

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1977

AND

PURSUANT TO 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

B E T W E E N:

BRITISH CARIBBEAN BANK LIMITED

Claimant

-v-

THE GOVERNMENT OF BELIZE

Respondent

NOTICE OF ARBITRATION

4 May 2010

Allen & Overy LLP
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United Kingdom

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Ref: JAEG/MPG/AAMW

1. INTRODUCTION

- 1.1 This Notice of Arbitration (the **Notice**) is served by the Claimant, British Caribbean Bank Limited (**BCB** or the **Claimant**), on the Respondent, the Government of Belize (the **Government** or the **Respondent**), pursuant to:
- (a) Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 1977 (the **UNCITRAL Rules**); and
 - (b) Article 8 of 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 (the **Treaty**¹).
- 1.2 BCB demands that the dispute which is set out in this Notice be referred to arbitration in accordance with Article 3 of the UNCITRAL Rules and with Article 8 of the Treaty.
- 1.3 The dispute to which this Notice relates concerns the Government's disregard for the rights of BCB, a foreign investor entitled to protection under the Treaty. The dispute arises out of the Government's conduct in compulsorily acquiring BCB's rights under:
- (a) a Term Loan Facility 6 July 2007 granted by BCB to a company incorporated in Belize, Belize Telemedia Limited (**Telemedia**) (the **Telemedia Facility**)²;
 - (b) a Mortgage Debenture between BCB and Telemedia dated 31 December 2007 (the **Telemedia Mortgage**)³;
 - (c) a Syndicated Loan Agreement dated 19 September 2005 executed between BCB, The Belize Bank Limited, Caedman Limited and Sunshine Holdings Limited (**Sunshine**) (the **Sunshine Facility**)⁴;
 - (d) a Security Agreement dated 19 September 2005 executed between the Bank and Sunshine (the **Sunshine Security**)⁵; and
 - (e) a Facility Agreement dated 19 May 2006 executed between the Claimant, Sunshine and the Trustees of the Belize Telecommunications Ltd. Employees Trust (the **Sunshine Overdraft Facility**)⁶

¹ A copy of the Treaty is produced as **Exhibit C-1**.

² A copy of the Telemedia Facility is produced as **Exhibit C-2**.

³ A copy of the Telemedia Mortgage is produced as **Exhibit C-3**.

⁴ A copy of the Sunshine Facility is produced as **Exhibit C-4**.

⁵ A copy of the Sunshine Security is produced as **Exhibit C-5**.

⁶ A copy of the Sunshine Overdraft Facility is produced as **Exhibit C-6**.

(together the **Agreements**).

- 1.4 On 25 August 2009 the Government enacted the Belize Telecommunications (Amendment) Act 2009 (the **Act**)⁷, which enables it to acquire compulsorily all such property as the Prime Minister, with the approval of the Minister of Finance, considers necessary to take possession of and assume control over telecommunications in Belize. At all material times, Telemedia has been the largest owner and operator of telecommunications and other media services in Belize. On 25 August 2009 the Minister responsible for telecommunications made the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009 (the **Order**)⁸. By this Order the following property was compulsorily acquired for and on behalf of the Government:
- (a) approximately 94% of the shares in Telemedia, including 11,092,884 shares beneficially owned by Sunshine;
 - (b) the Bank's interest in Telemedia and its subsidiaries under the Telemedia Mortgage;
 - (c) the entire issued share capital of Sunshine.
- 1.5 The Telemedia Facility, which was secured by the Telemedia Mortgage, was not acquired under the Order.
- 1.6 However, on 4 December 2009 the Minister responsible for telecommunications made a further order under the Act, namely Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) (Amendment) Order, 2009, Statutory Instrument No. 130 of 2009 (the **Amendment Order**)⁹. Under the Amendment Order the Minister compulsorily acquired for and on behalf of the Government "*all proprietary and other rights and interests whatsoever held by*" the Bank under:
- (a) the Telemedia Facility;
 - (b) the Sunshine Facility;
 - (c) the Sunshine Security; and
 - (d) the Sunshine Overdraft Facility.

⁷ A copy of the Act is produced as **Exhibit C-7**.

⁸ A copy of the Order is produced as **Exhibit C-8**.

⁹ A copy of the Amendment Order is produced as **Exhibit C-9**.

1.7 These actions were in breach of the Government's obligations to BCB, which has the status of an investor under the Treaty.

