

AN ARBITRATION

BEFORE THE LONDON COURT OF INTERNATIONAL ARBITRATION

BETWEEN:

BELIZE TELEMEDIA LIMITED

Claimant

- and -

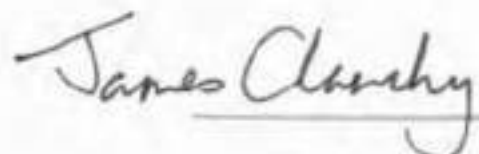
THE ATTORNEY GENERAL OF BELIZE
(On behalf of the Government of Belize)

Respondent

LCIA Arbitration No. 81079

FINAL AWARD

LONDON COURT OF INTERNATIONAL ARBITRATION
Certified true copy of original

 LCIA Registrar

Tribunal

Date 18 March 2009

Mr. Mark Kantor
Ms Paula Hodges
Mr. Alan Redfern (Chairman)

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I. INTRODUCTION

A. The Parties

1. The Claimant, Belize Telemedia Ltd ("the Claimant" or "Telemedia"), is a company incorporated and existing under the laws of Belize. Telemedia's address is Esquivel Telecom Centre, St Thomas Street, P.O. Box 603, Belize City, Belize, Central America.
2. Telemedia is represented in these proceedings by Ms. Judith Gill and Mr. Matthew Gearing of Allen & Overy LLP, One Bishops Square, London EC1 6AD, United Kingdom (Tel: 0044 20 3088 3000, Fax: 0044 20 3088 0088).
3. The Respondent is The Attorney General of Belize on behalf of the Government of Belize ("the Government" or "the Belize Government"). Pursuant to section 42(5) of the Belize Constitution, civil proceedings against the Government are taken in the name of the Attorney General. The Government's address is The Attorney General, Attorney General's Ministry, New Administration Building, Belmopan Cayo, Belize, Central America (Fax: 00501 822 3390).
4. The Government has been given notice of these proceedings, but is not represented and has failed or refused to take part in them.

B. Constitution of the Tribunal

5. Telemedia filed a Request for Arbitration ("the Request") in respect of this dispute with the London Court of International Arbitration ("LCIA") on 9 May 2008. In the Request, Telemedia invited the Government to agree to the nomination of arbitrators by the parties. The Government failed to do this. Nor did the Government file a Response to the Request as it was entitled to do.

6. Accordingly, by letter dated 13 June 2008, the LCIA Court appointed the following arbitrators ("the Tribunal") pursuant to Articles 5.4 and 5.5. of the LCIA Rules:

(1) Mr Mark Kantor, Suite 311B, 110 Maryland Avenue NE, Washington DC 20002, USA.

(2) Mr Rory Brady SC, St Dominic's, 5 Temple Gardens, Dublin 6, Ireland.

(3) Mr Alan Redfern, One Essex Court, Temple, London, EC4Y 9AR, UK

to be the Tribunal in this arbitration, with Mr Redfern presiding.

7. Unfortunately, Mr Brady was forced to withdraw due to illness. On 15 October 2008, the Registrar of the LCIA wrote to the parties informing them of this.

8. Ms Paula Hodges of Herbert Smith LLP, Exchange House, Primrose Street, London EC2A 2HS, UK was therefore appointed by the LCIA on 24 October 2008 to replace Mr Brady.

C. Summary of the Dispute

9. On 19 September 2005, the Government entered into a so-called "Accommodation Agreement" ("the Original Accommodation Agreement") with a company known as Belize Telecommunications Limited ("BTL"). Subsequently two amendments were made to this Original Accommodation Agreement, in November 2005 and December 2006.

10. BTL owned and operated telecommunications services in Belize from 1987 until its dissolution in 2007. Until December 2002, BTL was the monopoly telecommunications service provider in Belize. By the time of its dissolution in May 2007, BTL remained the largest operator in this industry in Belize, the second largest operator being Speednet Communications Limited ("Speednet").

11. Under a business transfer agreement dated 15 September 2006, BTL agreed to transfer its business to Telemedia. On 29 May 2007 the Belize Telecommunications Undertaking (Belize Telecommunications Limited Operators) Vesting Act, 2007 ("the Vesting Act") was assented to by the Governor General of Belize and was made law. Under the provisions of the Vesting Act, all of the assets, liabilities, rights and obligations, property, files and documentation of BTL which had been agreed to be transferred pursuant to a business transfer agreement (including any rights and obligations arising under the Original Accommodation Agreement, as subsequently amended) were vested in Telemedia. Accordingly, any and all of BTL's rights and obligations pursuant to the Accommodation Agreement as amended vested in Telemedia.
12. Further to the provisions of the Vesting Act, BTL was declared dissolved and references to its name in the register of companies maintained by the Registrar of Companies in Belize were deemed struck off.
13. The third and final amendment to the Original Accommodation Agreement was made between the Government and Telemedia in January 2008. Clause 7.1 of this Amendment Deed makes it clear that Telemedia has assumed all of BTL's rights and obligations under the Accommodation Agreement as amended. Under this clause, the Government acknowledged and agreed that all rights of BTL under the Original Accommodation Agreement were transferred to Telemedia with effect from 29 May 2007 and that BTL has no further liabilities under the Original Accommodation Agreement.
14. The Tribunal is told that Telemedia is Belize's largest telecoms provider and that it enjoys the most subscribers to telephone, cellular, internet and other such services in the country, supporting approximately 180,000 customer services nationwide¹.

¹ Boyce, First Witness Statement, paras. 2.2 and 2.6

15. In this Award, the Original Accommodation Agreement, as subsequently amended, is referred to as "the Accommodation Agreement".
16. On 8 February 2008, there was a change of Government in Belize. Telemedia wrote to the incoming administration to bring the Accommodation Agreement to its attention, but was told that the Government knew nothing of any such agreement. Disputes arose, as to whether or not the Claimant was entitled to the concessions set out in the Accommodation Agreement, and it is these disputes that have been referred to arbitration.

D. The Agreement to Arbitrate and Governing Law

17. In the Original Accommodation Agreement, the parties agreed that any disputes between them were to be referred to and finally resolved by arbitration in London under the LCIA Rules. Section 15 of the Original Accommodation Agreement stated:

"15.1 This agreement is governed by and shall be construed in accordance with Belize law.

15.2 Any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, which cannot be resolved amicably between the parties shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this Section. There shall be 3 arbitrators.

15.3 The arbitral proceedings shall be conducted in the English language.

15.4 The seat or legal place of the arbitral proceedings shall be London, England."

18. As already stated, the Original Accommodation Agreement was amended three times.

19. Clause 4.6 of the First Amendment Deed, Clause 6.2 of the Second Amendment Deed and Clause 9.2 of the Third Amendment Deed state that, save as amended by them, the provisions of the Original Accommodation Agreement remain in full force and effect.
20. The agreement to arbitrate which is set out above (at paragraph 17) has not been amended and is expressly incorporated into the Accommodation Agreement. Accordingly, the arbitration agreement applies to any dispute arising out of or in connection with the Accommodation Agreement, with London as the seat of the arbitration and the law of Belize as the governing law of the Accommodation Agreement.

E. Background to the Accommodation Agreement

21. Mr. Dean Boyce, Chairman of the Board of Directors of Telemedia, has submitted five witness statements in the course of this arbitration. In the first of these statements, he described the background to the Accommodation Agreement. Put briefly, it is said that:
 - (1) In 2005, the year in which the Original Accommodation Agreement was made, the telecommunications industry in Belize was "*in a dreadful mess*"².
 - (2) From about 2001, the Government had sought to liberalise the telecommunications industry. A company called International Telecommunications Ltd ("Intelco") was brought in to improve matters, but lacked experience and technical expertise in the industry and ran into financial difficulties. The Government then increased its shareholding in BTL and sought to sell a majority stake to Innovative Communication Corporation LLC ("ICC"), a company run by an US entrepreneur called

² Boyce, First Witness Statement, paras. 3.3 to 3.16

Jeffrey Prosser. However, ICC was unable to pay for the shares it had agreed to purchase and the Government retook control of BTL.

- (3) In 2005, the Government sought to enlist the assistance of the former BTL management and to sell 52% of BTL's share capital to private buyers in place of ICC.
- (4) In March 2005, approximately 15% of the issued share capital of BTL was sold to Ecom Limited ("Ecom"). During this period, Shire Holdings Limited ("Shire") became a director of BTL. (Mr Boyce was the corporate representative of Shire on the board of BTL.)
- (5) From March 2005 to September 2005, the Government and BTL entered into negotiations over a skeleton contract between them intended to support the local telecommunications industry. That intention was recorded in Mr Boyce's note of a meeting on 15 June 2006³. A number of general Government objectives for any agreement between the parties are set out in the First Witness Statement of Mr Boyce⁴.
- (6) Mr Boyce initially attended meetings with the Government in his capacity as corporate representative of Shire, and subsequently, from 29 August 2005, as Chairman of the Executive Committee of the Board of BTL. In attendance for the Government at those meetings were, variously, the Hon. Said Musa (the then Prime Minister and Minister of Finance), the Hon. Ralph Fonseca (the then Attorney General) and the Hon. Francis Fonseca (the then Minister of Public Utilities).

³ Exhibit C-26

⁴ Boyce, First Witness Statement, para. 4.6

F. The Accommodation Agreement

22. On 19 September 2005, the Original Accommodation Agreement was signed by Prime Minister Musa on behalf of the Government and by Mr Keith Arnold, Chairman of BTL, on behalf of BTL.
23. On 21 November 2005, the same signatories executed a deed of amendment to the Original Accommodation Agreement ("the First Amendment Deed").
24. On 15 December 2006, a second deed of amendment was executed by the parties. Prime Minister Musa and Attorney General Francis Fonseca signed on behalf of the Government. The deed was signed by Mr Boyce and Jose Alpuche, Secretary of BTL. The deed was witnessed by a Justice of the Peace ("the Second Amendment Deed")
25. On 7 January 2008, the signatories to the Second Amendment Deed signed the third deed of amendment ("the Third Amendment Deed"). This deed too was witnessed by a Justice of the Peace. By this stage the Vesting Act had been made law, and BTL was than known as Telemedia.
26. These executed documents together comprise the agreement between the parties which, as already stated, is referred to in this Award as "the Accommodation Agreement".

G. The Vesting Act

27. On 29 May 2007 the Vesting Act was assented to by the Governor General of Belize, and was made law. Under the Vesting Act, all the assets, liabilities, rights and obligations, property, files and documentation of BTL were transferred to and vested in Telemedia. On 30 May 2008, BTL was dissolved and struck off the Belize company register.
28. Section 7 of the Third Amendment Deed provided:

"7.1 Notwithstanding the provisions of section 19 of the Original Agreement, the Government acknowledges and agrees that all rights of BTL under the Original Agreement are transferred to Telemedia effective from 29 May 2007 and that BTL has no further liabilities under the Original Agreement.

7.2 Without prejudice to the provisions of the clause 7.1 above, section 19 of the Original Agreement shall be deleted in its entirety."

29. Therefore under the Vesting Act, as confirmed in the Third Amendment Deed, Telemedia assumed all the rights and liabilities that had accrued to BTL under the Accommodation Agreement.

H. Change of Government, 8 February 2008

30. On 8 February 2008, as previously stated, the Government administration in Belize changed, following a general election. The Hon. Dean Barrow was appointed the new Prime Minister and Minister of Finance.
31. On 8 February 2008, Telemedia wrote to the new administration bringing the Accommodation Agreement to its attention⁵. On 22 February 2008 the Government replied, stating that it knew nothing of any such agreement⁶. Following further correspondence, the Government was provided with copies of all Accommodation Agreement documents on 12 March 2008.
32. Telemedia contends that the new administration does not intend to honour the Accommodation Agreement. In Section 7.A of his First Witness Statement, Mr Boyce sets out the basis for that contention:

⁵ Exhibit C-9
⁶ Exhibit C-45

- (1) In an interview with 'Love FM' radio station on 11 April 2008⁷, Prime Minister Barrow stated that

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

- (2) On 25 April 2008, Prime Minister Barrow, in the Belize House of Representatives, referred to the Accommodation Agreement as⁸:

"...[a] secret agreement as it were handcuffing the government, shackling the government, making it impossible legally, contractually for the government to do anything about rates because that agreement guaranteed BTL a rate of return of 15% and said that if BTL didn't make that rate of return they could withhold their payment of their Business Tax, which they have done for the past three months."

- (3) Prime Minister Barrow has variously stated that the Government has *"...taken the formal position, we do not accept the validity of that agreement"*; that he believes *"...as a lawyer, that those agreements are invalid..."*; and that the Government was *"continuing to maintain that the accommodation and other agreements are illegal, null and void"*⁹.

I. The Principal Terms of the Accommodation Agreement

33. Telemedia alleges that the Government has failed to honour its undertakings and obligations under the Accommodation Agreement. The principal undertakings and relevant facts are set out below.

⁷ Exhibit C-10

⁸ Exhibit C-11

⁹ Exhibits C-48 to C-50

Purchase of properties by BTL

34. This is provided for in Section 5 of the Original Accommodation Agreement, as amended by Section 4 of the First Amendment Deed. BTL was to purchase several properties from the Government for BZ\$19,200,000.
35. BTL did in fact pay BZ\$19,200,000 to the Government by way of a Loan Note¹⁰. The last payment made under the Loan Note was in March 2008¹¹.

Minimum Rate of Return

36. The Government irrevocably undertook that, in any given financial year during the duration of BTL's Individual License, if the Achieved Rate of Return ("AROR") was below the Minimum Rate of Return ("MROR") of 15%, the Government would monetarily compensate BTL to the full extent of any shortfall ("the Shortfall Amount").
37. Clause 11.4 of the Original Accommodation Agreement provided:

"11.4 In the event that BTL fails to achieve, in any given financial year during the duration of BTL's Individual License, an Achieved Rate of Return (as defined in Schedule 2 hereto) greater than or equal to the Minimum Rate of Return (as defined in Schedule 2 hereto), then the Government hereby irrevocably undertakes to monetarily compensate BTL to the full extent of any shortfall in Earnings (as defined in Schedule 2 hereto), so that the Achieved Rate of Return is equal to the Minimum Rate of Return in the financial year under consideration. Any shortfall shall be demonstrated by reference to BTL's group audited accounts for the relevant financial year and a capital rate of return statement to be prepared by BTL in accordance with its normal accounting procedures and the terms of this Agreement (the "Capital Rate of Return Statement"). The Government shall be informed by BTL of the amount of any such shortfall (the "Shortfall Account" and provided by BTL with a copy of the group audited

¹⁰ Exhibit C-111

¹¹ Boyce, First Witness Statement, para. 6.2

accounts together with the Capital Rate of Return Statement for the relevant financial year no later than 6 months following the end of BTL's financial year (the "Delivery Date"). The Government agrees to pay BTL the Shortfall Amount in full no later than 3 months following the Delivery Date (the "Deadline Date"). The Government further agrees that should the Shortfall Amount not have been paid to BTL in full by the Deadline Date then any unpaid amount shall bear interest at the base rate as quoted by The Belize Bank Limited from time to time plus 1½ % per annum which shall accrue from the Deadline Date up to and including the date of payment in full to BTL of such unpaid amount and all such outstanding interest. In the event that payment to BTL of a Shortfall Amount (including all accrued interest) has not been made in full by the third anniversary of the Deadline Date then such unpaid amount may be set-off by BTL against the amount of any taxes (including Business Tax, Sales Tax or other similar taxes) payable by BTL to the Government."

38. Schedule 2 to the Original Accommodation Agreement prescribed the method of calculation to be used for the AROR and MROR.
39. Pursuant to Section 6.1 (ii) of the Original Accommodation Agreement, the Government also covenanted and undertook:

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

Business Tax

40. Section 11.3 (i)(f) of the Original Accommodation Agreement, as amended by Clause 3.5 of the Second Amendment Deed, provided as follows:

"11.3 (i)(f) Business Tax – the tax treatment of BTL shall be no less favourable than that afforded to other

telecommunications licensees in Belize. To enable telecommunications services providers to lower the rates to their subscribers the Government undertakes by no later than April 1, 2008 to adjust with immediate legal effect and force the rate of Business Tax applicable to telecommunications services so that the amount of Business Tax payable by BTL does not exceed the amount of Income Tax that would be paid by BTL if it was assessed for Income Tax by applying an Income Tax rate for companies at 25% (companies being persons other than employed persons for the purposes of the Income and Business Tax Act)."

41. Clause 3.1 of the Third Amendment Deed provided:

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

42. Therefore the Government undertook that by 1 April 2008, the Business Tax levied on BTL was to be no more than the equivalent of paying Income Tax at a rate of 25%. In addition, BTL's tax treatment was to be no less favourable than that of other telecommunications licensees in Belize ("the Agreed Rate").

43. Since 1 April 2008, Telemedia has therefore been filing Business Tax returns on the basis of the Agreed Rate. However, Assessment Notices for Business Tax

have been filed by the Commissioner for Income Tax which do not correspond with the Agreed Rate¹².

44. Furthermore, in his Third Witness Statement, Mr Boyce notes that, on 31 October 2008, it was reported in the Belize news that the Government planned to raise the rate of Business Tax payable by telecommunications companies¹³. The rate was in fact raised from 19% to 24.5% of gross revenue as of 1 January 2009¹⁴.

Business Tax Set-Off

45. As set out above, the Government undertook to compensate BTL annually for any difference between the AROR and the MROR. Section 11.4 of the Original Accommodation Agreement provided that if the Government failed to make payment, BTL would be entitled to set off any amount owed to it against taxes payable by BTL to the Government:

"11.4. [...] In the event that payment to BTL of a Shortfall Amount (including all accrued interest) has not been made in full by the third anniversary of the Deadline Date then such unpaid amount may be set off by BTL against the amount of any taxes (including Business Tax, Sales Tax or other similar taxes) payable by BTL to the Government."

46. The Government had been unable to pay by the end of December 2006. The parties therefore agreed that the Government would have more time to pay. That agreement is set out in Clause 2.2 of the Second Amendment Deed:

"2.2 Notwithstanding clause 2.1 herein, the Government hereby agrees to pay BTL the Shortfall Amount no later than October 31, 2007. The Government further agrees that in the event that payment of the Shortfall Amount has not been made by the Government to BTL in full by this date in accordance with the Original

¹² Boyce, First Witness Statement, paras. 7.54-7.55

¹³ Boyce, Fourth Witness Statement, para. 2.16

¹⁴ Boyce, Third Witness Statement, para. 2.16 and Exhibits C-171 to C-174

Agreement then such unpaid amount may be set off by BTL against the amount of any taxes or any other payments or obligations due and payable by BTL to the Government."

47. The 'set-off' was then re-visited in January 2008 in the Third Amendment Deed. Clauses 2.4-2.6 are particularly important in the context of these proceedings and are accordingly set out in full below:

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

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

2.5 Following the set-off described in clause 2.4 above, the balance of BZ\$3,075,000 plus the 2007 Shortfall Amount will be due and owing to Telemedia by the Government together totalling BZ\$14,703,000 ('the "Balance Amount") and the Government agrees that Telemedia shall be entitled with effect from 1

February 2008, and at its sole discretion, to set off the Balance Amount against monthly-based tax liabilities including, but not limited to, Business Tax as they fall due and owing until the Balance Amount has been extinguished.

