IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 394 OF 2013

BETWEEN:

(SARSTOON TEMASH INSTITUTE FOR (INDIGENOUS MANAGEMENT	**First Claimant**
(JOHN MAKIN in his own behalf and on behalf (of the MAYA Q'EQCHI' VILLAGE OF CONEJO	**Second Claimant**
(ANDRES BO in his own behalf and on behalf (of the MAYA Q'EQCHI' VILLAGE OF CRIQUE SARCO	**Third Claimant**
(MATEO COC in his own behalf and on behalf (of the MAYA Q'EQCHI' VILLAGE of MIDWAY	**Fourth Claimant**
(VICTORIANO ACK POP in his own behalf and on (behalf of the MAYA Q'EQCHI' VILLAGE of GRAHAM CREEK	**Fifth Claimant**
(AND	
(THE ATTORNEY GENERAL OF BELIZE	**First Defendant**
(US CAPITAL ENERGY BELIZE LIMITED	**Second Defendant**
(MINISTER OF FORESTRY, FISHERIES AND (SUSTAINABLE DEVELOPMENT	**Third Defendant**
(MINISTER OF ENERGY, SCIENCE AND (TECHNOLOGY AND PUBLIC UTILITIES	**Fourth Defendant**
(ADMINISTRATOR, SARSTOON TEMASH (NATIONAL PARK	**Fifth Defendant**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Eamon Courtenay, S. C., and Ms. Priscilla Banner of Courtenay Coye and Co. for the Claimants
Mr. Denys Barrow, S. C., and Ms. Iliana Swift for the First, Third, Fourth and Fifth Defendants
Mr. Michael Peyrefitte for the Second Defendant

J U D G M E N T

1. The First Claimant is SATIM (Sarstoon Temash Institute for Indigenous Management), a company incorporated under the Companies Act, Chapter 250 of the Laws of Belize. This company was formed by representatives of Mayan Villages such as Midway, Crique Sarco, Sunday Wood, Conejo Creek and the Garifuna Village of Barranco. One of the key objectives for which the company was formed as stated in the judgment of Awich J (as he then was) at paragraph 5 of Claim 212 of 2006 was to *"co-manage the Sarstoon-Temash National Park with the Government in harmony with the vision and aspirations of the indigenous communities and to ensure the participation of the indigenous communities and to support their values, needs and priorities, to undertake conservation and development measures in regard to natural resources and ecosystems in respect to forests, sea, fisheries, marine life, flora, fauna, hydrological, archaeological, historical and cultural resources, and to undertake*

and promote educational and scientific research activities." Claim 212 of 2006 *SATIM v. Forest Department of Ministry of Natural Resources and the Environment and US Capital Energy Belize Limited.*

2. The Second, Third, Fourth, and Fifth Claimants appear in their personal capacity (as members of Maya Q'eqchi ethnic origin) as well as alcaldes and representatives of the Mayan villages in which they live.

3. The First Defendant is the Attorney General of Belize who is the legal representative of the Government of Belize and in whose name all lawsuits for and against the Crown must be made.

4. The Second Defendant, US Capital Energy Belize Limited, is a subsidiary of US Capital Energy Partners L. P. British Virgin Islands, a privately owned company with offices in Corpus Christi, Texas and Littleton, Colorado U. S. A. The company is also incorporated under the Companies Act, Chapter 250 of the Laws of Belize, with registered office at 1 Front Street, Punta Gorda Town, Toledo District, Belize.

The Facts

5. In setting out a summary of the relevant facts, I rely on the timeline of events helpfully provided by the Claimants (not disputed by the Defendants) in their skeleton arguments supplemented by the evidence contained in the affidavits filed by witnesses in this matter.

1994 - Sarstoon Temash National Park is "an area in the south eastern part of Belize, declared a national park in 1994, by the Minister responsible, in Statutory Instrument No. 42 of 1994, under s3 of the National Parks System Act Chapter 215 of the Laws of Belize." A national park is defined in s2 of the National Parks System Act as "any area established for the protection and preservation of natural and scenic values of national significance for the benefit and enjoyment of the general public. The land area had been the traditional area of the Kekchi or Q'eqchi and Garifuna communities. The Q'eqchi are the original indigenous people; the Garifuna are nineteenth century migrant settler community. It is said that the communities used to obtain medicinal plants, building materials and food materials from the area without restriction before the area was declared a national park." (Awich J (as he then was) in Claim No. 212 of 2006 *SATIM v Forest Department and US Capital Energy Belize Limited*.)

13th August, 2012 - SATIM is contacted by US Capital Energy to provide its views of intended exploratory drilling in the National Park.

25th October, 2012 - Public consultation held by the Department of the Environment in respect of the EIA (Environmental Impact Assessment) for US Capital Energy's activities in the National Park.

26th October, 2012 - Buffer Zone Communities are the villages of Barranco, Midway, Graham Creek, Conejo and Crique Sarco which used the area prior to its designation as a national park for hunting, fishing, gathering and harvesting. (Affidavit of Greg Ch'oc dated 19th August, 2013). All Buffer Zone Communities (except Sunday Wood and Barranco) wrote to the Chief Environmental Officer, Department of the Environment, to express utter rejection of the consultation held on 25th October, 2012 and reminded the CEO of the Department of the Environment of the judgment of Conteh CJ (as he then was) in Claim No. 171 and 172 of 2007 *Aurelio Cal et. al. v. The Attorney General* "Maya Land Rights Case No. 1" and of the fact that US Capital Energy had no legal or effective right to drill in the territory.

19th October, 2012 - Buffer Zone Communities (except Sunday Wood) wrote to the Hon. Prime Minister formalizing objections to drilling activities in the National Park.

23rd November, 2012 - Minister Lisel Alamilla, Minister of Forestry, Fisheries and Sustainable Development and Minister Joy Grant, Minister of Energy, Science, Technology and Public Utilities write to SATIM to say that their ministries were designated to commence a dialogue with the Indigenous Peoples to (1) clarify the process for obtaining access to information relating to oil concessions, inclusive of permits and oil exploration data and (2) agree on a mechanism to allocate 2% of the Government of Belize's 10% working interest in US Capital's PSA (Production Sharing Agreement) to fund projects in the Toledo District in the event oil is discovered in commercial quantities.

3rd December, 2012 - SATIM writes to Wilber Sabido, Chief Forest Officer, to request copies of all permits/licences for exploratory drilling in the National Park and Indigenous territories granted to US Capital Energy Belize Limited No response received.

30th January, 2013 - Permission granted to the 2nd Defendant US Capital by the Commissioner of Lands and Surveys to survey approximately 7.2 kilometers of public road.

5th April, 2013 - Permission granted by the Chief Engineer, Ministry of Works and Transport, to US Capital to commence construction of an access road to the proposed well site. SATIM sends letter to Chief Forestry Officer requesting response to report by Conejo Village demonstrating damage caused by US Capital to their Maya Customary Lands as a result of seismic testing in the National Park.

6th April, 2013 - SATIM discovers that an Environmental Compliance Plan (ECP) has been executed between US Capital and the Department of the Environment. In the ECP, the responsibility is placed on US Capital to obtain necessary approvals prior to undertaking vegetation clearance within the National Park and to obtain all necessary approvals, licenses, permits from relevant regulatory agencies, including the Geology and Petroleum Department.

8th April, 2013 - SATIM writes to Minister Alamilla requesting intervention to cause an amendment to the Environmental Compliance Plan (ECP) to ensure environmental clearance is not given to US Capital to drill within the National Park.

30th April, 2013 - Permission granted to US Capital by the Government of Belize pursuant to s6 (a), (b) and (e) of the National Parks System Act to enter the National Park for the purpose of conducting petroleum exploration drilling activities.

28th May, 2013 - SATIM writes letter to place on record telephone conversation of 10th May 2013 (Minister Alamilla/Ch'oc) whereby SATIM expressed its disappointment with Government of Belize's position to conduct oil drilling inside the National Park and on Maya traditional lands which in its view was contrary to Belize law. SATIM requests copy of permit from Forest Department to US Capital to permit construction of road and oil drilling.

