

# THE HAYWARD CHARITABLE BELIZE TRUST

## MEDIA RELEASE

8 December 2009

### Notice of Arbitration under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments dated 30 April 1982

The Hayward Charitable Belize Trust (**Hayward**) wishes to inform the public that on 4 December 2009 its subsidiary, Dunkeld International Investment Ltd. (**Dunkeld**) commenced arbitration proceedings against the Government of Belize (the **Government**). These proceedings were commenced under the Arbitration Rules of the United Nations Commission on International Trade Law and in accordance with an international agreement between the Government of the United Kingdom and the Government for the Promotion and Protection of Investments dated 30 April 1982 (the **Treaty**).

Dunkeld alleges that the Government has breached several obligations which the Government owed to Dunkeld under the Treaty. In general terms, Dunkeld alleges that the Government has unlawfully expropriated Dunkeld's investment in Belize Telemedia Limited (**Telemedia**) and has failed to treat Dunkeld fairly and equitably. In order for the public to be informed properly, Dunkeld's Notice of Arbitration is attached.

Prior to the nationalisation of Telemedia on 25 August 2009, Dunkeld was the beneficial owner of approximately 69% of the shares in Telemedia. Dunkeld is a company established in the Turks and Caicos Islands and is an investor protected by the Treaty as a result of an exchange of notes between the Government of the United Kingdom and the Government extending investment protection to the Turks and Caicos Islands. The exchange of notes was signed on behalf of the Government of Belize in 1985 by the current Prime Minister of Belize, Hon. Dean Barrow, when he was the Minister of Foreign Affairs.

On 27 August 2009, Dunkeld formally notified the Government of a claim under the Treaty arising out of the nationalisation of Telemedia. Dunkeld informed the Government that it remained willing to seek amicable settlement of the dispute. The Government did not respond to Dunkeld in relation to this proposal.

Hayward is disappointed that the Government has not entered into any discussions in order to bring about an amicable settlement of the dispute. Hayward is a charitable trust the beneficiaries of which will substantially be Belizean causes. Bearing this in mind, Hayward remains very flexible in both the amount and timing of the compensation but remains surprised and disappointed that the Government continues to be unwilling to negotiate a settlement that is in the interest of all Belizeans; especially when the Belize economy is worsening and the continued dispute over Telemedia is having such a profound impact on all Belizeans.

**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**

**BETWEEN:**

**DUNKELD INTERNATIONAL INVESTMENT LTD.**

**Claimant**

**-v-**

**THE GOVERNMENT OF BELIZE**

**Respondent**

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**NOTICE OF ARBITRATION**

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4 December 2009

**Allen & Overy LLP  
One Bishops Square  
London E1 6AD  
United Kingdom**

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**Fax: +44(0)2030880088**

**Ref: JAEG/MPG/AAMW**

## 1. INTRODUCTION

1.1 This Notice of Arbitration (the **Notice**) is served by the Claimant, Dunkeld International Investment Ltd. (**Dunkeld** 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**<sup>1</sup>).

1.2 Dunkeld 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 vested rights of Dunkeld who is a foreign investor entitled to protection under the **Treaty**. Dunkeld was the beneficial owner of approximately 69% of the shares in Belize Telemedia Limited, a company incorporated in Belize (**Telemedia**). 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 Government enacted the Belize Telecommunications (Amendment) Act 2009 (the **Act**)<sup>2</sup>, 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. 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**)<sup>3</sup>. By this Order, approximately 94% of the shares in **Telemedia** were acquired for and on behalf of the Government, including those shares which were beneficially owned by Dunkeld. This action was in breach of the Government's obligations to Dunkeld, 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.

<sup>1</sup> A copy of the **Treaty** is produced as Exhibit C-1.

<sup>2</sup> A copy of the **Act** is produced as Exhibit C-2.

<sup>3</sup> A copy of the **Order** is produced as Exhibit C-3.

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).<sup>4</sup>

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:

*"(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*

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<sup>4</sup> A copy of the Exchange of Notes is produced as Exhibit C-4. 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.

*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 letter dated 27 August 2009, Allen & Overy LLP, on behalf of Dunkeld wrote to the Government and notified a claim to be submitted to international arbitration in accordance with Article 8(1) of the Treaty<sup>5</sup>. A period of three months has passed since Dunkeld notified the Government of its claim and the dispute has not been amicably settled. Dunkeld 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, Dunkeld 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 letter dated 27 August 2009<sup>6</sup> and a further letter dated 24 September 2009<sup>7</sup>, Allen & Overy LLP, on behalf of Dunkeld, 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 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.