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

48. Pursuant to the Accommodation Agreement, the Government agreed (in a letter dated 4 October 2007 from the Financial Secretary, on behalf of the Ministry of Finance, to Telemedia¹⁵) to set off the amount of BZ\$1,109,655.69 against Business Taxes due to be paid by Telemedia in October 2007 "in accordance with [the] Settlement Deed dated 15 December, 2006". The letter continued:

"I write to advise you that we have since completed the reconciliation of the figures provided, and hereby authorize a set-off of the amount claimed (i.e. \$1,109,655.69) against Business Taxes due to be to paid by BTL in October 2007.

By a copy of this letter, the Commissioner of Income Tax is advised of this approval."

49. From 1 February 2008, Telemedia began to set off the payment of Business Tax against the new Shortfall Amount. Telemedia has included the set-off in each monthly Business Tax return since 1 February 2008.

¹⁵ Exhibit C-8.

50. The Government has not accepted those tax returns. Instead, the Government (through the Commissioner of the Ministry of Finance) has issued monthly Assessment Notices including penalties and interest for the full sum of Business Tax owed, without any set-off. Those Assessment Notices have been issued against Telemedia and two of its subsidiaries: Business Enterprise Systems Limited ("BESL") and BTL Digicell Limited ("Digicell").
51. Telemedia also contends that those Assessment Notices are, in any event, calculated using different revenue figures and tax rates to those used by Telemedia¹⁶.
52. Telemedia refused to accept those Assessment Notices. In response, the Government issued judgment summonses¹⁷ for Telemedia at the Magistrate's Court to pay the tax as set out in the Assessment Notices. At a hearing in the Magistrate's Court on 24 June 2008, Telemedia was ordered to pay amounts in settlement of the judgment summonses issued.
53. Telemedia appealed that decision of the Magistrate's Court on 27 June 2008. Telemedia contended that the decision was made under an error of domestic law¹⁸. Telemedia further contended that by virtue of Section 112 of the Belize Supreme Court of Judicature Act, Cap 91 ("Section 112") it was not required to make payment pending the outcome of the appeal.
54. On 4 July 2008 the Government issued a warrant for the arrest of Mr Boyce. To avoid Mr Boyce's arrest, Telemedia made payment of Business Tax on 4 July 2008. To avoid another warrant being issued, Telemedia sought emergency declaratory relief from the Belize Supreme Court on 8 July 2008. This application was rejected. Telemedia therefore made payment of outstanding sums to avoid another warrant.

¹⁶ Statement of Case, para. 100

¹⁷ Exhibit C-57

¹⁸ Exhibit C-61

55. To avoid the risk that Section 112 might prevent the Government from enforcing judgment against Telemedia, the National Assembly passed an amendment to Section 112. The amendment stated that section 112 did not apply to payment of tax judgments by lower courts.
56. In his Second, Third and Fourth Witness Statements, Mr Boyce sets out the current position with regard to set-off. It appears from those statements that the Assessment Notices, summonses and Magistrate Court hearings instituted by the Government have been continuing.
57. Telemedia filed a public law action against the Government in Belize on 10 July 2008¹⁹ seeking declaratory relief that the Assessment Notices and judgment summonses are unlawful. In relation to that action, Conteh CJ found for the Government on 28 October 2008²⁰. Telemedia plans to appeal.

Import duties

58. Section 11.3 (i)(g) of the Original Accommodation Agreement provided:

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

59. In the Original Accommodation Agreement the Government therefore undertook to procure the exemption of BTL and its subsidiaries from paying duty on goods and equipment imported for BTL's own use.
60. Prior to the change of government administration in February 2008, Telemedia had *"been submitting lists of imported goods for exemption without any difficulties...the Ministry of Finance would provide us with a letter of exemption in*

¹⁹ Exhibit C-75

²⁰ Boyce, Third Witness Statement, para. 2.14

*respect of the goods that we could take to customs. On sight of the letter, Belize Customs would release the goods, without requiring payment of any import duty*²¹.

61. However, on 14 April 2008, when Telemedia submitted a list of imported goods²² for exemption from import duty, the Ministry of Finance wrote back on 18 April 2008²³ and stated:

"We are informed by the Commission of Income Tax that Belize Telemedia Ltd is substantially in arrears in their payment of Business Tax due to the Government of Belize. In the circumstances we are unable to consider your request for waiver of duties.

Whenever Belize Telemedia Ltd becomes current in its payment of Business Tax your application will be reconsidered."

62. Further lists of imported goods eligible for exemption from income tax were provided to the Ministry of Finance on 13 and 30 June 2008. No response was received. It appears that the Ministry of Finance was not prepared to release those goods unless either import duties were paid, or outstanding Business Tax was paid. In order to release the goods, Telemedia has recently started paying the necessary import duties²⁴.

Voice Over Internet Protocol

63. Section 6.1 of the Original Accommodation Agreement provided as follows:

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

²¹ Boyce, First Witness Statement, para. 7.57

²² Exhibit C-20

²³ Exhibit C-21

²⁴ Boyce, Second Witness Statement, section 3; Boyce, Third Witness Statement, section 3 and Exhibits C-143 to C-152; C-175 to C-179

- (i) *Authority, Permits and Licenses* – to take all necessary steps to procure to the satisfaction of BTL that: ... (c) no person other than BTL and Speednet have or will have or be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunications services involving or allowing the provision or transport of voice services, and (d) no holder of any Class License has or will have or be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunications services involving or allowing the provision or transport of voice services."

64. Section 11.3 provided:

"11.3 The GOB [Government] Post Closing obligations are as follows:

- (i) *The Government undertakes to procure that for the duration of BTL's Individual License or for a minimum term of 15 years, whichever is the longer period:*
- (a) *Voice Over Internet – (a) no Class License holder is able to use or permit the use of "voice over internet" for any telecommunications traffic originating or terminating within Belize; (b) no user or customer of a Class License holder is able to make use of "voice over internet" services, and (c) any user or customer of an Individual License holder is only able to make use of "voice over internet" services with the written approval of the Individual License holder concerned."*

65. Hence, the Government undertook to "procure to the satisfaction of BTL" that BTL and its competitor Speednet were to be the only parties allowed to provide telecommunications services which involved the provision or transport of voice services. The Government further undertook to procure that Voice over Internet Protocol ("VoIP") services could only be used by an individual with the written

approval of the Individual Licence holder concerned. Class Licence holders and their customers were not to be permitted to use VoIP services.

66. The Accommodation Agreement also considered the Caribbean Association of National Telecommunications Organisations ("CANTO") Guidelines. Clause 8.2 of the Third Amendment Deed provided:

"8.2. The Government undertakes to give and to procure that the Public Utilities Commission give, full legal effect to the "Guidelines for the Regulation of Voice over Internet Protocol ("VOIP") Operators" published by the Caribbean Association of National Telecommunications Organisations ("CANTO") in June 2007 (a copy of which is annexed to this deed) (the "CANTO Guidelines") by the issuance within 14 days of the date of this deed, and by their implementation no later than February 29, 2008, of regulations governing the regulation of VOIP in a form acceptable to Telemedia and in full compliance with the CANTO Guidelines.

The Government undertakes to take and to procure that the Public Utilities Commission take, all necessary steps to ensure that all Class Licensees fully comply with the CANTO Guidelines"

67. The Government therefore undertook to procure that the Belize Public Utilities Commission ("PUC") enacted Regulations governing the use of VoIP in a form acceptable to BTL and in full compliance with the CANTO Guidelines. Such Regulations were to be implemented no later than 29 February 2008.
68. Despite the 29 February 2008 deadline having passed, the Government has yet to enact Regulations implementing the CANTO Guidelines. It also appears that class licensees are offering access to VoIP service providers. MirrorNet Limited is a class licence holder offering voice plans to Belize-based customers for calling international telephones by VoIP, as well as for calling domestic telephones within

the MirrorNet network²⁵. Telemedia wrote to the Government informing them of these contraventions on 13 March 2008²⁶.

Frequencies

69. In the Third Amendment Deed, the Government agreed that within 21 days of the deed it would:

"8.1 (a) assign to Telemedia the frequency spectrum from 2.496 Ghz to 2.69 Ghz for Telemedia's sole use for the purposes of the deployment of its Wimax system throughout Belize"

70. Therefore, prima facie, the Government was to assign to Telemedia the frequency 2.496 – 2.69 Ghz by 28 January 2008. Telemedia had applied to the PUC for those frequency authorisations on 7 November 2007.

71. By 28 January none of the specific frequency spectrums had been assigned to Telemedia. On 9 March 2008, a notice was published in the Guardian newspaper that Southern Cable Network Ltd ("Southern Cable") had applied to the PUC for frequency bandwidth 2.524 Ghz and 2.588 Ghz²⁷. Telemedia therefore wrote to the Government on 13 March 2008 stating that Southern Cable's application should be refused²⁸.

72. On 14 April 2008, the PUC informed Telemedia that it assigned it the use of bandwidths 2.630 – 2.69 Ghz²⁹. Telemedia has not been granted the use of bandwidths 2.496 – 2.629 Ghz. The letter from the PUC stated that *"the PUC acknowledges that the 2.5 Ghz band provides superior coverage and in-building penetration"*.

²⁵ Boyce, First Witness Statement, para. 7.89

²⁶ Exhibit C-22

²⁷ Exhibit C-79

²⁸ Exhibit C-22

²⁹ Exhibit C-23

73. When Telemedia contested this assignation, and asked for the use of frequency range 2.496 – 2.69 Ghz, the PUC wrote to Telemedia again on 18 April 2008. In that letter the PUC's chairman, Mr Kingsley Smith, claimed that the PUC had no knowledge of the Accommodation Agreement. Mr Smith stated "*that the frequency range 2.496 GHz to 2.58 GHz is not available for Belize Telemedia Ltd to use at this time*"³⁰.

J. Belizean and English Injunctive Relief

74. On 9 May 2008, Telemedia filed an urgent "without notice" application for an injunction from the High Court of England and Wales, Commercial Division in order to preserve Telemedia's right to set off Business Tax and import duty exemptions. That application was heard by Mr Justice David Steel on 12 May 2008³¹.
75. Steel J granted an interim injunction restraining the Government and the Commissioner of Income Tax from obtaining any orders on the judgment summonses and issuing any further judgment summonses, until such time as the Government has given Telemedia full credit for any Shortfall Amounts. The Government was also ordered to take such steps as necessary to exempt Telemedia from relevant import duties.
76. The application notice for an extension of the interim injunction and note of proceedings were served on the Government by fax on 13 May 2008³². The Government appears to have complied to a degree with that Order³³ but Telemedia remained concerned that the Government would continue to issue summonses.

³⁰ Exhibit C-24

³¹ Relevant supporting documents are at Exhibits C-84 to C-86

³² Exhibit C-87

³³ Boyce, First Witness Statement, para. 8.12

77. A return hearing was held on 16 May 2008. Steel J heard the application and extended the injunction until trial or further Order¹⁴.
78. It appears that the Government has not abided by that Order.
79. Telemedia also attempted to obtain a similar injunction to that obtained in the English High Court, in Belize. Those attempts are set out in section 8.C of the First Witness Statement of Mr Boyce. The injunction application was heard by Chief Justice Conteh on 21 June 2008. Conteh CJ refused to grant the injunction, on the basis that the dispute related to Belizean tax matters, and an English Court did not have jurisdiction to interfere in such matters. If he was wrong about that, Conteh CJ held, in any event, that there would be no irreparable damage or loss because, if this Tribunal finds for Telemedia, it will make an Award for repayment of tax erroneously paid.
80. Telemedia filed a notice of appeal of the decision of Conteh CJ on 15 July 2008.

II. TRIBUNAL'S PROCEDURAL DIRECTIONS

A. The Request for Arbitration

81. By a Request dated 9 May 2008 Allen & Overy, acting on behalf of Telemedia invoked Section 15 of the Accommodation Agreement and requested arbitration under the LCIA Rules. The Request for Arbitration ("Request") outlined the background to the Accommodation Agreement and the operation of that agreement for a period of two and a half years, following its inception, which was described as being reasonably successful. The Request then went on to say that, on 8 February 2008, the Government in Belize changed and the new administration had failed or refused to honour the Accommodation Agreement.

¹⁴ Exhibits C-88 to C-91

82. The Request gave details of the Government's alleged breaches of the Accommodation Agreement in relation to, *inter alia*, Business Tax, import duties and requested frequencies and sought declaratory relief, damages and costs.

B. Appointment of the Arbitral Tribunal

83. In the Request, the Claimant pointed out that the Accommodation Agreement did not provide for party nomination of arbitrators, as envisaged by the LCIA Rules and went on to say:

"Telemedia invites the Government to indicate within 14 days of the date of this Request whether or not it agrees to party nominations, in which case Telemedia proposes that it would then nominate an arbitrator within seven days of such agreement, and the Government would nominate an arbitrator within a further seven days of Telemedia's appointment. If the Government does not agree to party nomination of arbitrators, or fails to respond within 14 days of the date of this Request, Telemedia requests that the LCIA Court constitute the Tribunal under Article 5.4 of the LCIA Rules."

84. The Government failed or refused to respond to this invitation; and accordingly the LCIA Court appointed all three members of the arbitral tribunal (those arbitrators are set out in the Introduction of this Award). The LCIA notified the parties of this by a letter of 13 June 2008 and by a formal Notice of the same date in which it stated *inter alia*:

"1. The LCIA has been informed that a dispute has arisen between the above-named parties out of an agreement entitled "Government Telecommunications Accommodation Agreement", dated 19 September 2005 (the Agreement);

2. By a Request for Arbitration dated 9 May 2008 (the Request), the Claimant requested arbitration of the dispute, invoking the provisions of Section 15 of the Agreement, which provides, in part, as follows:

"15.1 This agreement is governed by and shall be construed in accordance with Belize law.

15.2 Any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, which cannot be resolved amicably between the parties shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this Section. There shall be 3 arbitrators.

15.3 The arbitral proceedings shall be conducted in the English language.

15.4 The seat or legal place of the arbitral proceedings shall be London, England."

3. In the Request, the Claimant invited the Respondent to agree to the nomination of arbitrators by the parties;

4. No Response has been filed by the Respondent for the purposes of Article 2 of the LCIA Rules within the timeframe or at all, nor any reply to the Claimant's proposal in relation to the nomination of arbitrators."

85. On 17 June 2008, the Chairman of the Tribunal ("the Chairman") wrote to the parties' lawyers referring to the appointment of the Tribunal and stating in material part:

"Under Article 15 of the LCIA Rules, as Miss Shek¹⁵ has pointed out in her fax to you of 13 June 2008, the Claimant should file a Statement of Case within 30 days of 13 June 2008, unless the Claimant elects to treat the Request for Arbitration as a Statement of Case. This Statement of Case should set out the facts and any contentions of law on which the Claimant relies, together with the relief claimed.

Within 30 days of receipt of the Statement of Case, or of notice from the Claimant that it elects to treat the Request for Arbitration as its Statement of Case, the Respondent is required to submit a Statement of Defence, setting out which of the facts and contentions of law it admits or denies and on

¹⁵ On behalf of the Registrar

what grounds and on what other facts and contentions of law it relies.

These Statements should be accompanied by copies of the documents on which the party concerned relies."

86. The letter asked the Claimant to inform the Tribunal if it intended to lodge a Statement of Case; and by letter of 19 June, 2008 the Claimant stated that it did propose to do so, by 14 July 2008. (In the event, the Claimant was obliged to ask for two short extensions of time, which the Tribunal granted.) The Statement of Case, with exhibits, authorities and the First Witness Statement of Mr. Dean Boyce was submitted on 25 July 2008.
87. On 28 July 2008, the Chairman wrote to the Attorney General of Belize. The Chairman referred to his previous letter of 17 June 2008 and stated:

"The Claimant's lawyers, Allen and Overy LLP, have now submitted their Statement of Case dated 25 July 2008. Under the LCIA Rules of Arbitration, the Respondent is required to submit its Defence (and Counterclaim, if any) within 30 days of receipt of this Statement of Case.

Since we are now close to the August vacation, it may be that you will require more time in which to submit your Statement of Defence (and Counterclaim, if any). If this should be the case, I should be grateful if you would let the members of the Tribunal know, so that we can draw up a time-table for these proceedings.

By letter of 10 July, I suggested that we should hold a procedural meeting in mid-September between the members of the Tribunal and the parties' lawyers and I should be glad to hear from you in response to this proposal. The dates proposed are dates at which Mr. Kantor will be in London and so it would be helpful if we could meet on one of the proposed dates."

88. This letter, which was copied to the Claimant, the co-arbitrators and the LCIA was sent by fax to the Attorney General. No reply was received.

89. On 15 August, 2008, the Director-General of the LCIA wrote to the parties' lawyers, with a copy to the Tribunal, stating that the Respondent had failed to lodge its initial share of the advance on costs, as requested. The Director-General directed the Claimant to make a substitute payment, pursuant to Article 24.3 of the LCIA Rules. In the meantime, at the Chairman's request, his clerk was trying to arrange a procedural meeting between the Tribunal and the parties' lawyers, to take place in London in September 2008.

90. On 25 August 2008, the Government's Statement of Defence was due but was not filed.

91. On 27 August 2008, Allen & Overy wrote to the Tribunal stating:

"We refer to the letter from the LCIA dated 28 July 2008 and to the letter from Mr. Redfern of the same date informing the Respondent that its Statement of Defence should be filed on 25 August 2008 although extensions would be considered where necessary.

The Respondent failed to file its Statement of Defence on 25 August 2008 or, that being a national holiday in the United Kingdom (although not in Belize), on the next working day thereafter. We are unaware of any requests for an extension having been made or granted.

We note that the Respondent has yet to participate in these proceedings and that certain statements have been made in the Belize media that indicate that it will not do so. It was, for example, reported in Amandala, a Belize newspaper, on 27 June 2008 in the context of this dispute that:

"Prime Minister Dean Barrow has told Amandala that the Government would not expend resources in fighting a foreign arbitration..."

We attach a copy of that report for your information."

92. The letter went on to say:

"The Claimant has served a Statement of Case that sets out in detail the facts and legal arguments upon which it relies, which is supported by witness evidence and copies of documents relied upon by the Claimant. As it appears that the Respondent has chosen not to take part in these proceedings (thus far), we suggest that the 17/18 September 2008 hearing is used to consider the substantive merits of the case and, in particular, to deal with any questions or concerns that the Tribunal may have arising from the Claimant's Statement of Case so that an Award may be made on these issues.

As noted in paragraphs 7 and 82 of the Statement of Case, the Claimant intends to provide a report from an independent expert to quantify its claim for damages. The expert will not be available for the proposed hearing on 17/18 September 2008, but is estimated to be completed by or around 15 October 2008. The Claimant will provide that report to the Respondent and to the Tribunal as soon as it is available."

93. The letter concluded by suggesting that the Tribunal should, in effect, bifurcate the proceedings, giving first an Award on liability and, if this were favourable to the Claimant, going on to assess quantum later.
94. After consulting with his co-arbitrators, the Chairman replied to the parties' representatives, stating in material part:

"The Tribunal has received a letter from the Claimant's lawyers, dated 27 August, 2008, in which the Tribunal is asked the purpose of the meeting with yourselves, envisaged for 17/18 September 2008: the Claimant's lawyers suggest that this meeting should in fact deal with the merits of the Claimant's case, on the basis that it appears that the Respondent may fail or refuse to take part in this arbitration.