16th June, 2013 - US Capital commences the construction of the road within the boundaries of the National Park. As at the date of the swearing of the First Affidavit of Gregory Ch'oc on 19th July, 2013 the road had reached the proposed A1 drilling site within the National Park where two acres have been cleared. The oil drilling itself had not commenced.

19th June, 2013 - The Claimants file the Fixed Date Claim and Application for Injunction. The Claimants claim the following relief:

1) A declaration that the Decision of the 3rd, 4th and 5th Defendants to permit oil drilling and the construction of a road by the 2nd Defendant in the National Park is unlawful, null and void;

2) A declaration that the Decision of the Government of Belize to enter into a contract with the 2nd Defendant to permit oil drilling in the National Park is unlawful;

3) An Order striking down any permits or licences issued to the 2nd Defendant purporting to authorize drilling for oil and the building of a road in the National Park;

4) A permanent injunction restraining the Defendants whether by themselves, their servants agents or assigns or otherwise from proceeding with oil drilling and any related activities in the National Park;

5) In the alternative, an Order directing the Government to obtain the free, prior and informed consent from the Claimants in respect of any contract, permit or licence that falls within the National Park.

Legal Issues Agreed By the Parties to be Determined by the Court

6. (1) Was the permission granted by the Government of Belize to US Capital Belize Energy Limited to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park *ultra vires* the National Parks System Act and the Petroleum Act?

   (2) Is the decision of the Government of Belize to permit the Second Defendant to conduct commercial oil drilling in the Sarstoon Temash National Park unlawful?

   (3) Was the decision by the Government of Belize to allow the construction of a road and commercial oil drilling in the Sarstoon Temash National Park by the Second Defendant irrational and *Wednesbury* unreasonable?

   (4) Was the permission granted by the Government of Belize to the Second Defendant to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park unlawful, having been granted without the free, prior informed consent of the indigenous Maya communities named in this Claim?

(5) Was the decision by the Government of Belize to permit road construction and commercial oil drilling in the Sarstoon Temash National Park in breach of the Claimants' legitimate expectation that the Government of Belize would comply with its obligations under the United Nations Declaration on the Rights of Indigenous Peoples and the judgment of the Supreme Court of Belize in Claim No. 171 and 172 of 2007?

(6) Should the Court declare or strike down any of the permits or licences issued to the Second Defendant authorizing drilling for oil in the National Park? The Claimants say (but the Defendants reject) that these include (1) the permission dated 30th April 2013 issued to US Capital Belize Energy Limited by the Fifth Defendant to construct a road and conduct commercial oil drilling in the Sarstoon Temash National Park; (2) the permission dated 30th January, 2013 granted to the Second Defendant by the Commissioner of Lands and Surveys, Government of Belize, to survey 7.2 kilometers of public road in the Sarstoon Temash National Park; (3) the permission granted 5th April, 2013 to the Second Defendant by the Chief Engineer Ministry of Works and Transport, Government of Belize to commence construction of an access road to the proposed oil well site; and (4) the Production Sharing Agreements dated 22nd January, 2001 (as

amended on 28th September, 2004 and 29th October, 2007) executed between the Second Defendant and the Government of Belize, be quashed?

Issue One

Was the permission granted by the Government of Belize to US Capital Belize Energy Limited to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park *ultra vires* the National Parks System Act and the Petroleum Act?

Issue Two

Is the decision of the Government of Belize to permit the 2nd Defendant to conduct commercial oil drilling in the Sarstoon Temash National Park unlawful?

Claimants' Submissions on Issues One and Two

7. Mr. Courtenay, S. C., on behalf of the Claimants argues at paragraph 8 of his skeleton arguments that *"an interpretation of the National Parks System Act Chapter 215 of the Laws of Belize as a whole demonstrates that the construction of road and oil drilling for commercial purposes are neither impliedly nor expressly permitted by the said Act. Any permission granted to the Second Defendant to construct a road and to conduct oil drilling within the National Park for that purpose is therefore unlawful*". In oral arguments he developed

this argument by submitting that the National Parks System Act is important for two reasons: (1) It is uncontradicted and uncontested that the land in question in the case at bar is within the Sarstoon Temash National Park; (2) The licence to enter the National Park is in reliance on a permit supposedly issued pursuant to section 6 of the National Parks System Act (NPSA). He argues that section 3 of the National Parks System Act defines a National Park as any area established in accordance with the provisions of section 3 "*for the protection and preservation of natural and scenic values of national significance for the benefit and enjoyment of the general public*."

Mr. Courtenay further argues that Section 6 of the National Parks System Act lists the activities prohibited within the National Park (subject to section 7 of the said Act or the written authorization of the Administrator) as follows:

Section 6:

> *"No person shall, within any national park, nature reserve, wildlife sanctuary or natural monument, except as provided under section 7, or with the written authorization of the Administrator –*
>
> *(a)* ***permanently or temporarily reside in or build any structure of whatever nature whether as a shelter or otherwise****;*
> *(b)* ***damage, destroy or remove from its place therein any species of flora;***
> *(c) hunt any species of wildlife;*
> *(d) remove any antiquity, cave formation, coral, or other object of cultural or natural values;*

(e) ***quarry, dig or construct roads or trails****;*
(f) deface or destroy any natural or cultural features or any signs and facilities provided for public use and enjoyment; …"

Mr. Courtenay argues that section 6 of the National Parks System Act prohibits certain specified activities within the park, except where the written authorization of the Administrator of the National Park is provided. He submits that drilling for oil for the purpose of pursuing a commercial enterprise is not provided for in the National Park legislation. In addition, he contends that where the Administrator does in fact authorize any of the prohibited acts, such authorization must be compliant with and in furtherance of the policy objective underlying the Act as a whole which is fundamentally to preserve the fauna and flora of the National Park for observation purposes. In support of this contention, he cites the case of ***Blue Mountains Conservation Society Inc v Director of National Parks & Wildlife et al*** [2004] NSWEC 196 where the New South Wales Land and Environment Court held that the proposed activity - commercial filming activity - was unlawful because it did not satisfy the purpose for which a wilderness is declared under section 9 of the Wilderness Act. Section 9 of that Act stated that:

"A wilderness area shall be managed so as:

(a) to restore (if applicable) and to protect the unmodified state of the area and its plant and animal communities;

(b) to preserve the capacity of an area to evolve in the absence of significant human interference;

(c) to permit opportunities for solitude and appropriate self-reliant recreation."

Mr. Courtenay therefore submits in the matter at bar that in construing the Act as a whole it is clear that the activities being conducted by the 2nd Defendant or intended to be conducted are not contemplated by section 6 of the National Parks System Act of Belize. This is because the 2nd Defendant's enterprise is one for the commercial exploitation of oil resources if found in the National Park and for the earning of a profit from that exploitation.

In regards to the Petroleum Act, Chapter 225 of the Laws of Belize, Mr. Courtenay argues that the Minister with responsibility for petroleum, when deciding to contract with the 2nd Defendant, ought properly to have had regard for the National Parks Act. To the extent that the 2nd Defendant sought permission to carry out petroleum related activities in the National Park, the Minister with responsibility for petroleum could only have entered into the contract if he was satisfied that petroleum operations are permissible in the

National Park. The Minister cannot override the restrictions in or the objectives of the National Parks Act by simply entering into a contract with the 2nd Defendant.

Defendant's Submissions on Issues One and Two

8. Mr. Denys Barrow, S. C., on behalf of the First, Third, Fourth and Fifth Defendants argues that the Claimants have failed to prove firstly that they have particular rights to lands within the National Park. He submits that, as was held in the ***Wik Peoples v Queensland ("Pastoral Leases Case")*** [1997] 3 LRC 513, where it is logically impossible for a legislative act and rights under native title to co-exist, the effect of the legislative act is to extinguish native title rights. Mr. Barrow submits that while the Government of Belize is not, in these proceedings, asking the court to determine that there has been necessarily extinguishment of Maya customary land rights within the Park, the Government is asking the Court to decide, based on the principle of the primacy of legislation over native title rights as held in the Pastoral Leases Case, that Maya customary land rights cannot override or prevail over the exclusive possession that section 4, 5, 6 and 7 of the National Parks System Act .

