No. 16-136

IN THE

Supreme Court of the United States

GOVERNMENT OF BELIZE,

Petitioner,

v.

BCB HOLDINGS LIMITED AND BELIZE BANK LIMITED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts properly refused to dismiss this New York Convention foreign arbitral award enforcement proceeding under the doctrine of *forum non conveniens* where Belize offers no adequate alternative forum because the Belizean courts have already refused to enforce this very same award.*

2. Whether the lower courts correctly rejected application of the public policy defense to enforcement of a foreign arbitral award under Article V(2)(b) of the New York Convention where the party opposing enforcement failed to establish that enforcement of the arbitral award would violate any "explicit" or "well-defined and dominant" public policy of the United States.

* The question assumes that the doctrine of *forum non conveniens* applies in New York Convention award enforcement proceedings. That assumption is incorrect, as explained below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents BCB Holdings Limited (now known as Caribbean Investment Holdings Limited) and The Belize Bank Limited provide the following disclosures. BCB Holdings Limited states that it has no parent company and that no publicly held company owns 10 percent or more of its stock. The Belize Bank Limited states that no publicly held company owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION

The Government of Belize's petition for a writ of certiorari does not present anything that would make this case worthy of this Court's attention. At base, the petition is a last-ditch effort to correct a perceived error, and does not even implicate the questions it purports to raise. The Court should deny further review.

First, the Government of Belize principally bases its petition on a purported circuit split concerning the doctrine of *forum non conveniens*. However, this case does not implicate this asserted division in authority because the forum favored by the Belizean Government is not an adequate alternative forum under this Court's and the circuit courts' well-established case law. As the Belizean Government itself asserts, BCB Holdings Limited ("BCB Holdings") and The Belize Bank Limited ("Belize Bank") (collectively, "Holdings") attempted "enforcement of the award in Belize," and the Caribbean Court of Justice ("CCJ"), Belize's highest court, "refused enforcement" based on Belizean public policy "under Article V(2)(b) of the [New York] Convention."[1] Pet. at 8–9. That decision bars any further effort by Holdings to enforce the arbitral award in Belize. Since Holdings cannot now obtain *any* relief in Belize, that country cannot be an adequate alternative forum to enforce this award. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (1981) (stating that *forum non conveniens* "would not be appropriate where the alternative forum does not

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for the United States on Dec. 29, 1970) ("New York Convention").

permit litigation of the subject matter of the dispute."). Because this threshold issue precludes the Government of Belize's *forum non conveniens* argument, the Court could not even reach the question presented or the purported circuit split.

Second, the Belizean Government's other issue similarly offers nothing that warrants this Court's consideration. Put simply, there is no disagreement among the circuits on the meaning or application of the public policy defense to enforcement of a foreign arbitral award. Nor has the Government of Belize identified one. Courts uniformly recognize that the public policy defense requires an explicit or well-defined and dominant public policy of the court where enforcement is sought. The Belizean Government fails to identify any "explicit" or "well-defined and dominant" public policy *of the United States* that would prevent enforcement of the award in this case. The lower courts correctly applied the governing standard, and the Government of Belize merely wants another bite at the apple.

Moreover, the lower courts' decisions do not conflict with or otherwise denigrate the CCJ's decision. The CCJ recognized that the arbitral award was valid, but decided, under Article V(2)(b) of the New York Convention, that it violated a public policy of *Belize*. In this case, the Belizean Government has never identified an explicit or well-defined policy of the *United States* that would be violated by the arbitral award.

Nor is there any basis to consolidate this case with the petition in *Belize* v. *Belize Social Development Ltd.*, No. 15-830 (U.S. filed Dec. 22, 2015). The Belizean Government's petition here is completely foreclosed by this Court's precedent and fails to raise any issue that could merit review. In fact, the

Government of Belize has recognized that Holdings cannot obtain any possible relief in a Belizean forum. In these circumstances, the petition is essentially seeking nothing more than error correction in the context of an arbitral award that was rendered more than seven years ago.

The petition should be denied.

STATEMENT OF THE CASE

A. BCB Holdings And The Belize Bank

BCB Holdings is incorporated and runs the largest full service commercial and retail banking operation in Belize. Joint Appendix ("JA") 67, *BCB Holdings Ltd.* v. *Gov't of Belize*, No. 15-7063 (D.C. Cir. filed Dec. 9, 2015). Belize Bank is one of BCB Holdings' principal subsidiaries and is also registered in Belize. The majority shareholder of BCB Holdings is Lord Michael Ashcroft, a British businessman. *Id.*

B. The Settlement Deed

On March 22, 2005, the Belizean Government and BCB Holdings (then known as Carlisle Holdings Ltd.) entered into a Settlement Deed, which was subsequently amended in 2006, to resolve an existing dispute between the parties that was being arbitrated. JA635–44, 646–56.[2]

In exchange for terminating the pending arbitration, the Government of Belize made certain promises, including a warranty that Holdings would receive certain tax treatment in Belize and that Holdings would be indemnified for any breach of the

[2] That dispute concerned the purchase and sale of stock in a Belizean company. JA1160-61.

Belizean Government's tax warranties. JA569–73, 639–40.

The Settlement Deed was expressly governed by English law and provided that any dispute arising out of or in connection with it would be resolved by arbitration under the London Court of International Arbitration ("LCIA") Rules in London, England. JA552–53, 642–43. Furthermore, the Government of Belize "irrevocably and unconditionally" agreed to waive its sovereign immunity with regard to proceedings relating to the Settlement Deed. JA553, JA642.

