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OPINION

To: **The Hon. John Briceño, Prime Minister, Minister of Finance, Economic Development and Investment, Sir Edney Cain Building, Belmopan, Belize**

From: **Douglas Mendes SC and Jerome Rajcoomar, Attorneys-at-Law**

Date: **4th May 2023**

Subject: **Agreement between Portico and the Government of Belize**

Preliminaries

1. We have been asked to advise whether an agreement between Portico Enterprises Limited **("Portico")** and the Government of Belize **("GoB")** acting by and through the Ministry of Economic Development Petroleum, Investment, Trade and Commerce **("the Agreement")** is binding on the GoB.

2. We have been provided with an opinion prepared by Ben Juratowitch KC and Callista Harris dated 20th April 2023 **("the Advice")** which concludes *inter alia* that it is arguable that the GoB is entitled to avoid its obligations under the Agreement for the following reasons:

   a. the Agreement was entered into in breach of **section 17** of the **Finance and Audit (Reform) Act ("FARA")** because there was no open tender or selective tender undertaken in accordance with **sections 19** and **20 of FARA.**

   b. That if the Agreement did not fall within the scope of the FARA but was executed pursuant to the exercise of a prerogative, power, an argument could be made that the Minister did not have actual, implied or ostensible authority to execute the agreement having regard to **sections 41 and 43 of the Constitution**.

   c. That the Agreement is unenforceable on the ground of illegality because **Clause 12** breaches the separation of powers doctrine in that it is an agreement by the Executive which purports to bind Parliament.

3. We have been asked to advise on each of these contentions.

4. Our advice herein is premised on the assumption that the instructions recorded in the Advice are accurate save and except where we have been otherwise instructed.

The Factual Background

5. We have been instructed that in 2017, Portico approached the GoB and informed that it intended to develop a cruise ship docking port. The reason for Portico's approach to the Government was to seek the support of and facilitation by the GoB to enable the investment.

6. Because of the Government's interest in the further development of the cruise ship sector of the tourism industry, and because the facilitation of the intended investment would create jobs and earn foreign exchange, the GoB was receptive to Portico's intended plans and entered into a Memorandum of Understanding **("the MoU")** on 7th September 2017 to bring the project into being. The MoU was executed by then Minister Erwin Contreras, Minister of Economic Development, Petroleum, Investment, Trade and Commerce **("the Minister")** and witnessed by then Minister John Salvidor, Minister of Defense.

7. In summary, under the MoU, Portico and GoB agreed that they would work together to make the docking port a reality. The MoU was non-binding, but a good faith sign of Government's support for the project. Importantly, the MoU made clear that Portico and the GoB were not partners, joint venturers or in any relationship with respect to the Project. The MoU however provided that the Parties would work together to finalise an agreement[1], and that Government would enact legislation to facilitate the investment by Portico[2].

8. An Agreement was eventually executed on 1st October 2020 in furtherance of the Parties' intentions expressed in the MoU. It provided for the development, construction, operation and management of a cruise ship docking facility, including the access channel and other maritime and offshore structures required in relation thereto, and the strategic

[1] Clause 2 of the MoU
[2] Clause 4.4 of the MoU

location therein of duty free stores, concession stands, beaches, restaurants, bars and a hotel of 300 rooms with casino throughout the terminal and its surroundings **("the Project")**[3].

9. Under the provisions of the Agreement, the GoB appointed and authorized Portico to undertake the development of the Project, execute the requisite engineering, procurement and construction works and to then operate the facility and Portico agreed to accept this appointment[4]. In turn, the GoB agreed to facilitate the development of the Project through the enactment of primary and subsidiary legislation granting certain tax concessions, exemptions from foreign exchange controls and to take executive action to facilitate the requisite approvals for the Project[5].

10. The important features of the Agreement which need to be highlighted are the following. Firstly, the works to be performed by Portico are on lands to be privately acquired by Portico[6] through a mixture of debt and equity funding raised by Portico[7] with no outlay of capital by the GoB. The GoB is not acquiring the cruise port and in fact has no proprietary interest in the cruise port whatever. The cruise port is not being built and operated for the GoB but for Portico.