I shall return to this argument on behalf of the Defence regarding the existence of communal rights in the National Park in greater detail when I come to consider and determine the issue of "free, prior and informed consent."

On the specific question of whether the permission granted by the Government of Belize to the 2nd Defendant to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park is *ultra vires* the National Parks System Act and the Petroleum Act, Mr. Barrow, S. C., submits that it is a natural and necessary requirement of national parks legislation that there is super-imposed, over even outright private ownership of land, the prohibitions, restrictions and regulations for which the legislation provides.

In interpreting the provisions of the National Parks System Act in his oral arguments, Mr. Barrow, S. C., submitted that the starting proposition is that whatever may be done lawfully in the Country of Belize may be done lawfully in the National Park. He argued that if the Minister does not make a rule which prohibits certain activities within the park, then the necessary implication is that these activities may be done until they are prohibited. Nothing is prohibited except that which the National Parks System Act prohibits. Mr. Barrow further submits that the Petroleum Act 1991 is a later Act than the National Parks

System Act and thus whatever is contained in the earlier National Parks System Act of 1982 which is adversely affected by the National Parks System Act is impliedly repealed, or modified, to the extent of the provisions contained in the Petroleum Act.

Under the Petroleum Act, Mr. Barrow submits that the permit which a contractor needs to obtain is a permit to enter the park; he does not need a permit to explore for oil from the officials responsible for the Park. This is because in 1991, Parliament passed the Petroleum Act which says in Section 27 that subject to your getting permission to enter, you may enter and conduct petroleum operations.

Decision on Issue One and Issue Two

9. I find that the permission granted by the Government of Belize to the 2nd Defendant to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park was not *ultra vires* the National Parks System Act or the Petroleum Act. This point has been determined in the recent Court of Appeal decision of ***Ya'axche Conservation Trust v. Wilber Sabido (Chief Forest Officer) et. al.*** Civil Appeal No 8 of 2011. Similar arguments to those made by Mr. Courtenay, S. C., in this matter were advanced by the Appellant in that case,

that the purpose for which the permit was granted (to enter the Bladen Branch Nature Reserve for the purpose of conducting longitudinal and topographical surveys and acquiring hydrologic data) was not in keeping with the purpose for which the park was established. In delivering the judgment of the Court of Appeal, Mendes JA analyzed section 6 of the National Parks System Act Chapter 215 as follows:

> *"The protection afforded under section 6 is also not absolute. In fact, while prohibiting the activities specified in its sub-paragraphs, it proceeds expressly to empower the Administrator to authorize those very activities. Thus, the Administrator may authorize a person to damage or destroy any flora in a nature reserve, or hunt any species of wild life, or to quarry, dig or construct roads or trails, or introduce exotic species of flora or fauna, or catch fish. Each of these activities has the potential to undermine the purpose for which a piece of land is declared a nature reserve. Damaging, or destroying the flora and hunting species of wildlife is the antithesis of the protection of nature or the maintenance of natural processes in an undisturbed form. This is no doubt why Ms. Marin Young adopted the extreme position that, despite the express words used in section 6, the Administrator could not authorize, for example, the destruction of flora or the clearing of trails. But the fact is that section 6 does empower the Administrator to authorize these very activities, despite the obvious detrimental effect they could have on the purpose for which a nature reserve is created. And this is no doubt why Mr. Panton adopted the other extreme position that the Administrator could authorize the razing of all plant life in a nature reserve, even if there were no representative samples of the natural environment left thereafter for scientific study, monitoring or education.*
>
> *It is clear that none of these extreme positions is tenable. There would be no point in empowering the Minister to create a nature reserve, if the Administrator could authorize its destruction. And it would be no point*

> *in empowering the Administrator to authorize the destruction of flora on a nature reserve, if it is a power which in practice he could never exercise. The legislature has no doubt recognized that it would not serve the public interest to keep a nature reserve forever in its pristine form. Life goes on. There may be other pressing uses to which the tract of land designated a nature reserve may be put, without jeopardizing the purpose for which it was created in the first place."*

I adopt, with respect, this reasoning of the Court of Appeal to the arguments advanced before me on this ground, and in so doing I find for the Defendants on this first issue in that the permission granted by the Government of Belize to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park was not *ultra vires* the National Park System Act or the Petroleum Act. While it is obvious that road construction and commercial oil drilling are activities which will definitely damage the pristine nature of the park, the National Parks System Act itself allows the Administrator of the park to give permission for such activities to be conducted, once the Government of Belize has decided that there are other pressing uses in the national interest e.g. commercial oil drilling to which that piece of land can be put.

For these reasons, I also find for the Defendants on Issue 2, in that the decision simpliciter of the Government of Belize to permit the 2nd Defendant to conduct commercial oil drilling in the Sarstoon Temash National Park was not unlawful. In the case of ***SATIM v. Forest Department et. al.*** Claim No 212 of 2006 delivered

on September 26th, 2006, Awich J (as he then was) articulated the view at paragraph 15 of his judgment that "*it was not unlawful for the Government to grant permission to enter the park for the purpose of oil exploration*." The following passage of Awich J's judgment was cited with approval by the Court of Appeal at paragraph 32 of **Ya'axche Conservation Trust v Wilber Sabido** Civil Appeal No. 8 of 2011 by Mendes JA:

> *"It is also relevant that the studies being carried out concerned the potential use to which the natural resources with which Belize is endowed could be put for the development of Belize. It may be that it is a wise use of water resources to establish a hydroelectric plant. That is a matter for the duly elected representatives of the people of Belize to determine. There is nothing in the Act which says that once created, a nature reserve must forever be used as such. Indeed the Minister may at any time revoke the Order designating Bladen as a nature reserve. There is nothing unlawful in carrying out studies to determine whether any part or even the whole of a nature reserve should be put to other uses in the service of the public interest. Awich J made a similar point in SATIM. He said at paragraph 15:*
>
> > *'The Government was entitled to take a decision such as authorizing seismic surveys which could provide the Government with facts as to whether it would in the end opt for oil exploitation in the area and abandon the "protection and preservation of natural and scenic values of national significance for the benefit and enjoyment of the general public. That will be a decision that will entail choice between competing economic and social merits, a political choice, an area about which the Government is entitled to make a decision. Court is not a proper arbiter of such a matter.'"*

I therefore find that the decision simpliciter by the Government of Belize to grant permission to US Capital Energy Limited to conduct commercial oil drilling in the Sarstoon Temash National Park was not unlawful. It was a decision which the Government is legally mandated to make as the duly elected representatives of this country. Commercial oil drilling is one use to which a portion of the land in the park can be put to use for the benefit of, hopefully, all Belizeans and the Government in its wisdom has made the decision that the damage done to the park will be worth the benefits that finding oil in commercial quantities will bring. I also bear in mind that the Department of the Environment will keep a watchful eye on this project, monitoring it closely to ensure that only minimal damage will be done to the environment in the process.

Issue Four

10. Was the permission granted by the Government of Belize to the 2nd Defendant to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park unlawful, **having been granted without the free, prior and informed consent of the indigenous Maya communities named in this Claim?** (emphasis mine)

I have chosen to address Issue Four before dealing with Issue Three as I believe Issue Four is a natural precursor to deciding the remaining issues in this matter.

