IN THE COURT OF APPEAL OF BELIZE, A.D. 2012

CIVIL APPEAL NO. 6 OF 2011

BRITISH CARIBBEAN BANK LIMITED Appellant

V

THE ATTORNEY GENERAL OF BELIZE Respondent

BEFORE

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Mendes	**-**	**Justice of Appeal**
The Hon Mr Justice Pollard	**-**	**Justice of Appeal**

Lord Goldsmith QC and A Arthurs Martin for the appellant
D A Barrow SC, L M Young SC and M Perdomo for the respondent.

25 and 26 October 2011, 3 August 2012

SOSA P

1. I am firmly of the opinion that this appeal should be dismissed to the extent that the judge below correctly granted injunctive relief to the respondent but that it should be allowed to the extent that the duration of such relief was not appropriately limited by the terms of the judge's order.

2. I have read, in draft, the judgments of both Mendes and Pollard JJA.

3. I am content, for the sake of verbal economy, to adopt as my own the former's summary of this appeal's factual background, very broadly defined, as contained not only in paras 33-60, inclusive, below, but also in paras 29-32, inclusive, below, and 61-77, inclusive, below.

4. In the court below, Legall J granted an interim injunction of sorts. It was not, however, one meant to last only until trial of the substantive claim or further order. Rather, it was, unusually, one intended to remain in place

> 'until the hearing and determination of the local claim for compensation made on 15 October, 2009 by [the appellant], and until any subsequent proceedings in the local courts in relation to the said local claims are heard and determined.'

(See para 92 of the judgment of Legall J.)

5. In fairness to Legall J, however, it should be underscored that his order was not one for a perpetual injunction. In this respect, the injunction granted may usefully be contrasted with that being sought in the substantive claim, the proposed wording of which latter injunction was reproduced by Legall J at para 16 of his judgment. The latter injunction is one which, in my view, would, on its face, continue indefinitely and would properly be described as a perpetual one, which, as defined by the learned contributors to Atkins' Court Forms in Civil Proceedings, 2nd ed, vol 22 (1980 issue), title INJUNCTIONS, at para 2, is a restrictive injunction which permanently precludes infringement of rights and, save by consent of the restrained party, is only granted after the final determination of those rights.

6. Legall J, whilst not granting a perpetual injunction, may have appeared to be seeking to palliate, in a sense, the grant of injunctive relief likely to last beyond the trial of the substantive claim when he referred, at para 90 of his judgment, to the fact that he was not restraining the appellant indefinitely. But, to my mind, he had not demonstrated that the circumstances of the application were such as to place him in a position to grant a perpetual injunction; and it was therefore of no relevance whatever that he was not, in fact restraining the appellant indefinitely. What seems to me to have occurred here is that the judge lost sight of the House of Lords' clear reminder in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396 that the grant of an interlocutory injunction is a

remedy that is not only discretionary but also temporary (p 405, letter D) and, of fundamental importance, temporary in the sense that its duration should extend only up to the resolution of pertinent issues at the trial (p 406, letters D-E). In my view, therefore, Legall J erred egregiously in omitting to grant an interim injunction to last only until trial or further order.

7. I wholly concur in the view of Mendes JA that, in an appeal such as this one, ie one against an order made by a judge in the exercise of his discretion, the Court can do no better than to take guidance, as regards its limited function, from the speech of Lord Diplock in ***Hadmor Productions Limited v Hamilton and Others*** [1983] 1 AC 191, 220, a decision of the House of Lords. I fully recognise the relevance in the present appeal of the entire passage set out by Mendes JA at para 78, below; but, for present purposes, I would limit myself to emphasising only the latter portion of that passage, which reads:

> 'Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside [for this reason or for others set out earlier in the passage quoted by Mendes JA at para 78, below], that it becomes entitled to exercise an original discretion of its own.'

8. It is my respectful opinion that the judge below, in deciding to grant an interlocutory injunction in the terms in question, made a decision which was aberrant to the degree identified by Lord Diplock in the passage which I have just quoted. Put slightly differently, it was a decision departing so sharply from the accepted standard that no reasonable judge mindful of his duty to act judicially could have arrived at it. The error of the judge, as I see it, is one which appears *ex facie* on the order (as set out in his judgment) and about whose extreme degree of gravity there can be neither doubt nor useful argument. I consider that

it is an error which suffices by itself to warrant the setting aside of the order of Legall J for the interlocutory injunction.

9. That said, it needs further to be pointed out that I agree with the view of Mendes JA as to the impact on Legall J's grant of the injunction of the several events which have supervened and which are set out in detail by the former at paras 71-77, below. Bearing in mind what Lord Diplock said in the passage from ***Hadmor Productions Limited*** quoted at para 78, below, I readily coincide in the conclusion of Mendes JA that the decision handed down by this Court on 24 June 2011 in ***British Caribbean Bank Limited v Attorney-General and Anor*** and ***Boyce v Attorney-General and Anor***, Civil Appeals Nos 30 and 31, respectively, of 2010, has, in and of itself, had the ultimate effect of placing this Court in a position to set aside the order of Legall J and exercise an original discretion of its own in this matter. I have, of course, already adumbrated above that the very same goes, as far as I am concerned, for Legall J's error in granting an interlocutory injunction other than 'until trial or further order' (without suggesting, of course, that there is any magic in that particular phraseology).

10. It is right, as I understand Mendes JA to be saying at para 81, below, that the judge below should have adopted (and now this Court, in exercising its own original discretion in this matter, should adopt) the approach laid down by the House of Lords in ***American Cyanamid***, cited above, as explained in ***National Commercial Bank v Olint Corp*** [2009] UKPC 16. My own respectful view is that Legall J displayed a clear understanding of, and adhered to, the essentials of that approach. As he noted at para 21 of his judgment:

> 'At this interlocutory stage, the court … must be satisfied that the claim is not frivolous or vexatious, that there is a serious question to be tried.'

This faithfully reflected the words of Lord Diplock in ***American Cyanamid***, at p 407, letter G.

11. At para 48, having determined that there were, indeed, serious questions to be tried, Legall J quite rightly said:

> '… the next question is whether damages would be an adequate remedy'

and he went on to make it clear that the proper concern must be as to whether damages would be such a remedy to the claimant as well as to the defendant.

12. At para 49, Legall J left no doubt as to his full awareness of the need for him to 'assess whether granting or withholding an injunction is more likely to produce a just result'. And, in this regard, the judge made due reference to the Privy Council's slight but welcome elaboration on the relevant principles in ***Olint*****,** at para 16.

13. Despite what strikes one as mixed signals in Lord Diplock's speech in the ***American Cyanamid*** case as to the precise point of time at which there should arise the question 'Where does the balance of convenience lie?', I consider that, from a strictly practical standpoint, the better view (or signal) must be that that point is the one at which judicial doubt arises as to 'the adequacy of the respective remedies in damages available to either party or to both' (p 408, letter E). (The conflicting signal, for completeness, is that given by Lord Diplock at letters A-B on the same page.) Legall J was manifestly of the same view as I am: see para 50 of his judgment. He addressed the question only after reaching the point where he felt doubt as to the adequacy of damages as a remedy for both parties.

14. He noted, in this regard, the view of Lord Diplock as to the variety of matters relevant, but best left unlisted, at this stage of the judicial exercise (p 408 of the cited report of ***American Cyanamid***), as expanded upon by Lord Hoffmann, writing for the Board, in ***Olint*** (at para 18).

15. To reiterate, then, my own conclusion is that Legall J kept all relevant principles identified in ***American Cyanamid*** and ***Olint*** in the forefront of his mind in reaching his decision in the instant case.

16. Where I do, however, find myself again in substantial agreement with Mendes JA is in his criticism of the failure of the judge below to address full square 'the question whether there was a triable issue that it would be oppressive and vexatious to permit the arbitration to proceed': para 69, below. The former's analysis of the case-law relating to the pertinent equitable jurisdiction of the Court below (at paras 99-106, inclusive, below) is essentially concordant with mine; and, besides, I share his opinion that, in the light of the principles set forth in the cases considered in those paragraphs, as well as in ***Union of India v Dabhol Power Co***, unreported, 5 May 2004, Delhi High Court, (to which he refers at para 110, below) 'there is a serious issue to be tried as to whether the continuation of the arbitration by the appellant is vexatious or oppressive while the constitutional proceedings and the proceedings to determine the legality of the BTL facility and mortgage are underway': para 114, below.

17. Respectfully, however, I am not disposed to agree with Mendes JA that the offer by the appellant of such an undertaking as it gave in the court below (reproduced by Legall J at para 80 of his judgment) would be an acceptable way of effectively forestalling a determination on the part of a judge of the court below, on the hearing of the substantive claim, that the continued pursuit of arbitration will be vexatious or oppressive. I fail, for my part, to see what good the offer, let alone the acceptance, of such a bold undertaking could possibly hope to achieve. If it be a legitimate and desirable objective that the courts of Belize should be the arbiters of the lawfulness or otherwise of (to adopt the terminology of Mendes JA's judgment) the BTL Facility and the BTL Mortgage, and if the statutory claim for compensation (in which the question of quantum will involve the lawfulness or otherwise of that very facility and that very mortgage) is a matter to be decided in these courts, why should the appellant be allowed, by the

expedient of an undertaking, to find a way to have those matters left to be decided until after the arbitral tribunal has made its award? How will the arbitrators deal in the interim with the question of compensation claimed for the alleged expropriation of the BTL Facility and the BTL Mortgage, matters which must inevitably be dealt with (though not necessarily for the first time, given that the government is seeking a relevant declaration in a separate, but interwoven, claim filed in the court below) under the statutory claim for compensation? Would it be sufficiently prudent and safe for the court below to take the position that, whereas the claim pending before it for a declaration as to the lawfulness or otherwise of the BTL Facility and the BTL Mortgage should be resolved before there can be arbitration, it matters not whether the statutory claim for compensation be resolved within a similar time frame? And how will arbitration be justified, in retrospect, if the statutory claim for compensation results, post-arbitration and after all has been said and done in the courts here, in an order for the payment to the appellant of a sum equal to, or in excess of, that previously awarded by the arbitral tribunal there? As Mendes JA rightly puts it at para 110, below, 'the arbitral tribunal would not be able to assess whether the treaty has been violated until the local proceedings have been brought to their conclusion'. Unless the cart is to be put before the horse, there seems to me to be an inherent problem with the idea of an undertaking along the lines already indicated above as part of a solution in the coming trial of the respondent's substantive claim. Such an undertaking, as it seems to me, simply cannot afford to overlook, indeed, sweep under the carpet, the fact that the statutory claim, which is its subject, is, rather than standing all by itself, inextricably interwoven with the government's now pending claim for a declaration going to the lawfulness or otherwise of the BTL Facility and the BTL Mortgage. In making the above observations on the value of an undertaking such as has previously been seen in the present litigation, I seek, of course, not to prejudge matters or influence the court below, but, rather, to assist future discussion in that court, my own view being by no means a concluded one.

18. On the question whether the arbitral tribunal is competent to determine its own jurisdiction, my views differ in no respect from those expressed by Mendes JA, at para 116, below, to the effect that (i) it is the Supreme Court of Belize, and not the arbitral tribunal, that is vested with jurisdiction to determine whether (to again adopt the terminology of Mendes JA's judgment) the 2011 Acquisition Act and Order infringe the Belize Constitution, the doctrine of *kompetenz-kompetenz* notwithstanding, and (ii) that the arbitral tribunal is not competent to assess the amount of compensation to be paid under the Act and Order in question. I further agree with Mendes JA that rights under the relevant Bilateral Investment Treaty ('BIT') between the governments of the United Kingdom and Belize cannot, given the undisputed fact of non-incorporation, override the jurisdiction of the court below to restrain vexatious and oppressive arbitration proceedings by injunction. Nor do I find open to challenge the opinion of Mendes JA (para 118, below) that, in the circumstances to which he draws attention, neither comity nor any other consideration requires the court below to shrink from its duty to exercise its equitable jurisdiction to restrain vexatious and oppressive proceedings when it is just and convenient so to do.

19. Mendes JA considers, and I unreservedly agree, that the question whether the appellant's pursuit of arbitration proceedings is vexatious or oppressive in the circumstances of the instant case is a serious one to be tried. But he further considers that there is no serious question to be tried as regards (i) the validity of the BIT in question and (ii) the existence of an agreement to arbitrate ('topic (i)' and 'topic (ii)', respectively). I unhesitatingly join him in holding, for the reason he gives, that there is no serious question to be tried in regard to topic (i). There can, in other words, be no serious question to be tried as to the validity of the BIT, a matter of international law.

20. But I must with due respect part company with Mendes JA when it comes to topic (ii), being myself unpersuaded that there is no serious question to be tried as regards the pertinent contention of the respondent. As Mendes JA

rightly points out (para 88, below), the appellant places heavy reliance, in the argument on this topic, on ***Occidental Exploration & Production Company v The Republic of Ecuador*** [2006] QB 432, a decision of the Court of Appeal (Civil Division) of England and Wales. The insuperable difficulty which I have with such reliance is that I respectfully consider it to be entirely misplaced, since the undoubtedly very strong court (comprising Lord Phillips of Worth Matravers MR, Clarke LJ and Mance LJ, as they then, respectively, were) did not have before it for decision in that case any question as to whether the pertinent BIT, properly construed, provided for arbitration between Occidental Exploration & Production Company ('Occidental') and the Republic of Ecuador ('Ecuador').

21. The matter only reached the English courts when, following arbitration which culminated with a final award largely in favour of Occidental, both parties on one and the same day issued claim forms in those courts, the object of Ecuador's being to set aside the award under the Arbitration Act 1996 (UK). After the raising by Occidental of a prior objection to the claim of Ecuador, the English court of first instance directed the trial of a related preliminary issue which, insofar as it was not later abandoned, was then decided against Occidental by that court; and it was on the appeal from that decision that the Court of Appeal (Civil Division) gave the decision to which I have just referred, a decision that concerned, in the words of Mance LJ, delivering the judgment of the court, at para 1, 'the extent to which the English Courts may under s. 67 of the Arbitration Act consider a challenge to the jurisdiction of an award made by arbitrators appointed under provisions to be found in a Bilateral Investment Treaty'.

22. In these circumstances, it was, and could only be, common case before the courts that the BIT indeed provided for arbitration between Occidental and Ecuador by way of an agreement to arbitrate. As Mance LJ, in the most explicit of terms, observed, at para 46:

> ‘The present jurisdictional issues arise under an agreement to arbitrate which both parties to the arbitration accept to have been validly made and implemented.’

23. In my opinion, the ***Occidental*** case is, in the circumstances, not even an authority in the area of the law with which the Court is now concerned, ie the proper construction of provisions of a BIT which supposedly create an agreement to arbitrate on disputes arising between (a) a private investor who, or which, is a national of one party to the BIT and (b) the other such party. The judgment assuredly contains much interesting learning on the nature of the agreement to arbitrate and other areas such as the intention of parties to BITs; but that is not of any help in dealing with the only question relevant for present purposes: Did the BIT made between the governments of the United Kingdom and Belize, by its own particular wording, create, or lead to the creation of, an agreement to arbitrate of the kind already described above? I am wary in particular of generalisations about the nature and scheme of BITs entered into several years after 1982, the year in which the governments of the United Kingdom and Belize entered into the one with which the Court is concerned in the present appeal. It is noted in this regard that the BIT in the ***Occidental*** case was signed as many as eleven years later, in 1993, and that, on the whole, the cases and other materials cited in the judgment as supportive of the Court’s reasoning are of even more recent vintage.

24. Bearing in mind, in addition, the strong caveat of Lord Diplock in ***American Cyanamid***, at p 407, letters G-H, that

> ‘[i]t is no part of the court’s function [on an application for an interlocutory injunction] … to decide difficult questions of law which call for detailed argument and mature considerations’,

I am unable to fault Legall J for reaching the conclusion that there was here a serious question to be tried. For the fundamental reason that there may understandably be a gap between what BITs in general have been observed to

do and what the particular 1982 BIT now before this Court actually does, I consider that there is here a serious question to be tried in regard to topic (ii).

25. I come now to the respondent's claim for a declaration that the BIT in question is not part of the law of Belize and cannot therefore be relied upon by the appellant. Unlike Mendes JA, at para 93, below, I am not prepared to dismiss the contention inherent in this claim, viz that the BIT is not part of the law of Belize, as sound but academic. With respect, I consider that to do so is to regard that contention *in vacuo* rather than, as is proper, as part and parcel of a larger whole. The contention is such part and parcel in the sense that, if the BIT were indeed part of the law of Belize, that could seriously complicate the Claimant's case for his first declaration in the Claim, ie that the Supreme Court is the proper forum for the determination of all claims to compensation for expropriation under the 2011 Acquisition Act. (To appreciate the force of this point, one need hardly go beyond imagining that the law of Belize was to the effect of the provisions of Article 8(1) of the BIT, which read

> "**Settlement of Disputes between an Investor and a Host State**
>
> (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 …"

And, if the Supreme Court is not such proper forum, where does that then leave the case for an interlocutory injunction, which hinges, in my analysis, on the proposition that the statutory claim for compensation is a matter for the courts of Belize and should be settled before the commencement of arbitration? The same obviously needs to be said concerning the claim for a declaration that the court below is the proper forum for the determination of all claims to compensation for expropriation of the appellant's property under the 2011 Acquisition Act. The respondent's contention in this regard, viz that the court

below is indeed such proper forum, does not, for the very reason just given, involve a question which is beside the point and academic and, hence, not a serious one to be tried.

26. Before proceeding, I would comment briefly on the argument that has been heard both here and below on the point whether the BIT under consideration is in force. That argument does not, to my mind, properly arise in the instant case. The relevant declaration being sought in the substantive claim is that the treaty is not a part of the law of Belize for one specific reason, namely its non-incorporation. To contend, in those circumstances, that the BIT is, in addition, not in force is, as I see it, to attempt to introduce an extraneous matter into the debate. For this reason, I have pondered long and hard as to whether I should simply ignore this irrelevant argument despite the fact that it features reference to the appeal of ***Alpuche and Ors v The Attorney-General***, Civil Appeal No 8 of 2010 (judgment delivered on 14 June 2010), in which I was the presiding member of the panel. I have decided to say only this: the issues in that appeal having been those which were set out by Morrison JA at para [11] of his judgment, the sole substantive one in the appeal, the Court properly heard no argument on the point whether the BIT in question was in force. My own understanding, which there was no reason to articulate at the hearing, was that both sides assumed it so to be.

27. As already indicated above, it is the conclusion of Mendes JA that the only serious question to be tried is whether, having regard to the pendency of the other relevant proceedings in the courts of Belize, the further pursuit at this time of the arbitration proceedings commenced by the appellant in May 2010 would be vexatious and oppressive. Adopting, as Legall J did in the court below, the approach held out as the correct one in ***American Cyanamid***, Mendes JA next poses, at para 119, below, the question whether an award of damages would be an adequate remedy for the respondent. I agree with his expression of strong misgiving as regards the quantification of damages in a case such as the instant

one, assuming such a remedy to be available in the first place. In my view, the conclusion that, in a real sense, damages would not be an adequate remedy, may, in these circumstances, properly be reached. I also entirely agree with Mendes JA's reasoning and decision (at paras 120-123, below) as to where the balance of convenience lies in the present case.