2. THE TREATY

2.1 The Treaty is dated 30 April 1982, approximately seven months after Belize, formerly British Honduras, gained its independence from the United Kingdom, and came into force on the same date in accordance with its Article 12. It remains in force today.

2.2 Article 11 of the Treaty provides:

"At the time of signature of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes."

2.3 The Treaty was extended by Exchange of Notes to the Turks and Caicos Islands on 10 December 1985 (the Exchange of Notes).¹⁰

2.4 The preamble to the Treaty records that the intention of the Contracting Parties was to enhance their mutual economic prosperity through the promotion and protection of investments by the nationals of each state in the territory of the other. The preamble provides:

"The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize;

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;"

2.5 The Treaty's object and purpose is the promotion and protection of investment flows between Belize and the United Kingdom and with other territories to which protection was extended under Article 11, such as the Turks and Caicos Islands. As described briefly below, the Government has acted in disregard of the intentions expressed in the Treaty and in violation of the international legal obligations to which it agreed to be bound.

3. THE AGREEMENT TO ARBITRATE

3.1 Article 8 of the Treaty provides:

¹⁰ A copy of the Exchange of Notes is produced as Exhibit C-10. The Note was signed on behalf of Belize by Dean Barrow, who was at that time the Minister of Foreign Affairs and is now the Prime Minister.

"(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled, shall after a period of three months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes."

"(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to—

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules."

3.2 By letters dated 4 December 2009 and 13 January 2010, Allen & Overy LLP, on behalf of BCB, wrote to the Government and notified claims to be submitted to international arbitration in accordance with Article 8(1) of the Treaty¹¹ (the **Notification Letters**). A period of three months has passed since BCB notified the Government of its claims and the dispute has not been amicably settled. BCB now refers the dispute to international arbitration.

3.3 By the terms of Article 8(1), the Government expresses in writing in advance its generic and unequivocal consent to submit disputes to international arbitration. By serving this Notice, BCB accepts the Government's offer to submit this dispute to international arbitration in accordance with Article 8 of the Treaty.

3.4 By the above mentioned Notification Letters¹² Allen & Overy LLP, on behalf of BCB, asked the Government to indicate which of the above means of international arbitration it would propose for the dispute. The Government has not responded to this request and accordingly the Parties have not

¹¹ Copies of the letters from Allen & Overy LLP to the Government dated 4 December 2009 and 13 January 2010 are produced as **Exhibit C-11**.

¹² **Exhibit C-11**.

agreed on the means of international arbitration. Therefore, under Article 8(2) of the Treaty, the Parties are bound to submit the dispute to arbitration under the UNCITRAL Rules.

4. APPOINTMENT OF THE TRIBUNAL

4.1 BCB proposes that the arbitral tribunal shall comprise three arbitrators. BCB notes that, under Article 5 of the UNCITRAL Rules, if the Government does not agree with this proposal within fifteen days of receipt of this Notice, a three member arbitral tribunal shall be the default position.

4.2 In accordance with Article 7 of the UNCITRAL Rules, BCB appoints Mr John Beechey to act as a member of the Arbitral Tribunal. Mr Beechey's contact details are as follows:

Strictly private and confidential – addressee only

Mr John Beechey

Chairman

ICC International Court of Arbitration

38 Cours Albert 1er

75008 Paris

France

Email: john.beechey@iccwbo.org

Fax: + 33 1 49 53 29 29

4.3 The Parties have not previously designated an appointing authority. By its Notification letters¹³, Allen & Overy LLP, on behalf of BCB, proposed to the Government that the Court of Arbitration of the International Chamber of Commerce act as the appointing authority for the purposes of Article 7 of the UNCITRAL Rules. The Government has not replied to this proposal. BCB notes that, failing agreement between the Parties, the appointing authority shall (if required) be designated in accordance with Article 7(2)(b) of the UNCITRAL Rules.

5. SEAT OF THE ARBITRATION

5.1 The Parties have not agreed upon a seat of the arbitration. However BCB invites the Government to agree London, England as the seat of the arbitration.

5.2 BCB recognises that absent agreement it is for the Tribunal to determine the seat of the arbitration in accordance with Article 16(1) of the UNCITRAL Rules. BCB will make submissions to the Tribunal as to the appropriate neutral and well-recognised arbitral venue in due course, should that

¹³ Exhibit C-11.

prove necessary. By virtue of Article 16(2) of the UNCITRAL Rules, the fixing of the seat does not of course require the Tribunal to hold hearings at the place of the seat.