C. The LCIA Arbitration

In 2008, following an election that brought a new political party to power, the Belizean Government refused to honor the Settlement Deed. JA554. As a result of this repudiation, Holdings commenced arbitration in London, England, before the LCIA. *Id.*

The Government of Belize refused to participate in the arbitration notwithstanding the many notices and opportunities. The arbitral tribunal, after taking evidence, issued a final award on August 20, 2009 (the "Award"). JA581, 562. The tribunal first concluded that the Settlement Deed was legal and that the Prime Minister and the Attorney General of Belize had actual, as well as apparent, authority to enter into the Settlement Deed. JA69, 605, 607. The arbitral tribunal further explained that it was "not being asked to enforce Belize revenue laws; rather it [was] being asked to determine the validity and interpretation of a contractual warranty." JA596, 607–08.

The arbitral tribunal ultimately found that the Government of Belize had promised to provide certain treatment with respect to the payment of

business and income taxes by BCB Holdings Group, and that "[i]n refusing to accept [Holdings'] tax returns based on this treatment, [the Belizean Government] breached its contractual warranty and clearly evinced its intention not to honour the agreement." JA609. For this repudiatory breach, the tribunal awarded damages to Holdings and ordered the Belizean Government to pay Holdings BZD40,843,272.34, plus interest and costs. JA619, 631–32.

D. The Belizean Government's Campaign To Resist Payment Of The Award

In addition to refusing to participate in the arbitration, JA554, the Government of Belize also stated that it was unlikely that any arbitral award against it would be enforced in Belize. During the arbitration, the Prime Minister stated that "[a]ny damages award made under the umbrella of the London Court of International Arbitration must be brought to Belize for enforcement by our Supreme Court before it can have any practical effect," and professed his "complete[] confiden[ce] that [Belize could] successfully resist any attempt at local enforcement." JA275.

To that end, the Belizean Government systematically prevented parties from asserting claims outside of Belize. It implemented its strategy in two ways: First, the Government of Belize repeatedly obtained ex parte injunctions from the Belize Supreme Court to prevent parties—including BCB Holdings' subsidiary at the time, British Caribbean Bank—from enforcing rights against Belize in any forum outside Belize. JA70, 73–75. Second, the Belizean Government enacted legislation (the "Criminal Statute") that made violation of a Belize Supreme Court injunction a criminal offense

subject to mandatory imprisonment of five years and/or fine of BZD50,000, as well as fines of BZD100,000 for each day the offense continues. JA425.

These measures put parties—and specifically parties affiliated with Lord Ashcroft and their counsel—at risk of being subject to criminal sanctions for asserting their rights against the Government of Belize in any forum outside Belize.[3]

E. Enforcement Proceedings In Belize

1. On August 21, 2009, Holdings commenced proceedings to enforce the Award in Belize. JA555. The Belizean Government opposed enforcement on three grounds. On December 22, 2010, the Belize Supreme Court rejected each ground and enforced the Award. Pet. App. 66. The court found that the Arbitration Act was valid, the warranty claim in the Settlement Deed was arbitrable, and enforcement of the Award did not violate Belizean public policy. *Id.*

2. On appeal, the Belize Court of Appeals denied enforcement of the Award, finding that the Belize Arbitration Act, which provides for enforcement of arbitration awards under the New York Convention, was enacted *ultra vires* and was therefore void. JA556. Holdings appealed that decision to the CCJ. *Id.*

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[3] On January 24, 2014, the CCJ struck down portions of the Criminal Statute. The CCJ found that the Statute "obviously offend[ed] the rule of law" by "contraven[ing] the principle of the presumption of innocence," JA492, and that the minimum sentences for breach of court injunctions mandated by the Statute were "grossly disproportionate, inhumane and therefore unconstitutional," JA488.

3. In July 2013, the CCJ found that the agreement to arbitrate was binding and faulted the Government of Belize for refusing to participate. See Pet. App. 92. (noting that the Government "was contractually bound by…. [t]he agreement to arbitrate"). Nonetheless, the CCJ refused enforcement of the Award on Belizean public policy grounds.

The CCJ stated that "[w]here enforcement of a foreign or Convention award is being considered," courts may refuse enforcement where the Award is contrary to the public policy *of the country where enforcement is sought*. Pet. App. 71 ("Article V. 2(b) of the Convention provides that enforcement of an award may be refused if enforcement would be contrary to 'the public policy of *that country*….'") (emphasis added). Accordingly, the CCJ stated that "[p]ublic policy in this case must in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize." *Id.*

Contrary to U.S. law,[4] the CCJ then held that it was both permitted and required to "re-examine the

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[4] Under U.S. law, arbitrators "have completely free rein to decide the law as well as the facts," *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968), and "the fact that [a court] is inquiring into a possible violation of public policy [does not] excuse a court for doing the arbitrator's task." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 45 (1987). *See also Yukos Capital S.A.R.L.* v. *Samaraneftegaz*, 592 F. App'x 8, 11 (2d Cir. 2014) (stating that under Article V(2)(b) "courts may not 'revisit or question the fact-finding or the reasoning which produced the award'" (quoting *Int'l Bhd. Of Elec. Workers, Local 97* v. *Niagara Mohawk Power Corp.*, 143 F.3d 704, 716 (2d Cir. 1998))); *Baxter Int'l, Inc.* v. *Abbott Labs.*, 315 F.3d 829, 831 (7th Cir. 2003) (holding the public policy defense does not permit "reargue[ment] [of] an issue that was resolved by the arbitral tribunal").