The Tribunal considered that once the Respondent had submitted its Statement of Defence (and Counterclaim if any), it would be appropriate to hold a meeting with you in order to discuss the future conduct of these proceedings. One of the members of the Tribunal who is not based in London will be in London on other business on 17/18 September 2008 and it was envisaged that the procedural

meeting, which would not take more than half a day, could conveniently be held at that time, subject to the availability of the parties.

The Tribunal has not heard from the representatives of the Respondent in reply to its questions as to their availability for this proposed meeting; and it has not received the Statement of Defence from the Respondent that was due on 25 August 2008, in accordance with the LCIA Rules of Arbitration. In these circumstances, the Tribunal will go ahead with the proposed meeting, at 2.30 p.m. on Wednesday 17 September 2008, at these Chambers.

The purpose of this meeting will be to consider how to proceed with the conduct of this arbitration, and will take account of the possibility that it may have to proceed in accordance with Article 15.8 of the LCIA Rules, should the Respondent fail to refuse to take part."

95. This letter was sent to the Attorney General of Belize by Transworld, a firm of international couriers, who provided a copy of the signed delivery receipt.

C. The Procedural Meeting of 17 September 2008.

96. A few days before the date fixed for this meeting, Mr. Rory Brady informed his co-arbitrators that he would be unable to attend. (He was due to enter hospital in Ireland for an operation, on the day following the meeting). The Chairman decided that, as this was simply a procedural meeting, it should go ahead with himself and Mr. Kantor alone, on the basis that any decisions would be discussed with Mr. Brady, before being communicated to the parties.
97. At the Procedural Meeting, the Claimant was represented by Ms. Judith Gill and Mr. Matthew Gearing of Allen & Overy. The Respondent was not represented and did not appear.
98. There were discussions between the Claimant's lawyers and the two members of the Tribunal as to the procedure to be followed, with the Tribunal emphasising that it would be for the Claimant to prove its case, by evidence and argument, even if

the Respondent did not appear and was not represented at the Hearing. There would be no question of the Tribunal simply "rubber-stamping" the Claimant's case.

99. Following the Procedural Meeting, the Chairman and Mr. Kantor prepared a draft Procedural Order, which was sent to Mr. Brady for approval.
100. Once this approval had been obtained, the Chairman sent the First Procedural Order to the parties' representatives, the Respondent's copy being sent by courier as before.

D. The First Procedural Order

101. The First Procedural Order was sent to the parties on 30 September 2008. The Order included, *inter alia*, the following terms:

"10. The procedural meeting was held at the IDRC in London, as planned, on Wednesday 17 September, with Mr Kantor and Mr Redfern present as members of the Tribunal and with Messrs Allen & Overy representing the Claimant. The Respondent did not attend this meeting and was not represented.

11. At the beginning of the procedural meeting, the Chairman stated that the Respondent would be given a final opportunity to submit its Statement of Defence; and that whether or not this was done, the Tribunal would proceed with the arbitration and make an award, pursuant to Article 15.8 of the LCIA Rules.

12. The Tribunal added that, if the arbitration did proceed in default of any participation by the Respondent, the Claimant would need to prove its case: it would not be approved by the Tribunal without question.

13. After consultation with Mr Brady, the Tribunal now makes the Order that follows.

II. THE TRIBUNAL'S ORDER

14. *The Claimant is ordered to file evidence as to the quantum of its claim by Friday 17 October 2008.*

15. *The Respondent is ORDERED to file its Statement of Defence, in conformity with Articles 15.3 and 15.6 of the LCIA Rules, by Friday 31 October 2008.*

16. *In view of the Respondent's failure so far to file any Statement of Defence, as previously directed by the Tribunal, this Order is now made as a peremptory Order, pursuant to section 41(5) of the English Arbitration Act, 1996. If the Respondent fails to comply with this peremptory Order, the Tribunal will proceed to an Award on the basis of the evidence presented to it, in accordance with Article 15.8 of the LCIA Rules and Section 41(7)(c) of the English Arbitration Act, 1996."*

102. Despite the Tribunal's Order, the Government did not file a Statement of Defence by 31 October 2008 or at all.

103. That omission appears consistent with Prime Minister Barrow's reported comments to a Belize newspaper on 27 June 2008 that:

"[The] Government would not expend resources in fighting a foreign arbitration, but would wait until steps are taken to enforce any possible rulings here in the Belize Supreme Court, to defend itself against BTL's claims³⁶."

104. In another interview on 18 July 2008, Prime Minister Barrow is reported as having stated:

"The [arbitration] in the UK, we take the view that's illegal, if you will, since it stems from a contract that we absolutely renounce and reject, and we will use that to resist any award that they get in the UK, which must be enforced in the courts of this country³⁷."

³⁶ Exhibit C-81

³⁷ Exhibit C-83

III. THE PARTIES' RESPECTIVE CLAIMS

A. Telemedia's case

105. Telemedia set out its claims in its Statement of Case. Telemedia alleges that the Government is in breach of the Accommodation Agreement in the following respects:

- (1) The Government's failure to allow Telemedia to set off the Shortfall Amounts owed by the Government to Telemedia and, specifically, a failure to uphold Telemedia's right to set off such amounts against its Business Tax liability and amounts due under the Loan Note;
- (2) The Government's failure to apply the correct Business Tax rate to Telemedia;
- (3) The Government's failure to exempt Telemedia from import duties;
- (4) The Government's failure to grant the requested and stipulated frequencies to Telemedia;
- (5) The Government's failure to enact regulations governing VoIP services and the CANTO guidelines.

106. Telemedia sought relief from the Tribunal, as set out in its Statement of Case³⁸. At the hearings in London in November 2008 and January 2009, to which reference is made later in this Award, the Claimant sought leave to amend its Statement of Relief.

107. During the course of the January hearing, the Claimant was given leave to amend certain claims and indicated that it would not pursue others. In order to be clear as

³⁸ Section F

to the precise position, the Chairman of the Tribunal wrote to the Claimant's lawyers, with a copy to the Respondent, asking them to set out their client's requests for relief as they stood at the close of the January hearing.

108. The Claimant's lawyers replied on 17 February 2009 with a "Summary of Relief Sought", which was expressed to be supplemental to that previously requested. The Chairman then wrote again, to make it clear that what the Tribunal was looking for was a "stand-alone" document, which could be read as a complete statement of what was sought and what was no longer being sought. The Claimant's lawyers confirmed on 24 February, 2009 that the "Summary of Relief Sought" dated 17 February, 2009 was intended to be a "stand-alone" document including all relief now claimed and the relief no longer pursued. Subsequently, this document was updated to 27 February, 2009 as requested by the Tribunal.

109. As set out in this updated document, the Claimant's amended claim for relief is as follows:

Orders to the Respondent to take or refrain from taking a particular course of action

Business Tax

110. An order directing the Government to procure the withdrawal of the Assessment Notices and any Magistrate Court proceedings for the enforcement of the May judgment summonses and any further judgment summonses issued in breach of the Telemedia companies' right of set-off; and

Import Duty Tax Exemption

111. An order requiring the Government to issue and procure the issuance of such documents and to take such other steps as are necessary to exempt Telemedia from any tax, duty, levy or other impost upon goods, materials, equipment and machinery of every type of description imported for the use of the Claimant's

business in accordance with Section 11.3 (i)(g) of the Accommodation Agreement, including those items listed in Telemedia's letter dated 30 June 2008; and

Frequencies

112. An order requiring the Government to procure the unconditional assignment to Telemedia of the frequencies 2.496 Ghz to 2.69 Ghz inclusive; and

VoIP

113. An order that the Government must procure that:
- (1) no person including any holder of a Class Licence other than the current Individual Licence Holders, Telemedia and SpeedNet, has been or will be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunications services in Belize involving of allowing the provision of or transport of voice over internet services;
 - (2) no user or customer of a holder of a Class Licence is able to make use of voice over internet services; and
 - (3) a user or customer of an Individual Licence Holder is only able to make use of voice over internet services with the written permission of the relevant Individual Licence Holder; and
114. An order that the Government must procure that the CANTO Guidelines are implemented in full compliance with their provisions; and

New Tariffs

115. An order requiring the Government to issue or procure that the Public Utilities Commission issues all authorisations, consents or approvals necessary for Telemedia to fully implement with effect from a date to be determined by

Telemedia, the tariff changes detailed in Telemedia's communication to the Public Utilities Commission dated 10 August 2007.

Declaratory Relief

General

116. A declaration that the Accommodation Agreement is binding on the Government; and
117. A declaration that Telemedia is entitled to set off payments due under the Loan Note; and

Business Tax

118. A declaration that Telemedia and its subsidiaries, BTL Digicell Limited and Business Enterprises Systems Limited, are entitled pursuant to the terms of the Accommodation Agreement to elect to set off the Shortfall Amounts and the contractual interest accruing thereon as they fell due against Business Tax and/or such other payments or obligations due and payable by Telemedia to the Government; and
119. A declaration that Telemedia is entitled to apply the Agreed Rate to its business tax liabilities pursuant to the terms of the Accommodation Agreement; and

Import Duty Tax Exemption

120. A declaration that Telemedia is entitled to an exemption from import duty on the terms set out in Section 11.3 (i)(g) of the Original Accommodation Agreement; and

Frequencies

121. A declaration that Telemedia is entitled, pursuant to the terms of the Accommodation Agreement, to the use of the frequencies 2.496 Ghz to 2.69 Ghz inclusive; and

VoIP

122. A declaration that the Government has agreed to procure the following in respect of voice over internet services:
 - (1) no person including any holder of a Class Licence other than the current Individual Licence Holders, Telemedia and SpeedNet, has been or will be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunications services in Belize involving or allowing the provision of or transport of voice over internet services;
 - (2) no user or customer of a holder of a Class Licence is able to make use of voice over internet services; and
 - (3) a user or customer of an Individual Licence Holder is only able to make use of voice over internet services with the written permission of the relevant Individual Licence Holder; and

New Tariffs

123. A declaration that Telemedia is entitled to implement the tariff changes detailed in Telemedia's communication to the Public Utilities Commission dated 10 August 2007, a copy of which is annexed to the Third Amendment Deed.

Monetary Relief

General

124. An order for the payment of any outstanding Shortfall Amount, together with interest at the contractual rate as set out in Section 11.4 of the Original Accommodation Agreement, currently BZ\$15,973,621; and

Business Tax

125. An order for damages to compensate Telemedia and its subsidiaries in respect of payments made in connection with Business Tax, namely:
- (1) The interest and penalties levied on Business Tax on the basis of late payment in the sum of BZ\$1,738,777; and
 - (2) The loss of the use of the sums wrongly paid to the Government by way of Business Tax, interest and penalties (which had the Government not denied Telemedia and its subsidiaries their right of set-off they would have had the benefit of BZ\$1,184,173); and
126. An order for damages in the sum of BZ\$9,797,879 in respect of the difference in the Business Tax levied from 1 April 2008 and that ought properly to have been due if the Agreed Rate had been applied as per the Accommodation Agreement; and

Import Duty Tax Exemption

127. An order for damages for:
- (1) The payments Telemedia has made by way of import duty in order to have its goods released and a reasonable rate of interest on those payments; and

- (2) The loss of the use of the sums paid to the Government by way of import duty; together, BZ\$912,781; and

VoIP

128. An order for damages in the sum of BZ\$3,346,931 (if calculated by Method 1, including interest) or in the sum of BZ\$4,696,686 (if calculated by Method 2, including interest) in respect of the Government's breach in relation to the VoIP provisions of the Accommodation Agreement; and

Indemnity

129. Pursuant to Section 13.1 of the Original Accommodation Agreement, Telemedia claims any and all costs and expenses incurred in connection with these arbitration proceedings, including but not limited to:

- (1) Reasonable legal fees (and related disbursements) incurred by Telemedia to Allen & Overy LLP and Courtenay Coye & Co incurred in respect of these arbitration proceedings in the sum of BZ\$2,840,085.79; and

- (2) Reasonable legal fees incurred by Telemedia to Allen & Overy LLP and Courtenay Coye & Co incurred in respect of Claim No 2008-458 before the English High Court, Commercial Division and Claim No 317 of 2008 before the Belize Supreme Court and any subsequent appeal in the sum of BZ\$1,833,937 (not including interest); and

- (3) Fees paid to the LCIA and the Arbitral Tribunal in connection with these arbitration proceedings in the sum of BZ\$404,298.03 (including interest); and

130. Telemedia also seeks:

- (1) The costs of the arbitration in the sum of BZ\$3,244,383.82 (including interest and as an alternative to the claim made at paragraph 128(1) and (3)); and
- (2) Such other or further relief as this Arbitral Tribunal thinks just and/or appropriate; and
- (3) Interest on the bases specified above, alternatively interest compounded at monthly rests on sums owing both pre and post-Award pursuant to Section 49 of the Arbitration Act 1996 and/or Article 26.6 of the LCIA Rules.

Claims for Relief no longer pursued by the Claimant

131. During the hearing, Telemedia made clear that it was no longer seeking the following claims for relief:
 - (1) An order for damages for disruption to Telemedia's business. This is in the context of the import duty exemption claim; and
 - (2) An order for damages for the failure to assign the sole use of the frequency spectrum 2.496 Ghz to 2.69 Ghz by 28 January 2008 inclusive; and
 - (3) An order for damages in respect of the Government's breach in relation to the frequency provisions of the Accommodation Agreement; and
 - (4) An indemnity for any and all damages, losses and expenses which can be attributed to the management time which officers and employees of Telemedia have incurred in connection with the breaches by the Government of the Accommodation Agreement and these arbitration proceedings.

B. The Government's case

132. The Government has not submitted any arguments or evidence in these proceedings. However, Prime Minister Barrow has variously described the Accommodation Agreement as "*invalid*", "*illegal*", "*null*" and "*void*". The Accommodation Agreement has also been referred to by Prime Minister Barrow as a "*secret agreement*" entered into by the previous administration.
133. This appears to be a contention that the Accommodation Agreement as entered into between the Government of Prime Minister Musa and BTL/Telemedia is invalid and/or does not bind the Government of Prime Minister Barrow.
134. The Accommodation Agreement contained an agreement to arbitrate, by which the Government agreed that it would take part in arbitral proceedings in London under the LCIA Rules, if called upon to do so. It is well established in the law and practice of international arbitration that such an "agreement to arbitrate" is independent of the main contract in which it is contained and gives an arbitral tribunal the authority to rule on its own jurisdiction, "*including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement*"³⁹.
135. This is the principle of *competens/competens* to which the Honourable Chief Justice Abdulai Conteh referred in his judgment of 21 June 2008⁴⁰. Therefore, it was open to the Government to take part in these proceedings and to argue, if it so wished, that the Accommodation Agreement was – as Prime Minister Barrow asserts – "*illegal, null and void*"⁴¹.
136. The Government did not avail itself of the opportunity. It chose to boycott these proceedings. This does not prevent the Tribunal from carrying out its task.

³⁹ Article 23.1 of the LCIA Rules

⁴⁰ At paragraph 9, fifth point. The Chief Justice went on to say that he did not consider that the remit of an arbitral tribunal comprehended "the payment of taxes or customs duties ..." and this issue is considered later in this Award.

⁴¹ Exhibits C-48 to C-50; and C-234

Article 15.8 of the LCIA Rules makes it clear that if any party *"fails to avail itself of the opportunity to present its case"*, the Tribunal *"may nevertheless proceed with the arbitration and make an award"*⁴².

137. This is what the Tribunal decided to do; and in doing so, the Tribunal made it clear that, despite the absence of the Respondent, the Claimant could not take anything for granted: it would have to prove its case to the satisfaction of the Tribunal.

IV. WITNESSES AND HEARINGS

A. Witnesses

138. Written witness statements for the first and second hearings of this case were submitted by the following witnesses on behalf of the Claimant:

- (1) Mr. Dean Boyce. As already stated, Mr. Boyce is Chairman of the Executive Committee of the Board of Directors of Telemedia. His First Witness Statement, a document of some 54 pages, describes the background to the dispute and the Government's alleged breaches of the Accommodation Agreement. His Second, Third, Fourth and Fifth Witness Statements deal with further and continuing alleged breaches by the Government of the Accommodation Agreement and outline investments made by Telemedia in pursuance of that agreement.
- (2) Mr. Alastair Macpherson, a partner in the London office of the United Kingdom firm of PricewaterhouseCoopers LLP. Mr Macpherson is a partner in the London office of Pricewaterhouse Coopers LLP. He has worked in the telecommunications industry for over 19 years, acting for operators, regulators and governments in over 30 countries. Mr. Macpherson submitted a voluminous expert report on behalf of the Claimant, in which he assessed the losses allegedly sustained by the Claimant as a result of the Government's alleged breaches of the

⁴² This reflects Section 41 of the English Arbitration Act, 1996.

Accommodation Agreement. This Report was updated by Addenda of 11 November 2008, 18 November 2008, 9 January 2009 and 26 February 2009 and a letter dated 4 March 2009.

- (3) Mr. Macpherson made a declaration in his Expert Report, and again before the Tribunal, in which he recognised that his duty to the Tribunal overrides his obligation to the party who engaged him. Mr. Macpherson also disclosed to the Tribunal at the hearing on 19 November 2008 that, in May 2005, he had been engaged by Lord Ashcroft, the chairman of BB Holdings Limited (a shareholder in Telemedia) to provide advice on the definition of the rate of return and other financial measures. That work was, according to Mr. Macpherson, ultimately incorporated into the Original Accommodation Agreement. In the Second Addendum to his Expert Report dated 18 November 2008, Mr. Macpherson had already explained that, in his view, *"this background knowledge had not been of any relevance to the instruction to carry out the production of [his] expert report and subsequent addenda and that the work has not prevented [him] in any way from forming an independent view on the matters set forth"* in that Report and addenda. The Tribunal concludes that Mr. Macpherson's independence has not been impaired by virtue of that connection.
- (4) A written witness statement for the Second Hearing of this case was submitted by Mr. Philip Osborne, a member of the Executive Committee of the Board of Directors of Telemedia. Mr. Osborne gave evidence as to the negotiation of the Accommodation Agreement (and of the previous agreements) and of the steps taken to implement it. This brought Mr. Osborne into regular contact with members and officials of the Belize Government.
- (5) Mr. Boyce gave evidence in person at the first hearing of the arbitration and by video-link from New York at the second hearing.

- (6) Mr. Osborne gave evidence in person at the second hearing. Mr. Macpherson gave evidence in person at both hearings.

B. The November Hearing

139. As arranged, the Hearing of this arbitration opened at the International Dispute Resolution Centre in London ("the IDRC") on Wednesday, 18 November 2008. The Claimant was represented by Ms. Judith Gill and Mr. Mathew Gearing of Allen & Overy.
140. Ms. Gill made an opening statement on behalf of the Claimant and evidence was then given orally by Mr. Dean Boyce and Mr. Alastair Macpherson, both of whom were questioned in detail by the members of the Tribunal. At the end of the day, the hearing was adjourned for further evidence and legal submissions, to a date to be fixed.
141. A transcript of the proceedings was made, by Court reporters, and a copy of this transcript was sent by the Chairman of the Tribunal to the Attorney-General of the Government of Belize by letter of 25 November 2008.
142. On 5 December 2008, the Clerk to the Chairman of the Tribunal notified the parties as follows:

"I am directed by the Chairman of the Tribunal to confirm that the adjourned hearing of this arbitration will take place at the IDRC, 70 Fleet Street, London on 14 and 15 January 2009 at 10.30am.