6. THE PARTIES

6.1 The Claimant, BCB, is a company registered in the Turks and Caicos Islands¹⁴, whose registered office is:

Governor's Road
Leeward
Providenciales
Turks and Caicos Islands

6.2 As such, BCB is a "*company*" of the Turks and Caicos Islands (being a territory to which the Treaty was extended under its Article 11), under Article 1(d)(i) of the Treaty, which Article 1(d)(i) provides:

*"(d) "companies" means:
(i) in respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11".*

6.3 BCB has authorised Allen & Overy LLP to serve this Notice on its behalf.

6.4 BCB's representatives are:

Allen & Overy LLP
One Bishops Square
London
EC1 6AD
United Kingdom
Tel: +44 (0)20 3088 3000
Fax: +44 (0)20 3088 0088
Email: judith.gill@allenoverly.com; matthew.gearing@allenoverly.com;

For the attention of Judith Gill QC and Matthew Gearing.

6.5 BCB confirms that it is content for all communications addressed to BCB to be sent only to Allen & Overy LLP at its London office above.

6.6 The Respondent, the Government of Belize, is a sovereign State and a Contracting Party to the Treaty. Belize's contact details are:

The Honourable Dean Barrow
Prime Minister and Minister of Finance
Office of the Prime Minister
Belmopan City
Cayo District
Belize

¹⁴ A copy of the Certificate of Change of Name dated 17 February 2009 from the Registrar of Companies of the Turks and Caicos Islands is produced as Exhibit C-12. As set out in that Certificate, the company was incorporated under the Companies Ordinance 1981 on 8 September 1998 and changed its name from The Belize Bank (Turks and Caicos) Limited to BCB by Special Resolution dated 9 February 2009.

Fax: 00 501 822 0898

- 6.7 BCB confirms that this Notice of Arbitration, together with Exhibits, is being served on the Prime Minister and Minister of Finance, the Hon. Dean Barrow (the **Prime Minister**) at the above address, with a copy also being served on the Attorney-General, Wilfred Elrington, the principal legal adviser to the Government:

The Honourable Wilfred Elrington
The Attorney-General of Belize
The Attorney-General's Ministry
2nd Floor
East Block Building
Belmopan City
Belize
Fax: +501 822 3390

7. GENERAL NATURE OF THE CLAIM

BCB's investments

- 7.1 Details of BCB's investments in respect of which it is claiming are set out below.
- 7.2 On 19 September 2005, BCB made funding available to Sunshine by way of the Sunshine Facility. As at 30 April 2010, the current principal amount due to BCB (in accordance with its participation in the syndicate) under the Sunshine Facility (but for the compulsory acquisition) would have been approximately US\$1,187,540.57. A condition precedent to the Sunshine Facility was the grant by Sunshine of the Sunshine Security in favour of BCB. Pursuant to the Sunshine Security a first legal charge was taken by BCB over 11,092,844 shares owned by Sunshine in Telemedia.
- 7.3 Secondly, by way of a facility letter dated 19 May 2006, BCB further granted to Sunshine the Sunshine Overdraft Facility. As at 30 April 2010, the current principal amount due to BCB under the Sunshine Overdraft Facility (but for the compulsory acquisition) would have been approximately US\$1,026,164.96. A condition precedent to the Sunshine Overdraft Facility was the grant by Sunshine of further security in favour of BCB, as set out in Clause 5 of the Sunshine Overdraft Facility, comprising a first legal charge in favour of BCB over the entire issued share capital of Sunshine, namely two shares in Sunshine held by each of Mr Dean Boyce and the Trustees of the BTL Employees Trust. The security was set out in two Mortgage of Shares documents (the **Sunshine Mortgage of Shares**)¹⁵.
- 7.4 On 6 July 2007, BCB also granted to Telemedia the Telemedia Facility. As at 30 April 2010, the current principal amount due to BCB under the Telemedia Facility (but for the compulsory acquisition) would have been approximately US\$21,889,098.69. Pursuant to its terms, repayments

¹⁵ Copies of the Mortgages of Shares are produced as **Exhibit C-13**.

of interest were to be made by Telemedia to BCB every month. Prior to the Order, repayments of interest were duly made. However, no repayments have been made since the date of the Order. BCB took security for the lending to Telemedia in the form of the Telemedia Mortgage, which granted BCB a charge over all of Telemedia's assets.

- 7.5 Each of the Sunshine Facility, the Sunshine Security, the Sunshine Overdraft Facility, the Telemedia Facility and the Telemedia Mortgage and the entire issued share capital of Sunshine were compulsorily acquired following the introduction of the Act.