legality of the Deed" by virtue of "the public policy against giving effect to transactions obviously offensive to the court," notwithstanding its recognition that "the Tribunal ha[d] specifically addressed that issue and found the Deed to be valid." Pet. App. 74–76. After re-examining the Deed's legality, the CCJ rejected the Tribunal's findings, see *id.* at 87, 90, held that the Settlement Deed was unconstitutional, and refused enforcement of the Award within Belize. See *id.* at 94–95 (noting the CCJ's "duty to invoke the public policy exception"). In concluding that the Award could not be enforced in Belize, the CCJ did not address or make any findings with respect to allegations of governmental corruption.

This award enforcement proceeding followed.

F. Proceedings Below

1. After the CCJ struck down portions of the Criminal Statute that penalized violations of anti-arbitration injunctions in Belize, see *supra*, n.3, Holdings commenced this proceeding to enforce the Award in the United States. Pet. App. 9–10. In response, the Government of Belize moved to dismiss. *Id.* at 10.

After considering the parties' arguments, the district court entered judgment confirming the Award in favor of Holdings, converting the Award into U.S. dollars, plus prejudgment interest. Pet. App. 7. The district court found that the CCJ's decision did not preclude enforcement of the Award in the United States under the New York Convention because "[a]s England is the country with primary jurisdiction, only an English court may set aside the arbitral award issued by the LCIA. Consequently, although the CCJ decided not to enforce the Award, its decision

to do so does not hold preclusive effect on this court." *Id.* at 29. The court therefore rejected the Belizean Government's arguments based on the doctrines of *res judicata*, collateral estoppel, and international comity. *Id.* at 27.

The district court also rejected the Government of Belize's request to dismiss under the doctrine of *forum non conveniens* and held that Belize was not an adequate alternative forum. Relying on the D.C. Circuit's controlling decision in *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005), the court held that "there is no alter[native] … forum that has jurisdiction to attach the commercial property of a foreign nation located in the United States." Pet. App. 30.

Lastly, the district court rejected the Government's public policy defense under Article V(2)(b) of the New York Convention. The court found that the Government of Belize failed to meet its burden to identify "an explicit or well-defined U.S. public policy that, if violated, would offend the most basic notions of morality and justice." Pet. App. 38. The court also observed that the anti-corruption policy relied upon by the Belizean Government "implicates the politics of a foreign nation" and explained that "Article V(2)(b) was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'" *Id.* (quoting *Parsons* v. *Whittemore Overseas Co.* v. *Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

2. In affirming the district court's judgment, the D.C. Circuit rejected all the Belizean Government's challenges to enforcement of the Award. With respect to *forum non conveniens*, the D.C. Circuit, relying on its decision in *TMR Energy*, held "that the doctrine of forum non conveniens does not apply to actions in the

United States to enforce arbitral awards against foreign nations." Pet. App. 4.

The D.C. Circuit also rejected the Belizean Government's public policy defense to enforcement, which was premised on the doctrines of separation of powers and international comity and a purported public policy against public corruption. The D.C. Circuit held that enforcement of the Award "would not violate any 'basic notion of morality and justice' rooted in" U.S. conceptions of either the separation of powers doctrine or the international comity doctrine. Pet. App. 4.

Finally, the D.C. Circuit rejected the Belizean Government's assertion that the Settlement Deed resulted from public corruption, noting that "[t]he arbitral tribunal did not find any corruption. And Belize's highest court refused to enforce the award not because the underlying agreement was tainted by corruption, but rather because the agreement violated Belize's separation of powers." Pet. App. 3–4.

REASONS FOR DENYING THE PETITION

I. THE GOVERNMENT OF BELIZE'S *FORUM NON CONVENIENS* ARGUMENT DOES NOT MERIT REVIEW BY THE COURT BECAUSE THIS CASE DOES NOT IMPLICATE ANY CIRCUIT CONFLICT.

Certiorari is unwarranted on the *forum non conveniens* question presented by the Government of Belize because this case offers no opportunity to resolve the circuit conflict asserted by the Belizean Government. Holdings sought enforcement of the Award in Belize, and the Belizean courts refused enforcement on public policy grounds specific to Belize. As a result of the CCJ decision, the Award

cannot be enforced in Belize, and the Belizean courts would not permit litigation of the subject matter of this dispute again. Regardless of any circuit split, the result in this case would not change because of this antecedent issue—Belize is not "an adequate alternative foreign forum" under this Court's established case law, as well as the case law of both the D.C. and Second Circuits. The petition should therefore be denied.

A. There Is No Adequate Alternative Forum To Enforce The Award In Belize, Precluding Review Of The Question Presented.

According to the Government of Belize, certiorari is warranted to resolve a circuit conflict between the D.C. Circuit and Second Circuit on when an adequate alternative forum exists in an award enforcement proceeding against a foreign sovereign. The petition argues that the D.C. Circuit's holding that an alternative forum does not exist in this context, because only a U.S. court may attach the commercial property of a foreign nation located in the United States, conflicts with the Second Circuit's holding that an alternative forum exists as long as "there are some assets of the defendant in the alternative forum." Pet. at 17–18 (quoting *Figueiredo Ferraz E Engenharia de Projeto Ltda.* v. *Rep. of Peru*, 665 F.3d 384, 391 (2d Cir. 2011)). This case, however, offers the Court no opportunity to resolve any difference between the circuits over this aspect of the *forum non conveniens* doctrine because Belize is unquestionably not an adequate alternative forum under well-established precedent.