11. Secondly, Portico's obligations are to obtain the necessary equity and debt financing to undertake the Project[8], to obtain the relevant permits licenses and consents[9], to obtain insurance coverage[10], and to undertake the Project in a commercial manner and proper manner that benefits Belizeans[11].

12. Thirdly, in exchange for the foregoing, the GoB's primary obligations can be summarized as the obligations to (1) grant certain tax exemptions (by means of primary and/or subsidiary Legislation), (2) facilitate the grant of permits and (3) licenses and to ensure availability of currency.

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[3] Recital 2 to the Agreement
[4] Clause 6 of the Agreement
[5] Recital 5 to the Agreement and Clause 12 of the Agreement
[6] Clause 5.1.2 of the Agreement
[7] Clause 7 of the Agreement
[8] Clause 7 of the Agreement
[9] Clause 8 and 10 of the Agreement
[10] Clause 9 of the Agreement
[11] Clause 10 of the Agreement

13. The Agreement was executed by the Minister for and on behalf of the GoB. At the time of signing the Agreement, the ministerial portfolios for tourism and ports were not assigned to the Minister.

14. According to the instructions recorded in the Advice, the Agreement was not approved by Parliament, Cabinet, the GoB Investment Committee, the then Prime Minister or the then Attorney General, nor were any consultations held with Cabinet or the Prime Minister. We have great difficulty acting on the basis of such assumed instructions for the reason which we give below[12].

FARA

15. The first question is whether FARA applies to this transaction.

16. Part IV of FARA provides for the regulation of GoB Procurement and Sales Contracts. **Section 17(1)** confers upon the GoB the capacity to own, acquire and dispose of property. It states:

> **"17.**-(1) Subject to this Act, the GoB shall have power to acquire, hold and dispose of, by sale or otherwise, property of any kind, and all property owned by the GoB shall be held in the name of the GoB of Belize,"

17. **Section 17(2)** regulates the GoB's power to enter "procurement or sales contracts". It states:

> (2) The GoB shall have power to enter into procurement or sale contracts using either the limited tendering procedure, the open tendering procedure, or the selective tendering procedure.

18. In accordance with section 19, the open tendering procedure involves an invitation to any interested party to bid for the proposed service which the Government seeks and therefore envisages the possibility of multiple applicants. Where the GoB decides to engage the selective tendering process under section 20 it must ensure that the number of suppliers invited to submit a tender "is sufficient to ensure competition without

[12] We address the question of proof of lack of authority below as we are of the opinion that the GoB should exercise great caution in acting on the basis that the Minister acted without any knowledge or authority of the Cabinet.

affecting efficiency in the tendering process." As with the open tendering process, therefore, the selective tendering process envisages multiple tenderers.

19. The limited tendering process can only be engaged where the open or selective processes fails to produce a tenderer or the process is corrupted by collusion or is not in accordance with a condition of the tender or for the other reasons stipulated in section 21.

20. What is clear however is that the tendering processes envisaged by section 17(2) are intended to be engaged where the Government of its own accord is desirous of obtaining service and is in search of someone or some entity which will provide that service at a competitive price. The tendering processes do not sit well with a scenario such as the one which presents itself in this case where a private entity is desirous of its own accord, using its own resources and its own property, to pursue a project from which it will earn income for itself, which happens to accord with the GoB's development policies, and seeks concessions from the Government to facilitate the pursuit of the project. It is difficult to envisage how in those circumstances the GoB would invite tenders for a project which has been developed privately by another individual.

21. We therefore do not agree that FARA applies to the Agreement and that the Agreement may be invalidated for failure to engage a tendering process. In this regard we differ from the Advice but note that the authors did not consider whether FARA is applicable in circumstances where a private entity develops a project which it intends to pursue privately and approaches the Government for concessions to facilitate the project.

Authority to Contract

22. In ***BCB Holdings v AG*** [2013] CCJ 5 (AJ), [38]-[39], the CCJ acknowledged the wide prerogative powers of the GoB to promise to provide tax incentives to potential investors as "an inducement to make the investment or carry out an activity which is the subject of such agreements … even when those agreements require legislative approval before they can become binding on the State." The precise nature the promise which is permissible for the GoB to make is the subject of some debate and will be explored

further below. For the time being, the question is whether the Minister had the authority of the GoB to enter into the Agreement.