The dispute between Telemedia and the Government

- 7.6 The Act was introduced as a result of a dispute which arose between Telemedia and the Government concerning an agreement originally entered into on 19 September 2005 and subsequently amended on 21 November 2005, 15 December 2006 and finally 7 January 2008 (the **Accommodation Agreement**).¹⁶ Whilst BCB itself was not involved in the dispute, nor was it a party to the Accommodation Agreement or involved in its operation, that dispute provides the background to and context for BCB's claims in these proceedings. BCB will begin therefore by setting out very briefly the circumstances in which that dispute arose and how it led to BCB's claims in this arbitration.

- 7.7 The Accommodation Agreement operated successfully following its inception for a period of some two and a half years. However on 8 February 2008 the government administration in Belize changed following a General Election. The existence and implementation of the Accommodation Agreement became a highly politicised issue in Belize following the General Election. The new administration, and in particular the new Prime Minister and Minister of Finance, the Hon. Dean Barrow, took exception to the Accommodation Agreement and sought publicly to discredit both Telemedia and the former administration. The Prime Minister described the Accommodation Agreement as a "*secret*" agreement and one which the Government would not now honour. For example, in an interview with the *Love FM* radio station on 11 April 2008¹⁷, the Prime Minister made clear that he had no intention of honouring the Accommodation Agreement. In particular he said:

"What's happening with BTL is that we were confronted immediately with a position taken by the local management of BTL that there was this secret agreement that had been signed by the last government that committed us to all sorts of extraordinary in my view concessions to be given to BTL. I indicated that I don't care, I am not going to abide by such agreement..."

¹⁶ Copies of the Accommodation Agreement and its amendments produced as **Exhibit C-14**. The Accommodation Agreement was originally entered into by Belize Telecommunications Limited, whose business (including the Accommodation Agreement) was subsequently transferred on 29 May 2007 to Telemedia pursuant to a Business Transfer Agreement and the Belize Telecommunications Undertaking (Belize Telecommunications Limited Operations) Vesting Act.

¹⁷ A copy of an unofficial transcript of the Prime Minister's interview with the *LOVE FM* radio station on 11 April 2008 is produced as **Exhibit C-15**.

- 7.8 From February 2008 onwards the Government refused to comply with its obligations under the Accommodation Agreement and on 9 May 2008 Telemedia filed a Request for Arbitration with the LCIA (**LCIA Arbitration No. 81079**). The Government did not take part in the arbitration, but it did make publicly available the Request for Arbitration and other documents, including the tribunal's subsequent award.
- 7.9 On 18 March 2009, the LCIA Tribunal comprising Mr Alan Redfern (as chair), Mr Mark Kantor and Ms Paula Hodges issued a final and binding award on the merits in favour of Telemedia (the **LCIA Award**)¹⁸. The LCIA Award upheld the validity of the Accommodation Agreement. It granted declaratory relief and awarded damages of BZ\$38,527,083.87 payable by the Government to Telemedia in respect of the Government's breaches of the Accommodation Agreement up until 27 February 2009, together with Telemedia's costs relating to the arbitration hearing.
- 7.10 The financial element of the LCIA Award was subsequently assigned to a BVI company called Belize Social Development Limited (**BSDL**).
- 7.11 The Government has not complied with LCIA Award. Moreover, before Telemedia had even taken steps to seek recognition and enforcement of the LCIA Final Award, the Government commenced Claim No. 317 of 2009 in the Belize Supreme Court (the **Telemedia/BSDL Injunction Proceedings**) and on 7 April 2009, the Government obtained an *ex parte* interim injunction against Telemedia and BSDL. The interim injunction purported to restrain both BSDL and Telemedia from taking any steps to enforce, or cause to be enforced, the LCIA Award whether in Belize or any other jurisdiction outside Belize. Further, the injunction sought to prevent the defendants from commencing or continuing any other legal or arbitral proceedings in any country or jurisdiction whether in or outside of Belize, relating to or arising out of the LCIA Award.
- 7.12 Telemedia appeared in the Telemedia/BSDL Injunction Proceedings to seek recognition of the LCIA Award. It also unsuccessfully challenged the interim injunction order in July 2009. BSDL did not appear in the Telemedia/BSDL Injunction Proceedings. However, before the hearing of Telemedia's application for recognition of the LCIA Award could take place, the Government passed the Act.