Summary and Orders

28. Legall J erred egregiously when he omitted to grant an injunction to last only until trial or further order. His error placed his decision to grant the interlocutory injunction in a special category, one into which fall all decisions aberrant to the point where they must be set aside for the simple reason that no judge conscious of his or her duty to act judicially could have arrived at it. That error is enough in itself to warrant the setting aside of Legall's order for the interlocutory injunction. ~~The order is therefore set aside and the appeal, to that extent succeeds.~~ An added ground for setting aside that order is that the decision of this Court in ***British Caribbean Bank Limited v Attorney-General and Anor*** and ***Boyce v Attorney-General and Anor***, Civil Appeals Nos 30 and 31, respectively, of 2010, has had the ultimate effect of placing this Court in a position to do so and then go on to exercise its own original discretion in the matter. There is, however, in the substantive claim a serious issue to be tried as to whether the continuation of the arbitration by the appellant would be vexatious or oppressive while the constitutional proceedings and the proceedings to determine the legality of the BTL facility and mortgage are ongoing. And a determination by the court below that the continued pursuit of such arbitration would be oppressive or vexatious ought not, I am inclined to say, to be permitted to be effectively forestalled by the mere expedient of an undertaking such as was given in the court below. Moreover, the respondent's contentions (i) that the BIT is not a part of the law of Belize and cannot therefore be relied upon by the appellant and (ii) that the court below is the proper forum for the determination of all claims to compensation for expropriation of the appellant's property under the 2011 Acquisition Act are not academic. Each thus gives rise, unless accepted by

the appellant, to a further serious issue for trial. Legall J was, in my respectful view, in error in not holding that there was a serious issue for trial as to whether the continued pursuit of arbitration would be oppressive or vexatious but he was correct in his decision that there were serious issues for trial as to (i) whether the BIT is not a part of the law of Belize and cannot therefore be relied upon by the appellant and (ii) whether the court below is the proper forum for the determination of all claims to compensation for expropriation of the appellant's property under the 2011 Acquisition Act. He was, in those circumstances, right to grant the respondent an interlocutory injunction, once satisfied that damages would not be an adequate remedy for the respondent, but wrong to grant it for the period stated in his order. In the circumstances, I would affirm the order of the judge below insofar as the grant of an interlocutory injunction is concerned, set it aside insofar as the period for which it was granted is concerned and order instead that the interlocutory injunction shall remain in force only until trial of the substantive claim or further order in the court below. It follows that I concur in the orders proposed by Mendes JA in his judgment.

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SOSA P

MENDES JA

29. By notice dated 5 May 2010, the appellant commenced arbitration proceedings against the Government of Belize under the Arbitration Rules of the United Nations Commission on International Trade Law 1977. The notice was issued pursuant to a treaty dated 30 April 1982 and made between the Government of the United Kingdom of Great Britain and Northern Ireland and the

Government of Belize ("the treaty"). The appellant complained that the compulsory acquisition of certain of its properties by orders made under the Belize Telecommunications (Amendment) Act No. 9 of 2009 ("the 2009 Acquisition Act") violated a number of the provisions of the treaty. It asked the arbitration tribunal to declare that these breaches had occurred and to order damages.

30. By a fixed date claim form filed on 16 August 2010, the respondent sought a permanent injunction, the effect of which, if granted, would be to bring a halt to the arbitration proceedings. The respondent also applied on the same date for an interim injunction restraining the continuation of the arbitration. On 7 December 2010, after hearing extensive submissions, Mr. Justice Oswell Legall ordered that the appellant be restrained

> "whether by itself or by its officers, servants, or agents, subsidiaries, assignees or other persons or bodies under its control, from taking any or any further steps in the continuation or prosecution of the arbitration proceedings, commenced by the (appellant) by notice of arbitration dated 5 May 2010 under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 and pursuant to the treaty or agreement made on 30 April 1982 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize and extended to the Turks and Caicos Islands, until the hearing and determination of the local claim for compensation made on 15 October 2009 by the (appellant), and until any subsequent proceedings in the local courts in relation to the said local claims are heard and determined."

Legall J. ordered further that

> "After the completion of hearing and determination of the local claims, and any subsequent proceedings … for compensation, the (appellant) may, if it thinks fit, continue or commence arbitration proceedings under the above mentioned treaty or agreement for such compensation or other remedies as it thinks fit."

31. It is noteworthy that the injunction was granted until the hearing and determination of a claim made by the appellant under the 2009 Acquisition Act for compensation for the expropriation of its assets and not until the hearing and determination of the fixed date claim, as is customary. The injunction is final in form, in other words, even though the respondent had applied for an interim injunction.

32. The appellant appeals against these orders on a number of grounds, seventeen in all, which will be dealt with under the various issues which were raised on the appeal.

The Background Facts

33. The appellant is a company registered in the Turks and Caicos Islands (TCI). It was originally called the Belize Bank (Turks and Caicos) Limited but changed its name to British Caribbean Bank Limited in February 2009. The appellant claims to be one of the largest financial institutions operating in the TCI. It offers personal and corporate banking services and products and claims to be the leading provider of customized lending products with flexible loan terms and highly competitive interest rates. As at 31 March 2010, it had a loan portfolio of $357.2 million which made it the largest lender in the TCI.

34. The appellant is a wholly owned subsidiary of BCB Holdings Limited. The shares of BCB Holdings are listed on the AIM in London, on the Trinidad and Tobago Stock Exchange and on the Bermuda Stock Exchange. As at 31 March 2010, BCB Holdings had 920 shareholders, including 657 UK shareholders. Lord Michael Ashcroft, who is a Belizean citizen, is a substantial shareholder of BCB Holdings and sits as one of ten directors on its Board of Directors. BCB Holdings is registered in Belize.

The Assets Compulsorily Acquired

35. On 19 September 2005, the appellant entered into a syndicated loan agreement, the parties to which were Sunshine Holdings Limited (as borrower), the Belize Bank Limited (as Lender), Caedman Limited (as lender) and the appellant (as both agent and lender). Under the agreement Sunshine Holdings became the beneficiary of a US$10,000,000.00 loan facility ("the Sunshine facility"). As security for the loan, Sunshine Holdings created a first legal charge on the then 7,375,038 ordinary shares it owned in Belize Telecommunications Limited ("the Sunshine Security"). At the time, this represented 20% of the entire issued share capital of Belize Telecommunications. It would appear that the Sunshine Security was at some later time amended to cover 11,092,844 shares owned by Sunshine Holdings in Belize Telecommunications but there was no evidence before us as to how or when this took place. As at 30 April 2010, the principal amount due to the appellant under the facility was approximately US$1,187,540.57.

36. By letter dated 19 May 2006, the appellant extended an overdraft facility to Sunshine Holdings, up to but not exceeding US$1,000,000.00 ("the Sunshine Overdraft Facility"), to be used in connection with Sunshine's working capital needs. The facility was secured by what is described as "a first priority legal mortgage to be granted in favour of (the appellant) by the holders of the two(2) issued ordinary shares which they own in the share capital of (Sunshine)" ("the Sunshine Overdraft Mortgage"). The two shareholders were Dean Boyce and the Trustees of the Belize Telecommunications Ltd Employees Trust and they duly executed mortgages over their shares on the same day. As at 30 April 2010, the principal amount due to the appellant under this facility was approximately US$1,026,164.56.

37. On 6 July 2007, the appellant granted a term loan facility to Belize Telecommunications ("the BTL Facility") which was secured by a charge dated 31 December 2008 over all of Belize Telecommunications' assets ("the BTL

Mortgage"). As at 30 April 2010, the principal amount due to the appellant under this facility was approximately US$21,884,098.00.

38. At some point in time not explored fully on the evidence, Belize Telecommunications Limited vested its assets in Belize Telemedia Limited and thereafter, it appears, all rights and interests in Belize Telecommunications became rights and interests in Belize Telemedia.

The Acquisition Legislation and Orders

39. The Belize Telecommunications (Amendment) Act No. 9 of 2009 came into force on 25th August 2009. Its declared purpose was to provide for the assumption of control over telecommunications by the Government of Belize in the public interest. Section 63 empowered the relevant Minister, with the approval of the Minister of Finance, to acquire for and on behalf of the Government all such property as he may consider necessary to take possession of and to assume control of telecommunications, where the Minister considers that such control should be acquired for a public purpose. The Act provided that in the case of every such acquisition, "there shall be paid to the owner of the property that has been acquired … reasonable compensation within a reasonable time …" (s. 63(3)) and that "any person claiming an interest in or right over the acquired property shall have a right of access to the courts for the purpose of determining whether the acquisition was duly for a public purpose …" (s. 63(4)). The procedure for the recovery of compensation was to begin with the publication of a notice containing the particulars of the property that had been acquired and requiring interested persons to submit their claims within such time as may be specified (s. 64(1)). Upon receipt and verification of a claim, the Financial Secretary was required to enter into negotiations with the claimant for the payment of reasonable compensation within a reasonable time (s. 65(1)). In default of agreement, compensation payable was to be determined by the Supreme Court (s. 65(2)), such proceedings to be commenced either by the Claimant or the Financial Secretary (s. 66(1)). Detailed rules were provided for

the determination of compensation (s. 67(1)). In assessing compensation, the Court was required to employ generally accepted methods of valuation of the kind of property that had been acquired, taking into account the comparable sales of such property in Belize (s. 67(1 (c)). More particularly, but subject to the foregoing, the value of the property acquired was to be taken to be the amount which the property might have been expected to have realised if sold in the open market by a willing seller (s. 67(1)(a)). Unless the court considered that injustice might otherwise be done, no claim for compensation was to be admitted or entertained unless made in writing to the Financial Secretary within twelve months after publication of the notice of acquisition (s. 70).

40. By the Belize Telecommunications (Assumption of Control Order Over Belize Telecommunications Limited) Order No. 104 of 2009, made on 25 August 2009 ("the August 2009 Acquisition Order"), the Government of Belize acquired the 11,092,844 shares which Sunshine Holdings owned in Belize Telemedia Limited. The Government also acquired the shares owned by Dean Boyce and the Trustees of the Belize Telecommunications Limited's Employees Trust in Sunshine Holdings and all proprietary and other interests held by the appellant in Belize Telemedia and its subsidiaries under the BTL Mortgage. In effect, therefore, the Government acquired the appellant's interest in the Sunshine Security, the Sunshine Overdraft Mortgage and the BTL Mortgage.

41. Further, by Amendment Order No. 130 of 2009 made on 4 December 2009 ("the December 2009 Acquisition Order"), the Government acquired all of the appellant's proprietary and other rights and interest under the BTL Facility, the Sunshine Facility, the Sunshine Security and the Sunshine Overdraft Facility.

42. I will refer to these orders collectively as the 2009 Acquisition Orders and to the Act and Orders collectively as the 2009 Acquisition Act and Orders.

Claims made by the appellant under the 2009 Acquisition Act

43. By letter dated 15 October 2009, the appellant through its Attorney submitted a claim to the Financial Secretary in respect of the BTL Mortgage, the Sunshine Security and the Sunshine Overdraft Mortgage pursuant to section 64 of the 2009 Acquisition Act, but this was expressly made without prejudice to any claim with respect to the unconstitutionality of the 2009 Acquisition Act and the August 2009 Acquisition Order which the appellant might make and any claim the appellant "may have to assert and enforce any other rights in connection with ownership" of its assets so acquired. The appellant claimed that the acquisition of its property was both unconstitutional and an abuse of power.

44. By letter in response dated 19 October 2009, the Financial Secretary informed the appellant that its claim was being examined and asked to be provided with certain information "to facilitate the verification of the claim." By letter dated 12 November 2009, the appellant asserted that the information required was either not necessary or already provided. The appellant noted further that section 65(1) of the 2009 Acquisition Act required the Financial Secretary to enter into negotiations with it without delay for the payment of reasonable compensation within a reasonable time and asked that the Financial Secretary by return provide his proposals "for how the negotiations are to proceed." There was no reply to this letter.

45. Following the publication of the December 2009 Acquisition Order, the appellant submitted a claim by letter dated 14 January 2009 in respect of the BTL Facility, the Sunshine Facility, the Sunshine Security and the Sunshine Overdraft Facility. It again asserted that the acquisition was unconstitutional and an abuse of power and noted that its claim was without prejudice to any claims as to the unconstitutionality of the 2009 Acquisition Act and Orders, to any claims it may have to assert and enforce any rights arising further or in connection with the property acquired and, in addition, any claim it may have arising under the treaty.

By letter dated 15 January 2010, the Financial Secretary acknowledged receipt of this letter and informed the appellant that his Ministry was studying the claim and that there would be a full reply as soon as possible. There was no such further reply.

The UK-Belize Investment Treaty

46. On 30 April 1982, the Governments of Belize and the United Kingdom executed an agreement for the Promotion and Protection of Investments. The agreement was expressed to be concluded in order "to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State" and in recognition 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." Article 2(2) provides that "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." Article 3 provides that

> "1. Neither Contracting Party shall in its territory subject investment 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 investment 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."

Article 5(1) deals with the expropriation of investments. It provides that

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

47. The treaty further provides for the settlement of disputes between an investor and the Host State. Article 8(1) provides that

> "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."

48. Although the Treaty was initially made between the Governments of the United Kingdom and Belize, provision was made for the extension of its territorial reach. Thus Article 11 provides that

> "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."

It is not disputed that in an Exchange of Notes signed in Belmopan on 30 April 1982, the parties agreed to the extension of the Treaty to the Turks and Caicos Islands.

The appellant's claim under the treaty

49. By letter dated 4 December 2009, the appellant notified the Prime Minister and the respondent, pursuant to Article 8(1) of the Treaty, of its claim against the Government of Belize for breaches of Articles 2(1) and (2), 3(1) and (2) and 5(1) of the treaty. By further letter dated 13 January 2010, the appellant notified the Prime Minister and the respondent of its supplemental or further claim under treaty arising from the December 2009 Acquisition Order. There was no response to these letters.

50. Accordingly, on 4 May 2010, the appellant served a notice of arbitration on the Government of Belize. The appellant alleged the following breaches of the Treaty

i) In breach of Article 5(1), the expropriation of its property was not carried out "for a public purpose related to the internal needs of Belize." Rather, the expropriation was carried out to avoid the Government's contractual obligations under an agreement with Belize Telemedia whereby the Government of Belize agreed, inter alia, that no person other than Belize Telemedia and a company called Speednet Telecommunications Limited would hold an individual telecommunications license and that steps would be taken to ensure that Belize Telemedia would be permitted to charge its customers and subscribers such rates as would enable it to achieve a

minimum rate of return of 15% per annum ("the Accommodation Agreement");

ii) In breach of Article 5(1), the Government failed to provide "adequate, prompt and equitable compensation" since, even though the expropriation occurred in August and December 2009, by May 2010 no compensation had been paid and there was no indication when compensation would be assessed or paid. Further, since section 67(2)(vi) of the 2009 Acquisition Act purported to exclude any compensation in respect of the Accommodation Agreement, this necessarily diluted the value of Sunshine Holding's shares in Belize Telemedia, which in turn precluded the appellant from obtaining compensation which properly reflected the value of its charge on those shares;

iii) In breach of Article 5(1), the appellant was denied "the right of prompt review by a judicial or other independent authority … of his or her case and of the valuation of his or its investment in accordance with the principles set out in (Article 5(1))":

iv) In breach of Article 2, the Government of Belize failed to accord the appellant's investment "fair and equitable treatment" and "full protection and security" in that the Prime Minister had made it clear that the Act was directly aimed at the interests of Lord Ashcroft and had directly targeted foreign investment as it related to Belize Telemedia and its shareholders, while leaving the shareholding of Belizean nationals intact, and accordingly acted in a discriminatory, unfair and inequitable manner;

v) In breach of Article 3, the Government failed to accord treatment no less favourable to that accorded to Belize nationals by targeting foreign investors and leaving the shareholdings of Belize nationals intact.

The appellant claimed compensation for these breaches.

51. Following its notice of arbitration, the appellant appointed Mr. John Beechy to act as a member of the arbitration tribunal. Mr. Beechy is the Chairman of the International Court of Arbitration of the International Chamber of Commerce. The Government of Belize did not appoint its own arbitrator, as it was entitled to. Accordingly, the appellant by letter dated 11 June 2010, asked the Secretary General of the Permanent Court of Arbitration to appoint the second arbitrator. On 15 July 2010, the PCA appointed Mr. Rodrigo Oreamana as the second arbitrator. On 20 July 2010, the parties were informed that the two arbitrators had agreed that Dr. Albert Jan Van den Berg would serve as the presiding arbitrator.

52. By letter dated 26 July 2010, the arbitrators convened a preparatory conference to be held on 26 August 2010 in Washington DC, the purpose of which was to determine the further conduct of the proceedings. The arbitrators also proposed that they be paid at the rate of £500 per hour and invited the parties each to deposit £60,000.

53. The appellant attended the preparatory meeting on 26 August, but the Government of Belize did not. By this time, the respondent had commenced these proceedings and had applied for the interim injunction. The appellant informed the arbitrators of these developments. By letter dated 1 September 2010 the arbitrators explained the procedural steps which had been taken to date. They further informed the parties that the "PCA's prima facie assessment of its competence to act in facilitating the constitution of the Tribunal pursuant to the UNCITRAL Rules is without prejudice to any objection that the Tribunal may be asked to consider to the effect that it lacks jurisdiction or with respect to the existence or validity of the arbitration clause."

The challenge to the constitutionality of the 2009 Acquisition and Orders

54. In the meantime, and as foreshadowed in its claim for compensation, on 21 October 2009 the appellant commenced proceedings challenging the constitutionality of the 2009 Acquisition Act and Orders. The appellant contended that its rights under the Belize Constitution were infringed because its properties had not been acquired for a legitimate public purpose; the acquisition was not required for the stated public purpose of bringing about the stabilization and improvement of the telecommunication industry and the provision of reliable services at affordable prices; the acquisition was not necessary to assume control over telecommunications; the reasons given for the acquisition, namely that the Accommodation Agreement was "illegal," "immoral" and "anti Belize" and not in the interests of Belizeans and that in effect there was no true competition in the telecommunication industry because Speednet which operated in the sector was owned by Belize Telemedia, both of which were controlled by Lord Ashcroft, had no connection or nexus to the stated public purpose of the acquisition; the 2009 Acquisition Act did not provide for the payment of reasonable compensation within a reasonable time in that its provisions failed to state a time limit for the payment of compensation and there was uncertainty as to whether reasonable compensation would ever be available given that section 71 of the Act made compensation contingent on "moneys voted for the purpose by the National Assembly" and the section did not state what was to happen in the event that no funds were voted; the appellant had a right to be heard by the Minister before making the 2009 Acquisition Act and Orders and there was no such hearing; and the 2009 Acquisition Orders were discriminatory because the motivation was the 'Belizeanization' of Telemedia and the promotion of Belizean interests over those of Lord Ashcroft.

55. On 30 July 2010, Legall J. dismissed the claim but he did order the Financial Secretary to comply with his obligations under section 65(1) of the Act

to pay the appellant reasonable compensation within a reasonable time and to enter into negotiations for that purpose. The appellant promptly appealed.

56. I pause here to note the overlap between the constitutional challenge and the claim which the appellant made for compensation under the 2009 Acquisition Act, on the one hand, and the claim under the treaty, on the other. In the claims for compensation and the arbitration, the appellant was asking to be paid 'reasonable' and 'just and equitable' compensation respectively, both to be assessed, roughly speaking, by reference to the market value of the expropriated assets. Further, in both the constitutional challenge and the arbitration, the appellant was contending that the acquisition was not for a legitimate public purpose and had to do with the avoidance of the Government of Belize's obligations under the Accommodation Agreement. In both proceedings as well, the appellant was contending that it was being subjected to treatment from which Belizean nationals were exempt.

The English Injunction

57. Immediately before lodging the notice of arbitration, the appellant applied for and obtained from an English judge an order restraining the Government of Belize from commencing, pursuing, progressing or taking any steps before the Courts of Belize or elsewhere to enjoin or restrain the appellant or the arbitral tribunal from commencing or taking any steps in an anticipated arbitration under the treaty. The order was made on 4 May 2010 and was to last until 14 days after the first procedural hearing of the arbitration tribunal. The injunction was continued on 2 September 2010 until further order of the court or the date of issue of the final award of the arbitration tribunal. We have been provided with a note of these proceedings prepared by the appellants' English solicitors which records the exchanges between the Court and counsel appearing for the appellant, but we have not been provided with a reasoned judgment of the Court. The Government of Belize was given the right to apply to discharge the order but has chosen not to exercise that right.