Actual Authority

23. From the Advice, it appears that the GoB has given instructions that the Minister executed the Agreement without the knowledge and/or approval of the Cabinet or the Prime Minister. If that is in fact so, it is plain that the Minister would not have had actual authority to contract on behalf of the Government. However, we advise that the Government should be extremely cautious to rely entirely on the mere absence of any evidence that such approval was received in concluding that the Minister did not have actual authority.

24. First, we note that the Agreement was signed in October 2020, likely during the pandemic. The fact that there may be no formal cabinet note or record of a cabinet decision on the matter or a formal document demonstrating that the Cabinet or the Prime Minister authorised the Minister to sign the agreement does not mean that there was not actual or implied authority given by the Cabinet or by the Prime Minister. Authority can be conferred in writing by informal correspondence, orally or even through a course of dealing. It is therefore entirely possible for Portico to obtain a witness statement from the former Prime Minister which confirms that all actions taken by the Minister were done with his express approval or the express approval of Cabinet.

25. Second, the MoU is dated September 2017. It demonstrates that this project was being *developed* over a period of 3 years prior to the execution of the Agreement and certainly there would have been discussions about it even before the MoU was executed. The Minister of Defence signed the MoU as a witness. It would be very surprising that these two Ministers would secretively execute such an important and significant MoU, that the Minister would enter into negotiations and then sign the Agreement 3 years later, without the knowledge of the Cabinet or at least the then Prime Minister.

26. Third, the MoU was the subject of a press release by the Belize Press Office. It is incredible to accept that the other members of Cabinet did not thereby become aware of the proposed project, if indeed they were not before then aware, and then did not ask the Minister questions about the project that he was negotiating with Portico.

27. Fourth, it is quite incredible that the two Ministers would have been the only persons in the GoB to have known about the proposed construction of a cruise port to enhance tourism in Belize and moreso that they would have kept this important information to themselves.

28. All of the foregoing considerations together strongly lead to the inference that the Minister must have had the actual sanction of the Cabinet and it would be dangerous in our view to act on the basis that there was absolutely no consultation with and approval by the Cabinet.

29. Further, we agree with this statement made in the Advice:

> *"111. In the present case, ports and tourism are allocated to other ministers by law; namely, the Minister of Works, Transport and National Emergency Management (the Minister of Works) and the Minister of Tourism and Civil Aviation (the Minister of Tourism). In exercise of the power conferred on him by section 41(1) of the Constitution (to "assign … to any other Minister responsibility for any business of the Government, including … the administration of any department of Government"), the Governor-General assigned the Minister of Tourism responsibility for the Ministry of Tourism and Civil Aviation (the Ministry of Tourism). In the directions in writing from the Governor-General, the "business of Government" dealt with by the Ministry of Tourism is specified to include "Tourism", including "Tourism Development". Similarly, the Governor-General assigned the Minister of Works responsibility for the Ministry of Works, Transport and National Emergency Management, the business of which is specified to include "Transport", including "Ports and Harbours". As ports and tourism are allocated to other ministers by law, the Minister for Economic Development, Petroleum, Investment, Trade and Commerce did not have authority to enter into the Agreement. It could be said against this that the subject matter of the Agreement, although concerning a port to be used by tourists, could also fairly be characterised as a <u>matter of economic development and investment</u>, so as to come in a general sense within the authority of the Minister for Economic Development, Petroleum, Investment, Trade and Commerce. This is thus not a case where the subject matter of the contract is obviously outside the scope of the signing Minister's portfolio. There is at least an argument that it could be regarded as coming within it."*

30. While the Agreement might more naturally falls within the Tourism and Works portfolios, it also plainly falls within the portfolio of the Minster of Economic Development and Investment since the project does involve significant investment in plant and infrastructure in Belize and through the attraction of tourists and the creation of employment brings money into Belize and the economy and contributes to the

development of the economy. The Agreement therefore plainly falls within the portfolio of the Minister who signed the Agreement.