Belize Telecommunications (Amendment) Act 2009 and Statutory Instrument No. 104 of 2009

- 7.13 On 24 August 2009, the Prime Minister tabled the Act in the House of Representatives. In his speech to the House of Representatives when tabling the Act, the Prime Minister said:

"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

¹⁸ A copy of the LCIA Award No. 81079 is produced as **Exhibit C-16**.

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 invoked 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."¹⁹

7.14 All three readings of the Bill were completed in one day. The speed with which the legislation was passed was exceptional. The members of the House, including the Opposition were presented with the Bill that morning, leaving little, if any, room for debate in the House in relation to this extraordinary measure. The Prime Minister himself stated that the lack of notice of the legislation was to be "regretted" but explained that this was a deliberate move by the Government to frustrate opposition to this measure. On 25 August 2009, the Bill was passed by the Senate and submitted to the Governor General who gave his assent thereto.

7.15 Section 63 (Assumption of control by Government on revocation of licence or for a public purpose) of the Act provides:

¹⁹ A copy of an unofficial transcript of the speech of the Honourable Prime Minister of Belize, Dean Barrow, on 24 August 2009 is produced as Exhibit C-17.

"63. (1) *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.*"

7.16 The Act defines "property" in Section 63(9) in very broad terms and includes "shares, stock, interests of all kinds, including a mortgagee's or chargee's interest in property".

7.17 Under Section 63(10) of the Act the Minister has the power to make an order under Section 63 for and on behalf of the Government by statutory instrument with legislative effect.

7.18 Section 67 of the Act provides for rules to be applied when assessing the value of compensation for any acquisition of property. Section 70 of the Act prevents the Government from paying any compensation without National Assembly approval.

7.19 On 25 August 2009, the Order²⁰ was signed by the Minister responsible for Telecommunications compulsorily acquiring property specified in the Schedule to the Order. This property included approximately 94% of the shares in Telemedia as set out in Part IA of the Order and specifically 11,092,844 shares held by Sunshine. It also included in Part IE of the Order the entire share capital of Sunshine itself. Under the description "*OTHER PROPERTY ACQUIRED*" by Part II of the Order the Government also compulsorily acquired "*All proprietary and other interest held by [BCB] in [Telemedia] and its subsidiaries under [the Telemedia Mortgage] (including any amendments thereto) executed between [Telemedia] as the Mortgagor and [BCB] as the Mortgagee, and registered in the Companies and corporate Affairs Registry, Belmopan, on or about the 8th February 2008.*"

7.20 On 4 December 2009, the Amendment Order was signed by the Minister responsible for Telecommunications. The Amendment Order amended Part II of the Schedule to the Order so as to include within the property compulsorily acquired for and on behalf of the Government "*all proprietary and other rights and interests whatsoever*" held (1) by BCB under the Telemedia Facility; (2) by BCB, The Belize Bank Limited, Caedman Limited and Sunshine under the Sunshine Facility; (3) by BCB under the Sunshine Security; and (4) by BCB under the Sunshine Overdraft Facility.

7.21 The Order states that the acquisition was for a public purpose, namely:

²⁰ Exhibit C-8.

"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".

7.22 The Order was published in the Belize Gazette on 25 August 2009.²¹ A Notice of Acquisition was sent to BCB on 27 August 2009.²² Following the passing of the Amendment Order, on 7 December 2009, a Notice of Acquisition was issued *"for the avoidance of doubts"* by the Financial Secretary confirming that all BCB's *"proprietary and other rights and interests whatsoever held"* under the Telemedia Facility, the Sunshine Facility, the Sunshine Security and Sunshine Mortgage of Shares had been acquired by the GOB.²³

Defaults by Sunshine and Telemedia

7.23 The effect of the Order and the Amendment Order were to put both Sunshine and Telemedia in default under the Agreements.

7.24 In particular Sunshine failed to pay the amounts due under the Sunshine Facility following its nationalisation and that constitutes an Event of Default under clause 14.1.1 of the Sunshine Facility. In addition, the nationalisation of Sunshine pursuant to the Order constitutes an Event of Default under clause 14.1.6 of the Sunshine Facility.

7.25 Further, the disposal of its shares in Telemedia by Sunshine, effected pursuant to the Order, was a breach of Clause 7 of the Sunshine Overdraft Facility, pursuant to which Sunshine undertook not to *"sell, grant, lease or otherwise dispose of its assets or create or permit to subsist any encumbrance, mortgage, pledge, lien, charge, assignment, hypothecation or security interest in and over its assets"*.