1. The procedure prior to this hearing will be as follows:

- (a) a Witness Statement of Philip Osborne; and*
- (b) a letter from Alastair Macpherson responding to queries put to him by the Tribunal at the hearing on 19 November 2008;*

2. *By 6.00pm (London time) on Friday 19 December 2008, the Claimant shall file a written skeleton outlining its oral submissions; and*

3. *By 6.00pm (London time) on Friday 9 January 2009, the Respondent shall file any skeleton submissions in reply."*

C. The January Hearing

143. The hearing took place on 14 and 15 January 2009. Much of the time was taken up with legal argument by Ms. Gill and Mr. Gearing on behalf of the Claimant, but the Tribunal also heard additional evidence from Mr. Boyce (by video link from New York), Mr. Osborne and Mr. Macpherson.

144. As before, a transcript of the proceedings was made and a copy sent to the Government by the Claimant under by letter dated 20 January 2009.

V. THE ISSUES

A. Introduction

145. Although the Government chose not to take part in these proceedings, there is a general issue that the Tribunal must consider of its own initiative as to the legality of the Accommodation Agreement. This has been said, by the present Prime Minister of Belize, to be an invalid and, indeed, illegal agreement. The Tribunal raised the issue of alleged illegality with Counsel for the Claimant and proposes to deal with it first. If the Tribunal finds the Accommodation Agreement to be valid and enforceable, the Tribunal will then go on to consider the specific issues raised by the Claimant in these proceedings.

B. The General Issue

A secret agreement?

146. As set out in Section I.H of this Award, the current Government (on taking office) maintained that it had no knowledge of the Accommodation Agreement. In its letter to Telemedia of 22 February 2008⁴³, the Government stated that:

"No one currently in the Ministry of Finance, or the Attorney General's Ministry, has copies of, or has ever seen, the Accommodation Agreement (or any other related agreement) to which you refer."

147. Moreover, Prime Minister Barrow has described the Accommodation Agreement on a number of occasions as "secret"⁴⁴.
148. The Tribunal has therefore investigated the extent to which the existence of the Accommodation Agreement was in the public domain and was known to the representatives of the previous administration.
149. According to Mr. Boyce⁴⁵ and Mr. Osborne⁴⁶, no press release was issued when the Accommodation Agreement was signed in September 2005. However, Mr. Osborne gave evidence that the negotiations between the previous Government and BTL were widely covered by the press over the summer of 2005⁴⁷ and that the existence of the Accommodation Agreement was known to numerous representatives of the previous administration⁴⁸. Mr. Osborne identified a number of individuals involved in the negotiation and implementation of the Accommodation Agreement, including Prime Minister Musa (the then Prime Minister and Minister of Finance), Minister Ralph Fonseca (the then Minister of Public Utilities), Minister Francis Fonseca (the then Attorney General), Godfrey Smith (the then Minister of Foreign Affairs and Minister of Information), Dr.

⁴³ Exhibit C-45

⁴⁴ Exhibits C-10 and C-11

⁴⁵ Transcript 19 November 2008, p.86, line 14

⁴⁶ Transcript 14 January 2009, p.36, line 1

⁴⁷ Osborne, Witness Statement, section 3

⁴⁸ Osborne, Witness Statement, section 2

Elson Kaseke (former Solicitor General), Gian Gandhi (Government legal counsel), Arsenio Burgos (the then Chairman of the Development Finance Corporation), Dr. Carla Bennett (Ministry of Finance), John Briceno (the then Minister of Natural Resources), Mrs. Betty-Ann Jones (Ministry of Finance), Dr. Gilbert Canton (the then Chairman of the PUC), Joseph Waight (Ministry of Finance), and Edwin Flowers (former Solicitor General). Similar evidence was provided by Mr. Boyce in his First Witness Statement⁴⁹. Both Mr. Boyce and Mr. Osborne also gave oral evidence to the same effect⁵⁰. Furthermore, Mr. Boyce confirmed that the previous Government had not issued any direction to keep the Accommodation Agreement secret⁵¹.

150. The Tribunal found the following evidence to be particularly compelling in assessing the Government's knowledge of the Accommodation Agreement:

- (1) the transfer to BTL of the properties identified in the Accommodation Agreement and the involvement of both Elson Kaseke, the then Solicitor General, and Gian Gandhi, a legal adviser within the Ministry of Finance, in this process⁵²;
- (2) the routine processing of import duty exemptions by Mrs Betty-Ann Jones at the Ministry of Finance between April 2006 and January 2008⁵³;
- (3) the steps taken by the Government to enforce the Loan Note issued by BTL in order to pay for the properties it had received, including a letter from Joseph Waight at the Ministry of Finance dated 19 May 2006⁵⁴;
- (4) the response of 30 November 2006 from Edwin Flowers (the then Solicitor General) to Allen & Overy's letter of 9 November 2006 alleging various breaches of the Accommodation Agreement by the Government, which

⁴⁹ Boyce, First Witness Statement, Sections 4-6

⁵⁰ Transcript 19 November 2008, pp.46-48, 52-84, 86-88 and Transcript 14 January 2009, pp.23-29, 38

⁵¹ Transcript 14 January 2009, p.87, line 9

⁵² Exhibits C-183-200

⁵³ Exhibits C210

⁵⁴ Exhibits C203-206

acknowledged the existence of the Accommodation Agreement and the obligations it imposes on the Government⁵⁵; and

(5) the letter from Joseph Waight to BTL of 4 October 2007 in which he authorises a set-off of BZ\$1,109,655,69 against "Business Taxes" due to be paid by BTL in October 2007, pursuant to the Second Amendment Deed⁵⁶.

151. It is important to note that a number of the individuals listed above have retained roles at the Ministry of Finance within the new Government⁵⁷. Joseph Waight, Betty-Ann Jones and Gian Gandhi are particularly worthy of mention. Mr Osborne also identified Eric Eusey, the Commissioner of Income Tax, as falling into the same category, and possibly Beverley Castillo (Commissioner of General Sales Tax)⁵⁸.

152. Given all of this evidence, the Tribunal is satisfied that the Accommodation Agreement was not a "secret" agreement. Nor has any allegation of corruption been made⁵⁹.

Is the Accommodation Agreement binding on the new Government?

153. In order for the Accommodation Agreement to be binding on the new Government, it is necessary for the Claimant to prove that the previous administration had authority to enter into the Agreement and that its contents are lawful. The Tribunal deals with each of these issues in turn.

154. The Original Accommodation Agreement and each of the three Amendment Deeds were signed (expressly) on behalf of the Government of Belize by Prime Minister Musa in his capacity as Prime Minister and Minister of Finance. The Second and Third Amendment Deeds were also signed by the Honourable Francis

⁵⁵ Exhibits C-34 and 35

⁵⁶ Exhibit C-8

⁵⁷ Exhibit C-58

⁵⁸ Transcript 14 January 2009, p.30, line 11. See also Exhibits C-14, C-17 and C-103

⁵⁹ Transcript 19 November 2008, p. 76, lines 1-17

Fonseca in his capacity as the Attorney General of Belize, and witnessed by a Justice of the Peace.

155. Belize gained its independence in 1981, but it remains part of the Commonwealth. Under the Belize Constitution, the executive authority of Belize is vested in Her Majesty The Queen, but it may be exercised on behalf of Her Majesty by the Governor-General directly or through other officers of the Government of Belize. The Governor-General appoints both the Prime Minister and other Government Ministers to whom he may assign responsibility for *"any business of the Government, including the administration of any department of government"*. This permits the Minister responsible to *"exercise general direction and control over that department of government"*. In addition, the Attorney General is identified under the Constitution as *"the principal legal advisor to the Government ...with responsibility for the administration of legal affairs in Belize"*⁶⁰.
156. The Belize Gazette of 23 August 2004 announced that, as of 19 August 2004, the Governor-General had assigned to Prime Minister Musa responsibility for the business of Government relating to the Office of the Prime Minister and Ministry of Finance, Defence and the Public Service. The Public Utilities Commission was identified as falling within the Office of the Prime Minister and the remit of the Ministry of Finance was stated to cover customs and excise, the Development Finance Corporation, income tax, the Inland Revenue, sales tax and taxation. The same edition of the Belize Gazette also announced the responsibilities assigned to the Honourable Ralph Fonseca as Minister of Home Affairs and Investment and the Honourable Francis Fonseca as Attorney General (including responsibility for the administration of justice, contracts and legal affairs)⁶¹. The Tribunal has seen no evidence to suggest that the assignment of these responsibilities was altered prior to the change of administration in February 2008.

⁶⁰ Authority A-1: The Constitution of Belize, Sections 36-42

⁶¹ Authority A-8: The Belize Extraordinary of 23 August 2008. Also see references to the Honourable John Briceno and the Honourable Godfrey Smith.

157. At the time when the Original Accommodation Agreement and the three Amendment Deeds were executed in September 2005, November 2005, December 2006 and January 2008, the Tribunal therefore finds that Prime Minister Musa had authority to contract on behalf of the Government of Belize. The participation of the Attorney General, as the Government's principal legal advisor (including responsibility for government contracts), in the negotiation of the Accommodation Agreement and the execution of the Second and Third Amendment Deeds by the Attorney General in the presence of a Justice of the Peace further corroborates the Government's authority to enter into the Accommodation Agreement.
158. The next issue to consider is whether the authority of the Prime Minister and other Government Officials extended to the matters covered by the Accommodation Agreement. From the evidence before the Tribunal, it appears that the Government of Belize entered into the Accommodation Agreement in a bid to resolve the difficulties stemming from inter alia the failed takeover of BTL by ICC and to develop modern, sustainable telecommunications services for the people of Belize. For example, the Government's objectives are described in a note prepared by Mr Boyce in June 2005 at the outset of negotiations with BTL⁶².
159. In return for the obligations accepted on the part of BTL to purchase certain properties *"[in] order to better accommodate the Government's telecommunications needs and other requirements"* and in the expectation that BTL would be the principal telecommunications provider in Belize for a number of years, the Government agreed to afford BTL a number of benefits in the Original Accommodation Agreement and subsequent Amendment Deeds including:
- (1) an MROR of 15% triggering a potential payment by the Government of the Shortfall Amount;

⁶² Exhibit C-26

- (2) the right to set off any unpaid Shortfall Amount against "the amount of any taxes or other payments or obligations due and payable by Telemedia to the Government"⁶³;
- (3) Business Tax payable at the Agreed Rate (no more than 25% of taxable income as opposed to gross revenue);
- (4) exemption from import duties;
- (5) assignment of the 2,496 – 2.69 Ghz frequency range for Telemedia's sole use; and
- (6) restrictions on VoIP services offered by third parties and implementation of the CANTO Guidelines.

160. The question for the Tribunal to decide is whether it was lawful for Prime Minister Musa and the other Government officers involved to afford these benefits to BTL and subsequently Telemedia.

161. As recorded in Section I.D of this Award, the governing law of the Accommodation Agreement is the law of Belize. Pursuant to the Belize Constitution and the Imperial Laws (Extension) Act⁶⁴, the Tribunal accepts that the law of Belize is based to a significant degree on English law. This approach was affirmed by the Supreme Court of Belize in *The Attorney General v The Belize Bank Limited (2008)*⁶⁵.

162. The Crown's common law prerogative to enter into contracts in relation to public services is extensive as can be seen from the judgments in *Bankers Case (1700)*⁶⁶ and *New South Wales v Bardolph (1934)*⁶⁷. The latter case also recognises that

⁶³ Exhibit C-4, Section 2.6

⁶⁴ Authorities A-1 and A-2

⁶⁵ Authority A-4: Claim No. 228 of 2008

⁶⁶ Authority A-6: [1700] 90 E.R. 270

⁶⁷ Authority A-7: [1934] 52 C.L.R. 455

this prerogative can be exercised on behalf of the Crown by the Government of the day in the absence of any constitutional or statutory restriction and provided that:

- (1) the contract is entered into in the ordinary or necessary course of Government administration;
- (2) it is authorised by the responsible Minister; and
- (3) any payments to be made by the Government are covered by or referable to an appropriate parliamentary grant (although this limb was held not to affect the validity of the contract *per se*).

163 As noted in paragraph 155 above, the Belize Constitution provides duly appointed Government Ministers with a significant degree of latitude to pursue the business of Government relevant to the departments over which they have been assigned responsibility. In the absence of any specific statutory limitation to the contrary, therefore, the Tribunal finds that Prime Minister Musa (as the most senior Government Minister dealing with public services and taxation, acting on the advice of the Attorney General) had the authority to enter into the Accommodation Agreement and to grant the benefits afforded to BTL/Telemedia in circumstances where it was necessary to stabilise the telecommunications industry in Belize and to develop it for future generations, thereby dealing with the first two *Bardolph* provisos. For the avoidance of doubt, the Tribunal considers (following the judgment in the *Bardolph* case) that the third proviso dealing with payments by the Government goes to the enforceability of the Agreement rather than its validity. Given that Telemedia is seeking payment of the Shortfall Amount by way of set-off (rather than a direct payment) on the basis of the Second and Third Amendment Deeds and that the Accommodation Agreement does not stipulate the direct payment of any other sum by the Government, this issue does not require further consideration.

164. In order to determine whether there is any specific statutory restriction on the Government's authority to execute the Accommodation Agreement, the Tribunal considers in turn each of the claims raised by Telemedia.
165. MROR/Shortfall Amount – A press report of 3 August 2005 records Prime Minister Barrow (as the then Leader of the Opposition) objecting to the suggestion that BTL be afforded a MROR as a matter of principle, but the Tribunal has seen no evidence that it was unlawful for the Government to make such a contractual commitment. Moreover, as the press reports of the time mention, the Government had previously agreed a 15% MROR with ICC (the company run by Jeffrey Prosser, which would have taken over BTL but for its inability to source the purchase funds)⁶⁸ and the Tribunal is not aware of any challenge being made to the validity of that arrangement. To the contrary, the Government of the day sought to rescind the agreement when ICC failed to pay for the shares that they had agreed to buy, implying that the original validity of the agreement was not in doubt⁶⁹.
166. Right of set-off – It appears from the evidence that the Income and Business Tax Act ("IBTA")⁷⁰ does not contain any provision dealing expressly with a tax payer's right of set-off. It neither authorises a tax payer to set off any debts due from the Government against its tax liabilities nor does it prohibit such a practice⁷¹. Prime Minister Barrow has suggested in press reports that National Assembly approval would be required in respect of any "*withholding*" of tax, but the Tribunal is satisfied that this would not arise in a case where tax debts are being set off against sums due from the Government as opposed to being withheld in the sense of not being paid at all. The Tribunal draws support for this view from both the legal authorities cited and the evidence served in this case. First, a number of English law cases recognise that the Crown may choose to set off debts that it owes to tax

⁶⁸ Exhibit C-246, Section 7.8.1 and 7.16.1 of the Share Purchase Agreement

⁶⁹ Exhibit C-248

⁷⁰ Authority A-51

⁷¹ Exhibits C-103 and C-107

payers against their outstanding tax liabilities⁷². Secondly, there are a number of examples of the Government of Belize granting a set-off against outstanding tax liabilities⁷³. Exhibits C-8, C-13 and C-36 relate to the previous administration, but it is worthy of note that Exhibit C-135 records the current Government setting off general sales tax ("GST") against Telemedia's Business Tax liabilities. By way of completeness, the Tribunal has not identified any statutory limitation on the Government's right to agree a broad set-off provision such as that contained in Clause 2.2 of the Second Amendment Deed to the extent that it applies to payments due under the Loan Note (which is dealt with in further detail below) as well as Business Tax liabilities.

167. Business tax – The Government undertook in the Accommodation Agreement that from 1 April 2008 the Agreed Rate of Business Tax would apply to BTL/Telemedia. The standard rate of Business Tax is charged at 19% of gross revenue, but Prime Minister Barrow's administration has recently introduced a new rate for telecommunications companies of 24.5% of gross revenue as of 1 January 2009⁷⁴. According to Mr. Boyce, the previous Government agreed to a lower rate of Business Tax for BTL/Telemedia in order to level the playing field with other industries in Belize, who were perceived as paying less tax, and to encourage BTL/Telemedia to reduce customer tariffs⁷⁵. The Agreed Rate of tax was never introduced formally, but the Government agreed in the Third Amendment Deed that Telemedia should from 1 April 2008 self-assess its Business Tax liability at the Agreed Rate, which it has done. Telemedia relies on Section 95 of IBTA⁷⁶, which permits the Minister of Finance to remit income tax payable (in whole or part) if he is satisfied that it would be "*just and equitable*" to do so, as the statutory basis for the Government's contractual agreement to charge Telemedia a lower rate of tax. This provision has remained unchanged following

⁷² Authorities A-12-15: *De Lancey v The Queen* [1871] L.R. 6 Ex 415; *Re: DH Curtis (Builders) Limited* [1978] 2 W.L.R. 28; *Re: Cushla Limited* [1979] 3 All ER 415; *Secretary of State for Trade and Industry v Friel* [2004] 2 All ER 1042

⁷³ Exhibits C-8, C-13, C-36 and C-135

⁷⁴ Authority A-57: *Income and Business Tax (Amendment) (No.2) Act 2008*

⁷⁵ Boyce, First Witness Statement, para.4.14

⁷⁶ Authority A-51

the introduction of the new 24.5% charge for telecommunications companies and Telemedia argues that the contractual rate agreed by the Government therefore still applies. Ms Gill also pointed to the fact that governments often agree tax concessions to encourage investment in a particular business sector and cited the *Alcoa Minerals of Jamaica Inc (USA) v Government of Jamaica* case⁷⁷ as an example. In addition, Telemedia argues that there is no restriction on the Government agreeing to a self-assessment mechanism in the form contained in the Third Amendment Deed. At the hearing in January, the Tribunal probed the extent to which the Government can tie its hands in relation to the rate of Business Tax imposed on Telemedia. On balance, however, the Tribunal considers that the power to remit tax under IBTA does provide a statutory basis for the lower rate agreed and has identified no limitation on the Government allowing Telemedia to undertake a self-assessment in respect of its Business Tax liability.

168. Exemption from import duties – In the context of Telemedia's application for ancillary injunctive relief before the Belize courts in June 2008⁷⁸, the Government argued that an injunction should not be granted in respect of the import duty exemption afforded to Telemedia under the Accommodation Agreement on account of the limited circumstances in which the Minister of Finance is expressly permitted to remit duties under Section 17 of the Customs and Excise Duties Act 2002⁷⁹. Section 17 provides that:

"17.(1)The Minister may after consultation with the Comptroller remit, wholly or partially, the duties set forth in the First Schedule in the case of goods imported by charitable and religious organisations, or registered non-governmental organisations with emphasis on poverty reduction and not engaged in commercial activities, or for educational or

⁷⁷ Authority A-24: Unpublished Decision on Jurisdiction and Competence of Arbitral Tribunal, International Centre for Settlement of Investment Disputes (ICSID) ARB 74/2 (1975), mentioned in *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v Government of Jamaica* by John T. Schmidt in *Harvard International Law Journal*, 1976, Vol.17, page 92

⁷⁸ Exhibit C-110, p.8

⁷⁹ Authority A-28

charitable objects, if he is satisfied that it would be in the public interest to do so.