Claimant's Submissions on Issue Four

11. On behalf of the Claimants, Mr. Courtenay argues that the right of the Claimants to "free, prior and informed consent" in respect of decisions affecting the exercise of their cultural, social, and economic rights over their communal property has been firmly established in Belize. He submitted that on August 7th, 1998 the Indian Law Resource center and the Toledo Maya Cultural Council presented a petition to the Inter-American Commission on Human Rights. The Petitioners claimed that Belize was responsible for violating rights that the Mopan and Q'eqchi Maya People of the Toledo District had over certain lands and natural resources pursuant to the American Declaration of the Rights and Duties of Man. The Petitioners further argued that by granting concessions to companies to extract logging and oil resources from the traditional lands of the Maya people, without properly delimiting and demarcating those lands and without effective consultation with or agreement by the affected communities, Belize had violated the right to property of the Maya People under Article XXII of the American Declaration. The Inter-American Commission on Human Rights found in favor of the Petitioners and stated at paragraph 142 of its report that:

> *"… one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories. As the Commission has previously noted, Articles XVIII and XXVIII of the American Declaration specifically oblige a member state to ensure that any determination of the extent to which the indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.*
>
> *143. Based upon the record in the present case, the Commission finds that the State granted logging and oil concessions to third parties to utilize property and resources that* ***could*** *fall within the traditional lands of the Maya People of the Toledo District, and that the State failed to take appropriate or adequate measures to consult with the Maya People concerning these concessions. There is no evidence that the State conducted effective consultations with the Maya Indigenous communities* ***prior*** *to granting logging licenses 1/93 or 6/95, or in issuing the concession now held by US Capital Ltd. and Island Oil Ltd. for oil exploration in the Toledo District." (emphas*is mine)

Mr. Courtenay further submits in his oral arguments before this Court that Conteh CJ (as he then was) in **Maya Land Rights Cases 1 and 2** has put beyond dispute "the nature and right of indigenous people in the Toledo District who enjoy customary land tenure. It is set out very clearly in this case which has not

been appealed by the Government, exactly, precisely and concisely what is the nature and extent that Maya customary land title." He drew the Court's attention specifically to an order made by the Chief Justice at paragraph 136 of his judgment *"that the Defendants (the Government of Belize) cease and abstain from any acts that might lead the agents of the Government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution. This order will include, but not be limited to, an order directing the Government to abstain from: the issuing of any lease or grants; registering any such interest in land; issuing any regulations concerning land or resources; and issuing any concessions for resource exploitation and harvesting, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forest Act, the Petroleum Act or any other Act."*

Mr. Courtenay, S. C., for the Claimants reminds the Court that this order remains in full force and effect and has not been appealed.

In his written submissions as paragraph 45, Mr. Courtenay submits that in both Maya Land Rights No. 1 and Maya Land Rights No. 2, Conteh CJ recognized the customary rights and interests of the Maya people in land in the Toledo District and declared that the Maya in the Toledo District had customary land tenure rights and interests which were protected by the Constitution of Belize. He submits further that the Chief Justice concluded that the Defendants in Maya Land Rights No. 1 were bound in both domestic law by sections 3, 3(a), 3(d), 4, 16 and 17 of the Constitution of Belize and international law to respect the rights to and interests of the Claimants as members of the indigenous Maya community, to their lands and resources.

Mr. Courtenay also argued that the Chief Justice stated in Maya Lands Rights No. 1 that Belize voted in favor of the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** passed by the General Assembly of the United Nations on 13th September, 2007 and that the Declaration embodied general principles of international law which Belize will not disregard. He submits that Belize is obligated by **United Nations Declaration on the Rights of Indigenous**

Peoples (UNDRIP) to ensure that decisions affecting the rights of indigenous peoples are made after consultative process with free, prior and informed consent, and that any process involving indigenous peoples are participatory and respect their right to self-determination. He refers specifically to Article 32 of the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**:

> *"Article 32:*
> *1. Indigenous people have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands and territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water or other resources.*
>
> *3. States shall provide effective mechanism for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."*

Mr. Courtenay reminds this Court that the Court of Appeal of Belize in ***The Attorney General of Belize v. The Maya Leaders Alliance and The Toledo Alcaldes Association on behalf of the Maya Villages of the Toledo District*****,** Civil Appeal No. 27 of 2010 has affirmed the approach adopted by the Chief Justice in relying on Belize's international obligations and general principles of

international law in determining property rights of the Maya People. In that case, Morrison JA stated that:

> "I accordingly think that Conteh CJ was entirely correct, both in the Maya Land Rights case (which has not been appealed) and in his judgment under appeal in the instant case, to take into account Belize' international law and treaty obligations, as well as general principles of international law."

Mr. Courtenay argues that in the present case there was no free, prior and informed consent of the Mayas sought or given. He says that insofar as the Permissions dated April 20th, 2013 were granted to the 2nd Defendant to conduct exploratory drilling in the National Park, the Claimants were only provided with a copy of the said Permission after the present claim was filed. He submits that the First Affidavit of Gregory Ch'oc sets out repeated requests for information and so far no information has been provided. He further submits that the consultation on the Environmental Impact Assessment conducted by the 2nd Defendant fell woefully short of what was required in that SATIM only became aware of the consultation 20 days before it was to be held; SATIM requested of the CEO of the Department of the Environment asking for more time "to request that the Government engage in free, prior and informed consent in a culturally appropriate manner for the Maya people", e. g., that the

300 plus page document be presented to them in a less technical format and translated into the language of the Maya people. This request was refused.

For these reasons, the Claimants say that the Defendants acted unlawfully in failing to obtain the free, prior and informed consent of the Maya People prior to granting concessions, permissions and licenses for the construction of a road and drilling for oil within the National Park. He also prays in aid of this submission several authorities which demonstrate how international courts have treated the issue of "free, prior and informed consent". These include *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights* (Ser. C) No. 79 (2001), *Saramaka Peoples v Suriname, Inter-American Court of Human Rights* (2007) and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare v Kenya*, 276/2003, African Commission of Human and People's Rights.

Defendants' Submissions on Issue Four

12. The Defendants for their part argue that free, prior and informed consent is not much of an issue because ownership of the land in the National Park vests in the Government of Belize, not in the Maya. Mr. Barrow, S. C., submits in his oral

arguments that what lies at the core of this claim is the requirement that there be political accommodation that there be conducted and concluded this exercise that Conteh CJ purported to mandate both in the first and second Maya Land Rights cases. He argues that respectfully it is with good reason that the Court of Appeal in ***The Attorney General of Belize v. The Maya Leaders Alliance and The Toledo Alcaldes Association on behalf of the Maya Villages of the Toledo District*** Civil Appeal No. 27 of 2010 accepted it was not competent for the Court to order or supervise such an exercise.

Mr. Barrow, S. C., argues that there is no evidence of any communal rights existing within the National Park. He rejects the Claimants' submission that *"The Defendants have not produced any evidence to rebut the Claimants' evidence that the 2nd to 5th Claimants have acquired communal property rights by virtue of their traditional use and occupation of lands which fall within the National Park*." He counters this by saying that it is the Claimants who have failed to provide evidence of the existence of Maya customary rights within the National Park. In the portion of his written submissions entitled "What Customary Rights?" Mr. Barrow, S. C., cites the *Pastoral Leases case*, which was an appeal against the decision by a judge on preliminary issues, the substantive case was sent to trial on the footing that the Aboriginal claimants would first have to

prove, by evidence, the rights they claim existed and which the court had only so far assumed they would be able to prove. Mr. Barrow submits that it was recognized in deciding the appeal on the preliminary issue that it would be only if a grant by the Crown was logically inconsistent with the particular native title rights that were proved to have existed, that the court could then proceed to decide whether the native title rights were extinguished.

Mr. Barrow argues that, in the instant case, there arises for the first time in litigation before the courts of Belize an assertion by the Maya of customary land rights in or over lands comprising a national park. He submits that the Court cannot make any decision as to the need for the Claimants' consent to activities within the park without any evidence as to the particular rights the Claimants allege exist. More importantly, for the Court to be able to make such a decision it would be indispensable that the Court should be told where in relation to the 41,000 acres of land that comprise the park, which particular rights, claimed by which particular community, are alleged to exist so that the Court may know if these rights may be in the least bit affected by the oil drilling activities authorized by the Government of Belize. He further submits that it is entirely conceivable that, as in the Pastoral Leases case, native title rights may be exercised in relation to particular lands concurrently with the exercise of

different rights by a grantee from the Government. It follows that, even if, as a general principle and in relation to lands within a national park, the consent of the holders of customary land rights may be required, it could be required only if those rights may be affected. Whether those rights are or may be affected is distinctly a question of fact and there is no evidence from the Claimants as to that fact.