7.26 On 14 October 2009, BCB wrote to Sunshine demanding payment by 23 October 2009 of the amounts outstanding under the Sunshine Facility and the Sunshine Overdraft Facility. No payment has been received by BCB. This constitutes a further Event of Default under clause 14.1.1 of the Sunshine Facility.

7.27 Given that Sunshine's only assets were the shares it held in Telemedia, the compulsory acquisition of these shares by the Government precluded BCB's ability to recover the sums owed to it by exercising its rights under the Sunshine Mortgage of Shares and the Sunshine Security. Furthermore, following the Amendment Order, the Sunshine Facility and the Sunshine Overdraft Facility were also nationalised such that BCB no longer held any interest which it could pursue under either the Sunshine Facility or the Sunshine Overdraft Facility or the Sunshine Mortgage of Shares or the Sunshine Security.

²¹ A copy of the Notice in the Belize Gazette is produced as **Exhibit C-18**.

²² A copy of the 27 August 2009 Notice of Acquisition is produced as **Exhibit C-19**.

²³ A copy of the 7 December 2009 Notice of Acquisition is produced as **Exhibit C-20**.

- 7.28 Similarly, pursuant to the Telemedia Facility Telemedia was obliged to make monthly interest payments to BCB which were due on 10 September 2009 and on 10 October 2009. In breach of the Telemedia Facility, Telemedia failed to make these interest payments to BCB. An event of default therefore arose under Clause 9(a)(i) of the Telemedia Facility and all indebtedness and liability of Telemedia to BCB became immediately due and payable.
- 7.29 On 14 October 2009, BCB notified Telemedia of its failure to make these two successive interest payments under the Telemedia Facility²⁴. BCB stated that it required payment by 23 October 2009. Telemedia did not make this payment. However, BCB was unable to enforce its security as it had been nationalised by the Government pursuant to the terms of the Order.
- 7.30 In any event, pursuant to the Amendment Order the Telemedia Facility itself was also nationalised such that BCB no longer held any interest which it could pursue under either the Telemedia Facility or the Telemedia Mortgage.

BCB's constitutional challenge to the Act

- 7.31 A challenge to the nationalisation legislation has been commenced in the Belize Supreme Court by BCB on the basis that it is contrary to the Constitution of Belize. BCB seeks, among other things, a Declaration that the compulsory acquisition by the GOB of BCB's interests in Telemedia and its subsidiaries under the Telemedia Mortgage is contrary to the Constitution of Belize (the **Constitution**) and is void.
- 7.32 BCB claims that the Act, the Order and the Amendment Order breach Sections 3(d), 6(1), 16 and 17 of the Constitution, provisions which provide guarantees for the fundamental rights of protection from arbitrary deprivation of property and discrimination.
- 7.33 BCB's constitutional challenge is currently pending before the Belize Supreme Court but BCB acknowledges that, if successful and the Act (and the Order and Amendment Order made pursuant to it) is nullified, that will impact upon BCB's claims for compensation in this arbitration.

Violations of the Treaty

- 7.34 Article 1(a) of the Treaty provides:

"(a) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

²⁴ A copy of the notification letter is produced as **Exhibit C-21**.

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

7.35 Article 1(b) of the Treaty provides:

"(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees."

7.36 Articles 1(a) and 1(b) of the Treaty confirm that BCB's interests under the Agreements are entitled to protection under the Treaty.

7.37 By its actions described above, the Respondent has breached several provisions of the Treaty and certain obligations under customary international law. These are set out below.

Expropriation

7.38 Article 5 (Expropriation) of the Treaty provides:

"(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against adequate, prompt and equitable compensation. Such compensation shall amount to the market value of the investment expropriated before the expropriation or impending expropriation became public knowledge, shall include interest at a normal Commercial rate prescribed by law until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee the compensation provided for in that paragraph in respect of their investment to such nationals or companies of other Contracting Party who are owners of those shares."

7.39 The Government has unlawfully purported to expropriate BCB's investments made pursuant to the Agreements in both Telemedia and Sunshine. In so doing, the Government has violated the obligations in Article 5 of the Treaty which it owes to BCB. The nationalisation effected by the Act was not carried out *"for a public purpose related to the internal needs"* of Belize. Rather, the Government flexed its legislative muscle to avoid its obligations under the Accommodation

Agreement as upheld by the LCIA Award. At its heart this was essentially a commercial contractual dispute with Telemedia about the validity of the Accommodation Agreement, which dispute had been resolved in Telemedia's favour by an independent tribunal in the appropriate and agreed upon forum of an international arbitration. An expropriation, the stated purpose of which was to avoid the Government's contractual obligations, cannot be considered as lawful under international law.

