No. _____

In The
Supreme Court of the United States

GOVERNMENT OF BELIZE,

Petitioner,

v.

BELIZE SOCIAL DEVELOPMENT LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to the New York Convention, a court may decline confirmation of a foreign arbitral award under local procedural rules such as the doctrine of *forum non conveniens* (Article III), or if enforcement of the award would be contrary to public policy (Article V(2)(b)).

The District of Columbia Circuit has affirmed an order (1) denying dismissal on *forum non conveniens* grounds holding that Belize is not an adequate forum, and (2) confirming an arbitral award rendered by the London Court of International Arbitration against Petitioner Government of Belize rejecting its public policy defense. The award is based on agreements executed by a former Belizean Prime Minister which provided tax exemptions without Parliamentary approval to a Belizean company controlled by a reported campaign donor. The Caribbean Court of Justice has held that such agreements are "repugnant to the established legal order of Belize," "unconstitutional, void and completely contrary to public policy," and "attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean."

The questions presented by this Petition are:

1. Under the doctrine of *forum non conveniens*, as applied to the New York Convention by Article III, is a foreign forum *per se* inadequate because specific assets in the United

QUESTIONS PRESENTED – Continued

States cannot be attached by a foreign court, as the D.C. Circuit has held; or is it adequate if it has jurisdiction and some attachable assets, as the Second Circuit held?

2. Under Article V(2)(b) of the New York Convention, does the public policy in favor of arbitration yield where confirmation of an arbitral award would be contrary to countervailing public policies, such as those grounded in constitutional separation of powers principles, combating government corruption and/or international comity?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is the Government of Belize ("GOB"). Respondent Belize Social Development Limited ("BSDL") filed a petition against GOB in U.S. District Court for the District of Columbia to confirm an arbitral award issued by the London Court of International Arbitration ("LCIA") in favor of Belize Telemedia Ltd. ("Telemedia"), and assigned to BSDL. The arbitration concerned "Accommodation Agreements" that the former Prime Minister of Belize secretly executed (without the Belizean Parliament's approval) with Belize Telecommunications Limited ("BTL"), predecessor of Telemedia, granting it tax exemptions, which the current Prime Minister made public and refused to recognize as binding against GOB. The District Court granted GOB's motion to stay, but the D.C. Circuit granted a writ of mandamus questioning the stay. On remand, the District Court denied GOB's motion to dismiss on *forum non conveniens* grounds and confirmed the award despite GOB's public policy defense under the New York Convention. GOB appealed and the D.C. Circuit affirmed.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel state that the Government of Belize is a sovereign state, and thus is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

The Government of Belize ("GOB") submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the U.S. District Court for the District of Columbia, issued by the Hon. Richard J. Leon, is reported at 5 F. Supp. 3d 25 and reproduced at App. 15 ("*Belize Social*"). The D.C. Circuit's opinion is reported at 794 F.3d 99 and reproduced at App. 1 ("*BSDL II*"). The D.C. Circuit's order denying GOB's petition for rehearing *en banc* after calling for a response is unreported. App. 69. An earlier grant of a writ of mandamus by the D.C. Circuit is reported at 668 F.3d 724 and reproduced at App. 50 ("*BSDL I*").

JURISDICTION

The D.C. Circuit filed its opinion on July 21, 2015, App. 1, and denied rehearing *en banc* on September 28, 2015, App. 69. This Petition is timely. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (1970), 330 U.N.T.S. 3 ("Convention" or "New York Convention"), implemented by the Federal Arbitration Act ("FAA"), 9 U.S.C. §201 *et seq*. The relevant provisions are set forth in the Appendix.

INTRODUCTION

Pursuant to the New York Convention, Belize Social Development Limited ("BSDL") filed a petition in the U.S. District Court for the District of Columbia to confirm a foreign arbitral award rendered by the London Court of International Arbitration ("LCIA") *ex parte* against GOB, and assigned to BSDL. The award is based on "Accommodation Agreements" executed by a former Belizean Prime Minister kept secret from the Belizean government and public, providing tax exemptions without approval of the Belizean Parliament to the largest Belizean private telecommunications company, then controlled by a reported campaign donor of that Prime Minister.

The Caribbean Court of Justice ("CCJ"), a multinational regional court of last resort for Belize, has held that similar agreements executed by that Prime Minister with entities related to BSDL are "repugnant to the established legal order of Belize," "unconstitutional, void and completely contrary to public

policy," and "attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean." The CCJ refused to enforce a parallel LCIA award involving such agreements on public policy grounds.

Although this dispute is entirely Belizean, the courts below denied GOB's motion to dismiss on *forum non conveniens* grounds. Reaffirming *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303-04 (D.C. Cir. 2005), the D.C. Circuit held that Belize cannot be an adequate foreign forum because GOB's assets in the United States, even if none exist at this time, can only be attached by a U.S. court. *TMR Energy* directly conflicts with the Second Circuit's decision in *Figueiredo Ferraz E. Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 390-91 (2d Cir. 2011), which held that a foreign forum is adequate if there is jurisdiction and offers some remedy. This circuit split is square and fully developed. *Figueiredo* expressly rejected *TMR Energy*, holding that it eviscerates *forum non conveniens* dismissals because a foreign court can never attach assets in the United States. *Id.* at 391. Now, the D.C. Circuit has refused to revisit *TMR Energy*, despite *Figueiredo*. This circuit split is significant because the D.C. Circuit is the default venue for actions against foreign states under the Foreign Sovereign Immunities Act ("FSIA"). *See* 28 U.S.C. §1391(f)(4).

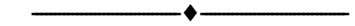
TMR Energy is irreconcilable with this Court's acknowledgment that the *forum non conveniens* doctrine "has continuing application . . . only in cases

where the alternative forum is abroad," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007), since *TMR Energy* eliminates the possibility of an alternative *foreign* forum. This Court stated in *Sinochem* that the facts in that case presented a "textbook case" for application of the doctrine, *id.* at 435, yet the doctrine would not apply to those facts under *TMR Energy*. Given the interests of the Belizean people in this dispute, it too presents a textbook case for application of the doctrine. Justice Benjamin Cardozo wrote that "[t]he doctrine of *forum non conveniens* is an instrument of justice." *Rogers v. Guar. Trust Co. of N.Y.*, 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting). This action should have been dismissed in favor of the Belizean forum to protect the integrity of the international arbitration process. An arbitration clause should never shield a foreign party which enters into illicit agreements with a foreign government official from the jurisdiction of pertinent foreign courts. Certiorari is required to resolve this important circuit split regarding the threshold *forum non conveniens* question as to the adequacy of a foreign forum.

On the merits, GOB sought denial of confirmation under the "public policy defense" in Article V(2)(b) of the Convention. The current Prime Minister of Belize made the Accommodation Agreements public and rejected them, maintaining that their tax exemptions are unconstitutional. Indeed, the CCJ has held that such agreements violate separation of powers principles, which this Court also has described as an "important constitutional principle[ ]."

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 536 (2009). This Court also has stated that "combating public corruption is a significant international policy." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 869 (2008). But the District Court and D.C. Circuit expressly ignored the CCJ's decision, and denied GOB's motion to submit briefing about it, calling it "irrelevant" despite the critical importance of the CCJ to Caribbean states. The courts below disregarded the CCJ's decision, separation of powers principles, the policy of combating governmental corruption, and international comity, all in order to give effect to the policy in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

"The legislative history of [Article V(2)(b)] offers no certain guidelines to its construction." *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974). The circuit courts disagree as to how Article V(2)(b) should be applied, some assessing whether a dominant public policy trumps the policy in favor of arbitration, while others balance the competing policies. Certiorari is also required to identify the test to be applied under Article V(2)(b) where there are competing policies.



STATEMENT OF THE CASE

A. The Accommodation Agreements Granting Belizean Private Entities Tax Exemptions Without Legislative Approval.

The former Prime Minister of Belize, Said Musa, entered into various agreements with Belizean companies controlled by Lord Michael Ashcroft,[1] the wealthiest person in Belize and a reported financial supporter of Mr. Musa's political party. *See* SA[2] 156, 186-87, 189, 203. These agreements provided tax exemptions to Ashcroft-controlled companies, such as BTL and Belize Bank Ltd. ("BBL"). SA 163-68, 186-87; App. 88 ¶1. This case involves four Accommodation Agreements first executed in 2005 by Prime Minister Musa and Ashcroft-controlled Belize Telecommunications Limited ("BTL"), Belize's largest telecommunications company (Telemedia's predecessor), SA 186-87. The Belizean Parliament, the branch constitutionally empowered to set taxes, was not informed of, nor did it approve, the agreements. *See* JA[3] 283-86. After taking office, current Prime Minister Dean Barrow first became aware of these agreements when BTL refused to pay taxes, and rejected them as

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[1] Lord Ashcroft is a citizen of Belize and the United Kingdom, SA 189; has been embroiled in tax-related controversies in both countries, SA 186, 204; claims his Belizean interests have been exempt from taxes, SA 197; and has been the Deputy Chairman of the United Kingdom's Conservative Party, SA 168, and Belize's Ambassador to the United Nations, SA 143.

[2] *BSDL II*, Supplemental Joint Appendix, filed Aug. 22, 2014.

[3] *BSDL II*, Joint Appendix, filed Aug. 8, 2014.

"utterly against the interest of the people of this country." SA 186-187, 195.

B. Belize Telemedia Ltd.'s Arbitration in the LCIA.

Telemedia then began arbitration in London. The Agreements stated that, although governed by Belize law, disputes would be resolved in Lord Ashcroft's home country of England, by LCIA arbitration. JA 147 §§15.1, 15.2, 15.4. GOB did not participate in the arbitration because Prime Minister Barrow stated that "the secret agreement between Musa and Ashcroft is illegal and he will not honour it." SA 197. On March 18, 2009, the LCIA rendered an *ex parte* award in BTL's favor for $38.5 million. JA 17-127; SA 197. Two days later, Ashcroft associates formed BSDL in the British Virgin Islands, SA 19; SA 2 ¶5, and that same day BTL assigned the award to BSDL, JA 215-21.

C. Related Litigation in the Belize Courts.

1. Preliminary Injunction Issued by the Belize Supreme Court on the Accommodation Agreements.

In April 2009, GOB sought a declaration from the Belize Supreme Court (a trial court) against BTL and BSDL that the Accommodation Agreements are void and the award is unenforceable. JA 280-82 ¶¶3, 6-7; JA 295-310. The court issued an injunction prohibiting enforcement of the award until the case concluded, stating that there was "a serious question

as to whether enforcement of the award will not be contrary to the Constitution, the other statutory laws and public policy." JA 325-26 ¶17; *see* JA 290 ¶29; *see also* JA 312-38.

On August 25, 2009, GOB nationalized control over Telemedia, SA 106-26, which Prime Minister Barrow explained was necessary because the situation had become "intolerable," JA 360-62; SA 200.