Decision on Issue Number Four

13. I agree fully with the submissions of Counsel for the Claimants on this issue. It is clear that the Supreme Court of Belize in Maya Lands Rights case No. 1 (which has not been appealed) and in the majority judgment of the Court of Appeal in *The Attorney General of Belize v. The Maya Leaders Alliance and the Toledo Alcaldes Association on behalf of the Maya Villages of the Toledo District et. al.*, Civil Appeal No. 27 of 2010, have recognized that the Maya have rights to lands in Southern Belize based on the Maya People's traditional use and occupation of those lands. I fully understand and appreciate the argument made on behalf of the Defence that since the lands claimed by the Maya have not been demarcated, or surveyed, then it is not clear whether those lands do or do not lie geographically within or extend to the National Park. However in deciding this issue I pay heed to the points raised by Mr. Courtenay that: (1) the nature

of title of Maya historical lands is not such as can be delineated by meets and bounds, as they are an agrarian nomadic people and the nature of their title is anecdotal, rooted in stories of their traditional use of the land for farming, hunting, fishing, etc.; (2) the IACHR has already found in *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C. H. R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004) that the Government of Belize had violated the rights of the Maya by granting a permit without first obtaining the free, prior and informed consent of Maya when dealing with land that *could* fall within those claimed by them as traditional Maya Lands; (3) the judgment of Conteh CJ in Maya Lands case No. 1 plainly puts the onus of demarcating property belonging to the Maya on the Government of Belize in consultation with the Mayas. It is not for the Mayas to come and prove that their land lies within the park. It is for the Government of Belize to meet with the Mayas and make good faith attempts to arrive at a mutual understanding and agreement as to what areas of land will be demarcated as Maya Lands. At an international level, in the case of ***Maya Indigenous Community of The Toledo District v. Belize Case*** 12.053, Report No. 40/04, Inter-Am. C. H. R, OEA/SER.L/V/II.122 Doc.5 rev.1 at 727 (2004) it was stated that "*the organs of the inter-American human rights system have*

*recognized that the property rights protected by the system are not limited to those property interests that are **already** recognized by states or that are defined by **domestic law**, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition. Consistent with this approach, the Commission has held that the application of the American Declaration to the situation of indigenous peoples requires the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions*." I agree with the Claimants that it is incumbent on the Government of Belize to put in place the legal mechanisms necessary to recognize and to give effect to those rights belonging to the Maya which have already been recognized by the Supreme Court, Court of Appeal and the International Commission of Human Rights.

The principle of "free, prior and informed consent" is one which was set out very clearly in the *United Nations Declaration on the Rights of Indigenous Peoples* at *Article 32* as follows:

> *"Article 32:*
>
> *1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *2. States **shall** consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water or other resources.*
>
> *3. States **shall** provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to minimize adverse environmental, economic, social, cultural or spiritual impact."*

I agree with the submission made on behalf of the Claimants that Belize, as a member state of the United Nations which voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples on 13th September, 2007 is clearly bound to uphold the general principles of international law contained therein. In addressing the question what is meant by "free, prior and informed consent" Mr. Courtenay cites James Amaya in the ***"Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of***

Indigenous People" United Nations General Assembly, A/HRC/12/34 dated 15th July 2009 as para 62, 63 and 72:

> *"62. In accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No 169, States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them with the objective of obtaining their free, prior and informed consent.* ***Premised on an understanding of indigenous peoples' relative marginalization and disadvantaged conditions in regard to normal democratic processes, this duty derives from the overarching right of indigenous peoples to self – determination and from principles of popular sovereignty and government by consent; and it is a corollary of related human rights principles****. (emphasis mine)*
>
> *63. The duty to consult applies* ***whenever*** *a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests,* ***The duty to consult does not only apply when substantive rights that are already recognized under domestic law, such as legal entitlements to land, are implicated in the proposed measures.*** *(emphasis mine)*
>
> *72. Even when private companies, as a practical matter, are the ones promoting or carrying out activities, such as natural resource extraction, that affect indigenous peoples,* ***States maintain the responsibility to carry out or ensure adequate consultations.*** *For their part, as a matter of policy if not legal obligation, private companies should conform their behavior at all times to relevant international norms concerning the rights of indigenous peoples, including those norms related to consultation." (emphasis mine)*

Upon examining the evidence before me, I find that in this case, there was no free, prior and informed consent of the Mayas sought by the Government of Belize. It is an undisputed fact that the licences, permits and concessions in the

Production Sharing Agreement, as well as the permissions and licences granted to the Second Defendant to construct a road and drill for oil in the National Park were entered into without the knowledge, much less the consent, of the Claimants. As I look at the affidavit of Mr. Ch'oc I am struck by the repeated requests for information from the Defendants which apparently fell on deaf ears. In regard specifically to the consultation conducted by the Defendants on October 25th, 2012 regarding the Environmental Impact Assessment, while (as argued by the Defence) it might conform with the strict statutory provisions as set out in the Act, in my view that purported consultation fell far short of the Government's international human rights obligation to seek the free, prior and informed consent of those people who would be most affected by the project. I find it compelling that the actual Environmental Assessment Report prepared by the Second Defendant acknowledges at paragraph 11.2 the reason why the specific communities of Sunday Wood, Crique Sarco, Conejo Creek, Midway and Barranco were chosen to be consulted in regard to the EIA:

> *"These communities are on the periphery of the Sarstoon Temash National Park in the region where the exploratory drilling activity will take place. They have had a long association with the area covered by the Park traditionally using it for hunting and gathering. Since the declaration of the Park in 1994 the communities have had a somewhat ambivalent attitude to the park. In the initial period they objected to the park and the restriction it brought; however over time their attitude changed and they began to work more closely with the management of the Park.*

> ***Because of their proximity, they would have the greatest potential to benefit economically from the project, while on the other hand they would also have the greatest potential to be impacted socially, physically and environmentally."*** *(emphasis mine)*

I cannot put any clearer the reason why the Maya should have been afforded by the Government of Belize the opportunity to give their free, prior and informed consent to this project. In addition to the material fact that their rights to ancestral lands in Southern Belize have been articulated in the Maya Land cases at the Supreme Court and Court of Appeal level, it is also because these are the members of Belizean populace/citizenry whose daily lives will be directly impacted, for better or for worse, by this particular development.

I reproduce in its entirety one of over 20 unanswered letters written by Mr. Ch'oc exhibited at Tab 5 to 30 of the Claimants' written submissions begging the Government for information regarding the project:

0ctober 11, 2012

Mr. Martin Alegria
Chief Environmental Officer
Department of the Environment
Belmopan

Dear Mr. Alegria,

The Sarstoon Temash Institute for Indigenous Management (SATIlM), the co-manager of the Sarstoon Temash National Park, writes to you in regards to US Capital Energy's Environmental Impact Assessment (EIA) 2012 and the planned "consultation" to be held on October 25th, 2012.

Firstly, SATIIM was not aware that US Capital Energy was conducting an EIA for exploratory drilling and at no time was SATIIM consulted during the development of the environmental impact assessment. As co-managers, we consider that SATIIM and the communities it represents, should have been informed about these actions. On August 13th, 2012, Allan Herrera, consultant hired by US Capital

Energy to carry out the EIA, contacted SATIIM requesting views and concerns about the proposed project, and provided a provisional Terms of Reference (TOR) for the study. In good faith, SATIIM submitted a detailed documentation of how the TOR should be improved, as we thought that the EIA was about to commence. However, Mr. Allan Herrera in an email responded by saying that SATIIM was too late. On October 1st, 2012 when the Department of the Environment uploaded US Capital Energy's EIA on its website, SATIIM found out why we were late. The EIA had in fact been completed in early August, being this the same time when US Capital provided SATIIM with the provisional Terms of Reference for the study. This cautions us to question - why was SATIIM contacted to give its views and concerns about a proposed project, when in fact it was already done? Can we even consider this an action of good faith on behalf of the Company?