<sup>5</sup> A copy of the letter from Allen & Overy LLP to the Government dated 27 August 2009 is produced as Exhibit C-5.

<sup>6</sup> Exhibit C-5.

<sup>7</sup> A copy of the letter from Allen & Overy LLP to the Government dated 24 September 2009 is produced as Exhibit C-6.

#### **4. APPOINTMENT OF THE TRIBUNAL**

4.1 Dunkeld proposes that the arbitral tribunal shall comprise three arbitrators. Dunkeld 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, Dunkeld appoints 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  
Fax: + 33 1 49 53 29 29

4.3 The Parties have not previously designated an appointing authority. By letter dated 24 September 2009<sup>8</sup>, Allen & Overy LLP, on behalf of Dunkeld, 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. Dunkeld 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. Dunkeld recognises that it is, therefore, for the Tribunal to determine the seat of the arbitration in accordance with Article 16(1) of the UNCITRAL Rules.

5.2 Dunkeld suggests that the Tribunal, once constituted, fixes the seat in a neutral venue which is also well recognised as a seat of international arbitrations. In this regard, Dunkeld suggests Geneva, Switzerland, being both a neutral venue and also one which is well established as a venue of international arbitration. Dunkeld is, however, equally content for the seat to be fixed in any other neutral and well-recognised arbitral venue. 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.

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<sup>8</sup> Exhibit C-6.

**6. THE PARTIES**

6.1 The Claimant, Dunkeld, is a company registered in the Turks and Caicos Islands<sup>9</sup>, whose registered office is:

Box 97  
No. 1 Caribbean Place  
Leeward Highway  
Providenciales  
Turks and Caicos Islands

6.2 As such, Dunkeld 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 Dunkeld has authorised Allen & Overy to serve this Notice on its behalf.

6.4 Dunkeld'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@allenovery.com](mailto:judith.gill@allenovery.com); [matthew.gearing@allenovery.com](mailto:matthew.gearing@allenovery.com);  
[angeline.welsh@allenovery.com](mailto:angeline.welsh@allenovery.com)

For the attention of Judith Gill QC, Matthew Gearing, Angeline Welsh.

6.5 Dunkeld confirms that it is content for all communications addressed to Dunkeld 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  
Fax: 00 501 822 0898

<sup>9</sup> A copy of the Certificate of Continuation from the Registrar of Companies of the Turks and Caicos Islands is produced as Exhibit C-7. Dunkeld was incorporated in the British Virgin Islands on 1 June 2004, before changing its domicile to the Turks and Caicos Islands on 8 June 2009.

- 6.7 Dunkeld 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

### *The factual background to the dispute*

- 7.1 Telemedia is the statutory successor to Belize Telecommunications Limited (**BTL**). BTL owned and operated telecommunications and other media services in Belize from 1987 until its dissolution in May 2007 (see below). Up until December 2002, BTL was the monopoly telecommunications service provider in Belize. At the time of its dissolution in May 2007, BTL was still the largest operator in this industry in Belize, with the second largest operator, Speednet Communications Limited, growing its business and having achieved 20% of the cellular market.
- 7.2 In early 2004, the Government purported to take over BTL and then to sell it to a company called Innovative Communication Corporation LLC (**ICC**), run by a US entrepreneur called Mr. Prosser. ICC entered into an agreement with the Government to purchase over 80% of the issued share capital of BTL in March 2004. Ultimately ICC was unable to advance the funds necessary to pay for the majority of the shares which had been transferred to it.
- 7.3 Therefore, in February 2005, the Government exercised its security over the unpaid shares and effectively took back control of BTL from ICC. There followed a plethora of subsequent litigation and arbitration proceedings in Belize, Miami and Canada between ICC, related Prosser entities and BTL and the Government concerning the circumstances of the abortive Prosser take over and the ability of the Government to re-take control. In Action Nos: 179 and 190 of 2005 before the Supreme Court of Belize, a claim which related to the interpretation of the articles of BTL, the Chief Justice commented in giving judgment that BTL: "*...is the hapless and captive prey that is the subject of all these proceedings.*"<sup>40</sup>
- 7.4 During ICC's control of BTL, the business suffered a substantial deterioration because ICC failed to implement BTL's planned improvements and developments. By 2005 both the industry and BTL



were in turmoil. Actions of the previous Government and of the management of ICC had led to a rapid deterioration of the infrastructure and investment previously made (principally by BTL), putting the development and growth of the industry back several years. In April 2005, the turmoil and lack of effective management resulted in a full nationwide shut down of all national telecommunications services by BTL employees, with significant disruptions to services, including international links, lasting for around 10 days.