2. The Caribbean Court of Justice Refuses to Enforce a Similar LCIA Award.

The CCJ has held that a parallel arbitral award rendered by the LCIA (based on a similar unauthorized agreement executed also by former Prime Minister Musa and granting tax exemptions to another Ashcroft-controlled entity, BBL) is unenforceable on public policy grounds. *BCB Holdings Ltd. v. Attorney Gen. of Belize* [2013] CCJ5 (AJ), App. 87. Yet, the District Court and D.C. Circuit rejected the CCJ's decision as "irrelevant."

(a) The Formation and Importance of the CCJ.

The Caribbean nations, including Belize (formerly British Honduras), were the subject of European colonization. Belize became independent in 1981. But since the British legacy remained strong in the English Speaking Caribbean ("ESC"), states sought increased independence and formed CARICOM, the

Caribbean Community and Common Market.[4] However, the Privy Council in London, created by Parliament in 1833 as a means to impose British law on the colonies, "made [it] clear that England was the center of power and there was always a higher authority than governments in the Caribbean."[5] To sever this vestige of colonialism, CARICOM states formed the CCJ[6] in 2001 to replace the Privy Council.[7] The CCJ's mission is to "protect and promote the rule of law as a court of final appeal."[8] Indeed, "sovereignty and independence (independence that is both legal and psychological) are . . . central to the self-respect,

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[4] "History of the Caribbean Community," Caribbean Cmty. Secretariat, http://www.caricom.org/jsp/community/history.jsp?menu=community.

[5] Ezekiel Rediker, Note, *Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice*, 35 Mich. J. Int'l L. 213, 221 (Fall 2013) (quotations omitted); *see also* Roget V. Bryan, *Toward the Development of a Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal*, 7 J. Transnat'l L. & Pol'y 181, 183-84 (1998).

[6] Hon. Mme. Justice Désirée P. Bernard, *The Caribbean Court of Justice: A New Judicial Experience*, 37 Int'l J. Legal Info. 219, 220-21 (2009) (CCJ is a "culmination of aspirations" to create a court of last resort in the Caribbean and replace the "legac[y] of British colonialism. . . .").

[7] Agreement Establishing the Caribbean Court of Justice, http://www.caribbeancourtofjustice.org/court-instruments/the-agreement-establishing-the-ccj.

[8] http://www.caribbeancourtofjustice.org/about-the-ccj/mission-vision.

self-confidence, and self-definition of [ESC] people."[9] The ESC has six million residents, mostly people of color, "who have respect and honor for the rule of law, and have been dogged in seeking independence and their own self-determination from their former colonial ruler."[10] "Independence leaders were eager to develop a Caribbean jurisprudence – through a regional Supreme Court – that reflected the history and values of its population."[11] The "break with the Privy Council in London [gave] the ESC a court of final appeal that is geographically located in the region and will provide judges with an appreciation of local circumstances. The . . . CCJ should truly signal the sunset of British colonial rule in the ESC."[12]

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[9] David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 Nova L. Rev. 171, 182 (2005).

[10] Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. Miami Inter-Am. L. Rev. 197, 199 (2005).

[11] Rediker, 35 Mich. J. Int'l L. at 242; *see also* Agreement Establishing the Caribbean Court of Justice, http://www.caribbeancourtofjustice.org/court-instruments/the-agreement-establishing-the-ccj.

The CCJ's current members are Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & The Grenadines, Suriname and Trinidad & Tobago. At all relevant times, no CCJ Justice has been Belize, but one is from the United Kingdom. *See* http://www.caribbeancourtofjustice.org/about-the-ccj/faqs.

[12] Birdsong, 36 U. Miami Inter-Am. L. Rev. at 227.

(b) The CCJ's Seminal Ruling That Unauthorized Agreements Executed by the Former Belizean Prime Minister are Unconstitutional.

BBL and BCB Holdings Ltd. ("BCB"), both Ashcroft-controlled entities which had similar agreements with Prime Minister Musa providing tax exemptions unauthorized by Parliament, also obtained an LCIA award *ex parte* after Prime Minister Barrow repudiated those agreements. App. 88-89 ¶¶1-2, 91-92 ¶8; *see* SA 164-68. These companies sought to enforce the award in Belize, but on July 26, 2013, the CCJ held "that it would be contrary to public policy to recognise the Award and accordingly we decline to enforce it." App. 89 ¶3.

> The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value. So too is the principle of Separation of Powers the observance of which one is entitled to take for granted. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean.

CCJ, App. 123 ¶59; *see* App. 122-23 ¶58.

> The public policy contravened in this case falls well within the definition of "international public policy" recommended by the ILA [International Law Association] that might justify the non-enforcement of a

> Convention Award. *If this Court ordered the enforcement of this Award we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this.* Responsible bodies, including the Attorney General, have a right and duty to draw attention to and appropriately challenge attempts to undermine the Constitution.

CCJ, App. 124-25 ¶61 (emphasis added).[13]

D. Proceedings Below.

BSDL did not file an action in Belize to confirm the subject LCIA award. Rather, disregarding the Belizean Supreme Court's injunction, BSDL filed, on November 17, 2009, this proceeding in the U.S. District Court for the District of Columbia, SA 1-17, the default venue for suits against foreign states, 28 U.S.C. §1391(f)(4). Count I of the Petition sought confirmation of the award. SA 14-15 ¶¶54-60. Count II sought prejudgment interest. SA 15-16 ¶¶61-65.

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[13] After the CCJ refused to enforce the award, BCB and BBL turned to the District Court below, which confirmed that award ignoring the CCJ's opinion. *BCB Holdings Ltd. v. Gov't of Belize*, No. 14-1123, ___ F.Supp.3d ___, 2015 WL 3896102 (D.D.C. June 24, 2015). GOB has appealed. *BCB Holdings Ltd. v. Gov't of Belize*, Nos. 15-7063, 15-7069 (D.C. Cir.). Reversal here would dispose also of that action.

The District Court initially issued a stay pending adjudication of the Belize action, ECF Minute Order (Oct. 18, 2010), and BSDL appealed, *see BSDL I*, App. 50. A divided D.C. Circuit panel held that the stay was improper. App. 51, 64. A petition for a writ of certiorari was filed on June 27, 2012, Sup. Ct. Docket 12-2, and denied on October 1, 2012, 133 S.Ct. 274. The question presented in that petition was different from the questions presented here.

On December 11, 2013, the District Court denied GOB's motion to dismiss, ECF 15; JA 222, and granted BSDL's Petition, ECF 1; SA 1, over GOB's opposition, ECF 39; JA 540, rejecting GOB's *forum non conveniens* and public policy arguments. *See Belize Social*, App. 15-16, 26-27, 46-47.

On *forum non conveniens*, the District Court noted that its hands were tied by D.C. Circuit precedent. App. 26-27 & n.9. The analysis is whether an adequate alternative forum exists and, if so, whether the balancing of private and public interests favors dismissal. App. 26 (citing *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981))). "The balancing of private and public interests occurs *only if* an adequate alternative forum exists." App. 26 (emphasis in the original). The Court held that, under D.C. Circuit precedent, Belize was not an adequate alternative foreign forum:

> Unfortunately for GOB, there is no adequate alternative forum for this case because "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 Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005). Even if GOB has no attachable property in the United States at this time, Resp't's Suppl. Br. at 8, "it may own property here in the future, and [BSDL's] having a judgment in hand will expedite the process of attachment," *TMR Energy*, 411 F.3d at 303. This is the controlling law in our Circuit, and I will therefore apply it faithfully. Because GOB's *forum non conveniens* argument falters at the first step, I need not consider the second.

App. 26-27.

> *TMR Energy* is binding, unlike Second Circuit case law, *see* Resp't's Mem. at 26-28 (citing *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002)); Resp't's Suppl. Br. at 6-10 (citing *Figueiredo Ferraz E. Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011)), and unlike an "in the alternative" decision rendered by another judge of this court that was not affirmed (or even considered) on appeal, Resp't's. Mem. at 28 (citing *TermoRio S.A. E.S.P. v. Electrificardora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd on other grounds*, 487 F.3d 928, 932 (D.C. Cir. 2007).

App. 27 n.9.

The District Court also rejected GOB's public policy defense, which permits courts to refuse confirmation if doing so "would be contrary to the public policy of that country." Convention, Article V(2)(b) (App. 75); *see* App. 46-47. The Court "agree[d] with the general notion that the United States has a strong policy against foreign corruption," but held that the "'federal policy in favor of arbitral dispute resolution'" prevailed. App. 46-47 (quoting *BSDL I*, 668 F.3d at 733 (App. 52) (quoting *Mitsubishi*, 473 U.S. at 631)).

The District Court denied GOB's motion, ECF 47, requesting leave to submit briefing on the impact of the CCJ's decision. The Court refused to even review it, calling it irrelevant. App. 47-48 n.31 ("I find that additional briefing on a recent decision by the Caribbean Court of Justice is unnecessary, as that court's ruling would have no impact on my analysis."); App. 21 (citing *BSDL I*, 668 F.3d at 730 (App. 58)) ("[L]itigation in Belize is irrelevant to enforcement of the arbitration award in this proceeding.").

GOB appealed these orders and Judgment. *See* ECF 57, 61, 67. The D.C. Circuit affirmed, simply adopting the District Court's rationale:

> Belize raises several other arguments for why we should dismiss this action, including *forum non conveniens* . . . as well as specific defenses under the Convention. These arguments were adequately discussed and rejected by the district court, and none warrant further exposition by this Court.

BSDL II, App. 14. After calling for a response, the D.C. Circuit denied GOB's petition for rehearing *en banc* also without explanation. App. 69.

This timely Petition followed.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE A CIRCUIT SPLIT, CREATED BY THE D.C. CIRCUIT'S DEPARTURE FROM THE RULINGS OF THIS COURT ON *FORUM NON CONVENIENS*.

The D.C. Circuit has confirmed an LCIA award based on agreements executed by a former Belizean Prime Minister that provided tax exemptions without Parliamentary approval to a company controlled by a reported campaign donor. The CCJ has held that a parallel LCIA award based on a similar agreement executed between the same Prime Minister and another company of this same individual was unenforceable because it violated the Belizean Constitution. This is a compelling case for *forum non conveniens* dismissal because Belize's interests are overwhelming. But the D.C. Circuit rejected that forum based on its precedent which conflicts with Second Circuit law and this Court's holdings.

A. Certiorari is Required to Resolve a Circuit Split Regarding Adequacy of an Alternative Foreign Forum.

"A federal court has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has jurisdiction to hear the case," and dismissal is supported by the balancing of interests. *Sinochem*, 549 U.S. at 429 (internal quotation and alteration omitted). Certiorari is required to resolve a square circuit split regarding the threshold question of what is an adequate alternative foreign forum. Sup. Ct. R. 10(a).

In the context of a Convention action, the D.C. Circuit has held that no foreign forum can be adequate because a foreign court cannot attach assets in the United States. *TMR Energy*, 411 F.3d at 303-04. The Second Circuit has expressly rejected *TMR Energy* as eviscerating the *forum non conveniens* doctrine, and held that a foreign forum is adequate if it has jurisdiction and *some assets* of the defendant. *Figueiredo*, 665 F.3d at 389-93.

