right to enact constitutionally consistent legislation governing disobedience to orders issued by the courts."[115]

2. The Commencement of the Dunkeld II Proceedings and the Resolution of the Injunctions in the Court of Belize

174. In parallel with the constitutional challenge to the SCJA Act and the legal challenge to the Dunkeld I Injunction, the Claimant sought to bypass these restrictions by reasserting its claims in the Dunkeld II Proceedings.

175. On 26 July 2010, Dunkeld applied for an injunctive order from the High Court of Justice of England and Wales (Commercial Court), Queen's Bench Division.[116] On the same day, the High Court granted Dunkeld the Anti-Suit Injunction, which restrained the Government "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 [. . .]."[117] On the same day, Dunkeld filed the Dunkeld II Notice of Arbitration.[118]

176. On 27 July 2010, counsel for Dunkeld served the Anti-Suit Injunction on the Attorney-General of the Government by fax.[119]

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114 *Attorney General of Belize v Philip Zuniga and others*, CCJ Appeal No. CV 8 of 2012, Judgment, [2014] CCJ 2 (AJ) (Caribbean Court of Justice, 24 January 2014) (**Exhibit C-205**).

115 *Attorney General of Belize v Philip Zuniga and others*, CCJ Appeal No. CV 8 of 2012, Judgment, para 123, [2014] CCJ 2 (AJ) (Caribbean Court of Justice, 24 January 2014) (**Exhibit C-205**).

116 *Dunkeld International Investment Limited v. Attorney-General of the Government of Belize*, Application Notice and Draft Order (High Court of Justice of England and Wales, Queen's Bench Division, 26 July 2010)(**Exhibit C-112**).

117 *Dunkeld International Investment Limited v. Attorney-General of the Government of Belize*, Claim No. 2010 Folio 886, Order (High Court of Justice of England and Wales, Queen's Bench Division, 26 July 2010)(**Exhibit C-114**).

118 Notice of Arbitration (26 July 2010)(**Exhibit C-113**).

119 Fax from Allen & Overy LLP to the Attorney-General of Belize (27 July 2010)(**Exhibit C-116**).

177. On 2 September 2010, the Government applied to the Supreme Court of Belize for an order restraining Dunkeld from "taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by Dunkeld by Notice of Arbitration dated 26 July 2010 [. . .]."[120] On 8 September 2010, the Government's application was served by courier on Dunkeld through Allen & Overy LLP, pursuant to section 106A(9) of the SCJA Act.[121]

178. On 5 October 2010, Dunkeld applied to the Supreme Court of Belize for the discharge of the Dunkeld I Injunction, arguing that "[t]his Honourable Court does not have jurisdiction over Dunkeld" and that "there is no basis for an Order restraining the Applicant from continuing any legal or arbitral proceedings."[122]

179. On 3 March 2011, the Supreme Court of Belize issued an interim injunction in respect of the Dunkeld II Proceedings to restrain Dunkeld "from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by Dunkeld by Notice of Arbitration dated 26th July 2010 or from commencing or continuing any other arbitral proceedings arising out of or relating to the same or substantially the same facts [. . .]."[123]

180. On 10 May 2011, after a hearing from 1 April to 7 April 2011, the Supreme Court of Belize granted the Dunkeld II Injunction.[124] In its decision, the Supreme Court found Dunkeld in contempt of court for making an application to the High Court of Justice of England and Wales in spite of the Dunkeld I Injunction. The Court denied Dunkeld's request to discharge the Dunkeld I Injunction, and found that the Dunkeld I Injunction was enforceable against Dunkeld.[125]

181. On 1 November 2013 the Belize Court of Appeal—having delayed its decision to await the CCJ's judgment in *British Caribbean Bank Limited v The Attorney General*,[126] considering BCB's challenge to a similar anti-arbitration injunction—rendered its judgment in the matter of *Dunkeld v. Attorney General* (Civil Appeal No. 24 of 2011). In its decision, the Court of Appeal found that the Supreme Court of Belize had erred in refusing to hear Dunkeld's applications on the grounds that Dunkeld was in contempt of court. The Court of Appeal set aside the Government's service

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120 Notice of Application for an Interim Injunction (2 September 2010)(**Exhibit C-121**).

121 Letter from Gian Gandhi to Allen & Overy LLP (8 September 2010)(**Exhibit C-123**).

122 Notice of Application, Supreme Court of Belize (5 October 2010)(**Exhibit C-126**).

123 Interim Injunction, Supreme Court of Belize (3 March 2011)(**Exhibit C-144**).

124 Order Granting Second Injunction, Supreme Court of Belize (10 May 2011)(**Exhibit C-147**).

125 *Attorney General of Belize v. Jose Alpuche, et al*., Claim No. 1042 of 2009, Decision (Supreme Court of Belize, 10 May 2011)(**Exhibit C-146**).

126 *British Caribbean Bank Limited v. The Attorney General of Belize*, CCJ Appeal No. CV 001 of 2013). Judgment, [2013] CCJ 4 (AJ) (Caribbean Court of Justice, 25 June 2013)(**Exhibit C-197**).

of its fixed date claim form on Dunkeld, and it also set aside the Dunkeld I and Dunkeld II Injunctions. The Court of Appeal declined, however, to directly grant Dunkeld's application to stay the Government's anti-arbitration proceedings that the lower court had refused to hear. Judge Morrison, writing for a unanimous bench, reasoned in relevant part as follows:

> [. . .]
>
> **The anti-arbitration injunction issue**
>
> [. . .]
>
> [130] In my view, the reasoning of the CCJ in the BCB case provides a complete code for the resolution of the issues from Awich CJ (Ag)'s grant of the anti-arbitration injunction in this case.
>
> [. . .]
>
> [135] In light of the decisions of this court and of the CCJ in the BCB case, it cannot now be doubted that the jurisdiction to grant anti-arbitration injunctions is wholly exceptional. It must be exercised with caution and such injunctions will only be granted if the arbitral proceedings are vexatious or oppressive or, in the words of section 106A(8), an abuse of the legal arbitral process.
>
> [. . .]
>
> **Conclusion**
>
> [155] For all of these reasons, I consider that the learned judge erred in (i) refusing to hear Dunkeld on its applications on the ground that it was in contempt of the court's order of 5 February 2010; and (ii) refusing to discharge that injunction and granting a fresh injunction on 11 May 2011. I also consider that Dunkeld has made good its application to set aside service of the fixed date claim form and that this court's order should go accordingly. However, I would dismiss Dunkeld's application for a stay of the proceedings.
>
> [. . .] [127]

* * *

[127] *Dunkeld International Investment Limited v. The Attorney General*, Civil Appeal No. 24 of 2011, Judgment (Court of Appeal, 1 November 2013)(**Exhibit C-199**).

IV. RELIEF REQUESTED

The Claimant's Request

182. In its Statement of Claim, the Claimant requested the following relief:

> (a) a declaration that the Government has violated Articles 2(2), 3, 5 and 8 of the Treaty, as well as its obligations under general international law;
>
> (b) an order that the Government make full reparation to Dunkeld for the injury or loss to its investment arising out of the Government's violations of the Treaty, and applicable rules of international law, such full reparation being US$175,379,241 plus Dunkeld's costs of the Second Arbitration and dealing with the various injunction proceedings commenced by the Government in the sum of £1,518,349.40 plus BZ$364,789.85 (as set out at paragraphs 258 to 260 above);
>
> (c) interest, compounded quarterly, on US$175,379,241 from 25 August 2009 to the date of the Award, and thereafter until the date of payment, at the rate set forth in paragraph 265 above, or alternatively on such other basis as the Tribunal shall determine;
>
> (d) interest, compounded quarterly, on Dunkeld's claim for legal costs in respect of the Second Arbitration and the Belize court proceedings from the date those costs were incurred to the date of the Award, and thereafter until the date of payment, at the rate set forth in paragraph 265 above, or alternatively on such other basis as the Tribunal shall determine;
>
> (e) 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 Dunkeld including but not limited to the fees of their legal counsel, experts and consultants as well as Dunkeld's own employees on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal; and
>
> (f) any alternative or other relief the Tribunal may deem appropriate in the circumstances.[128]

183. These claims have been narrowed as a result of the Parties' Settlement Agreement (see paragraph 186 below).

The Respondent's Request

184. In its Statement of Defence, the Respondent requested the following relief:

> For the foregoing reasons, GOB requests that the Tribunal enter an award:
>
> (a) dismissing or denying Dunkeld's Statement of Claim in its entirety and denying any relief to Dunkeld,
>
> (b) finding in favor of GOB on its counterclaims and awarding actual damages and exemplary damages to GOB against Dunkeld on the counterclaims, and
>
> (c) awarding to GOB its actual attorneys' fees and costs incurred in these proceedings against Dunkeld.[129]

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128 The Claimant's Statement of Claim, para. 268.

129 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 410.

185. On 10 April 2015, at the close of the hearing, the Respondent indicated that it wished to dismiss the counter-claims advanced in its Statement of Defence and Rejoinder.[130] The Respondent's claims have also been narrowed as a result of the Parties' Settlement Agreement (see paragraph 186 below).

The Settlement Agreement

186. Pursuant to the Parties' Settlement Agreement as recorded in paragraph (B)(v) of the Tribunal's Order No. 10 (set out in full at paragraph 87 above), the remaining issues to be determined by the Tribunal are limited to the following:

> the issues set out in Section 2.1(c) of the Claimant's Post-Hearing Brief (as articulated in Section 8 of the Claimant's Post-Hearing Brief and Sections 4.2 (excluding para. 114), 5, 7 and 8 of the Respondent's Post-Hearing Brief, together with the related pre-hearing submissions, evidence and submissions on costs).(Remaining Issues);

187. Section 2.1(c) of the Claimant's Post-Hearing Brief provides as follows:

> (c) Damages
>
> (i) Whether PwC's "*bottom up*" approach to Telemedia's growth prospects is to be preferred over NERA's "*top down*" approach (Section 8.3), including:
>
> (A) Whether NERA's fundamental assumption, to rely exclusively on the 2009/10 Business Plan, was reasonable (Section 8.3(a)).
>
> (B) Whether NERA's and PwC's other assumptions are reasonable (Section 8.3(b)).
>
> (C) Whether either approach is supported by any other external valuation methodology (Section 8.3(c)).
>
> (ii) Whether the value attributable to synergies and the AA Damages Claim should be included in the fair market value of Telemedia (Section 8.4).
>
> (iii) What value can be placed on the AA Damages Claim (Section 8.4(b)).
>
> (iv) Whether Dunkeld is entitled to recover the costs of the Second Arbitration and of the Anti-Arbitration Claim (Section 8.5(b)).
>
> (v) Whether a payment in US dollars is required under the Treaty (Section 8.5(c)).
>
> (vi) Whether Dunkeld is entitled to recover the costs of this Arbitration (to be addressed in Costs Submissions).

188. Section 8 of the Claimant's Post-Hearing Brief concerns "Damages: Fair Market Value" and encapsulates the Claimant's arguments on quantum.

189. Section 4.2 of the Respondent's Post-Hearing Brief sets out the Respondent's argument that "the Tribunal should not accord any value to the contingent claim for repudiation of the Accommodation Agreement." Paragraph 114, which is excluded from the remaining issues for

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130 Hearing Tr. 989:8-12.

the Tribunal's decision, relates to the timing of the repudiatory breach of the Accommodation Agreement in relation to Dunkeld's migration to the TCI.

190. Sections 5, 7, and 8 of the Respondent's Post-Hearing Brief set out, respectively, the Respondent's views on "the fair market value of Telemedia shares" and its arguments that "Dunkeld is not entitled to recover costs and fees" and that "Dunkeld is not entitled to recover interest".

191. On 16 February 2016, the Tribunal sought clarification from the Parties "as to whether the alleged breach of Article 8 of the Treaty constitutes one of the Remaining Issues that require a decision by the Tribunal." On 26 February 2016, the Claimant set out the scope of the Parties' agreement as follows:

> [. . .] Dunkeld International Investment Ltd (Dunkeld) has claimed the costs of the Dunkeld II proceedings as well as costs associated with various litigation proceedings (the Dunkeld II Costs) in two ways: (i) as a claim for costs; and (ii) as a claim for the substantive breach of Article 8 of the Belize-UK Bilateral Investment Treaty (the Treaty).
>
> The amount claimed is the same in both cases (see Statement of Claim, paragraph 268 (b)). It is accepted that Dunkeld cannot double recover for this amount. Therefore, even if it were to succeed on both bases, Dunkeld would only be entitled to be paid the amount once.
>
> It is undisputed that the claim for recovery of the Dunkeld II Costs as costs in the Dunkeld I proceedings is within the remaining jurisdiction of the Arbitral Tribunal.
>
> In relation to the claim under Article 8 of the Treaty, the Government has conceded the merits of this claim and the only issue that remains for the Arbitral Tribunal to determine is quantum. The reasoning is as follows:
>
> 1. Pursuant to paragraph 3.2(a) of the Settlement Agreement dated 11 September 2015, the Government agreed to withdraw all of its preliminary objections and objections to the merits of Dunkeld's claims.
> 2. The remaining issues to be determined are identified in Recital (B)(v) of the Tribunal's Order No 10. They are limited to those issues set out in Section 2.1(c) of the Claimant's Post-Hearing Brief.
> 3. Section 2.1(c)(iv) of the Claimant's Post Hearing Brief includes the following issue: "Whether Dunkeld is entitled to recover the costs of the Second Arbitration and of the Anti-Arbitration Claim (Section 8.5(c))" This is a reference to the claim for the Dunkeld II Costs. The separate claim for breach of Article 8 is listed as an issue in Section 2.1(b)(vii) of the Claimant's Post-Hearing Brief, and accordingly was excluded as a remaining issue given that the merits of the claim were conceded by the Government.
> 4. It follows that the only issue to be resolved in relation to the Article 8 claim is quantum. The Government only dealt with the merits of Dunkeld's claim under Article 8 in paragraphs 180 to 181 of its Post Hearing Brief, which is why no reference to those paragraphs was included in the Settlement Agreement or, more specifically, Schedule 2 to that agreement which subsequently became the Tribunal's Order No 10.

The Respondent has confirmed its agreement to this understanding.

* * *

V. THE TRIBUNAL'S CONSIDERATIONS

A. QUANTUM IN RESPECT OF THE EXPROPRIATION OF TELEMEDIA

1. The Standard of Damages

192. The Parties are in agreement that the standard of damages is the "fair market value of the expropriated investment, as set out in Article 5(1) of the Treaty", using the Discounted Cash Flow ("**DCF**") analysis.[131] The Parties also agree that the valuation should be undertaken as at 25 August 2009.[132]

2. The Mitigation of Damages

The Claimant's Position

193. The Claimant disputes the Respondent's contention that Dunkeld failed to mitigate its losses, noting that "Dunkeld does not accept that the Companies' pursuing their claims for compensation is relevant to the mitigation of Dunkeld's losses" and that "Dunkeld is entitled to pursue its Treaty claim regardless of the relief available at the domestic level."[133]

194. Moreover, the Claimant adds that the Companies have submitted claims under the local process. According to the Claimant, even though they accepted the Government's offer of BZ$1.46 per share as partial payment, the Government has failed to make any payment, and "it is incorrect to suggest that the Companies have not been engaged in that process or that they have ceased to negotiate."[134]

The Respondent's Position

195. The Respondent argues that "Dunkeld is barred from recovering damages because it has failed to mitigate damages." Relying on *Middle East Shipping & Handling Co. v. Arab Republic of Egypt*,[135] the Respondent submits that Dunkeld had a duty to mitigate damages and argues that Dunkeld had "at its disposal, a fair and independent mechanism to mitigate its alleged damages"

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131 The Claimant's Post-Hearing Brief, para. 228; The Respondent's Post-Hearing Brief, para. 7.

132 The Claimant's Post-Hearing Brief, para. 229; The Respondent's Post-Hearing Brief, para. 7.

133 The Claimant's Reply, para. 245.

134 The Claimant's Reply, para. 246.

135 *Middle East Shipping & Handling Co. v. Arab Republic of Egypt*, 7 ICSID Rep. 173, 205 (Award) (12 April 2002)(**Authority RA-41**).

through the local compensation process. Nevertheless, according to the Respondent, Dunkeld "failed to mitigate its damages."[136]

The Tribunal's Considerations

196. The Tribunal notes that the Respondent raised the question of mitigation of damages in its Statement of Defense and Rejoinder, but did not return to or develop it during the hearing or in its Post-Hearing Brief. The issue is addressed in Section 8 of the Claimant's Post-Hearing Brief, however, and to the extent that the Respondent maintains this argument, the Tribunal is of the view that the Claimant did seek to mitigate its losses and to avail itself of the local compensation process in Belize.