- 7.5 It was against this background that the Government sought to enlist the assistance of the former management and shareholders of BTL, in order to take this rapidly developing and technologically complex industry forward in Belize. Discussions between the Government, BTL's management and the former management and shareholders of BTL led to an important agreement relevant to the future direction of the industry in Belize. In summary, BTL and the Government agreed that BTL would, further to the policies of the Government, set up an infrastructure through which a sophisticated telecommunications network could be established and developed in Belize. In return, the Government agreed to provide certain guarantees, benefits, covenants and undertakings, including certain tax and duty exemptions.
- 7.6 Accordingly, on 19 September 2005, BTL and the Government entered into an accommodation agreement (the **Original Accommodation Agreement**).<sup>11</sup> The Original Accommodation Agreement was subsequently amended by a Deed dated 21 November 2005 (the **First Amendment Deed**), and also by a Settlement Deed dated 15 December 2006 (the **Second Amendment Deed**), both made between BTL and the Government.<sup>12</sup> Telemedia and the Government entered into a further Settlement Deed dated 7 January 2008 (the **Third Amendment Deed**).<sup>13</sup> The Original Accommodation Agreement and the First, Second and Third Amendment Deeds are referred to together in this Notice as the **Accommodation Agreement**. The Accommodation Agreement operated successfully following its inception for a period of some two and a half years until the change of government in Belize in February 2008.
- 7.7 On 15 September 2006, BTL entered into a business transfer agreement with Telemedia, pursuant to which BTL agreed to transfer its business to Telemedia (the **Business Transfer Agreement**). On 29 May 2007 the Belize Telecommunications Undertaking (Belize Telecommunications Limited Operations) Vesting Act (the **Vesting Act**) was assented to by the Governor General of Belize and was made law. Pursuant to the provisions of the Vesting Act, all of the assets, liabilities, rights and obligations, property, files and documentation of BTL which had been agreed to be transferred pursuant to the Business Transfer Agreement (including the Accommodation Agreement) were

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<sup>10</sup> A copy of the judgment in Claims Nos. 179 and 190 of 2005 before the Supreme Court of Belize is produced as Exhibit C-8.

<sup>11</sup> A copy of the Original Accommodation Agreement is produced as Exhibit C-9.

<sup>12</sup> A copy of the First Amendment Deed is produced as Exhibit C-10, and a copy of the Second Amendment Deed is produced as Exhibit C-11.

<sup>13</sup> A copy of the Third Amendment Deed is produced as Exhibit C-12.

vested in Telemedia. BTL was declared dissolved and references to its name in the register of companies maintained by the Registrar of Companies were deemed struck off.

- 7.8 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 decided the Accommodation Agreement 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 2008<sup>14</sup>, 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..."*

- 7.9 Furthermore, on 25 April, 2008 the Prime Minister made similar comments to the House of Representatives in Belize, in particular referring to the Accommodation Agreement as:

*"[a] secret agreement as it were handcuffing the government, shackling the government, making it impossible legally, contractually for the government to do anything about rates because that agreement guaranteed BTL a rate of return of 15% and said that if BTL didn't make that rate of return they could withhold their payment of their business tax, which they have done for the past three months. But we are not going to tolerate that and I want the public to know that."<sup>15</sup>*

- 7.10 Disputes arose as to whether Telemedia was entitled to rely upon the Accommodation Agreement and on 9 May 2008 Telemedia filed a Request for Arbitration with the LCIA (LCIA Arbitration No. 81079). The Government was given full and repeated notice of the proceedings (by Telemedia, the LCIA and the tribunal), but failed or refused to take any part in them.
- 7.11 By letter dated 13 June 2008, the LCIA Court appointed a tribunal consisting of Mr Mark Kantor, Mr Rory Brady and Mr Alan Redfern (the LCIA Tribunal). Mr Brady withdrew due to illness. On 24 October 2008 Ms Paula Hodges was appointed by the LCIA to replace Mr Brady.
- 7.12 On 18 March 2009, the LCIA Tribunal issued a final and binding award on the merits in favour of Telemedia (LCIA Award No. 81079)<sup>16</sup>. The LCIA 81079 Award upheld the validity of the Accommodation Agreement. The LCIA 81079 Award was made up of two general types of relief.