(2) In exercising his discretion under sub-section (1) above, the Minister shall have due regard to the kind and quantity of the goods imported and to whether such goods are reasonably necessary for the purpose of such organisation or for the achievement of such object as aforesaid.

(3) The limitation to the discretion of the Minister to remit customs duties imposed by this section shall not affect the application of any contract or other agreement in force at the date of the commencement of this section between the Government and any person providing for the remission of customs duties in terms of the contract or the agreement"

169. Telemedia disputes that Section 17 includes an exhaustive list of the circumstances when the Minister may exercise his discretion to remit duties and argues that it does not invalidate the exemption granted to Telemedia, not least because of the broad power of the Prime Minister/Minister of Finance to execute contracts in relation to the departments over which he has responsibility and the involvement of the Attorney General in negotiation and execution of the Accommodation Agreement. The Belize court was not required to reach a decision on this issue and, in the Tribunal's opinion, the interpretation of Section 17 is not straightforward. The stated circumstances in which duties may be remitted are not expressed to be exhaustive, but they are all non-commercial in nature and Section 17(3) refers to the "*limitation*" to the Minister's discretion to remit customs duties "*imposed by this section*" in the context of carving out contracts which the Government may have executed prior to the Customs and Excise Duties Act 2002 coming into force. It could be argued that commercial agreements executed by the Government after 2002 would be subject to the "*limitation*" imposed by Section 17, potentially throwing into doubt the import duty exemption granted to Telemedia under the Accommodation Agreement in 2005. On balance, however, the Tribunal considers that any fetter on the broad power of the Prime Minister/Minister of Finance to contract on behalf of the

Government should have been stipulated expressly in Section 17 if that was in fact the intention of the legislators. The Tribunal draws support for its view from the actions taken by the Government under the administrations of both Prime Minister Musa and Prime Minister Barrow in respect of Telemedia's exemption described in paragraphs 60-62 above.

170. Frequency range/VoIP services – On the basis of the evidence before it, the Tribunal is not aware of the current Government raising any objection in principle (whether statutory or otherwise) to the power of the previous administration to agree the provisions in the Accommodation Agreement in relation to (1) the assignment of the 2.496 – 2.69 Ghz frequency range to Telemedia for its sole use, and (2) the restrictions on VoIP services offered by third parties and implementation of the CANTO Guidelines. Mr Gearing did bring to the Tribunal's attention Section 42(4) of the Telecommunications Act 2002⁸⁰, but the Tribunal is satisfied that this does not fetter the Government's power to enter into the relevant provisions of the Accommodation Agreement. The Tribunal considers the Government's authority over the PUC in paragraph 175 below.
171. In conclusion, the Tribunal finds that the Government had actual authority to enter into the Accommodation Agreement and that it was lawful for the Government to agree to the provisions that are now in dispute. In any event, the Tribunal shall also deal briefly with the submissions made by Telemedia in respect of the Government's apparent or ostensible authority to execute the Agreement.
172. As highlighted by Telemedia's Counsel, the principles of English law as to apparent authority (and the Tribunal is not aware of any divergence under Belize law) were summarised in recent years by Mr Justice Cresswell in *Marubeni Hong Kong and South China Ltd. V Government of Mongolia*⁸¹. Apparent authority arises in circumstances where:

⁸⁰ Authority A-38

⁸¹ Authority A-45: [2004] 2 Lloyd's Rep. 198

- (1) a person by words or conduct represents or permits to be represented that a person has authority to act on his behalf;
- (2) the representation may be express or implied; and
- (3) it is either a genuine representation or a representation of a very general nature.

173. In the same case, Mr Justice Cresswell pointed out that certain special considerations arise when a public official purports to contract on behalf of the Crown and he considered in particular the case of the *Attorney General for Ceylon v Silva*⁸². However, he concluded that those special considerations do not apply where the authority of the public official is not borne out of and therefore limited by specific legislation, and where the act in question is not seen to fetter the Crown's freedom of action to do its public duty generally. In the *Marubeni* case, therefore, the Minister of Finance was held to have apparent authority to issue a guarantee on behalf of the Mongolian Government on the basis of affirmative letters issued by the Ministry of Justice.

174. Returning to the current case, the Accommodation Agreement was negotiated by the then Prime Minister/Minister of Finance and other senior Government ministers, including the Attorney General and Minister of Public Utilities, all of whom were assigned responsibility for conducting business in relation to the government departments under their control as described in paragraph 156 above. Moreover, Section 7 of the Accommodation Agreement contains extensive representations and warranties on the part of the Government as regards the legality and enforceability of the Agreement and the authority of the Prime Minister to act on its behalf. This provision is incorporated by reference into the three Amendment Deeds. In addition, the Accommodation Agreement and three Amendments Deeds were signed by the Prime Minister and (in the case of the Second and Third Amendments Deeds) the Attorney General expressly on behalf of the Government of Belize. The Tribunal therefore finds that the criteria for

⁸² Authority A-50: [1953] AC 461

apparent authority have been established and that the special considerations that arise when contracting with the Crown have been met. This conclusion is further supported by the implementation of the Accommodation Agreement by the Government. For example, the transfer of properties to BTL, the vesting of BTL's assets etc in Telemedia (which in itself required the enactment of the Vesting Act 2007 and the assent of the Governor General), the agreement to pay the Shortfall Amount in the Second and Third Amendment Deeds and the granting of import duty exemptions until May 2008⁸³.

175. The remaining issue for the Tribunal to consider in relation to the validity of the Accommodation Agreement is the authority of the Government to procure that its departments and future administrations abide by its terms.

- (1) For the purposes of implementing the Accommodation Agreement, the Ministry of Finance and PUC are the key bodies involved. Given the responsibility assigned to Prime Minister Musa in respect of both of these bodies in his roles as Prime Minister and Minister of Finance, the Tribunal accepts that he had authority to direct the Ministry of Finance and PUC to implement the provisions of the Accommodation Agreement. In the case of the Ministry of Finance, there are numerous examples in the evidence of both Prime Minister Musa and Prime Minister Barrow directing the Ministry's representatives to take certain actions and of their directions being followed⁸⁴. For example, Joseph Waight approving the Business Tax set-off in October 2007 under the Musa administration, but subsequently withholding import duty exemptions pursuant to instructions from Prime Minister Barrow in April 2008. Turning to the PUC, it was involved to an extent in the transfer of the properties to BTL⁸⁵, but has not fulfilled the Government's promises to BTL/Telemedia in relation to VoIP services and assignment of the 2.496 – 2.69 Ghz frequency range for

⁸³ Exhibit C-210

⁸⁴ For example, Exhibits C-8, C-59 and C-103

⁸⁵ For example, Exhibit C-41

Telemedia's sole use. The PUC is a statutory body established by the Public Utilities Commission Act⁸⁶. Section 3.2 describes the PUC as "*an autonomous institution*" but states that it should exercise its powers in accordance with the legislation that governs its functions. For instance, the Belize Telecommunications Act⁸⁷ requires the PUC to regulate the telecommunications sector and to implement Government policy. As noted in paragraph 156 above, the PUC falls within the purview of the Office of the Prime Minister and has been described by the Belize Supreme Court as "*a functionary of the Government*"⁸⁸. The Tribunal therefore concludes that the Government is able to procure that the PUC implements the terms of the Accommodation Agreement.

- (2) Similarly, the Tribunal finds that the Accommodation Agreement is binding on the Government notwithstanding any change in the political administration given its conclusion that the Agreement is valid in all other respects. The *Bardolph* case is persuasive authority in this regard⁸⁹. Indeed, it is worthy of note that the current Government has not consistently attacked the validity of the Accommodation Agreement. The press reports in evidence record Prime Minister Barrow as acknowledging the binding nature of the Accommodation Agreement at times⁹⁰. Moreover, in a speech to the House of Representatives on 11 December 2008, Prime Minister Barrow is reported as having said that if Telemedia is transparent about its operations and is prepared to enter talks with the Government, "*we don't have a problem with the accommodation agreement...we may have to retune it, retweak it, but in essence we don't have a problem with it*"⁹¹. The Government has also taken steps to

⁸⁶ Authority A-39

⁸⁷ Authority A-38, Section 6

⁸⁸ Authority A-9: *Attorney General of Belize v Belize Water Services*, claim No. 376 of 2004, para. 13

⁸⁹ Authority A-7: *New South Wales v Bardolph* (1934) 52 C.L.R. 455

⁹⁰ Exhibits C-11

⁹¹ Exhibit C-234

enforce the Loan Note by which Telemedia agreed to pay for the properties transferred pursuant to the Accommodation Agreement⁹²,

176. To conclude on the General Issue, the Tribunal finds that the Accommodation Agreement is valid and enforceable against the present Government of Belize.

C. The Specific Issues

177. The Tribunal now turns to the Specific Issues raised by Telemedia in this arbitration. Its claims are set out in paragraph 105 above.

178. First, however, there is a threshold issue which the Tribunal must resolve in connection with its jurisdiction to deal with certain of the claims.

Arbitrability of claims?

179. There are two issues for the Tribunal to determine as regards the arbitrability of the claims, namely:

- (1) whether the Tribunal has jurisdiction to determine the claims relating to tax issues under the Accommodation Agreement; and
- (2) whether the claim relating to set off of payments due under the Loan Note falls within the arbitration clause contained in the Accommodation Agreement.

180. First, the Tribunal will deal with the tax issues. The Tribunal accepts that the enforcement of tax laws should be undertaken by the national courts of the jurisdiction in question⁹³. However, in upholding this general rule, the House of Lords in *Government of India v Taylor*⁹⁴ acknowledged that "there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognise some of the consequences of that law". Moreover, the authorities

⁹² Exhibit C-139-142

⁹³ Authority A-16: Dicey & Morris, *The Conflict of Laws* (14th Ed) pages 100-121

⁹⁴ Authority A-17: [1955] A.C. 491, p.505

reviewed by the Tribunal do not restrict the ability of the courts to determine contractual arrangements relating to the application of foreign revenue laws as opposed to the enforcement of the laws themselves. Similarly, the Tribunal's attention has been drawn to a number of cases in which arbitral tribunals have dealt with tax disputes in a contractual context⁹⁵. In the present case, the Tribunal is being asked to determine the disputes that have arisen as regards the application of the bespoke tax arrangements included in the Accommodation Agreement relating to the rate of Business Tax to be paid by Telemedia, its right to set off the Shortfall Amount against its tax liabilities and its entitlement to be exempted from import duties. The Tribunal concludes that these claims fall within its jurisdiction. The Tribunal notes that the Belize Supreme Court anticipated that the Tribunal would deal with the set-off claim (at least) when dealing with Telemedia's application for ancillary injunctive relief in that regard in June 2008⁹⁶.

181. Secondly, the Tribunal acknowledges that the Loan Note constitutes a separate contract which does not contain an arbitration agreement. Nevertheless, the issue in dispute relates to the ability of Telemedia to set off part of the Shortfall Amount against outstanding payments due under the Loan Note pursuant to the set-off provision contained in Clause 2.2 of the Second Amendment Deed. The Deed incorporates by reference the arbitration agreement contained in Section 15 of the Accommodation Agreement⁹⁷. The Tribunal therefore finds that it has jurisdiction to determine this claim too.

⁹⁵ Authorities A-18-24: *Engineering Company (Italy) v Engineering Company (Greece) and Greece* – Final award in cases nos. 6515 and 6516 of 1994; *Amco Asia Corporation v Republic of Indonesia* (1988) 27 ILM, pages 1283-1313; *T.C.S.B. Inc v Iran* (Case No. 140), 1984, Award No. 144-140-2; *Pan American Energy LLC (United States) and Ors v The Argentine Republic (Argentina)* ICSID Case No. ARB/03/13; *Owner of Company registered in Lebanon v Defendant African State* (not specified), Unpublished (Original in French), mentioned in Yearbook Commercial Arbitration, 1995, Vol. XX, pages 58-61; *Questech hc v The Ministry of National Defence of the Islamic Republic of Iran* Award in Case No. 59 (191-59-1) of 1985, mentioned in Yearbook Commercial Arbitration, 1986, Vol. XI, pages 283-287; *Alcoa Minerals of Jamaica Inc (USA) v Government of Jamaica*, *supra* note 77

⁹⁶ Exhibit C-245

⁹⁷ Exhibit C-3, Clause 7.1

Set-off claim

182. As described in paragraphs 36 and 37 above, Telemedia is entitled to receive the Shortfall Amount from the Government of Belize as compensation for the difference between AROR and MROR in the first two years of operation following the execution of the Accommodation Agreement (financial years 2006 and 2007). As an alternative to paying Telemedia direct, the Government agreed that Telemedia could set off the Shortfall Amount against its tax liabilities and any other amount owed by Telemedia to the Government. Telemedia has therefore taken steps to set off the Shortfall Amount against its Business Tax liabilities and sums outstanding under the Loan Note. The Government under the administration of Prime Minister Musa approved the set-off of BZ\$1,109,655.69 against Business Taxes due to be paid by Telemedia in October 2007, but the current Government has refused to recognise the set-offs included in Telemedia's monthly Business Tax returns since February 2008. The current Government has also disputed Telemedia's entitlement to set off part of the Shortfall Amount against sums outstanding under the Loan Note⁹⁸.
183. Telemedia's right of set-off was first established in Section 11.4 of the Original Accommodation Agreement, but this was expanded in the Second and Third Amendment Deeds. Clause 2.2 of the Second Amendment Deed is drafted in broad terms and affords Telemedia a right of set-off against *"any taxes or any other payments or obligations due and payable by [Telemedia] to the Government"*. This provision combined with the specific Business Tax set-off permitted under Clause 2.5 of the Third Amendment Deed entitles Telemedia to exercise its rights of set-off in the manner described in the previous paragraph. The Tribunal therefore finds that the government of Belize is in breach of its obligations under Section 11.4 of the Original Accommodation Agreement as amended.

⁹⁸ Exhibits C-139-142

Agreed Rate of Business Tax

184. As described in paragraphs 42 and 43 above, Telemedia has been entitled since 1 April 2008 to submit Business Tax returns applying the Agreed Rate. However, the Commissioner for Income Tax has issued Assessment Notices against Telemedia that do not correspond to the Agreed Rate. In addition, the current Government has raised the standard rate of Business Tax applicable to telecommunications companies from 19% to 24.5% of gross revenue as of 1 January 2009.
185. To the extent that the Government of Belize has not applied the Agreed Rate to Telemedia in respect of its Business Tax liabilities, the Tribunal finds that the Government is in breach of Section 11.3 (i)(f) of the Original Accommodation Agreement as amended by Clause 3.5 of the Second Amendment Deed and Clause 3.1 of the Third Amendment Deed.

Import Duty Exemption

186. As described in paragraphs 58 and 59 above, Section 11.3 (i)(g) of the Original Accommodation Agreement entitles Telemedia to an exemption from import duties in respect of goods imported for its own use. Exemptions were duly granted to Telemedia until May 2008, but the current Government has refused to exempt Telemedia from paying import duties purportedly because its Business Tax payments are in arrears. The Government has also raised an objection on the basis of the Customs and Excise Duties Act 2002, but that point has already been dealt with in paragraph 169 above. Therefore, given the finding that the Government's position in respect of Telemedia's Business Tax liabilities is unsustainable, the Tribunal concludes that the Government is in breach of Section 11.3 (i)(g) of the Original Accommodation Agreement.

Frequencies

187. As described in paragraphs 71 to 73 above, Telemedia has not been assigned the 2.496 – 2.69 Ghz frequency range for its sole use in accordance with Clause 8.1 of the Third Amendment Deed and has been told by the PUC that the frequency range is not available for it to use *"at this time"*. It is not clear from the evidence whether the frequency range has been assigned to a third party. In any event, the Tribunal finds that the government of Belize is in breach of its obligations under the Third Amendment Deed.

VoIP

188. As described in paragraph 68, the Government has not taken steps to restrict the extent to which VoIP services can be offered by third parties or to implement the CANTO guidelines in accordance with its obligations under Sections 6.1 and 11.3 (i)(a) of the Original Accommodation Agreement, Clause 4 of the Second Amendment Deed and Clause 8.2 of the Third Amendment Deed. The Tribunal therefore finds that the Government is in breach of its obligations under these provisions of the Accommodation Agreement.

D. Relief Sought

189. As set out in Section III.A above, Telemedia has sought relief in the form of declarations, orders and damages. No point of principle arises in respect of the declarations sought by Telemedia and the Tribunal considers Telemedia's claims to damages in the valuation section to follow. However, the Tribunal is concerned as to its power to grant certain of the orders sought by Telemedia to the extent that Telemedia is seeking specific performance against the Government of Belize, and the Tribunal deals with this issue below.
190. In Section 15.5 (iii) of the Accommodation Agreement, the Government consents to *"the giving of any relief"* in the context inter alia of these arbitration proceedings. Therefore, it is open to Telemedia to seek an order for specific

performance on the face of the Agreement alone. Nevertheless, given that this arbitration is taking place in London, the Arbitration Act 1996 (the "1996 Act") applies and the Tribunal's powers should be interpreted in line with its provisions.

191. Section 48 of the 1996 Act⁹⁹ deals with the Tribunal's power to order remedies as follows:

"48 Remedies

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.

(4) The tribunal may order the payment of a sum of money, in any currency.

(5) The tribunal has the same powers as the court—

(a) to order a party to do or refrain from doing anything;

(b) to order specific performance of a contract (other than a contract relating to land);

(c) to order the rectification, setting aside or cancellation of a deed or other document."

192. As Mr Gearing pointed out, Section 48 affords the parties freedom to agree the Tribunal's powers in respect of remedies. Section 48 also describes certain of the remedies that a Tribunal may award in the absence of any agreement between the parties to the contrary. As regards injunctive relief and orders for specific performance, Section 48(5) stipulates that the Tribunal has the same powers as the English court. Mr Gearing sought to argue that a broad agreement between the parties on remedies of the sort contained in Section 15.5 (iii) of the Original

⁹⁹ Authority A-43

Accommodation Agreement overrides any limitation on the Tribunal's power to order specific performance under Section 48(5) on account of the words "*Unless otherwise agreed by the parties...*" in Section 48(2). The Tribunal does not accept that submission. The Tribunal interprets the phrase in Section 48(2) as meaning that the Tribunal will have the powers specified in Section 48(3)-(5) unless the parties agree that it should not. The Tribunal therefore finds that the parties cannot agree to extend its power to order specific performance beyond the power exercisable by the English court.

193. The Belize Crown Proceedings Act¹⁰⁰ prohibits orders for specific performance being made against the Crown in civil proceedings and directs that declaratory relief should be ordered instead. Telemedia argues that this provision does not apply to arbitral tribunals as its remit is limited to civil proceedings in the Belize courts and that the Supreme Court of Belize in *Attorney General of Belize v Carlisle Holdings Limited*¹⁰¹ has curtailed the application of the provision in any event. Taking each argument in turn, the Tribunal finds it hard to accept that an arbitral tribunal sitting in London should have greater latitude than the courts in Belize to order specific performance against the Government of Belize. In addition, the *Carlisle Holdings* case concerned an application to restrain the Government of Belize from dealing with the (BTL) shares in dispute between the parties pending the outcome of LCIA arbitration proceedings in London. Therefore, although Conteh CJ in that case sought to limit the scope of the Belize Crown Proceedings Act, his comments should be read in the context of the interim relief being sought by Carlisle Holdings and his desire to hold the Government of Belize to the terms of the arbitration agreement reached between the parties. The case should not, in the Tribunal's view, be interpreted as undermining the overall thrust of Section 19 of the Belize Crown Proceedings Act that declaratory relief should be ordered against the Crown in preference to specific performance.