Before commencing enforcement proceedings in the United States, Holdings "sought enforcement of the award in Belize," and the CCJ "refused enforcement

[of the award] under Article V(2)(b) of the [New York] Convention." Pet. at 8–9. The CCJ's decision undisputedly precludes any future attempt to enforce the Award *within Belize*. This fact is fatal to Belize's *forum non conveniens* argument and disposes of its petition because the lack of any possible remedy renders Belize an inadequate alternative forum.

As this Court has long held, "dismissal" under *forum non conveniens* "would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (1981). That is exactly the situation here. Holdings tried to enforce the Award in Belize, and the CCJ foreclosed that effort on Belizean public policy grounds. That ruling eliminates Belize as an available forum under this Court's settled jurisprudence because the subject matter of this dispute cannot be litigated there.

The same result naturally follows under both D.C. and Second Circuit precedent. The Second Circuit has repeatedly held that *forum non conveniens* dismissal is impermissible where the alternative forum is not "presently capable of hearing the merits of plaintiff's claim" and "an action that can be maintained in the United States is foreclosed in the foreign jurisdiction." *Norex Petrol. Ltd.* v. *Access Indus., Inc.*, 416 F.3d 146, 159 (2d Cir. 2005) (holding defendant failed to demonstrate that Russia was "a presently available forum" where "Russian courts would likely deem the core issues underlying plaintiff's claims largely precluded by" prior litigation); see also *Corporación Mexicana de Mantenimiento Integral S. de R.L. de C.V.* v. *Pemex-Exploración y Producción*, – F.3d –, 2016 WL 4087215, at *12 (2d Cir. Aug 2, 2016) ("The grant of a *forum non conveniens* motion that would otherwise be proper 'would not be

appropriate where the alternative forum does not permit litigation of the subject matter of the dispute'" (quoting *Piper Aircraft*, 454 U.S. at 254 n.22)). Thus, even under the Second Circuit's approach that the Belizean Government favors, the CCJ's denial of enforcement of the Award in Belize means that Belize is not "presently capable of hearing the merits of [Holdings'] claim," *Norex,* 416 F.3d at 159, and *forum non conveniens* dismissal is not permissible.

The same is true under the D.C. Circuit's case law. See *El Fadl* v. *Cent. Bank of Jordan*, 75 F.3d 668, 678–79 (D.C. Cir. 1996) (reversing dismissal under *forum non conveniens* where "the Jordanian courts would appear to be closed to El-Fadl's claims against Petra Bank and perhaps even to claims against PIBC"), *abrogated on other grounds*, *Samontar* v. *Yousuf*, 560 U.S. 305 (2010); see also *Nemariam* v. *Fed. Democractic Rep. of Eth.*, 315 F.3d 390, 394 (D.C. Cir. 2003) (holding that the lack of jurisdiction to award relief to individuals made the forum an inadequate alternative).

The facts here that make *forum non conveniens* inapplicable present no opportunity for the Court to resolve the division in authority asserted by the Government of Belize.

B. The D.C. Circuit's Decision In *TMR Energy* Was Correctly Decided.

Even if resolution of the division could affect this case (which it cannot), the Government of Belize's *forum non conveniens* arguments are without merit. In *TMR Energy*, the D.C. Circuit affirmed the district court's refusal to dismiss a New York Convention award enforcement proceeding under the doctrine of *forum non conveniens*. The D.C. Circuit faithfully applied the Court's established two-prong *forum non*

conveniens analysis—"(1) whether an adequate alternative forum for the dispute is available, and if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008) (citing *Piper*, 454 U.S. at 254 n.22.). The D.C. Circuit concluded that the first prong of the analysis was dispositive of the case because a foreign forum could not enforce an arbitral award in the United States.

As the D.C. Circuit explained, "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States." *TMR Energy*, 411 F.3d at 303; see 28 U.S.C. § 1610(a)(6) (allowing attachment of property used for commercial activity in the United States of a foreign state upon a judgment entered *by a court of the United States* based on an order confirming an arbitral award rendered against the foreign state). Since only U.S. courts can enter a judgment that can be executed against a foreign state's assets within the United States, no adequate alternative forum existed to enforce the award in the United States, and dismissal based on *forum non conveniens* was inappropriate.

The D.C. Circuit's decision properly recognized that an award enforcement proceeding under the New York Convention presents only one issue—whether an award that has resolved the merits of the parties' dispute can be turned into a local judgment and then executed within the forum. See *TMR Energy*, 411 F.3d at 303; *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 372 n.59 (5th Cir. 2003) (the question in award enforcement proceedings is whether "to enforce[], or refuse[] to enforce, awards arbitrated

elsewhere"). Because no other forum can turn an international arbitral award into a judgment of a *U.S. court* that can be executed against assets *in the United States*, no alternative adequate forum exists in the case.