The Fixed Date Claim Form and the application for the interim injunction

58. Despite the English injunction, the respondent commenced these proceedings by fixed date claim form dated 16 August 2010 seeking the following relief:

> "1) A declaration that the Supreme Court of Belize is the proper forum for the determination of all claims to compensation and other matters arising out of or relating to the acquisition of certain property by the Government of Belize, including the property of the (appellant) herein under the (2009 Acquisition Orders).
>
> 2) A declaration that the (treaty), not having been brought into domestic law by enabling legislation, is not a part of the law of Belize and cannot be relied upon by the (appellant) or any other person.
>
> 3) A declaration that there is no agreement between the (respondent) and the (appellant) to refer any disputes arising out of or relating to the (2009) Acquisition Orders to international arbitration.
>
> 4) A declaration that, in any case, the (appellant) being under the control of a citizen of Belize, has no locus to invoke the Treaty, even if it were to be assumed (without admitting) that the Treaty applied.
>
> 5) A declaration that the action of the (appellant) in commencing arbitration proceedings against the Government of Belize, by Notice of Arbitration dated 4 May 2010 and continuing with such proceedings, is oppressive, vexatious, inequitable and an abuse of the arbitral process within the meaning of section 106A(8) (i) of the Supreme Court of Judicature Act (CAP. 91), as amended by the Supreme Court of Judicature (Amendment) Act 2010 (No. 18 of 2010), or otherwise.
>
> 6) An order restraining the (appellant), whether by itself or by its servants, agents, subsidiaries, assignees, or other persons and bodies under its control, from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the (appellant) by Notice of Arbitration dated 4 May, 2010, in respect of or

relating to the acquisition of certain property by the Government of Belize under the (2009) Acquisition Orders, or commencing or continuing any other arbitral proceedings arising out of or relating to the same facts."

59. On the same day, the respondent applied by notice for an interim injunction restraining the appellant "from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the (appellant) by Notice of Arbitration dated 4 May 2010." The grounds on which the application was based were stated to be as follows:

"1) The (appellant), British Caribbean Bank Limited, has already commenced arbitration proceedings against the Government of Belize by Notice of Arbitration dated 4 May 2010. The arbitration tribunal has been constituted and a Preparatory Conference is due to be held on 26 August 2010.

2) The said action of the (appellant) is oppressive, vexatious, inequitable and an abuse of the arbitral process as shown in the first affidavit of Joseph Waight filed in support of this application.

3) The Supreme Court of Belize is the proper forum for the determination of all claims to compensation arising out of or relating to the acquisition by the Government of Belize of the (appellant's) property.

4) The (appellant) has already filed a claim for compensation to the Financial Secretary, which is presently under consideration.

5) The Treaty relied upon by the (appellant) to commence arbitration proceedings is not a part of the law of Belize and, in any case, the (appellant) has no locus to invoke the Treaty.

6) The Court has subject matter jurisdiction as the underlying property is situate in Belize.

7) The Court has specific jurisdiction to grant an anti-arbitration injunction under section 106A(8)(i) of the Supreme Court of Judicature Act (CAP. 91), as amended by the Supreme

Court of Judicature (Amendment) Act 2010 (No. 18 of 2010), in addition to the jurisdiction founded on common law.

8) The case is of considerable public importance as it involves a substantial amount of money."

60. Section 106A(8)(i) of the Supreme Court of Judicature on which the respondent relied provides as follows:

"…. (t)he Court shall have jurisdiction –

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

The judgment of the Court below

61. This then was the state of play when Legall J. came to consider the respondent's application for an interim injunction. It is apparent that the respondent was contending that the appellant was not entitled to refer any dispute to arbitration either because the treaty was not in force, or because the treaty was not part of the domestic law of Belize and as such could not be relied upon by the appellant, or because there was no agreement between the appellant and the Government of Belize to arbitrate alleged breaches of the treaty, or because the appellant did not have locus standi under the treaty. The appellant was also contending, in any event, that the commencement and continuation of the arbitration was oppressive, vexatious, inequitable and an abuse of the arbitral process within the meaning of section 106A(8)(i) of the Supreme Court of Judicature Act, as amended, or at common law because in particular the appellant was simultaneously pursuing a claim for compensation for the expropriation of its assets pursuant to the provisions of the 2009

Acquisition Act. The appellant claimed to be entitled to a permanent injunction restraining the arbitration commenced by the appellant and an interim injunction presumably pending trial.

62. Legall J. first assessed the strength of the appellant's case. On the question of the validity of the treaty, he noted that this Court in ***Jose Alpuche v Attorney General*** (CA. No. 8 of 2010) had stated that "The treaty … is an agreement for the promotion and protection of investments between the government of the United Kingdom and GOB dated 30 April 1982 and remains in force" and that it could be argued that such a finding was binding on him. However, he then referred to the respondent's submission that the Court of Appeal's pronouncement on the validity of the treaty was obiter since that was not an issue before the Court in that case. He concluded that there was a serious question to be tried on this issue.

63. Having then referred to the appellant's argument that the agreement to arbitrate between the appellant and the respondent was separate and apart though derived from the treaty and that the arbitration tribunal had competence to determine for itself whether it had jurisdiction in the matter, he concluded that there were certainly "compelling reasons for holding that the treaty and the agreement to arbitrate are binding on the government, not only as a matter of municipal law, but also on the principles of Public International Law." But, he said, this was an issue for the trial judge to decide and he was satisfied at "this interlocutory stage that there were serious issues to be tried".

64. On the question whether the Government of Belize was bound by the English injunction, he observed that there was nothing in the Belize Constitution which gave an English Court the jurisdiction to issue an injunction against the Government of Belize by which it would be bound under Belize law. He therefore concluded that the Government of Belize was free to disregard the English injunction, unless restrained by the Belizean courts, law or constitution.

65. On the question whether damages was an adequate remedy, he said as follows (at para 50):

> "If the injunction is refused, and the claimant participates in the arbitration and prevails, costs would be awarded to the claimant. But there is no evidence before me as to the approximate extent of such costs payable to the claimant; and would the costs be adequate damages for the claimant. There is evidence that the cost of the arbitration is prohibitive, but this is not very helpful. On the other hand, if the injunction is granted and the defendant is restrained from participating in the arbitration, where is the evidence of the approximate amount of damages the defendant would be entitled to, for any loss of damage which it suffered because of the injunction, if it turned out that the defendant was wrongly restrained? Because of these considerations, I have doubt as to the adequacy of damages. "It is," says Lord Diplock, "where there is doubt as to adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises": see American Cyanamid v Ethlcon Ltd. 1975 AC at 408."

66. He accordingly proceeded to consider where the balance of convenience lay. Noting that he had to consider "the prejudice which the claimant may suffer if no injunction is granted, or the prejudice the defendant may suffer if it is granted," he reasoned as follows (paras 53-54):

> "There are many matters to be considered on this question of balance of justice or convenience. If the defendant prevails at the tribunal, could the tribunal enforce its order of compensation against the claimant? If the claimant refuses to obey any order the tribunal makes, does the tribunal have enforcement powers against the claimant? In the absence of such enforcement powers of the tribunal, it seems that the defendant would have to confine itself to the local claims made by it for compensation. It may therefore result in the hearing of the claims for compensation simultaneously bearing in the mind of the court order in 874/2009, or a second time, which would result in financial consequences involved in prosecuting and defending the claims.
>
> Again, if the injunction is refused, the defendant will proceed to pursue claims for compensation before the tribunal; and at the same time the local claim would be continuing under the order of

the court made in (the constitutional challenge), and again there would be contemporaneous hearings. Assuming the defendant obtains an order for compensation from the tribunal as a result of its claims there, the defendant, in that case, could still continue with the local claims for compensation against the government under the undertaking?"

67. And later he said (at paras 85-87):

"If both local and international proceedings are allowed to go on, there are the expense, the stress, the inconvenience and the time involved by both parties. What is more likely to produce a just or convenient result at this interlocutory stage – granting or refusing the injunction?

If the injunction is refused and the tribunal is allowed to proceed, while the Financial Secretary at the same time proceeds with the local claim for compensation filed by the defendant, as the Financial Secretary is ordered to do by the court, there would be simultaneous hearings, both local and international, on the issue of compensation. Suppose the parties reach an agreement in that local claims process, the tribunal hearing would have been useless. Now assume the reverse situation, the defendant, on the granting of the injunction proceeds in the local claims process, and it successfully prevails there the tribunal process would also be not necessary. What on the facts, is the just or convenient thing to do? If both processes for compensation are allowed to continue simultaneously, because this could occur bearing in mind the order of the court in (the constitutional challenge), both sides would suffer more expense, time, stress, inconvenience, harassment. If one process is allowed at a time, it could result in less expense, time, stress, inconvenience. The Financial Secretary had sworn to an affidavit and said that the cost of International arbitration was generally prohibitive and that the arbitration proceedings "will overburden the Government of Belize financially." No doubt it would also be prohibitive and highly expensive and will overburden the defendant too.

Would it not be just or convenient to allow one process at a time, one which the Financial Secretary was ordered to undertake without delay by the court, and which is earlier in time to the arbitral proceedings? If this process earlier in time so ordered by the court does not resolve the issue of compensation between the parties, resort may then be taken of the arbitral process if the defendant so desire. Would it not be just or convenient to allow one process at a

> time instead of two processes contemporaneously? Would the balance of convenience come down on the side of allowing the process earlier in time to continue rather than both processes at the same time? As I see it, I think it would."

68. He accordingly concluded that it would be just and convenient to grant an injunction staying the arbitral proceedings until the local claim for compensation was concluded. He said (at para 90):

> "In other words, I think it just and convenient, and the balance of convenience requires, that one process for compensation be undertaken at a time, and since the local claim is earlier in time, and ordered by the court, I think that process ought to continue."

69. Legall J. did not at any time specifically focus on the question whether there was a triable issue that it would be oppressive and vexatious to permit the arbitration to proceed. Rather, he appeared first to treat the question whether the arbitration was oppressive or vexatious as "another issue to consider on this question of a balance of justice." He considered himself empowered by section 106A(8)(i) of the Supreme Court of Judicature Act to restrain the continuation of the arbitration on the grounds of oppression or vexation. Then having examined the authorities on anti-arbitration injunctions he found that "if in … different proceedings there is a duplication of factual or legal issues, it may be unjust or oppressive to allow both proceedings to proceed at the same time" and that in determining whether there was oppression or vexation the court should have regard to "the issue of injustice, the issue of needless expense, time and stress and harassment; the overlap of factual and legal issues; and the question whether the matter before the local court goes as to the root of the matter before the tribunal." As appears from the passages quoted above, the factors which he thought might cause oppression or vexation informed his assessment of where the balance of convenience lay. Indeed, he concluded this assessment with the finding that "It would be vexatious or oppressive to allow both proceedings for compensation to go on simultaneously." This explains why, although appearing initially to focus on what was the proper course to adopt at an interlocutory stage

of the proceedings, he in fact issued a final injunction restraining the continuation of the arbitration until the determination of the claim for compensation under the 2009 Acquisition Act. In this way, he made a finding which was determinative of the entire proceedings rather than focusing simply on whether there was a serious question to be tried.

70. In order no doubt to counteract any oppression which might be thought to arise because of the duplication of proceedings, the appellant offered the following undertaking:

> "The Government of Belize ('GOB"), the Defendant, British Caribbean Bank Limited ("BCB"), undertakes that if this Honourable Court declines to grant the injunction sought in the above proceedings by the GOB, then, subject to paragraph 2 below, it will:
>
> (ii) suspend the pursuit of its statutory claim for compensation in Belize whilst BCB's arbitration against the GOB commenced by a Notice of Arbitration dated 4 May 2010 (the "Investment treaty Arbitration") is proceeding: and
>
> (iii) abide by the decision of the Tribunal in the Investment Treaty Arbitration as to the merits and quantum of that claim (subject to any rights to challenge an award of the tribunal).
>
> There are only two circumstances where BCB would reserve its right to resume its statutory claim (which it is entitled to bring) in Belize:
>
> (a) if the Tribunal rejects BCB's Investment Treaty Arbitration claim on jurisdictional grounds (which BCB does not think it is a likely outcome but which, given that the GOB is raising the jurisdiction issue, will allow for the contingency) and therefore refuses to give a decision as to the merits or quantum of that claim; or
>
> (b) an award is given in BCB's favour by the Tribunal, but the GOB fails to satisfy that award within 90 days of its issue. In that event, BCB should be able to pursue any remedy to recover payment to which it is entitled including the statutory claim."

There is an obvious error in the way the undertaking was formulated to the extent that it is suggested that the undertaking should emanate from the Government of Belize. That apart, Legall J. thought that this was not satisfactory since "under the undertaking, it is possible, that there may be proceedings for compensation in the tribunal as well as the local claims for compensation" and in any event "the undertaking cannot suspend the process of the local claim" because the court had ordered in the constitutional proceedings that the Financial Secretary comply with section 65(1) of the Act to enter into negotiations with the appellant without delay for the payment of reasonable compensation within a reasonable time.

Events since Legall J's judgment

71. This appeal was heard on 25 and 26 October 2011. It was perhaps inevitable that after Legall J. made his order, there would be developments impacting on the case. First of all, on 24 June 2011, this Court delivered judgment declaring the 2009 Acquisition Act and Orders to be unconstitutional, null and void and of no effect. Specifically, this Court held that the Act and Orders violated section 17 of the Belize Constitution in that the Act did not prescribe the principles on which reasonable compensation was to be paid within a reasonable time; did not secure to a person claiming an interest or right over the acquired property a right of access to the courts for the purpose of establishing his interest or right; and did not secure to a person who had been awarded compensation a right of access to the courts for the purpose of enforcing the right to compensation. This Court held further that the acquisitions were not carried out for a public purpose. There was no evidence to suggest that the acquisitions would assist in the public purpose which the acquisitions were stated to promote, that of improving the telecommunications industry by the provision of reliable telecommunication services to the public at affordable prices. The acquisitions were also not a proportionate response to the stated public purpose and had as its explicit dominant objective the bringing to an end of Lord Ashcroft's alleged campaign to subjugate an entire nation to his will. Accordingly, the acquisitions were for an illegitimate purpose and breached the appellant's

right to protection from the arbitrary deprivation of its property. Further, the appellant was entitled to be heard before the acquisition orders were made and was denied this right. Lastly, this Court upheld the trial judge's finding that there was no sufficient evidence that the acquisitions discriminated against non-Belizeans by not subjecting Belizean nationals to similar expropriations. The appellants have since obtained leave of the CCJ to appeal against this Court's finding that the appellant's right not to be discriminated against was not infringed and the Court's failure to grant consequential relief. The respondent has not appealed and accordingly the 2009 Acquisition Act and Orders remain void and of no effect.

72. Ordinarily, this would have brought an end to these proceedings since there would no longer have been any basis for the continuation of the arbitration which was premised upon the expropriation of the appellants' investment. But there have been important developments. First of all, on 4 July 2011, the Belize Telecommunications (Amendment) Act 2011 ("the 2011 Acquisition Act") was passed providing once again for the compulsory acquisition of property to permit control to be taken of the telecommunications industry. The Act was declared to take effect as from 25 August 2009, the date on which the August 2009 Acquisition Order was made. Then, by Order No. 7 of 2011 also made on 4 July 2011 ("the 2011 Acquisition Order"), the Government of Belize re-acquired all of the appellants' assets which had been acquired in 2009. This was followed by the Belize Constitution (Ninth Amendment) Act 2011 which inter alia declared that the Government should henceforth have and maintain at all times majority ownership and control of, among other public utilities, Belize Telemedia and that the 2011 Acquisition Order be deemed to be duly carried out for a public purpose. The Ninth Amendment Act provided further that no court shall enquire into the constitutionality, legality or validity of the said acquisitions.

73. The 2011 Acquisition Act, on its face, appears to be intended to correct the errors identified by this Court in its judgment declaring the previous Act

unconstitutional while the Ninth Amendment Act appears on its face to immunise the 2011 Acquisition Act and Order from curial challenge for breach of the provisions of the constitution and in particular the requirement that the expropriation of private property be carried out for a public purpose. Whether they have successfully done so will no doubt be tested in the proceedings to challenge the constitutionality of the 2011 Acquisition Act and Order which the appellant has now commenced before the Supreme Court of Belize. The second important development therefore is that the constitutionality of the expropriation of the appellant's properties is once again under challenge and indeed the appellant's appeal to the CCJ has now been stayed pending these fresh constitutional proceedings, upon the respondent having undertaken to cooperate with the appellant to have the claim heard in a timely fashion – see ***Dean Boyce & British Caribbean Bank Limited v Attorney General of Belize*** (CCJ Appeal Nos CV 4 & 6 of 2011, 26 January 2012).

74. Further, given the time frame for the making of claims under the 2011 Acquisition Act, by letter dated 31 August 2011, the appellant submitted a claim to the Finance Secretary for compensation, making it clear once again that it considered the 2011 Act and Order to be unconstitutional and void and that its claim was made without prejudice to any action which might be taken in respect of the unconstitutionality of the 2011 Act and Order and to any claims it may have to assert and enforce under the treaty.

75. Thirdly, on 4 June 2011, the Government of Belize and Belize Telemedia commenced proceedings (Claim No. 360 of 2011) in the Supreme Court for a declaration that the BTL Facility and the BTL Mortgage were unlawful. The main ground appears to be that the loan was made to enable Belize Telemedia to purchase its own shares. The appellant has applied to strike out the claim and its application is still pending. In the meantime, however, the respondent had on 25 January 2011 amended its fixed date claim form in these proceedings to add a declaration in terms similar to the relief sought in Claim No. 360 of 2011. In the

light of these proceedings, by letter dated 12 October 2011, the Finance Secretary, in response to the appellant's claim dated 31 August 2011, confirmed that the Government of Belize was not liable to compensate the appellant in respect of the acquisition of the BTL Facility and Mortgage and that its claim for compensation must accordingly await the final determination of Claim No. 360 of 2011.

76. Fourthly, in the meantime, on 22 December 2010 the Supreme Court of Belize declared section 106A(8)(i)&(ii) of the Supreme Court of Judicature Act to be unconstitutional. This was the section under which Legall J. acted in issuing the injunction now under appeal. The unconstitutionality of section 106A(8)(i)&(ii) is itself under appeal and judgment of this Court is due shortly.

77. Fifthly, by a letter dated 14 March 2011 to the Director for Europe, Trade and International Affairs, the Chief Executive Officer of the Ministry of Foreign Affairs and Foreign Trade expressed the view that the treaty "never came into force, as Belize did not comply with its internal legal processes for bringing the agreement into force." The internal legal processes referred to were identified as follows:

> "Under our constitutional practice, an international agreement must be transformed into domestic law by enabling legislature. Since 2001, there is a further requirement for approval of the Senate before a treaty can be ratified."

By reply dated 11 April 2011, the Director pointed out that the failure to carry out "internal legal procedures could have no effect on the validity of the treaty which was expressed to come into force upon signature." In sum, the respondent is now claiming that the treaty never came into force.

78. The question which arises is what impact, if any, do these developments have on the injunction granted by Legall J? In this regard, we were reminded of what Lord Diplock said in ***Hadmor Productions Limited v Hamilton & Others***

[1983] 1 AC 191, 220 about the limited function of an appellate court on an appeal from the grant or refusal of an interlocutory injunction:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or ***upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.*** Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own." (Emphasis added)

79. It had initially occurred to me that the whole substratum of the arbitration had been removed by this Court's determination that the 2009 acquisition was unconstitutional and that accordingly it was pointless continuing an injunction to restrain an arbitration which had effectively run its course. However, we were assured by Lord Goldsmith, who appeared for the appellant, that the appellant intended, when permitted to do so, to apply to the arbitrators to amend the claim to reflect the change in circumstances. While any such amendment would be a

matter on which the arbitrators only are competent to pronounce, it does appear unlikely that they would refuse it given in particular that the same assets have been acquired and the acquisition has been backdated to the date of the original taking.

80. Be that as it may, it does appear that the invalidation of the 2009 Acquisition Act and Orders has had a profound effect on Legall J's injunction. As appears from the extracts of his judgment quoted above, in assessing where the balance of convenience lay, he was particularly persuaded by the fact that the local claim for compensation under the 2009 Acquisition Act was made before the arbitration proceedings were launched. He was also influenced by the fact that, in his judgment dismissing the appellant's constitutional challenge to the 2009 Acquisition Act and Orders, he had directed the Financial Secretary to comply with section 65(1) of the Act. The effect of this Court's order invalidating the 2009 Act and Orders is that the claim for compensation thereunder has now gone by the wayside and there is no longer any enforceable order requiring the Financial Secretary to comply with his obligation under the now defunct Act. Given the importance which Legall J. attached to the timing of the local claim for compensation and his order directing the Financial Secretary to enter into negotiations to settle the claim, it does appear that Legall J. may have come to a different conclusion if he had been presented with this changed state of affairs. On this ground alone, therefore, this Court is now entitled to exercise an original discretion of its own.