<sup>14</sup> 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-13.

<sup>15</sup> A copy of an unofficial transcript of these comments is produced as Exhibit C-14.

First, certain declaratory relief in respect of the Government's obligations under the Accommodation Agreement. Secondly, an award of 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.

- 7.13 On 20 March 2009 Telemedia assigned the benefit of the LCIA Award No. 81079, in so far as it orders the payment of certain damages and costs by the Government to Telemedia, to Belize Social Development Limited, a company incorporated in the British Virgin Islands<sup>17</sup>.
- 7.14 The Government has not complied with LCIA Award No. 81079.
- 7.15 Continuing the stance adopted previously of public disavowal of the Accommodation Agreement, on Friday 24 July 2009, the Prime Minister made the following comments to the House of Representatives in Belize:

*"This business of suggesting that we are anti-investors is a way to try and get away from the fact that this government is above all nationalistic and will not countenance the kinds of arrangements with so called investors that are clearly and egregiously and flagrantly against the interests of the Belizean people in order for us to demonstrate for the member for Fort George that we are pro-investment we must for example countenance the Accommodation Agreement. You talk about confrontation, well I will tell you there will be confrontation with any investor with whom you have signed the kind of agreement that is of the sort that we see represented in the infamous accommodation agreement."<sup>18</sup>*

- 7.16 By letter dated 24 August 2009, Allen & Overy LLP on behalf of Telemedia wrote to the Government and accepted the Government's repudiatory breach of the Accommodation Agreement, choosing to treat the agreement as being at an end<sup>19</sup>.

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

- 7.17 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 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.*

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<sup>16</sup> A copy of the LCIA Award No. 81079 is produced as Exhibit C-15.

<sup>17</sup> A copy of the assignment from Telemedia to Belize Social Development Limited dated 20 March 2009 is produced as Exhibit C-16.

<sup>18</sup> A copy of the Channel 7 article entitled "Said Musa Back in Debate Form" dated 24 July 2009 is produced as Exhibit C-17.

<sup>19</sup> A copy of the letter dated 24 August 2009 from Allen & Overy LLP to the Government is produced as Exhibit C-18.

*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.<sup>20</sup>*

7.18 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. 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.

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

"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*

<sup>20</sup> 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-19.

*such order shall be prima facie evidence that the property to which it relates is required for a public purpose."*

- 7.20 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".
- 7.21 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.
- 7.22 Section 67 of the Act provides for rules to be applied when assessing the value of compensation for any acquisition of property. Those rules seek in a number of ways to reduce the value of such compensation. Further, Section 70 of the Act prevents the Government from paying any compensation without National Assembly approval.
- 7.23 On 25 August 2009, the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No 104 of 2009, (the Order)<sup>21</sup> was signed by the Minister of Public Utilities compulsorily acquiring, amongst other assets, approximately 94% of the shares in Telemedia. Part I of the Order provides:

**"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 5th January 2009, or held by any transferees of the said shares in the event of any transfers taking place since the said date of filing:*

<b>Name of Shareholder</b>	<b>Address</b>	<b>No. of Shares acquired</b>
1. BB (or BCB) Holdings Limited	P.O.Box 1764, Belize City	1,234,859
2. BTL International Inc.	P.O. Box 71, Tortola, BVI	895,552
3. BTL Investments Limited	BTL, St. Thomas Street Belize City	750,000
4. ECOM Limited	P.O.Box 1764, 212 North Front St. Belize City	15,178,488
5. Mercury Communications Limited	P.O.Box 1764, 212 North Front St., Belize City	4,786,230
6. New Horizons Inc.	212 North Front St. Belize City	20,581
7. Sunshine Holdings Limited	P.O. Box 1258, 212 North Front St., Belize	11,092,844

<sup>21</sup> Exhibit C-3.