197. The Tribunal agrees with the Claimant that recourse to local remedies is not strictly linked to the mitigation of losses, such that any duty to mitigate should require the exhaustion of local remedies or require a party to prefer a local remedy to one that may be available to it through international arbitration. Nevertheless, it may be the case that local administrative procedures may offer a remedy that appears more rapid or certain than that of an international claim, such that a party would be derelict in failing to attempt the local process.

198. In the present case, however, the Tribunal notes that the Registered Owners, presumably acting at Dunkeld's direction, promptly submitted claims to the Government on 14 October 2009, following the first acquisition of Telemedia, and on 30 August 2011, following the re-acquisition (see paragraphs 139 and 157 above). In each instance, these claims were within the relevant deadline imposed by the Government and the Registered Owners' responses to subsequent correspondence were timely. Ultimately, the Government and the Registered Owners were unable to reach agreement on the valuation of Telemedia. The Registered Owners were nevertheless willing to accept the sum offered by the Government as partial compensation, provided that this did not foreclose their right to pursue further payment (see paragraph 160 above). This appears to have been the final correspondence on this subject and the record before the Tribunal does not indicate any response from the Government.

199. The duty to make reasonable use of available administrative procedures to reduce losses certainly does not imply that a potential Claimant must forego the option of pursing international remedies or must agree to whatever compensation is offered at the local level. Here, the Registered Owners

136 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 266.

pursued local compensation without a successful result, and the Respondent has not identified any other steps that the Claimant could reasonably have taken to mitigate its losses.

200. Accordingly, there is no bar to the Tribunal awarding the Claimant compensation.

3. The Valuation of Telemedia

201. Both Parties have submitted several expert reports, setting out their views of the value of Telemedia as at 25 August 2009. These expert reports differ significantly, both in the value they ultimately assign to Telemedia and in the methods they use in reaching their conclusions. The Claimant's expert, Mr. Alastair Macpherson, calculates the total value of Telemedia at 25 August 2009 as US$259,300,000 (or BZ$10.23 per share).[137] In light of Dunkeld's claimed interest in 71.20 percent of Telemedia, the Claimant submits that the value of its interest was US$175,379,241.[138] In contrast, the Respondent's expert, Dr. Richard Hern, calculates the value of Telemedia at 25 August 2009 as BZ$1.44 per share.[139]

202. In reaching these differing conclusions, the Parties' experts differ primarily in respect of four factors: (a) the role of the Accommodation Agreement in the valuation; (b) the basis for deriving cash flow projections for the purpose of the DCF analysis; (c) the market for Telemedia and whether value should be accorded to synergies that could be generated by potential buyers; and (d) whether the conclusions of a DCF analysis should be cross-checked through the use of other methods. The Parties' respective views on these differences are set out in turn.

(a) The Appropriate Valuation of the Accommodation Agreement

203. The Parties' respective valuations differ in their treatment of the Accommodation Agreement. The Claimant includes the value attributable to the Accommodation Agreement in its overall valuation of Telemedia; the Respondent discounts the Agreement entirely. The Parties' experts are in agreement, however, that the principal effects of the Accommodation Agreement stem from the Agreement's provisions for (a) an adjusted business tax rate of 25 percent of profits, rather than 24.5 percent of revenue; (b) the removal of the 6 percent duty on imports; and (c) a prohibition on the use of voice over internet protocol ("**VoIP**").[140] The Parties' experts also reach substantially similar conclusions regarding the effect of the Accommodation Agreement on

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137 The Claimant's Reply, para. 251.

138 The Claimant's Statement of Claim, para. 242; The Claimant's Reply, para. 240.

139 Nera Report, para. 191.

140 Hearing Tr. 518:11 to 519:7; Hearing Tr. 686:12-17.

Telemedia's value, with the Claimant according it a value of BZ$3.10 per share[141] and the Respondent BZ$3.03 per share.[142]

The Claimant's Position

204. The Claimant's expert witness, Mr. Macpherson, completed his valuation under the assumption that the Accommodation Agreement would be in effect until 2034, the year which, pursuant to Clause 14.2 of the Accommodation Agreement, is equivalent to the duration of Telemedia's renewed license plus two years.[143]

205. According to the Claimant, this inclusion of the Accommodation Agreement is appropriate insofar as:

(a) The Accommodation Agreement was not a secret agreement as the Government alleges. The Claimant considers the testimony of Mr. Waight that he was unaware of the Agreement to be unconvincing[144] and notes that the issue of the secrecy of the Accommodation Agreement was ruled on by the LCIA tribunal in the Accommodation Agreement Award.[145]

(b) The legality of the Accommodation Agreement was expressly upheld by the LCIA tribunal faced with the question (see paragraphs 123-126 above)[146] and no other court or tribunal has ever ruled otherwise. The Claimant notes the Respondent's initial reliance on the CCJ's decision of July 2013 (see paragraph 132 above) and the Belize Court of Appeal's decision of May 2014 (see paragraph 163 above) for the proposition that the Accommodation Agreement was illegal for being in excess of the Government's authority. The Claimant emphasizes that the CCJ's decision was a refusal to enforce the Settlement Deed Award (see paragraphs 130-132 above) and not the Accommodation Agreement Award: "there was no arbitral award based on the Accommodation Agreement before the CCJ."[147] Similarly, the Claimant considers the Belize Court of Appeal's observations to be *obiter dictum* insofar as the legality of the Accommodation Agreement was not at issue in those

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141 Hearing Tr. 519:8-10.

142 Hearing Tr. 986:7-13; *see also* The Claimant's Post-Hearing Brief, para. 234.

143 The Claimant's Statement of Claim, para. 250.

144 The Claimant's Post-Hearing Brief, paras. 35-37.

145 The Claimant's Post-Hearing Brief, para. 39.

146 The Claimant's Reply, para. 258.

147 The Claimant's Reply, para. 26.

proceedings. In any event, the Claimant notes that the Respondent conceded during the hearing that neither of these decisions was directly on point.[148]

(c) "[T]he Government has never sought to challenge the Award at the seat of the arbitration", and the U.S. District Court for the District of Columbia in *Belize Social Development Limited v. the Government of Belize* declined to "consider the Government's arguments regarding the alleged illegality of the Accommodation Agreement".[149]

206. Noting that the Government had repudiated the Accommodation Agreement prior to 25 August 2009, the Claimant submits that the value of the agreement at that date is as a damages claim against the Government.[150] The Claimant argues that, at 25 August 2009, the Accommodation Agreement Award was *res judicata* and that the LCIA tribunal had directly determined the question of the legality of the Accommodation Agreement.[151] Accordingly, the Claimant considers that a buyer on that date would have accorded value to Telemedia's damages claim, with the remaining question being one of quantum.[152] According to the Claimant, in valuing this claim:

(a) Litigation success risk would be negligible because, in light of the *res judicata* effect of the Accommodation Agreement Award, "the hypothetical willing buyer would consider the result of the claim to be a foregone conclusion and would not apply any significant discount on the basis of litigation success risk."[153]

(b) Enforcement risk "must be assumed away"—even if a hypothetical willing buyer would take it into account—because "[p]ublic international law requires tribunals to disregard unlawful acts by a state in calculating damages."[154] The Claimant relies on *Occidental v. Ecuador*[155] and *Tidewater v. Venezuela*[156] in support of the proposition that "[a]ny discount

148 Hearing Tr. 247:1-6.

149 The Claimant's Reply, paras. 285-286; The Claimant's Post-Hearing Brief, para. 338.

150 The Claimant's Reply, para. 270.

151 The Claimant's Reply, paras. 277-279.

152 The Claimant's Reply, para. 280.

153 The Claimant's Post-Hearing Brief, para. 346.

154 *See* The Claimant's Reply, paras. 282-3.

155 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012, paras 541-547 (**Authority CA-126**).

156 *Tidewater v. The Bolvarian Republic of Venezuela*, ICSID Case No ARB/10/5, Award of 13 March 2015 (**Authority CA-162**).

the buyer may have given to the AA Damages Claim must be assumed away as a matter of law."[157]

(c) General country risk is already captured in the DCF analysis and applying a further discount to the Accommodation Agreement "amounts to double counting".[158]

207. Although the Claimant considers that no discount to the value of the Accommodation Agreement should apply and that "neither expert has provided the Tribunal with an assessment of the discount which would be applied to the AA Damages Claim by the reasonable hypothetical willing buyer," the Claimant submits that "the Tribunal nevertheless has discretion to apply an appropriate discount."[159] The Claimant relies on *SD Myers v. Canada*[160] and *Quasar de Valores v. Russia*[161] in support of the Tribunal's discretion in this respect. As to how the Tribunal might exercise this discretion, the Claimant recalls that a January 2008 offer for Telemedia by Cable & Wireless Plc ("**Cable & Wireless**") included a provision to retain 9.2 percent of the purchase price, subject to Telemedia obtaining a reasonable after-tax profit. Drawing on this figure, the Claimant posits that "a reasonable investor might apply a discount of 9.2% to the value of Telemedia for the risk associated with the AA Damages Claim. Using PwC's valuation of BZ$10.23 per share, this equates to a discount of BZ$0.94 per share, or 30.3% of the value of the AA Damages Claim."[162]

The Respondent's Position

208. According to the Respondent, the Accommodation Agreement was illegal[163] and should not be included in the valuation.[164] The Respondent concedes that no court has directly ruled on this question.[165] According to the Respondent, the value of the judgment reached by the CCJ in *BCB Holdings Ltd. and The Belize Bank Ltd. v. The Attorney General of Belize* is rather as "a judgment that another agreement between the same Government, the same Prime Minister, and another

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157 The Claimant's Post-Hearing Brief, para. 352.

158 The Claimant's Post-Hearing Brief, para. 358.

159 The Claimant's Post-Hearing Brief, para. 362.

160 *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Second Partial Award of 21 October 2002, para. 175 (**Authority CA-143**).

161 *Quasar de Valores SICA V S.A. et al v The Russian Federation*, SCC, Award of 20 July 2012, para. 215. (**Authority CA-156**).

162 The Claimant's Post-Hearing Brief, para. 367.

163 The Respondent's Rejoinder on the Merits, Reply in Support of Preliminary Objections, and Reply in Support of Counterclaims, para. 396; Hearing Tr. 963:19-20.

164 Hearing Tr. 985:23-25.

165 Hearing Tr. 247:1-6.

Ashcroft group entity that purported to do certain things was *ultra vires* and beyond the Prime Minister's power to agree to".[166] In other words, the Respondent contends that the Settlement Deed at issue in those proceedings was found to be unlawful for reasons that would apply equally to the Accommodation Agreement. In the Respondent's view, this is very persuasive, even though it "is not res judicata with respect to how the Belizean courts will come out on the issue".[167]

209. With respect to the value of the Accommodation Agreement, if legal, the Respondent's expert notes that a portion of the value of the Agreement was already captured in his DCF analysis. Dr. Hern recalls that his analysis was based on the Telemedia business plan and submits that "the business plan did not forecast paying any import duty"[168] and that "there's not a material impact on valuation in terms of revenues associated with VoIP in that business plan."[169] Instead, according to Dr. Hern, "[t]he one area where . . . it probably would be appropriate to make an adjustment is on the issue of business taxation."[170] According to Dr. Hern:

> The Accommodation Agreement has got a clause with respect to not paying more than I think 24.5 per cent of tax on profits. In the business plan it was assumed that the taxation would be based on the existing approach of taxation on revenues, so a switch to the Accommodation Agreement would . . . lead to a lower tax charge going forwards and, therefore, a higher valuation. But in essence that's not something that needs a different model. That adjustment can essentially be done to the existing forecasts, but to adjust those forecasts for tax based on the clause set out in the Accommodation Agreement.[171]

210. As a preliminary matter, the Respondent argues that "value associated with the Accommodation Agreement must be dismissed in any event because Dunkeld failed to provide any evidence of the fair market value of that asset."[172] Relying on the reasoning of the tribunal in the British Caribbean Bank Proceedings, the Respondent argues that:

> Neither expert provided any opinion on the fair market value of the contingent, unliquidated claim. . . . Although both experts acknowledged that a contingent claim would carry substantial risk and that a rational, willing buyer would certainly discount the claim's value because of that risk, neither undertook an analysis of what such a discount might be.[173]

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166 Hearing Tr. 247:6-11.

167 Hearing Tr. 247:6-17.

168 Hearing Tr. 686:9-11.

169 Hearing Tr. 687:12-14.

170 Hearing Tr. 687:15-17.

171 Hearing Tr. 687:20 to 688:5.

172 The Respondent's Post-Hearing Brief, para. 116.

173 The Respondent's Post-Hearing Brief, para. 116.

According to the Respondent, Dunkeld "may not recover damages under Article 5 for the value of the contingent LCIA claim for the repudiatory breach of the Accommodation Agreement."[174]

211. In any event, the Respondent submits that "clearly a reasonable, willing buyer would consider [a valid Accommodation Agreement] as a contingent damages claim, which is the impact of their termination letter, and would have to apply some sort of risk to that." [175] The Respondent notes Mr. Boyce's memorandum to the Employees Trust discussing the possibility of selling the Accommodation Agreement Award to a collection company at a discount.[176] Accordingly, the Respondent submits that "there would, in fact, be a discount in connection with valuing that claim and that discount should be quite significant because not only of the litigation risk but the collection risk."[177] For the Respondent, this is not "the government seeking to benefit from its purported bad acts but the mere collection risk associated with country risk, in this instance, the bond rate for Belize."[178]

212. In the Respondent's view, the most that could be accorded to the Accommodation Agreement—"even giving it no discount for risk associated with a contingent claim"—would give Telemedia a total value of BZ$4.47 per share.[179]

The Tribunal's Considerations

213. As set out above, the Parties differ sharply with respect to the Accommodation Agreement and its validity. The Respondent has repeatedly denounced the Agreement as illegal, while the Claimant considers its validity to be a settled matter, comprehensively decided by the LCIA tribunal in the Accommodation Agreement Award of 18 March 2009.

214. The Accommodation Agreement appears to have played a significant role in precipitating the events giving rise to these proceedings, and under either Party's calculation, the validity or otherwise of the Agreement has a significant effect on the value of Telemedia. In the Tribunal's view, the Accommodation Agreement was a valid contract between Telemedia and the Government of Belize and should be included in the valuation of Telemedia for the reasons that follow.

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174 The Respondent's Post-Hearing Brief, para. 116.

175 Hearing Tr. 965:21-25.

176 Hearing Tr. 966:6-9.

177 Hearing Tr. 966:10-14.

178 Hearing Tr. 966:14-17.

179 Hearing Tr. 986:7-13.

215. As an initial matter, the Tribunal considers that it need not determine whether the Accommodation Agreement Award and the findings of the LCIA tribunal with respect to the validity of the Agreement are *res judicata* in these proceedings. This would be a complex question of law that would turn on a determination of the degree of privity between a corporation and its ultimate parent and on the scope of issue estoppel in the municipal law of England, as the place of the Accommodation Agreement Award, and of the Netherlands, as the place of this arbitration. Rather, it suffices for present purposes that the determination of validity in the Accommodation Agreement Award most likely would be considered to be *res judicata* in a hypothetical further arbitration, seated in London, between Telemedia under the management of its willing buyer, and the Government of Belize. For the present Tribunal, this is a question of fact in establishing the value of Telemedia. In any event, the Tribunal also agrees with the essential conclusion of the LCIA tribunal concerning the validity of the Accommodation Agreement, notwithstanding the decision reached by the CCJ in *BCB Holdings Limited & The Belize Bank Limited v. The Attorney General of Belize*[180] (see paragraph 132 above).

216. The Respondent raises the following series of objections to the Accommodation Agreement:

(a) The Agreement is null and void because the Constitution of Belize requires all revenues raised by the Belizean tax laws to be paid into the Consolidated Revenue Fund and includes no power permitting the Executive to contract otherwise.[181]

(b) The Executive lacks authority under the Belize Income and Business Tax Act to alter the Agreed Rate of business tax.[182]

(c) The Executive lacks authority under the Belize Customs and Excise Duties Act to alter the rate of custom duties, except where empowered by the Act itself.[183]

(d) The Public Utilities Commission (the "**PUC**"), rather than the Executive, held the authority to regulate the use of radio frequencies under the Belize Telecommunications Act, and the Executive lacked the authority to direct the PUC to allocate frequencies to Telemedia.[184]

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180 *BCB Holdings Limited & The Belize Bank Limited v. The Attorney General of Belize*, CCJ Appeal No. CV 7 of 2012, Judgment, [2013] CCJ 5 (AJ) (26 July 2013).

181 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 302(a).

182 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 302(b).

183 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 302(c).

184 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 302(d).