7.40 Moreover BCB was an innocent bystander to this commercial contractual dispute. Even if the dispute provides an explanation for the Government's actions relating to the acquisition of shares in Telemedia, it provides no rationale for the compulsory acquisition of the entire share capital of Sunshine, the Telemedia Facility, the Sunshine Facility, the Sunshine Overdraft Facility or the Sunshine Security.

7.41 Further, even if (which is denied) it could be said that the taking of shares in Telemedia was "*for a public purpose related to the internal needs*" of Belize, the Government are in clear breach of BCB's rights under Article 5(1) of the Treaty to receive "*adequate, prompt and equitable compensation*". In particular:

- (a) by letter dated 15 October 2009²⁵ from its Belizean counsel, Courtney Coye LLP, BCB submitted a formal claim for compensation pursuant to section 64 of the Act in respect of the compulsory acquisition of the Telemedia Mortgage, Sunshine's shares in Telemedia and the entire share capital of Sunshine itself.
- (b) The Financial Secretary responded on 19 October 2009²⁶ stating that the claim submitted by BCB was being "*examined and we will write to you in more detail as soon as possible*". He also requested confirmation of the change of name, confirmation of whether certain security documents had been registered and a copy of the trust deed establishing the Belize Telecommunications Ltd Employees Trust.
- (c) On 12 November 2009 Courtenay Coye LLP²⁷ responded querying why further information was required to determine its claim for compensation and explaining that it had provided the Financial Secretary with the information which had been requested in the Notice of Acquisition. Courtenay Coye LLP also asked for the Financial Secretary's proposals for how negotiations were to proceed. No response was received to this letter.
- (d) Following the passing of the Amendment Order on 14 January 2010 Courtenay Coye LLP submitted a further claim for compensation to the Financial Secretary.²⁸ On 18 January

²⁵ A copy of the letter is produced as Exhibit C-22.

²⁶ A copy of the letter is produced as Exhibit C-23.

²⁷ A copy of the letter is produced as Exhibit C-24.

²⁸ A copy of the letter is produced as Exhibit C-25.

2010 the Financial Secretary wrote to Courtenay Coye LLP, indicating that they were studying the claim and that they would send a full reply as soon as possible.²⁹

(e) BCB has to date received no compensation from the GOB and has no indication when any compensation will be assessed or paid.

7.42 Furthermore, the Government are in clear breach of BCB's rights under Article 5(1) of the Treaty to receive "*adequate, prompt and equitable compensation*" in so far as the expropriation of BCB's security interest over Sunshine's shares in Telemedia is concerned. Section 67(2)(vi) of the Act effectively purports to exclude any compensation in respect of the Accommodation Agreement, which necessarily dilutes the value of Sunshine's shares in Telemedia and precludes BCB from obtaining compensation (even assuming the Government had any intention of paying compensation) which properly reflects the value of the security interest that has been expropriated.

7.43 Further BCB has not been accorded its right under Article 5(1) to "*prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph*".

7.44 The nationalisation of BCB's investments by the Order and the Amendment Order in accordance with the Act is the manifestation of the abusive exercise of sovereign power by the Government. It was not carried out "*for a public purpose related to the internal needs*" of Belize but rather to avoid its obligations under the Accommodation Agreement as upheld by the LCIA Award. This course of conduct and the absence of "*adequate, prompt and equitable compensation*" amount to an unlawful expropriation of BCB's investment in violation of Article 5 of the Treaty and applicable rules of customary international law. No compensation has been paid to BCB, whether representing the market value of its investment or at all. Therefore, the expropriation of BCB's investment is an illegal act in breach of Article 5 of the Treaty entitling the BCB to full reparation or its monetary equivalent.

Fair and Equitable Treatment and other protections under Article 2

7.45 Article 2 (Promotion and Protection of Investment) of the Treaty provides:

"(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, and consistently with its national objectives, shall admit such capital.

(2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the

²⁹ A copy of the notification letter is produced as Exhibit C-26.

territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party..."

7.46 Therefore, under Article 2 of the Treaty, the Government undertook to encourage and create favourable conditions for BCB's investment, to accord to BCB's investment "*fair and equitable treatment*" and "*full protection and security*", not to impair BCB's investment by unreasonable or discriminatory measure and to observe any obligation entered into with regard to BCB's investment. In breach of Article 2 of the Treaty, the Government has in several respects failed to ensure that BCB's investments were treated in accordance with these requirements. The Government's conduct has been grossly unjust and discriminatory.