1. The D.C. Circuit's Holding Eliminates Alternative Foreign Forums.

Here, the D.C. Circuit followed and refused to revisit *TMR Energy*. In *TMR Energy*, a foreign corporation filed an action to confirm a Swedish arbitral award against SPF, a Ukrainian state entity. 411 F.3d at 298-99. The district court denied *forum non conveniens* dismissal and confirmed. Affirming, the

D.C. Circuit held that it "need not weigh any factors favoring dismissal . . . if no other forum . . . can grant the relief [plaintiff] may obtain in the forum it chose." *Id.* at 303. Although there were suits pending in Sweden and Ukraine, those were inadequate forums because "only a court of the United States . . . may attach the commercial property of a foreign nation located in the United States." *Id.* The D.C. Circuit denied dismissal although "SPF has no assets in the United States against which a judgment can be enforced," because "it may own property here in the future." *Id.* "[T]here is no other forum in which TMR could reach the SPF's property, if any, in the United States." *Id.* at 304.

2. The Second Circuit Expressly Rejected *TMR Energy* Because it Would Eviscerate *Forum Non Conveniens*.

No other circuit has followed *TMR Energy*. Other circuits ask whether "an alternative forum has jurisdiction to hear [the] case,"[14] as instructed by this Court. *See, e.g.*, *Sinochem*, 549 U.S. at 429.

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[14] *See, e.g.*, *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 424 (1st Cir. 1991); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991); *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249 (4th Cir. 2011); *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 794 (5th Cir. 2007); *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 519 (6th Cir. 2010); *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015); *de Melo v. Lederle Laboratories, Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1061 (8th Cir. 1986); *Tuazon v. R.J. Reynolds Tobacco*

(Continued on following page)

Notably, the Second Circuit has *expressly* rejected *TMR Energy*. In *Figueiredo*, the Republic of Peru sought *forum non conveniens* dismissal of an action to confirm an arbitral award rendered in Peru. 665 F.3d at 388. Peru argued that the New York action sought to avoid Peruvian law. *See id.* at 387-88. The district court followed *TMR Energy*, denying dismissal because "only a United States court 'may attach the commercial property of a foreign nation located in the United States.'" *Id.* at 390 (quoting *Figueiredo*, 655 F. Supp. 2d at 375-76 (quoting *TMR Energy*, 411 F.3d at 303)). But the Second Circuit reversed and rejected *TMR Energy*, holding that it eviscerates the doctrine, because "every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC." *Id*.[15] The Second Circuit followed this Court's rule that "[a]n alternate forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Id.*

> Where adequacy of an alternative forum is assessed in the context of a suit to obtain a judgment and ultimately execution on a defendant's assets, the adequacy of the

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Co., 433 F.3d 1163, 1178 (9th Cir. 2006); *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1174 (10th Cir. 2009); *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1382 (11th Cir. 2009).

[15] *TMR Energy* has ended *forum non conveniens* dismissals in the District of Columbia. *See BCB Holdings*, 2015 WL 3896102 at *8; *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F.Supp.2d 46, 57 (D.D.C. 2010).

> alternate forum depends on whether there are *some assets* of the defendant in the alternative forum, not whether the *precise asset* located here can be executed upon there.

Id. at 391 (emphasis added). "To the extent that the District of Columbia Circuit in *TMR Energy* considered a foreign forum inadequate because the foreign defendant's precise asset in this country can be attached only here, we respectfully disagree." *Id.* The Second Circuit then ordered dismissal based on Peru's strong interests in the matter. *Id.* at 392-94.

3. Certiorari is Required to Resolve this Important Split Between the D.C. and Second Circuits.

The District Court stated that, "[u]nfortunately for GOB," it was required to "faithfully" apply *TMR Energy* and hold that there was no adequate foreign forum without balancing the interests. *Belize Social*, App. 26-27 & n.9. But here, the interests parallel those in *Figueiredo*, commanding dismissal

> [w]ith the underlying claim arising (1) from a contract executed in [Belize] (2) by a corporation then claiming to be a [Belizean] domiciliary (3) against . . . the [Belizean] government (4) with respect to work to be done in [Belize], the public factor of permitting [Belizean courts to determine whether an award based upon a constitutionally infirm agreement should be confirmed] *tips the*

> *FNC balance decisively* against the exercise of jurisdiction in the United States.

665 F.3d at 392 (emphasis added).

Furthermore, the D.C. Circuit's denial of rehearing *en banc* after calling for a response, as well as a recent decision from the Second Circuit reaffirming *Figueiredo*, *see* App. 14, 70; *Wenzel v. Marriott Int'l, Inc.*, No. 14-4557-cv, ___ Fed.Appx. ___, 2015 WL 6643262 at *1 (2d Cir. Nov. 2, 2015), demonstrate that the circuits themselves are not going to resolve this conflict.

B. The D.C. Circuit's Rule Conflicts with this Court's Holdings.

This Court has indicated that the doctrine of *forum non conveniens* "has continuing application [in federal courts] only in cases where the alternative forum is abroad." *Sinochem*, 549 U.S. at 430 (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994)); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981). This Court has *never* held that a foreign forum is inadequate because a foreign court cannot attach *particular* assets in the United States. Dismissal is appropriate even if the "potential damages award may be smaller" in the foreign forum. *Piper Aircraft*, 454 U.S. at 254-55. Indeed, *TMR Energy* conflicts with this Court's unanimous and recent pronouncement of what constitutes "a textbook case for immediate *forum non conveniens* dismissal." *See Sinochem*, 549 U.S. at 435. Malaysia International

sued Sinochem, a Chinese state-owned importer. Malaysia International sought damages for the arrest of its ship by Sinochem in China, *id.* at 426-27, requesting that "any assets of Sinochem be attached," *see* Amended Complaint, *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, Civ. Action No. 03-3771, 2003 WL 23904713 (E.D. Pa. 2003). This Court stated that the facts constituted "a textbook case for immediate *forum non conveniens* dismissal," because "the gravamen" of the complaint was "an issue best left for determination by the Chinese courts." *Sinochem*, 549 U.S. at 435-36. But *TMR Energy* would foreclose that result because "no other forum . . . could reach [Sinochem's] property, if any, in the United States." *See* 411 F.3d at 304. *Sinochem* ordered dismissal despite the request for attachment of assets in the United States, relief unavailable in China. *TMR Energy* cannot be squared with *Sinochem*. Certiorari is required because the D.C. Circuit continues to adhere to *TMR Energy.*[16]

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[16] *Forum non conveniens* applies to confirmation actions because Article III of the Convention states that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure* of the territory where the award is relied upon." *Monegasque*, 311 F.3d at 494-95 (quoting Convention, Art. III). Yet, in *BSDL I*, the D.C. Circuit exacerbated its split with the Second Circuit by "defin[ing] the district court's task [as] to review and grant BSDL's petition to confirm the Final Award absent a finding that an *enumerated exception* to enforcement specified in the New York Convention applied." App. 65 (emphasis added). That instruction derailed the District Court's analysis, which rejected

(Continued on following page)

II. REVIEW IS NECESSARY TO CLARIFY THE APPLICATION OF THE CONVENTION'S PUBLIC POLICY DEFENSE WHERE THERE ARE COMPETING PUBLIC POLICIES.

Certiorari also is required to provide guidance on how to apply Article V(2)(b) of the Convention to competing public policies. Sup. Ct. R. 10.

This is a compelling case for application of Article V(2)(b). The CCJ has condemned agreements such as those at issue here as unconstitutional under separation of powers principles, and refused to confirm a parallel award on public policy grounds. Separation of powers is a core principle in Belize and the United States, and this Court has recognized that combating public corruption and international comity are important policies. Yet, the courts below ignored the CCJ's decision as irrelevant, and confirmed the award citing the policy in favor of arbitration.

Under Article V(2)(b) of the Convention, courts may refuse confirmation if "recognition or enforcement of the award would be contrary to the public

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GOB's arguments stating that: "I am confident that if this case raised such significant jurisdictional . . . concerns, our Circuit Court would have flagged them." App. 22-23. However, those issues were not before the panel in *BSDL I*. The statement in *BSDL I* is also inconsistent with *GSS Group Ltd. v. National Port Authority*, 680 F.3d 805, 817 (D.C. Cir. 2012), which affirmed dismissal of a confirmation action for lack of personal jurisdiction, although not a defense enumerated in the Convention.

policy of that country." App. 75. Circuit law is unclear regarding how Article V(2)(b) is applied where there are competing policies.

The CCJ's decision frames the issues: "[P]ublic policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception." App. 123 ¶59. The CCJ cited constitutional principles to deny confirmation of a parallel award based on a similar agreement signed by Prime Minister Musa:

> The latter principle [separation of powers] goes back to the writings of Montesquieu. So far as it relates to a strict division between the Executive and the Legislature, with the growing complexity of the machinery of government, the principle may have lost some of its lustre. In particular, in relatively small Parliaments like Belize's, and where the Executive is largely drawn from the legislature, the separation between these two bodies often appears blurred. But it is erroneous to assume that there is not an important division between the functions performed by each branch. The struggle to maintain this important distinction is as old as the epic battles waged between Chief Justice Coke and King James I who sought to use Royal proclamations to make law without Parliament's approval. The structure and content of the Belize Constitution reflects and reinforces the distinction. The Constitution carefully distributes among the branches the

> unique functions that each is authorised to exercise. The rights and freedoms of the citizenry and democracy itself would be imperilled if courts permitted the Executive to assume unto itself essential law-making functions in the absence of constitutional or legislative authority so to do. It would be utterly disastrous if the Executive could do so, selectively, via confidential documents. In young States especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance. Caribbean courts, as part of their general function of judicial review, have a constitutional obligation to strike down administrative or executive action that exceeds jurisdiction or undermines the authority of the legislature.

App. 111-13 ¶42.

> The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value. So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean.

App. 123 ¶59.

> [C]ompeting policies contend with each other when one must decide whether the public

> policy exception may successfully be invoked to render a foreign Award not enforceable. . . . Reference has already been made to the pro-enforcement bias that informs the court's approach and to the restrictive manner in which the public policy exception should be applied in the case of foreign awards.

App. 120 ¶54.

> [However, the] Committee on International Commercial Arbitration has endorsed "tax laws" as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award. In our judgment, especially as the underlying agreement was to be performed in Belize, the balance here undoubtedly lies in favour of not enforcing this Award. This is a case where the Court actually has a duty to invoke the public policy exception.

App. 123-24 ¶59.