(e) The restriction that VoIP services could only be utilized under licenses from Telemedia or Speednet violates the PUC's power to receive and process license applications and the prohibition in the Belize Telecommunications Act on licensees entering into agreements that would lessen competition.[185]

(f) The Constitution and laws of Belize do not permit a set-off against tax liability.[186]

217. With the exception of the Constitutional point concerning the Consolidated Revenue Fund, each of these arguments was considered by the LCIA tribunal on its own initiative and decided in the Accommodation Agreement Award against the position now advocated by the Respondent. The core of that decision was that the Prime Minister of Belize has the authority, in the absence of specific statutory limitations to the contrary, to contract on behalf of Belize in the ordinary or necessary course of Government administration and that the circumstances of the Government seeking to stabilize the telecommunications industry in Belize fell within that ambit.[187] The LCIA tribunal then went on to examine whether any statutory limitation was applicable, holding that (a) the Income and Business Tax Act contains no provision precluding set-offs; (b) Section 95 of the Income and Business Tax Act broadly permits the Minister of Finance to remit income tax payable, which should be construed as applicable to business tax; (c) Section 17 of the Customs and Excise Duties Act should not be interpreted to preclude the Minister of Finance from remitting customs duties in circumstances other than those expressly enumerated; and (d) no statutory provision prevents the Government from contracting to allocate radio frequencies or to restrict VoIP services offered by third parties.[188] The LCIA tribunal also concluded that the Government was able to procure the implementation of the Agreement by the PUC[189] and that the Accommodation Agreement was not a secret agreement.[190] Accordingly, the LCIA tribunal reached the conclusion that "the Government had actual authority to enter into the

185 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 302(e).

186 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 302(f).

187 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, paras. 155-163 (**Exhibit C-15**).

188 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, paras. 164-170 (**Exhibit C-15**).

189 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, para. 175(1) (**Exhibit C-15**).

190 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, paras. 146-152 (**Exhibit C-15**).

Accommodation Agreement and that it was lawful for the Government to agree to the provisions that are now in dispute."[191]

218. This, however, was not the end of the LCIA tribunal's reasoning. Having found that the Government possessed actual authority to enter into the Accommodation Agreement, the LCIA tribunal went on to examine whether the Government of Belize also possessed apparent or ostensible authority to enter into the Agreement. Examining the common law principles on apparent authority as summarized in *Marubeni Hong Kong and South China ltd. v. Government of Mongolia* ("***Marubeni***"),[192] the LCIA tribunal noted that the Accommodation Agreement "was negotiated by the then Prime Minister/Minister of Finance and other senior Government ministers, including the Attorney General and Minister of Public Utilities, all of whom were assigned responsibility for conducting business in relation to the government departments under their control". The LCIA tribunal also took note of the express warranties on legality and authority set out in the Agreement itself and the counter-signature of the Second and Third Amendment Deeds by the Attorney General before concluding that "the criteria for apparent authority have been established and that the special considerations that arise when contracting with the Crown have been met."[193]

219. The Respondent argues that the LCIA tribunal's conclusions have been effectively superseded by the CCJ's 26 July 2013 decision in *BCB Holdings Limited & The Belize Bank Limited v. The Attorney General of Belize*.

220. The Parties are in agreement that that decision concerned the enforceability of the Settlement Deed Award (see paragraph 130 above) and the validity of the Settlement Deed, not the Accommodation Agreement. The Parties are also in agreement that no court in Belize has directly ruled on the validity of the Accommodation Agreement.[194] The Tribunal agrees with the Respondent, however, that in ruling on the enforceability of the Settlement Deed Award the CCJ was directly called on to interpret Section 95 of the Income and Business Tax Act and that the decision is therefore relevant to the question of the Accommodation Agreement. In that decision, the CCJ held that "Section 95 cannot properly be interpreted as being capable of granting the

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191 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, para. 171 (**Exhibit C-15**).

192 *Marubeni Hong Kong and South China ltd. v. Government of Mongolia*, [2004] EWHC 472 (Comm), *affirmed* [2005] EWCA Civ 395.

193 *Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, para. 174 (**Exhibit C-15**).

194 Hearing Tr. 152:6 to 157:11; 247:1-19.

Minister the power to do what the [Settlement Deed] here purported to do."[195] In particular, the CCJ held that Section 95 does not permit the Minister of Finance to remit an unspecified amount of future taxes that have not yet been incurred.[196]

221. The Tribunal accepts that the rulings of the CCJ are dispositive with respect to the content of Belize law and that the question of the Government's actual authority to have entered into the Accommodation Agreement is a matter of Belize law. Accordingly, the Tribunal concludes that, further to the CCJ's decision, the present state of Belize law would be that the Government lacked the actual authority to conclude the Accommodation Agreement, at least with respect to those provisions relating to the calculation and remission of business tax. The same conclusion, however, does not hold true with respect to the Government's apparent authority to conclude the Accommodation Agreement. Apparent authority constituted a separate and independent basis for the Accommodation Agreement Award, as well as for the Settlement Deed Award considered by the CCJ. The CCJ, however, did not address the Settlement Deed Award's findings with respect to apparent authority and appears to have found that Award to be unenforceable in Belize on the basis of a lack of actual authority alone.

222. The Accommodation Agreement is a contract governed by Belize law and the question of apparent authority is accordingly also a matter of Belize law. Both Parties, however, have argued the issue of apparent authority by reference to English jurisprudence,[197] and the Tribunal understands this to be an area of the common law of agency and contract in which the law of Belize does not differ materially from that of England. On this issue, the Respondent relies on *Minister of Agriculture and Fisheries v. Mathews* for the proposition that although a private individual can be estopped from denying the validity of a contract he has entered into without actual authority, a government body cannot, such that an *ultra vires* act of government is not an act of government at all. The Tribunal, however, is of the view that the law on this issue is more accurately described in *Marubeni*, which follows *Bowstead & Reynolds on Agency* for the proposition that the apparent authority of a Crown official may be established "in the normal way", subject to express statutory limitations and the Crown's need to preserve the "freedom of

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195 *BCB Holdings Limited & The Belize Bank Limited v. The Attorney General of Belize*, CCJ Appeal No. CV 7 of 2012, Judgment, para. 47, [2013] CCJ 5 (AJ) (26 July 2013).

196 *BCB Holdings Limited & The Belize Bank Limited v. The Attorney General of Belize*, CCJ Appeal No. CV 7 of 2012, Judgment, para. 47, [2013] CCJ 5 (AJ) (26 July 2013).

197 *See Belize Telemedia Limited v. The Attorney General of Belize*, LCIA Arbitration No. 81079, Final Award of 18 March 2009, para. 171 (**Exhibit C-15**), *citing Marubeni Hong Kong and South China ltd. v. Government of Mongolia*, [2004] EWHC 472 (Comm), *affirmed* [2005] EWCA Civ 395; The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 292, *citing Minister of Agriculture and Fisheries v. Mathews* [1950] 1 KB 148, 153 (**Authority RA-43**).

action to do its public duty."[198] The authority advanced by the Respondent may be correct with respect to the scope of estoppel, but "[a]lthough ostensible authority is a form of estoppel, it is treated as an exception to the general principle that estoppel cannot be relied upon to rehabilitate a transaction entered in excess of powers."[199]

223. The Tribunal agrees with the findings of the LCIA tribunal that the Government had apparent authority to conclude the Accommodation Agreement. In particular, the Tribunal notes that the involvement of the Attorney General of Belize in the negotiation of the Agreement[200] and the Attorney General's counter-signature on the Second and Third Amendment Deeds[201] parallels the representation of authority made by the Minister of Justice of Mongolia and considered dispositive in *Marubeni*.[202] The doctrine of apparent authority exists to protect parties that rely upon the representation of a principal that its agents are empowered to assume obligations on its behalf when in fact they are not.[203] The need for such protection is no less valid when the principal in question is a sovereign.

224. Accordingly, for the purposes of this arbitration, the Tribunal concludes that an English arbitral tribunal in a hypothetical further arbitration pursuant to the Accommodation Agreement would consider the Accommodation Agreement Award to be dispositive of the matter of apparent authority, notwithstanding the intervening decision of the CCJ on the content of section 95 of the Income and Business Tax Act, and would award damages on that basis. The Tribunal therefore considers that the Accommodation Agreement should be included in the value of Telemedia, although not at the full value advocated for by the Claimant. Before addressing the value to be given to the Accommodation Agreement, however, the Tribunal turns to a further objection raised by the Respondent on the basis of the Award of 19 December 2014 in *British Caribbean Bank Ltd (Turks & Caicos) v. The Government of Belize* (PCA Case No. 2010-18).

225. The Respondent argues that the value associated with the Accommodation Agreement must be disregarded insofar as the Claimant has not presented evidence of the fair market value of the

198 *Marubeni Hong Kong and South China ltd. v. Government of Mongolia,* [2004] EWHC 472 (Comm) at para. 124, *quoting Bowstead & Reynolds on Agency*, Art. 74, para. 8-044 (16th ed., 1996).

199 *Chitty on Contracts*, para. 10-011 (30th ed., 2008).

200 First Witness Statement of Mr Dean Boyce in LCIA Arbitration between Belize Telemedia Limited and The Attorney General of Belize, 25 July 2008, at para. 4.4 (**Exhibit C-52**).

201 Accommodation Agreement - Second Amendment Deed, 15 December 2006 (**Exhibit C-11**); Accommodation Agreement - Third Amendment Deed, 07 January 2008 (**Exhibit C-12**).

202 *Marubeni Hong Kong and South China ltd. v. Government of Mongolia,* [2004] EWHC 472 (Comm) at para. 126.

203 *Bowstead & Reynolds on Agency*, Art. 74, para. 8-014 (16th ed., 1996).

Agreement as a contingent claim, rather than as a functioning contract (see paragraph 210 above). The Respondent considers the Accommodation Agreement equivalent to the loans at issue in the BCB Proceedings for which the Award in that matter found a claim of face value to be insufficient.

226. In the Tribunal's view, however, the Accommodation Agreement differs in fundamental ways from the loans made by British Caribbean Bank. As an initial matter, the Tribunal does not consider that the Treaty's requirement to establish fair market value requires a party to set out the market value of each asset or element of the business independently, but rather to establish the fair market value of the expropriated investment as a whole, drawing on calculations of the future cash flows from its component parts that will necessarily involve a degree of estimation. Moreover, the Tribunal notes that the Claimant has presented, built into its DCF calculation, evidence of the market value of the Accommodation Agreement to Telemedia's business, in other words, of the amounts that it would have claimed in a hypothetical further arbitration at the LCIA. Given the existence of a *res judicata* decision on the validity of the Accommodation Agreement and the Claimant's argument that enforcement risk must be assumed away as a matter of law, the Tribunal considers that, whether or not it ultimately agrees with the Claimant, the Claimant did make a sufficient showing of the market value of the repudiated Accommodation Agreement as a potential claim. This situation differs from that of the loans in the BCB Proceedings, where factors other than the Government's actions would necessarily have impacted the market value of the Telemedia and Sunshine loan facilities.

227. Turning to the ultimate value of the Accommodation Agreement as a contingent claim, the Tribunal is sensitive to, and largely in agreement with, the Claimant's argument that the value of a valid claim should not be discounted to reflect the possibility that a recalcitrant party may seek to unlawfully delay or frustrate enforcement. At the same time, the Tribunal is conscious of its particular standing in these proceedings, insofar as it has not been asked to rule on and award damages for the Government's breach of the Accommodation Agreement, but rather to step into the position of the valuer and to assign a value to Telemedia's un-arbitrated claim as at 25 August 2009.

228. Additionally, the Tribunal is uncomfortable with the Claimant's equation of the Belize courts' review of an arbitral award for enforceability with unlawful activity, rather than considering the same to represent the proper functioning of the New York Convention system for international arbitral awards. Under the circumstances, the Tribunal considers it appropriate to recognize both the time that Telemedia would have required to secure an award and payment, and the possibility that the Belize courts might legitimately decline enforcement on public policy grounds—as in fact occurred with the Settlement Deed Award—even if the same award could well remain

enforceable outside of Belize. The Tribunal takes the view that these considerations do not form part of the general country risk discount already applicable, but are particular to the Accommodation Agreement as a claim. They can most reasonably be represented by applying a supplemental discount of five percent to revenues linked to the Accommodation Agreement.

229. The Tribunal will address the specific effects of the Accommodation Agreement on the value of Telemedia in the course of its calculations below.

(b) The Parties' respective DCF calculations

i. The overall approach to the DCF calculation

230. While both Parties have carried out DCF analyses in attempting to value Telemedia, they differ significantly in their approach and in the sources of information used to project Telemedia's future cash flows. The Parties' differences in their respective overall approaches are set out as follows.

The Claimant's Position

231. The Claimant's expert, Mr. Macpherson, conducts his DCF analysis on the basis of what the Parties' have termed a "bottom up" approach. In so doing, Mr. Macpherson constructed a model of projected future revenue and costs over a 15-year period. With respect to revenues, Mr. Macpherson examined trends in market factors such as population, GDP growth, inflation, and exchange rates; trends in mobile telecommunications, including market size and mobile usage, market share, pricing and price elasticity, and data services; and trends in fixed line telecommunications, including household size, market share, and broadband usage.[204] With respect to costs, Mr. Macpherson developed models for trends in operating costs, taxation, and capital expenditures.[205]

232. Mr. Macpherson considers this approach to be preferable to the Respondent's approach of relying on Telemedia's 2009-2010 business plan for two principal reasons:

(a) First, projections based on the business plan are "depressed because of the breakdown of Telemedia's relationship with the Government."[206]

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204 Expert Report of Alastair Macpherson, 28 February 2014, paras. 8.1-8.127.

205 Expert Report of Alastair Macpherson, 28 February 2014, paras. 9.1-9.15

206 Reply Expert Report of Alastair Macpherson, para. 6.2.

(b) Second, the business plan "fails to recognise the value accretion which may be available to a hypothetical buyer able to deploy different capabilities or exploit economies of scale and scope."[207]

233. As summarized by Mr. Macpherson:

> I have looked at the business plans as one source of information, but I've looked at benchmark information from other telecoms operators in other telecoms markets, and I think that is relevant information that I have applied to a more fundamental based forecast of the cash flows.[208]

In his view, this approach is appropriate insofar as:

> [The business plan] represents the expectation or ambition . . . of what the current management think they can do in their current mode of operation. So it's got their operating model built into it or evolutions of that through the planned period. It's essentially valuing the cash flows they expect to get the business with their knowhow, capability, resources and operating environment.
>
> Fundamentally . . . if one contemplated Cable & Wireless or Digicel or American Mobile entering into this they would have a completely different perception of the possibilities of this market because they have different assets, different capabilities and different knowhow to bring to bear. So the business plan represents a view of the management of what it thinks it can do with its current operating model and the evolutions it has postulated in its business plan. That is not necessarily the value of the business for a fair market purpose because it doesn't contemplate the value that could be achieved by a class of buyers or, indeed, value that they would have to pay for if it were able to acquire that company. I think that is an important distinction between the business plan and looking at this from the outside perspective of a universe of potential buyers.[209]

234. The Claimant concludes: "the Business Plan does not accurately capture Telemedia's potential as a business as at 25 August 2009, it does not include the improvements and benefits that a large international operator would be able to realise and it includes the downward pressures of Government interference, and so it should not be a proxy for Telemedia's valuation."[210]

The Respondent's Position

235. In contrast, the Respondent's expert, Dr. Hern, carried out his DCF analysis on the basis of what the Parties have termed a "top down" approach. Dr. Hern based his future cash flow predictions on Telemedia's 2009-2010 business plan, adjusted to take account of information as at August 2009, in particular with respect to the effects of the financial crisis.

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207 Reply Expert Report of Alastair Macpherson, para. 6.2.

208 Hearing Tr. 528:20-25.

209 Hearing Tr. 552:1 to 553:5.

210 The Claimant's Reply, para. 264.

236. In the Respondent's view:

> Dr. Hern's analysis reflects what a real-world fair market value would look like. A willing and likely buyer would certainly turn first to Telemedia's own business plans, to see what its management, the people most knowledgeable about the company and its prospects, believed to be possible, before then making adjustments to reflect its own views about prospects and value as well as risks, including country-specific risk.[211]

237. Reviewing the Claimant's approach, Dr. Hern concludes as follows:

> the problem with that approach is that it can be very sensitive to one or two key assumptions and very sensitive to the comparators that are used for, for example, deriving long-term achievable broadband penetrations, or long-term achievable fixed rate penetrations. I think when we looked very closely at the PwC model we found many areas where those assumptions that were being made were based on subjective data, ie, the perspective that this country was the best comparator for Belize and not that country, or that this growth rate of GDP which we can see based up to 2015 would continue right throughout the whole horizon. There are many assumptions like that made in the PwC model and the valuation, as a result, is very sensitive to some of those assumptions.
>
> I think maybe that's fine, but at the very least there has to be some cross check based on management projections for the business, what the business has managed to achieve over the period of time that we can see historical data, and the trends of those key revenues. And, when I look at the PwC's projections, I see a significant divergence between the projections that are coming out of the PwC model and what's coming out of those management projections and historic trends. They are way, way higher than the management is projecting for the business. I think it's implausible that an investor in this type of business is going to value a business at a significant premium to what the existing management of the business say is achievable.[212]

238. Dr. Hern also observes that "Telemedia has significantly underperformed against previous Business Plans, and PwC do not provide any evidence that investors would be likely to expect outperformance".[213] Accordingly, he concludes that "it is not credible to assume that shares in Telemedia would be based on revenue and cost growth rates that are substantially more optimistic than management targets."[214] Finally, Dr. Hern notes that Belize is a particular market, with a low per capita GDP, high country risk and corruption figures, and a sparsely dispersed population. As such, he considers it "inappropriate to take these other countries . . . and use those as comparators for what could be achievable in Belize."[215]

The Tribunal's Considerations

239. With respect to the overall approach, the Tribunal accepts Respondent's submission that the Business Plan for 2009-2010 would be a first point of reference for a willing and likely buyer in

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211 The Respondent's Post-Hearing Brief, para. 123.