31. This has two consequences; it supports the view that the Minister had implied actual authority to enter the Agreement on behalf of the Government and ostensible authority to do so.

32. On the question of ostensible authority, in both **BCB** and **BISL**, the CCJ held that the PM was clothed with wide ostensible or apparent authority to enter into contracts. In **BISL**, Anderson and Rajnauth Lee JJ stated as follows:

> [87] The GoB clearly had the apparent or ostensible authority to enter into these types of agreements. The Prime Minister, acting as a Minister of the Crown and head of GoB administration, and in this case the Head of Finance, must be assumed to speak with the authority of the GoB and intention to bind the GoB. The Prime Minister is expressly recognised by the Constitution as the senior minister of GoB. The Governor General, acting on the advice of the Prime Minister may assign to the Prime Minister or any other Minister, responsibility for any business of GoB. In the present case, the Prime Minister was assigned the role of Finance Minister and was thus in charge of the conducting of the business of finance for the GoB. The Prime Minister was thereby 'clothed' with authority to make contracts relating to the business of GoB policy.
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> [88] Section 36(1) of the Constitution also confers a common law prerogative to enter into contracts, which is exercised by the Ministers on behalf of the Crown. The Extension Agreement was signed by the Attorney General who has responsibility for the administration of legal affairs in Belize. Accordingly, in signing the Extension Agreement, the Prime Minister and Attorney General both represented that the GoB had the power to enter into that Agreement. The GoB is bound by apparent or ostensible authority.

33. Of course, in that case, the agreement was executed by the Prime Minister and the Attorney General. What is noteworthy however is that in so holding, both judges concluded that the Prime Minister and the Attorney General were both competent to give representations that they had the authority of the GoB to enter the agreement based on their Ministerial portfolios.

34. This makes sense. The GoB is not an individual who must, as principal, hold out to a third party that the agent is clothed with authority to act. The GoB must act and communicate its position on who has the authority to act on its behalf through individuals. In this regard, the GoB may be likened to a corporation which can only act

through its human officials. In the case of a company, a person appointed to a high office carries with him or her by virtue of that high office, the ostensible authority of the corporation to do all such things as would usually fall within the scope of his office. In this regard, the authors of **Bowstead on Agency** say the following (at page 293):

> "But where a person is held out by the company as having an authority that he might consistently with the provisions of the memorandum and articles possess, a third party is in some cases is entitled to assume that he has such authority, and that the relevant procedures of "indoor management" … for giving him this authority have been completed. The holding out must at the ultimate level be effected by some person or group of persons who have in accordance with the company's memorandum and articles actual authority. The first type of holding out occurs where the agent is appointed to a position carrying with it a usual authority, e.g. that of managing director."

35. Thus, a managing director can bind the company on the basis of apparent or ostensible authority simply by virtue of the fact that he was appointed to the office and is doing something which can be regarded as falling within the usual performance of his functions. Similarly, a Minister executing a document which falls within the scope of his **usual authority** as bestowed on him or her by his instruments of appointment issued under the Constitution may therefore bind the Government with regard to those activities which fall within the usual performance of his or her functions.

36. We have noted that the Advice refers to the decision in **Attorney General v Silva** and an extract from **Bowstead on Agency** for the proposition that the Minister as a public officer cannot hold himself out as having authority. It should be noted however that in relation to the ***Silva*** case the authors of ***Bowstead*** make the following observation:

> "However, this was a clear case, inasmuch as the agent's powers were limited by delegated legislation, and to hold otherwise would have been to give a Crown official a dispensing power to validate ultra vires acts. Another clear case occurs where to bind the Crown would be to permit an officer of the Crown to fetter the Crown's freedom of action to do its public duty. Subject to these important reservations, however, it may be possible to establish apparent authority, though it may be difficult to distinguish this form of estoppel from other estoppels, e.g. as to whether the relevant authority has taken a decision. Further, if the supposed doctrine of usual authority is accepted as a separate notion from that of apparent authority, the Crown may perhaps be held liable under it since no specific holding out is required - unless it be suggested that policy reasons still make the doctrine inapplicable to the Crown. The interaction of public and private law principles makes the area a difficult one."