¹⁰⁰ Authority A-41, Section 19(1)(a)

¹⁰¹ Authority A-44; Claim No 15 of 2005

194. The same approach was endorsed by the Privy Council in *Gairy v Attorney General of Grenada*¹⁰². That case concerned the constitutional right of the applicant not to have his property compulsorily acquired without compensation and the Privy Council decided that the Constitution of Grenada gave the court "a broad power to give effective relief for any contravention of protected constitutional rights, where necessary by a new remedy". Nevertheless, Lord Bingham drew a distinction between "coercive" orders against a government minister in support of constitutional rights and "mandatory orders to which there attaches a sanction...for non-compliance". He continued:

"Such orders, regularly made against private individuals, are not made against ministers and public officials. There is no need. Experience shows that if such orders are made there is compliance, at any rate in the absence of most compelling reasons for non-compliance."

195. In short, Lord Bingham was advocating the use of declaratory relief in place of injunctions and orders of specific performance against government ministers, a point echoed (expressly) by Conteh CJ in the *Carlisle Holdings* case, who concluded that declarations have a similar mandatory effect in any event. The Tribunal therefore holds that it is more appropriate for it to order the declaratory relief sought by Telemedia against the Government of Belize in place of orders for specific performance, which is a discretionary remedy in any event.

VI. VALUATION

A. Damages

196. The claims for relief made by Telemedia are set out in Section III.A above.

¹⁰² Authority A35: [2001] UKPC 30

197. In connection with these requests for relief, Telemedia has submitted in evidence the Witness Statements and testimony from Mr. Boyce and the Expert Reports, as supplemented, of Mr. Macpherson discussed above.
198. Mr. Macpherson also testified as an expert witness before the Tribunal on 18 November 2008 and 14 January 2009. The Tribunal questioned him closely on the evidence relating to damages and found him to be a reliable witness.
199. In his Expert Report, as supplemented, and in his testimony before the Tribunal, Mr. Macpherson provided evidence as to (i) Shortfall Amounts, (ii) the right to set off Business Tax and Loan Note repayments payable by Telemedia against Shortfall Amounts owed to it, (iii) losses arising in respect of the difference in Business Tax levied from 1 April 2008, (iv) sums paid to the Government by way of Business Tax which allegedly should not have been paid, (v) loss of the use of sums paid to the Government by way of import duty, (vi) loss of profits as a result of the Government's alleged failure to ensure that no user or customer of a Class Licence holder is able to make use of VoIP services, (vii) loss of profits as an alleged consequence of Telemedia being unable to exploit the use of the frequencies that the Government allegedly failed to assign to Telemedia and (viii) all costs and expenses arising from legal proceedings.
200. In the Fourth (and final) Addendum to his Expert Report, Mr. Macpherson set out as follows his conclusion in respect of the position as at 27 February 2009.

Area of Claim	Para	Principal Amount BZ\$	Interest BZ\$	Total BZ\$	Total GB£
Shortfall Amounts	3.2	18,703,000	4,842,208	23,545,208	8,439,143
Less: Tax set-off applied	4.7	(24,884,456)	(2,569,186)	(27,453,642)	(9,840,015)
Less: Loan Note repayment set-off applied	4.7	(2,664,443)	(175,966)	(2,840,409)	(1,018,068)
Adjustments resulting from the change of Business Tax rate	5.3	9,242,441	555,438	9,797,879	3,511,785
Sums paid to the Government by way of Business Tax which should not have been paid	6.4	15,669,954	1,184,173	16,854,127	6,040,906
Loss of the use of the sums paid to the Government by way of import duty	7.4	866,499	46,282	912,781	327,162
Loss of profits as a result of the Government's failure to ensure that no user or customer of a Class License holder is able to make use of VoIP services	8.7	4,108,395	588,291	4,696,686	1,683,400
Loss of profits as a consequence of Telemedia being unable to exploit the use of the frequencies that the government failed to assign to it		-	-	-	-
Costs and expenses arising from legal proceedings	10.2	1,833,937	-	1,833,937	657,325
Total loss		22,875,327	4,471,240	27,346,567	9,801,637

201. The Tribunal also questioned Mr. Macpherson closely as to whether any double-counting may have occurred in his calculations. The Tribunal is satisfied that no double-counting has occurred.
202. All computations the Tribunal will refer to in the remainder of this Award will be based upon the final figures Mr. Macpherson presented as at 27 February 2009.
203. In assessing damages, the Tribunal has generally employed the standard of "*the balance of probabilities*" in weighing the evidence presented. The Tribunal understood, however, that a different standard might apply to questions of proof of lost profits. The Tribunal sought information from the Claimant regarding the proper standard for proof of lost profits under Belize law.

204. Telemedia noted that, by virtue of the LCIA Rules Article 22.1(f), the Tribunal is not constrained to apply strict rules of evidence to proof of lost profits.

"Article 22

Additional Powers of the Tribunal

22.1 Unless the parties at any time agree otherwise in writing, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

(f) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Tribunal;"

205. The Tribunal considers, that the question before it is the standard for the burden of proof for the existence of lost profits, not the admissibility, relevance or weight of the evidence to which that burden will apply. In that regard, Telemedia asserts that the proper standard of proof is *"the balance of the probabilities"*¹⁰³.
206. The Tribunal questioned counsel at the oral hearings about whether English law, and, therefore, Belize law, imposed a higher burden of proof ("reasonable certainty") for lost profits in respect of damages than for breach of contract damages generally¹⁰⁴.
207. In response, counsel noted that English law traditionally draws a distinction between remoteness and heads of damages, as substantive law, and the measure or quantification of damages, which are procedural questions¹⁰⁵.

¹⁰³ Authority A-52: Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, (4th Ed.) at paragraph 6-67

¹⁰⁴ Transcript 15 January 2009, pp. 133 to 140

¹⁰⁵ Authority A-53: See Dicey, Morris and Collins on *The Conflict of Laws*, Vol. 1, para. 7-035 et seq. (14th ed. 2006) referring to *Boys v. Chaplin*, [1971] A.C. 356, 379.

208. "*Heads of damages*" includes the question as to what items of loss may be recovered. English substantive law would call for proof of "*heads of damages*" with as much certainty and particularity "... *as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done*"¹⁰⁶."
209. Quantification, on the other hand, as a procedural issue, would fall within the authority of the Tribunal under the LCIA Rules.
210. As Vaughan Williams, LJ, stated in *Chaplin v. Hicks*¹⁰⁷, "[the] fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages."
211. If, however, the Tribunal was minded to apply the English (and therefore Belize) substantive legal principle of "*reasonable certainty*" to quantification of lost profits, then the Claimant stressed that the evidence presented by Mr Boyce and Mr Macpherson satisfied that test in any event.
212. In *Biggin & Co. Ltd. v. Permanite Ltd.*¹⁰⁸, Devlin J. said, "Even if it can be said that the damage must be proved with reasonable certainty, the word 'reasonable' is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount."
213. The Tribunal concludes that, whether or not a "*balance of probabilities*" test or a "*reasonable certainty*" test is applied, Telemedia has demonstrated that it is losing profits as a consequence of the Government's breach of its obligations under the Accommodation Agreement with respect to VoIP. Therefore, the Tribunal is satisfied that Telemedia has established heads of damages with the requisite degree of certainty.

¹⁰⁶ *Ratcliffe v. Evans*, [1892], 2 Q.B. 524 CA, at 533 (Bowen, L.J.). See, generally, Authority A-54: McGregor on Damages, para. 8-001 et seq. (17th ed. 2003).

¹⁰⁷ [1911] 2 K.B. 786

¹⁰⁸ [1951] 2 KB 314

214. Moreover, Telemedia cannot be held to an unusually high standard of proof for quantification. It is the Government's conduct in breach of its freely-accepted contractual obligations, not Telemedia's conduct, that makes it difficult to calculate these lost profits with precision. It would be inequitable to hold Telemedia, the non-breaching party, responsible for the consequences created by the Government's breach.

Shortfall Amounts

215. Telemedia seeks damages for breach of contract for the 2006 and 2007 Shortfall Amounts, together with contractual interest thereon.

2006 Shortfall Amount

216. As explained in Mr. Boyce's Witness Statements and in Mr. Macpherson's Expert Report (as supplemented), the Government guaranteed under Section 11.4 of the Accommodation Agreement a MROR on capital invested in BTL of 15%. If the AROR was less than the 15% MROR, the Original Accommodation Agreement required the Government to make up the shortfall through the payment of Shortfall Amounts. The formula set out in Schedule 2 to the Original Accommodation Agreement is principally as follows:

$$\text{AROR (\%)} = \frac{\text{Earnings after tax and interest received (but before deducting interest paid)}}{\text{Total shareholders' equity + long term debt}}$$

217. Based on BTL's audited consolidated financial statements, for the fiscal year ended 31 March 2006¹⁰⁹, Mr. Macpherson calculated that the AROR for 2006 was 12.3%, resulting in a 2006 Shortfall Amount of BZ \$7,075,000. PKF Accountants

¹⁰⁹ Exhibit C-42

and Business Advisers audited those statements. That amount was confirmed by the Government in Clause 2.1 of the Second Amendment Deed.

218. Section 11.4 of the Accommodation Agreement defines the "*Deadline Date*" for payment in full of the Shortfall Amount as "*no later than 3 months following the Delivery Date [the date of submission of that year's calculation by means of a Capital Rate of Return Statement].*" For 2006, the Delivery Date was 18 September 2006. The Deadline Date for full payment of the 2006 Shortfall Amount was thus 18 December 2006.
219. Section 11.4 further provides that interest will accrue on the unpaid portion of any Shortfall Amount at the base rate quoted by The Belize Bank Limited plus 1½ % per annum.
220. The base rate of The Belize Bank Limited has remained unchanged at 14½% per annum from the 2006 Deadline Date (18 December 2006) to the date of this Award. Accordingly, the interest rate set by Section 11.4 is 16% per annum simple interest. According to Mr. Macpherson's calculations, accrued and unpaid interest on the 2006 Shortfall Amount from 18 December 2006 until 27 February 2009 was BZ\$2,487,299.
221. Excluding any set-off for Business Tax and for amounts due under the Loan Note, which are discussed below, the total owing by the Government on account of the 2006 Shortfall Amount plus interest to 27 February 2009 was, according to Mr. Macpherson, BZ \$9,562,299.
222. The Government has not paid any portion of the 2006 Shortfall Amount or interest thereon.
223. Subject to the set-offs for Business Tax and amounts due under the Loan Note the Tribunal is satisfied that Telemedia has shown damages for failure by the Government to pay the 2006 Shortfall Amount in the amount of BZ \$9,562,299,

comprising a Shortfall Amount of BZ \$7,075,000 plus interest to 27 February 2009 of BZ \$2,487,299.

2007 Shortfall Amount

224. Mr. Macpherson again calculated the Shortfall Amount for 2007 based upon BTL's audited consolidated financial statements. PKF Accountants and Business Advisers again served as auditors for those financial statements¹¹⁰. The 2007 fiscal year ended on 31 March 2007. The AROR for 2007 was 11.2%, resulting in a Shortfall Amount from the 15% MROR of BZ \$11,628,000. BTL submitted its Capital Rate of Return Statement on 23 August 2007, and thus the Deadline Date for payment by the Government of the 2007 Shortfall Amount was 23 November 2007.
225. Based on Section 11.4 of the Accommodation Agreement, Mr. Macpherson calculated 16% per annum simple interest on the unpaid 2007 Shortfall Amount, again to 27 February 2009, at BZ \$2,354,909.
226. Excluding any set-off for Business Tax and for amounts due under the Loan Note, which are discussed below, the total owing by the Government on account of the 2007 Shortfall Amount plus interest to 27 February 2009 was thus BZ \$13,982,909, according to Mr. Macpherson.
227. The Government has not paid any portion of the 2007 Shortfall Amount or interest thereon. Subject to the set-offs for Business Tax and amounts due under the Loan Note the Tribunal is satisfied Telemedia has shown damages for failure by the Government to pay the 2007 Shortfall Amount under the Accommodation Agreement in the amount of BZ \$13,982,909, comprising a Shortfall Amount of BZ \$11,628,000 plus interest to 27 February 2009 of BZ \$2,354,909.

¹¹⁰ Exhibit C-43

No 2008 Shortfall Amount

228. Telemedia calculated the Shortfall Amount for 2008, based upon Telemedia's consolidated financial statements, again audited by PKF Accountants and Business Advisers. Telemedia, as noted above, succeeded to BTL's position under the Accommodation Agreement on 29 May 2007. Telemedia's 2008 fiscal year ended 31 March 2008.
229. By letter dated 30 September 2008¹¹¹, Telemedia advised the Government that it was not claiming a Shortfall Amount for 2008, subject to a reservation *"to the extent that any retrospective charges are levied in connection with matters relating to the financial year ended 31 March 2008, thereby subsequently necessitating a claim for a Shortfall Amount in respect of that period."*
230. Telemedia has not sought recovery of a 2008 Shortfall Amount in these proceedings.

Shortfall Amount Conclusion

231. Therefore, subject to Business Tax and Loan Note set-offs applied to these Shortfall Amounts, Telemedia is entitled to an aggregate Shortfall Amount of BZ \$18,703,000 plus interest as at February 27, 2009 of BZ \$4,842,208 totalling BZ \$23,545,208.

Set-Off of Business Tax and Loan Note Repayments

232. Mr. Macpherson then turned in his Expert Report to Clause 2.2 of the Second Amendment Deed. That clause provides *"in the event that payment of the Shortfall Amount has not been made in accordance with the Original [Accommodation] Agreement then such unpaid amount may be set off by BTL against the amount of any taxes or any other payments or obligations due and payable by BTL to the Government."*

¹¹¹ Exhibit C-112

233. As explained previously, Telemedia succeeded to the rights and obligations of BTL under the Accommodation Agreement by operation of the Vesting Act and the Third Amendment Deed.
234. The Third Amendment Deed specifically referenced set-off of a BZ \$4,000,000 tax liability against unpaid Shortfall Amounts, calculated from a final tax assessment for the period ended 31 March 2005.
235. In Clause 2.5 of the Third Amendment Deed, the parties specified a "Balance Amount" of BZ \$14,703,000, representing the unpaid 2006 and 2007 Shortfall Amounts after giving effect to the set-off of that BZ \$4,000,000 tax liability.
236. Therefore, the sum of BZ\$4,731,178, comprising the BZ\$4,000,000 tax set-off from the Third Amendment Deed plus interest accruing thereon to cancel out the comparable interest accruing on the Shortfall Amounts, must be deducted from the Shortfall Amounts in calculating the sum due to Telemedia under this Final Award.

The Loan Note

237. As discussed above, the Government transferred to BTL a number of properties pursuant to Schedule 1 of the Original Accommodation Agreement. One of those properties (the San Ignacio property) became the object of a substitution contemplated in the First Amendment Deed. BTL paid for those properties by means of a Loan Note of BZ \$19,200,000, as provided for in Section 5.4 of the Original Accommodation Agreement.
238. As noted previously, the Tribunal has found that Telemedia is entitled to set off sums due under the Loan Note against Business Tax owed by Telemedia.
239. For the purposes of his Expert Report as supplemented, Mr. Macpherson has calculated set-off sums on the basis of Telemedia's position before this Tribunal.

240. The Loan Note provides for principal to be paid in 28 quarterly instalments from 30 June 2006 to 31 March 2013, plus interest at 6.188% per annum. Telemedia sought to exercise set-off rights for quarterly payments due on 30 June 2008, 30 September 2008 and 30 December 2008.
241. Mr. Macpherson calculated the value of Loan Note payments against which Telemedia has, as at 27 February 2009, sought to exercise a set-off as follows.

Quarter ended	Outstanding Principal	Repayment		
		Amount BZ\$	Principal BZ\$	Interest BZ\$
30 June 2008	13,714,288	685,714	211,579	897,293
30 September 2008	13,028,574	685,714	203,209	888,923
31 December 2008	12,342,860	685,714	192,513	878,227
		2,057,142	607,301	2,664,443

242. The Tribunal has concluded that Telemedia is entitled to set off unpaid Shortfall Amounts and unpaid interest thereon under the Accommodation Agreement against Business Tax and Loan Note Repayments provided that such set-off rights are not exercised in a manner to produce double recovery on account of unpaid Shortfall Amounts and interest accruing thereon through enforcement of this Award and the set-off of sums for which compensation is also hereby awarded. The Tribunal is also satisfied that the set-off rights on account of Business Tax extend to Telemedia's consolidated subsidiaries, including BESL and Digicell.
243. Telemedia seeks to set off the sum of BZ \$2,664,443, comprising the three principal instalments due under the Loan Note referred to above plus interest of BZ \$607,301 accrued thereon under the Loan Note, against unpaid Shortfall Amounts. Therefore, in light of the Tribunal's conclusion that Telemedia is entitled to effect that set-off, the specified sum, plus interest accruing thereon to cancel out the comparable interest accruing on the Shortfall Amounts, must be deducted from the Shortfall Amounts in calculating the sum due to Telemedia under their Final Award.

Net Shortfall Amounts owing to Telemedia

244. In view of the foregoing, the Tribunal holds that a net Shortfall Amount of BZ \$15,973,621, including interest and after giving effect to set-offs for Business Tax and Loan Note payments, is due to Telemedia pursuant to the Accommodation Agreement. That sum is calculated on the following basis:

	Principal Amount	Interest	Total	Total
	BZ\$	BZ\$	BZ\$	GB£
Shortfall Amounts	18,703,000	4,842,208	23,545,208	8,439,143
Less: Tax set-off specifically referred to in the Third Amendment Deed	(4,000,000)	(731,178)	(4,731,178)	(1,695,763)
Less: Loan Note repayment set-off	(2,664,443)	(175,966)	(2,840,409)	(1,018,068)
Total	12,038,557	3,935,064	15,973,621	5,725,312

Right to Future Business Tax Set-offs

245. Clause 2.5 of the Third Amendment Deed provides as well that *"Telemedia shall be entitled with effect from 1 February 2008, and at its sole discretion, to set off the Balance Amount against monthly-based tax liabilities including, but not limited to, Business Tax as they fall due and owing until the Balance Amount has been extinguished."*
246. In light of these provisions, Mr. Macpherson calculated in his Expert Report, as supplemented to 27 February 2009, the balance of unpaid Shortfall Amounts if the monthly Business Tax were set off against the Balance Amount (i.e., the 2006 and 2007 Shortfall Amounts). His calculations excluded any reduction in the rate of Business Tax by operation of Clause 11.3(i)(f) of the Original Accommodation Agreement as amended by Clause 3.5 of the Second Amendment Deed, which he dealt with separately (and which the Tribunal discusses below).