212 Hearing Tr. 694:9 to 695:15.

213 NERA Report, para. 138.

214 NERA Report, para. 138.

215 Hearing Tr. 696:8 to 697:9

order to ascertain what Telemedia's management believed to be achievable, before making adjustments to reflect its own views about prospects and value as well as risks, including country-specific risk.

240. In opposing the use of the Business Plan for valuation purposes, the Claimant raised two objections: first, that the Business Plan sets out depressed projections as a result of Telemedia's dispute with the Government, and second, that the Business Plan does not account for the potential synergies that could be realized by another telecommunications company. With respect to the former, the Tribunal considers that, to the extent the business plan presents lower projections as a result of the non-application of the Accommodation Agreement, this can be captured through adjustments to the cash flows projected in the Business Plan and by including a value for historic breaches in the value attributed to the Accommodation Agreement. To the extent that, more generally, Telemedia may have only underperformed its Business Plan as a result of Government interference, the Tribunal agrees with the Respondent (see paragraph 254 below) that these were "one-off" events only in the sense that particular past adversities involved the Government. With respect to the Claimant's second objection, the Tribunal agrees with the Respondent regarding the appropriateness of valuing synergies, which will be discussed in greater detail below (see paragraph 269). For the Tribunal, therefore, neither objection warrants departing from the Business Plan as the starting point for the valuation.

241. The Tribunal respects the significant effort that evidently went into the creation of the Claimant's valuation model, but considers that too many of the projections underpinning it are ultimately speculative, in particular over the extended period projected by the Claimant. Taken together, the effect of these projections is to increase the degree of uncertainty in the Claimant's calculations beyond what the Tribunal considers reasonable. Accordingly, the Tribunal prefers the "top down" model developed by the Respondent as a starting point for its own conclusions.

ii. The appropriateness of assumptions underlying the Claimant's DCF calculation

242. Beyond their differences in overall approach, the Parties also differ with regard to certain specific assumptions made in each of their respective DCF calculations. In light, however, of the Tribunal's preference for the Respondent's overall approach to valuing Telemedia, it is unnecessary to resolve these differences in respect of the assumptions underlying the Claimant's DCF calculations.

iii. The appropriateness of the assumptions underlying the Respondent's DCF calculation

243. The Tribunal is, however, called upon to resolve the Parties' differences with respect to the appropriateness of the assumptions made in the Respondent's DCF calculation.

The Claimant's Position

244. The Claimant makes seven overarching criticisms of the assumptions applied in the Respondent's DCF calculation.

245. First, the Claimant submits that Dr. Hern employed too short a time frame for forecasting cash-flows, relying on the five-year forecast set out in Telemedia's business plan. Although Dr. Hern's DCF calculation specifies a continuing value thereafter, the Claimant argues that this "does not capture the incremental value expected from these long-life capital investments beyond five years".[216] The Claimant notes that Belize is an emerging market where substantial growth can be expected even beyond five years.[217] Additionally, the Claimant considers telecommunications to be a capital intensive industry in which assets frequently have a life of 10 or 15 years, such that "a longer forecasting period is . . . necessary to reflect the full value of Telemedia's capital investment programme."[218] The Claimant notes that the business plan was not prepared as a valuation, and the selection in the plan of a five-year forecasting period cannot reflect a determination that this was an adequate period for valuation purposes.[219]

246. Second, the Claimant considers that Dr. Hern's approach treats Telemedia's business plan as an upper limit for what the company could achieve and has the effect of extending specific instances of historic underperformance into the future. According to the Claimant, "Telemedia's revenues were very close to its business plan targets in three of the five years in question."[220] In 2005/2006 and 2008/2009, however, results were affected by one-off events in the form, first, of the after-effects of the failed Prosser transaction (see paragraphs 112-114 above) and, second, of the new Belize Government's refusal to apply the Accommodation Agreement.[221] While the Respondent considers that potential willing buyers would anticipate that similar issues could arise in the

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216 The Claimant's Post-Hearing Brief, para. 269.

217 The Claimant's Post-Hearing Brief, para. 266.

218 The Claimant's Post-Hearing Brief, para. 268.

219 The Claimant's Post-Hearing Brief, para. 270.

220 The Claimant's Post-Hearing Brief, para. 273.

221 The Claimant's Post-Hearing Brief, para. 273.

future, the Claimant considers that this is already accounted for in the discount for country risk. In the Claimant's view, "by factoring country risk into his assessment of the 2009/10 Business Plan and hence Telemedia's future cash-flows, Dr Hern is guilty of double counting, as his calculation of Telemedia's cost of capital also includes an assessment of Belize's country risk premium."[222]

247. Third, the Claimant argues that Dr. Hern assumes an EBIT margin for FY 2014/2015 that is below the trend of the preceding years. Dr. Hern projects an EBIT margin rising from 29 percent in FY 2009/2010 to 39 percent in FY 2013/2014, before dropping back to 35 percent in FY 2014/2015. According to Mr. Macpherson, Dr. Hern "does not provide any explanation for why Telemedia's EBIT margin should decrease from 2013/2014 to 2014/2015, and stay at that lower level indefinitely. The impact of this is it significantly reduces NOPLAT in 2015 and therefore lowers Telemedia's 'Continuing Value'."[223]

248. Fourth, the Claimant argues that Dr. Hern inappropriately projects low revenue growth with continued high capital expenditure. While Dr. Hern has adjusted Telemedia's business plan to decrease projected revenue, he has used the plan's capital expenditure forecasts without adjustment. In the view of Mr. Macpherson:

> it is unlikely that management would continue to invest capital at planned levels if it believed planned revenues would no longer materialise. In my view management is more likely, to stem capital spending to ameliorate the pressure on return on investment. Furthermore, NERA's exclusion of the Accommodation Agreement would make this level of capital expenditure less likely because it would be considerably more difficult for Telemedia to make a return.[224]

Mr. Macpherson examines the relationship between annual revenue and capital expenditure growth for 162 listed telecom operators and argues that they are correlated, such that capital expenditure should fall along with revenue.[225]

249. Fifth, the Claimant considers that Dr. Hern's assumption of a constant effective tax rate overstates the taxes that Telemedia would actually have paid. The Claimant notes that internet and data revenues are taxed in Belize at a lower level of 1.75 percent (as opposed to 19 or 24.5 percent for telecommunications revenues). Because Dr. Hern has projected a growing share of Telemedia's

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222 The Claimant's Post-Hearing Brief, para. 276.

223 Reply Expert Report of Mr. Macpherson, paras. 7.12-7.13.

224 Reply Expert Report of Mr. Macpherson, para. 7.16.

225 Reply Expert Report of Mr. Macpherson, para. 7.18.

revenue deriving from internet and data services, the Claimant considers that he should also have projected a falling effective tax rate.[226]

250. Sixth, the Claimant argues that Dr. Hern overestimated the effect of the financial crisis on revenue growth and the time that would be required for recovery by using "data which would not have been available at the valuation date, resulting in an overestimate of the shock effect and an underestimate of the pace of recovery."[227] The Respondent notes that Dr. Hern uses September 2009 data on Telemedia's actual results in the first half of FY 2009/2010 to estimate the effect of the financial crisis when July 2009 data on the company's performance that was actually available at the valuation date would have predicted a lesser effect.[228] Similarly, the Claimant notes that April 2009 data from the IMF that was actually available at the valuation date predicted a faster recovery than the October 2010 data actually used by Dr. Hern.[229]

251. Lastly, the Claimant submits that the final result of Dr. Hern's calculation at BZ$1.44 per share is implausibly low, such that the result should call into question the validity of the model. The Claimant notes as follows:

(a) Dr. Hern's valuation is less than the BZ$1.46 per share that was offered by the Government to Telemedia's shareholders (see paragraphs 143, 158 above), who rejected the offer. There was therefore not, the Claimant argues, a willing seller at this price.[230]

(b) Dr. Hern's valuation is substantially less than, and in the Claimant's view not reconcilable with, the Government's October 2010 offer of BZ$5 per share.[231]

(c) Dr. Hern's valuation would accord the entirety of Telemedia less value than the Government was able to raise from selling 30 percent of the shares 14 months later.[232]

(d) "Dr Hern's valuation of BZ$71.4 million is just twice Telemedia's net earnings in the year to March 2008 (BZ$37.8 million) and three times its net earnings in the year to March 2009

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226 Reply Expert Report of Mr. Macpherson, paras. 7.21-7.25.

227 The Claimant's Post-Hearing Brief, para. 279.

228 The Claimant's Post-Hearing Brief, paras. 280-281.

229 The Claimant's Post-Hearing Brief, paras. 282-283.

230 The Claimant's Post-Hearing Brief, para. 286(a).

231 The Claimant's Post-Hearing Brief, para. 286(b).

232 The Claimant's Post-Hearing Brief, para. 286(c).

(BZ$22.2 million)." The Claimant endorses Mr. Macpherson's view that a multiple of 12 to 20 times net earnings would be more usual for a telecommunications company.[233]

(e) Dr. Hern's valuation nearly equals Telemedia's capital expenditure in the 17 months prior to the nationalisation. In the Claimant's view, this would suggest that "no other part of the company had any value whatsoever".[234]

(f) Dr. Hern's valuation equals only one third of the book value of Telemedia's assets. The Claimant endorses Mr. Macpherson's view that this is implausible insofar as Telemedia's recent capital expenditures were on new assets and included in the book value.[235]

The Respondent's Position

252. The Respondent replies to each of the Claimant's objections in turn.

253. First, with respect to the use of a five year cash-flow forecast, the Respondent's expert, Dr. Hern, notes as follows:

> In terms of the time periods over which the valuation was undertaken, in essence here my logic was the following. An investor into the business looks at the available projections of revenues and cost forecasts, as far as they are available, going forwards. In the case of Belize Telemedia, those public projections by the business were only available for the next five years. So Telemedia only published its business plan forecast for the next five years. There were no other public forecasts or revenues and costs for this business after that point.
>
> So I had to make an assumption about how best to project forward revenues and costs for the business for the period after that, and my logic was that, rather than trying to do it on an annual basis, which would have been quite sensitive to the assumptions that I would have made for each individual year after that, a better approach is to assume an average growth rate going forwards from 2015, and to calculate what I call a continuing value from that point onwards, so you can think of it, in essence, as a terminal value but it's a terminal value with an assumed growth rate of revenues and costs from that point onwards. That growth rate was set at 3 per cent, so I assumed revenues and costs would grow at 3 per cent from 2013/14 onwards, and that 3 per cent was consistent with the business plan forecast for the next five years, and broadly consistent with historical data.
>
> The driving factor in the continuing value calculation was the growth rate -- or one driving factor was the growth rate of revenues and, therefore, profits.[236]

254. Second, on the effect of one-off events like the Prosser sale or the breakdown of Telemedia's relationship with the new government, Dr. Hern notes:

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233 The Claimant's Post-Hearing Brief, para. 286(d).

234 The Claimant's Post-Hearing Brief, para. 286(e).

235 The Claimant's Post-Hearing Brief, para. 286(f).

236 Hearing Tr. 678:17 to 679:25.

> An investor would look at, in my view, the history of revenues taking account of the full context, of which a very important part is the political environment in which the company operates. You know, when you say one-off, it's one-off in a sense that this was Prosser. It's one-off in a sense that this was this particular change of Government. But it's not one-off in the sense that this is an adverse event or an event that can affect a company's performance. It's that kind of event that I am certain is taken into account by investors when they think about valuations.[237]

255. Third, on the selection of the EBIT margin, Dr. Hern explains as follows:

> My EBIT margin assumption of 35% is calculated as the average EBIT margin of the five prior forecast years, from 2009/10 to 2013/14.
>
> [. . .]
>
> Since the EBIT margin is used to calculate the cash flows resulting from the company in its long-run steady state, the margin should not be based on temporary EBIT fluctuations or the business cycle. I use the five-year average to capture the underlying steady state of the company. PwC on the other hand suggests I should project the current trend forwards, which would bias the CV based on the temporary trend from previous years.
>
> The five years of data in the explicit forecast period characterises the trend in the business cycle. By taking the average, I assume that the business cycle repeats itself in perpetuity, which is a more realistic assumption than assuming that the 2014 margin applies continuously into perpetuity. Evidently, there are recessions (2009) and periods of recovery (2010 to 2014) and by taking an average we assume that this pattern of a business cycle also holds true into the future.
>
> I prefer a more prudent approach by taking the average of the five previous cash flows. This reflects the uncertainty around how cash flows may develop from 2015 onwards. [. . .][238]

256. Fourth, with respect to the relationship between revenue growth and capital expenditure, Dr. Hern responds as follows:

> - By presenting the relationship between average revenue growth and average capex growth for 162 telecoms operators, PwC only considers the mean, and does not consider the range. There is significant variation in the relationship between capex and revenue across companies, and PwC fails to consider where in the distribution Telemedia, which faces Belize-specific conditions, would fall.
> - Even if Telemedia is close to the mean of these comparators, PwC's chart shows that low revenue growth was associated with high capex growth in the years 2010-12. Therefore, PwC's evidence supports my forecast of low revenue growth and high capex growth.
> - Telemedia's business plan confirms this as the management has noted that it aim[s] to increase capex to stimulate revenues when revenue growth is low. This motivation is consistent with my forecast of low revenue growth and high capex.[239]

Dr. Hern further notes that "[o]ur analysis of Telemedia's financial statements from 2004 to 2009 confirms the view that capital expenditure bears little relation with concurrent revenue generation" and that "following the economic crisis, interest rates have been lowered to stimulate economic activity. With lower interest rates, the critical internal rate of return that Telemedia

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237 Hearing Tr. 771:4-16.

238 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, paras. 184-188.

239 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, para. 205.

investment projects must attain decreased, potentially driving up the number of projects that are profitable, in net present value terms."[240]

257. Fifth, Dr. Hern explains his effective tax rate calculation by noting that the share of Telemedia's revenue taxed at 1.75 percent was effectively constant between FY 2004/2005 and FY 2008/2009, supporting the application of a constant rate thereafter.[241] Dr. Hern also notes that the calculation of the implied share of Telemedia's revenue taxed at different levels is necessary because actual revenue share data is not available.[242]

258. Sixth, on the selection of data sets to measure the effects of the financial crisis, Dr. Hern explains the reliance on September 2009 data as follows:

> I think the reality is that an investor would have at least had the August data. So, when my attention was drawn to that, I felt there was no real good reason to adjust my valuation. I'd used one month one side. This data was published one month the other side. The average would have been in the middle. You know, I felt that a rational investor -- I felt it was a reasonable assumption.[243]

Dr. Hern further explains the use of October 2010 data to measure the rate of recovery from the crisis in the following terms:

> we did the valuation in October 2010. At that time the data that was available on GDP growth in Belize was in the October 2010 tab, which was 0 per cent. And we said, OK -- we asked the question what would an investor have assumed in 2009 about GDP growth rate in that year in August. I understood this data was not published at that time, but I felt it was reasonable that -- basically I'm making a rational investor's assumption here which is that it's quite reasonable that an investor could have predicted that the Belize economy over that period would have achieved, in fact, 0, which it did achieve, even though the data that was published by the IMF didn't predict it. You have to bear in mind here that the IMF is just one source of predictions about GDP growth. The other source was the Belize Central Bank which didn't at the time publish retrospective data so we couldn't go back and ask what did they view when standing in the middle of 2009. The World Bank at the time had published a report in January 2010 saying that they expected GDP growth to be negative in a year in 2009, so there were different sources available. This is one source. The IMF is one source of forecast. We felt it was better to use what actually happened on the basis that an investor would have considered a variety of data. What actually happened was Belize GDP was 0 per cent in that year and we thought it was a reasonable assumption that an investor would also have made that assumption. Even, you know, as I say, there were different sources available that showed different numbers.[244]

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240 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, paras. 202-203.

241 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, paras. 207-208.

242 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, para. 207.