37. Anderson and Rajnauth Lee JJ both seemingly regard the principle of usual authority as applicable to Ministers and both have held that Ministers may enter into contracts on behalf of the Government.

38. More recently, in ***Law Debenture Trust Corpn v Ukraine*** [2023] 2 WLR 461 , the UK Supreme Court stated as follows:

> 84 .... As a matter of English law, if the state, as principal, represents that a person has authority to act on its behalf, it will be bound by the acts of that person with respect to anyone dealing with him as an agent on the faith of that representation. So if, as we would hold, Ukraine, as principal, had the power to hold out and did in fact hold out the CMU and the Minister of Finance as having ostensible authority by reason of their appointment to agree the terms of borrowing and to issue the Notes on behalf of Ukraine, the Trustee was entitled to rely on the CMU and the Minister of Finance as having the authority it assumed them to have, subject of course to the issue of notice, to which we will come.
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> 85 In reaching this conclusion we have given careful consideration to the decision of the Privy Council in Attorney General for Ceylon v Silva [1953] AC 461, upon which Ukraine has placed particular reliance.
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> 89 Properly understood, therefore, Attorney General for Ceylon v Silva does not support the submission that a state body cannot be bound by an officer acting with ostensible authority."

39. In that case, the Minister of Finance was clothed with ostensible authority to execute notes.

40. In ***Marubeni Hong Kong and South China Ltd v Mongolian Government*** [2002] 2 All ER (Comm) 873, the Commercial Court was of the view that the Minister of Finance was clothed with ostensible authority to execute a guarantee and the Minister of Justice was clothed with ostensible authority to give opinions in relation thereto.

41. Given that the building of the cruise port falls within the Minister's portfolio, we are of the opinion that the Agreement falls within the scope of the Minister's usual authority and that he therefore had ostensible authority to act on behalf of the Government in executing the Agreement.

42. For all of these reasons, we are of the view that the Agreement cannot be invalidated on the ground that the Minister did not have the authority to execute the Agreement on behalf of the Government.

The obligation to enact legislation

43. By clause 12 of the Agreement, the GoB is obliged to i) introduce primary and subsidiary legislation in the National Assembly to grant tax and other exemptions to Portico and cause same to be passed, and ii) to take such Executive Action as may be required to grant the various exemptions stated therein.

44. However, clause 12 of the Agreement has not yet come into force and will only be binding once other obligations are met by the Government[13]. Those obligations are contained in other clauses which are declared to come into force immediately.

45. Three of the clauses which have already come into force are clauses 4, 5 and 6 the relevant parts of which provide as follows:

> 4.2 In furtherance of and to facilitate the achievement of the foregoing public policy objectives, the Government has entered into this Agreement (including all ancillary agreements, instruments, assurances and documents) and commits to fulfill its obligations hereunder including but not limited to passing of, enabling and/or enacting other necessary and/or prudent legislation to ensure the realization of the Project and to providing further support to the Developer as may be required from time to time.
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> 5.1. The whole of this Agreement, save for the provisions of clause 1 to 4, this clause 5, clauses 6.2 to 6.4 both inclusive), clause 7.2, clauses 17 to 34 (both inclusive) which shall be of immediate force and effect on the Commencement Date, is subject to the following conditions precedent ('Conditions Precedent") and shall enter into force on the Effective Date:
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> 5.1.4. the Legislation has been duly enacted in form and manner satisfactory to the Developer in the terms set forth in clause 12.1 below.
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> 5.2 Forthwith after the Commencement Date, the Parties shall use their respective reasonable endeavours and co-operate in good faith to procure the fulfilment of the Conditions Precedent, to the extent that it is within their power to do so, as expeditiously and as reasonably possible.
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> 5.5 Unless the Conditions Precedent have been fulfilled or (where applicable) waived, the provisions of this Agreement, save for those clauses stated in 5.1, will never become of any force or effect and the status quo will be restored as far as may be possible and none of the Parties will have any claim against any other in terms hereof or arising from the failure of the Conditions Precedent, save for any claims arising from a breach of clause 5.2 and/or any prior breach of any of the provisions of this Agreement.