81. However, there are other grounds upon which this Court is entitled to exercise its own discretion. As will appear momentarily, I am of the view that Legall J's finding that there were serious issues to be tried on the question of the validity of the treaty and whether there was an agreement between the appellant and the Government of Belize to arbitrate breaches of the provisions of the treaty was based upon a misunderstanding of the law and the evidence adduced before him. I am also satisfied that he adopted a wrong approach by, in effect, conflating

his analysis of what would amount to oppression or vexation in the pursuit of a foreign arbitration with his assessment of the balance of justice and then proceeding to make what appears to be a final determination that the further pursuit of the arbitration would be oppressive and vexatious. What he ought to have done was to first determine whether there was a serious issue to be tried on the question of oppression and vexation and then to carry out the exercise which the Privy Council outlined recently in ***National Commercial Bank Jamaica Ltd v Olint Corporation Limited*** [2009] 1 WLR 1405 in the following passages (at paras 16-19):

> "It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."
>
> Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases….."

82. Accordingly, consideration must now be given to the following matters:

i) Whether there are any serious questions to be tried and if so the strength of the respondent's case;

ii) Whether damages would be an adequate remedy for the respondent; and if not

iii) Whether granting or withholding an injunction is more likely to produce a just result.

In carrying out this exercise, this Court must necessarily take account of the developments since Legall J delivered his judgment.

Serious questions to be tried
Agreement to arbitrate

83. The respondent contends that there is no valid treaty in existence between the Governments of the United Kingdom and Belize on which the appellant could found a right to refer a dispute to arbitration; that even if the treaty is valid, there is no agreement to arbitrate between the appellant and the Government of Belize; or alternatively, that the appellant had no *locus standi* under the treaty to refer a dispute to arbitration. On any of these bases, the appellant has no right to proceed to arbitration and accordingly should be restrained from so doing. In

support of its claim for an injunction on this ground the respondent relies on the long standing practice of the Courts of Equity of granting injunctions to restrain references to arbitration under an agreement which is invalid or which is impeached – ***Kitts v Moore*** [1895] 1QB 253, 260; ***Halsbury's Laws of England,*** 4th ed. Reissue, Vol. 8(1), para 642.

84. The respondent has not disputed that the treaty on which the appellant relies in fact exists and was executed by the Prime Minister of Belize on behalf of the Government of Belize. Nor does the respondent dispute that subsequently the Prime Minister of Belize exchanged notes with the UK Government extending the treaty to Hong Kong and the Bailiwicks of Jersey, Guernsey and the Isle of Mann (in 1983), to the Turks and Caicos Islands (in 1985) and to the Cayman Islands (in 1986), all in apparent recognition of the validity of the treaty. As a matter of fact, therefore, the treaty exists and the Government of Belize is a party to it. What the respondent says, in reliance on the letter dated 14 March 2011 from the Chief Executive Officer of the Ministry of Foreign Affairs and Foreign Trade, is that the treaty does not bind the Government of Belize in international law because, contrary to Belize's constitutional practice, the treaty was not transformed into domestic law by enabling legislation. It does not appear that the respondent relies on the practice allegedly in existence since 2001 of obtaining approval from the Senate before ratification, since on its face this practice would not have been in existence when the treaty was signed.

85. An assessment of the respondent's case on these points naturally requires both an examination of how the treaty would be viewed as a matter of international law and an interpretation of the provisions of the treaty itself, both being exercises which would normally be carried out by the international tribunal before which the claim is prosecuted. Indeed, the arbitration tribunal, no doubt with an eye on the claims made by the respondent in these proceedings, has reserved for consideration whether it lacks jurisdiction to hear the claim or whether the arbitration clause exists or is valid. Curiously enough, though, the

respondent in its written submissions contends that this is an exercise which this court is not permitted to embark upon because the Government of Belize has declared that the treaty is of no effect and the question whether or not that declaration is correct is not justiciable. The respondent therefore asks this court to accept the remarkable proposition that we are empowered to enjoin the appellant from pursuing its claim under the treaty on the ground that the treaty is invalid, but that we are not empowered to determine the soundness of the respondent's claim that the treaty is indeed invalid. In short, the mere declaration by the Government that the treaty is invalid, and that the appellant is accordingly not entitled to arbitrate under it, is sufficient to support its claim for an injunction.

86. The respondent relies on the general principle that a Belizean Court is not competent to interpret or apply an international treaty - ***JH Rayner Ltd v Department of Trade*** [1990] 2 AC 418, pp 499-501; ***R v Lyons*** [2003] 1 AC 976, para 27. However, there are a number of exceptions to this rule, including most pertinently where such interpretation is necessary for the purposes of determining the rights and duties of an individual under domestic law - ***Republic of Ecuador v Occidental Exploration and Production Co***. [2006] QB 432, para 31. In addition, for similar purposes it may be necessary to determine whether a state is in fact a party to a treaty. In ***JH Rayner Ltd v Department of Trade***, Lord Oliver said (at p. 500-501):

> "It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts."

It appears to me that the exercise involved in adjudicating upon the respondent's claim falls within these exceptions. In order to determine whether there is in existence an agreement to refer disputes under the treaty to arbitration it must first be determined whether as a matter of fact a valid treaty exists to which the Government of Belize is a party and secondly whether on a proper interpretation of the treaty provision is made for such arbitration. These are both matters in respect of which this court has jurisdiction. Otherwise, the respondent's claim would have to be dismissed summarily on the ground that Belizean courts lack the jurisdiction to consider the issues raised.

87. I note that there is no provision in the treaty making its validity dependent upon its transformation into domestic law by enabling legislation. Indeed, Article 12 of the treaty specifically declares that "This Agreement shall enter into force on execution." It is significant in this context that Article 12 of the Vienna Convention on the Law of Treaties provides that "The consent of a State to be bound by a treaty is expressed by the signature of its representative when … the treaty provides that signature shall have that effect" and that Article 24(1) provides that "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree." Moreover, it is highly unusual that a treaty would be made to bind a state only when it becomes part of the domestic law of that state. Ordinarily, a treaty would require the State Parties to take steps to amend their domestic law to ensure compliance with their treaty obligations. Necessarily, therefore, the treaty obligation must first exist before it is incorporated into domestic law, although there may no doubt be cases where a state would alter its domestic in preparation for or in anticipation of its accession to a treaty. Contrary to Legall J's finding, therefore, in my judgment there is no serious question to be tried on the question whether the treaty is valid in international law.

88. In answer to the respondent's contention that in any event there is no agreement between the appellant and the Government of Belize to refer disputes

concerning breaches of the treaty to arbitration, but rather an agreement between two Governments albeit intending to bestow benefits on named individuals, the appellant relies on the decision of the English Court of Appeal in ***Republic of Ecuador v Occidental Exploration and Production Co***. [2006] QB 432, where, in relation to a similar investment treaty, Mance LJ said (at para 33):

> "… the agreement to arbitrate which results by following the treaty route is not itself a treaty. It is an agreement between a private investor on the one side and the relevant state on the other."

89. The respondent attempts to distinguish the ***Ecuador*** case by pointing to the specific provisions of the treaty there under consideration and in particular to Article VI(4) thereof which provided that:

> "Each party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: (a) written consent of the parties to the dispute for purposes of chapter II of the ICSID Convention (jurisdiction of the centre) and for purposes of the additional facility rules; and (b) an 'agreement in writing' for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 ('New York Convention')."

There was held to be a separate agreement to arbitrate in the ***Ecuador*** case, the respondent argues, because the State party had given its written consent in the language of the treaty itself. When an individual investor consented to refer a dispute to arbitration, an agreement to arbitrate was thereby created. By contrast, the respondent continues, there is no similar consent to arbitration given by the Government of Belize in this case.

90. I do not agree. In the first place, it is important to bear in mind that the treaty, though formally made between the Governments of two independent states, is intended first and foremost to bestow rights in international law on individuals who are identifiable by reference to the investments which they make in the territories of the state parties. Thus, the parties undertake to accord fair and equitable treatment to the investments of each others' nationals and companies, to provide each others' nationals and companies restitution, indemnification or compensation no less favourable to that provided to their own nationals and companies where loss is suffered due to revolution or such like, and to eschew nationalization or expropriation of the investments of each others' nationals and companies, except for a public purpose and upon payment of reasonable compensation. The express purpose of the treaty is to encourage investment in each others' territories and the mechanism chosen to facilitate such investment is to provide protection in circumstances in particular where the laws of the state parties fall below the standards established in the treaty. It is not surprising therefore that the treaty provides for an avenue of redress independent of the state parties' legal systems. Where a dispute arises between an investor and a state party concerning the latter's obligations under the treaty, therefore, Article 8 empowers either party to the dispute to submit a claim to international arbitration. Even though the parties to the treaty do not in terms declare their consent to arbitration, that consent is present in Article 8 by necessary implication. As the appellant has argued, article 8 may be seen in other words as an offer at large by the state parties to investors to arbitrate disputes arising under the treaty, which is accepted and crystallizes into an agreement to arbitrate upon the submission to arbitration by the investor. That such rights enforceable before an international tribunal were intended to be bestowed upon individual investors is not unusual and indeed is well established – see ***Ecuador v Occidental*** para 19. As Zachary Douglas observed in "***The Hybrid Foundations of Investment Treaty Arbitration***" [2003] BYIL 151,187:

> "The functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its nation state."

I find further support for my conclusion in the following passage from the judgment of Mance LJ in ***Ecuador v Occidental*** (at para 32):

> "The treaty involves, on any view, a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim to which national courts should, in an internationalist spirit and *because* it has been agreed between states at an international level, aspire to give effect."

91. In my judgment, therefore, there is no serious issue to be tried on this point either.

92. Although the respondent challenges the appellant's locus standi in the fixed date claim form, it does not appear that this aspect of the case was pursued before Legall J and no argument was presented to us either in support thereof. I will accordingly give no further consideration to this aspect of the respondent's case.

93. The respondent also claims a declaration that the treaty is not part of the law of Belize, not having been incorporated into domestic law by enabling legislation, and accordingly cannot be relied upon by the Defendant. It is of course trite law that an unincorporated treaty is not part of the law of Belize and creates no rights or obligations which are enforceable domestically – ***Attorney General of Barbados v Joseph and Boyce*** (CCJ Appeal CV2 of 2005); ***JH Rayner Ltd v Department of Trade***, supra. The appellant accordingly cannot rely upon the treaty by itself, for example, to claim any right to compensation for the expropriation of its property enforceable domestically. To that extent, the appellant cannot rely on the treaty and the respondent would have been entitled to the declaration sought if in fact what the appellant was seeking to do was to enforce the treaty domestically. But this is not what the appellant is seeking to

do. The appellant wishes to proceed to arbitrate before an international tribunal and to enforce its rights under the treaty in international law. The declaration which the respondent seeks therefore appears wholly academic and even though there is otherwise a sound basis in law for it, is insufficient to support an injunction in this case.

Proper Forum

94. Similarly, the respondent's claim for a declaration that the Supreme Court of Belize is the proper forum for the determination of all claims to compensation for the acquisition of the appellant's property under the 2011 Acquisition Act is beside the point. The appellant does not seek compensation under the 2011 Acquisition Act before the arbitration tribunal. The arbitration tribunal has no jurisdiction to award compensation due under the 2011 Acquisition Act, any more than the Supreme Court of Belize has jurisdiction to award compensation for breaches of the provisions of the treaty. What the appellant seeks before the arbitration tribunal are declarations that the provisions of the treaty have been breached by the Government of Belize in relation to it, and compensation for such breaches. While at present the appellant is pursuing claims both locally and before the arbitration tribunal for compensation for the expropriation of its assets, the Supreme Court of Belize, if eventually called upon to do so, will be concerned to ensure that the appellant is paid the compensation to which it is due under the 2011 Act, while the arbitration tribunal will be assessing compensation for any breaches of the treaty which the appellant might substantiate. Accordingly, the declaration on forum is likewise insufficient by itself to support the injunction which the respondent seeks.

95. Having said this, I should note that although the parties did not address the court on whether any award made by the arbitration tribunal is enforceable domestically under the Arbitration Act, they both nevertheless appeared to assume that it is. Even on that assumption, the conclusions to which I have just arrived are unaffected. If the appellant eventually seeks to pursue any remedies

it might have under the Arbitration Act to enforce any award it obtains from the arbitration tribunal it will not be seeking to enforce the treaty. Rather, it will be seeking to enforce any rights it might have under the Arbitration Act. Similarly, the enforcement of an award for compensation for the expropriation of an investment in breach of the treaty would not constitute the arbitrators the proper forum for determining compensation under the 2011 Acquisition Act. To the extent that the arbitrators may make an award for compensation greater than that which the Supreme Court of Belize might award under the 2011 Act, the arbitrators would yet be performing their assigned role of determining whether Belize law, as applied by the Supreme Court of Belize, conforms to the standards established by the treaty. That would still not amount to the assumption of the functions of the Supreme Court of Belize under the 2011 Act. Indeed, the very goal sought to be achieved by permitting claims to be made under the treaty for breaches of its provisions is to hold domestic law to international standards. By the treaty, the Government of Belize has bestowed the power to make such an assessment on international arbitration tribunals. Nevertheless, the fact that two separate proceedings may be running simultaneously, both considering the same subject matter, does raise the question whether it would be oppressive and vexatious to pursue the one at the same time as the other.

The legality of the BTL Facility and Mortgage

96. As noted, after Legall J delivered his judgment on 7 December 2010, the respondent amended his fixed date claim form to add a declaration that the BTL Facility and the BTL Mortgage were unlawful. It is alleged that the facility and mortgage are transactions which did not comply with the Companies Act and are *ultra vires* the objects and powers of BTL. The respondent has since commenced separate proceedings claiming the same relief and in addition a declaration that the Government of Belize is not liable to compensate the appellant for the acquisition of the facility and the mortgage under the 2011 Acquisition Act. The question of the legality of the facility and the mortgage appeared to have been put before Legall J by the respondent in the course of argument, leading the

appellant to submit that since it appeared that the Government did not intend to compensate the appellant for the acquisition of these assets, it could not be vexatious or oppressive for the appellant to pursue its claim before the arbitrators because the arbitration may be the only remaining process through which it might get compensation. Although Legall J noted that he had not had the benefit of full argument on the point, and even though the legality of the facility and mortgage were not issues in the case at that time, he nevertheless ventured to say that he did not think much of the case for illegality and doubted that any court on the facts available to him would be persuaded by the respondent's submissions. He hastened to add however that he was not deciding the point at this interlocutory stage.

97. Like Legall J we have not had the benefit of any reasoned argument on the question of the legality of the facility and the mortgage. The respondent has contented himself with simply referring to the fact that the legality of the facility and the mortgage is now under challenge in Claim No 360 of 2011 and that there is accordingly now "a proper basis to revisit the Judge's provisional view." For its part, the appellant argues that given that the judge in effect found that there was no issue to be tried on this point, he ought not to have issued an injunction. Further, and in any event, the appellant argues, the arbitrators are competent to determine whether the facility and mortgage were valid under Belize law and accordingly the issue should be left to them to decide. Given therefore that neither party has advanced a case for or against the legality of the facility and mortgage, I do not propose to give consideration to the issue at this stage, except to recognise that the question of the validity of the facility and mortgage is a live one before the Supreme Court of Belize as well as the arbitrators, a state of affairs which is relevant to the question whether the continuation of the arbitration is vexatious or oppressive.

Oppression and Vexation

98. Legall J founded his jurisdiction to grant the injunction on section 106A(8)(i) of the Supreme Court of Judicature Act which empowers the supreme court to restrain arbitration proceedings which are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process. That section has been declared unconstitutional and at the time of writing it remains so. Nevertheless, courts of equity have long accepted the jurisdiction to restrain foreign arbitral proceedings on the grounds of vexation and oppression. Since the respondent has not focused on inequity or abuse of process, the invalidation of section 106A(8)(i) does not affect the case on this ground and I will proceed to assess whether there is a serious issue to be tried based on the court's equitable jurisdiction.

99. One of the more recent expositions of this jurisdiction is the case of ***J. Jarvis and Sons Limited v Blue Circle Dartford Estates Limited*** [2007] EWHC 1262 where Jackson J held (at para 40) that the court would exercise the power to restrain arbitration proceedings "if two conditions are satisfied, namely (a) the injunction does not cause injustice to the claimant in the arbitration, and b) the continuation of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process" – see also ***Albon (T/A NA Carriage Co.) v Naza Motor Trading SDN BHD*** [2007] EWCA Civ 1124, para 7; ***Elektrim SA v Vivendi Universal SA*** [2007] EWHC 571 (Comm), paras 55-56. The authorities make clear, however, that the jurisdiction will be exercised sparingly and with great caution and only in exceptional circumstances – ***Republic of Kazakhstan v Instil Group Inc*** [2007] EWHC 2729 (Comm), para 1; ***Wiessfisch v Julius*** [2006] EWCA Civ 218, para 33; ***Claxton Engineering Services Limited v TXM Olaj-Es Gazkatuto Ktf*** [2011] EWHC 345 (Comm), paras 27-34. Indeed, there may be cases where it would be appropriate to refuse an injunction even if it is felt that the continuation of the arbitration would be oppressive, vexatious or unconscionable - ***Elektrim v Vivendi***, paras 74-75.

100. The courts have accepted that oppression or vexation may arise where there are co-extensive or overlapping proceedings before a local Court and before an arbitral tribunal – ***Carter Holt Harvey Ltd v Genesis Power Limited*** [2006] 3 NZLR 794, para 17 – particularly where the possibility of the enforcement of a determination in both would create the undesirable specter of "a race between (the court) and a private tribunal which should be the first to give a decision in the matter" ***– Doleman v Ossett Corporation*** [1912] 3 KB 257, 269 per Fletcher Moulton L.J. Nevertheless, it needs to be stressed that there is no presumption that the pursuit of domestic and foreign arbitral proceedings at the same time is vexatious, particularly where the procedure and remedies before the foreign tribunal are different – ***McHenry v Lewis*** (1882) 22 Ch. D. 397, 400 per Jessel M.R.

101. Thus far, the courts have been careful not to restrict the notions of vexation and oppression by attempting a comprehensive definition and have emphasized that what amounts to vexation and oppression must vary with the circumstances of each case – ***McHenry v Lewis***, pp. 407-408. Even so, judges from time to time have offered examples of what may or may not amount to vexation. In ***Peruvian Guano v Bockwoldt*** (1883) 23 Ch. D. 225, 230, Jessel M.R. thought that vexation may occur where the foreign proceedings are "so utterly absurd that the Judge sees that it cannot possibly succeed, and that it is only brought for annoyance." On the other hand, it would not be vexatious to commence proceedings abroad where "there are substantial reasons of benefit" to do so – ibid; ***Merrill Lynch v Raffa*** (2001) I.L. Pr. 31, para 22. For example, there may be "assets available for execution in a foreign country, or another party may only be amenable to the jurisdiction of the courts of the foreign country" – per Lord Goff in ***Soćiete Nationale Industrielle Aerospaticle v Lee Kui Jak*** [1987] 1 AC 871, 894. In that case, Lord Goff summarised the proper approach of the courts in the following passage (at pp. 896-897):

> "In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the

> English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay upon terms."

Although this was said in relation to foreign judicial proceedings, it is accepted that the jurisdiction is exercisable as well in relation to foreign arbitration proceedings.