7.47 The Prime Minister gave a lengthy speech to the House of Representatives on 24 August 2009 when tabling the Act.³⁰ The Prime Minister made it very clear that the Act was directly aimed at what the Government perceived to be the interests of Lord Ashcroft:

"As well, we are only acquiring the 94% or so of Telemedia that is controlled by Ashcroft interests. The shareholding owned by the Belizeans will be left intact.

...

This is not an ad hominem move; it is to deal with a structural problem... This, I repeat then, is only about Telemedia and no more and no less than a case of the Belizean national interest trumping any other consideration."

7.48 The Government, by the public admission of its Prime Minister, has directly targeted foreign investment related to Telemedia and its shareholders, including Sunshine, while leaving intact the shareholding in Telemedia owned by Belizean nationals. The Government's actions are discriminatory, unfair and inequitable. The Government has fallen woefully short of the standards of treatment required of it by Article 2 of the Treaty.

7.49 The nationalisation of BCB's investments as part of a scheme entailing the abusive use of sovereign power in order to resolve a commercial contractual dispute and avoid its obligations under the Accommodation Agreement as upheld by the LCIA Award is the antithesis of the requirement of fair and equitable treatment.

7.50 Further the obligation to ensure full security and protection is not merely a restriction on the Government's activities but it also entails positive obligations. This obligation certainly covers the physical security of an investment. This obligation was violated by various actions of the Government, most notably by the Government's nationalisation of Telemedia and its shareholder Sunshine.

7.51 Further the Government has failed to observe obligations entered into with regard to BCB's investment, including but not limited to failing to comply with the terms of the Agreements.

National Treatment and Most-favoured-nation Provisions

7.52 Article 3 of the Treaty contains a promise by the Government to accord to investors such as Dunkeld treatment which is no less favourable than that accorded by the Government to Belize nationals or other investors of third States. This most-favoured-nation (MFN) treatment obligation provides:

"(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords in the same circumstances to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords in the same circumstances to its own nationals or companies or to nationals or companies of any third State."

7.53 As explained above, the Government, by the public admission of its Prime Minister, has directly targeted foreign investment related to Telemedia and its shareholders, including Sunshine, while leaving intact the shareholding in Telemedia owned by Belizean nationals. The Government's actions treat BCB less favourably than nationals or companies of Belize.

8. THE AMOUNT INVOLVED AND THE RELIEF REQUESTED

8.1 In respect of BCB's claim for expropriation under Article 5(1) of the Treaty, BCB claims:

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

8.2 In the event that the expropriation is found to be unlawful, and/or the Tribunal finds that the Government's acts were in violation of Article 2 of the Treaty, the standard of damages is determined by customary international law. BCB is entitled to be placed in the position in which it would have been had its rights under the Treaty not been violated. BCB is entitled to be paid damages or compensation sufficient to wipe out all of the consequences of the Government's breaches of the Treaty.

8.3 BCB's damages or losses will be particularised and quantified in due course through the production of documentary and expert evidence. By way of indication for the purposes of Article 3(3)(e) of the

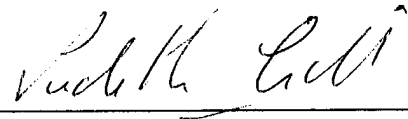
³⁰ Exhibit C-17.

UNCITRAL Rules only, the value of BCB's investment is in the order of approximately US\$24 million (plus interest).

8.4 BCB seeks in particular the following relief:

- (a) a declaration that the Government has violated Articles 2, 3 and 5 of the Treaty, as well as its obligations under general international law;
- (b) an order that the Government make full reparation to BCB for the injury or loss to its investment arising out of the Government's violation of the Treaty, and applicable rules of international law, such full reparation being in the form of damages or compensation paid to BCB in an amount to be determined, including interest thereon;
- (c) an order that the Government pay the costs of these arbitration proceedings including the costs of the Tribunal, as well as the legal and other expenses incurred by BCB including but not limited to the fees of their legal counsel, experts and consultants as well as BCB's own employees on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal; and
- (d) any alternative or other relief the Tribunal may deem appropriate in the circumstances.

Dated 4 May 2010



Judith Gill Q.C. / Matthew Gearing / Angeline Welsh

Allen & Overy LLP

Solicitors for the Claimants