[13] See clause 5 reproduced below.

6.4 The Government agrees that it … shall pass such enabling and/or other necessary and or prudent legislation including but not limited to the Legislation (referred to in 12) to ensure realisation of the Project Facility and the Project, the execution of the EPC Works and the performance of the Operations, and to provide further support as may be required from time to time.

46. These clauses are clumsily drafted but when read together the GoB has committed itself to enacting legislation (4.2 & 6.4) and making reasonable endeavours and co-operating in good faith to enact the legislation referred to in clause 12 (5.2), to the extent that it is within their power to do so, as expeditiously as is reasonably possible. The obligation to enact legislation under clause 12 only comes into effect when the condition precedent in clause 5.1.4 is fulfilled, but that is the precise obligation provided for under clause 12 which would necessarily become otiose once the condition precedent is fulfilled.

Lawfulness of the obligations

47. There is a vast difference between the obligation taken on by the GoB to enact legislation and the lesser obligation to take reasonable steps to do so. The former is unlawful but there is authority to the effect that a promise to provide benefits, such as exemptions for tax, which can only be provided by enacting a law, is unobjectionable as long as the legislation is eventually passed.

48. In ***Port of Portland v Victoria*** [2009] VSCA 282, the Court of Appeal of Victoria had for consideration the following provisions:

11.4 Land Tax

(a) The State has agreed with the Purchaser that it will effect an amendment to statutes governing the assessment and imposition of land tax to ensure that the unimproved site value used as the basis for assessment of land tax liability for the Real Property excludes the value of buildings, breakwaters, berths, wharfs, aprons, canals or associated works relating to a port.

(b) In the event that, before or after Completion the relevant statutory amendments do not become law and, as a result of that the Purchaser is assessed to land tax on the Real Property at a rate higher than would have been the case if the relevant statutory amendments were law, the State will refund or allow to the Purchaser the difference between the two amounts.

49. The Court of Appeal unanimously agreed that subclause (b) was unenforceable as it was a contractual provision which effectively mandated the executive to refund taxes if the legislation was not enacted. That conclusion was upheld by the High Court of Australia.

50. Two members of the Court (Buchanan JA and Maxwell P) were of the view that subclause (a) was null and void as it purported to bind Parliament. According to Maxwell P (at [5]):

> "As a matter of fundamental constitutional principle, no parties, not even the State acting by its Executive Government, can purport to bind the Parliament in respect of legislative action. Effect cannot be given to these provisions as a matter of contract by this or any court. … [W]hatever the intention of the parties, [the provisions] can only be seen as expressions of comfort as between the parties to the contract, as to what they each then expected or hoped would be the course of future events. No doubt these provisions … may reflect some degree of moral commitment by each of the parties to the future courses contemplated, but in no sense can it be accepted that a legally binding obligation to give effect to what is contemplated by the [provisions] was intended, or achieved as a matter of contract …"

51. That conclusion was supported by the decision of the New Zealand High Court in ***Rothmans of Pall Mall v AG*** [1991] 2 NZLR 323 where the Court stated as follows:

> "It is elementary that the executive may not restrict the legislative competence of Parliament by contract. As it is said in Currie, Crown and Subject (1953) at pp 52-53:
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> "However amply the executive Government may purport to bind the Crown, its contracts, like those of a subject, are liable to be overridden by subsequent legislation . . . Any moral obligation arising from the circumstance that under a parliamentary system the executive Government in power effectively controls the course of legislation does not create a legal obligation. Moreover, there can be no distinction between an undertaking to refrain from promoting legislation and one to promote legislation; in a legal sense there can be no such thing as contracting for the future exercise of a legislative power.' [Holmes v Rolleston (1873) 2 NZCA 287 at p 294]."
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> Since the only promise given by the Government which could be said to amount to consideration is one which is without any value (the executive being unable to bind the legislature by contract), the contract must fail."

52. On the basis of these authorities, which we believe are consistent with regional jurisprudence, the obligations in clause 4.2 and 6.4 are unlawful and therefore null and void. So would the obligation in clause 12 if it were ever to come into force.