The Government of Belize favors the decision of a divided panel of the Second Circuit in *Figueiredo*, which held that the inability of a Peruvian court to enforce an arbitral award against U.S. assets did not render Peru an inadequate alternative forum. 665 F.3d at 390–91. However, the *Figueiredo* majority missed the dispositive issue: whether an award enforcement proceeding to recover against a sovereign's property *in the United States* could be asserted elsewhere. It cannot. And as this Court has explained, "dismissal [based on *forum non conveniens*] would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 254 n.22. Foreign courts cannot attach or otherwise obtain assets in the United States, and, as a result, foreign courts do not "permit litigation" to enforce an arbitral award in the United States.

C. *Forum Non Conveniens* Does Not Apply To Award Enforcement Proceedings.

The D.C. Circuit's decision in this case is also correct for the alternative reason that the doctrine of *forum non conveniens* does not even apply in award enforcement proceedings, a threshold issue that the courts have not addressed. The express language in Section 207 of the Federal Arbitration Act provides that a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207; see also *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes &*

Lerach, 523 U.S. 26, 35 (1998) (noting that the use "of the mandatory 'shall,' … normally creates an obligation impervious to judicial discretion" (citing *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947))). Since the doctrine of *forum non conveniens* is not an Article V defense, it cannot be a basis to refuse enforcement. This is the position taken by the Restatement (Third) of International Commercial Arbitration (Tentative Draft No. 3, 2013) ("Rest. Int'l Comm. Arb."), which states that a proceeding to "enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds." Rest. Int'l Comm. Arb. § 4-29(a). And it is also the position taken by Judge Lynch in his dissent in *Figueiredo*. 665 F.3d at 399 (Lynch, J., dissenting) ("[T]he doctrine of forum non conveniens is not available at all in an action [to enforce a Convention award]."). The lower courts' judgment can be affirmed on this alternative basis.

D. *TMR Energy* Does Not Conflict With This Court's Decisions.

The Government of Belize asserts (Pet. at 20, 22–23) that the D.C. Circuit's decision in *TMR Energy* conflicts with this Court's decisions in *Sinochem International Co.* v. *Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), *Verlinden, B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983), and *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960). It does not.

Sinochem did not involve a proceeding to enforce a foreign arbitral award against a foreign nation's assets in the United States. Rather, it was a lawsuit alleging negligent misrepresentation arising from statements made in China. 549 U.S. at 426. Nothing in *TMR Energy*—which is limited to an award

enforcement proceeding—would affect the outcome in *Sinochem*.

The Belizean Government suggests that the request in *Sinochem* by the plaintiff "that 'any assets of Sinochem be attached'" makes the case comparable to an award enforcement proceeding. Pet. at 21 (quoting Am. Compl., *Malay. Int'l Shipping Corp.* v. *Sinochem Int'l Co.*, No. 03-3771 (E.D. Pa. 2003), *available at* 2003 WL 23904713). The Government of Belize is mistaken. As the *Sinochem* Court instructed, the key to *forum non conveniens* is the "gravamen" of the complaint, which, in *Sinochem*, was a negligent misrepresentation case for damages arising from events in China. The "gravamen" of the issue in *TMR Energy*, on the other hand, was a proceeding to enforce a foreign arbitral award against assets located in the United States. Indeed, the factors that supported *forum non conveniens* dismissal in *Sinochem*—challenging personal jurisdiction inquiries, the need for burdensome jurisdictional discovery, and a controversy that was "entirely foreign" where "the gravamen of [plaintiff's] complaint" concerned "an issue best left for determination by the Chinese courts," see 549 U.S. at 428, 435–36—are entirely absent in the award enforcement context, where the merits have already been resolved by an arbitral tribunal and the *only* issue is whether to convert an arbitral award into a local judgment. See *Figueiredo*, 665 F.3d at 405 (Lynch, J. dissenting); *Karaha Bodas Co.*, 335 F.3d at 372 n.59.

The Belizean Government also contends that by rendering *forum non conveniens* dismissal "unavailable in suits against *foreign states*," Pet. at 23, *TMR Energy* contradicts this Court's suggestion in *Verlinden* (a decision concerning a dispute on the

merits) that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*," 461 U.S. at 490 n.15. But the D.C. Circuit's holding neither departs from the traditional doctrine of *forum non conveniens*, nor renders it inapplicable to plenary lawsuits against foreign states.

First, the basis for the holding in *TMR Energy*—that foreign fora are inadequate *in award enforcement proceedings* due to the territorial limitations on execution and attachment, 411 F.3d at 303—was well established before Congress enacted the FSIA. See *Rep. of Arg.* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014) (noting that the FSIA did not address the execution immunity of extraterritorial assets because U.S. courts "lack authority in the first place to execute against property in other countries"); see also *Fotochrome, Inc.* v. *Copal Co,* 517 F.2d 512, 519 (2d Cir. 1975) ("[A] foreign award can never be self-executing in the forum state but must be merged in a local judgment to be effective as a matter of domestic law."). Second, *TMR Energy* has not rendered *forum non conveniens* dismissal "unavailable" in plenary lawsuits on the merits against foreign states. On the contrary, the D.C. Circuit has affirmed dismissals of suits against foreign sovereigns on *forum non conveniens* grounds since its decision in *TMR Energy*. See *MBI Grp., Inc.* v. *Credit Foncier Du Cameroun*, 616 F.3d 568, 576 (D.C. Cir. 2010) (affirming *forum non conveniens* dismissal of action asserting tort and contract claims against Republic of Cameroon). The Government of Belize simply refuses to acknowledge the uniqueness of an award enforcement proceeding.