The importance of the CCJ's ruling is clear: "[t]o disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean." *Id.*

Nonetheless, the courts below ignored the CCJ's decision and reached a contrary result. Faced with a parallel LCIA award based on similar agreements, whereby Prime Minister Musa granted unauthorized tax exemptions to another Belizean entity controlled

by Lord Ashcroft, the District Court confirmed the award, taking the extreme position that the CCJ's decision was "irrelevant," a holding affirmed by the D.C. Circuit. The Court, while noting the public policy against corruption, refused to even review the CCJ's decision, following the D.C. Circuit's flawed and overbroad statement that all "litigation in Belize is irrelevant to enforcement of the arbitration award in this proceeding." *Belize Social*, App. 47-48 n.31; App. 21 (citing *BSDL I*, 668 F.3d at 730 (App. 58)).[17]

Although this Court has acknowledged the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, that policy cannot automatically take precedence in every Convention action. In the United States as in Belize, separation of powers is also an "important constitutional principle[ ]," *Fox Television*, 556 U.S. at 536, "protect[ing] each branch of government from incursion by the others," *Bond v. United States*, 131 S.Ct. 2355, 2365 (2011). Here too, "Congress makes laws" and the President "faithfully execute[s] them." *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 134 S.Ct. 2427, 2446 (2014) (internal quotation marks omitted). Congress has the "power '[t]o lay and collect [t]axes.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321, 2327 (2013) (first alteration in

[17] *BSDL I* held that the Belizean injunction could not support the stay under Article V(1)(e). *See* App. 58. After remand, however, the issue was different: whether confirmation should be denied based on Article V(2)(b).

original). This Court also has stated that "combating public corruption is a significant international policy." *Pimentel*, 553 U.S. at 869. The "strong U.S. commitment to combat corruption" is echoed by the Executive Branch[18] which has noted that "[t]here were public indications of government corruption under the previous administration" of Prime Minister Musa.[19]

The District Court recognized the "countervailing polic[ies]" in favor of arbitration and of combating governmental corruption, *Belize Social*, App. 46-47, but ignored the applicable constitutional principles by disregarding the CCJ's decision, thereby also disregarding international comity, *see Pimentel*, 553 U.S. at 869 ("significant international policy" of "combating public corruption" underscores "important comity concerns"); *Mitsubishi*, 473 U.S. at 629 ("international comity" is grounds for deference "even assuming that a contrary result would be forthcoming in a domestic context"); *Daimler AG v. Bauman*, 134 S.Ct. 746, 762-63 (2014) (international comity should be considered in transnational disputes). The Court "agree[d] with the general notion that the United States has a strong policy against foreign corruption," but held that "it also has a countervailing policy . . . an 'emphatic federal policy in favor of arbitral dispute

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[18] U.S. Department of State, *Keeping Foreign Corruption Out of the United States: Four Case Studies* (2010), http://www.state.gov/j/inl/rls/rm/136527.htm.

[19] *2009 Investment Climate Statement – Belize* (2009), http://www.state.gov/e/eb/rls/othr/ics/2009/117851.htm.

resolution' that 'applies with special force in the field of international commerce'" that prevailed. App. 46-47 (quoting *BSDL I*, 668 F.3d at 733 (App. 64) (quoting *Mitsubishi*, 473 U.S. at 631)).

The circuit courts employ different approaches as to the application of Article V(2)(b) where there are competing public policies. One view is that the policy in favor of arbitration means that Article V(2)(b) is read narrowly and applies where confirmation would violate a "dominant public policy." The Second and Ninth Circuits have held that, "[i]n recognition of a presumption favoring upholding international arbitration awards under the Convention, this defense is 'construed narrowly.'" *Ministry of Def. & Support for the Armed Forces of the Islamic Rep. of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096-97 (9th Cir. 2011); *Parsons*, 508 F.2d at 973 ("[G]eneral pro-enforcement bias informing the Convention . . . points towards a narrow reading of the public policy defense."). Then, "[e]nforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons*, 508 F.2d at 974. The question is whether enforcement of the award would contravene an "explicit" public policy that is "dominant." *Id.*; *see also Saint Mary Home, Inc. v. Serv. Emps. Int'l Union, Dist. 1199*, 116 F.3d 41, 46 (2d Cir. 1997) ("[C]ourts may refuse to enforce arbitral awards only in those rare cases when enforcement of the award would be directly at odds with a well-defined and dominant public policy resting on clear

law and legal precedent."); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) (Article V(2)(b) requires "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.") (citing *United Paperworks Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quotation marks and citations omitted)).[20]

Other circuits balance the competing policies. *See, e.g.*, *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft MBH & CIE KG*, 783 F.3d 1010, 1017 (5th Cir. 2015) (balancing "foundational policies favoring arbitration and protecting seamen"). Here, although the District Court claimed to balance the "countervailing" policies, it simply credited the arbitration policy without applying any test or even analyzing whether the countervailing policies applied to the facts, an approach affirmed by the D.C. Circuit without analysis. *Belize Social*, App. 46-47; *BSDL II*, App. 14. The D.C. Circuit thus held that the arbitration policy always prevails, an approach repeated recently in *Chevron Corp. v. Ecuador*, 795 F.3d 200, 209 (D.C.

[20] Circuits also utilize the terms "paramount legal principle," *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001), "fundamental public policy," *Cubic Def. Sys.*, 665 F.3d at 1097, and "basic, fundamental national policies," *Agility Pub. Warehousing Co. K.S.C. v. Supreme Foodservice GMBH*, 495 Fed.Appx. 149, 152 (2d Cir. 2012).

Cir. 2015) ("[E]nforcement of the arbitral award is fully consistent with the public policy of the United States, most notably the 'emphatic federal policy in favor of arbitral dispute resolution.'") (citation omitted).

This Court should adopt a dominant public policy test. Reading Article V(2)(b) narrowly credits the policy in favor of arbitration, as the CCJ noted. But that policy cannot trump all other policies, or it would render Article V(2)(b) a nullity, since Article V(2)(b) envisions application of the public policy defense precisely in the context of an arbitration confirmation action. If a dominant public policy approach applies, the arbitration policy must yield. This test is consistent with this Court's holding in *Misco*, 484 U.S. at 43 (invalidating a collective-bargaining agreement as "contrary to public policy" requires "explicit public policy" that is "well defined and dominant").

The D.C. Circuit must be reversed under either test. This Court should hold that policies grounded on principles of separation of powers, international comity and combating governmental corruption *can* prevail over the policy in favor of arbitration, and that *they do* under the facts presented here.

Given that the "liberal federal policy favoring arbitration agreements . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements," *Mitsubishi Motors*, 473 U.S. at 625 (internal quotation omitted); *accord Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013) ("arbitration is a matter of contract"), it should be

generally subservient to the competing policies at issue here. Nor does the fact that the arbitration policy is reflected in the Convention change the calculus, since "a treaty is [also] a contract, though between nations," *BG Grp., PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1208 (2014). The holding of the District Court that the arbitration policy prevails (without even factual analysis) is flawed, because "[t]he treaty power" does not "extend[ ] so far as to authorize what the [C]onstitution forbids." *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Thus, constitutional considerations must prevail over the arbitration policy. *See, e.g.*, *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 749-50 (5th Cir. 2012) ("Because the New York Convention . . . is an exercise of presidential and congressional power, whereas personal jurisdiction is grounded in constitutional due process concerns, *there can be no question that the Constitution takes precedence.*") (emphasis added) (citations omitted).

Here, the Accommodation Agreements violate separation of powers principles fundamental to the United States and Belize and the significant policy of combating governmental corruption. Those policies dominate the policy in favor of arbitration. As the CCJ has held, enforcement of awards like this one would improperly "reward[ ] corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation," App. 124 ¶61. As the D.C. Circuit used to hold before this case, a judgment that

undermines "the public confidence in the administration of the law" is against public policy. *TermoRio*, 487 F.3d at 938.

The decision of the English Court of Appeals in *Soleimany v. Soleimany*, [1999] 3 Eng. Rep. 847, applicable to LCIA awards, is persuasive. It denied confirmation of an arbitral award which gave effect to a contract that violated Iranian revenue and export control laws. It held that "[w]here public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it." *Id.* at 859. A court must "preserve the integrity of its process, and [ ] see that it is not abused. The parties cannot override that concern by private agreement. They cannot *by procuring an arbitration conceal* that they, or rather one of them, is *seeking to enforce an illegal contract*. *Public policy will not allow it.*" *Id.* (emphasis added).

Here too, this LCIA award cannot overcome the constitutional infirmities found by the CCJ. United States public policy will not allow it. Confirmation of the award should have been denied based on separation of powers principles and the significant policy of combating public corruption and international comity, *despite* the liberal policy in favor of arbitration.

III. THE IMPORTANCE OF THE DOCTRINE OF *FORUM NON CONVENIENS* AND NEED FOR GUIDANCE AS TO ARTICLE V(2)(B) SUPPORT CERTIORARI.

The impact of the circuit split on *forum non conveniens* is significant. This Court has reiterated the importance of exercising judicial restraint based on international comity. *See Daimler*, 134 S.Ct. at 763; *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664-65 (2013). In that regard, *forum non conveniens* remains a robust doctrine, but has continuing application only to alternative foreign forums. *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S.Ct. 568, 580 (2013); *Sinochem*, 549 U.S. at 430. Yet, the D.C. Circuit has eliminated application of the doctrine to foreign forums.

Therefore, the circuit split has broad implications. It affects foreign states since the doctrine is not supplanted by the FSIA, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983); *Republic of Austria v. Altmann*, 541 U.S. 677, 706 (2004); private litigants including American business entities, *see Daimler*, 134 S.Ct. at 771 (Sotomayor, J., concurring); the enforcement of forum selection clauses, *Atl. Marine*, 134 S.Ct. at 580 ("forum-selection clause pointing to . . . foreign forum is [enforced] through the doctrine of *forum non conveniens*"); and the caseloads of federal courts, *Altmann*, 541 U.S. at 713 (2004) (Breyer, J., concurring; Souter, J., joining) ("*[F]orum non conveniens* will limit the number of suits brought in American courts.").

The need for guidance regarding Article V(2)(b) also supports certiorari. In *Scherck v. Alberto-Culver Co.*, 417 U.S. 506 (1974), this Court noted that Article V(2)(b) provides a public policy defense, but left the question of its application unresolved where there are competing policies. *Id.* at 519 n.14 ("Although we do not decide the question, presumably the type of fraud alleged here could be raised" under Article V(2)(b) "in challenging the enforcement of [an] arbitral award."). Forty years later, this question remains unresolved.

Further, in applying the Convention, courts "must not only observe the strong policy favoring arbitration, but must also foster the adoption of standards which can be uniformly applied on an international scale." *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981), *abrogated on other grounds by Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012). The D.C. Circuit's holding must be reversed because it is devoid of any such considerations and conflicts with the CCJ's reasoned decision.