	City	
8. Thiermon Limited	212 North Front St., Belize City	12, 886, 959
<b>Total number of Shares acquired</b>		<b>46,845,513</b>

7.24 The Order states that the acquisition was 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".*

7.25 The acquisition was published in the Belize Gazette on 25 August 2009.<sup>22</sup> A Notice of Acquisition was sent to the former shareholders of Telemedia on 27 August 2009.<sup>23</sup>

7.26 Prior to the Order, Dunkeld's interests in Telemedia were as follows:

- (a) Thiermon Limited (Thiermon) owned 26.01% of the shares in Telemedia.<sup>24</sup> Dunkeld is the sole shareholder of Thiermon. Therefore, Dunkeld indirectly held legal title to 26.01% of the shares in Telemedia;
- (b) BCB Holdings Limited (BCB Holdings)<sup>25</sup> owned 2.49% of the shares in Telemedia.<sup>26</sup> BCB Holdings held these shares on trust for Dunkeld.<sup>27</sup> Therefore, Dunkeld owned the beneficial interest in 2.49% of the shares in Telemedia; and
- (c) Ecom Limited (Ecom), Mercury Communications Limited (Mercury) and New Horizons Inc. (New Horizons) owned 30.63%, 9.66% and 0.04% respectively of the shares in Telemedia.<sup>28</sup> Ecom, Mercury and New Horizons are each jointly owned by Northtown Limited and Southtown Limited.<sup>29</sup> Northtown and Southtown held these shares in Ecom, Mercury and New Horizons on trust for Dunkeld.<sup>30</sup> Therefore, Dunkeld owned the beneficial interest in 100% of the shares in Ecom, Mercury and New Horizons which in turn held the legal title to 40.33% of the shares in Telemedia.

7.27 Article 1(a) of the Treaty provides:

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

<sup>22</sup> A copy of the Notice in the Belize Gazette is produced as Exhibit C-20.

<sup>23</sup> A copy of the Notice of Acquisition is produced as Exhibit C-21.

<sup>24</sup> A copy of Thiermon's share certificates in Telemedia is produced as Exhibit C-22.

<sup>25</sup> BB Holdings Limited changed its name to BCB Holdings Limited on 26 May 2009. A copy of the change of name is produced as Exhibit C-23.

<sup>26</sup> A copy of BCB Holdings' share certificates in Telemedia is produced as Exhibit C-24.

<sup>27</sup> A copy of the Declaration of Trust is produced as Exhibit C-25.

<sup>28</sup> Copies of Ecom's, Mercury's and New Horizons' share certificates in Telemedia are produced as Exhibit C-26.

<sup>29</sup> Copies of Northtown Limited and Southtown Limited's share certificates in Ecom, Mercury and New Horizons are produced as Exhibit C-27.

<sup>30</sup> Copies of the Declarations of Trust are produced as Exhibit C-28.

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

*(ii) shares, stock and debentures of companies or interests in the property of such companies;*

*(iii) claims to money or to any performance under contract having a financial value;*

*(iv) intellectual property rights and goodwill;*

*(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."*

7.28 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."*

7.29 Articles 1(a) and 1(b) of the Treaty confirm that both Dunkeld's legal and beneficial interests in Telemedia are entitled to protection under the Treaty. (See further paragraph 7.43 below).

#### ***Violations of the Treaty***

7.30 For the reasons stated above, the Respondent has breached several provisions of the Treaty and certain obligations under customary international law. These are set out below.

#### ***Expropriation***

7.31 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."*

- 7.32 The Government has unlawfully purported to expropriate Dunkeld's investment in Telemedia. In so doing, the Government has violated the obligations in Article 5 of the Treaty which it owes to Dunkeld. The nationalisation of Telemedia was not carried out "*for a public purpose related to the internal needs*" of Belize. Rather, the Government flexed its legislative muscle to address what was essentially an ordinary commercial contractual dispute (namely the dispute with Telemedia relating to the validity of the Accommodation Agreement). Indeed, that commercial contractual dispute had already been resolved in the appropriate and agreed upon forum of an international arbitration tribunal (in LCIA Award No. 81079). An expropriation, the stated purpose of which was to avoid the Government's contractual obligations, cannot be considered as lawful under international law.
- 7.33 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 provisions which purport to allow for "*reasonable compensation*" under the Act are patently inadequate and a clear breach of Dunkeld's rights under Article 5(1) of the Treaty to "*adequate, prompt and equitable compensation*". In particular, the express provision which purports to exclude any compensation in respect of the Accommodation Agreement (see Section 67(2)(vi) of the Act) is a transparent attempt to deny Dunkeld that to which it is properly entitled. Similarly, the Government's entitlement to deduct sums allegedly due as arrears of taxes, duties and charges (see Section 71 of the Act), in circumstances where Telemedia has established in LCIA Award No. 81079 its entitlement to apply the specified taxation rates and set-off provisions of the Accommodation Agreement is a clear attempt by the Government to deny Dunkeld adequate and equitable compensation as required by Article 5 of the Treaty.
- 7.34 The nationalisation of Telemedia by the 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 and, in the absence of "*adequate, prompt and equitable compensation*", amounts to an unlawful expropriation of Dunkeld's investment in violation of Article 5 of the Treaty and applicable rules of customary international law. No compensation has been paid to Dunkeld, whether representing the market value of its investment or at all. Therefore, the expropriation of Dunkeld's investment is an illegal act in breach of Article 5 of the Treaty entitling the Dunkeld to full reparation or its monetary equivalent.