Nor does the D.C. Circuit's decision conflict with this Court's decision in *Continental Grain*, a case addressing venue transfer under 28 U.S.C. § 1404(a).

The Court has repeatedly held that Section 1404(a) did *not* "codifi[y] … *forum non conveniens* within [the] U.S.," Pet. at 21, and that the analysis governing statutory venue transfer is different from the *forum non conveniens* inquiry. *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955) (recognizing that Section 1404 "*revis[ed]*" "the existing law on *forum non conveniens*" (first emphasis added)); see *Piper Aircraft,* 454 U.S. at 253 ("[Section] 1404(a) transfers are different than dismissals on the ground of *forum non conveniens*…. District courts were given more discretion to transfer under 1404(a) than they had to dismiss on grounds of *forum non conveniens*.").

Moreover, the rationale of *Continental Grain*, which concerned *in rem* claims in admiralty for damages resulting from a vessel's unseaworthiness, is irrelevant to *in personam* award enforcement proceedings under the Convention. *Continental Grain* affirmed a statutory transfer where a vessel's owners (but not the vessel itself) were subject to suit in the transferee court. *Cont'l Grain Co.*, 364 U.S. at 20. While suits in admiralty must be brought against a vessel *in rem*, the Court permitted transfer as "an alternative way of bringing the [vessel's] owner into court." *Id.* at 26. Since the owner was amenable to suit within the U.S., the Court did not allow an admiralty law fiction, meant to provide *some* U.S. forum, to prevent litigation of the merits in a more convenient district court. *Id.* at 23.

In this case, the only question remaining is Holdings' entitlement to a local judgment that can be executed in the United States, a question that cannot be adjudicated elsewhere. The prejudgment attachment jurisdiction issues discussed in *Continental Grain* are simply absent in these proceedings to enforce an arbitral award under the

New York Convention, where the merits have already been litigated in arbitration and the district court's *in personam* jurisdiction over the Government is undisputed.

II. THE GOVERNMENT'S PURPORTED PUBLIC POLICY ARGUMENTS DO NOT MERIT REVIEW BY THE COURT.

Like the petition's first question, the second question does not warrant this Court's review. First, there is no disagreement among the circuits regarding the application of Article V(2)(b) of the New York Convention. The lower courts properly applied the long-standing standard, and the Belizean Government merely seeks to relitgate that case-specific determination. Second, the Government of Belize has failed to articulate any "explicit" or "well-defined and dominant" United States public policy that would allow the district court to deny enforcement of the Award. See *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 43 (1987). Instead, the Government relies upon Belizean public policy, which is irrelevant under Article V(2)(b) in an award enforcement proceeding in the United States. For the same reason, the lower courts' rulings here in no way conflict with or disparage the CCJ's Belize-specific decision.

Finally, the assertion made by the Belizean Government's amicus that enforcement of the Award only serves "to ratify, reward, and foster corruption," Amicus Br. at 12, represents a fundamental misunderstanding of the New York Convention and of the record in this case.

The petition should be denied.

A. The Standard Governing The Public Policy Defense To Enforcement Under The New York Convention Is Well Established.

The circuits that have addressed the meaning of the public policy defense in Article V(2)(b) agree that, in light of "[t]he general pro-enforcement bias informing the [C]onvention[,]" "[t]he public policy defense [in Article V(2)(b)] is to be 'construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.'" *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) (quoting *M & C Corp.* v. *Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 n.2 (6th Cir. 1996)). *Accord Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096–97 (9th Cir. 2011); *TermoRio S.A. E.S.P.* v. *Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007); *Admart AG* v. *Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006); *Slaney* v. *Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); *Parsons & Whittemore Overseas Co.* v. *Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

This means that "arbitral awards are unenforceable on grounds that they are violative of public policy only when the award violates some explicit public policy that is well-defined and dominant … [and is] ascertained by reference to the laws and legal precedents" of the country where enforcement is sought "and not from general considerations of supposed public interests." *Indus. Risk Insurers* v. *M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (omission and alteration in

original) (quoting *Drummond Coal Co.* v. *United Mine Workers, Dist. 20*, 748 F.2d 1495, 1499 (11th Cir. 1984)). See also *Misco, Inc.*, 484 U.S. at 43 (same).

The Belizean Government suggests that *Asignacion* v. *Rickmers Genoa Schiffahrtsgesselschaft MBH & CIE KG*, 783 F.3d 1010 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 795 (2016), raises a potential conflict with this consistent body of case law. Pet. at 31. Not so. In *Asignacion*, the Fifth Circuit applied the well-established standard and held that enforcement of an arbitral award did not violate the "well defined and dominant" public policy protecting seamen. 783 F.3d at 1017 & n.27 (quoting *Misco, Inc.*, 484 U.S. at 43). There is no circuit conflict that merits this Court's attention.

B. The Government Of Belize Has Not Identified A Well-Defined And Dominant Public Policy Of The United States That Precludes Enforcement Of The Award.

Given the well-established standard for the public policy defense, the petition presents no issue that warrants this Court's attention because the Belizean Government has failed to demonstrate how enforcement of the Award would violate any "explicit" or "well-defined and dominant" United States public policy. The Government of Belize invokes and relies on the decision of the CCJ denying enforcement of the Award based on Belizean public policy. But that ruling provides no basis for a defense that looks to the public policy of the United States.