Finally, the questions presented have generated significant disagreement and attention demanding their resolution by this Court. With respect to *forum non conveniens*, the U.S. Government contends that the doctrine is available in a Convention action. *See Figueiredo Ferraz E. Engenharia De Projeto Ltda. v. Republic of Peru*, Nos. 09-3925, 10-0214, 10-1612, Brief for the United States of America as *Amicus Curiae* in Support of Vacatur and Remand at 21-22

(2d Cir. Feb. 25, 2011). A leading treatise recognizes that the doctrine applies when "the more convenient forum is in a foreign country." *See* 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §3828 (1986). Another treatise agrees that the adequacy of the foreign forum "depends on whether respondent has some assets in that alternate forum, not whether the precise asset located in the U.S. can be executed upon." Thomas Oehmke with Joan Brovins, *Commercial Arbitration* (3d ed.) §41:101 (2015). And, another treatise notes that "[a]lthough it is not listed as an exception in the New York Convention, increasingly parties have been raising *forum non conveniens* as a defense in recent years." Jay E. Grenig, *Enforcing and Challenging International Commercial Arbitral Awards* §2:7 (2015). On the other hand, the American Law Institute states that a Convention action "is not subject to . . . dismissal in favor of a foreign court on *forum non conveniens* grounds." Restatement (3d) of the U.S. Law of Int'l Commercial Arbitration (Tentative Draft No. 2 (Apr. 16, 2012)), §4-29(a); Restatement (3d) of the U.S. Law of Int'l Commercial Arbitration (Tentative Draft No. 3 (Apr. 16, 2013)), §4-29(a) (same); Restatement (3d) of the U.S. Law of Int'l Commercial Arbitration (Tentative Draft No. 4 (Apr. 17, 2015)), §2-25(b) (same). And, in 2013, the American Bar Association ("ABA") adopted Resolution 107c, disagreeing with *Figueiredo*. *See* http://www.americanbar.org/content/dam/aba/directories/

policy/2013_hod_annual_meeting_107C.docx.[21] These disagreements regarding application of the doctrine of *forum non conveniens* to Convention actions have resulted in a call for "the Supreme Court to[ ] resolve this apparent inconsistency between the circuits." *See* Rostyslav Shiller, *Recent Developments in Enforcement of Arbitral Awards Against an Instrumentality of a Foreign State: TMR Energy v. State Property Fund of Ukraine*, 16 Am. Rev. Int'l Arb. 581, 607 (2005).

With regard to Article V(2)(b), it too presents an important and timely question. Recently, in October 2015, the International Bar Association ("IBA") issued a *Report on the Public Policy Exception in the New York Convention*, which cited international variations to the application of Article V(2)(b) and noted that this Court has not addressed the article in the thirty years since *Mitsubishi*. *See* General Report and

[21] But the ABA itself has taken different positions on this question. Mr. Louis B. Kimmelman, BSDL's counsel, has written on behalf of the ABA's *Litigation Section* that "[t]he 'available forum' requirement is generally satisfied by demonstrating that all the defendants are amenable to process in the alternative forum or have agreed to submit to the foreign court's jurisdiction, and that the alternative forum permits 'litigation of the subject matter of the dispute.' . . . [O]nly in 'rare circumstances' where the remedy provided in the foreign court is *so clearly inadequate as to afford no remedy at all*, can the foreign court be considered an inadequate alternative." *See* Christopher, Kimmelman and Smith, 2 Bus. & Com. Litig. Fed. Cts. §21:46 (3d ed.) (2015) (citations omitted) (emphasis added).

United States Country Report, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx. The IBA noted the importance of Article V(2)(b), stating that "[c]ontravention of public policy is thus *one of the few grounds* for refusing the recognition or enforcement of a foreign award" under the Convention. *Id.*, General Report at 1 (emphasis added). Indeed, when submitting the Convention for ratification, President Lyndon B. Johnson attached a State Department memorandum stating that Article V(2)(b) "would give the courts . . . considerable latitude in refusing enforcement." S. Exec. Doc. E, 90th Cong., 2d Sess. 19, 21 (1968). However, "[t]he legislative history of [Article V(2)(b)] *offers no certain guidelines* to its construction." *Parsons*, 508 F.2d at 973 (emphasis added).

IV. THIS CASE IS THE RIGHT VEHICLE FOR RESOLVING THESE IMPORTANT QUESTIONS.

As to *forum non conveniens*, the D.C. and Second Circuits are entrenched in their respective positions. Here, the D.C. Circuit has refused to revisit *TMR Energy* even in light of the subsequent *Figueiredo* decision and GOB's petition for rehearing *en banc*. And in 2015, the Second Circuit has reaffirmed its adherence to *Figueiredo*. *Wenzel*, 2015 WL 6643262 at *1. The conflict between these circuits is reoccurring, neither circuit yielding to the other.

Because the District of Columbia is the *de facto* venue for civil suits against foreign states, litigants also can elect to file suit in that District to scuttle *forum non conveniens* arguments in the Second or any other Circuit. Here, BSDL filed this action in the District of Columbia and promptly registered the Judgment in the Southern District of New York, *Belize Social Development Limited v. Government of Belize*, Civ. No. 1:15-mc-00380-P1, Registration of Foreign Judgment, ECF No. 1 (S.D.N.Y. Nov. 19, 2015).

This Court should resolve the circuit split in this case because the D.C. Circuit has placed GOB in the untenable position of being ordered to pay the award in the United States while the CCJ (the highest court in Belize, and the "check and balance" on the Prime Minister's encroachment into parliamentary powers) prohibits GOB from paying such an award. *Compare Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (under international comity, no conflict exists between laws of United States and foreign state where person subject to regulation *can* comply with both laws). This situation satisfies the "substantial prejudice" that a party must establish for reversal where *forum non conveniens* dismissal has been denied and the case has proceeded to judgment. *Indasu Int'l, C.A. v. Citibank, N.A.*, 861 F.2d 375, 380 (2d Cir. 1988). The D.C. Circuit's holding is an unjust result which application of the *forum non conveniens* doctrine (or Article V(2)(b)) would have avoided. The negative effects on U.S. relations in the Caribbean

resulting from the courts' flippant disregard of the CCJ's decision (which attacks the legitimacy of this young judicial institution of critical importance to CARICOM) demands granting certiorari and applying "limiting principles such as . . . *forum non conveniens*" designed to "help . . . minimize international friction," *Kiobel*, 133 S.Ct. at 1674 (Breyer, J., concurring; Ginsburg, J., Sotomayor, J., Kagan, J., joining).

This case also perfectly frames the issues as to Article V(b)(2). This is a compelling case for application of the public policy defense. The competing policies are important, guidance is needed regarding how competing policies are resolved under Article V(2)(b), and the D.C. Circuit's holding cannot stand given that the CCJ has held, in a reasoned decision echoing our own public policies, that confirmation would "attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean." App. 123 ¶59.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 16, 2015 Decided July 21, 2015

Nos. 14-7002

BELIZE SOCIAL DEVELOPMENT LIMITED,
APPELLEE

v.

GOVERNMENT OF BELIZE,
APPELLANT

Consolidated with 14-7003, 14-7018

Appeals from the United States District Court
for the District of Columbia
(No. 1:09-cv-02170)

Creighton R. Magid argued the cause and filed the briefs for appellant. Marcus W. Sisk Jr. entered an appearance.

Louis B. Kimmelman argued the cause for appellee. With him on the brief were Dana C. MacGrath and Ryan C. Morris.

Before: GARLAND, Chief Judge, TATEL, Circuit Judge, and SENTELLE, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge SENTELLE.

SENTELLE, *Senior Circuit Judge*: Belize Social Development Limited ("BSDL") petitioned the district court to confirm an arbitration award rendered against the government of Belize. The arbitration award arises out of the alleged breach by Belize of a 2005 agreement between Belize and Belize Telemedia Limited, BSDL's predecessor in interest. Belize had declined to participate in the arbitration underlying the petition and took the position in the district court and before us that the Prime Minister at the time of the entry of the agreement lacked authority to enter either the underlying contract or the arbitration agreement and that therefore, the arbitration exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, does not apply, so that Belize remains immune from this action and the courts of the United States do not have jurisdiction over this litigation. Because Belize had not provided support for its claim with respect to the arbitration agreement, the district court rejected the contention and entered judgment in favor of BSDL. *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 33-34 (D.D.C. 2013). For the same reason, we affirm the judgment of the district court.

BACKGROUND

In 2005, Belize, acting under the direction of then-Prime Minister Said Musa, entered into an agreement styled "The Accommodation Agreement" with Belize Telemedia Limited, Belize's largest private telecommunications company. Under the agreement,

the company contracted to purchase properties from Belize which the country desired to sell "in order to better accommodate the Government's communication needs." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 728 (D.C. Cir. 2012). As part of the transaction, Telemedia was to obtain relief from tax and regulatory burdens otherwise applicable to the company, and receive other significant benefits. The agreement, among other things, (1) guaranteed Telemedia a 15% rate of return on investments, with any shortfall to be paid by Belize; (2) gave Telemedia preferential tax treatment; (3) excluded Telemedia from import duties; and (4) committed Belize to ensuring that "no person other than BTL and [Speednet Communications Limited, BTL's competitor,] have or will have or be granted any authority, permit or license in Belize to legally carry on, conduct, or provide telecommunication services involving or allowing the provision or transport of voice services." Government Telecommunications Accommodation Agreement §§ 3.1, 6.1, 11.4, 11.3, September 19, 2005, Joint Appendix 129-160. The parties also agreed to an arbitration clause which stated:

> Any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, which cannot be resolved amicably between the parties shall be referred to and finally resolved by arbitration under the London Court of International Arbitration

> (LCIA) Rules which Rules are deemed to be incorporated by reference under this Section.

Id. at § 15.2.

The administration of Prime Minister Musa lasted only until 2008, when Prime Minister Dean Barrow took office. The new prime minister renounced the Accommodation Agreement, asserting that it was repugnant to the laws of Belize and therefore invalid. Belize then ceased to honor the contractual obligations as asserted by Telemedia. Telemedia repaired to the terms of the arbitration clause and submitted the dispute to arbitration before the LCIA in London. Belize refused to participate in the arbitration proceedings, contending, as it contends now, that the arbitration clause was invalid and that the arbitrators lacked jurisdiction. On March 18, 2009, the arbitral tribunal ruled that the Accommodation Agreement was valid and binding on Belize; that the tribunal had jurisdiction over Telemedia's claims; and that Belize had breached the accommodation agreement. *Belize Soc. Dev. Ltd.*, 668 F.3d at 728. The arbitral tribunal granted Telemedia declaratory relief, and awarded over 38 million Belize dollars in damages. *Id.* Two days later, Telemedia assigned the monetary portion of its award to BSDL. *Id.*

In November 2009, BSDL brought suit in the District Court for the District of Columbia to confirm the arbitral award pursuant to section 207 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 207. Belize moved to stay confirmation of the award pending

resolution of related litigation in Belize. The district court obliged; BSDL appealed. We reversed, noting that under the FAA, the stay order "was not in conformity with federal law and international commitments." *Belize Soc. Dev. Ltd.*, 668 F.3d at 733. We remanded and instructed the district court "to review and grant BSDL's petition to confirm the Final Award absent a finding that an enumerated exception to enforcement . . . applie[s]." *Id.* On remand, Belize argued that the district court lacked subject matter jurisdiction over the dispute because it was entitled to sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"). *Belize Soc. Dev. Ltd.*, 5 F. Supp. 3d at 32. The district court held that jurisdiction was proper under the arbitration exception to the FSIA, and granted BSDL's petition to confirm the award. *Id.* at 33. This appeal followed.