53. On the other hand, there is nothing illegal or objectionable about the Executive entering into an agreement which requires Parliamentary approval or commits the Executive to obtaining such Parliamentary approval before the obligation becomes binding. Thus, if the legislature ultimately agrees to implement such an agreement through the enactment of legislation, there can be no challenge whatsoever to the legality or enforceability of the agreement. In **BCB**, Saunders J stated as follows:

> "[37] The Tribunal addressed the issue of the legality of the Deed by asking itself whether the Minister had actual and/or ostensible authority to make these promises to the Companies. The Tribunal held that the Minister did have such authority. The Tribunal rested this conclusion on two premises, firstly, the extensive prerogative powers of the Executive to make agreements and secondly, section 95 of the Income and Business Tax Act. The Tribunal noted that it is commonplace in international investment contracts for a host country to promise a foreign investor or contractor tax incentives as an inducement to make the investment or carry out an activity which is the subject of such agreements. The judge at first instance affirmed these conclusions of the Tribunal.
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> [38] We agree that the Minister does indeed possess wide prerogative powers to enter into agreements. ***The Executive may do so even when those agreements require legislative approval before they can become binding on the State***."

54. However, it is to be noted that there is authority to the effect that while an obligation to take reasonable steps to have legislation enacted may not be unlawful per se, a court will not issue an order specifically enforcing the obligation or award damages where there is a failure to enact promised legislation because to do so would involve an impermissible encroachment by the judiciary upon the exclusive domain of the legislature.

55. In ***Port of Portland*** Nettle JA (dissenting) suggested that an obligation to use best endeavours to procure the passage of the legislation is enforceable by an order for damages. According to him:

> 86 To begin with, although clause 11.4(a) of the Agreement was expressed in absolute terms, I consider that it should be construed as an obligation to do no more than the respondent could lawfully and effectively do to procure the sort of amendment to legislation to which the clause refers.
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> 87 Next, although, as Buchanan JA explains, the State cannot without legislative authority exempt a subject from obligations imposed by existing legislation or tie the hands of a future Parliament, I see no reason in principle

> and we were not referred to any authority which holds that the State cannot, as part of a bona fide commercial arrangement like the sale of public infrastructure comprised in the Agreement, covenant to do whatever it can lawfully and effectively do to procure a specific tax concession pertinent to the sale. To the contrary, in my view, public confidence in Government dealings and contracts would be greatly disturbed if such a covenant were held not to be binding to the extent that the State is lawfully and effectively able to perform it."

56. Maxwell P disagreed. In his view, if a breach of the subclause resulted in an award of damages, this would circumvent the very reason for invalidity of subclause (b) as the taxpayer would obtain by means of an award of damages a refund of the taxes which the Executive could not lawfully promise to enact.

57. The Supreme Court of New Zealand in ***Ngati Whatua Orakei v A-G*** [2019] 1 NZLR 116 similarly regarded the obligation to introduce a bill as being clearly unenforceable by way of an order of specific performance or damages[14], on the basis of the principle of non-interference in Parliamentary proceedings[15].

58. It is uncertain what position the CCJ will take on the question of enforceability of a promise to take steps to enact legislation which falls short of an obligation to bind the legislature. What is clear however is once the legislature passes the necessary law to give effect to the promise to grant exemptions, the issue of illegality falls away.

59. As noted, this was the position taken by the CCJ in ***BCB***. But there is also strong authority for the proposition that even if the obligation undertaken is unlawful or unenforceable for whatever reason, the legislature may pass a law which in effect ratifies the otherwise unlawful agreement and provides the promised exemptions.

60. Legislation giving effect to contractual obligation entered into by the executive is not new. In **Pyx Granite v Ministry of Housing**[16] Lord Jenkins stated as follows at page 312:

> "In the present case, no concluded agreement had been entered into before the passing of the Act. The heads of agreement were not binding on anyone until the Act had been passed, and their terms were plainly such that, when the Act was passed, they could have no contractual validity independently of the Act. If s 54 and Sch 4 had not been included in the Act, it is reasonably

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[14] [36]
[15] [46]
[16] [1960] AC 260

plain that a contract in the terms of the heads of agreement in derogation of the terms of the Act could not have been validly made. I respectfully adopt the words of Romer J in the unreported case of Pyx Granite Co Ltd v Malvern Hills Conservators where he said:

> "The parties only became bound by the heads of agreement by virtue of the express provision to that effect in s. 54 of the Act, and the heads of agreement were in this way made part of the Act."