The New York Convention public policy defense is specific to each jurisdiction in which enforcement of an award is sought. See New York Convention art. V(2)(b) (1958); Rest. Int'l Comm. Arb. § 4-18 cmt. e

(Tentative Draft No. 2, 2012) ("The language of the Convention[] makes clear that the content of public policy is determined by the law of the jurisdiction where recognition or enforcement is sought."); see also *Yukos Capital S.A.R.L.* v. *Samaraneftegaz*, 592 F. App'x 8, 11 (2d Cir. 2014). Accordingly, the sole issue is whether enforcement in the United States of the Award (damages for breach of a contractual warranty) would violate U.S. public policy under Article V(2)(b) of the New York Convention.[5]

The CCJ decision does not reflect any United States public policy under Article V(2)(b) of the New York Convention. The CCJ made clear that its decision to deny enforcement of the Award in Belize was based purely on Belizean law and Belizean public policy. Pet. App. 71 ("Public policy in this case must … be assessed with reference to the … cardinal principles of law of … Belize.").[6] The Belizean Government

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[5] *See, e.g.*, *Karaha Bodas Co.*, 364 F.3d at 306 (stating that Article V(2)(b) concerns "the forum state's most basic notions of morality and justice"); Rest. Int'l Comm. Arb. § 4-18(a) (Tentative Draft No. 2) (stating that a U.S. court may deny enforcement of a foreign arbitral award "to the extent that the grant of post-award relief would be repugnant to the public policy of the United States").

[6] The Government of Belize suggests that the CCJ based its decision to refuse enforcement of the Award on grounds of "international public policy" rather than Belize public policy alone. This is incorrect. The Belizean Government misinterprets the phrase "international public policy." That phrase "is not to be understood … as referring to a public policy which is common to many States … or to public policy which is part of public international law." *See* Int'l Law Ass'n, *Final Report on Public Policy* 3 (2002). Rather, it "is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy *of a State* which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award." *Id.* (emphasis added). The CCJ refused enforcement of

contends that, despite the jurisdiction-specific character of the public policy defense, the CCJ's decision bars enforcement within the U.S. under Article V(2)(b) for two reasons: (1) the CCJ's findings with respect to Belizean public policy establish that enforcement of the Award would *also* violate purported *United States* public policies concerning "separation of powers principles" and the "significant international policy of combating public corruption." Pet. at 27; and (2) Article V(2)(b) permits the United States to defer to an enforcement jurisdiction's refusal to enforce a foreign arbitral award, on grounds of domestic public policy by virtue of the doctrine of international comity. Pet. at 27. These arguments are unavailing.

First, enforcement of the Award does not implicate any U.S. public policies. A purported U.S. public policy of separation of powers cannot be implicated because the Award does not involve any branches of the U.S. Government. Enforcement of the Award would not create any separation of powers concerns within the United States. Nor has the Belizean Government established that any domestic separation of powers principles establish a U.S. public policy with respect to the conduct of foreign governments.[7]

Similarly, there is no authority to suggest that a general policy against public corruption constitutes a

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the Award in Belize based on Belizean public policy. Pet. App. 95.

[7] *See Yukos Capital S.A.R.L.* v. *OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 298-99 (S.D.N.Y. 2013) (rejecting public policy defense to enforcement and finding reliance on U.S. tax law did not support Article V(2)(b) defense where enforcement of arbitral award in U.S. "would give effect to Russian tax fraud" in Russia), *aff'd*, 592 F. App'x 8 (2d Cir. 2014).

"public policy" under Article V(2)(b). *Rep. of Phil.* v. *Pimentel*, 553 U.S. 851 (2008), does not support such a proposition. In *Pimentel*, which involved alleged crimes by the Marcos regime, the Court held that under Federal Rule of Civil Procedure 19(b) "the likely prejudice to the [Philippines] should [an] interpleader proceed in [its] absence" outweighed policy concerns regarding public corruption. *Id.* at 869. The case does not address the public policy defense, or otherwise suggest that there is a free-form public policy.

Moreover, the Government of Belize's separation of powers and public corruption arguments are simply claims of error by the tribunal, and U.S. courts "do not sit to hear claims of factual or legal error by an arbitrator." *Misco, Inc.*, 484 U.S. at 38; *Baxter Int'l, Inc.* v. *Abbott Labs.*, 315 F.3d 829, 831 (7th Cir. 2003) ("[U]nder the Convention, arbitrators 'have completely free rein to decide the law as well as the facts and are not subject to appellate review.'" (quoting *Commonwealth Coatings Corp.*, 393 U.S. at 149)). The arbitral tribunal concluded that the Belizean Government had "actual [and apparent] authority to enter into the Accommodation Agreement" and that the resulting agreement was "lawful." JA221. The tribunal's conclusions regarding the parties' agreement and its legality are not subject to reconsideration through the back door of the public policy exception.

Finally, neither the tribunal, nor the CCJ found any indications of public corruption—the word "corruption" does not even appear in the CCJ's decision. Pet. App. 58–96. There is simply nothing in the record to support this baseless assertion.

Second, by its own terms, the doctrine of international comity cannot constitute a public policy

within the meaning of Article V(2)(b). The doctrine of international comity does *not* impose an "absolute obligation" upon the United States to recognize foreign judgments, and considerations of comity "cannot be … defined and fixed." *Hilton* v. *Guyot*, 159 U.S. 113, 163–64 (1895). Rather, the doctrine is discretionary. As a result, a refusal to extend comity to a foreign award enforcement proceeding does not implicate a well defined U.S. public policy by "violat[ing] the [United States'] most basic notions of morality and justice." *Parsons*, 508 F.2d at 974.