ANALYSIS

The Foreign Sovereign Immunities Act is "the sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States]." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Its terms are absolute: Unless an enumerated exception applies, courts of this country lack jurisdiction over claims against a foreign nation. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). BSDL claims the arbitration exception applies to this case.

The arbitration exception provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6).

Where a plaintiff has asserted jurisdiction under the FSIA and the defendant foreign state has asserted "the jurisdictional defense of immunity," the defendant state "bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Belize makes two arguments as to why the arbitration exception does not apply.

First, Belize argues that the arbitration exception to sovereign immunity does not apply because there was no "agreement made by the foreign state." 28 U.S.C. § 1605(a)(6). Belize syllogizes as follows: The Prime Minister lacks actual authority to bind the sovereign in an unconstitutional agreement; the Accommodation Agreement violates the Constitution and laws of Belize; therefore, the Prime Minister lacked authority to bind Belize in the Accommodation Agreement. Pet. Br. 9-10. Belize concludes that because the Prime Minister lacked actual authority to execute the Accommodation Agreement on behalf of Belize, the agreement is void *ab initio*, and there is no "agreement made by the foreign state." *Id.* at 19, 22.

Essential to Belize's analysis is the assumption that if the former Prime Minister lacked actual authority to execute the Accommodation Agreement, then every provision in the agreement, including the arbitration provision, is void. Because this assumption is incorrect, Belize's argument fails.

The language of the FSIA arbitration exception makes clear that the agreement to arbitrate is severable from the underlying contract. The exception only requires a valid "agreement . . . to submit to arbitration," 28 U.S.C. § 1605(a)(6). It also distinguishes between the underlying "legal relationship" and the agreement to arbitrate disputes arising from that relationship. *Id.* As we have previously noted, the agreement to arbitrate is "separate from the obligations the parties owe to each other under the remainder of the contract." *Marra v. Papandreou*, 216 F.3d

1119, 1123, 1125 (D.C. Cir. 2000). It is, for all intents and purposes, "a distinct contract in and of itself." *Id.*; *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (distinguishing between the agreement to arbitrate and the underlying contract). In order to succeed in its claim that there was no "agreement made by the foreign state . . . to submit to arbitration," 28 U.S.C. § 1605(a)(6), Belize must show that the Prime Minister lacked authority to enter into the arbitration agreement. This Belize has failed to do.

In the district court, Belize argued that the Prime Minister lacked authority to enter into the Accommodation Agreement. *See, e.g.*, Respondent's Preliminary Response to Petition to Confirm Arbitration Award at 30, *Belize Soc. Dev. Ltd. v. Gov't of Belize*, No. 1:09-cv-02170 (D.D.C. Aug. 8, 2014) ("[T]he Accommodation Agreements are null and void, ab initio, because the Prime Minister had no authority to enter into an agreement that would exempt [Telemedia] from its tax liabilities under Belize law."). Belize repeated the same argument in this Court. *See, e.g.*, Pet. Br. 9 ("The Accommodation Agreements are void *ab initio* because the former Prime Minister lacked actual authority to execute them."). But Belize presents nothing beyond its bare allegation in support of its argument that the Prime Minister lacked authority to enter the *agreement to arbitrate*. Without such support, Belize failed to carry its burden of establishing that BSDL's allegations do not bring this case within the FSIA's arbitration exception.

More briefly put, this case turns on the proposition that Belize entered two agreements: the Accommodation Agreement and the Agreement to Submit to Arbitration, albeit the two were entered simultaneously. The argument of Belize that the Accommodation Agreement was beyond the authority of the Prime Minister might provide a defense if we were considering this controversy *de novo* on its merits. However, in order to bring that argument before us, Belize must first establish that the arbitration provision of the contract is void, so that we would not be bound to honor the arbitral tribunal's determinations. We cannot determine the merits of the defense if the arbitration clause applies. Since Belize has not negated the clause, we do not reach the merits defense.

This brings us to Belize's second line of defense. Belize argues that the arbitration exception does not apply because the award is not "governed by a treaty or other international agreement . . . calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Specifically, Belize contends that the relevant treaty, the New York Convention, does not govern the award because the award does not arise from a commercial transaction, as required by the treaty, but from a governmental transaction.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) is a multilateral treaty providing for "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of

such awards are sought." Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), art. I(1), 21 U.S.T. 2517 (1970). For most signatories, the New York Convention applies to all private arbitral agreements, regardless of the subject matter. Restatement (Third) of Foreign Relations Law § 487 cmt. f (1987). The United States, however, made a declaration, authorized by Article I(3) of the Convention, that the Convention would be applicable "only to differences arising out of legal relationships whether contractual or not, which are considered commercial under the national law of the State making such declaration." New York Convention, 21 U.S.T. 2517. The United States implemented the Convention in the Federal Arbitration Act, 9 U.S.C. § 201 et seq. *See id.* at § 202 (applying the Convention to an award that arises "out of a legal relationship, whether contractual or not, which is considered as commercial").

The New York Convention, as codified in the FAA, does not define the term "commercial." "When a statute uses [a term of art], Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). In the context of international arbitration, "commercial" refers to "matters or relationships, whether contractual or not, that arise out of or in connection with commerce." Restatement (Third) of U.S. Law of Int'l Comm. Arbitration § 1-1 (2012); *see* Restatement (Third) of Foreign Relations Law § 487 cmt. f (1987) ("That a government is a party to a transaction does not

destroy its commercial character; indeed, the fact that an agreement to arbitrate is in the contract between a government and a private person may confirm its commercial character . . . ."). As the Comment to the Restatement on International Commercial Arbitration explains, "A matter or relationship may be commercial even though it does not arise out of or relate to a contract, so long as it has a connection with commerce, whether or not that commerce has a nexus with the United States." Restatement (Third) of U.S. Law of Int'l Comm. Arbitration § 1-1 cmt. e; *see Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973) ("[I]t seems clear that the full scope of 'commerce' and 'foreign commerce,' as those terms have been broadly interpreted, is available for arbitral agreements and awards." (quoting Leonard V. Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A. J. 821, 823 (1972))). Using the Restatement's definition of "commercial," the New York Convention applies to the Accommodation Agreement.

The text of the FAA's codification of the New York Convention is consistent with this conclusion. While the New York Convention, as codified in the FAA, does not expressly define "commercial," it does expressly encompass any "transaction, contract, or agreement described in" 9 U.S.C. § 2. 9 U.S.C. § 202. Section 2 in turn includes contracts "evidencing a transaction involving commerce," 9 U.S.C. § 2 – a term the Supreme Court has interpreted "as the functional equivalent of the more familiar term

'affecting commerce' – words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power," *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Accommodation Agreement falls within that term's broad compass.

The Agreement involves the sale of real property in exchange for certain accommodations, a transaction with a connection to commerce. *See Holzer v. Mondadori*, No. 12 Civ. 5234, 2013 WL 1104269, at *5 (S.D.N.Y. Mar. 14, 2013) (noting that the sale of property is commercial under the New York Convention). The provision of telecommunication services has an even more obvious connection to commerce. Indeed, in today's technological age, telecommunication services are often a "crucial segment of the economy." *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). The taxes Belize levies against a company also have a connection with commerce, *see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614-15 (1981) (noting the impact taxes have on commerce), as do the duties Belize charges (or forgoes charging). We thus conclude that the Accommodation Agreement is commercial and is governed by the New York Convention.

Belize seeks to avoid this result by arguing we should adopt the definition of "commercial" articulated by the Supreme Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). In that case, the Supreme Court, in examining the scope of the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2), held that a foreign state engages in commercial

activities when it acts in the manner of a private player within the market. *Weltover*, 504 U.S. at 614. The Court reasoned that the FSIA "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity"; that the word "commercial" was a "term of art"; and that Congress therefore intended the word to have "the meaning generally attached to that term under the restrictive theory at the time the statute was enacted," *i.e.*, distinguishing between "state sovereign acts, on the one hand, and state commercial and private acts, on the other." *Id.* at 612-13. In this case, Belize argues that in granting Telemedia certain tax and duty exemptions, it exercised "powers peculiar to sovereigns" as opposed to "powers that can also be exercised by private citizens," *id.* at 614, and thus its actions were not commercial.

Belize's reliance on *Weltover* is misplaced. Unlike with the FSIA, Congress was not codifying the restrictive theory of foreign sovereign immunity when it ratified and implemented the New York Convention. Rather, the treaty concerns international arbitration. We thus recognize that: (1) the Convention's purpose was to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts," *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007); (2) the word "commercial" is a "term of art"; and (3) in implementing the Convention, Congress intended that word to have the meaning generally attached to that term in the international commercial arbitration context. As

we discussed above, "commercial" in the context of international arbitration refers to matters which have a connection to commerce. Belize's argument to the contrary will not sell.

Belize raises several other arguments for why we should dismiss this action, including *forum non conveniens*, international comity, and lack of personal jurisdiction, as well as specific defenses under the Convention. These arguments were adequately discussed and rejected by the district court, and none warrant further exposition by this Court.

CONCLUSION

For the reasons stated above, the judgment below is affirmed.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BELIZE SOCIAL DEVELOPMENT LIMITED,	)	
Petitioner,	)	
v.	)	**Civil Case No. 09-2170 (RJL)**
THE GOVERNMENT OF BELIZE,	)	
Respondent.	)	

MEMORANDUM OPINION
(December 11, 2013) [##1, 15, 47]

Petitioner Belize Social Development Limited ("petitioner" or "BSDL") brings this action against respondent the Government of Belize ("respondent" or "GOB"), seeking the confirmation and enforcement of a foreign arbitral award pursuant to § 207 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 207, and Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "N.Y. Conv.").[1] Before the Court are petitioner's Petition to Confirm Arbitration Award and to Enter Judgment [Dkt. #1] and respondent's Motion to Stay Action or, in the Alternative, Dismiss

[1] *Opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (entered into force for the U.S. Dec. 29, 1970), *available at* http://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf.

Petition [Dkt. #15]. Upon consideration of the pleadings, relevant law, and the entire record, the petition to confirm and enter judgment is GRANTED, and the motion to stay or dismiss is DENIED.