102. In ***Lee Kui Jak***, the plaintiff's husband was a passenger in a helicopter which crashed in Brunei. He was killed. The helicopter was manufactured by a French company S.N.I.A.S. and operated and serviced by a Malaysian company, Bristow Malaysia. The plaintiff instituted proceedings in Brunei against Bristow Malaysia and S.N.I.A.S, and in Texas against, inter alia, S.N.I.A.S and its associated companies, and Bristow Malaysia and its associates. The Texas court had jurisdiction over S.N.I.A.S because it carried on business there. The plaintiff's claim against the Bristow Malaysia was settled. Accordingly, S.N.I.A.S served a contribution notice on Bristow Malaysia, which then intimated that it would submit to Brunei but not Texan jurisdiction, and that it would accept service of a third party notice issued by S.N.I.A.S in Brunei. The plaintiff's Texas attorneys commenced pretrial discovery and trial was eventually fixed for 1 July 1987 in Texas. Meanwhile, S.N.I.A.S. applied to the High Court of Negara Brunei

Darussalam for an order restraining the plaintiff from continuing with the Texan proceedings. Given that the grounds upon which Bristow was contesting Texan jurisdiction was substantial and Bristow Malaysia was prepared to accept service of the third party proceedings in Brunei it followed that, if the plaintiff were permitted to proceed with the Texas proceedings, it was possible that Bristow Malaysia would not be party to those proceedings, with the effect that S.N.I.A.S., if held liable in Texas, would have to commence separate proceedings, presumably in Brunei, in order to seek an indemnity or contribution from Bristow Malaysia. This itself would involve multiplicity of proceedings. The problem which this posed was described by Lord Goff in the following passage (at p. 901-902):

> "Now, let it be supposed that the proceedings in Texas against S.N.I.A.S. are allowed to continue to proceed, and that in those proceedings S.N.I.A.S. are held liable to the plaintiffs. Then let it be further supposed that S.N.I.A.S. claim contribution or indemnity from Bristow Malaysia in Brunei, relying upon a judgment of the Texas court as showing that they, S.N.I.A.S., were *liable* in respect of the relevant damage. Would that judgment provide conclusive evidence that S.N.I.A.S. were so liable? Or would S.N.I.A.S. have to satisfy the Brunei court, independently of that evidence, that they were in law liable for such damage? If the latter were the case, S.N.I.A.S. would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to the plaintiffs in Texas without any right over against Bristow Malaysia in that court, and might be held not liable to the plaintiffs in Brunei, in which event they would have no claim over against Bristow Malaysia, even though negligence on the part of Bristow Malaysia may in fact have been a substantial cause of the accident....
>
> So S.N.I.A.S. are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, S.N.I.A.S. may well be unable to claim over against Bristow Malaysia in those proceedings; and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability."

In these circumstances, the Privy Council was of the opinion that serious injustice could be caused if the plaintiff was permitted to proceed in Texas and that the plaintiff's conduct in continuing with their proceedings in Texas should properly be described as oppressive.

103. In ***Albon v Naza Motors*** it was held to be oppressive to continue arbitration proceedings where there was a sufficiently good arguable case that the arbitration agreement was forged, that the forgery was brought into existence after the claimant had issued his proceedings in order to stop the English proceedings in their tracks and the English Court was to be the final judge on the question of the authenticity of the arbitration agreement so that that question would not presently be determined by the arbitrators. In those circumstances, the continuance of the arbitration proceedings was oppressive because it was a needless expense, because it would be difficult to avoid over-proliferation of pleadings and disclosure if the parties did not know whether it will be ultimately determined that the arbitration agreement was genuine or not and because it need not take long to determine the forgery and the defendant could co-operate in a speedy resolution of that question if they wished to do to.

104. In ***Elektrim v Vivendi*** it was held not to be oppressive or vexatious to carry on two arbitrations at once where it was clear that the two arbitrations concerned different subject matter and both arbitrations were started pursuant to contracts by which the parties agreed to resolve disputes concerning them by arbitration.

105. Similarly, in ***Internet FZCO v Ansol Limited*** [2007] EWHC 226 (Comm), it was not considered to be oppressive or unconscionable to pursue arbitration proceedings in which the claims did not raise the questions of fraudulent conspiracy or fraudulent misrepresentation which were the subject of the competing high court action. Moreover, the claimant in the arbitration had undertaken not to pursue any claims nor seek relief alleging, or based upon, any

alleged fraud, or associated claims. The court thought that there was no risk of there being inconsistent findings, since, insofar as there may be any adverse findings against the claimants, issue estoppel would arise to prevent them from re-arguing or re-litigating such issues in the high court proceedings. Whilst it would be convenient that one tribunal should determine all the issues between all the parties, the court thought it would be unjust to prevent the claimants from exercising their undoubted contractual right to pursue their contractual claims in the arbitration. Were an injunction to be granted, they would be deprived of the benefits of the arbitration, and the opportunity of an award which could be achieved far more quickly than in the Commercial Court proceedings. Moreover, enormous costs had already been incurred in the arbitration which, in reality, would be wasted if the injunction were to be granted.

106. In ***Jarvis v Blue Circle*** the court thought there was force in the argument that it would be oppressive to continue with simultaneous arbitration proceedings where there was a real risk that Jarvis would end up paying the same damages twice over, the first to Blue Circle pursuant to whatever award the arbitrator may make and the second to a third party pursuant to whatever judgment the Court may give at the end of the litigation which the third party proposed. However, the court was relieved of the burden of determining whether to restrain the arbitration proceedings in the light of an undertaking given by Blue Circle which made the risk of Jarvis being mulcted in damages twice over so low that the arbitration could not be characterised as oppressive for that reason.

Discussion

107. In this case, there are at present three sets of proceedings in Belize which it may be said are competing with the arbitration which the appellant wishes to pursue. The first is the constitutional challenge to the 2011 Acquisition Act and Order which the appellant has commenced. In these proceedings, the appellant will no doubt once again contend that the acquisition was not carried out for a public purpose. There will accordingly be an overlap between the constitutional

proceedings and the arbitration in this regard at least and there may be additional such repetition depending upon the grounds which the appellant might choose to pursue.

108. Secondly, there is the claim which the appellant has instituted under the 2011 Act for compensation for the expropriation of its assets. This claim has not gotten very far. The Financial Secretary has denied one aspect of the appellant's claim in relation to the BTL Facility and the BTL mortgage on the ground that these transactions were unlawful and that any assessment must await the determination of proceedings launched by the Government of Belize in that regard. To the extent that this claim proceeds even in part, there would be some overlap with the arbitration proceedings to the extent that the Financial Secretary and ultimately the Supreme Court will be called upon to determine what reasonable compensation the appellant is entitled to, at the same time as the arbitration tribunal will be considering a similar question under the treaty.

109. As the authorities indicate, the mere fact that there is some significant overlap between local proceedings and arbitration proceedings does not by itself constitute vexation and oppression. Moreover, there is some real benefit to be gained by the appellant in pursuing the arbitration to the extent that the arbitration tribunal will be engaged in the process of determining whether the expropriation of the appellant's assets complies with the Government's obligations under the treaty, an exercise which will involve the application of international legal principles. As such, while the subject matter of the two exercises may be largely the same, the principles which are to be applied in resolving the questions committed for determination in both cases are different. In sum, the arbitration tribunal will be called upon to determine whether the expropriation carried out and compensation available under Belize law complies with the treaty obligations entered into by the Government of Belize. Local officials and courts, on the other hand, will be determining the question committed to them in accordance with Belizean law.

110. However, the significance of the constitutional and compensation proceedings in Belize to the question whether it would be vexatious or oppressive to continue the arbitration proceedings, is that in a real way, the arbitral tribunal would not be able to assess whether the treaty has been violated until the local proceedings have been brought to their conclusion. Thus, it may very well happen, as indeed it happened in relation to first constitutional challenge, that the 2011 acquisition legislation and orders are declared to be invalid. In that event, there will not have been any expropriation, whether contrary to the treaty or otherwise, and the core of the appellant's complaint to the arbitrators will have been resolved. Similarly, if the compensation to which the appellant is determined to be entitled locally equals or exceeds what the appellant considers might be obtained in the arbitration, there will likewise be little to complain about. If the arbitration is allowed to proceed and the appellant is successful, it may then seek to enforce the award under the Arbitration Act. The Government will then be confronted with a claim for the enforcement of an award based upon the expropriation of the appellant's assets at the same time as proceedings are wending their way through the Belizean legal system to determine whether that very expropriation is valid. If it is eventually determined that the expropriation is invalid, the claim for enforcement could hardly proceed. It is therefore arguable that the continuation of the arbitration is both vexatious and oppressive to the extent that, if taken to a conclusion, and enforcement proceedings are brought locally, any award which the appellant obtains may in the interim be overtaken and superseded by a determination in the local proceedings in the appellant's favour. It is therefore arguable that it would be vexatious and oppressive for the Government of Belize to be confronted with enforcement proceedings whose viability will ultimately depend on the outcome of the constitutional proceedings which the appellant is simultaneously pursuing. In ***Union of India v Dabhol Power Company*** (unreported, 5 May 2004, Dehli High Court), Chopra J found a prima facie case of oppression where an arbitration was continuing in circumstances where a pending decision of the Supreme Court of India "would go to the root of the matter".

111. Similar considerations apply in relation to the third set of proceedings pending locally, that is, the claim launched by the respondent to have the BTL facility and mortgage declared unlawful. There is the possibility that if not restrained the arbitrators may proceed to assess compensation for those assets, only to find that the courts in Belize have determined that these are not assets to which the appellant is entitled. The Government of Belize may then be faced with an application for the enforcement of an award for compensation for the expropriation of an asset which the Supreme Court of Belize has already determined, or is in the process of determining, has been unlawfully obtained. The appellant argues that the arbitrators are themselves competent to determine whether under Belizean law the facility and mortgage are unlawful. The consequence is that if the award is enforceable domestically, the arbitrators' view of the validity of the facility and mortgage will be prima facie binding even on the Supreme Court of Belize. I must confess to some disquiet at this proposition but would be prepared to say at this stage only that this too would be a serious question to be tried. We are not dealing here with an arbitration clause which requires the arbitration to be determined in accordance with Belizean law. Furthermore, if the arbitrators' determination on the validity of the facility and mortgage is binding, the specter of a race between the local courts and the arbitrators to be the first to make a determination on the question looms large.

112. I have considered whether the question whether the arbitration may be rendered pointless by a favourable outcome in the local constitutional proceedings should not be one which should engage the attention of the arbitrators. It appears to me that, since under Article 8 of the treaty only disputes which are not amicably settled can be referred to arbitration, the dispute between the appellant and the Government of Belize would not be ripe for arbitration until it is determined whether any assets belonging to the appellant have been lawfully expropriated. That is a matter for the local Belizean courts to determine. Similarly, it appears to me that the arbitrators will not be in a position to assess whether the obligations of the State of Belize under the treaty have been violated

until the judicial arm of the state of Belize has determined whether under the Belizean constitution the appellant's assets have been validly acquired and, if they were, what compensation should be paid under Belizean law. It is only when the judicial process has been completed that a treaty violation, if any, will become clear. As such, it appeared to me that the arbitrators might themselves be minded to stay the arbitration while the local proceedings were underway. I asked Lord Goldsmith whether there was any principle applicable in an arbitration of this sort which required the complaining party to exhaust local remedies before moving the arbitrators, but he told me there was none. I take it therefore that there was nothing which would prevent the arbitrators from proceeding to judgment in the meantime.

113. It is relevant however that the appellant is prepared to undertake to suspend the pursuit of its statutory claim for compensation in Belize whilst its arbitration under the treaty is proceeding. The appellant is also prepared to undertake to abide by the decision of the arbitrators as to the merits and quantum of that claim (subject to any rights to challenge an award of the tribunal), except if the arbitrators rejected the appellant's claim on jurisdictional grounds and refuses to give a decision as to the merits or quantum of that claim, or an award is given in the appellant's favour but the Government of Belize fails to satisfy the award within 90 days of its issue. In either of those events, the appellant reserved the right to pursue any remedy to recover payment to which it is entitled, including the statutory claim. It seems to me that were such an undertaking to be offered at the trial of this claim it would nullify any vexation or oppression that might otherwise be caused by the simultaneous pursuit of the arbitration and the statutory claim for compensation. Prima facie the appellant is prepared to accept the arbitrators' award in satisfaction of its claim for compensation under the statute. The award made by the arbitrators will either be lower than any award for compensation to which the appellant may be entitled under the statute, in which case the Government of Belize will have no grounds for complaint, or the arbitrators' award will be greater than the statutory award, in

which case, if it is enforceable under Belizean law, the Government of Belize will in any event be required to pay exactly what the law mandates. I do not consider it unreasonable for the appellant to reserve its position in the two circumstances identified. If the arbitrators reject the claim on jurisdictional grounds, it is only reasonable that the appellant should resume its statutory claim. Likewise, it is only reasonable that the appellant should be permitted to seek to enforce the arbitrators' award and/or to pursue its statutory claim for compensation if the Government of Belize should fail to satisfy the arbitrators' award, although the question of vexation or oppression would arise once again if the appellant decided to pursue both at the same time. I make no comment on that issue at this time.

114. In the circumstances, in my judgment there is a serious issue to be tried as to whether the continuation of the arbitration by the appellant is vexatious or oppressive while the constitutional proceedings and the proceedings to determine the legality of the BTL facility and mortgage are underway. I wish to make it clear that I have determined only that the question of vexation or oppression is an arguable one. Whether there is such vexation or oppression is a matter for the determination of the trial judge. But I am prepared to say that there is no serious issue to be tried as to whether the pursuit of the arbitration will be vexatious or oppressive while the statutory claim for compensation remains undetermined, as long as the appellant is prepared at trial to give the undertaking discussed previously.

Kompetenz-Kompetenz

115. The appellant has addressed us at length on the question whether the arbitrators are competent to determine their own jurisdiction. I mean no disrespect by not referring to the many authorities cited by Lord Goldsmith for this proposition. I did not understand him to submit that the arbitrators' competence to decide on challenges to their jurisdiction affected this court's jurisdiction to restrain arbitration proceedings which were vexatious or

oppressive, except to inform the caution which must be exercised in deciding whether an injunction should be issued – see ***Claxton Engineering Services Limited v TXM Olaj-Es Gazkatuto Ktf***, supra para 30. This means in a practical sense that an arbitrator ought not to be prevented from proceeding to decide a question which it is said goes to his or her jurisdiction simply on the basis that that very question is the subject of proceedings before a local court. The reason for this is that any errors which the arbitrators may make may either be corrected before the court having supervisory jurisdiction over the arbitrators or can be relied on to resist enforcement of the arbitrators' award, if indeed the issue in question is a basis under the Arbitration Act for resisting such enforcement. In other words, the Arbitration Act may in effect give the arbitrators the final say on a particular point to the extent that that point cannot be relied on to challenge the arbitrators' award.

116. In this case, however, in relation to all of the matters which the respondent has argued before this court which can fairly be said to go to the jurisdiction of the arbitrators viz, the validity of the treaty and the existence of an agreement to arbitrate, I have decided in the appellant's favour. It appears to me plain however that the arbitrators do not and cannot have been intended to be vested with the jurisdiction to determine whether the 2011 Acquisition Act and Order violate the Constitution of Belize. That is a matter solely and entirely for the Supreme Court of Belize to determine. The doctrine of *kompetenz-kompetenz* cannot therefore assist the appellant is this regard. Similarly, the arbitrators likewise are clearly not competent to determine what compensation should be payable under the acquisition legislation. That too is a matter for the courts of Belize, but as I have already pointed out any vexation or oppression which might otherwise have been caused by proceeding simultaneously with the claims for compensation under the acquisition legislation and the treaty will be forestalled by the undertaking which the appellant is prepared to give to the trial judge. I have concerns as to whether the arbitrators will have jurisdiction to determine finally whether the BTL facility and mortgage are valid in the sense that any decision they make on this point will

be binding on the courts of Belize. It is in my judgment arguable at least that this is a matter for the Courts of Belize to determine and, as I have already said, this is another serious question which must be tried.

117. The appellant argues further that should a Belizean court grant an injunction restraining pursuit of arbitration under the treaty, the State of Belize would be put in violation of its international obligations to the Government of the United Kingdom to permit an investor whose rights under the treaty are alleged to have been infringed, to arbitrate his or her dispute with the Government of Belize. Again, I do not understand the appellant's argument to be that this by itself is a bar to the court's jurisdiction to restrain access to the arbitrators. It could not be since the treaty has not been domesticated and the rights to arbitration created thereunder must necessarily play second fiddle to the court's jurisdiction to restrain an arbitration which is vexatious or oppressive. And even if it had been domesticated, the obligations created thereunder would nevertheless be subject to the court's jurisdiction to grant injunctive relief. In any event, the injunctive relief being sought does not pretend to eradicate the appellant's right to arbitrate under the treaty but merely to postpone it until the relevant local proceedings are completed.

The English Injunction

118. The appellant contends that Legall J was wrong, and by extension, this court would be wrong, to restrain it from continuing the arbitration given that the respondent commenced these proceedings and has asked for injunctive relief in violation of the orders issued by the English Court. The appellant does not say that the English injunction is enforceable in Belize or that it is binding on the Supreme Court of Belize. Neither does it raise an issue estoppel. Rather, the appellant contends simply that we should follow the principle of comity and the precedent set in this regard in ***Attorney General of Belize v Carlisle Holdings Limited*** (Claim No 15 of 2005, 21 February 2005) and ***Attorney General of Belize v Belize Bank Limited*** (Claim No 228 of 2008, 4 July 2008). However,

even though in those cases the Chief Justice came to conclusions which were consistent with the orders made by the English Courts, I do not understand him to have considered himself compelled to the conclusions he arrived at by the principle of comity. Be that as it may, I must say that I was somewhat troubled by the fact that the Government of Belize is asking this court in effect to participate with it in defying the English injunction which it has not sought to set aside, even though it had every opportunity to do so. However, even though Queens Counsel appearing for the appellant brought to the attention of the English Court the claim by the Government of Belize that the treaty arbitration would be vexatious or oppressive in light of the claim for compensation made under the 2009 Acquisition Act, it does not appear from the note of the proceedings before the English Court that any consideration was given to the possibility that the arbitration might be vexatious or oppressive having regard to the then pending challenge to the constitutionality of the expropriation of the appellant's assets. In addition, it does not appear that at that point the legality of the BTL Facility or Mortgage was a live issue and in any event was not yet the subject of any pending proceedings before the Supreme Court of Belize. As such, its potential to render the treaty arbitration vexatious or oppressive could not have been brought to the English Court's attention. In these circumstances, I consider that I am not constrained by the need to give the order made by the English Court the due respect which it would otherwise deserve and rather feel that the Supreme Court of Belize is duty bound to determine whether in the light of the pending proceedings in Belize the treaty arbitration would be vexatious or oppressive.

Damages

119. The next question which falls for determination is whether damages would be an adequate remedy for the respondent. The only "cause of action" which I have considered to raise a serious question to be tried, is the respondent's right to an injunction to restrain arbitral proceedings on the grounds of oppression or vexation. I have not been referred to any authority which provides a claimant who has been harassed by oppressive or vexatious proceedings with a remedy

in damages. The courts have determined that injunctive relief is available in such circumstances. In addition, we have not been addressed on the question whether the remedy of damages is available. But even assuming that such a remedy is available, it is difficult to quantify the damage which a litigant such as the respondent would suffer if faced with the scenarios described above. Apart from the possible recovery of any expenditure incurred in defending what might turn out to be unnecessary claims, it would not be possible to properly quantify in monetary terms the harassment which may be caused by such proceedings.

The balance of convenience

120. In the circumstances, this court ought only to restrain the continuation of the arbitration proceedings, pending the trial of the action, if satisfied that the balance of justice favours such a course. This involves an assessment of whether the grant, as opposed to the refusal of the injunction sought, seems likely to cause the least irremediable prejudice to the appellant or the respondent. From the appellant's standpoint, the continuation of the injunction will further delay the progress of the arbitration proceedings in circumstances where it does not appear that the respondent has pursued its claim with alacrity. Despite the grant of the injunction in December 2010, the first case management conference was not held until 1 July 2011 and this only came about, it appears, as a result of a request made by the appellant in May 2011 for a directions hearing. The parties fiercely dispute the responsibility for the adjournment of the case management conference thereafter but it does not appear to be in dispute that the respondent took no step to bring the matter on earlier. The continuation of the injunction at this stage would accordingly further frustrate the appellant's effort to have its claim determined under the treaty, a claim which it is otherwise entitled to pursue. It would be difficult to assess the damage which the appellant would suffer by this further delay and accordingly any cross-undertaking in damages which the respondent might be required to give would be meaningless.

121. I accept that it was incumbent upon the respondent to proceed with the claim with due diligence so as to limit as far as possible the period during which the appellant would be deprived of its right to pursue the arbitration. I accept as well that this court may in its discretion discharge the injunction granted by Legall J or decide not to issue a fresh injunction if it were satisfied that there was inordinate and inexcusable delay on the part of the respondent in progressing its claim – ***Newsbrook Newspapers Limited v The Mirror Group Newspapers (1986) Limited*** [1991] FSR 487. However, while the respondent has not been entirely diligent and the delay in bringing the claim on for case management will be taken into account in the balancing exercise, I do not consider the delay to be inordinate such as, without more, to justify discharging the injunction. I bear in mind as well that the judgment issued by this court in the constitutional proceedings effectively brought an end to the arbitration and by extension to these proceedings, both of which were given new life by the passage of the 2011 Acquisition Act and the re-acquisition of the appellant's assets thereunder. In a real sense, therefore, time began to run again in July 2011 when the appellant's assets were expropriated once again, just about the same time that this claim was being case managed.