In fact, the Convention and U.S. implementing legislation, 9 U.S.C. § 207, do not permit the United States to refuse enforcement of an Award based on Belize's determination that enforcement of the Award within Belize would violate Belizean public policy. Section 207 commands that the district court "must enforce [a] [Convention] award unless it finds one of the grounds for refusal or deferral of enforcement specified in the Convention." *Karaha Bodas Co.*, 364 F.3d at 288. As international comity is not one of the seven exclusive defenses to enforcement specified in Article V, the doctrine may not be invoked to bar enforcement of a Convention award. See *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1054 (5th Cir. 2012) (noting U.S. bankruptcy law imposes "certain requirements and considerations that act as a brake or limitation on comity"); see also *In re Fairfield Sentry Ltd.*, 768 F.3d 239, 246 (2d Cir. 2014) (holding comity principles did not justify a bankruptcy court's deference to a foreign judgment approving a sale of property where the court had a statutory obligation to independently determine the propriety of the transfer). Nor is comity a U.S. "public policy."

In arguing that the lower courts should have deferred to the CCJ's refusal to enforce the Award on

Belizean public policy grounds, the Government of Belize (and its amicus) ignore the legal framework created by the Convention and U.S. implementing legislation. That structure determines when deference to another court is appropriate in an award enforcement proceeding. The Convention recognizes two types of national courts: courts of primary jurisdiction—the courts in the state in which or under the law of which the parties agreed to arbitrate—and courts of secondary jurisdiction—the courts of all other states in which enforcement of an award is sought. See *Yusuf Ahmed Alghanim & Sons, W.L.L.* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 22–23 (2d Cir. 1997) ("[U]nder the Convention, the power and authority of the … courts of the rendering state remain of paramount importance."). The Convention "*mandates* very different regimes for the review of arbitral awards" in primary and secondary jurisdictions. *Id.* at 23 (emphasis added).

An arbitral award's validity is only subject to challenge in the courts of primary jurisdiction, and the domestic law of the primary jurisdiction provides the sole basis for setting aside, vacating, or modifying an arbitral award. *Id.* (noting that the Convention recognizes the primary jurisdiction's exclusive right "to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief"). In contrast, "a court in a country with secondary jurisdiction *is limited to deciding whether the award may be enforced in that country*," *Karaha Bodas Co.*, 364 F.3d at 287 (emphasis added), and "may refuse enforcement only on the grounds specified in Article V" of the Convention. *Id.* at 288; see also *Yusuf*, 126 F.3d at 23 ("[T]he Convention is … clear that when an action for enforcement is brought in a foreign

state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.").

The courts of Belize and the courts of the United States are both secondary jurisdictions with respect to the Award—they are jurisdictions in which enforcement of the Award has been sought. Under the New York Convention, each of these secondary jurisdictions is required to enforce the Award unless one of the seven grounds provided by Article V is established. *Karaha Bodas Co.*, 364 F.3d at 288. Importantly, the determination of enforcement (or nonenforcement) by one secondary jurisdiction does not affect enforcement in another secondary jurisdiction. Only the judgment of a court of primary jurisdiction is entitled to deference under the Convention. New York Convention art. V(1)(e).

It is undisputed that the English courts have primary jurisdiction in this case and that the Government of Belize has never sought to have the Award set aside or vacated in England. In asserting here that the United States should defer to the CCJ's refusal to enforce the award within Belize on Belizean public policy grounds, the Belizean Government and its amicus are asking the United States to accord deference to another secondary jurisdiction—contrary to U.S. law and the New York Convention framework.

The issue is not, as the amicus asserts, whether "American courts will honor CCJ opinions." Amicus Br. at 5. The United States, together with 157 other countries (including Guyana), have agreed that New York Convention awards will be presumptively enforceable and may only be refused enforcement based on the seven narrow grounds specified in the Convention. A decision by another secondary

jurisdiction not to enforce an award based on its own public policy is not one of those grounds. All Convention states have agreed that secondary jurisdictions may not bar enforcement of an award in other jurisdictions on the basis of their domestic law, and the United States "ha[s] no right to enlarge th[is] power[] upon the principles of comity." *Tucker* v. *Alexandroff*, 183 U.S. 424, 436 (1902) ("[T]he [treaty's] enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter.").

Thus, the fact that the CCJ's refusal to enforce the Award in Belize based on Belizean public policy is not a permissible defense to enforcement in the United States does not represent disrespect for the decisions of the CCJ. Rather, it reflects one of the principal purposes of the Convention, which is to harmonize the standards for enforcing awards around the world based on the Convention defenses. This Court has recognized that "the principal purpose underlying American adoption and implementation of" the Convention "was to … unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). That uniformity can only be maintained if each country honors its commitment to enforce awards unless one of the seven specified defenses is established. The Belizean Government's and its amicus' comity argument—which disregards the Convention's express distinction between courts of primary and secondary jurisdiction—would undermine the uniformity that is fundamental to the Convention and to its implementation in the United States.

In sum, the Belizean Government has not shown how enforcement of the Award in the United States would violate any "explicit" or "well-defined and dominant" public policy that represents the "most basic norms of morality and justice" in the United States.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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