FACTUAL BACKGROUND

A. Accommodation Agreements

On September 19, 2005, respondent GOB and Belize Telecommunications Limited ("BTL")[2] entered into the first of four "Government Telecommunications Accommodation Agreement[s] . . . to improve telecommunications for the people of Belize and better accommodate the GOB's telecommunications needs." Pet'r's Mem. of Points and Authorities in Supp. of Pet. to Confirm Arb. Award & Enter J. ("Pet'r's Mem.") at 2 [Dkt. #1-1]; Resp't's Mem. in Supp. of Mot. to Stay Action or, in the Alt., Dismiss Pet. ("Resp't's Mem.") at 5-6 [Dkt. #15]. As part of the agreements (hereinafter, "original agreements"), BTL would acquire certain properties owned by GOB for 19,200,000 Belize dollars. Pet'r's Mem. at 2. In exchange, GOB would give BTL preferential tax treatment, exempt BTL from import duties on goods and

[2] Belize Telecommunications Ltd. (now "Belize Telemedia Limited") is owned by Lord Michael Ashcroft, who is a member of the United Kingdom House of Lords and has dual nationality in Belize. Resp't's Prelim. Resp. to Pet. to Confirm Arb. Award ("Resp't's Prelim. Resp.") at 3 [Dkt. #16]. He is one of the wealthiest people in the United Kingdom and Belize and is a major investor in Belize. *Id.*

equipment, guarantee BTL a minimum rate of return on investments, pay any shortfall that may occur between the minimum rate of return and the actual rate of return, and allow BTL to control the use of "Voice Over Internet Protocol." *Id.*; *see also* Pet. to Confirm Arb. Award & Enter J., Ex. A ("Final Award" or "LCIA Award") at 20-23 [Dkt. #1-3] (explaining class license holders and their customers were not permitted to use voice over internet protocol services unless permitted by the individual license holder (BTL)).

The Accommodation Agreements also contained a clause which provided that any dispute would be referred to and resolved by arbitration under the London Court of International Arbitration ("LCIA") Rules. Pet'r's Mem. at 4. Over the next few years, the parties amended the original agreement three times and on May 29, 2007, under the third agreement, Belize Telemedia Limited ("Telemedia") "assumed all of BTL's rights and obligations under the Accommodation Agreement." *Id.* at 3.

On February 8, 2008, Dean Barrow was appointed the new Prime Minister of Belize and his administration refused to acknowledge Telemedia's rights as set forth in the Accommodation Agreements or to comply with its obligations under the agreements. *Id.* at 5. Telemedia, on the other hand, complied with its obligations under the Accommodation Agreements by purchasing GOB properties for 19,200,000 Belize dollars. *Id.*

B. Arbitration Proceedings in the LCIA

Telemedia submitted a request for arbitration to the LCIA on May 9, 2008, claiming multiple breaches of the Accommodation Agreements. Pet'r's Mem. at 6. The LCIA appointed a Tribunal comprised of three distinguished arbitrators to govern the arbitration proceedings. *Id.* at 7. GOB refused to participate in the arbitration proceedings, *id.* at 8; Resp't's Prelim. Resp. at 6, and on March 18, 2009, following a three day evidentiary hearing, "the Tribunal unanimously ruled in favor of Telemedia and issued its Final Award," which granted Telemedia both declaratory and monetary relief, Pet'r's Mem. at 8; Resp't's Mem. at 8. The Tribunal found that: (i) the Accommodation Agreements are legal and binding under Belize law, (ii) "GOB . . . violated numerous provisions of the Accommodation Agreement[s]," and (iii) "Telemedia was entitled to relief." Pet'r's Mem. at 9.

Two days after the Tribunal issued its Final Award, on March 20, 2009, BSDL was created in the British Virgin Islands. Resp't's Prelim. Resp. at 7. That same day, Telemedia assigned to BSDL the monetary portion of the Tribunal's Final Award, *id.* at 7-8, thereby allowing BSDL "to enforce and receive the monetary portion of the Final Award," Pet'r's Mem. at 9.

C. Belize Litigation and GOB Legislation

In Belize, GOB filed a lawsuit against Telemedia on April 6, 2009, Pet'r's Mem. in Opp'n to Resp't's

Mot. to Stay or Dismiss and in Supp. of Pet. To Confirm Arb. Award ("Pet'r's Suppl. Mem.") at 3 [Dkt. #45], seeking a declaratory judgment that the Tribunal's arbitration award is "unenforceable and the Accommodation Agreements are invalid as contrary to Belize law and public policy," Resp't's Prelim Resp. at 8.[3] On July 20, 2009, the Belize Supreme Court issued a preliminary injunction barring Telemedia and BSDL from enforcing the arbitration award until after the court issued its ruling in the pending action. *Id.* at 9. The parties dispute whether that injunction remains valid after the April 2009 lawsuit was discontinued and a February 2012 lawsuit instituted in its place. *See* Resp't's Suppl. Br. at 3 [Dkt. #39] (claiming that "the injunction remains in place"); Pet'r's Suppl. Mem. at 4 (claiming that "the Belize Supreme Court ordered . . . the discharge of the injunction").[4]

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[3] The lawsuit was captioned *Attorney General v. Belize Telemedia Ltd. & Belize Social Development Ltd.*, Claim No. 317 of 2009. *See* Resp't's Mot. to Stay Action or, in the Alt., Dismiss Pet. ("Resp't's Mot.") at 1 [Dkt. #15].

[4] GOB's April 2009 lawsuit was discontinued because "the Claim had not been served within the required period and had expired." Decl. of Eamon H. Courtenay ("Courtenay Decl."), Ex. B (Apr. 19, 2012 Order of the Belize Supreme Court) [Dkt. #45-8]; *see also* Courtenay Decl. ¶ 9 [Dkt. #45-6]. The Order discontinuing the case also explicitly discharged the injunction against BSDL. *Id.* Ex. B ¶ 3. In GOB's February 2012 suit – *Attorney General v. Belize Social Development Ltd.*, Claim No. 140 of 2012 – the court entered an injunction, but it expired on March 29, 2012. *See* Courtenay Decl. ¶¶ 10-13 & Ex. C. ¶ 6. As of February

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GOB also enacted legislation in 2009 to assume control over telecommunications in Belize and obtained 94% of Telemedia's shares as part of that legislation. Resp't's Prelim. Resp. at 9; Resp't's Suppl. Br. at 12. In 2010, the Belize Supreme Court of Judicature (Amendment) Act ("SCJA") made it a criminal offense punishable by fine, imprisonment of at least five years, or both "to disobey or fail to comply with an injunction" issued by the Belize Supreme Court. Pet'r's Suppl. Mem. at 5. GOB also made it a crime for BSDL and its counsel to respond to the pleadings that GOB had already filed in this case. *Id.* In August 2012, "the Belize Court of Appeal struck down several sections of the SCJA as unconstitutional," including the sections giving SCJA extraterritorial effect[5] and the sections imposing criminal penalties. *Id.* at 6.

D. United States Litigation

BSDL filed its petition in this Court on November 17, 2009. On October 18, 2010, this court stayed the proceeding pending resolution of the case in

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2013, that case was still pending before the Belize Supreme Court. *See id.* ¶ 15; Tr. of Oral Arg., Feb. 25, 2013 ("Tr.") at 45-46.

[5] The SCJA purported "to have extraterritorial effect, making it a criminal offense if any person, whether in Belize or elsewhere, directly or indirectly 'instigates, commands, counsels, procures, solicits, advises or in any manner whatsoever aids, facilitates or encourages' violation of an injunction or similar order issued by the Supreme Court of Belize." Pet.'s Suppl. Mem. at 5.

Belize. *Id.* at 7. BSDL appealed the stay order and, alternatively, sought a writ of mandamus. *Id.*

The United States Court of Appeals for the District of Columbia Circuit granted the writ of mandamus and held that this court's indefinite "stay order as issued exceeded the proper exercise of authority of the district court." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012), *cert denied*, 133 S. Ct. 274 (2012). In addition, the D.C. Circuit held that this case is governed by the New York Convention, and litigation in Belize is irrelevant to enforcement of the arbitration award in this proceeding. *See id.* at 730 ("[T]he pending action in Belize has no preclusive effect on the district court's disposition of the petition to enforce pursuant to the FAA and the New York Convention . . . ."). The case was remanded, and I was instructed to "conduct further proceedings not inconsistent with [the] opinion." *Id.* at 734 (internal quotation marks omitted).

LEGAL ANALYSIS

At oral argument, BSDL took the position that "in the world of foreign arbitration awards that are brought to the United States for confirmation under 9 USC section 207, this is what you would call run of the mill," and that "the D.C. Circuit has given . . . a very clear template as to what is to be done, because section 207 says that when an award is brought for confirmation, the District Court shall confirm unless one of the grounds for either stay or non-enforcement

under the [New York] convention is established." Tr. at 20. This is in line with my reading of our Circuit Court's opinion in this case:

> [T]he FAA, by codifying the New York Convention, provides a carefully structured scheme for the enforcement of foreign arbitral awards and represents an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." The plain terms of the FAA instruct a district court reviewing a foreign arbitral award to "confirm the award unless it *finds* one of the grounds for refusal or deferral of recognition or enforcement . . . specified in the [New York] Convention."

Belize Soc. Dev. Ltd., 668 F.3d at 733 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and 9 U.S.C. § 207).[6]

GOB nevertheless argues that, even after the Circuit Court's ruling, there are at least five distinct grounds on which I could dismiss the petition, including lack of subject matter jurisdiction, lack of standing, and *forum non conveniens*. *See* Resp't's Suppl. Br. at 126; Resp't's Mem. at 1545; Oral Arg. Tr. at 4-19. I

[6] This case does not involve "a number of complex factual and legal issues" warranting dismissal. Resp't's Suppl. Br. at 12. Even if I accepted the notion that a petition can be denied solely because it is complex, I would not do so here. Indeed, the length of this opinion is a result of the sheer number of meritless arguments that GOB has raised, not their complexity!

am confident that if this case raised such significant jurisdictional and justiciability concerns, our Circuit Court would have flagged them, rather than emphasizing that "the district court's task [is] to review and grant BSDL's petition to confirm the Final Award absent a finding that an enumerated exception to enforcement specified in the New York Convention applie[s]." *Belize Soc. Dev. Ltd.*, 668 F.3d at 733. Still, in an abundance of caution, I will consider each of GOB's grounds for dismissal before turning to GOB's five arguments for why I should deny the petition on its merits. *See* Resp't's Suppl. Br. at 26-43.

In short, I am not persuaded by any of GOB's asserted bases for dismissing or denying BSDL's petition, and I will therefore grant the petition, confirm the arbitration award, and enter judgment in BSDL's favor.

I. GROUNDS FOR DISMISSING THE PETITION

A. Jurisdiction and Immunity Under Foreign Sovereign Immunities Act

This Court has subject matter jurisdiction over "any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under [the Foreign Sovereign Immunities Act ("FSIA")] or under any applicable international agreement." 28 U.S.C. § 1330(a). GOB takes the position that it is entitled to sovereign immunity

under the FSIA because it has never waived immunity and none of the FSIA exceptions apply. *See* Resp't's Mem. at 37-41. GOB is mistaken.