122. For the respondent, if the injunction is discontinued at this stage, there does not appear to be any prejudice which the Government of Belize would immediately suffer. It has not thus far participated in the arbitration and there is no indication that it intends to do so. The trial of the fixed date claim form is now fixed for hearing in the month of April 2012. By then it is unlikely that the arbitration proceedings would have been concluded, far less for any enforcement proceedings which may be commenced locally. However, there is always the possibility that the trial may be adjourned and some time must be allowed for delivery of judgment. If by that time the arbitration is completed, any injunction which the trial judge might be minded to issue would be pointless. In such an event, the respondent's claim would have been rendered nugatory and irremediable prejudice would have been caused. While it would appear that

harm would be caused to both parties which an award of damages or a cross-undertaking in damages would not satisfy, and despite the delay in the progress of the proceedings for which the respondent is responsible, in my judgment greater irremediable prejudice would be caused to the respondent if the injunction is discharged and accordingly the balance of justice favours the continuation of the injunction, but only pending the trial of the action, not, as the trial judge determined, until the determination of the local claim for compensation.

123. In short, I would continue the injunction because at this stage I am unable to say that there is no serious question to be tried on the question whether it would be vexatious or oppressive to continue the arbitration. If I had taken a different view, I would have been in favour of discharging the injunction. Further, I would grant the injunction because if the arbitration is allowed to proceed, any injunction which the trial judge may be persuaded to grant would be purely academic if the arbitrators have by then made an award in the appellant's favour.

124. In the above premises, I would order as follows:

> That the appellant be restrained whether by itself or by its officers, servants, or agents, subsidiaries, assignees or other persons or bodies under its control, from taking any or any further steps in the continuation or prosecution of the arbitration proceedings, commenced by notice of arbitration dated 5 May 2010 under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 and pursuant to the treaty or agreement made on 30 April 1982 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize and extended to the Turks and Caicos Islands, until the hearing and determination of the Claim herein or further order.

The respondent shall have 80% of his costs, certified fit for three counsel, including two Senior Counsel, such costs to be taxed, if not sooner agreed. This order as to costs shall stand unless application be made for a contrary order within 7 days of the date of delivery of this judgment, in which event the matter shall be decided by the Court on written submissions to be filed within 15 days from the said date.

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MENDES JA

POLLARD JA

Introduction

125. This is an interlocutory appeal by the Appellant, **British Caribbean Bank Limited ('BCBL')** against the Judgment of the learned Hon. Mr. Justice Oswell Legall delivered on 7 December 2010 and the related order dated 26 January 2011 made in favour of the Hon. Attorney General representing the Government of Belize **('GOB')**. By that judgment, the learned trial judge enjoined BCBL from continuing, until after the determination of claims for compensation under a Belize law since declared null and void by this Court, arbitration proceedings commenced under the terms of a bilateral investment treaty **('BIT')** concluded in 1982 between the Governments of the United Kingdom and Belize **('the UK-Belize Treaty 1982')** and extended by Exchange of Notes to the Turks and Caicos Islands in December 1985.

126. The effect of the injunction was to restrain BCBL from continuing an arbitration commenced on 4 May 2010 with the London Court of International

Arbitration **('LCIA')**. Since then, there has been no payment of compensation under the relevant nationalization legislation nor the commencement of negotiations for the payment of such compensation statutorily required by the relevant legislation nationalizing the assets of BCBL. The learned trial judge expressly granted the interlocutory anti-arbitration injunction since, in his opinion, it was just and convenient so to do and, *"in the light of the order of the Court made in Claim 874 of 2009, that the Financial Secretary comply without delay with Section 65(1) of the Belize Telecommunications Act for the payment to the Defendant of reasonable compensation within a reasonable time"*[1] in order to avoid two sets of processes for compensation being undertaken simultaneously. Further, he determined that there were serious issues to be tried and doubts about the adequacy of damages.[2] Notice of Appeal against the decision and Order of the learned trial judge was filed on 26 January 2011 and an amended Notice of Appeal on 27 September 2011. BCBL has indicated its intention to rely on a further affidavit relating to developments since the grant of the interlocutory anti-arbitration injunction by the learned trial judge.

Background to the Litigation

127. In order to appreciate the nature and effect of the interlocutory anti-arbitration injunction and the respective claims of the parties, it is proposed to indicate some important events constituting the background to the dispute. On 25 August 2009, the Government of Belize **('GOB')** enacted the Belize Telecommunications (Amendment) Act 2009. Section 63 of the Act provided that where the Minister responsible for Telecommunications considered 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 all such property as he may consider necessary to take possession of and assume control over telecommunications. Pursuant to section 63 of the Act, the competent Minister charged with responsibility for

[1] See paragraph 91 of the Judgment in Claim No. 588 of 2010.
[2] See paragraph 88 of the Judgment in Claim No. 588 of 2010.

telecommunications issued two Orders by way of statutory Instruments, No. 104 of 2009 and No. 130 of 2009, respectively, ('the first acquisition legislation') whose cumulative effect was to compulsorily acquire the proprietary and other rights and interests of the Appellant in Belize Telemedia Limited including a loan to Belize Telemedia Limited in an amount of US$22,500,000 secured by a mortgage debenture over all of the assets of Belize Telemedia Limited, including its unissued shares. The loan, allegedly, was used unlawfully to purchase shares in Belize Telemedia Limited.

128. Act No. 9 of 2009 made provision for a claim, the assessment and payment of compensation for the property nationalized, required the Financial Secretary to publish a Notice of Acquisition in the Gazette and at least one local newspaper of general circulation in Belize, and for the submission of claims for compensation by all interested persons within one month of the publication of the Notice of Acquisition in the Gazette. On 15 October 2009, the Appellant made a claim for compensation in respect of its nationalized proprietary rights and interests by the first acquisition legislation. This claim was made expressly without prejudice to the Appellant's legal rights including its right to resort to arbitration pursuant to the UK-Belize Treaty 1982 in order to protect its interest. On October 21, 2009, the Appellant challenged the constitutionality of the first acquisition legislation and on 4 May 2010 filed a Notice of Arbitration at the London Court of International Arbitration **('LCIA')** pursuant to Article 8 of the UK-Belize Treaty 1982 on grounds of unfair, discriminatory and inequitable treatment of its nationalized assets which, allegedly, were an abuse of sovereign power and were not acquired for a public purpose. The Appellant also requested an order from the LCIA that Belize make full reparation to the Appellant in the form of damages or compensation in an amount to be determined by the Tribunal, which was fully constituted on 20 July 2010.

129. On 30 July 2010, the Supreme Court of Belize determined that the acquisition legislation was constitutional and that the acquisition was indeed for a

public purpose. On 16 August 2010, the Respondent filed a claim against the Appellant seeking relief in the form of various declarations and an injunction set out in the claim form and for an interim injunction, which is the subject of the instant proceedings. On 7 December 2010, the learned trial judge granted the Respondent an interlocutory injunction restraining the Appellant from taking any or any further steps in continuation or prosecution of the arbitration proceedings commenced by the Applicant by Notice of Arbitration dated 4 May 2010 until the hearing and determination of the local claims for compensation made by the Appellant on 15 October 2009 and until any subsequent proceedings in the local courts in relation to the said local claims are heard and determined. It was ordered, further, that following the hearing and determination of the local claims, the Appellant may, if it thinks fit, continue or commence arbitration proceedings under the UK-Belize Treaty 1982 for such compensation or other remedies as it thinks fit.

130. On 24 June 2011, the Belize Court of Appeal declared the first acquisition legislation unconstitutional, null and void. This was followed by an enactment of the GOB on 4 July 2011 of Act No. 8 of 2011 and the issue of statutory Instrument No. 70 of 2011 reacquiring the Appellant's assets ('the second acquisition legislation') which was declared to be retrospective to 25 August 2009. On 31 August 2011, the Appellant filed with the Financial Secretary a claim for compensation in an amount of US$23,844,893.29 in respect of its nationalized assets. This claim was expressly made without prejudice to the Appellant's legal rights including its right to commence arbitration at the LCIA.

131. The Appellant has challenged the granting of the interlocutory injunction by the learned trial judge on myriad grounds. In the ultimate analysis, however, the critical issue to be determined by this Court is, whether in granting the interlocutory anti-arbitration injunction, the learned trial judge exercised his discretion properly. In making such a determination, three issues appear to be of decisive importance, as follows:

(a) Was the UK-Belize Treaty 1982 in force and legally binding on the parties?

(b) If the UK-Belize Treaty 1982 was in force and legally binding on the parties, did Article 8 thereof accord the Appellant an unqualified, indefeasible right to commence international arbitration proceedings, at its option, under the United Nations Commission on International Trade Law (UNCITRAL) Rules of Arbitration? a,

(c) In granting the interlocutory anti-arbitration injunction, did the learned trial judge exercise his discretion properly or at all?

On a careful, dispassionate analysis, the aforementioned issues succinctly encapsulate the myriad submissions of Counsel for the parties and will be adopted as the point of departure for an evaluation and determination of their respective claims.

The Legally Binding Status of the UK-Belize Treaty 1982

132. In 1982, the Governments of the United Kingdom and Belize concluded a bilateral investment treaty (BIT) for the promotion and protection of investments in their respective jurisdictions. In his skeleton arguments, Counsel for the Respondent averred:

> "…the requirements of Article 5 of the Treaty coincide with the requirements of section 17 of the Constitution: neither the Treaty nor section 17 prohibit (sic) acquisition and both require that compensation be paid; and the second acquisition law provides for an acquisition of property and for the payment of compensation. Thus, there is no loss to the Appellant in following the statutory scheme for review and award of compensation provided by the second acquisition law."[3]

In my respectful opinion, however, these submissions tendentiously avoid two seminally important issues requiring definitive determination in this interlocutory appeal, namely, the right of the Appellant under the UK-Belize Treaty 1982 to

[3] See paragraph 22 of the Respondent's Skeleton Argument.

elect for international arbitration of the claim arising from the expropriation of its property, and, secondly, the entitlement of the Appellant to rely on the relevant provisions of the said Treaty for compensation in respect of its expropriated assets. However, whether the Appellant succeeds in vindicating his rights will depend, in the ultimate analysis, on the status of the UK-Belize Treaty 1982 and the competence of the Parties thereto, according to the applicable norms of international law, to confer rights directly on the private entities within the contemplation of the Treaty without the prior intervention of Parliament in dualistic jurisdictions like Belize.

133. In this connexion, learned Counsel for the Respondent advanced two submissions, namely, that the UK-Belize Treaty concluded by the parties in 1982 was not legally binding and, even more importantly, that the instrument was not "domesticated" in Belize thereby necessarily compromising the entitlement of the Appellant to derive any rights thereunder, and in particular, the right to initiate international arbitration of the dispute pursuant to Article 8 thereof. Despite the statement of the learned trial judge that the bilateral investment treaty "and the agreement to arbitrate are binding on the Government of Belize not only as a matter of municipal law but also on the principles of public international law,"[4] reliance will not be placed here on this determination which, in my respectful opinion, appears to be juridically misconceived. For, if the Treaty was expressed to be legally binding in the municipal law of Belize, a generally acknowledged dualist jurisdiction, it did appear to follow, as a matter of ineluctable inference, that the instrument was "domesticated", but which, curiously, in the characterization of the learned trial judge was still a serious issue to be tried.[5]

134. There exists an impressive line of eminent authorities in Commonwealth jurisdictions, which are adherents to dualism, supportive of the juridical principle that unincorporated treaties, among which is numbered the UK-Belize Bilateral Investment Treaty 1982, are incapable of conferring rights or imposing

[4] See paragraph 47 of the Judgment at p. 1404 of Volume III of the Record of Appeal.
[5] See para. 88 of the Judgment in the Record of Appeal Volume 3.

obligations on private entities in municipal systems without the prior intervention of the legislature: ***The Parlement-Belge (1878) 4 PD 129; AG for Canada v AG of Ontario (1937) AC 526, 347-8; Blackburn v AG [1971] 1WLR 1037; Malone v Metropolitan Police Commissioner [1980] QB. 49; Fothergill v Monarch Airlines [1981] AC 251; JH Rayner (Mincing Lane) Ltd. v Dept. of Trade & Industry [1989] Ch. 72; R v Secretary of State for Home Department ex parte Brind et al [1991] 1 AC 696; Garland v Briish Rail Engineering Ltd. [1993] 2 AC 751; Minister of Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; Ismay Holder et al v Council of Legal Education, HCA No. 732 of 1997; Mattadeen v Pointu (1999) 1AC 98; John Junior Higgs v Minister of National Security [1999] 55 W1R 103; R v S.S. for Home Dept. ex parte Simms [2000] 2 AC 115.***

135. In *Littrell v USA (No. 2)***,** Lord Hoffman, in addressing the peculiarity of dualism as a legal doctrine, cited with approval the dictum of Lord Kingdom, Secretary of State in Council of *India v Kamachee Boye Sahaba (1859) 13 Moo PCC 22 at 75*, where he asserted: *"The transactions of independent states are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."* In support of Lord Hoffman's position, reliance may also be placed on the *obiter dicta* of Lord Manse in *Occidental Petroleum, Production Co. v Ecuador* to the effect that *"as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Quite simply, a treaty is not part of English law unless and until it has been incorporated in the law by legislation."*[6] But the critical issue to be determined here is not only whether an unincorporated or undomesticated treaty forms part of the law but, more

[6] [2005] EWCA (iv. 116 at para. 27).

importantly, whether such a treaty can confer rights directly on an individual without the intervention of the legislature.

136. Consistently with the normal dualist position, the Respondent was insisting that, in the absence of domestication of the UK-Belize Treaty 1982, the Appellant was not entitled to commence international arbitration proceedings. In support of his contention that the UK-Belize Treaty 1982 was not legally binding, the Respondent referred to the affidavit of the Hon. Attorney-General of Belize to which was attached a statement from the Ministry of Foreign Affairs which alleged that the said Treaty was not binding. The Respondent also referred to *"a declaration by Belize that the document is of no legal effect. The question whether the declaration is correct is not justiciable."*[7] This submission, in my respectful opinion, is juridically misconceived. Statements emanating from competent authorities of the executive concerning the legal effect of treaties are not binding on the Courts. In the opinion of Lord Oliver cited with approval by Lord Justice Manse in the International Tin Council Case: "(w)hich states have become parties to a treaty and when and what the terms of the treaty are, are questions of fact. The legal results which flow from it in international law, whether between the parties *inter se* or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts." [8]

137. It follows that whether the Treaty was legally binding on Belize, that is, a legal result flowing from the fact of being a party thereto, is a matter of law for determination by international courts and beyond the competence of the executive. It does appear, therefore, that the Respondent's reliance on the affidavit of the Hon. Attorney-General alleging that the Treaty is not legally binding does not progress the case of the Respondent in these proceedings. However, I do not apprehend that our Court is precluded from taking judicial notice of relevant provisions of the Vienna Convention on the Law of Treaties

[7] See para. 91 of the Respondent's Skeleton Argument.
[8] See paragraph 28 of Occidental Exploration and Production Company v Republic of Ecuador [2005] EWCA Civ 116.

establishing that the UK-Belize Treaty 1982 is legally binding.[9] In this connexion, it is useful to bear in mind that this Court had determined in ***Jose Alpuche and Another v AG No. 8 of 2010 per Morrison J.A***. at paragraph 9 of the Judgment as follows: *"The treaty ,,, is an agreement for the promotion and protection of investments made between the Government of the United Kingdom and the Government of Belize dated 30th April 1982 and remains in force." Sosa J.A. and Alleyne J.A.* concurred in the Judgment. Even more importantly, Article 26 of the Vienna Convention on the Law of Treaties provides: *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."* It does appear, *a fortiori,* as a matter of judicial notice and without our Court presuming to determine the legal effect of the UK-Belize Treaty 1982, that the instrument is legally binding and must be performed by the parties in good faith.

138. In the premises, I cannot endorse the Respondent's submission that the Applicant is asking the Court to make a finding on a principle of international law. The Court is engaged in establishing the provisions of an international instrument which is a matter of fact. This is qualitatively different from interpreting and applying the provisions of such an instrument. In support of my position, reference is made to the authoritative statement of *Bennion: "Judicial notice is taken of rules and principles of public international law … The existence of the presumption dealt with in this section of the Code means that the court is obliged to consider any relevant rule of public international law and permit the citation of any relevant treaty."*[10] And in the characterization of another outstanding authority, *"International Law need not, like foreign law, be proved as a fact by expert evidence or otherwise. The British courts will take judicial notice of its rules, and may of their own volition refer to text books and other sources for evidence thereof."* [11]

139. Our court is not required to take as conclusive matters of law declarations of the Minister of Foreign Affairs regarding the legal effect of treaties. In the

[9] See Francis Bennion, Statutory Interpretation, 4th ed. Butterworth's 2002, p. 703.
[10] See footnote at paragraph 13 above.
[11] I.A. Shearer, Starke's International Law, 11th ed. Butterworth's 1994 at p. 71.

authoritative opinion of Oppenheim*: "At common law it is the practice of English Courts to accept as conclusive statements by or on behalf of the Secretary of State for Foreign and Commonwealth Affairs relating to certain categories of questions of fact in the field of international affairs. In such cases, the statement is conclusive even in the face of contrary evidence … The categories of cases in which prerogative statements by the Foreign and Commonwealth Office (or its predecessors) have, at common law, been treated as conclusive include:*

> *(a) whether a foreign state or government has been recognized by the United Kingdom either de facto or de jure;*
>
> *(b) whether recognition has been granted to conquest by another state or to other changes of territorial title …;*
>
> *(c) the sovereign status of a foreign state or its monarch;*
>
> *(d) the commencement or termination of a state of war against another state;*
>
> *(e) whether a state of war exists with a foreign country or between two foreign countries;*
>
> *(f) the existence of a case for reprisals in maritime war;*
>
> *(g) whether a person is entitled to diplomatic status;*
>
> *(h) the existence or extent of British jurisdiction in a foreign country …*
>
> *The Department of State charged with responsibility for the conduct of foreign affairs is thus able to state authoritatively the relevant facts of which the courts, in consequence, take judicial notice."*[12]

140. I am not apprised of any legal principle or rule of municipal law that has established the competence of the Ministry of Legal Affairs or the Office of the Hon. Attorney-General to issue the type of prerogative certificate within the contemplation of the Respondent, bearing in mind that the issue requiring determination falls within the area of international affairs. Further, in my

[12] See Duff Development Co. v Kelantan [1924] AC 797.

respectful opinion, there can be no doubt, as demonstrated below that, as a matter of law, the UK-Belize Treaty 1972 as stated**,** *en passant,* by the learned trial judge is legally binding. According to Article 12 of the instrument, it enters into force on signature, one of the international acts recognized by the Vienna Convention on the Law of Treaties as establishing the consent of states to be bound by a treaty.[13] And there is no evidence before this Court that the termination procedure set out in Article 13 of the instrument has been activated by either party to the treaty.

141. In the premises, I am constrained to affirm that the statement of the learned trial judge that the Treaty is legally binding is correct even though it does appear that he might have reached the right conclusion for reasons which were not articulated and remain indeterminable. Whether an international instrument is in force is a matter of fact; whether it is legally binding is a matter of law to be determined by the employment of the applicable rules of international law. But this determination is fundamentally different from a finding that a treaty has the force of law at the municipal plane and is enforceable by the municipal courts.[14]

142. The fundamental principle to be determined in this case is the status of the UK/Belize Bilateral Investment Treaty and the obligations of the State of Belize under this Treaty. The status of Belize under the Treaty must be determined from two perspectives, the municipal law perspective and the international law perspective. And an understanding of dualism to which the State of Belize subscribes is necessary for an appreciation of both the municipal law and the international law perspectives. Succinctly put, monism perceives international law and municipal law as two discrete normative regimes which constrain international tribunals and municipal courts to their respective jurisdictions.