***Fair and Equitable Treatment***

- 7.35 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 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..."*

7.36 Therefore, under Article 2 of the Treaty, the Government undertook to accord to Dunkeld's investment "*fair and equitable treatment*". In breach of Article 2 of the Treaty, the Government has in several respects failed to ensure that Dunkeld's investments were treated fairly and equitably. The Government's conduct has been grossly unjust and discriminatory.

7.37 The Prime Minister gave a lengthy speech to the House of Representatives on 24 August 2009 when tabling the Act.<sup>31</sup> 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."*

7.38 The Government, by the public admission of its Prime Minister, has directly targeted Dunkeld's foreign investment, 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.

7.39 Moreover, 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.

#### ***National Treatment and Most-favoured-nation Provisions***

7.40 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 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*

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<sup>31</sup> Exhibit C-19.

*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."*

7.41 The Government has accorded nationals of third States more favourable treatment in, *inter alia*, its investment treaties with countries besides the UK. Such treaties include:

- (a) the 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 and in force since 1 February 2002 (the Austria-Belize BIT);<sup>32</sup> and
- (b) the Agreement between Belize and the Kingdom of the Netherlands on Encouragement and reciprocal Protection of Investments, signed on 20 September 2002 and in force since 1 October 2004 (the Belize-Netherlands BIT).<sup>33</sup>

7.42 Amongst other provisions, the Belize-Austria BIT contains the following definition of "investment by an investor of a Contracting Party" in Article 1(2):

*"(2) "investment by an investor of a Contracting Party" means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:*

- (a) an enterprise constituted or organised under the applicable law of the first Contracting Party;*
- (b) shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph (a), and rights derived therefrom;*
- (c) bonds, debentures, loans and other forms of debt and rights derived therefrom;*
- (d) any right whether conferred by law or contract, including turnkey contracts, concessions, licences, authorisations or permits to undertake an economic activity;*
- (e) claims to money and claims to performance pursuant to a contract having an economic value;*
- (f) intellectual property rights as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organisation, including industrial property rights, copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;*
- (g) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs."*

7.43 This is to be contrasted with the narrower definition of "investment" in the Treaty which is set out in paragraph 7.27 above which, *inter alia*, does not contain the words "owned or controlled, directly or indirectly". Therefore, the treatment accorded by the Belize-Austria BIT is arguably more

<sup>32</sup> A copy of the Austria-Belize BIT is produced as Exhibit C-29.

<sup>33</sup> A copy of the Belize-Netherlands BIT is produced as Exhibit C-30.

favourable than that accorded by the Treaty. In the event that the Tribunal finds that the definition of "investment" in the Belize-Austria BIT is broader than the equivalent definition in the Treaty, Dunkeld's investment is entitled to the benefit of the former protection.

## **8. THE AMOUNT INVOLVED AND THE RELIEF REQUESTED**

8.1 In respect of Dunkeld's claim for expropriation under Article 5(1) of the Treaty, Dunkeld 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."*<sup>34</sup>

8.2 In the event that the expropriation is found to be unlawful, and/or finds that the Government's acts were in violation of Articles 2 and 3 of the Treaty, the standard of damages is determined by customary international law. Dunkeld is entitled to be placed in the position in which it would have been had its rights under the Treaty not been violated. Dunkeld 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 Dunkeld'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 UNCITRAL Rules only, the value of Dunkeld's investment is in the order of 69% of BZ\$300 – 600 million.<sup>35</sup>

8.4 Dunkeld 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 Dunkeld 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 Dunkeld 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 arbitrators, 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


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<sup>34</sup> Similarly, Article 5 of the Belize-Austria BIT provides that "The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier".

Dunkeld'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 December 2009**



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

Allen & Overy LLP

Solicitors for the Claimants

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<sup>33</sup> Copies of the newspaper articles which were published following the nationalisation of Telemedia and which demonstrate this range in value are produced as Exhibit C-31.