Secondly, SATIIM requests that the planned consultation on October 25th, 2012 be rescheduled to November 22nd, 2012 considering that the necessary conditions and adequate mechanisms are not in place for a just consultation. More time would even be better. As you are aware, SATIIM works with the Indigenous communities, whose lands form part of the national park, and as such is obligated to ensure that the rights of these communities to meaningful and effective participation in the consultation, as well as their right to free, prior and informed consent is preserved. We take that you are cognizant to the fact that in the 2007 and 2010 Maya land rights cases, the Supreme Court of Belize established that "the Maya villages have a right to give free, prior, and informed consent to any activities that might affect the existence, value, use or enjoyment of the land and resources that they traditionally occupy or use. "

We must emphasize that for the indigenous communities of the Sarstoon Temash Region to effectively participate in this consultation process, they need to understand the content of the over 300 pages of the EIA document, which first needs to be translated into their native language _ Q'eqchi'. They have informed SATIIM that they were never consulted during the development of the EIA. For a project of this magnitude which has the potential to vastly alter forever, the ways of life of these communities, SATIIM believes that it is imperative that effective measures are taken to ensure that these communities have adequate time to discuss, debate and seek expertise to help them understand the magnitude of all possible impacts of the project, before they are consulted on a project from which they have already been excluded. They are also in their right to either consent or not. Added to this, they have the right to "access to and prompt decision through just, fair and due procedures"; let's not take that away from them.

We also take this opportunity to remind you that the United Nations Declaration on the Rights of Indigenous Peoples, which Belize is a signatory to, in its Article 32 (2) establishes that *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources*". We trust that your ministry will act in accordance to this International Indigenous Peoples Human Rights instrument, which seeks to safeguard the rights of our Maya and Garifuna communities, and therefore give these communities the time needed so that they can fully exercise this right.

Respectfully yours

Gregory Ch'oc
Executive Director

CC: Hon. Senator Minister Lisel Alamilla
Hon. Senator Minister Joy Grant
APAMO
Coalition to Save our Natural Heritage

At the very least, these requests of SATIM should have been honored by the Government of Belize, especially in light of the fact that the consent of the Maya People had not been sought prior to the granting of the permits and licences for this project. It does not appear to be good faith on the part of the Government or the oil company to throw a 300 plus document written in English in highly technical scientific language at these indigenous people and give the agrarian Mayan communities many of whom speak only Mopan/Q'eqchi language twenty days to digest it before the scheduled meeting.

I find that the failure of the Government of Belize to obtain the free, prior and informed consent of the Maya people **prior** to granting the concessions and permissions for the construction of a road and drilling for oil within the National Park was unlawful.

Issue No. 3

14. Was the decision by the Government of Belize to allow the construction of a road and commercial oil drilling (without first seeking the free, prior and informed consent of the Claimants) in the Sarstoon Temash National Park by the Second Defendant irrational and *Wednesbury* unreasonable?

I also find for the Claimants on this third issue. I agree that in deciding to issue the permissions and licences to permit the construction of a road and the drilling for oil (without first seeking the free, prior and informed consent of the Claimants) within the National Park, the 1st, 3rd, 4th and 5th Defendants acted irrationally. As submitted on behalf of the Claimants, the irrationality is that articulated by Lord Diplock in ***Council of Civil Service Unions v. Minister for the Civil Service*** [1985] AC 374 at 410-411:

> *"By irrationality I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness.' It applied to a decision which is so outrageous in its defiance of logic or of acceptable moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…Irrationality by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."*

The decision is irrational for the reasons stated by the Claimants that: (1) the Defendants knew that the Supreme Court and the Court of Appeal of Belize had recognized and declared the communal property rights of the 1st to 5th Claimants; (2) the Defendants knew that the concessions, permissions and licenses fell within, or were likely to fall within the Claimants' communal property; (3) the Defendants proceeded to grant the permissions and licenses or continued the concessions despite this knowledge. I would add to this the fact

that the Government failed to obtain the free, prior and informed consent of the Claimants as discussed above, despite being aware of the judgments of the Supreme Court and the Court of Appeal and in so doing I find that the Government of Belize acted irrationally, especially in light of Belize's obligations to its indigenous peoples under the American Declaration of Human Rights and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Issue No. Five

15. Was the decision by the Government of Belize to permit road construction and commercial oil drilling in the Sarstoon Temash National Park in breach of the Claimants' legitimate expectation that the Government of Belize would comply with its obligations under the United Nations Declaration on the Rights of Indigenous Peoples and the Judgment of the Supreme Court in Claim Nos. 171 and 172 of 2007 (Conejo)?

Claimants' Submissions on Issue No. Five

The Claimants say that the Government's decision to permit road construction and commercial oil drilling in the National Park breached their legitimate expectation that the Government would comply with United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as well as with the

Maya Land Rights cases. Mr. Courtenay submits that the Claimants had a legitimate expectation that, Chief Justice Conteh having declared Conejo Village's right to property and to free, prior and informed consent, the Government of Belize would have complied with this order. This is so particularly since the Government has never appealed that decision, thus indicating that the Government has accepted the declared rights of Conejo to both its property and to its right to free, prior and informed consent. The Claimants also had a legitimate expectation that the Government having not appealed that decision, the Government has accepted the right to free, prior and informed consent of all indigenous peoples. He relies on the case from the Caribbean Court of Justice of ***The Attorney General of Barbados v Joseph and Boyce*** CCJ Appeal No. CV2 of 2005 as authority for the submission that even an unincorporated instrument may give rise to a legitimate expectation on a domestic plane to a group of people such as the indigenous Maya. In that case, the CCJ was called upon to determine whether Barbados was under an obligation to defer execution of a condemned man until the determination of any petition filed by him with an international body, pursuant to the provisions of a human rights treaty entered into and ratified by the State, but not incorporated into domestic law by the legislature. The CCJ held that albeit

unincorporated, the relevant treaty gave rise to a legitimate expectation that Barbados would await the outcome of the proceedings before the international bodies before proceeding with executing the death sentence. In giving this decision the Court made the following observations:

> *"[104] The differences reflect in part a variety of responses to underlying changes that have been taking place in the manner in which treaties, and human rights treaties in particular, are drawn. These changes affect the reach of such treaties and the entities that are accorded rights under them. Traditionally, individual citizens derived no entitlement under treaties concluded between States. Such instruments imposed obligations and conferred benefits upon States. The subject matter of the treaties was not intimately bound up with rights of human beings now regarded as fundamental and inalienable.*
>
> *[105] Over the last sixty or so years, however, it has become quite common for treaties to grant to individual human beings "rights" directly enforceable by them with the result that, far from being passive subjects, individuals can now become active players on the international plane pursuant to treaties entered into by their Governments.* ***These treaties contain provisions that are legally complete under international law. They provide the process by which individuals may enforce the rights conferred by them and no refinement is required by a State Party in order for nationals to take advantage of such provisions.*** *Pursuant to the ACHR, for example, without formal incorporation by Parliament, individual citizens may initiate proceedings and obtain relief from an international body. (emphasis mine)*
>
> ***[106] This development has been accompanied by the promotion of universal standards of human rights, accepted both at the domestic and on the international level. Citizens are now at liberty to press for the observance of these rights at both levels. At the domestic level, the jurisprudence of international bodies is fully considered and applied. In determining the content of a municipal right, domestic courts may consider the judgments of international bodies. Likewise, on the international plane, the judgments of domestic courts assist in informing the manner in which international law is interpreted and applied. There is***

> ***therefore a distinct, irreversible tendency towards confluence of domestic and international jurisprudence"*** *(emphasis mine)*
>
> *[107] The American decision in Minister of State for Immigration and Ethnic Affairs v Teob appears to have been received and approved throughout the common law world as an appropriate response to the evolving situation. The view seems to have emerged that, unless municipal law rules this out, a ratified but unincorporated treaty can give rise to a legitimate expectation of a procedural benefit.* ***When a treaty evidences internationally accepted standards to be applied by administrative authorities in dealing with basic human rights, courts will be hesitant to regard the relevant terms of the treaty as mere "window- dressing" capable of being ignored on the domestic plane."****(emphasis mine)*

Defendants' Submissions on Issue No. Five

Mr. Barrow, S. C., on behalf of the Defendants in his submissions entitled "Notes on Claimants' International Law Submissions" argues that the Claimants case in relation to legitimate expectation is misconceived. He submits that the Claimants have not identified any domestic legislation made in recognition of the respective treaties which would allow the court to draw upon those treaties. What the Claimants have attempted to do is simply draw upon the international treaties and plant them into the domestic arena as giving rise to rights, specifically the right to consultation and the right to free, prior and informed consent. He argues that this is contrary to a dualist system. It is also noteworthy that the cases relied upon by the Claimants are international law decisions

recognizing treaty rights; not domestic law cases recognizing unincorporated treaty rights.