143. As pointed out by the Judicial Committee of the Privy Council in ***R v Lyons [2003] 1AC 976*** *at para. 22 per Lord Hoffman* "*… it is firmly established*

[13] See Article 12 of the Vienna Convention on the Law of Treaties.
[14] See Joseph & Boyce v AG of Barbados (2006) 69 W1R 104.

that international treaties form no part of English (Belize) law and that English (Belize) Courts have no jurisdiction to interpret or apply them." Similarly, the Judicial Committee of the Privy Council determined in ***Charles Matthew v The State (Privy Council Appeal No. 12 of 2004).***

> "55. It is common ground between the parties to this appeal that an obligation of a state in international law but not forming part of its domestic law cannot override or even influence the construction and application of a clear and unambiguous provision of domestic law. It is also common ground that if a provision of a state's domestic law is ambiguous and permits of two interpretations, one of which will accord with the state's international obligations and the other of which will involve a violation of those obligations, a court will so far as possible adopt that interpretation which will accord with the state's international obligations. We accept both propositions, which are supported by authorities such as ***Mattadeen v Pointu [1979[1 AC 98; Lewis v Attorney General of Jamaica [2001] 2 AC 50 and Reyes v The Queen [2002] 2 AC 235, 247."***

The foregoing dicta which adumbrate the dualist approach was enthusiastically endorsed by the Respondent to establish that the UK/Belize Bilateral Investment Treaty of 1982 "was never brought in the municipal sphere by enabling legislation (and) cannot override the statutory scheme for payment of compensation set out in the Acquisition Act."[15]

144. However, this argument is subject to the important qualification that States, as an attribute of sovereignty, may confer directly on private citizens rights under a treaty which can be enforced in municipal systems absent the enactment of relevant legislation: ***The Republic of Ecuador v Occidental Exploration and Production Co.*** where it was determined that the agreement to arbitrate set out in a treaty is not itself part of the treaty but "an agreement between a private investor, on the one side, and the relevant state on the other."[16] As such, there is no need for transformation by enactment to become legally binding in municipal law. This is the accepted learning on the issue in the

[15] See paragraph 75 of the Respondent's Skeleton Argument.
[16] See Republic of Ecuador v Occidental Exploration & Production Co. infra at para. 28.

jurisprudence of capital-exporting developed countries and which emerging sovereignties have little choice but to accept as part of the corpus of international law governing relations in the international community. However, this doctrine, in my respectful opinion, stripped of its juridical embellishments must be perceived to be no more than a convenient, opportunistic normative postulate in order to protect the investors of capital-exporting countries from developing countries' unpredictable essays into economic nationalism. The Vienna Convention on the Law of Treaties, which is the most authoritative instrument on treaty law, addresses the severability of treaties in *Article 44,* but no where is it prescribed that the severed part of a treaty ceases to have the status of a treaty and is transformed by some esoteric, indeterminable juridical principle into municipal law. In my judgment, the more juridically feasible position is that stated by Oppenheim below.[17]

145. In their written submissions learned Counsel for the Respondent maintained as follows:

> "The circumstances of this Case also include the added feature that the Treaty upon which the Appellant relies as housing an agreement to arbitrate, has not been legislated into the laws of Belize by legislation. This is an issue which the trial judge found at paragraph 47 of his judgment raises a serious issue to be tried. The claimant maintains that there is no arbitration agreement between the Claimant and the Defendant to refer any disputes to international arbitration as the treaty relied upon by the Defendant was never brought into force by enabling legislation in Belize. As illustrated in the paragraph below, in Belize, treaties are not self-executing but must be transformed into the municipal sphere by specific legislation … It is an undisputed fact the 1982 UK Belize Bilateral Investment Treaty (BIT) was never legislated into domestic law, whether by omission or design. It is submitted that, this Treaty is not in force between Belize and the UK, as Belize has not complied with the internal procedure and practice to bring it into force. It follows that the Applicant cannot rely on the Treaty to ground its claim to international arbitration."[18]

[17] See paragraph 28.
[18] See paragraph 85 of the Respondent's Skeleton Argument.

146. The foregoing submissions of learned Counsel for the Respondent clearly demonstrate an egregious misappreciation of the applicable law. In any event, this Court has already determined in ***Jose Alpuche and Another v AG. No. 8 of 2010*** that the Treaty is in force. Article 12 of the UK/Belize Bilateral Investment Treaty 1982 provides that the instrument shall enter into force on signature which was duly satisfied by both parties. Provision was also made for termination in Article 13. In the absence of any evidence before the Court concerning termination of the Treaty, this Court is proceeding on the basis that the Treaty is in force and legally binding on both parties. In this context, it is important to indicate that the legally binding nature of a treaty operates at the level of international law. And as ***Article 2 (1)(a)*** of the Vienna Convention on the Law of Treaties has established, a treaty is an international agreement between two or more States whether embodied in one or more instruments and irrespective of their designation and governed by international law. Domestication of a treaty or its enactment into municipal law has nothing to do with its legally binding effect at the international plane.

147. Absence of domestication of instruments governed by international law normally precludes municipal courts from interpreting them and giving effect to them at the municipal plane; but this does nothing to compromise the status of these instruments at the international plane. The foregoing notwithstanding, the Appellant is not precluded from initiating arbitral proceedings at the international plane because the States Parties to the UK-Belize Treaty of 1982 had conferred this right directly on private investors, a right which could be exercised without domestication, *soit disant*, of the Treaty. States, as an attribute of sovereignty as mentioned above, are competent to confer international rights on private entities directly and which are effective without intervention of the legislature at the municipal plane. This is a relatively recent phenomenon which has been employed by various States, for example, the States of the European Union,[19]

[19] See, for example, Article 230 of the Maastricht Treaty 1992.

the States of the Andean Group[20] and, closer home, by the States of the Caribbean Community as exemplified in *Article 222 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy.*

1. The provisions of this Article read as follows:

> *"Article 222*
> *Locus Standi of Private Entities*
>
> *Persons natural or juridical of a Contracting Party may, with the special leave of the Court be allowed to appear as parties in proceeding s before the Court where:*
>
> *(a) The Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and*
>
> *(b) The persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and*
>
> *(c) The Contracting Party entitled to espouse the claim in proceedings before the Court has:*
>
> *(i) omitted or declined to espouse the claim, or*
>
> *(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party to entitled; and*
>
> *(d) The Court has found that the interest of justice requires that the persons be allowed to espouse the claim."*

148. In elucidating the legal incidence of Article 222, the Caribbean Court of Justice in ***Trinidad Cement Limited v The Caribbean Community***[21]

[20] See Article 19 of the Treaty of Cartagena establishing the Court of Justice of the Andean Group.
[21] [2009] CCJ 2 (OJ) at paragraph 30.

determined *"… Article 211 deals with the quite different matter of jurisdiction, and when read with Article 222 gives the Court the power, as a matter of procedure, to enable private entities to appear before it in all manner of disputes concerning the interpretation and application of the Revised Treaty including allegations that a body or organ of the Community acted ultra vires."* In effect, the Caribbean Court of Justice construed Article 222 of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy as conferring on private entities of CARICOM nationals the right to espouse claims before it where specified conditions were satisfied, without the intervention of the legislature at the municipal plane, and this in Guyana, a dualist jurisdiction of CARICOM. The position articulated by the Caribbean Court of Justice mentioned here is the new development in international law referred to by *Oppenheim* below.[22]

Did the UK-Belize Treaty confer an indefeasible right on the Appellant to initiate arbitration proceedings?

149. The UK-Belize Bilateral Investment Treaty 1982 is one such unincorporated treaty conferring rights directly on private entities, but, as the context of its elaboration and conclusion has established, an unincorporated treaty with a difference. In the characterization of the United Nations Conference on Trade and Development (UNCTAD):

> "The primary motives behind the rapid expansion of international investment treaties were the desire of investors from capital exporting countries to invest safely and securely abroad and the need to create a stable international legal framework to facilitate and protect those investments. The risks against which such protection has been aimed are the injurious acts and omissions by host governments themselves and also the injurious acts and omissions by other persons in the host country … Investors recourse to local courts for protection may prove to be of little value

[22] See paragraph 28 below.

in the face of prejudice against foreigners or governmental interference in the judicial process."[23]

150. From the perspective of capital-importing developing countries in which classification Belize falls, even though the harbingers of foreign investment are to be welcomed as potential contributors to accelerated positive national economic development, considerable care and circumspection have to be exercised by competent decision-makers in order to preempt negative predatory exploitation of human and natural resources. What is required of this international economic development relationship are confidence building measures facilitative of dynamic stability in the investment climate for foreign investors and not implausible expectations by host governments of responsible corporate citizenship by foreign investors. Granting the validity of the immediately foregoing, it does appear on a definitive appraisal of the standard-form bilateral investment treaty, that the balance of advantages is normally in favour of the foreign investor from the developed capital-exporting countries where the development and determination of applicable legal norms governing international transactions, including transnational investments, incorporated very little normative input, if any, from developing host countries, especially in relation to the international minimum standard for the treatment of foreign investments and the so-called separability of disputes settlement arrangements in investment treaties.

151. As concerns the need for domestication of treaties, the better position appears to be the one enunciated by Oppenheim who maintains that "States can, however, and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights, *stricto sensu*, that is rights which they acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals. Moreover, the quality of individuals (and private companies and other legal persons) as subjects of

[23] UNCTAD, Bilateral Investment Treaties in the Mid – 1990s (1998) 114-18 at TAB 8 of the Applicant's Skeleton Arguments.

international law is apparent from the fact that, in certain spheres, they enter into direct legal relationships on an international plane with states and have, as such, rights and duties flowing directly from international law." [24] In our own CARICOM region, *Article 222 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy*, as indicated above, has conferred on private entities, natural and juridical, the right to seek special leave to espouse a claim in proceedings before the Caribbean Court of Justice in the exercise of its original jurisdiction as an international tribunal interpreting and applying the constituent instrument of the Caribbean Community.[25]

152. And this is precisely what the UK-Belize Treaty 1982 set out to achieve. Bilateral investment treaties must be appreciated in the context of the bourgeoning emergence of new sovereignties in the international community in the post World War II era, anxiously in search of foreign direct investment to enhance and sustain national economic development, on the one hand, and the concerns of capital-exporting developed countries, on the other hand, that investments of their nationals are accorded minimum international standards of treatment by emerging sovereignties. As was pertinently observed by the British Court of Appeal in ***Occidental Exploration and Production Company v Ecuador*** where the challenge to the jurisdiction of an arbitration award under a bilateral treaty was an issue: "The treaty involves on any view, a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim to which national courts should, in an internationalist spirit and because it has been agreed between States at an internationalist level, aspire to give effect – compare the reasoning of the Permanent Court of International Justice in the Jurisdiction of the Courts of Danzig Case … The present treaty holds out to investors on a standing basis, the right to choose to consent in writing to the submission of the dispute for settlement by binding arbitration … It must, as it seems to us, have been

[24] Oppenheim's International Law, 9th ed. Sir Robert Jennings & Sir Arthur Watt's, Longmans, 1996 at pp. 847-8.
[25] Special leave was accorded to a private entity in Trinidad Cement Co. Ltd. v Caribbean Community [2009] CCJ 2 (CJ).

intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed by the Treaty".[26]

153. Based on the applicable law, there can be no doubt that the UK-Belize Treaty of 1982 has direct effect in the jurisdictions of the parties as an exceptional measure because the parties to the Treaty, in the exercise of their sovereign competence, agreed to confer on investors from both jurisdictions the right to resort to arbitration in the event of an investment dispute. "That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the Treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national state's involvement or even consent."[27] Despite the dualistic jurisdiction of Belize in respect of which the Respondent made very heavy weather, the Treaty, in my respectful opinion, does not require domestication or incorporation into local law to trigger the entitlement of BCBL to commence international arbitration as it did on filing its Notice of Arbitration with the London Court of International Arbitration (LCIA) on 4 March 2010. I endorse the written and oral submissions of the Appellant in this behalf. Whether or not the Treaty had legal incidence at the municipal plane, it remained a legally binding instrument in force at the international plane, and in respect of which the Appellant was entitled to exercise specific rights.

154. Granting, therefore, the legally binding status of the UK-Belize Treaty of 1982 which, as this Court has determined, was in force, and the legitimacy of the compensation arrangements set out therein at Articles 5 and 6 as compared with similar arrangements established by the second acquisition legislation of Belize, it is not surprising that Counsel for the Respondent demonstrated a preference for a resolution of the dispute on the basis of the Belize legislation, and the Counsel for the Appellant insisted on the Appellant's entitlement to commence international arbitration proceedings on the basis of the UK-Belize Treaty 1982.

[26] [2005] EWCA Civ. 116 at para. 32.
[27] Occidental Exploration and Production Co. v Republic of Ecuador [2005] EWCA Civ. 116 at para. 19.

155. Even a cursory examination of the two instruments involved would confirm that the relevant provisions of the Treaty offer the Appellant more credible prospects for a favourable resolution of the issue than the second acquisition legislation enacted by the Government of Belize. But, as the Court of Appeal determined in the *Occidental Case:* "Bilateral investment treaties such as the present introduce a new element and create a very different situation … The protection of nationals is crystallized and in the present Treaty expanded to cover every type of investment owned or controlled directly or indirectly by nationals or companies of the other Party"…, but the investor is given direct standing to pursue the state of investment in respect of any investment dispute." [28]

156. In this connexion, it may be apposite to indicate that whether or not a treaty is opposable to one or another party thereto is a matter of law to be determined by employment of the applicable rules of international law by a court of competent jurisdiction, namely, an international tribunal. Consistently with this position, Belize is expected to discharge in good faith the obligations assumed under the UK-Belize Treaty 1982 especially in view of the preambular paragraph (e) of its Constitution which required Belize to demonstrate "respect for international law and treaty obligations in the dealings among nations." In the premises, it appears to be an axiomatic assumption that the State of Belize may not in good faith rely on its Courts, as guardians of its Constitution, to facilitate a breach of an international obligation by frustrating the right of the Appellant under the UK-Belize Treaty to initiate international arbitral proceedings to vindicate its entitlement in respect of its expropriated assets.

157. Indeed, the Respondent's submission that the UK-Belize Treaty is not legally binding for lack of domestication exemplifies a fundamental misunderstanding of the applicable rules of law. Treaties are consensual engagements concluded by subjects of international law in written form and

[28] See Occidental Exploration and Production Co. v Ecuador , op. cit. at para. 16.

governed by international law.[29] It follows that since treaties are governed by international law, their legally binding effect is determinable exclusively by relevant rules of international law. However, whether or not treaties are enforceable, as distinct from being legally binding in dualist jurisdictions, by municipal courts is determinable by applicable rules of municipal law. It follows that the legally binding status of treaties as international instruments has nothing to do with their domestication.

158. There is no persuasive conventional evidence before this Court establishing that the UK-Belize Treaty 1982 is not legally binding. And even if there were such evidence the Courts of Belize, as municipal courts, would not be competent to interpret and apply such evidence in arriving at a determination. As was observed by ***Lord Hoffman in R v Lyons[30],*** **municipal courts have no competence to interpret and apply treaties.** And, as **Lord Oliver** opined, which States are parties to a treaty or the terms of a treaty are matters of fact. These matters in my opinion, may be judicially noticed by municipal courts. But the legal effect of such facts is a matter of law to be determined by international tribunals. However, notwithstanding the jurisdictional disability inuring to municipal courts in terms of interpreting or applying the provisions of treaties, dualist states are competent, nonetheless, to selectively conclude treaties with direct effect. And where this occurs, municipal courts are required to take judicial notice of relevant provisions. And this is exactly what the UK-Belize Treaty has achieved in terms of conferring on investors within their jurisdictions the right to initiate arbitration proceedings, thereby rendering unnecessary domestication of the Treaty as a precondition for the exercise of such a right. And even though it is trite law that municipal courts are required to enforce or give effect to statutes even where they are clearly in breach of international obligations,[31] I am aware of no rule of law or practice requiring a municipal court, in the absence of a clear intent to this effect, to place the State in breach of its obligations under international law, especially where the relevant constitution of which the courts

[29]See Article 2 (1)(a) of the Vienna Convention on the Law of Treaties, 1969.
[30][2003] 1 AC 976 at paragraph 27.
[31] Collco Dealings Ltd. v IRC [1962] AC 1, 19.

are generally regarded to be the guardians, urges respect for international law as is the case with the Constitution of Belize.[32] On the contrary, statutes are to be interpreted by the Courts so as not to conflict with international law, given the presumption that Parliament did not intend to commit a breach of international law.[33]

159. Even a cursory comparison of Articles 5 and 6 of the UK-Belize Treaty of 1982 with the relevant provisions of the second acquisition legislation appears to establish without equivocation that the compensation arrangement established by the latter instrument does not keep faith with relevant international obligations assumed under the first-mentioned instrument. The second acquisition legislation does authorize the nationalization of private property by the Belize Government for a public purpose and for the commencement of negotiations by persons aggrieved with the Hon. Minister of Finance for payment of reasonable compensation within a reasonable time after filing a claim with the Financial Secretary within one month of notification of the acquisition. Where such negotiations fail, provision is made for payment on the basis of a fair market value to be determined by the Supreme Court by reference to what a willing seller would receive based on principles which may include, and I emphasise *"may"*, payment of interest by reference to commercial bank rates payable on fixed deposits at the date of acquisition. More importantly, with the approval of the Supreme Court, compensation was payable by the issue of Treasury Notes redeemable within five years from the date of issue and bearing interest at a rate paid on fixed deposits by Belizean commercial banks. Contravention of an acquisition order was punishable by a fine of five thousand dollars ($5,000.00) per day for the continuation of the offence or by a term of imprisonment not exceeding two years or both such fine and imprisonment. Compensation assessed under the Belizean acquisition legislation was required to be expressed and payable in Belizean currency.

[32] See preambular paragraph (e) of the Belize Constitution.
[33] Fothergill v Monarch Airlines Ltd. [1981] AC 251.

160. Compare the aforementioned terms with the terms of relevant provisions of the UK-Belize Treaty which require compensation **"**to be "the market value of the investment expropriated before the expropriation or impending appropriation became public knowledge." This evaluation was to include interest at a rate prescribed by law with payment as a requirement as distinct from a discretion provided for in the second acquisition legislation. Furthermore, the compensation was to be payable without delay rather than within a reasonable time determined by the Supreme Court as provided in the second acquisition legislation and was required to be effectively realizable and be freely transferable." Persons or companies affected by the expropriation were entitled to a right of prompt review by a judicial or other independent authority of his case and of the valuation of the relevant investment in accordance with agreed principles. Article 6 of the Treaty provided for unrestricted repatriation of investments and returns, subject to the equitable and good faith exercise of powers in cases of exceptional balance of payment difficulties. Such powers were not to be employed to impede the transfer of returns. Transfers of currency were to be effected without delay in convertible currencies of the original investment or in any other agreed transferable currency. Unless otherwise agreed, transfers were to be made at rates of exchange applicable on the date of transfer pursuant to exchange rate regulations in force.

161. In his skeleton submissions, the Respondent suggested that the compensation scheme established by the second acquisition legislation could yield as acceptable a result as that provided by the Treaty. However, since the Respondent's observations were apparently confined to Article 5 of the Treaty and did not address the provisions of Article 6 which spoke in some detail about the repatriation of investments and returns, his analysis may not be regarded as an adequate comparative evaluation of the relevant instruments. Nothing in the Belize second acquisition legislation, for example, expressly immunizes the conversion of Belizean currency as payment of compensation from foreign exchange controls nor the payment of withholding taxes or the free transferability

of currencies to jurisdictions outside Belize. On the basis of the foregoing, it would be difficult to conclude that Belize, on the basis of the second acquisition legislation, discharged in good faith the obligations assumed under the UK-Belize Treaty 1982.

162. In his skeleton submissions, the Respondent also maintained that "the requirements of Article 5 of the Treaty coincide with the requirements of section 17 of the Constitution: neither the Treaty nor section 17 prohibit acquisition and both require that compensation be paid; and the second acquisition law provides for an acquisition of property and for the payment of compensation. Thus, there is no loss to the Appellant in following the statutory scheme for review and reward of compensation provided by the second acquisition law."[34] However, this claim is not borne out even by a cursory examination of the relevant instruments, and completely ignores the element of informal coercion lurking in the compensation arrangements of the second acquisition legislation.