243 Hearing Tr. 780:12-20.

244 Hearing Tr. 784:8 to 785:15.

The Tribunal's Considerations

259. Having considered the assumptions underlying the Respondent's DCF model, the Tribunal agrees with the Respondent's reasoning in significant part. In particular, the Tribunal accepts the Respondent's reliance on a five-year forecast of annual cash flow. This is a necessary consequence of basing the valuation, as the Tribunal prefers to do, on the Telemedia Business Plan and its five-year period of forecasts. The Tribunal recognizes that the Respondent's continuing value calculation is necessarily an approximation, but notes that such approximation could potentially overstate, as well as understate, the actual results that Telemedia would have achieved in the "but for" scenario represented by the forecast. The Tribunal considers this approximation to be unavoidable. It is of the view that the Claimant's effort to model particular growth patterns beyond the five-year period of the Business Plan is unduly speculative.

260. The Tribunal is also persuaded by the Respondent's explanations regarding Telemedia's historical underperformance of its Business Plan and the use of the Plan as an upper bound, the use of an average EBIT margin for the calculation of continuing value, the link between Telemedia's revenue growth and capital expenditure, and the projection of a constant effective tax rate across the forecast period.

261. The Tribunal disagrees, however, with the Respondent's use of data that were not available on the valuation date to model the effects of the financial crisis on Telemedia's revenue forecasts. The Tribunal recognizes that the comparable data then available (actual company results from 30 July 2009 and IMF forecasts of GDP growth from April 2009)[245] may also misrepresent the overall perception of Telemedia's value by a willing buyer, in particular with respect to the state of the Belize economy, which may have shifted between April and August 2009. The Tribunal is not satisfied, however, that the general impressions of a potential buyer on 25 August 2009 that the Belize economy was performing worse than any published prediction available at that date provides sufficient reason to substitute actual GDP data that would only be available well after the valuation date. Faced with the fact that any data that the Tribunal may select will necessarily only approximate the situation on the valuation date, the Tribunal prefers to restrict itself to data actually available on 25 August 2009. The Tribunal agrees with the Respondent's method, but will re-run the Respondent's financial crisis calculations using the earlier data from April and July 2009.

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245 International Monetary Fund, World Economic Outlook Database, April 2009 Edition, available at <www.imf.org/external/pubs/ft/weo/2009/01/weodata/index.aspx>; Reply Expert Report of Alastair Macpherson (**Exhibit 3-FF**).

262. The Tribunal notes the Claimant's argument (see paragraph 251 above) that the Respondent's value for Telemedia is unreasonable on its face in light of various metrics. The Tribunal will return to this point after having adjusted the Respondent's calculations to correspond with its own assumptions.

(c) The Appropriateness of Valuing Synergies

The Claimant's Position

263. The Claimant notes that "Mr Macpherson takes into account interest from more than one potential buyer, the potential of improving upon existing performance and includes the value of synergies in his valuation."[246] In the Claimant's view, it is appropriate and accepted practice to include value for synergies where "there was a reasonable probability as of 25 August 2009 that Telemedia would be sold to a capable third party—a telecoms sector buyer."[247] Reviewing the record, the Claimant concludes that "sustained interest from Cable & Wireless, Digicel, and Atlantic Telenetworks demonstrates that there is clearly a reasonable probability that Telemedia would have been sold to a telecoms sector buyer."[248] This "population of willing telecoms buyers" would have, according to the Claimant, "created competitive tension and would have forced potential buyers to pay for synergies."[249] The Claimant's expert, Mr. Macpherson, ascribes a value of BZ$0.74 per share to synergies.[250]

264. Ultimately, the Claimant considers its valuation of potential synergies to be conservative. Mr. Macpherson emphasized that he had included value only for cost synergies and not for potential revenue synergies.[251] As summarized by Mr. Macpherson, such synergies should be achievable irrespective of the market in which a company operates:

> Every telco buys the same types of plant and equipment assets, and they buy them broadly from the same constituency of international product vendors. I did not have any revenue synergies in my number. I had a capex synergy which went to bulk buying of assets which would have to be bought by an operator in a poorer market and in a larger market, and I had efficiencies savings due to economies of scale and scope at the management layer and at the operational layer. Neither of those has anything to do with the richness of the market.[252]

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246 The Claimant's Reply, para. 265.

247 The Claimant's Post-Hearing Brief, para. 330.

248 The Claimant's Post-Hearing Brief, para. 330.

249 The Claimant's Post-Hearing Brief, para. 332.

250 Hearing Tr. 519:11-14.

251 Hearing Tr. 596:21-22.

252 Hearing Tr. 596:22 to 597:8.

265. According to the Claimant, the resulting figure was below the level actually achieved by Cable & Wireless in its prior acquisition of the Bahamas Telecommunications Company and the forecasted synergies underpinning Cable & Wireless' January 2008 offer for Telemedia.[253]

The Respondent's Position

266. The Respondent submits that Mr. Macpherson was incorrect to include synergies in his valuation, as there was "insufficient evidence to show the buyer would be a telecoms operator, in which case financial theory does not support the inclusion of synergies in the FMV."[254]

267. According to the Respondent's Expert, Dr. Hern, "it is an established principle of valuation that synergies should not normally be included in a Fair Market Valuation since they represent a source of value to only one category of investor, rather than the generalised class of investor." As such, "including synergies . . . is . . . only justified in fairly unique situations, namely that we have very strong evidence of competitive interest by competing potential acquirers that are prepared to pay for the full cost of those synergies or full value of those synergies."[255]

268. Dr. Hern does not consider the Claimant to have established that Telemedia would have been acquired by a telecommunications operator capable of generating synergies and notes that the valuation date falls in August 2009, at the height of the financial crisis, during a period in which there were few other transactions.[256] Dr. Hern also notes that an "analysis of mergers and acquisitions in Central America and the Caribbean in the past decade shows there have been a number of acquisitions in the Latin America and Caribbean region in the recent past involving a takeover of a telecoms company by a nonstrategic buyer." Finally, Dr. Hern notes, "a buyer would be able to extract value from synergies by buying an asset without a premium for synergies, particularly in illiquid markets." Because "[t]he market in the Belize environment is relatively illiquid with a high country risk premium . . . the valuation of synergies is irrelevant for determining the FMV of Telemedia."[257]

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253 The Claimant's Post-Hearing Brief, para. 331.

254 The Respondent's Rejoinder on the Merits, Reply in Support of Preliminary Objections, and Reply in Support of Counterclaims, para. 431.

255 Hearing Tr. 698:21 to 699:1.

256 Hearing Tr. 829:5-8.

257 The Respondent's Rejoinder on the Merits, Reply in Support of Preliminary Objections, and Reply in Support of Counterclaims, paras. 426-427.

The Tribunal's Considerations

269. The Tribunal agrees with the Respondent concerning the appropriateness of valuing synergies. The Tribunal would consider the inclusion of synergies to be appropriate only in the event that a specific telecommunications buyer, able to realize synergies from the purchase, could be identified and that sufficient competition among potential telecoms buyers could be identified to force the purchaser to pay for such synergies.

270. Accordingly, the mere existence of other telecommunications companies in the Caribbean with a regional expansion policy falls short of this threshold.

(d) Cross-checks to the DCF analysis

i. Overall approach

The Claimant's Position

271. According to the Claimant's Expert, Mr. Macpherson, it is "an important part of any valuation to identify if there is external evidence which can be used to corroborate the evaluation from a DCF approach."[258] In his view, "valuation best practice is to use multiple valuation approaches wherever possible and to consider all relevant available information."[259] Accordingly, Mr. Macpherson sought to confirm the results of his DCF calculation by examining (a) the 15 January 2008 offer by Cable & Wireless for 100 percent of Telemedia; (b) the valuation of BZ$6 per share made by the Government in October 2010 in connection with Telemedia's share offering; (c) a multiples valuation of nine comparable publicly traded companies; and (d) a multiples valuation of the market value of three comparable transactions.

272. Mr. Macpherson considers that the Respondent's sole reliance on DCF departs from valuation best practices for unlisted businesses, and "ignores the fact that, when available, market approaches, not DCF, are generally acknowledged to provide the best evidence of market value", and dismisses relevant evidence.[260]

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258 Hearing Tr. 529:10-23.

259 Reply (3rd) Expert Report of Alastair Macpherson, para. 4.29.

260 Reply (3rd) Expert Report of Alastair Macpherson, para. 4.25.

The Respondent's Position

273. The Respondent's expert, Dr. Hern, submits that "using one valuation technique is appropriate if there is no reliable market evidence" and notes that both Parties have advanced DCF analyses.[261] Dr. Hern concludes that the "C&W offer cannot be used with any reasonable degree of accuracy given it was made prior to the change of Government and the start of the financial crisis" and was "withdrawn following the change of Government".[262] Dr. Hern also concludes that "there is no suitable multiple-based evidence to fully cross-check the DCF methodology results."[263]

274. Dr. Hern emphasizes, however, that he did not undertake a DCF analysis without cross-checks. Rather:

> The cross checks were significant, but they were within the DCF model, so the cross checks were to look at the reasonableness of the fair market valuation based on projections against the historic trends or revenues and costs and what they would have produced if an investor had placed more emphasis on that data rather than the business plan.[264]

The Tribunal's Considerations

275. As a matter of principle, the Tribunal agrees with the Claimant that the use of cross-checks represents a best practice in the conduct of valuation. However, such cross-checks require that genuinely comparable variables are, in fact, available. The Tribunal will address the specific cross-checks proposed by the Claimant in turn. Before doing so, however, the Tribunal notes that the Respondent is correct regarding the use of internal cross-checks within its expert's DCF calculation, which compare the adjusted forecast for Telemedia's revenues and costs to the time trend of Telemedia's historic results.

ii. The January 2008 offer from Cable & Wireless

The Claimant's Position

276. The Claimant's expert, Mr. Macpherson, considers the January 2008 offer from Cable & Wireless to be "[o]ne of the most important pieces of information" insofar as it was an arms-length offer, conducted after significant due diligence, with an evaluation of potential synergies, at a time when

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261 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, para. 91.

262 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, para. 92.

263 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, para. 94.

264 Hearing Tr. 683:3-10.

the Accommodation Agreement was still in effect.[265] Mr. Macpherson then looked at the change in Telemedia's earnings before interest, taxation, depreciation, and amortization ("**EBITDA**") between January 2008 and August 2009 to reach a lower value on the valuation date, reflecting the effect of the financial crisis and Government actions prior to that date.[266] This calculation produces an estimated value at August 2009 of BZ$10.18 per share, which the Claimant considers to compare favourably with the result of BZ$10.23 reached through its expert's DCF analysis.[267]

277. The Claimant acknowledges that the Cable & Wireless offer did not close, for reasons that are not in the record, but argues that this does "not render the Cable & Wireless offer 'meaningless'".[268] The Claimant notes in particular that the Cable & Wireless offer was made after substantial due diligence and is simply being used as a cross-check, rather than as the basis for the Claimant's valuation.[269] According to the Claimant, "[t]hat the adjusted Cable & Wireless offer is so similar to the results of PwC's independently-produced DCF analysis is strong evidence that PwC's assumptions align closely with those made by a real-world arm's length willing buyer."[270] Mr. Macpherson also notes that the 23 percent downward adjustment of Cable & Wireless' actual offer (based on changes in Telemedia's EBITDA) aligns closely with the 20 percent downward adjustment posited by the Respondent's expert.[271]

The Respondent's Position

278. The Respondent argues that Cable & Wireless withdrew its offer, rendering any conclusions drawn from the offer "no more than speculation".[272] In the Respondent's view, "[n]ot knowing why C&W chose not to pursue the transaction makes it inappropriate to rely on its non-binding numbers to value Telemedia nineteen months later."[273]

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265 Hearing Tr. 513:15 to 515:14; The Claimant's Post-Hearing Brief, para. 3.17; Reply (3rd) Expert Report of Alastair Macpherson, paras. 4.09-4.10.

266 Hearing Tr. 515:20 to 516:12; Reply (3rd) Expert Report of Alastair Macpherson, paras. 4.13-4.20.

267 The Claimant's Post-Hearing Brief, para. 317.

268 The Claimant's Post-Hearing Brief, para. 319.

269 The Claimant's Post-Hearing Brief, paras. 320-322.

270 The Claimant's Post-Hearing Brief, para. 322.

271 Hearing Tr. 516:13-18.

272 The Respondent's Rejoinder on the Merits, Reply in Support of Preliminary Objections, and Reply in Support of Counterclaims, paras. 368-71.

273 The Respondent's Post-Hearing Brief, para. 141.

The Tribunal's Considerations

279. The Tribunal considers that the offer from Cable & Wireless was just that: simply an offer. The Tribunal does not know what information prompted Cable & Wireless to withdraw its offer for Telemedia or how that information might have impacted Cable & Wireless' valuation of the company had it nevertheless sought to go ahead with the deal. Without more details as to why Cable & Wireless chose not to proceed with the deal, the Tribunal considers it inappropriate to draw inferences from the offer.

iii. The October 2010 Telemedia share offering

The Claimant's Position

280. The Claimant's expert, Mr. Macpherson, considers a further comparison in the form of the October 2010 issue of 44 percent of Telemedia's shares by the Government at a price of BZ$5 per share (based on a valuation of BZ$6 per share and a BZ$1 discount).[274] Using an Enterprise Value/EBITDA ("**EV/EBITDA**") analysis, as with Cable & Wireless' offer, Mr. Macpherson posits an equivalent value at August 2009 of BZ$7.34 per share.[275] Mr. Macpherson recalls that the Government's valuation necessarily excluded the Accommodation Agreement, which the Government considered illegal, and lacked any value for synergies, insofar as it was a public offering. Stripped of the value of the Accommodation Agreement and synergies, Mr. Macpherson notes that his DCF analysis produced a value of BZ$6.39 per share,[276] which the Claimant considers to compare favourably to the Government's valuation.[277]

281. Considering the Respondent's arguments, the Claimant concedes that the October 2010 share offering is not a perfect comparator, insofar as "[i]t doesn't include any control premium; it doesn't attribute the values of Accommodation Agreement to synergies; and . . . only something like 70 per cent of the shares on offer actually were sold in that sort of IPO."[278] Nevertheless, the Claimant considers the October 2010 share offering to be incompatible with the Respondent's DCF value of BZ$1.44 per share.[279] The Claimant notes that the Respondent's attempt to reconcile these two valuations assumes that certain favourable tax changes that were planned, but not yet

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274 Expert Report of Alastair Macpherson, paras. 18.2-18.9; Hearing Tr. 520:1-10.

275 The Claimant's Post-Hearing Brief, para. 302.

276 Hearing Tr. 519:8-22

277 The Claimant's Post-Hearing Brief, para. 302.

278 Hearing Tr. 520:21 to 521:1.

279 The Claimant's Post-Hearing Brief, para. 306.

approved in October 2010, were fully reflected in the offer price.[280] The Claimant also notes that, even adjusted to August 2009, the October 2010 value is likely low, insofar as the Belizean public, to whom the shares were offered, lacked the purchasing power of a buyer in the telecommunications industry and "given the ongoing constitutionality litigation, the public may have also been concerned about the Government's title to the shares."[281]

The Respondent's Position

282. The Respondent argues that the Claimant is incorrect to place weight on the 2010 Telemedia share offering, on the grounds that it occurred 14 months after the valuation date and "was not the market-clearing price and not indicative of the [fair market value] as of the valuation date."[282]

283. Reviewing the Claimant's comparison, the Respondent's expert, Dr. Hern, notes that the 2010 share offering was premised on the basis that Telemedia's loan debt to British Caribbean Bank was invalid and need not be valued (in contrast to the Respondent's DCF assumptions following the award in the British Caribbean Bank Proceedings). According to Dr. Hern, invalidating the loan debt to make the comparison effective would raise his own valuation by 90 cents to BZ$2.34 per share.[283] Furthermore, Dr. Hern argues:

> A bigger difference is the change in the tax rate that was announced around the time of the Belize offer, including a reduction in the rate of tax on revenues I think from 24.5 to 19 and a removal of tax on dividends. So when I tried to compare what difference that would make to my valuation, I think that increases my valuation up by about 67 per cent, so you move from 2.44 up to around $4.[284]

284. Dr. Hern suggests that any remaining difference can be explained by the fact that the Government was to remain the majority shareholder and could, accordingly, "control to some extent risks of competition or risks of bankruptcy".[285] Ultimately, Dr. Hern concludes that "the valuation of $5 at the time, notwithstanding the fact it wasn't a market clearing price, actually reconciles fairly well with my $1.44."[286]

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280 The Claimant's Post-Hearing Brief, para. 305.

281 The Claimant's Post-Hearing Brief, para. 305.

282 The Respondent's Rejoinder on the Merits, Reply in Support of Preliminary Objections, and Reply in Support of Counterclaims, para. 420.

