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“Surgical” Nationalization and its Complications

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, December 30th, 2009

As a political slogan, re-Belizeanization was supposed to have a brief shelf life.

When the Government of Belize announced last August the “re-Belizeanization” of the tiny Central American country’s dominant telecommunications company, Belize Telemedia Limited, the government disavowed any intention to embark upon a broader programme of economic nationalization.

“It is not part of any pattern, part of no new philosophy,” Prime Minister Dean Barrow told parliament, “It is plain and simple a special measure for a special case.”

Not only was the government targeting a single company in the telecoms sector, it was excising only the 94% shareholding allegedly controlled by the British Peer, Lord (Michael) Ashcroft.

Compared to the large-scale nationalizations taking place elsewhere in the hemisphere, this was framed as minimally invasive economic surgery.

However, the surgery is having some serious complications – not least a massive arbitration claim filed by an off-shore shareholder in Telemedia.

Relations between Belize and Telemedia were on a downhill slide long before Mr. Barrow’s United Democratic Party (UDP) came to power in February 2008.

Telemedia enjoyed broadly cozy relations with the former administration, and on the UDPs first day in office, the (then still-privately owned) telecoms firm wrote to inform the new government of the terms of a so-called “accommodation agreement” struck with the previous administration.

That 2005 deal was meant to resolve certain long-festering disputes, and to set out operating terms for the next 15 years.

As accommodations go, these were notably generous ones for Telemedia: the firm was guaranteed a 15% per annum rate of return, with any shortfall to be offset against taxes paid to the state.

The deal also offered protection against competitors offering cheaper voice over internet (VOIP) services such as Skype, Vonage, GoogleTalk), as well as a waiver of duties on equipment imports.

Upon being informed of the agreement’s existence by Telemedia, the UDP administration denied knowledge of its terms.

After being shown the detailed terms of the arrangement, the new Prime Minister denounced the contract as a secret deal “shackling the government, making it impossible legally, contractually, for the government to do anything about (telephone) rates”.

Gov’t tied to old contract

As it became clear that the new administration would not abide by the terms of the deal, Telemedia sought damages in contract arbitration under the LCIA rules. The government declined to defend itself in these arbitral proceeding; signalling instead that it would challenge any final ruling in the Belize courts.

In a ruling handed down in March of 2009, arbitrators ruled that the accommodation agreement – while not subjected to parliamentary or public review – had been lawfully concluded by the previous administration, thus binding the new government.

More than 38 Million Belizean Dollars (plus interest) was ordered as compensation as a result of the government’s failure to live up to the terms of the accommodation agreement from early 2008 thru early 2009.

More troubling for Belize, the tribunal also gave an implicit green light to future claims by Telemedia against the government in the event of future non-compliance. Indeed, Telemedia promptly threatened further arbitration proceedings to enforce the contract’s terms.

Out of the frying pan, into the fire

It was against this backdrop that the government announced in August that it would nationalize the bulk of Telemedia, rather than grapple further with the company in arbitration proceedings.

However, most readers can guess where the story goes from there.

The government nationalized 94% of the company, and the bulk of these shares were held by a pair of Trusts in which Lord Ashcroft remains a major prime mover – as well as a major lender.

Although the Belize government has promised to compensate the trusts for their stakes in Telemedia, the government’s tentative offer of $150 Million was only half of the valuation put on the assets by the erstwhile shareholders.

In a speech to the Belize parliament at the time of nationalization, the Prime Minister sought to assure the public that there will be “no more Telemedia court battles; no more debilitating waste of government’s energies and resources”.

This has proven to be wishful thinking on the government’s part.

Much of the 72% holding held by the Hayward Charitable Trust appears to be protected by a bilateral investment treaty between the United Kingdom and Belize. (Although as I’ve noted in my newsletter, the claimant may have to persuade a tribunal that indirectly-held investments fall under the treaty’s protective rubric; the treaty is silent on the extent to which it extends to indirectly-held investments).

A nationalization claim has now begun in earnest, and promises to be for much higher stakes than the previous skirmishes between Telemedia and the government. The claimant will claim its share of the company's former value including future lost profits, which, thanks to the generous accommodation agreement, appeared to be sizable for many years to come. (While damages have yet to be fully quantified, already the majority shareholder has cited sums of $100-200 Million US – which work out to about $500 for every Belizean citizen.)

Meanwhile, a bank controlled by Lord Ashcroft has also put Belize on notice of a parallel arbitration claim under the UK-Belize BIT: for alleged default on a loan to Telemedia.

It remains to be seen if other claims also lurk in the shadows. However, this much is clear: despite the fondest wishes of Prime Minister Barrow, Belize's days of battling with Lord Ashcroft, or his proxies, are far from over.

Indeed, the government's highest-stakes battles lie ahead, ensuring that the policy of re-Belizeanization will reverberate for many years to come.

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