247. In Belize, a Business Tax Return must be submitted by the 15th day of each month (or, if not a business day, the next succeeding day that is a business day). The Return covers the previous calendar month and sets out the Business Tax due for that month based on a percentage of the taxpayer's revenue. The calculated Business Tax is due and payable on the same day the Business Tax Return is required to be submitted¹¹².
248. Between 1 February 2008 and 27 February 2009, Telemedia and its subsidiaries submitted thirteen monthly Business Tax Returns. In each of those Returns, Telemedia has sought to exercise its set-off rights under the Second and Third Amendment Deeds against unpaid Shortfall Amounts.
249. The Government has, however, rejected any application of Telemedia's set-offs. Telemedia has therefore paid the Business Tax subject to protest on the basis of its set-off claim. Telemedia does not seek double recovery for full Shortfall Amounts plus set-offs. Instead, Telemedia seeks damages based on the Shortfall Amounts and a declaration that its set-off rights are properly exercised.
250. Mr. Macpherson calculated the following Business Tax sums and due dates, in each case after cross-checking amounts in each of the thirteen Business Tax Returns¹¹³ against supporting tax calculation schedules.

¹¹² Macpherson, Expert Report para. 4.4

¹¹³ Exhibits C-12-14, C-17, C-54, C-63, C-69, C-73, C-122, C-131, C-134, C-230, C-233. These returns are appended to Mr MacPherson's Expert Report and supplements thereto

Date	Calendar Month	Telemedia	BESL	Digicell	Total
		BZS	BZS	BZS	BZS
15/02/2008	January 2008	919,738	911,583	431,314	1,442,635
17/03/2008	February 2008	1,008,047	115,777	674,568	1,798,392
15/04/2008	March 2008	994,311	93,890	601,596	1,689,797
15/05/2008	April 2008	981,499	85,768	615,280	1,682,547
16/06/2008	May 2008	872,139	94,727	575,420	1,542,286
15/07/2008	June 2008	923,497	92,509	597,440	1,613,446
15/08/2008	July 2008	857,700	96,269	587,153	1,541,122
15/09/2008	August 2008	827,486	88,160	536,166	1,451,812
15/10/2008	September 2008	826,967	93,708	527,092	1,447,767
15/11/2008	October 2008	920,099	76,351	433,501	1,429,951
15/12/2008	November 2008	840,899	79,766	480,373	1,401,048
15/01/2009	December 2008 (estimate)	759,626	89,907	547,243	1,396,776
15/01/2009	December 2009	820,489	100,082	547,743	1,468,314
16/02/2009	January 2009	983,266	83,328	726,657	1,793,251
	Total due	<u>11,776,137</u>	<u>1,191,928</u>	<u>7,334,303</u>	<u>20,302,368</u>

251. Mr. Macpherson then adjusted underpayment of Business Tax in the amount of BZ \$582,088 for the period 1 April to 31 December 2007, as per a 9 May 2008 letter from Telemedia to the Government¹¹⁴.
252. The Tribunal concludes that Telemedia is entitled to a declaration that it and its subsidiaries, Digicell and BESL are entitled pursuant to the Accommodation Agreement to set off Shortfall Amounts and contractual interest accruing thereon as they fall due against Business Tax and/or such other payments or obligations

¹¹⁴ Exhibit C-55

due and payable by Telemedia to the Government (including sums under the Loan Note).

Difference in Business Tax Rate

253. Telemedia further seeks damages in respect of the difference in the Business Tax levied from 1 April 2008 on Telemedia and its consolidated subsidiaries and the Business Tax that would have been due from 1 April 2008 if the Agreed Rate specified in Section 11.3 (i)(f) of the Original Accommodation Agreement, as amended by Clause 3.5 of the Second Amendment Deed, had instead been applied.
254. The effect of this Agreed Rate is to set a ceiling on Telemedia's Business Tax, from and after 1 April 2008, equal to the amount that would be assessed for Income Tax at a 25% rate.
255. The Business Tax in Belize is payable monthly on a company's receipts without deduction. According to Telemedia, the rate applicable to BTL's telecommunications revenues, comprising more than 50% of BTL's total receipts, was 19%. Other revenue streams were taxed at lower rates, including property rental income at 3% and income from the sale of telecommunication equipment at 1.75%.
256. Under Belize tax law, Business Tax is treated as an advance payment of Corporate Income Tax for that year, which is charged at 25% of chargeable profits. Chargeable profits are, of course, calculated as receipts minus expenses, with a variety of adjustments. Business Tax is deducted from the final Corporate Income Tax payable for the applicable year.
257. Historically, the Business Tax amount for BTL and Telemedia has been higher than the Corporate Income Tax. In Section 11.3 (i)(f) of the Accommodation Agreement, BTL sought a reduction in Business Tax so that the Business Tax amount payable would not exceed the Corporate Income Tax amount payable.

258. The Tribunal has held that the ceiling set by Section 11.3 (i)(f) is binding and enforceable in accordance with its terms.

259. Mr. Macpherson reviewed adjusted Business Tax Returns submitted by Telemedia and its subsidiaries for the ten months following the effective date of 1 April 2008 established by Section 11.3 (i)(f). His adjustments seek to implement the Agreed Rate by reducing the amount of Business Tax payable to be equivalent to 25% of the chargeable profits of Telemedia and its subsidiaries in the respective months.

260. Mr. Macpherson then calculated the adjustments resulting from the change in Business Tax at the Agreed Rate, as follows:

Date	Description	Principal Amount	No of Days	Interest at 16%	Total
		BZS		BZS	BZS
15/05/2008	April 2008	760,904	288	96,062	856,966
16/06/2008	May 2008	759,357	256	85,214	844,571
15/07/2008	June 2008	782,409	227	77,855	860,264
15/08/2008	July 2008	993,746	196	85,381	1,079,127
15/09/2008	August 2008	891,988	165	64,516	956,504
15/10/2008	September 2008	888,993	135	52,609	941,602
17/11/2008	October 2008	804,603	102	35,976	840,579
15/12/2008	November 2008	966,338	74	31,346	997,684
15/01/2009	December 2008	1,064,684	43	20,069	1,084,753
16/02/2009	January 2009	1,329,419	11	6,410	1,335,829
Total tax adjustments		9,242,441		555,438	9,797,879

261. As the Tribunal has already noted, the Government has failed to recognize Telemedia's alleged right to set off Business Tax against unpaid Shortfall Amounts. Accordingly, Telemedia has been required to make Business Tax payments without regard to the asserted set-offs, together with amounts for penalties and interest resulting from late payment.

262. Accordingly Telemedia is entitled pursuant to the Accommodation Agreement to apply the Agreed Rate to its Business Tax liabilities.

263. The Tribunal therefore finds that Telemedia is entitled to damages of BZ \$9,797,879, being the difference in Business Tax actually paid by Telemedia to the Government from and after 1 April 2008 and the amount of Business Tax that should have been payable to the Government on account of Business Tax if tax had been charged at the Agreed Rate, plus simple interest on such sums at the rate of 15% per annum discussed below.
264. The Government further assessed penalties and interest for Telemedia's efforts to assert its set-off rights, in the amount of BZ \$1,737,777 to 27 February 2009.
265. In addition, Telemedia is entitled to be compensated for the use by the Government of the sums wrongly paid to the Government on account of Business Tax improperly assessed and interest, penalties and fees related thereto. That sum is BZ\$1,119,600, calculated on the basis of 15% simple interest from the date of the payment to 27 February 2009, as follows:

Date	Description of Tax-Related Payment	Principal Amount	No of Days	Interest at 15%
		BZ\$		BZ\$
13/05/2008	Without prejudice payment on account	1,500,000	290	178,767
04/07/2008	Payment of first instalment in relation to February and March 2008 tax assessment	2,360,559	238	230,882
09/07/2008	Payment of second instalment in relation to February and March 2008 tax assessment	2,303,692	233	220,586
05/08/2008	Payment in relation to May 2008 tax assessment	2,200,027	206	186,249
24/10/2008	Tax payment in relation to June and July 2008 Business Tax assessments referred to in my first addendum report	4,152,107	126	215,000
12/11/2008	Further tax payment in relation to August 2008 Business Tax assessment	2,042,059	105	88,116
Total Interest				<u>1,119,600</u>

266. For the purposes of a reasonable rate of interest, Mr. Macpherson has employed for these and other heads of damages a rate of 15% per annum simple interest. That rate represents in Mr. Macpherson's view compliance with the provision in the Accommodation Agreement guaranteeing that all capital reinvested in Telemedia's business is entitled to a 15% MROR.
267. Pursuant to Sections 49(3) and (4) of the 1996 Act and Article 26.6 of the LCIA Arbitration Rules, the Tribunal is entitled to set interest at such rate as it considers appropriate. The Tribunal concludes that, in light of the 15% MROR established by the Accommodation Agreement, simple interest of 15% per annum is a

reasonable interest rate in the circumstances. That 15% rate is, of course, lower than the 16% current rate for interest on Shortfall Amounts called for by the Accommodation Agreement.

268. For the avoidance of doubt, the Tribunal notes that awarding damages on account of these breaches of the obligation in the Accommodation Agreement, to permit set-off of Business Tax and other obligations and to charge Business Tax at the Agreed Rate, does not result in double recovery. The amounts awarded by the Tribunal as damages for the Government's failure to pay Shortfall Amounts do not (just like the Government's conduct) take account of Telemedia's asserted Business Tax set-off.

Overpayment of General Sale Taxes

269. In addition, Telemedia claimed a General Sales Tax (GST) refund of BZ \$1,308,304 on account of April 2008. The Government has asserted that the correct refund amount due is instead BZ \$838,326. The Government has further stated that this amount is being offset against Business Tax obligations of Telemedia that the Government considers to still be due, owing and unpaid notwithstanding the terms of the Accommodation Agreement.
270. The Government has asserted an off-set of this refund amount against sums it claims Telemedia owes (which Telemedia denies). Telemedia has therefore been denied the benefit of that refund. Telemedia seeks the benefit of this refund of General Sales Tax plus a reasonable rate of interest on the refund amount (which Telemedia again considers to be 15% simple interest).
271. For purposes of calculating this aspect of Telemedia's damages claim, Mr. Macpherson has without prejudice employed the lower refund amount of BZ \$838,326 claimed by the Government, rather than the higher sum of BZ \$1,308,304 claimed by Telemedia.

272. On this basis, Mr. Macpherson calculated Telemedia's loss on account of the failure of the Government to refund General Sales Tax to 27 February 2009, including again 15% simple interest per annum, as BZ \$1,176,083, as follows:

Date	Description	Principal Amount	No. of days	Interest at 15%	Total
		BZ\$		BZ\$	BZ\$
02/10/2008	General Sales Tax refund due	838,326	148	50,989	889,315
29/10/2008	Further General Sales Tax refund due	273,184	121	13,584	286,768
	Total due	<u>1,111,510</u>		<u>64,573</u>	<u>1,176,083</u>

Loss of Use of Sums Paid by Way of Import Duty

273. Telemedia seeks damages for payments the Government has required it to make by way of import duty in order to have its imported goods released, again with 15% simple interest thereon.
274. Section 11.3 (i)(g) of the Accommodation Agreement provides that *"BTL and its subsidiaries shall be exempt from any tax, duty, levy or import upon goods, materials, equipment and machinery of every type or description imported for their own use..."* with an exclusion for goods imported with a view towards prompt resale in the normal course of business.
275. The Government has, however, failed to grant Telemedia's requests for import duty exemptions on goods since 27 May 2008. Telemedia has, accordingly, made payments under protest in respect of import duty. Those payments total BZ \$866,499 to 27 February 2009, as verified by Mr. Macpherson.
276. To that sum, Mr. Macpherson has again applied a 15% interest rate, from the date of protested payment until 27 February 2009 as a measure of the loss of the use of such funds. He therefore calculated an interest sum of BZ \$46,282.

277. The resulting total loss calculated by Mr. Macpherson for the sums allegedly improperly paid to the Government by way of import tax, together with interest to 27 February 2009 is BZ \$912,781.
278. The Tribunal concludes that Telemedia has demonstrated that it incurred damages on account of the Government's breach of its obligation under the Accommodation Agreement to exempt imports from import duty, including simple interest at 15% per annum to 27 February 2009 of BZ \$912,781.

Loss of Profits from Governments' Failure to Fulfil VoIP Commitments under Accommodation Agreement

279. VoIP calls are substantially less expensive calls compared to Public Switched Telephone Network (PSTN) calls over a network of the type operated by Telemedia and most major telecommunications carriers. Although VoIP has a lower quality of service than PSTN calls, nevertheless according to Mr. Boyce and Mr. Macpherson the availability of VoIP in contravention of the Government's commitments under the Accommodation Agreement has diverted users from Telemedia to VoIP providers, resulting in lost revenues for Telemedia. Telemedia therefore seeks lost profits damages on account of this breach.
280. As discussed above, the Tribunal has concluded that the Government did in fact breach its obligations with respect to VoIP under the Accommodation Agreement.
281. To determine the impact of VoIP availability on Telemedia, Mr. Macpherson has presented the Tribunal with what he refers to as a "top down" analysis of the VoIP lost profits (Method 2) and, by way of a check, with a "bottom up" analysis (Method 1) also.
282. The "top down" estimate of lost cash flow assumed that subscribers with broadband lines will substitute their PSTN international calls with VoIP calls to a specified extent.

283. The "*bottom up*" assessment compared Telemedia's PSTN international traffic against the trend line growth rate before VoIP traffic was present. Telemedia had noticeable success in blocking VoIP during 2006 and 2007. By reviewing Telemedia's international traffic, adjusted for subscriber growth, Mr. Macpherson estimated a shortfall against trend line growth thereafter in this international traffic. In the absence of other explanations, he attributed that shortfall after 2007 against the trend line to VoIP competition.
284. Mr. Macpherson relied upon the "*top down*" method because, among other matters, (i) it takes account of both inbound and outbound international minutes not accounted for in the "*bottom up*" method and (ii) it can account for traffic utilizing Skype and similar systems. The "*bottom up*" method estimates losses in outgoing international calls only, not any loss in incoming international connections.
285. The "*top down*" method, though, potentially understates lost VoIP profits, as it does not account for multiple VoIP users of a single broadband line – for example, workplace and internet café computers.
286. According to Mr. Boyce and Mr. Macpherson, losses attributable to VoIP competition prior to 1 April 2007 have resulted in reductions in AROR for fiscal years ended in 2006 and 2007. Consequently, the Shortfall Amounts for those years, up to the MROR of 15%, will compensate for VoIP-attributable losses with respect to that period.
287. However, Telemedia has not claimed a Shortfall Amount for the fiscal year ended 31 March 2008 or thereafter. In each case, therefore, Mr. Macpherson made his calculations of lost profits for the period from 1 April 2007 to 30 September 2008.
288. He further assumed that losses attributable to improper VoIP competition for each month subsequent to September 2008 would continue to accrue at the same even rate.

289. Both methods estimate only lost international traffic, not any lost domestic traffic. Mr. Macpherson considered lost domestic traffic to be "*small relative to the potential loss of international traffic, due to the low penetration of broadband users in Belize*" and the lower cost of domestic calls over the Telemedia network compared with international calls.
290. In addition, both the "*bottom up*" and the "*top down*" methods measure historical losses up to 27 February 2009 and do not predict future losses after that date.
291. It is plain that neither analysis can claim to provide an exact assessment of the loss suffered and likely to be suffered; no analysis of non-existent profits can do this nor could it be expected to do so.
292. All that can be expected is that damage is proved to have been suffered – which the Tribunal accepts – and that the expert who has attempted to assess the extent of that damage has done so honestly and with the appropriate professional skill and care. The Tribunal is satisfied that Mr. Macpherson has carried out his task in this way and has done his best to assist the Tribunal in assessing the amount of damages to be awarded by way of compensation for the loss which has undoubtedly been suffered by the Claimant.
293. The Tribunal notes that the Government has chosen not to participate in this arbitration. Accordingly, the Tribunal has not been presented with any evidence in rebuttal to Mr Macpherson's evidence.
294. After careful consideration the Tribunal has decided to adopt the "*top down*" approach (Method 2), which is the approach favoured by Mr. Macpherson.
295. For the purposes of the "*top down*" calculation, Mr. Macpherson employed the following assumptions, to calculate the average revenue for each customer making international PSTN calls.

Broadband customer type	Number of lines (Sept 2008)	Eligible customer For VoIP – overlap Between broadband Customers and those Making int'l calls	Effective VoIP lines (75% of Eligible)	Comment
Telemedia DSL lines	7,601	100%	75%	All DSL customers will have Telemedia fixed line. High cost of Int'l calls and high cost of broadband indicates common customer segment.
Fixed-Wireless providers	4,864	50%	37.5%	Customers do not necessarily have a Telemedia fixed line and have a choice of mobile from Speednet and Telemedia.
Others – e.g. CaTV	3,139	50%	37.5%	
Speednet	1,081	50%	37.5%	Customers do not necessarily have a Telemedia fixed line and are more likely to select Speednet for mobile.
Direct Satellite broadband links	1,000	50%	37.5%	Customers do not necessarily have a Telemedia fixed line and have a choice of mobile from Speednet and Telemedia.

296. Mr. Macpherson then calculated average revenue per user ("ARPU") for all Telemedia customers making and receiving international calls between August 2006 and March 2007, the period for which Telemedia's VoIP blocking was most effective. He estimated Outgoing International ARPU per customer as BZ \$19.31.

297. For Incoming International ARPU, Mr. Macpherson assumed that 50% of incoming international calls to effective VoIP lines are actually terminated on that VoIP service, with the remaining 50% terminating on the regular PSTN service. All incoming international calls are routed onto Telemedia's network, and thus

Telemedia collects termination rates for those connections from other originating international carriers.

298. Mr. Macpherson therefore then divided Telemedia's incoming international revenues, BZ \$1,340,000 per month, by the population of telephony subscribers in Belize.
299. On this basis, the lost revenue to Telemedia would be BZ \$22.96 per month per customer.
300. Turning to broadband lines, Mr. Macpherson then estimated average broadband lines per customer type, extrapolating growth rates for other carriers using Telemedia growth rates.

Broadband Customer type	Number of lines (March 2007)	Number of lines (March 2008)	Number of lines (Sept 2008) extrapolatioin	Average March 07 to September 08
Telemedia DSL	6,484	7,534	7,601	7,043(e)
Fixed-Wireless providers	3,874(e)	4,500	4,864(e)	4,369(e)
Others – e.g. CaTV	2,722(e)	3,000	3,139(e)	2,930(e)
Speednet	861(e)	1,000	1,081(e)	971(e)
Direct Satellite Broadband	1,000(e)	1,000	1,000(e)	1,000(e)

301. The lost revenue resulting for VoIP would, under this computation, be the lost revenue for each broadband line.
302. Finally, Mr. Macpherson reduced revenues to reflect international carriers carrying outgoing Telemedia international calls to the end user. Mr. Macpherson calculated the deduction based on an average termination fee of BZ \$0.108 for each minute of lost calls.