283 Hearing Tr. 707:9-13.

284 Hearing Tr. 833:18 to 834:1.

285 Hearing Tr. 834:16-18.

286 Hearing Tr. 834:20-23.

The Tribunal's Considerations

285. In the Tribunal's view, a public share offering such as the October 2010 issue may serve as a relevant point of comparison. Ultimately, however, the most important fact is that the share offering occurred 14 months after the valuation date. Both Parties have identified certain factors—including concerns about constitutionality, the protection offered by Government involvement, synergies, control premium, the exclusion of the BCB loan debt, and promised changes to the applicable tax rate—to explain the difference between this amount and their own calculations of the value of Telemedia on the valuation date. For the Tribunal, the net effect of these competing narratives is merely to highlight the uncertainty inherent in attempting to project the market value of a company from one point in time to another in significantly differing circumstances. The October 2010 share offering is therefore a relevant point of information, but the valuation date prevails.

iv. Comparable companies

The Claimant's Position

286. The Claimant's expert, Mr. Macpherson, carried out a further cross-check by comparing his DCF analysis of Telemedia with nine publicly traded telecommunications companies[287] that he considered comparable in terms of services offered and GDP of the country of operations. Mr. Macpherson corrected these calculations with updated data during the hearing to produce a range of EV/EBITDA multiples from 3.29 to 7.4. Applying the average of that range to Telemedia's EBITDA as at August 2009 produces a per-share value of BZ$6.89, which the Claimant considers to compare favourably to its expert's DCF valuation (excluding the Accommodation Agreement and synergies) of BZ$6.39 per share.

287. Considering the Respondent's criticism of this approach, Mr. Macpherson notes that he does not consider the spread of EV/EBITDA values to be "a surprising or large range for this kind of analysis".[288] The Claimant also argues that the Respondent's criticism that these companies were subject to varying levels of country risk is undercut by the Respondent relying on country risk data from 2014—long after the valuation date.[289] The Claimant notes that the Respondent's own

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287 Telecom Argentina S.A., Telefónica del Peru S.A.A., Cable & Wireless Jamaica Limited, Empresa Nacional de Telecomunicaciones S.A., Sonatel S.A., Joint stock Company Kazakhtelecom, Pakistan Telecommunication Company Limited, Philippine Long Distance Telephone Company and Itissalat Al-Maghrib (IAM) S.A. *See* Reply (3rd) Expert Report of Alastair Macpherson, paras. 4.53-4.57.

288 Hearing Tr. 602:7-9.

289 The Claimant's Post-Hearing Brief, para. 315.

expert's country risk figures for Belize in 2009 are significantly closer to the average of the nine comparators.[290]

The Respondent's Position

288. The Respondent's expert, Dr. Hern, rejects the use of a valuation multiples approach for the following reasons:

> Principally it's because, having worked in Belize, having understood the Belize local context, having understood the risks that investors face in Belize, for a variety of reasons I just don't think it's right to take companies in other markets that are very different and use those as an appropriate basis for valuation.
>
> [. . .]
>
> Whilst I might accept in principle that a telecom company in essence does the same thing in terms of mobile, fixed and internet data, what it doesn't do is operate in the same environment with similar population, with similar demographics between urban and rural areas, with similar country risk, with similar regulation. Implicit in all of these different valuations are a multitude of differences about the operating environments in which these companies work.[291]

289. Even narrowed by the corrected data, Dr. Hern submits that there remains "a very wide range in the context of the multiples analysis," as a result of dissimilar assets.[292]

290. The Respondent also criticizes the Claimant's multiples approach on the grounds that it neglects the significantly higher country risk profile applicable to Belize.[293] According to Dr. Hern, "when you're looking at multiples, if you don't control for country risk differences, then you're missing a big factor that explains those multiples. . . . the PwC multiples are highly misleading because of these differences".[294] Dr. Hern also asserts that the Claimant is incorrect that 2009 country risk data would lead to a lower number as the two figures are derived from different baselines and are, accordingly, not comparable.[295]

The Tribunal's Considerations

291. In principle, the Tribunal agrees with the Claimant that a cross-check with comparable companies on the basis of earnings multiples is a valuable exercise. The value of such an exercise, however, is predicated on the existence of publicly traded companies that are genuinely comparable. In this

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290 The Claimant's Post-Hearing Brief, para. 315.

291 Hearing Tr. 704:25 to 706:7.

292 Hearing Tr. 859:20 to 860:5.

293 NERA Rebuttal of 3rd Expert Report of Alastair Macpherson, para. 83.

294 Hearing Tr. 849:9-16.

295 Hearing Tr. 853:24 to 854:5

respect, the Tribunal agrees with the Respondent that no such comparable companies are available. The nine companies identified by the Claimant's expert Mr. Macpherson operate in a range of markets that differ materially from the circumstances prevailing in Belize.

292. The Tribunal does not believe that an earnings multiple comparison can provide meaningful results when stretched across such a range of markets, companies, and circumstances.

v. Comparable transactions

The Claimant's Position

293. The Claimant's expert, Mr. Macpherson, carried out a third cross-check by comparing his DCF analysis of Telemedia with three comparable transactions (narrowed from a broader list in response to criticism from the Respondent).[296] These three transactions featured EV/EBITDA multiples ranging from 5.48 to 6.56. Applying the average of that range to Telemedia's EBITDA as at August 2009 produces a per-share value of BZ$8.39 per share.[297] The Claimant notes that these transactions likely included some value for synergies, such that the appropriate comparison would be with Mr. Macpherson's DCF valuation of Telemedia with synergies (but without the Accommodation Agreement) at BZ$7.13 per share.[298]

The Respondent's Position

294. The Respondent objects to the use of multiples in the Claimant's comparable transactions cross-check for broadly the same reasons that its objects to their use in the comparable companies context.

The Tribunal's Considerations

295. As with the Claimant's comparable companies exercise, the Tribunal does not believe that comparators exist to permit this analysis to produce meaningful results. To the afore-mentioned difficulties in selecting comparators across a range of countries and market environments, the Claimant's comparable transactions exercise adds the complexity of comparing transactions that occurred at widely varying points in time. The Tribunal also notes that the exercise includes a comparison with the 2003 sale of Belize Telemedia Ltd. to Mr. Prosser, which the Claimant's

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296 BellSouth (Latin America), Belize Telecommunications Ltd (the 2003 Prosser Sale), and Groupe Outremer Telecom SA. *See* Reply (3rd) Expert Report of Alastair Macpherson, paras. 4.44-4.52.

297 The Claimant's Post-Hearing Brief, para. 309.

298 The Claimant's Post-Hearing Brief, para. 310.

expert concedes was not an arms-length transaction. Accordingly, the Tribunal declines to give weight to the Claimant's comparable transactions analysis.

(e) The Tribunal's valuation of Telemedia

296. On the basis of the foregoing conclusions, the Tribunal calculates the value of Telemedia as follows. The Tribunal's calculations are derived from those set out in the Respondent's expert report, but updated to reflect the Tribunal's decisions.

297. In order to calculate the rate of recovery of the Belize economy from the financial crisis, the Tribunal recreates Table 4.3 from the Respondent's Fair Market Value Report using the IMF World Economic Outlook forecasts published in April 2009:[299]

	GDP Recovery Rates		
	Avg Growth Rate	LT Growth Rate	% Recovery
	I	II	III=I/II
2009/10	1.25%	2.5%	50.0%
2010/11	2.08%	2.5%	83.0%
2011/12	2.33%	2.5%	93.0%
2012/13	2.43%	2.5%	97.0%
2013/14	2.50%	2.5%	100.0%

298. The Tribunal then recreates the Adjusted Business Plan calculation from Tables B1 and B2 of the Respondent's Fair Market Value Report using Telemedia's actual results as at July 2009[300] and the revised economic recovery rate of 50 percent for FY 2009/2010:

	Actuals			
	Apr-Jun FY08/09	Apr-Jun FY09/10	FY-end 08/09	Proportion of
	30.7.08	30.7.09	31.3.09	Rev in 1st 4 months
	I	II	III	IV=I/III
Fixed Lines-Installation, LAM, Equipment	6,093	6,149	18,053	33.75%
Fixed Lines-National (To fixed and Cellular)	9,605	8,461	25,929	37.04%
Fixed Lines-International	2,017	1,798	5,521	36.54%
Fixed Lines-Prepaid, All Destinations	3,591	2,113	10,250	35.04%
International Settlements	4,466	4,076	11,226	39.78%
International Roaming	2,699	2,110	6,958	38.79%
GSM Post Pd Nat. (Incl-All monthly chrg)	2,051	1,496	4,949	41.44%
GSM Post Paid International	288	309	844	34.14%
GSM Prepaid, All Destinations	14,268	16,493	41,026	34.78%
GSM Other	460	476	1,169	39.36%
AMPS MOBILE	29	17	56	51.08%
Internet and Data	7,272	7,065	21,319	34.11%
ICSL	60	38	200	30.00%
Other Revenue (Incl.-Interconnection etc)	1,587	1,494	3,540	44.84%
Total Revenue	**54,487**	**52,095**	**151,040**	

299 International Monetary Fund, World Economic Outlook Database, April 2009 Edition, *available at* <www.imf.org/external/pubs/ft/weo/2009/01/weodata/index.aspx>.

300 Reply Expert Report of Alastair Macpherson (**Exhibit 3-FF**).

	Forecast					
	FY-end 09/10 Based on Jul-09 Projection V=II/IV	Growth Rate Based on Jul-09 Projection VI=V/III-1	Growth Rate Original Biz Plan VII	Difference VIII=VI-VII	Growth Rate 50% recovery IX=VII+VIII*(1-50%)	Adj Biz Plan FY-end 09/10 X=III*(1+IX)
Fixed Lines-Installation, LAM, Equipment	18,220	0.92%	3.50%	-2.58%	2.21%	18,452
Fixed Lines-National (To fixed and Cellular)	22,840	-11.91%	-3.00%	-8.91%	-7.46%	23,996
Fixed Lines-International	4,920	-10.88%	-3.00%	-7.88%	-6.94%	5,138
Fixed Lines-Prepaid, All Destinations	6,030	-41.17%	-2.00%	-39.17%	-21.58%	8,038
International Settlements	10,246	-8.73%	2.00%	-10.73%	-3.37%	10,848
International Roaming	5,439	-21.83%	-2.00%	-19.83%	-11.91%	6,129
GSM Post Pd Nat. (Incl-All monthly chrg)	3,610	-27.06%	-2.00%	-25.06%	-14.53%	4,230
GSM Post Paid International	905	7.24%	-5.00%	12.24%	1.12%	853
GSM Prepaid, All Destinations	47,425	15.60%	-6.00%	21.60%	4.80%	42,995
GSM Other	1,209	3.44%	0.00%	3.44%	1.72%	1,189
AMPS MOBILE	33	-40.56%	-100.00%	59.44%	-70.28%	17
Internet and Data	20,711	-2.85%	7.00%	-9.85%	2.07%	21,761
ICSL	127	-36.67%	0.00%	-36.67%	-18.33%	163
Other Revenue (Incl.-Interconnection etc)	3,332	-5.87%	3.00%	-8.87%	-1.44%	3,489
Total Revenue	**145,047**					**147,298**

299. Adjusted revenue for subsequent years is then recalculated using the same shock reductions for the effect of the financial crisis and the recovery rate projected by the IMF's GDP data. Thus, projected revenue for FY 2010/2011 was calculated as follows:

	Adj Biz Plan FY-end 09/10 I	FY10/11 Growth Rate Original Biz Plan II	Shock Difference III	FY10/11 Growth Rate 83% recovery IV=II+III*(1-83%)	Adj Biz Plan FY-end 10/11 V=I*(1+IV)
Fixed Lines-Installation, LAM, Equipment	18,452	5.00%	-2.58%	4.56%	19,294
Fixed Lines-National (To fixed and Cellular)	23,996	1.00%	-8.91%	-0.52%	23,872
Fixed Lines-International	5,138	-3.00%	-7.88%	-4.34%	4,915
Fixed Lines-Prepaid, All Destinations	8,038	-5.00%	-39.17%	-11.66%	7,101
International Settlements	10,848	1.00%	-10.73%	-0.82%	10,759
International Roaming	6,129	4.00%	-19.83%	0.63%	6,168
GSM Post Pd Nat. (Incl-All monthly chrg)	4,230	1.00%	-25.06%	-3.26%	4,092
GSM Post Paid International	853	5.00%	12.24%	7.08%	914
GSM Prepaid, All Destinations	42,995	6.00%	21.60%	9.67%	47,153
GSM Other	1,189	3.00%	3.44%	3.59%	1,232
AMPS MOBILE	17	-100.00%	59.44%	-89.90%	2
Internet and Data	21,761	10.00%	-9.85%	8.33%	23,573
ICSL	163	5.00%	-36.67%	-1.23%	161
Other Revenue (Incl.-Interconnection etc)	3,489	8.00%	-8.87%	6.49%	3,716
Total Revenue	**147,298**				**152,950**

300. The Tribunal has considered whether Telemedia's revenue projections should be adjusted to model the effect of the Accommodation Agreement's ban on the use of VoIP. Having reviewed Telemedia's Business Plan, the Tribunal notes the inclusion of statements such as the following:

> 3.2 Major Project Initiatives
>
> The following key projects shall be undertaken and completed during the year in order to achieve the objectives that have been set out:
>
> [. . .]
>
> 5. Continue the expansion of company's VoIP and VoIP management solution (includes the Cisco Security Engine, the Bitek solution, an additional method for dealing with VPNs, and the WebTalk product). Other platforms to be investigated / utilised, including the new Nortel softswitch;[301]

301 BTL Business Plan 2009-2010, p. 10 (**Exhibit N-07**).

And also the following:

> [. . .] Telemedia recently installed a Cisco solution to better manage the VoIP illegal traffic. This, coupled with the original Bitek solution, is working to ensure that VoIP is difficult to use. There does need to be a continued effort to manage this traffic effectively and to limit the revenue loss.
>
> Telemedia does allow some customers to utilise third party VoIP providers in some cases, however those customers are required to pay for their internet at a higher rate, and to agree to additional controls to ensure that the VoIP is used by the customer only, and not by additional users.
>
> As we look forward, Telemedia's best line of defence will be the continued bundling of services, including international and domestic minutes for fixed prices, internet services, substantial increases in off-peak (low capacity utilisation) low cost / free services to customers, so that the marginal benefits for customers buying third party products is substantially reduced.[302]

301. Taken together, the Tribunal considers these statements to indicate that Telemedia was already largely successful in restricting competition from VoIP, even without the Accommodation Agreement, and that the projections in the Business Plan do not reflect significant losses to VoIP competition. In any event, the Tribunal also considers that it does not have the information before it to reasonably model Telemedia's losses to VoIP competition and is of the view that the approach taken in the Accommodation Agreement Award cannot be adapted to a later time or extended over a longer period without producing results that are unduly speculative (a point also acknowledged by the Claimant's expert[303]). For both reasons, the Tribunal declines to adjust Telemedia's revenue projections to reflect the Accommodation Agreement's ban on VoIP.

302. The Tribunal thus reaches the following adjusted forecasts for Telemedia's revenue through FY 2013/2014, which are paired with Telemedia's actual cost and depreciation forecasts to produce projected EBIT values:

	31-Mar-10	31-Mar-11	31-Mar-12	31-Mar-13	31-Mar-14
Revenues	147,298	152,950	158,727	164,376	167,532
Costs (COGS, SGA, Other)	-77,368	-72,262	-73,115	-74,232	-75,265
Depreciation	-23,921	-24,462	-23,361	-22,970	-23,207
EBIT	46,009	56,226	62,251	67,174	69,060

303. Telemedia's revenue for FY 2014/2015 for the purpose of calculating a continuing value is projected using a 3 percent growth rate, and its EBIT for that year is calculated using an average of Telemedia's EBIT margin across the preceding five years:

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302 BTL Business Plan 2009-2010, p. 12 (**Exhibit N-07**).

303 *See* Expert Report of Alastair Macpherson, paras. 15.21-15.25.