Mr. Barrow, S. C., cites the same CCJ decision of ***The Attorney General of Barbados v Joseph and Boyce*** cited by the Claimants and quotes from that decision where the Justices of the CCJ described the dualist system as follows:

> "[*55] In states that international lawyers refer to as 'dualist', and these include the United Kingdom, Barbados and other Commonwealth Caribbean states, the common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty making on the other hand is a power that lies in the hand of the Executive."*

Mr. Barrow also relies on the following passage from the *Joseph and Boyce* judgment:

> *"[131 This decision should not be seen as opening up avenues for the wholesale domestic enforcement of unincorporated treaties. States, and small States in particular, enter into treaties for a host of different reasons and a Caribbean Court is acutely sensitive to such realities. Our application of the doctrine of legitimate expectation in this case is rooted in a number of considerations which are peculiar to the situation in which it has been invoked ..."*

Mr. Barrow argues that while the Claimants in the case at bar may have a right in international law to be consulted in relation to their communal lands - which they would first have to prove is involved or affected - that right is not enforceable in the domestic courts because it has not been incorporated in the domestic law as required by our adherence to the dualist system. The court will only call in aid an unincorporated treaty (1) to interpret ambiguous domestic legislation; (2) in recognition of a legitimate expectation that actually arises and which will not be presumed to arise. He further submits that the Claimants have made a leap in both instances in that there is no domestic legislation that calls for interpretation and they have failed to identify any representation made to the Claimants by the State that gives rise to a legitimate expectation.

Decision on Issue No. Five

I fully agree with the submissions made on behalf of the Claimants on this issue. In the Maya Lands case No. 1 at the Supreme Court Conteh CJ set out the rights of the Maya to lands in Southern Belize based on their ancestral title and the accompanying principle of free, prior and informed consent. This was affirmed by Morrison JA at the Court of Appeal level. In my view, legitimate expectation arises not merely from the fact that Belize is a signatory to the American Declaration of Human Rights and has ratified the treaty, but also from the fact

that the Government of Belize has itself made a treaty with the Maya people in 2000.

I reproduce the Ten Points Agreement in its entirety, with particular emphasis on Point 6 as follows:

TEN POINTS OF AGREEMENT

BETWEEN

The Government of Belize

AND

The Maya Peoples of Southern Belize

BELIZE

AN AGREEMENT made this day of, 2000 BETWEEN the GOVERNMENT OF BELIZE (hereinafter referred to as the GOB) of the One Part and the TOLEDO MAYA CULTURAL COUNCIL, the TOLEDO ALCALDES ASSOCIATION, the K'EKCHI COUNCIL OF BELIZE, the TOLEDO MAYA WOMEN'S COUNCIL and the ASSOCIATION OF VILLAGE COUNCIL CHAIRPERSONS who are collectively described as the MAYA LEADERS REPRESENTINGTHE MAYA P EOPLES OF SOUTHERN BELIZE (hereinafter referred to as the "Maya Leaders") of the One Part.

WHEREAS
A. The GOB and the Maya Leaders have been engaged in certain ongoing negotiations to find a solution to some of the issues set forth in the petition submitted to the Inter-American Commission on Human Rights and other issues of concern to the Maya Leaders;

B. The negotiations have not yet produced results satisfactory to either the GOB or the Maya Leaders;

C. The GOB and the Maya Leaders both remain committed to working together to achieve an expeditious and amicable settlement of the issues in a way that is mutually satisfactory to both parties

NOW THEREFORE the GOB and the Maya Leaders recognize and agree upon the following Ten Points of Agreement as an important step towards settling the issues that are of concern to the Maya Leaders

Ten Points of Agreement

It is Recognized and Agreed:

1. That much resources and research has gone into the draft Regional Development Plan for Southern Belize (the Plan) which was developed by the ENVIRONMENTAL AND SOCIAL TECHNICAL ASSISTANCE PROJECT (ESTAP) in collaboration with southern communities, the Government of Belize and the Inter-American Development Bank (IDB), and which outlines in

detail development programmes and an implementation strategy for the development of southern Belize.

2. That the IDB is ready to fund the implementation of the development programmes outlined in the plan in a way that is beneficial to both the GOB and the Maya Peoples, once they are completed and following a period of consultation about the plan with the Maya Leaders and other affected areas.

3. That it is in the interest of the GOB and the Maya Leaders to form a partnership for the Involvement of the Maya Leaders in the design and implementation of development programs and other matters affecting the Maya Leaders and their communities. This includes the TOLEDO DEVELOPMENT CORPORATION.

4. That the TOLEDO DEVELOPMENT CORPORATION will be the main agency for the Implementation of the Plan, subject to the mutual agreement of the GOB and the Maya Leaders as to its terms, including its objectives, its management and the composition of its Board of Directors.

5. To enable the Maya Leaders and their People to directly benefit throughout the entire Implementation phase of the Plan, the GOB will provide professional and technical assistance that is necessary for the Maya Leaders and their representative organizations to actually design, supervise and carry out development projects in their communities. The TOLEDO DEVELOPMENT CORPORATION will also award contracts for the implementation of the plan and for other development projects designed by the Maya Leaders and their representative organizations.

6. That the GOB recognizes that the Maya People have rights to lands and resources in southern Belize based on their long-standing use and occupancy.

7. That the first consideration of the partnership between the GOB and the Maya Leaders will be the establishment of a program to address the urgent land needs of the Maya communities of the south, including the surveying and distribution of lands or establishing and protecting communal lands, depending on the various needs of the Maya communities. The GOB and the Maya leaders shall develop, within four (4) months after the signing of this agreement, a framework and target dates, as well as administrative and other measures for the implementation of the programme.

8. That the second consideration of the Partnership shall be to develop within four (4) months after the completion of the paragraph (7) objectives, a framework and target dates to resolve other matters of mutual concern, including:
a. Sustainable management of natural resources within the 'Maya traditional land use areas', and equitable distribution of their benefits amongst the Maya communities;
b. Protection of Maya cultural practices and management of Maya cultural heritage;
c. Reform and status of community governance institutions; and
d. Other issues as agreed upon by the GOB and the Maya Leaders.

9. That the Partnership shall, with mutually agreed upon technical assistance as appropriate, Review and make recommendations about applications for large land leases, licenses for logging or oil exploration or extraction, assess their social, environmental and cultural impacts, and make recommendations about their conditions and status.

10. That the GOB and the Maya leaders will treat and use this agreement as the new basis for the resolution of issues of concern to the Maya Leaders and will by mutual agreement, expand, amend or develop more specific agreements within the framework of this general agreement.

DATED this day of 2000 A.D.

_____

Prime Minister, For and on Behalf of the Government of Belize

Chairperson, Toledo Maya Cultural Council

_____
Chairperson, Toledo Alcaldes' Chairperson, K'ekchi Council Association of Belize

_____
Chairlady, Toledo Maya Chairperson, Village Councils' Women's Council Association

As enunciated in the Maya Lands Cases, and confirmed in the Court of Appeal in *The Attorney General of Belize v The Maya Leaders Alliance and the Toledo Alcaldes Association on behalf of the Maya Villages of the Toledo District et. al.*, Civil Appeal No. 27 of 2010, this is a binding agreement made directly between the Government of Belize and the Maya People. This agreement to my mind plays a major role in moving the principle of free, prior and informed consent from the international plane to the domestic plane. This agreement, coupled with the declaration of rights in the Maya Lands case at Supreme Court and Court of Appeal level, and the fact that Belize's human rights obligations to its indigenous peoples arise under the American Declaration of Human Rights, gave rise to a legitimate expectation that the Government would have sought the free, prior and informed consent of the Mayas before granting the permissions and licences for this project.