303. He applied this termination rate to a share of the total outbound international traffic based on the proportionate share of total outbound international revenue attributable to his calculated incremental outbound revenue, resulting in 34,372,331 incremental minutes between April 2007 and September 2008.
304. The Tribunal questioned Mr. Macpherson as to whether any other additional expenses should be deducted in this calculation. Mr. Macpherson testified that, apart from the termination rate payable to the international carrier connecting the call to the end user, there are no other variable (marginal) reductions in costs associated with Telemedia losing an international call to VoIP¹¹⁵.
305. Mr. Macpherson explained that, because the calculation related to additional minutes for an existing subscriber, *"they already have those subscribers in their network, so the additional costs associated with the subscriber making 110 calls as opposed to 100 calls, for example, there are really only those that can be associated directly with that additional ten calls. The only costs that are directly variable with those continue (sic) calls that I could identify are the costs that are paid to the other operators, overseas operators, for terminating those calls..."*
306. The Tribunal concludes that this explanation is correct. The only expenses that are properly deducted from the additional lost revenues are the expenses that would actually have been incurred to support the additional service, not expenses that would be incurred regardless of new calls. Therefore, it would not be proper to deduct average operating expenses from revenues to arrive at a lost profits amount.

¹¹⁵ Transcript 19 November 2008, pp. 146 to 149.

307. The results of Mr. Macpherson's "top down" calculations are as follows:

Average number of broadband lines between March 07 and September 08	75% * 7,043 37.5% * 4,369 37.5% * 2,930 37.5% * 971 37.5% * 1,000 8,757 effective VoIP broadband lines
Monthly ARPU for PSTN international calls (inbound and outbound)	Outbound: BZ\$19.31 Inbound: BZ\$3.65 Total: BZ\$22.96
PSTN international outbound revenues lost to VoIP between 1 April 07 and 30 September 08	18 months * BZ\$19.31 * 8,757 BZ\$3,043,758
Outpayments for incremental international Outbound PSTN revenues	Termination rate * outgoing international Minutes BZ\$0.108 * 3,739.135 minutes BZ\$403,826
Net PSTN international outbound cash flow Lost to VoIP between 1 April 07 and 30 September 08	BZ\$3,043,758 – BZ\$403,826 BZ\$2,639,931
PSTN international inbound cash flow lost To VoIP between 1 April 07 and 30 September 08	18 months * BZ\$3.65 * 8,757 BZ\$575,335
CASH FLOW IMPACT OF LOST PSTN REVENUES	BZ\$3,215,266

308. As that chart shows, lost net cash flow calculated on the basis of the "top down" method would be BZ\$3,215,266, accruing evenly over the 18-month period from 1 April 2007 to 30 September 2008.

309. On the basis that losses would continue to accrue after 30 September 2008 at the same even rate, Mr. Macpherson calculated that the losses would be BZ\$178,626 for each subsequent month.

310. To 27 February 2009, therefore, Mr. Macpherson calculated total "top down" losses in respect of the impact of VoIP as BZ \$4,108,395, plus interest of BZ \$588,291 at 15% per annum, for total VoIP-related lost profits of BZ \$4,696,686.

311. Mr. Macpherson was asked generally if he was reasonably certain as to the numbers for his methods. He replied, *"I have taken different methods using the best empirical data I could find and tried to get the most reasonable estimates I can using the two methods, so I wouldn't describe that as a certainty. I think just given the informational difficulties with it, I think this is as good an estimate as I could produce"*¹¹⁶.
312. Accordingly, the Tribunal is also satisfied that Telemedia has demonstrated the amount of lost profits damages with the requisite degree of certainty required by English and Belize law.
313. The Tribunal therefore concludes that Telemedia is entitled to lost profits damages on account of breach by the Government of its VoIP obligations under the Accommodation Agreement in the amount of BZ \$4,696,686 including interest at 15% per annum of BZ \$588,291, to 27 February 2009.

Loss of Profits from Being Unable to Exploit Frequencies

314. Telemedia originally sought damages in its Statement of Case for Telemedia being unable to exploit the use of frequencies the Government had allegedly failed to assign to Telemedia in accordance with the Accommodation Agreement. Under the Accommodation Agreement, the Government was obligated to assign to Telemedia the sole use of the frequency spectrum 2.496 GhZ to 2.68 GhZ by 28 January 2008.
315. However, Telemedia is no longer pursuing damages for the failure to assign these frequencies to Telemedia by 28 January 2008.

Damages for Management Time

316. Telemedia sought in its Statement of Claim damages, losses and expenses attributable to the management time which officers and employees of Telemedia

¹¹⁶ Transcript 19 November 2008, p. 165, lines 13 to 19

have incurred in connection with the alleged breaches by the Government of the Accommodation Agreement and these arbitration proceedings.

317. However, Telemedia is no longer pursuing damages for disruption of its business.

B. Interest

318. The Tribunal has already addressed the accrual of interest on sums due to Telemedia from the date(s) of breach to 27 February 2009. For the period thereafter until the sums awarded to Telemedia in this Final Award are paid in full, the Tribunal holds that the Government is to pay interest on the unpaid amount of such sum at the rate of 15% or 16%, as the case may be, simple interest per annum as is applied to such sum in this Final Award for the period to 27 February 2009.

VII. COSTS

319. Telemedia has claimed legal costs and expenses on two bases: first, under the indemnity expressed in Section 13.1 of the Original Accommodation Agreement and secondly, as "*the costs of the arbitration*" under the LCIA Rules.¹¹⁷

320. The Tribunal will consider each of these bases of claim in turn.

A. Costs under the Indemnity

321. The claim for costs under the indemnity is for three sets of costs: first, the costs of proceedings before the English High Court; secondly, the costs of proceedings before the Belize Supreme Court and any subsequent appeal; and thirdly, the costs of the present arbitral proceedings.

322. Under Section 13.1 of the Original Accommodation Agreement, the Government agreed:

¹¹⁷ Updated Summary of Relief at para. 186.1

"to hold BTL ... harmless from and against all judgments, damages, losses, claims, liens, penalties, obligations, liabilities, settlements and expenses, including reasonable attorney's fees, arising out of –

- (a) any breach of any contractual provisions or covenant or any inaccurate or erroneous representations of the Government contained herein ...;*
- (b) any failure of the Government to perform or comply with any provision, obligation or duty contained in this Agreement and required to be performed or complied with by the Government; "*

323. The Tribunal has concluded that the Government breached a number of its obligations under the Accommodation Agreement, potentially triggering application of the contractual indemnity in Section 13.1 for *"reasonable attorney's fees"*.

324. However, unlike the English High Court or the Belize Supreme Court, before whom the Claimant appeared, this Tribunal is not well placed to determine whether the attorney's fees incurred by Telemidia in the judicial proceedings were reasonable in all the circumstances.

325. Under English law it is clear that a court has discretion in awarding costs, notwithstanding the terms of a contractual indemnity.

326. Civil Procedure Rules Part 44.3 provides in the relevant part:

"44.3

- (1) The court has discretion as to -*
 - (a) whether costs are payable by one party to another;*
 - (b) the amount of those costs; and*
 - (c) when they are to be paid.*
- (2) If the court decides to make an order about costs –*

- (a) *the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
- (b) *the court may make a different order.*

...

- (4) *In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –*
 - (a) *the conduct of all the parties;*
 - (b) *whether a party has succeeded on part of his case, even if he has not been wholly successful; and*
 - (c) *any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*
- (5) *The conduct of the parties includes –*
 - (a) *conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;*
 - (b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
 - (c) *the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
 - (d) *whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."*

327. It is clear from this that decisions about costs in judicial proceedings do not involve only the exercise of the court's discretion; they also require the court to review the particular circumstances of the judicial proceedings and the conduct of

the parties in those proceedings. This is not something this Tribunal can do, since it has no direct knowledge or experience of those proceedings.

328. Consequently, the Tribunal considers that requests for reimbursement of the claim before the English High Court, the claim before the Belize Supreme Court and any subsequent appeal and appearances, correspondence, objections and appeals in connection with Business Tax assessments are more properly addressed to the courts or other tribunals supervising those proceedings.
329. The Tribunal therefore declines to assess the reasonableness or otherwise of the legal costs incurred by the Claimant in those proceedings and makes no order in respect of them.

B. Costs of the Arbitration

330. By way of an alternative to the claim made under the indemnity, the Claimant seeks the "*costs of the arbitration in the sum of BZ\$ 3,244,383.82 (including interest ...*"¹¹⁸.

The Claimant's Submissions

331. In its "Schedule of Costs in the Arbitration to 27 February 2009" ("the Costs Schedule"), the Claimant submits that it is entitled to recover the costs incurred in this arbitration, under the LCIA Rules and under Section 61(1) of the English Arbitration Act, 1996. The Claimant states, in material part¹¹⁹:

"The costs incurred by Telemedia in relation to these proceedings are a foreseeable consequence of the Government's unlawful action. The Accommodation Agreement as amended operated between the parties for around two and a half years prior to a change in Government administration in February 2008. The new administration has made it clear that it does not intend to

¹¹⁸ Ibid.

¹¹⁹ See the Costs Schedule, at paras. 3.2 *et seq.*

*comply with the Accommodation Agreement as amended. On a Belizean radio station in April 2008 the Prime Minister said of the agreement "I don't care, I am not going to abide by such agreement".*¹²⁰

Prior to commencing these arbitration proceedings, Telemedia sought a resolution of this issues in the dispute with the Government. On 25 April 2008 Allen & Overy LLP wrote to the Government outlining the breaches of the Accommodation Agreement as amended seeking the remedy of those breaches. No response was received to that letter.

The Government then expended great efforts to circumvent the terms of the Accommodation Agreement as amended; namely breaching the terms of an English Court Injunction, issuing an arrest warrant for the Chairman of the Chief Executive of Telemedia and passing legislation in order to collect business tax from Telemedia when such tax had already been satisfied by way of Telemedia's contractual right of set-off.

Telemedia had no option in the circumstances but to commence these proceedings in order to preserve its contractual rights. These proceedings and the costs in relation thereto were a foreseeable consequence of the Government's conduct, and efforts on the part of the Claimant to seek resolution of the dispute without recourse to arbitration were unsuccessful. The Claimant submits that an award of costs in relation to its legal costs and the costs of the arbitration are necessary and appropriate to make Telemedia whole.

The Government has also failed to participate in these proceedings and narrow the issues in dispute, despite having numerous opportunities to do so. Additional costs have also been incurred by the Claimant in trying to anticipate and present to the Tribunal arguments which the Government of Belize might have made had they participated in the proceedings. As noted by Mr. Redfern on the second day of the hearing held on 14 and 15 January 2009 "it has not been easy absent the Government and you [counsel for the Claimant's] have tried very hard indeed to anticipate what the Government might have said if they had been here to

¹²⁰ See First Witness Statement of Dean Boyce, paragraph 7.5

deal with it¹²¹". For this reason the legal costs incurred by Telemedia are also proportionate and reasonably incurred.

Finally the Arbitral Tribunal has the power to award simple or compound interest on sums owing both pre- and post-Award pursuant to Section 49 of the Arbitration Act 1996 and/or Article 26.6 of the LCIA Rules. It is submitted that an award of compound interest is more appropriate in the circumstances and will more accurately reflect the loss caused to Telemedia by not having had the funds paid in costs at its disposal. An award of compound interest more accurately reflects the loss caused to Telemedia.¹²²

At Annex 3 Telemedia has calculated interest at 8% compounded monthly from the date that it paid its legal costs and the date on which it paid deposits to the LCIA in relation to the arbitration costs. The rate of interest is within the discretion of the Arbitral Tribunal. 8% is the rate applied to judgment debts in the High Court of England and Wales pursuant to section 17(1) of the Judgments Act, 1838 and the Judgment Debts (Rate of Interest) Order 1993 (CI 1993/564).

For the avoidance of doubt, post award interest is also claimed up until the date on which the Award is complied with in respect of the total sums awarded thereunder."

Discussion

332. This arbitration is being conducted under the LCIA Rules of Arbitration. These Rules contain the following provisions in respect of Costs:

"Article 28 – Arbitration and Legal Costs

- 28.1 *The costs of the arbitration (other than the legal or other costs incurred by the parties themselves) shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the Arbitral Tribunal and the LCIA for such arbitration costs.*
- 28.2 *The Arbitral Tribunal shall specify in the award the total amount of the costs of the arbitration as determined by the LCIA Court. Unless the parties*

¹²¹ Transcript 15 January 2009, p. 156, lines 14 to 22

¹²² *Sempri Metals Ltd v. Inland Revenue Commissioners* [2007] UKHL 34

agree otherwise in writing, the Arbitral Tribunal shall determine the proportions in which the parties shall bear all or part of such arbitration costs. If the Arbitral Tribunal has determined that all or any part of the arbitration costs shall be borne by a party other than a party which has already paid them to the LCIA, the latter party shall have the right to recover the appropriate amount from the former party.

28.3 *The Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing. The Arbitral Tribunal shall determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit.*

28.4 *Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order."*

333. The LCIA Rules distinguish between (i) the fees and expenses of the arbitrators and of the LCIA itself (which are called "*the costs of the arbitration*") and (ii) "*the legal or other costs*" incurred by the parties.

334. The "*costs of the arbitration*" are determined by the LCIA Court in accordance with its published Schedule of Costs. In this arbitration, the LCIA Court has fixed the total costs of the arbitration, pursuant to Article 28.1 of the LCIA Rules to be as follows:

Registration fee:	£1,500.00
Administrative charges:	£11,414.61
Tribunal's fees and expenses:	£144,994.93
Total costs of the arbitration:	£157,909.54

335. The "*legal and other costs*" of the Claimant (hereinafter "the legal costs") are considerable, as might be expected of such a complex dispute, with problems of constitutional law, arbitrability, enforceability and other matters to be considered, as well as issues of proof and of valuation. The legal costs, which include the fees and expenses of PriceWaterhouseCoopers LLP for forensic accounting services, amount to BZ \$ 2,785,937.99¹²³.
336. The justification for these costs has been given by the Claimant's lawyers in Annex 1 to their Costs Schedule. This gives a comprehensive description both of the work done and of the time spent by the legal and accountancy teams respectively.

Decision

337. In view of the importance and complexity of the issues involved in these proceedings, to which the Tribunal has already referred, the Tribunal has decided to award the Claimant the whole of the legal costs claimed, in the sum of BZ \$2,785,937.99.
338. The Tribunal has decided, however, that it would not be appropriate to award interest on these costs up to the date of this Award, as claimed by the Claimant. It is true, of course, that legal costs accumulate as an arbitration progresses; but the costs do not become due and payable by the adverse party until the arbitral tribunal so decides. In the present arbitration, the Tribunal's decision on costs forms part of this Award. In the Tribunal's judgment, it would be right that interest on the legal costs should only run from the date of the Award, when they will bear simple interest at the rate of 8% per annum until payment.
339. So far as the costs of the arbitration are concerned, these (as already stated) have been fixed by the LCIA Court in the sum of £157,909.54. The LCIA Court has

¹²³ Costs Schedule at page 5

accounted for these costs in pounds sterling and so the Tribunal's award in this respect is in pounds sterling.

340. The Claimant also paid for room hire and transcription services for the Hearings on 19 December 2008 and 14/15 January 2009 and these costs, again in sterling, which amount to £4,949.90¹²⁴, are added to the costs of the arbitration, making a total of £162,859.44. Once again, interest on this sum will only run from the date of this Award, when it will bear simple interest at the rate of 8% per annum until payment.

VIII. THE TRIBUNAL'S AWARD

341. For the reasons already set out in this Award, the Tribunal is not prepared to issue Orders for Injunctive Relief against the Respondent Government. However, the Tribunal now HEREBY GRANTS the following Declaratory Relief to the Claimant:

- (1) The Accommodation Agreement is binding on the Government and accordingly:
 - (i) The Assessment Notices, any Magistrate Court proceedings for the enforcement of the May judgment summonses and any further judgment summons should not have been issued.
- (2) Telemedia is entitled to set off payments due under the Loan Note against amounts due in Business Tax;
- (3) Telemedia and its subsidiaries, BTL Digicell Limited and Business Enterprises Systems Limited, are entitled pursuant to the terms of the Accommodation Agreement to elect to set off the Shortfall Amounts and the contractual interest accruing thereon as they fall due against Business

¹²⁴ Costs Schedule, Annex 2

Tax and/or such other payments or obligations due and payable by Telemedia to the Government;

- (4) Telemedia is entitled to apply the Agreed Rate to its Business Tax liabilities pursuant to the terms of the Accommodation Agreement;
- (5) Telemedia is entitled to an exemption from import duty on the terms set out at Section 11.3 (1)(g) of the Original Accommodation Agreement;
- (6) Telemedia is entitled, pursuant to the terms of the Accommodation Agreement, to the use of the frequencies 2.496 Ghz to 2.69 Ghz inclusive;
- (7) The Government has agreed to procure the following in respect of VOIP services:
 - (i) that no person including any holder of a Class Licence other than the current Individual Licence Holders, Telemedia and SpeedNet, has been or will be granted any authority, permit or licence in Belize to legally carry on, conduct, or provide telecommunications services in Belize involving or allowing the provision of or transport of VOIP services;
 - (ii) that no user or customer of a holder of a Class Licence is able to make use of VOIP services;
 - (iii) that a user or customer of an Individual Licence Holder is only able to make use of VOIP services with the written permission of the relevant Individual Licence Holder; and
 - (iv) that the CANTO guidelines are implemented in Belize.

- (8) Telemedia is entitled to implement the tariff changes detailed in Telemedia's communication to the Public Utilities Commission dated 10 August 2007, a copy of which is annexed to the Third Amendment Deed.

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

- (1) BZ \$15,973,621 as the amount of the outstanding net Shortfall Amount due to Telemedia including interest at 16% per annum to 27 February 2009 and after giving effect to set-offs for Business Tax and Loan Note payments;
- (2) BZ \$9,797,879 in respect of the Government's failure to apply the Agreed Rate of Business Tax including interest at 15% per annum to 27 February 2009;
- (3) BZ \$1,738,777 as compensation for penalties and interest wrongly applied by the Government to 27 February 2009 following Telemedia's efforts to assert its set-off rights;
- (4) BZ \$1,119,600 as compensation for loss of the use by Telemedia of the sums wrongly paid to the Government on account of Business tax, improperly assessed and interest, penalties and fees related thereto including interest at 15% per annum to 27 February 2009;
- (5) BZ \$1,176,083 in respect of the Government's failure to refund General Sales Tax including interest at 15% per annum to 27 February 2009;
- (6) BZ \$912,781 as compensation for sums wrongly paid to the Government by way of import duty including interest at 15% per annum to 27 February 2009;

- (7) BZ \$4,696,686 as compensation for lost profits caused by the Government's breach of its VoIP obligations including interest at 15% per annum to 27 February 2009; and
- (8) Simple interest on each of the above amounts from 27 February 2009 until payment in full, at the rate applied to such amount up to 27 February 2009.

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

- (1) BZ \$2,785,937.99 in respect of Telemidia's legal costs with simple interest on such amount accruing at the rate of 8% from the date of this Award until payment; and
- (2) £157,909.54 in respect of the costs of the arbitration plus £4,949.90 of additional hearing expenses, with simple interest on the total amount of £162,859.44 accruing at the rate of 8% from the date of this Award until payment.

344. All other claims are dismissed.

Signed

P. Hodges

Ms Paula Hodges

Mr Mark Kantor

Mr Mark Kantor

Alan Redfern

Mr Alan Redfern
(Chairman)

London, England the place of Arbitration, this *18th* day of *March* 2009.