	31-Mar-10	31-Mar-11	31-Mar-12	31-Mar-13	31-Mar-14	31-Mar-15
Revenues	147,298	152,950	158,727	164,376	167,532	172,558
Costs (COGS, SGA, Other)	-77,368	-72,262	-73,115	-74,232	-75,265	
Depreciation	-23,921	-24,462	-23,361	-22,970	-23,207	
EBIT	46,009	56,226	62,251	67,174	69,060	65,331
EBIT Margin	*31%*	*37%*	*39%*	*41%*	*41%*	*38%*

304. The Tribunal accepts the Respondent's calculation that 21.34 percent of Telemedia's revenue was taxed at the 1.75 percent business tax rate. To model the effect of the Accommodation Agreement on Telemedia's tax rate, the Tribunal applies a 25 percent income tax on the remaining 78.66 percent of Telemedia's revenue. The Tribunal applies this tax to Telemedia's projected EBIT, thereby assuming that costs and depreciation are divided equally between revenue subject to a 1.75 percent business tax and revenue subject to the Accommodation Agreement's altered arrangements. The Tribunal understands that interest charges are not tax-deductible in Belize and has made no adjustment to account for Telemedia's interest costs:

	31-Mar-10	31-Mar-11	31-Mar-12	31-Mar-13	31-Mar-14	31-Mar-15
Revenues	147,298	152,950	158,727	164,376	167,532	172,558
Costs (COGS, SGA, Other)	-77,368	-72,262	-73,115	-74,232	-75,265	
Depreciation	-23,921	-24,462	-23,361	-22,970	-23,207	
EBIT	46,009	56,226	62,251	67,174	69,060	65,331
EBIT Margin	*31%*	*37%*	*39%*	*41%*	*41%*	*38%*
Taxes (BZ Business Tax on Revenues Taxed at 1.75%)	-550	-571	-593	-614	-626	-644
Taxes (BZ Income Tax on Remaining Profits)	-9,048	-11,057	-12,242	-13,210	-13,580	-12,847
NOPLAT	***36,411***	***44,598***	***49,416***	***53,350***	***54,853***	***51,840***

305. The Tribunal agrees with the Respondent that Telemedia's Business Plan includes no reference to import duties. Therefore, it declines to adjust the capital expenditure projections to account for the Accommodation Agreement's waiver of import duty. As the Tribunal accepts the Respondent's view that Telemedia's capital expenditure projections should be used without adjustment on the basis of revised revenue forecasts, the capital expenditure projections from Telemedia's Business Plan are then added to produce the following free cash flow projections:

	31-Mar-10	31-Mar-11	31-Mar-12	31-Mar-13	31-Mar-14	31-Mar-15
Revenues	147,298	152,950	158,727	164,376	167,532	172,558
Costs (COGS, SGA, Other)	-77,368	-72,262	-73,115	-74,232	-75,265	
Depreciation	-23,921	-24,462	-23,361	-22,970	-23,207	
EBIT	46,009	56,226	62,251	67,174	69,060	65,331
EBIT Margin	*31%*	*37%*	*39%*	*41%*	*41%*	*38%*
Taxes (BZ Business Tax on Revenues Taxed at 1.75%)	-550	-571	-593	-614	-626	-644
Taxes (BZ Income Tax on Remaining Profits)	-9,048	-11,057	-12,242	-13,210	-13,580	-12,847
NOPLAT	***36,411***	***44,598***	***49,416***	***53,350***	***54,853***	***51,840***
Depreciation	23,921	24,462	23,361	22,970	23,207	
Gross Cash Flow	60,332	69,060	72,777	76,320	78,060	
Change in Working Capital	0	0	0	0	0	
Capital Expenditures	-28,571	-15,000	-20,000	-25,000	-30,000	
Free Cash Flow (FCF)	***31,761***	***54,060***	***52,777***	***51,320***	***48,060***	

306. The Tribunal has reviewed the Respondent's calculation of Telemedia's cost of capital and understands that the gearing used already reflects the assumption that the BZ$45 million loan debt

to British Caribbean Bank was valid. Accordingly, the Tribunal has made no adjustment to Telemedia's WACC:

Parameter	Low	High
Nominal BZ$ Risk Free Rate	10.20%	10.20%
Equity Risk Premium	5.90%	5.90%
Asset Beta	0.54	0.61
Gearing	21%	21%
Equity Beta	0.65	0.74
Nominal BZ$ Cost of Equity (post tax)	14.0%	14.6%
Nominal BZ$ Cost of Debt	9.3%	9.3%
Nominal BZ$ WACC (post tax)	13.0%	13.5%
Post-Tax WACC:		**13.5%**

307. The Tribunal thus reached the following operating value for Telemedia, reflecting the full value of the cash flow associated with the Accommodation Agreement:

		31-Mar-10	31-Mar-11	31-Mar-12	31-Mar-13	31-Mar-14	31-Mar-15
Revenues		147,298	152,950	158,727	164,376	167,532	172,558
Costs (COGS, SGA, Other)		-77,368	-72,262	-73,115	-74,232	-75,265	
Depreciation		-23,921	-24,462	-23,361	-22,970	-23,207	
EBIT		46,009	56,226	62,251	67,174	69,060	65,331
EBIT Margin		*31%*	*37%*	*39%*	*41%*	*41%*	*38%*
Taxes (BZ Business Tax on Revenues Taxed at 1.75%)		-550	-571	-593	-614	-626	-644
Taxes (BZ Income Tax on Remaining Profits)		-9,048	-11,057	-12,242	-13,210	-13,580	-12,847
NOPLAT		***36,411***	***44,598***	***49,416***	***53,350***	***54,853***	***51,840***
Depreciation		23,921	24,462	23,361	22,970	23,207	
Gross Cash Flow		60,332	69,060	72,777	76,320	78,060	
Change in Working Capital		0	0	0	0	0	
Capital Expenditures		-28,571	-15,000	-20,000	-25,000	-30,000	
Free Cash Flow (FCF)		***31,761***	***54,060***	***52,777***	***51,320***	***48,060***	
Discount Factor		0.88	0.78	0.68	0.60	0.53	
Present Value of FCF		27,993	41,994	36,134	30,968	25,561	
Sum of Present Value	162,651						
Continuing Value	385,134						
PV of Continuing value	204,831						
Operating Value	367,481						
Mid -Year Adjustment Factor	0.9504						
Operating Value (Adjusted)	**349,271**						

308. In order to reflect the Tribunal's view that cash flow associated with the Accommodation Agreement should be subject to a supplemental discount, the Tribunal calculates Telemedia's operating value both with and without the Accommodation Agreement and discounts the operating value associated with the Accommodation Agreement by five percent to reflect the agreement's status as an un-arbitrated contingent claim. The Tribunal also removes the amount of tax adjustment associated with unpaid taxes on dividends to reflect the Accommodation Agreement's waiver of such taxes (see paragraph 117 above at para. 6.1(v)) and adds an amount for historic breaches, based on the Claimant's calculation. Both such values are subject to the supplemental discount for the Accommodation Agreement. The resulting per-share value of Telemedia is then as follows:

	w/ Accomodation Agreement	w/o Accomodation Agreement
Operating Value	349,271	210,847
Operating Value after Supp. Discount	342,680	
Excess Market Securities	0	0
Enterprise Value	**342,680**	**210,847**
Debt	-56,657	-56,657
Tax Adjustment	-25,191	-45,572
Historical Breaches (Acc Agreement)	10,048	0
Equity Value	**270,879**	**108,618**
No. Shares	47,903	47,903
Value per Share	**5.6547**	**2.2675**

309. Recalling the Claimant's argument that the Respondent's calculation produced facially unreasonable results (see paragraph 251 above), the Tribunal notes that it considers the value reached through it adjusted calculations to be reasonable in light of all the circumstances.

310. The Tribunal accepts that Dunkeld's interest in Telemedia at the valuation date was as follows:

Company	Shares
ECOM Ltd.	10,841,778
	3,200,879
	1,135,831
Subtotal held through ECOM Ltd.:	**15,178,488**
Mercury Communications Ltd.	1,367,494
	3,418,736
Subtotal held through Mercury Comm. Ltd.:	**4,786,230**
New Horizons Inc.	5,880
	14,701
Subtotal held through New Horizons Inc.:	**20,581**
Thiermon Ltd.	3,681,988
	8,120,742
	1,084,229
Subtotal held through Thiermon Ltd.	**12,886,959**
BB Holdings Ltd.	352,816
	882,043
Subtotal held through BB Holdings Ltd.	**1,234,859**
Total:	**34,107,117**

311. These holdings correspond both with the share certificates in the record before the Tribunal[304] and with the shareholdings listed in the Government's first notice of acquisition (see paragraph 135 above).

304 Thiermon Limited's share certificates in Belize Telemedia Limited (**Exhibit C-22**); BCB Holdings Limited's share certificates in Belize Telemedia Limited (**Exhibit C-24**); Share Certificates of Ecom Limited, Mercury Communications Limited and New Horizons Inc. (**Exhibit C-26**).

312. The Tribunal understands, on the basis of Telemedia's 31 March 2009 Director's Report[305] that there were 49,551,652 issued shares of Telemedia. Further to the Tribunal's invitation to the Parties' experts to review the Tribunal's calculations, the Claimant noted that the Tribunal's use of this figure to calculate the per-share value of Telemedia did not include 1,648,676 shares in Telemedia held by Telemedia's subsidiaries BTL (Overseas) Limited, BTL International Inc., BTL Investments Limited, and Telemedia Investments Limited. The Claimant argued that

> The calculation for Shares Outstanding requires the deduction of the number of Treasury Shares held by Telemedia from the number of Shares Issued. This is because those Treasury Shares were shares in Telemedia acquired by the subsidiaries of Telemedia. As a consequence of the fact that those shares are owned by the company, they are excluded from the shares which have an ownership stake in the company; namely the Shareholders Equity.[306]

313. The Tribunal recalls that the treatment of shares of Telemedia held by a subsidiary of the company was the subject of consideration in *British Caribbean Bank v. Belize* and that the award in that matter held that "as the capital of the subsidiary is distinct from the capital of the parent, . . . the acquisition by a subsidiary of shares in its parent does not amount to a reduction of the share capital of the parent."[307] Because the acquisition of the shares by its subsidiaries did not reduce the share capital of Telemedia, the Tribunal considers that the shares held by Telemedia's subsidiaries should be regarded as distinct from the unissued shares of the company for which no capital had been paid in. The shares held by Telemedia's subsidiaries were, rather, assets of those subsidiaries, which were either acquired by the Government directly (in the case of the shares held by BTL International Inc. and BTL Investments Limited, see paragraph 135 above) or constructively through the acquisition of Telemedia itself (in the case of the shares held by BTL (Overseas) Limited and Telemedia Investments Limited). As a matter of consolidated accounting, however, the value of such assets is reflected in their treatment as treasury shares in Telemedia's consolidated financial statements and their deduction from the shares outstanding for the purposes of calculating earnings per share. The Tribunal thus agrees with the Claimant regarding the effect of shareholdings by Telemedia's subsidiaries on the number of shares outstanding for the purposes of valuing Telemedia and considers that this is consistent with the treatment of shares held by subsidiaries in *British Caribbean Bank v. Belize*.

314. The Tribunal also notes the Respondent's objection that the Claimant's comments on this point exceeded the Parties' undertaking to "limit their comments to the accuracy of the Tribunal's calculations and not to seek to re-litigate any points of substance decided by the Tribunal." The

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305 Consolidated Financial Statements for Belize Telemedia Limited for the Year Ending March 2009, 31 March 2009 (**Exhibit C-57**).

306 The Claimant's letter to the Tribunal dated 13 May 2016.

307 *British Caribbean Bank v. Belize*, PCA Case No. 2010-18, Award of 19 December 2014, para. 154.

Tribunal disagrees and considers that the calculation of Dunkeld's interest in Telemedia was part of the calculations on which the Tribunal sought the Parties' comments. The draft valuation provided for the Parties' comments did not reflect any decision on the treatment of shares held by subsidiaries, and the Tribunal considers that to neglect such shareholdings would be to distort the value of Telemedia.

315. Based on that figure, the Tribunal calculates Dunkeld's percentage interest in Telemedia as follows:

Company	Shares	Percentage Share
ECOM Ltd.	10,841,778	
	3,200,879	
	1,135,831	
Subtotal held through ECOM Ltd.:	**15,178,488**	**31.69%**
Mercury Communications Ltd.	1,367,494	
	3,418,736	
Subtotal held through Mercury Comm. Ltd.:	**4,786,230**	**9.99%**
New Horizons Inc.	5,880	
	14,701	
Subtotal held through New Horizons Inc.:	**20,581**	**0.04%**
Thiermon Ltd.	3,681,988	
	8,120,742	
	1,084,229	
Subtotal held through Thiermon Ltd.	**12,886,959**	**26.90%**
BB Holdings Ltd.	352,816	
	882,043	
Subtotal held through BB Holdings Ltd.	**1,234,859**	**2.58%**
Total:	**34,107,117**	**71.20%**

316. Applying Dunkeld's interest to Telemedia's equity value at 25 August 2009, the Tribunal calculates the value of Dunkeld's interest at BZ$ 192,867,186, of which BZ$ 115,530,419 is attributable to the Accommodation Agreement.

4. The Currency of Damages

The Claimant's Position

317. The Claimant points out that Article 5 of the Treaty specifies that compensation shall be "effectively realisable and be freely transferable." The Claimant notes that, as indicated in Mr. Macpherson's expert report, the International Monetary Fund lists the United States dollar as

being a freely transferable currency, but not the Belizean dollar. For this reason, "Dunkeld therefore seeks payment of damages in dollars."[308]

318. The Claimant also rejects the Respondent's argument that Belize law requires damages to be paid in Belizean dollars. The Claimant recalls the observation in *Petrobart Limited v. Kyrgyz Republic* that a "state cannot invoke its municipal law as a reason for not fulfilling its international obligations"[309] and submits that the Respondent "is, once again, conflating its domestic law rules with its international law obligations."[310]

The Respondent's Position

319. The Respondent contends that Belizean exchange control laws require that damages must be in Belizean dollars, unless the Belizean Controller gives "express permission."[311]

The Tribunal's Considerations

320. Although the Parties' arguments concerning the currency of damages appear to fall within the Remaining Issues for Tribunal decision, the Tribunal notes that paragraphs 4.3 and 4.5 of the Parties' Settlement Agreement address the currency of payments pursuant to this Award. The Tribunal considers that the Settlement Agreement accordingly resolves the issue of currency.

321. To the extent that any aspect of the question of currency is not resolved by the Settlement Agreement, the Tribunal agrees with the Claimant regarding the currency of damages and translates its calculation of Telemedia's value to U.S. dollars using the average inter-bank rate for the sale of Belize dollars on 25 August 2009 of 1.98965 Belize dollars to the U.S. dollar. On this basis, the Tribunal calculates the value of Dunkeld's interest at US$96,935,233, of which US$58,065,699 is attributable to the Accommodation Agreement.

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308 The Claimant's Statement of Claim, para. 255.

309 The Claimant's Reply, para. 308, *quoting Petrobart Limited v. Kyrgyz Republic*, ARB No. 126/2003, Award (29 March 2005), para. VII.1.B.7 (**Authority CA-90**).

310 The Claimant's Reply, para. 308.

311 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 346; *Central Bank of Belize Act*, Chapter 262 of the Laws of Belize, Sections 21-22 (**Exhibit R-104**); Exchange Control Regulations Act, Chapter 52, Sections 1-2 (**Authority RA-11**).

5. Interest

The Claimant's Position

322. The Claimant "seeks interest at the weighted average annual rate for fixed term deposits over one year paid by commercial banks in Belize, compounded quarterly, with interest to run from 25 August 2009 when compensation should have been paid, until the obligation to pay is fulfilled."[312]

323. The Claimant notes that Article 5(1) of the Treaty provides that compensation "'shall include interest at the rate prescribed by law until the date of payment,'" though the Treaty does not indicate which law applies and Belize law generally gives the courts broad discretion in awarding interest.[313] The Claimant notes, however, that Section 68(1) of the 2009 Act provides that interest be calculated by "'the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition.'"[314] According to the Claimant, this rate was 8.34 percent on 25 August 2009.[315]

324. Citing various cases, including *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*,[316] the Claimant argues that "[i]t has become common practice for investment treaty tribunals to award compound interest in expropriation cases on the basis that it best reflects the commercial return that an investor would expect to receive on its money."[317]

325. Regarding the Respondent's view that Dunkeld is not entitled to interest because the Companies have submitted claims to the Government, the Claimant argues that "[t]he Government cites no legal authority for this assertion."[318]

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312 The Claimant's Statement of Claim, para. 267.

313 The Claimant's Statement of Claim, para. 263; Supreme Court of Judicature Act, Chapter 91, Sections 102 and 105 (**Authority CA-14**).

314 The Claimant's Statement of Claim, para. 264.

315 The Claimant's Statement of Claim, para. 265; Weighted Average Interest Rates, Central Bank of Belize (**Exhibit C-213**); The Claimant's Reply, para. 240.

316 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002)(**Authority CA-20**).

317 The Claimant's Statement of Claim, para. 266.

318 The Claimant's Reply, para. 300.

The Respondent's Position

326. The Respondent contends that "Dunkeld is not entitled to any interest" because the Companies have submitted claims to the Government.[319] The Respondent further argues that:

> If the Tribunal makes an award of damages, it should not award interest for the entire time period because much—if not all—of the delay is attributable to Dunkeld's litigation strategy. GOB made offers of compensation to the registered shareholders; ultimately, it is they, and not Dunkeld, who are entitled to compensation.[320]

The Tribunal's Considerations

327. The Tribunal recalls that in its written pleadings, the Respondent did not contest the rate of interest requested by the Claimant. When the Respondent sought to do so during the hearing, the Tribunal ruled that "the matters raised in the e-mail of the Respondent of [8 April 2015] are raised too late. They should have been raised earlier. We have to proceed on the basis of what is in the submissions, the two exchanges and here at the hearing."[321] The Tribunal stands by this decision and does not see that the extended nature of these proceedings can be attributed to the Claimant, such that it would affect the justification for an award of interest.