Issue No. 6

16. Should the Court declare or strike down any of the permits or licences issued to the Second Defendant authorizing drilling for oil in the National Park? The Claimants say (but the Defendants reject) that these include: (1) the permission dated 30th April, 2013 issued to US Capital Belize Energy Limited by the Fifth Defendant to construct a road and conduct commercial oil drilling in the Sarstoon Temash National Park; (2) the permission dated 30th January, 2013 granted to the Second Defendant by the Commissioner of Lands and Surveys, Government of Belize, to survey 7.2 kilometers of public road in the Sarstoon Temash National Park; (3) the permission granted 5th April, 2013 to the Second Defendant by the Chief Engineer Ministry of Works and Transport, Government of Belize to commence construction of an access road to the proposed oil well site; and (4) the Production Sharing Agreements dated 22nd January, 2001 (as amended on 28th September, 2004 and 29th October, 2007) executed between the Second Defendant and the Government of Belize, be quashed?

The Claimants have established that the free, prior and informed consent, as articulated in Maya Lands case No. 1 was not sought by the Government of Belize. On that basis alone, I find that the Claimants are entitled to the Declarations that they seek. As emphatically stated by the Caribbean Courts of

Justice in *AG of Barbados v. Joseph and Boyce* cited above, it is not sufficient for governments to treat those international agreements which they have signed and ratified such as the American Declaration of International Human Rights as mere "window dressing". It is incumbent on the Government of Belize to put in place the legislative measures to ensure that the rights of the Maya as declared in our Supreme Court and Court of Appeal are given full effect. It is not enough for the Government to come and say they do not know where the lands lie because the Maya have not proven where they lie. It is for the Government to meet with the Maya to set up a system which would demarcate the lands that fall under Maya ancestral title. It is for the Government to put technical documents in simple language that indigenous people can understand, translate into their native language where necessary and give them enough time to mentally digest the information provided. It is for the Government to seek in good faith the free, prior and informed consent of the Maya and where possible obtain such consent *before* granting permits that could affect Maya rights. The Government has agreed with the Maya in the Ten Points Agreement of 2000 that it will do its best to address the particular needs of that community and so the Government must be held to that Agreement.

17. Now the Claimants have come to court asking for the permits to be struck down. It has also asked in the alternative for an order to be made whereby the Court would order that the Government would seek their free, prior and informed consent. The Claimants have stated that what they seek by this claim primarily is the validation of their right to free, prior and informed consent as indigenous people. Mr. Courtenay in his oral submissions before this Court made it clear that he is not seeking a structural injunction such as those issued by the Canadian courts in dealing with aboriginal rights. In making this decision, I have to bear in mind not only the interests of the Maya but also those of the Government of Belize, the oil company and indeed the entire nation of Belize. Belize as a nation can ill afford to discourage investors and I bear in mind the affidavit evidence of Dr. Michael Tewes and Allistair King, officials of the 2nd Defendant Company, as to the millions of dollars expended to date on this project, and the irrecoverable amount of money that both Belize as a country and the 2nd Defendant company will lose if the project is discontinued. With that said, I trust that this case will serve as a notice to the Government, investors and everyone else that it is imperative that the rights of the Maya be respected and enforced, and that the Maya People's free, prior and informed consent must be sought as early as possible before permits or licences are issued, and that their

consent obtained for projects which affect, or could affect their rights. It all boils down to a question of respect as Mr. Barrow admitted in his arguments before this Court.

18. I also take into account the 2% of the oil profits offered by the Government of Belize to the Maya People in its letter dated November 2012 which I now reproduce in its entirety:

> (Ref: MFFSD/98/2012
>
> November 23, 2012
>
> Mr. Juan Coc
> Chairman
> Crique Sarco Village
> Toledo District
>
> Dear Sir,
>
> In light of the recent and important issues raised by various Indigenous Peoples, the Prime Minister, Hon. Dean Barrow, has designated the Ministries of Forestry, Fisheries and Sustainable Development and Energy, Science & Technology and Public Utilities, under the stewardship of Minsters Alamilla and Grant, to commence a dialogue with the Indigenous Peoples to achieve the following objectives:
>
> - Clarify the process for obtaining access to information relating to oil concessions, inclusive of permits and oil exploration data.
> - Agree on a mechanism to allocate 2% of the Government of Belize's 10% working interest in the US Capital Energy Production Sharing Agreement to fund projects in the Toledo District, in the event that oil is discovered in commercial quantities.
>
> It is our hope that the proposed process will meet with your approval and provide a forum for dialogue and understanding in keeping with Government's commitment to transparency, accountability and inclusiveness.
>
> In order to expedite this process and make it as efficient as possible, we are recommending that the Indigenous Peoples collectively decide on nominating its representatives that will serve as the liaison between the Government and the

Indigenous Peoples. We recommend that the selection of these representatives be done in a transparent and inclusive manner so as to increase the buy-in from all stakeholders. It is also important that these representatives have clear channels of communication to ensure timely feedback between the various stakeholders and the Government.

Please inform us of the names of the three representatives who have been selected to lead this process at your earliest convenience. Subsequently, we will mutually agree on an outline on how to proceed in an effort to amicably address the issues raised above.

Sincerely,

_____

Hon. Lisel Alamilla
Minister of Forestry, Fisheries and Sustainable Development

_____

Hon. Joy Grant
Minister of Energy, Science & Technology and Public Utilities

Cc: Juan Choc
Luis Choj
Enrique Makin
Eufemio Makin
Jose Paau
Rolando Paau
John Rodriguez
Alberto Cos
Pablo Itch
Alfonso Cal
Pablo Mis
Gregorio Choc
Dr. Joseph Palacio

Without expressing any views on the sufficiency or otherwise of the percentage offered to the Maya, I view this letter as an olive branch, a positive step in the right direction on the part of the Government of Belize in recognizing the compensation that the Maya People fully deserve for the fact that this project will affect their indigenous rights. I also bear in mind the view expressed by Mr. Barrow that Canadian courts have displayed the tendency to refrain from

striking down permits that negatively impact Aboriginal title, and have tended instead to encourage the Canadian Government to **continuously dialogue** with their Aboriginal peoples with a view to attaining a mutually beneficial solution in good faith. It is in this light that, I will not strike down the permits or licenses. I believe that this judgment has clearly vindicated the right of the Maya people of Belize to free, prior and informed consent. I grant instead the alternative relief sought by the Claimants and I therefore order the Government of Belize to seek and make good faith attempts to obtain the free, prior and informed consent of the Maya People in granting permits or licences that fall within the National Park (or affect Maya ancestral lands). Charting the way forward, I must emphasize that in my view there is nothing to be gained and much to lose for the Government of Belize to continue to insist that the Mayas have no customary rights to lands in Southern Belize. In my respectful view, for the reasons already expressed in this judgment, that ship has already sailed and it is therefore in the best interest of all parties concerned including but not limited to the Government and Maya Peoples to come together to put in place measures that will ensure that those rights are respected and enforced, while working together to achieve the development and progress that this country needs, and that will benefit all parties concerned. It is in this spirit that I am

commending to the Government of Belize and to the Maya people and all other relevant parties, the approach taken by the Canadian Government in dealing with their own concerns of their native aboriginal populations. To this end I am grateful for the article entitled ***"The Petroleum Law Edition: The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development"*** (2007) 44 Alberta Law Review 571-618 submitted by Mr. Barrow, S. C., addressing in particular the Alberta Policy and the Alberta Framework as a model which can be adjusted and reconfigured to effectively address the needs and concerns of our own indigenous peoples.

19. The following relief is therefore granted to the Claimants:

(1) A declaration that the decision of the 3rd, 4th and 5th Defendants to allow oil drilling and road construction in the National Park is irrational and *Wednesbury* unreasonable, that decision having been made without the free, prior and informed consent of the indigenous Maya communities named in this claim;

(2) A declaration that the decision of the 3rd, 4th and 5th Defendants to permit oil drilling in the National Park is in breach of the legitimate expectation of the indigenous Maya Peoples represented by the Claimants, that the Government of Belize, and the 3rd, 4th and 5th Defendants would comply with their obligations under the United Nations Declaration on the Rights of Indigenous Peoples to respect the rights of the Indigenous Maya Peoples to

their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;

(3) Order directing the Government of Belize to obtain free, prior and informed consent from the Claimants with respect to any contract, permit or licence that falls within the National Park.

20. Costs awarded to the Claimants to be paid by the Defendants to be assessed or agreed.

Dated this 3rd day of April, 2014

_____

Michelle Arana
Supreme Court Judge