Jurisdiction of the Court to Grant Anti-arbitration Injunctions

163. Having established that the UK-Belize Treaty 1982 was legally binding and in force as determined by this Court and that the Appellant had an indefeasible right, in my opinion, to commence, at its option, international arbitral proceedings in respect of the expropriation of its assets, it now falls to this Court to determine whether, in exercising his discretion, the learned trial judge acted properly. And it is in the context of the background to the dispute detailed above, that it is proposed to evaluate the learned trial judge's exercise of his discretion and the respective claims of the parties relating thereto.

164. In this connexion, it is important to bear in mind that the Respondent approached the Court for two sets of remedies against the Appellant, firstly, a compendium of declarations and a permanent injunction as set out in the claim

[34] See Skeleton Argument of the Respondent at para. 22.

form and, secondly, an interim anti-arbitration injunction restraining the Appellant from taking any or any further steps in the continuation or prosecution of the arbitral proceedings commenced by the Defendant by the Notice of Arbitration dated 4 May 2010 under the Arbitration Rules of the United Nation's Commission on International Trade Law (UNCITRAL) 1977 and the UK-Belize Treaty of 1982 arising out of or relating to the acquisition of the Appellant's property by the Government of Belize under the Belize second acquisition legislation or commencing or continuing any other arbitral proceedings arising out of or relating to the same facts.

165. On the basis of comprehensive and elucidating submissions from Counsel of the parties, for which our Court is truly grateful, the learned trial judge granted the Respondent an interlocutory injunction restraining the Appellant from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the Appellant by the Notice of Arbitration dated 4 May 2010 until the hearing and determination of the local claims for compensation made by the Appellant and until any subsequent proceedings in the local courts in relation to the said local claims are heard and determined. It was also ordered that after the completion of hearing and determination of the local claims and subsequent proceedings for compensation, the Appellant may continue or commence arbitration proceedings under the UK-Belize Treaty 1982 for such compensation or other remedies as it thinks fit. This injunction which was granted to the Respondent is the subject of challenge in these current proceedings.

166. The applicable rules governing the grant of injunctions, both permanent and interlocutory, by Belizean Courts have been established by both statute and the common law. Thus, *Section 27 (1) of the Belize Supreme Court of Judicature Act, Cap. 91* provides as follows:

> *"(1) Subject to the rules of court, the Court may grant a mandamus or injunction or appoint a receiver by an*

interlocutory order in all cases in which it appears to the Court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks fit."

Furthermore, Section 106 A (8) (1) of the Act No. 18 of 2010 which was intended to amend the Supreme Court of Judicature Act, Cap. 9 purported to give the Court jurisdiction to grant an anti-arbitration injunction where it has been established that arbitration proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process. I endorse the submission of the learned Counsel for the Respondent that *"(n)otwithstanding the Court's subsequent finding of invalidity in relation to section 106 A(8)(1), the common law position remains and underpins the jurisdiction of the learned trial judge to grant the interlocutory injunction he granted on the 7th December 2010."*

167. In exercising his discretion to grant the Respondent an anti-arbitration injunction, the learned trial judge canvassed various considerations perceived to be relevant in reaching his determination. In this context, he considered, *inter alia*, whether the Appellant in initiating international arbitration under the UK-Belize Treaty of 1982 was engaged in oppressive or vexatious conduct; whether the Court had a serious issue to decide; whether the balance of convenience was in favour of the Applicant or the Respondent; whether damages were an adequate remedy should there be in a finding in favour of the Respondent and whether the international arbitration doctrine of ***Kompetenz – Kompetenz*** operated to oust the exercise of a discretion by the courts to grant an anti-arbitration injunction.

168. In determining his reasons for granting the anti-arbitration injunction, the learned trial judge determined that *"(i)t would be oppressive or vexatious on the facts of this case to have both processes for compensation taking place at the*

same time."[35] In this context, it is apposite to indicate that in reaching this conclusion, the learned trial judge appeared to have placed heavy reliance on section 106 A (8) (i) of the Act No. 18 of 2010 which was intended to amend the Supreme Court of Judicature Act Cap. 109. The learned trial judge maintained: *"The Court, according to section 106 A (8) (i) above, has jurisdiction to grant an injunction restraining a party from commencing or continuing arbitral proceedings, whether in Belize or abroad, where it is shown that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process."*[36] No further reference was made to the applicable common law principles, and several other references were made to the amendment of the Supreme Court of Judicature Act Cap. 109, cited above.

169. And given that this enactment was subsequently declared to be unconstitutional and the finding of the learned trial judge at the material time was not expressed to be based also on residual applicable common law principles, legitimate reservations were posed by the Appellant concerning the adequacy of the juridical basis for granting the injunction. The common law principles on which a court will grant an anti-arbitration injunction were articulated by the Judicial Committee of the Privy Council in ***Societe National Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871*** where it was determined that an anti-arbitration agreement will be granted where the ends of justice require or it was just and convenient to do so; in other words, where the arbitration proceedings were vexatious and oppressive. These conditions have been perceived to exist where there are coextensive or overlapping proceedings in the court and before an arbitral tribunal.[37]

170. Similarly, in ***Union of India v Dabhol Power Company [2004] Delhi High Court,*** it was determined to be unjust, unfair and oppressive to conduct foreign arbitral proceedings during the pendency of a matter before the Supreme

[35]See paragraphs 87 and 91 of the Judgment of the learned trial judge.
[36] See paragraph 55 of the Judgment at Volume 3 of the Record of Appeal, p. 1409.
[37] Carter Holt Harvey Limited v Genesis Power Limited and Rolls Royce New Zealand Limited [2006] paragraph 27.

Court of India *"as there would be a multiplicity of proceedings and there is a possibility of conflicting findings also resulting in confusion."*[38] As concerns the applicable common law principles, *Halsbury* maintains that where the court has jurisdiction over the Respondent, the court will order an anti-arbitration injunction "if in all the circumstances of the case it is equitable to do so. The categories of case in which the court will act are not fixed but the ground most commonly resorted to is that it is oppressive or vexatious for the Respondent to continue the proceedings against the applicant."[39] This jurisdiction was required to be exercised sparingly. According to relevant statutory provisions and in common law principles, the courts of Belize have jurisdiction to grant anti-arbitration injunctions where In all the circumstances of the case, it is just, equitable and convenient so to do or the arbitration proceedings of the claimant are deemed to be oppressive and vexatious. However, it is important to bear in mind that in exercising its jurisdiction to grant anti-arbitration injunctions, the courts of Belize are constrained only by the relevant statutes of Belize and the applicable rules of the common law, and not by any other law unless expressly determined by Belize.

171. The Respondent submitted that the learned trial judge exercised his discretion to stay the arbitration proceedings in accordance with the applicable common law principles adumbrated by *Lord Goff of Chievely,* to wit:

(a) where the ends of justice require it (that is where proceedings are oppressive and vexatious);

(b) where parties are being restrained from initiating or threatening proceedings in a foreign court;

(c) where the injunction is an effective remedy against a party amenable to the jurisdiction of the court; and

[38] Para. 19.
[39] See Halsbury's Laws Vol. 2. 4th ed. (Reissue), paragraph 642.

(d) the employment of caution in exercising jurisdiction to grant an injunction.[40]

Further, the Judicial Committee of the Privy Council pointed out in this case that foreign proceedings are to be restrained not only where there are vexatious but also where they are oppressive. I endorse these submissions.

172. The learned trial judge determined that it would be vexatious or oppressive to allow both proceedings for compensation initiated by the Appellant to go on simultaneously.[41] Proceedings are deemed oppressive where more than one is being conducted simultaneously. For example, the High Court of New Zealand held in ***Carter Holt Harvey Limited v Genesis Power Limited and Rolls Royce New Zealand Limited*** *at paras. 27/28 that* "*Courts have long recognized the existence of inherent jurisdiction to order the stay of arbitral proceedings where there are co-extensive or overlapping proceedings before the court and before an arbitral tribunal."* The Court determined that to allow two proceedings to proceed simultaneously would put *"the parties in inextricable difficulties" at p. 274 (para. 33)*.

173. Similarly, the Supreme Court of India determined in ***Union of India v Dabhol Power Company [2004] Delhi High Court*** that it had jurisdiction *"to exercise its inherent powers to prevent injustice, oppression and multiplicity of proceedings"* at paragraph 24. And in ***Albon v Naza Motor Trading Sdn Bhd & another (No. 4) [2007] EWCA Civ. 1124 C (A)***, the Court of Appeal granted an anti-arbitration injunction restraining the defendant from pursuing arbitration pending proceedings regarding the validity of a joint venture agreement. In this case, the Court at paragraph 7 endorsed principles enunciated by *Rix L.J* as follows:

"…(i) the defendant must be amenable to English territorial and personal jurisdiction;

[40] Societe National Industrielle Aerospatiale v Lee Kul Jak [1987] AC 871.
[41] See paragraph 91 of the Judgment at p. 1431 of Volume 3 of the Record of Appeal.

(ii) jurisdiction to grant an injunction in cases in which it is 'just and convenient to do so' …;

(iii) it will not be just and convenient unless:

(a) the threatened conduct is unconscionable which primarily means it must be conduct which is oppressive or vexatious or which interferes with the due process of the court;

(b) the jurisdiction is necessary to protect the applicant's legitimate interest in proceedings in England which must be the natural form for the litigation."[42]

174. The Respondent affirmed the foregoing as the basis for the grant of an anti-arbitration injunction on the ground of being oppressive and vexatious since by filing a claim for compensation with the Financial Secretary pursuant to the relevant provisions of nationalization legislation, the Appellant had engaged the jurisdiction of the Belizean courts, and the initiation of international arbitral proceedings under the UK-Belize Treaty of 1982 would result in two sets of proceedings being conducted simultaneously. He rejected the Appellant's submission that such an injunction should only be granted in exceptional circumstances. I agree with the submissions of the Respondent in this particular. There is no precedent in Belize case law supportive of the Appellant's submissions.

175. I am also persuaded by the Respondent's submissions on ***Ronald Lauder v The Czech Republic, CME Czech Republic v The Czech Republic, Mc Henry v Lewis and Merill Lynch v Raffa*** that in the ordinary course of events, initiation of proceedings in two different fora simultaneously is considered oppressive and vexatious in the absence of justifiable circumstances. Thus, in ***Merill Lynch, Pierce Fenner & Smith Inc. v Mohamed Said Raffa,*** it was determined that

> *"(t)he reason why two sets of proceedings in respect of the same subject matter will normally be vexatious is that it amounts to a harassment of the Defendant to make him fight the same battle twice with the attendant multiplication of costs, time and stress. But*

[42] Glencare International AG v Exeter Shipping Ltd. (2002).

> *in my view it will not be vexatious, nor will an election be called for, where the claimant has a sufficient justification for bringing the two sets of proceedings."*[43]

In the instant case, however, the Appellant was required by the second acquisition legislation to file a claim for compensation with the Financial Secretary within one month. This the Appellant did expressly without prejudice to his legal rights under Article 8 of the UK-Belize Treaty 1982 in order to protect his interests. In effect, the Appellant was eminently justified in filing a claim for compensation after initiating international arbitration proceedings thereby bringing its claim within the exception above.

176. Nor am I persuaded that the doctrine of *Kompetenz Kompetenz* which is peculiar to the law of arbitration is generally recognised as ousting the common law principle that the court enjoys an inherent jurisdiction to injunct arbitral proceedings where it considers it just and equitable so to do. In addition to the common law, the jurisdiction of the Courts of Belize to injunct arbitral proceedings is based on section 17 of the Belize Arbitration Act cap. 125. This enactment trumps any rule of international arbitration to the contrary. Furthermore, the Courts of Belize have determined that the doctrine of *Kompetenz Kompetenz* is no bar to the grant of an anti-arbitration injunction: ***British Telemedia Limited v AG of Belize and BB Holdings Ltd. and The Belize Bank Ltd. v AG of Belize.***

177. In determining whether there were any serious issues to be tried, the learned trial judge addressed the claim of the Respondent that the UK-Belize Treaty of 1982 had not been domesticated, that there was no agreement to arbitrate and, consequently, the Appellant was not entitled as a private entity in a dualist jurisdiction to initiate international arbitration proceedings under that instrument. He also considered a serious issue the submission that the agreement to arbitrate was not a constituent part of the treaty as claimed by the

[43] [2001] I.L. Pr. 31 at paragraph 22.

Appellant and consequently did not require domestication to become operative. In my respectful opinion, however, it is difficult to appreciate the statement of the learned trial judge on this issue especially as he had asseverated that the said treaty was legally binding as a matter of both municipal law and public international law. Such a statement in my respectful opinion does appear to foreclose the issue concerning the entitlement of the Appellant to institute international arbitration proceedings under the said Treaty. Consequently, the learned trial judge should have concluded, as a matter of compelling inference, that there was no serious issue to be tried.

178. I entertain strong reservations about the propriety of the decision of the learned trial judge to grant the injunction to restrain the Appellant in continuing the arbitration proceedings which he initiated. Firstly, the omission to grant the injunction, in my respectful opinion, would have operated to place the learned trial judge on the right side of the Constitution of Belize in terms of positively responding to the provisions of preambular paragraph (e) and the applicable rules of international law relating to the sanctity of treaties. I concur in the submission of Counsel for the Appellant that the grant of the injunction by the learned trial judge in effect facilitated the breach by the State of Belize of obligations assumed under the UK-Belize Treaty 1982. There can be no doubt that the enactment of the second nationalisation legislation of Belize placed the State of Belize squarely in breach of its international obligations and the grant of the injunction was tantamount to a denial of the right of the Appellant to resort to arbitration under the Treaty. As an important organ of the State, the Court, in granting of the anti-arbitration injunction, by the Court deprived the Appellant of its right under the Treaty and clearly engaged the international responsibility of Belize. [44]

179. On the basis of the applicable law, did the learned trial judge exercise his discretion properly in granting the interlocutory injunction? Was it convenient and

[44] See Article 4 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the ILC 53rd Session (2001) GAOR 56th Session Supp. 10.

in the interest of justice to grant the injunction in order to preempt vexatious and oppressive conduct on the part of the Appellant?[45] Addressing the last issue first, it does appear from the evidence adduced, that the discernible incidence of oppressive and vexatious conduct, if any, seems to have emanated from the Respondent and not from the Appellant. In the first place, the Respondent had for years been remiss in not incorporating or domesticating the UK-Belize Bilateral Investment Treaty thereby establishing its intention to discharge obligations assumed thereunder in good faith consonant with the primordial principle of international law, *to wit, pacta sunt servanda*, and which is within the contemplation of preambular paragraph (e) of the Belize Constitution. Secondly, the statutory scheme of compensation appears to have been flawed as intimated above.

180. Depressingly, to note, when the acquisition legislation was belatedly enacted, it fell short of the obligations assumed by Belize in Articles 5 and 6 of the UK-Belize Treaty of 1982. Unarguably, the acquisition legislation virtually coerced the Appellant into seeking compensation under the legislative scheme devised by Belize by requiring persons aggrieved to file for compensation within a short time and imposing draconian penalties in relation thereto for contempt of court. The Respondent also must be seen to have acted in bad faith by calling in aid the Supreme Court to facilitate a breach of its international obligations in granting an anti-arbitration injunction in order to prevent the Appellant from exercising its right. In this context, it is important to bear in mind that the Appellant's claim for compensation was expressly made without prejudice to its legal rights including its right to opt for international arbitration under the UK-Belize Treaty 1982 and that an undertaking not to pursue compensation under the Belize legislation was given. The learned trial judge did refer to the ambiguity of the language of commitment of the undertaking but, on a careful reading of the text in its proper context, there could have been no doubt about the nature and purpose of the undertaking, *to wit,* an undertaking by the Appellant in favour of

[45]Carter Holt Harvey Limited v Genesis Power Limited & Rolls Royce New Zealand Limited (2006) at para. 32.

the Respondent. As observed by the learned trial judge: *"The undertaking is that generally the claimant would not proceed locally, except where it fails before the tribunal or it the government fails to satisfy an award by the tribunal in 90 days."*[46]

181. In granting the injunction, the learned trial judge determined that there were serious issues to consider, *to wit,* whether the Treaty was domesticated; whether the Appellant had a right to initiate international arbitration proceedings since there was no arbitration agreement and whether treaties can confer rights directly on private entities. But, in reaching this determination, the learned trial judge may be perceived as reprobating and approbating in the same breath thereby compromising the integrity of his discretionary exercise. For one ineluctable inference capable of being drawn from his determination that the Treaty was binding as a matter of municipal law is that it was domesticated. As such, the domestication of the Treaty could not, in the circumstances of the case, have been reasonably considered to be a serious issue for determination and a plausible ground for granting the injunction. In my respectful opinion, there indeed was a serious issue to be tried but one which apparently evaded the learned trial judge. And the serious issue to be tried was whether States, as an attribute of sovereignty, could confer rights directly on private entities and which could be exercised without the intervention of the legislature in dualist jurisdictions. However, this issue was addressed by counsel for both parties as well as the learned trial judge and appears to have been resolved in the *Occidental Case.*

182. And given the divergence in the acceptable compensation arrangements agreed in the Treaty compared to those established by the second acquisition legislation of Belize, the informal coercion on the Appellant to file for compensation, the apparent diffidence of the Respondent in prosecuting the claim and the incontrovertible right of the Applicant to initiate arbitral proceedings under Article 8 of the UK-Belize Treaty 1982; that although the balance of

[46] See paragraph 54 of the Judgment.

convenience was not easily determinable, the compensation arrangements of the BIT tilted them in favour of the Appellant; and that it was not just and convenient in the circumstances of this case to issue the anti-arbitration injunction, which, in addition to being unaccompanied by an undertaking for damages by the Respondent, lacked the normal attributes of an interim injunction, it is unlikely, in my respectful opinion, that the Respondent would have been granted the injunction for which he applied. It is of considerable significance that the interlocutory injunction granted by the learned trial judge, unlike what had been urged by the Appellant was not until trial or further order as commended in **American Cyanamid Co v Ethicon Ltd [1975] 1 AER 504** but was made contemporaneous with the resolution of the compensation process prescribed by the Belize nationalisation legislation. In the premises, I am constrained to hold that the learned trial judge virtually abdicated his discretion in granting the anti-arbitration injunction by taking irrelevant factors into consideration and ignoring relevant factors, and, in so doing, placed the State of Belize in breach of the obligations assumed under the UK-Belize Bilateral Investment Treaty thereby engaging its international responsibility under the applicable norms.

Conclusion

183. Having established on the evidence before this Court that: the UK-Belize Treaty 1982 was in force and legally binding; the State of Belize did not implement in good faith the UK-Belize Treaty 1982; the compensation arrangements for the nationalization of the Appellant's assets and property were inadequate compared with relevant provisions of the UK-Belize Treaty 1982; the UK-Belize Treaty 1982 conferred an indefeasible right directly on the Appellant to initiate at its option international arbitration proceedings; the second nationalization legislation of Belize virtually coerced the Appellant to file for compensation in order to protect its interests under the local law; the Appellant in effect gave an undertaking not to seek compensation in Belize for its nationalized assets unless the arbitral proceedings failed or the Government of Belize did not satisfy an award for compensation; the Appellant's initiation of

arbitration proceedings at the London Court of International (LCIA) could not be reasonably construed in the circumstances of this case as vexatious and oppressive since, in so doing, the Appellant was merely exercising a right to which it was entitled under the UK-Belize Treaty 1982 freely concluded by the parties; the learned trial judge erred in law in finding that there were serious issues to be tried; the Appellant enjoyed an unqualified right to initiate international arbitration proceedings under the UK-Belize Treaty 1982 and which did not require domestication for the enforcement at the domestic plane; the learned trial judge erred in law in not granting the interim injunction until trial or further order, it is determined that the learned trial judge omitted to exercise his discretion properly.

184. The appeal is allowed subject to the following orders:

1. The injunction granted to the Respondent on 7 December 2010 is discharged.
2. The Appellant may continue or commence international arbitral proceedings in accordance with Article 8 of the UK-Belize Treaty of 1982 on condition that the Appellant foregoes its right to seek compensation pursuant to the second nationalization legislation of Belize.
3. The Respondent is restrained by itself, its officials, servants or persons or entities under its control from preventing the Appellant to continue or commence, at its option, international arbitration pursuant to Article 8 of the UK-Belize Treaty of 1982.
4. Costs to be paid by the Respondent, as agreed, or to be taxed.

_____

POLLARD JA