328. Accordingly, between 25 August 2009, the date of the expropriation, and the date of this Award, the Tribunal will follow section 68 of the Belize Telecommunications (Amendment) Act 2009, which provided as follows:

> (1) The Court, in awarding compensation, may add interest thereto and shall be guided by the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition; so, however, that reasonable compensation shall be paid to the claimant having regard to all the circumstances.
>
> (2) The interest under subsection (1) above may be added for the whole or any part of the period between the date of acquisition of the property and the date of the payment of the compensation awarded by the Court.

329. The Tribunal accepts Claimant's evidence that the rate of the weighted average annual rate for fixed term deposits of over one year in duration paid by commercial banks in Belize as at 25 August 2009 was 8.34 percent. Applying that rate, compounded quarterly and taking account of the Respondent's payment on 22 September 2015 of $24,557,124 pursuant to the Parties' settlement agreement, the Tribunal calculates the interest due from 25 August 2009 to 28 June 2016 at US $72,017,410, of which US $44,099,684 is linked to the value of the Accommodation Agreement.

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319 The Respondent's Preliminary Objections, Statement of Defense, and Counterclaims, para. 409.

320 The Respondent's Post-Hearing Brief, para. 185.

321 Hearing Tr. 988:23 to 989:3.

330. From the date of this Award, the Tribunal considers that its discretion with respect to the rate of interest is circumscribed by Article 5(1) of the Treaty, which provides that compensation for expropriation "shall include interest at the rate prescribed by law until the date of payment". Accordingly, the Tribunal determines that from the date of this Award until the date of payment, the interest payable on all outstanding amounts shall be at a rate of 8.34 percent, compounded quarterly.

B. WHETHER THE CLAIMANT IS ENTITLED TO RECOVER THE COSTS OF THE DUNKELD II PROCEEDINGS AND PROCEEDINGS IN THE BELIZE COURTS

The Claimant's Position

331. The Claimant seeks compensation for legal and other costs spent on the Dunkeld II Proceedings, since it "was a necessary response to the measures taken by the Government to prevent Dunkeld from pursuing this arbitration."[322] The Claimant also seeks costs, including the legal fees of Allen & Overy LLP and Courtenay Coye LLP, related to its litigation in Belize courts regarding the Dunkeld I and Dunkeld II Injunctions.

332. According to the Claimant, "Dunkeld claims these losses as either flowing from the Government's breach of the agreement to arbitrate set out in Article 8 of the Treaty and/or on the basis that they were necessary to bring and pursue these proceedings."[323] The Claimant also notes that some of these costs were awarded by the Court of Appeal, although Dunkeld has not yet recovered these costs. The Claimant adds that it "does not seek double recovery" and will alert the Tribunal should it recover any of these costs before the Tribunal hands down an award.[324]

333. The Claimant assesses these costs as follows:

(a) Allen & Overy, for costs related to the Dunkeld II Proceedings and proceedings in Belize courts regarding the First and Second Injunction = £1,297,314.40[325]

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322 The Claimant's Statement of Claim, para. 256.

323 The Claimant's Reply, para. 301.

324 The Claimant's Statement of Claim, para. 257.

325 The Claimant's Statement of Claim, para. 258, *citing* Certification and Costs Schedule, Allen & Overy LLP (**Exhibit C-224**).

(b) Courtenay Coye LLP, for costs related to proceedings in Belize courts regarding the First and Second Injunctions = BZ$364,789.85[326]

(c) PricewaterhouseCoopers, for costs related to preparing an expert report for the Second Arbitration = £221,035.00[327]

The Respondent's Position

334. As confirmed by the Parties' correspondence of 26 February 2016, the Respondent has conceded the Tribunal's jurisdiction to address the costs of the Dunkeld II Proceedings, as well as the costs associated with Belize court litigation concerning the Dunkeld I and Dunkeld II Injunctions. The Respondent has also conceded the merits of the Claimants' claim that the Government's actions to restrain Dunkeld from exercising its rights to arbitration constituted a breach of Article 8 of the Treaty.

The Tribunal's Considerations

335. The Tribunal considers that the issue of the costs of related proceedings is effectively determined by the Parties' Settlement Agreement. The Tribunal recalls the view expressed in the British Caribbean Bank Proceedings that "as a general matter, the costs of a proceeding in a particular forum are most appropriately assessed by that forum",[328] but considers that the present circumstances differ as a consequence of the Parties' agreement.

336. Notwithstanding the Parties' agreement that the Tribunal has jurisdiction to determine the costs of ancillary proceedings, the Tribunal would still have discretion pursuant to Article 40(2) of the UNCITRAL Rules and could, if appropriate, leave the question of costs to the Dunkeld II Proceedings and to the courts of Belize. However, the Parties' agreement that the Government's efforts to enjoin the present proceedings constitute a violation of Article 8 of the Treaty—and that the violation of that provision entails a damages remedy—leads to a different result. In contrast to Article 5 of the Treaty, Article 8 specifies no particular standard of damages for a breach of the obligation to arbitrate. The applicable standard in respect of such a breach is accordingly that existing in customary international law, as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows:

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326 The Claimant's Statement of Claim, para. 259, *citing* Certification and Costs Schedule, Courtenay and Coye LLP (**Exhibit C-223**).

327 The Claimant's Statement of Claim, para. 260, *citing* Invoice, PricewaterhouseCoopers (**Exhibit C-222**).

328 *British Caribbean Bank v. Belize*, PCA Case No. 2010-18, Award of 19 December 2014, para. 326.

> 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.[329]

337. In the Tribunal's view, full reparation for the breach of an agreement to arbitrate—which the Parties agree has occurred—would necessarily include the costs of domestic court litigation in respect of the Dunkeld I injunction applicable in these proceedings. These costs would, as a practical matter, also wholly encompass the costs of the Dunkeld II Injunction insofar as the two issues were litigated jointly. Additionally, the Tribunal considers that full reparation extends to other costs caused by the Government's breach of Article 8, which include the costs of reasonable efforts to exercise and protect the right to arbitrate through related proceedings such as the Dunkeld II arbitration.

338. The Respondent has not contested the amounts claimed in respect of each of these ancillary proceedings. Whether viewed as a matter of costs or as compensation for the breach of Article 8, the Tribunal therefore considers that its role is limited to determining whether the amounts claimed by Dunkeld are reasonable. In this respect, the Tribunal recalls that both injunctions were intensively litigated in the courts of Belize and that the Dunkeld II Proceedings were on the verge of a hearing when interrupted by the Dunkeld II Injunction. Under the circumstances, the Tribunal considers the costs sought by the Claimant to be reasonable and awards the Claimant £1,518,349.40 for the costs of Allen & Overy and PricewaterhouseCoopers and £136,550.98 (equivalent to BZ$364,789.85 as on 28 June 2016) for the costs of Courtenay Coye LLP.

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

VI. COSTS

339. 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.

340. 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.

A. COSTS OF ARBITRATION

341. As recorded in the Tribunal's Order Nº 1, the Parties agreed that the deposit held by the PCA in relation to the Dunkeld II proceedings (PCA Case Nº 2010-21) would be used in connection with this arbitration.

342. The Parties deposited with the PCA a total of €830,000.00 (€505,000.00 by the Claimant; €325,000.00 by the Respondent) to cover the costs of arbitration both in PCA Case Nº 2010-21 and this arbitration.

343. The fees and expenses in this arbitration of Mr. John Beechey, the arbitrator appointed by the Claimant, amount respectively to €59,375.00 and €12,230.07.

344. The fees and expenses in this arbitration of Mr. Rodrigo Oreamuno, the arbitrator appointed on behalf of the Respondent, amount respectively to €108,250.00 and €1,299.00.

345. The fees and expenses in this arbitration of Professor Albert Jan van den Berg, the Presiding Arbitrator, amount respectively to €236,166.77 and €4,991.39.

346. Pursuant to the Tribunal's Order Nº 1, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services in this arbitration amount to €84,527.50.

347. Also pursuant to the Tribunal's Order Nº 1, Ms. Niuscha Bassiri was appointed as Tribunal Secretary for these proceedings. Ms. Bassiri's fees in this arbitration amount to €16,974.97.

348. Other tribunal costs in this arbitration, including court reporters, interpreters, hearing room equipment, tribunal accommodation, bank charges, and all other expenses relating to the arbitration proceedings, amount to €88,996.00.

349. Based on the above figures, the combined tribunal costs in this arbitration, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Rules, total €615,269.26.

350. The Parties' respective portions of these tribunal costs, amounting to € 307,634.63 for each Party, shall be deducted from the deposit. Any unexpended balance shall be reserved pending the resolution of the Dunkeld II proceedings.

351. In the course of constituting the Tribunal in this arbitration, the fee of the PCA Secretary-General for the designation of an appointing authority was €750.00. The fee of the appointing authority for the appointment of an arbitrator on behalf of the Respondent was €1,000.00. These amounts, comprising the items covered in Article 38(f) of the UNCITRAL Rules, were borne by the Claimant in the first instance.

352. Turning to the application of Article 40(1) of the UNCITRAL Rules, the Tribunal recalls that the Rules anticipate that costs will be borne by the unsuccessful Party, but that "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." In the Tribunal's view the Parties' settlement agreement is such that neither Party can fairly be called the unsuccessful Party. Accordingly, the Tribunal considers that the circumstances of the case call for apportionment and decides that the Parties shall bear the costs of arbitration in equal shares. In light, however, of the Parties' unequal contributions to the deposit held by the PCA, the Tribunal effects an equal apportionment by ordering that the Respondent shall pay to the Claimant the amount of

€67,590.94 (corresponding to the Respondent's portion of the tribunal costs, borne by the Claimant in the first instance and half of the fees of the PCA Secretary-General and the appointing authority, borne by the Claimant in the first instance).

B. COSTS OF LEGAL REPRESENTATION AND ASSISTANCE

The Claimant's Position

353. The Claimant seeks costs in respect of its legal representation and assistance in the following amounts:

Item	Cost
Allen & Overy LLP Legal Fees:	£2,717,964.61
Disbursements:	£175,102.38
PricewaterhouseCoopers LLP Fees:	£507,000.00
Courtenay Coye LLP Legal Fees:	BZ$224,433.75
Witness Travel and Accommodation:	$115,469.29
Total (converted to GBP):	**£3,546,059.91**

354. The Claimant requests that "in the event that the Tribunal finds that the Claimant is successful in proving its claims under the Treaty, . . . the Tribunal to order the Government to pay for all costs incurred by the Claimant in connection with these arbitration proceedings (including costs of legal representation and assistance)".[330] According to the Claimant, *Gemplus S.A. v. Mexico*, *ADC v. Hungary*, and *SPP v. Egypt* establish the proposition that the award of legal costs is necessary to wipe out the consequences of unlawful acts.[331] The Claimant also notes that this approach was followed by the Tribunal in the British Caribbean Bank Proceedings.[332]

355. Additionally, the Claimant submits that an award of the costs of legal representation is warranted by the Respondent's "dilatory tactics before and during the arbitration proceedings" and by its "spurious and unsupported counterclaims".[333] The Claimant relies on *LETCO v. Liberia*, *Cementownia v. Turkey*, and *Euram v. Slovakia* for support for its proposition that "arbitral tribunals should award costs against a party that unnecessarily delays the arbitration and increases

330 The Claimant's Submissions on Costs, para. 16.

331 The Claimant's Submissions on Costs, para. 11.

332 The Claimant's Submissions on Costs, para. 16.

333 The Claimant's Submissions on Costs, para. 17.

the costs of the proceedings by making meritless applications, claims or objections."[334] In these proceedings, the Claimant argues, the Respondent engaged in dilatory tactics by:

(a) pursuing and obtaining the anti-arbitration injunction in the Courts of Belize;

(b) delaying the proceedings through the passage of the Supreme Court Judicature Act;

(c) pursuing and obtaining an anti-arbitration injunction against the Dunkeld II Proceedings;

(d) employing the decisions of the Courts of Belize as a pretext for unnecessary extensions;

(e) seeking to change the hearing venue;

(f) submitting overly broad and irrelevant requests for the production of documents; and

(g) seeking to bifurcate the proceedings only six weeks prior to the commencement of the hearing.[335]

356. In the Claimant's view, the Respondent also initiated counter-claims that were "without any basis or merit", only to withdraw them at the hearing after forcing the Claimant to incur costs in response.[336]

357. Finally, the Claimant emphasizes that its claim for the costs of legal representation is irrespective of the outcome of these proceedings on the merits. According to the Claimant:

> even if the Government prevails on its jurisdictional arguments or the merits, these aspects of the Government's case and the manner in which it was advanced justify a finding that the Claimant should not be responsible for any of the Government's costs, and that an award of the Claimant's costs of legal representation should be made in the Claimant's favour.[337]

The Respondent's Position

358. The Respondent requests that the Tribunal "award it the legal fees and costs it incurred in defending this arbitration proceeding", [338] as well expert witness fees and costs in the following amounts:

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334 The Claimant's Submissions on Costs, para. 12.

335 The Claimant's Submissions on Costs, paras. 18-19.

336 The Claimant's Submissions on Costs, paras. 21-22.

337 The Claimant's Submissions on Costs, para. 20.

338 The Respondent's Cost Submission, p. 3.

Item	Cost
Dorsey & Whitney LLP Legal Fees and Costs:	$725,085.46
NERA Economic Consulting Fees and Costs:	$171,358.78
Sub-total:	**$896,444.24**
Other Costs:	**£32,459.32**

359. The Respondent further submits that the Tribunal should deny Dunkeld's request for costs and fees.[339]

The Tribunal's Considerations

360. The Tribunal considers 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. In keeping with its decision on the costs of arbitration, however, the Tribunal considers that "the event" in this instance has been a settlement agreement to the benefit of both Parties and of the people of Belize.

361. Accordingly, the Parties shall each bear their own costs of legal representation and assistance.

* * *

339 The Respondent's Cost Submission, p. 3.

VII. DISPOSITIF

362. For the foregoing reasons, the Tribunal:

(a) DECLARES that the value associated with Telemedia's claim for damages for breach of the Accommodation Agreement should be included in the value of Telemedia as at 25 August 2009 subject to a supplemental discount of five percent;

(b) DECLARES that the value of Telemedia at 25 August 2009 was BZ$5.65474900702263 per share, of which BZ$3.38728185941928 is attributed to the value of the Accommodation Agreement;

(c) DECLARES that the value of Dunkeld's interest in Telemedia as at 25 August 2009 was US$96,935,233, of which US$58,065,699 is attributed to the value of the Accommodation Agreement;

(d) ORDERS the Respondent to pay to the Claimant US$96,935,233 in respect of the value of Telemedia, with such payment to be made in accordance with Section 4 of the Parties' Settlement Agreement of 11 September 2015, deducting the amount paid as "Partial Dunkeld Compensation" pursuant to paragraph 4.1(a) of the Parties' Settlement Agreement of 11 September 2015;

(e) ORDERS the Respondent to pay to the Claimant, in respect of the value of Telemedia, pre-Award interest in the amount US$72,017,410 (of which US $44,099,684 is attributed to the value of the Accommodation Agreement), with such payment to be made in accordance with Section 4 of the Parties' Settlement Agreement of 11 September 2015;

(f) ORDERS the Respondent to pay to the Claimant £1,518,349.40 and £136,550.98 in respect of the costs of the Dunkeld II Proceedings and the costs of litigation in the courts of Belize in respect of the Dunkeld I and Dunkeld II Injunctions, less any sums actually paid in relation to the costs already ordered by the Court of Appeal of Belize in relation to these proceedings.

(g) DECLARES that the Parties shall bear the costs of arbitration (other than legal representation and assistance) in equal shares;

(h) ORDERS the Respondent to pay to the Claimant the amount of €67,590.94 as reimbursement for the Respondent's share of the costs of the arbitration (other than legal representation and assistance) borne by the Claimant in the first instance;

(i) DECLARES that the Parties shall each bear their own costs of legal representation and assistance in the arbitration proceedings;

(j) ORDERS the Respondent to pay to the Claimant post-Award interest at a rate of 8.34 percent, compounded quarterly, on any outstanding amount starting from the date of this Award; and

(k) REJECTS all other claims.

Done in The Hague, the Netherlands, the place of arbitration, on 28 June 2016.

John Beechey

Rodrigo Oreamuno

Albert Jan van den Berg
Presiding Arbitrator