61. The position in English law is summarized as follows in **Halsbury's Laws of England Vol 96 Para 375:**

> "Where a contract is confirmed by an Act, no objection can be taken as to its validity. It cannot, for example, be challenged for uncertainty or remoteness; nor is it material that it creates a right which could not be created by ordinary contract. It does not follow that, because it is confirmed by an Act, a contract has the force and effect of an Act, but the terms in which it is confirmed may show that Parliament intended it to operate as a substantive enactment as if the contract had become part of the Act, and it will have such an operation if the Act in question, in addition to confirming the contract, expressly requires it to be carried into execution14. A contract having substantive effect in this way may accordingly affect persons who are not parties to it."

62. Footnote 9 to that extract states:

> Where an Act declares an agreement to be valid, its effect is not merely to give the parties capacity to enter into an agreement which would otherwise be ultra vires or invalid, but to make the agreement itself valid: see Manchester Ship Canal Co v Manchester Racecourse Co [1900] 2 Ch 352; affd [1901] 2 Ch 37, CA. The contract is normally scheduled to the Act, but this is not essential. The intention to confirm must, however, be clear, and a mere reference in an Act to the existence of an agreement does not necessarily amount to a confirmation of it: see Kent Coast Rly Co v London, Chatham, and Dover Rly Co (1868) 3 Ch App 656.

See also **NZ Moari Council v AG**[17], **Victoria v Tatts Group**[18] and **Re Michael, ex p WMC Resources**.

63. In ***Minerology Pty v State of Western Australia***[19], the High Court of Australia considered whether a provision in an agreement which was given statutory force

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[17] [2008] 3 LRC
[18] [2016] HCA 5
[19] [2021] HCA 30

breached the Australia Act by purporting to dictate how laws were to be enacted by Parliament. The relevant clause stated:

> ("1) The parties to this Agreement may from time to time by agreement in writing add to substitute for cancel or vary all or any of the provisions of this Agreement or of any lease licence easement or other title granted under or pursuant to this Agreement for the purpose of more efficiently or satisfactorily implementing or facilitating any of the objects of this Agreement.
>
> (2) The Minister shall cause any agreement made pursuant to subclause (1) in respect of any addition substitution cancellation or variation of the provisions of this Agreement to be laid on the Table of each House of Parliament within 12 sitting days next following its execution.
>
> (3) Either House may, within 12 sitting days of that House after the agreement has been laid before it pass a resolution disallowing the agreement, but if after the last day on which the agreement might have been disallowed neither House has passed such a resolution the agreement shall have effect from and after that last day."

64. Although, on the authorities cited, these clauses may at least be considered unenforceable, the High Court refused to find that the enacted legislation contemplated by these provisions was invalid or inoperative.

65. We are of the opinion that the foregoing is relevant insofar as the Government might be minded to abide by the terms of the Agreement. There is nothing unlawful or unconstitutional about the National Assembly enacting legislation giving effect to the obligations under the Agreement to grant concessions. Further, to the extent that there is any remaining doubt as to whether the Minister had authority to bind the Government or as to whether the Agreement violated the provisions of FARA or any of its provisions were illegal, there is nothing unlawful or objectionable about the legislature enacting a law which ratifies the agreement and specifies that the agreement is to be given legal force.

66. We note in closing however that before any such legislation is passed consideration be given to whether some of the clauses should not be given the force of law. We have in mind, for example, clauses 13 and 17 which purport to vest in Portico a right to damages where there are amendments to the Agreement. We also have in mind the very provisions which we have discussed above which bind the GoB to enact legislation or to takes steps to do so. Not only would those provisions be no longer necessary once the exemptions promised are actually enacted into law, but to sanction what might

otherwise constitute an encroachment on the legislature's exclusive power would open the legislation to attack on constitutional grounds.

And we so advise.

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4th May 2023