Under the FSIA, a foreign sovereign enjoys no immunity from a suit "to confirm an award made pursuant to [] an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6)(B). The LCIA's award in this case is clearly governed by the New York Convention because both England (where the arbitration took place) and the United States are parties to the Convention. *Belize Soc. Dev. Ltd.*, 668 F.3d at 731 n.3. Belize's status under the convention is irrelevant. *Id.* Moreover, it is well settled that an action to confirm an arbitration award under the New York Convention falls squarely within the ambit of the § 1605(a)(6)(B) immunity exception. *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123-24 (D.C. Cir. 1999); *see also Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 55-56 (D.D.C. 2010) (applying 28 U.S.C. § 1605(a)(6) in case involving dispute between a foreign sovereign, Nigeria, and one of its own nationals, a Nigerian corporation). Thus, this Court has subject matter jurisdiction.[7]

[7] Any argument that this Court lacks personal jurisdiction over GOB is also meritless. *See* Resp't's Mem. at 41-43. "[U]nder

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GOB challenges the application of § 1605(a)(6), claiming that the LCIA's final arbitral award is unenforceable because the Accommodation Agreements containing the arbitration clause "are void *ab initio* under Belizean law." *See* Resp't's Suppl. Br. at 25; *see also* Final Award ¶ 17 (quoting relevant arbitration clause). I agree with my colleague, Judge Boasberg, who recently noted a lack of authority for the proposition "that the Court must conduct [ ] an independent, *de novo* determination of the arbitrability of a dispute to satisfy the FSIA's arbitration exception." *Chevron Corp. v. Republic of Equador*, ___ F. Supp. 2d ___, 2013 WL 2449172, at *3 (D.D.C. June 6, 2013). Indeed, the FSIA jurisdictional inquiry is a "cabined" one that focuses on the authority of the court, not the contractual rights and obligations of the parties. *See id.* at *4 (citing *Creighton Ltd.*, 181 F.3d at 124). And regardless of whether I consider contract validity now, the question will be addressed anyway – as it always is, though under a deferential

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the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987) (internal quotation marks omitted); *see also* 28 U.S.C. § 1330(b); *cf. GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 809 (D.C. Cir. 2012) ("[F]oreign sovereigns and their extensively-controlled instrumentalities are not 'persons' under the Fifth Amendment's Due Process Clause – and thus have no right to assert a personal jurisdiction defense." (citing *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-96 (D.C. Cir. 2002))). GOB does not dispute that it was served process. *See* Oral Arg. Tr. at 23 (unrefuted argument by BSDL that "[t]here is no dispute about service.").

standard, *see id.* at *5 – when I turn to the Article V(1)(a) exception to the New York Convention, *see infra* Part II.B.[8]

B. *Forum Non Conveniens*

GOB also argues for dismissal based on the relative inconvenience of litigating in this forum. *See* Resp't's Mem. at 26-28; Resp't's Suppl. Br. at 5-13. Under the doctrine of *forum non conveniens*, I "must decide (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 Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981)). The balancing of private and public interests occurs *only if* an adequate alternative forum exists. *Id.*

Unfortunately for GOB, there is no adequate alternative forum for this case because "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 Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005).

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[8] GOB also argues that the assignment between Telemedia and BSDL is void, so GOB remains immune to suits *brought by BSDL*. *See* Resp't's Suppl. Br. at 25-26. But GOB cites no case – and I am aware of none – in which a foreign state's amenability to suit under the FSIA turns on the validity of an assignment to the plaintiff.

Even if GOB has no attachable property in the United States at this time, Resp't's Suppl. Br. at 8, "it may own property here in the future, and [BSDL's] having a judgment in hand will expedite the process of attachment," *TMR Energy*, 411 F.3d at 303. This is the controlling law in our Circuit, and I will therefore apply it faithfully.[9] Because GOB's *forum non conveniens* argument falters at the first step, I need not consider the second.

C. International Comity and Abstention

Convenience aside, GOB also urges me to dismiss BSDL's petition on international comity and abstention grounds for the following reasons: Belize is not a signatory to the New York Convention, this matter is already before the courts of Belize, Belize has a greater interest in the outcome of the case, and there are conflicts of law between the United States and Belize. *See* Resp't's Mem. at 24-26; Resp't's Suppl. Br. at 13-19. The Circuit Court's decision remanding this

[9] *TMR Energy* is binding, unlike Second Circuit case law, *see* Resp't's Mem. at 26-28 (citing *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002)); Resp't's Suppl. Br. at 6-10 (citing *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011)), and unlike an "in the alternative" decision rendered by another judge of this court that was not affirmed (or even considered) on appeal, Resp't's Mem. at 28 (citing *TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd on other grounds*, 487 F.3d 928, 932 (D.C. Cir. 2007).

case essentially forecloses these arguments, as the Court held that litigation in Belize "has no preclusive effect on the district court's disposition of the petition to enforce," *Belize Soc. Dev. Ltd.*, 668 F.3d at 730, and "[t]he fact that Belize is not a party to the New York Convention is irrelevant," *id.* at 731 n.3. Our Circuit Court, of course, was well aware that courts in Belize were reaching conflicting decisions regarding the enforceability of the Final Award, *see id.* at 728-29, and it instructed me to proceed with enforcement anyway.[10] Regardless of whether our Circuit Court's "holding has the potential for straining relations between the United States and Belize," Resp't's Suppl. Br. at 17, I am, in the final analysis, bound by that decision.[11]

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[10] I am also not convinced that there really is a "true conflict" between U.S. and Belizean law. *See* Resp't's Suppl. Br. at 18-19. The Court of Appeal of Belize has held that, because Belize is not party to the New York Convention, "there is no legal obligation *on the part of Belize* to recognize and enforce domestically arbitral awards within the contemplation of the New York Convention in accordance with Article 3 of that instrument." Decl. of Michael C. Young, S.C. ("Young Decl."), Ex. K at ¶ 76 (*Att'y Gen. of Belize v. BCB Holdings Ltd.*, Civ. App. No. 4 of 2011 (Aug. 8, 2012)) [Dkt. #39-12] (emphasis added). Our Circuit Court has, to my knowledge, never addressed whether *Belize's courts* must enforce awards under the New York Convention; it has merely held that *this Court* is required to do so unless a Convention exception applies. *See Belize Soc. Dev. Ltd.*, 668 F.3d at 733.

[11] GOB ignores that "the central precept of comity teaches that, *when possible, the decisions of foreign tribunals should be given effect in domestic courts*, since recognition fosters

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D. Standing

According to GOB, BSDL lacks standing to enforce the arbitration award because Telemedia did not validly assign BSDL the right to the monetary portion of the award. GOB challenges the assignment both under the terms of the Accommodation Agreement, *see* Resp't's Mem. at 33-34; Resp't's Prelim. Resp. at 16-17; Resp't's Suppl. Br. at 20- 21, and under Belizean law, *see* Resp't's Suppl. Br. at 2122 (citing Belizean case law and regulations).[12] Neither of these arguments is persuasive.

First, Section 19 of the Accommodation Agreement, on which GOB bases its entire Accommodation Agreement argument, was "deleted in its entirety" and replaced by a new provision on January 1, 2008, more than a year before the March 20, 2009 Telemedia-BSDL assignment even took place. *See* Decl. of Louis B. Kimmelman ("Kimmelman Decl."),

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international cooperation and encourages reciprocity, thereby promoting predictability and stability." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (emphasis added). The LCIA – located in England, a fellow signatory to the New York Convention – rendered a decision in BSDL's favor, and I will not dismiss this enforcement petition on the backwards notion that doing so will somehow advance the courts' interest in fostering international cooperation and reciprocity with foreign governments and their legal tribunals.

[12] GOB does not dispute that under the New York Convention, an assignee can enforce an arbitration award in favor of the assignor. *See, e.g.*, *Global Distressed Alpha Fund I LP v. Red Sea Flour Mills Co. Ltd.*, 725 F. Supp. 2d 198 (D.D.C. 2010).

Ex. E ¶¶ 7.2, 7.3 (Settlement Deed dated Jan. 7, 2008) [Dkt. #1-7], *amending* Kimmelman Decl., Ex. B § 19 ("Accommodation Agreement") [Dkt. #1-4]. Paragraph 7.3 of the Settlement Deed, which was in effect at the relevant time, contains *none* of the terms in Section 19 that GOB claims were offended by the assignment.

Second, GOB's reliance on the law of Belize is misplaced. By its own terms, the assignment "is governed by English law and shall be construed in accordance with English law." *See* Decl. of Stephen J. Ruzika ("Ruzika Decl."), Ex. C ¶ 3.6 (Deed of Assignment) [Dkt. #1-19].[13] Curiously, GOB does not address English law at all in its briefs, whereas BSDL has provided a thorough expert opinion, which explains that the assignment "complies with the requirements of section 136 of the [English] Law of Property Act 1925" and "is sufficient to transfer the [monetary portion of the arbitration award] from Telemedia to BSDL pursuant to both section 136 and equity." Op. of Marcus Smith QC on English Law ("Smith Op.")

[13] Precedent from this Circuit and others favors application of the law that the parties to a contract agreed would apply. *See, e.g.*, *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 411 n.11 (2d Cir. 2009) (in action to enforce arbitration award under New York Convention, applying New York law pursuant to choice-of-law clause in agreement); *Asia N. Am. Eastbound Rate Agreement v. BJI Indus., Inc.*, 923 F. Supp. 4, 4 (D.D.C. 1996) (applying Hong Kong law in arbitration enforcement case because "'[u]nder American law, contractual choice-of-law provisions are usually honored.'" (quoting *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992))).

¶ 15 [Dkt. #45-16]; *see also id.* ¶¶ 10-14. Moreover, BSDL's expert details why "nothing in either section 19 [of the Accommodation Agreement] or in section 7.3 [of the Settlement Deed] . . . prevent[s] the assignment." *Id.* ¶ 9; *see also id.* at 6-8. Finding no basis to discredit BSDL's expert or to treat the assignment as invalid, I am satisfied that BSDL has standing.[14]

E. Failure to Join a Required Party Under Rule 19

I am also satisfied that there are no necessary parties missing from this case. Under Federal Rule of Civil Procedure 19, a case may be dismissed only if an absent party is "required" in the litigation, the absent party cannot be joined, and equitable factors weigh in favor of dismissal. *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 149596 (D.C. Cir. 1997) (citing FED. R. CIV. P. 19(a), (b)); *see also* FED. R. CIV. P. 12(b)(7) (allowing motion to dismiss for "failure to join a party under Rule 19"). A party is "required" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or

[14] As already explained, it is irrelevant that "BTL intends to file an action in the Belize Supreme Court seeking a declaration that the purported assignment between [Telemedia] and BSDL was void *ab initio*." Resp't's Suppl. Br. at 23; *see Belize Soc. Dev. Ltd.*, 668 F.3d at 730.

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1).

GOB contends that Telemedia and its former majority shareholder, Dunkeld International Investments Ltd. ("Dunkeld"), are indispensable parties because Dunkeld has brought a separate claim in Belize "assert[ing] damages from the non-payment of the same Arbitration Award that BSDL seeks to collect," Resp't's Mem. at 44; *see also id.* at 43-45; Resp't's Suppl. Br. at 23-25, and because Telemedia "is the beneficiary of the award on its face and . . . the purported assignment [from Telemedia to BSDL] was invalid," Resp't's Suppl. Br. at 24. These arguments are meritless.

There is no evidence in the record that Dunkeld has ever asserted the right to enforce the LCIA arbitration award. To the contrary, Dunkeld's December 4, 2009 Notice of Arbitration – which GOB cites as the sole piece of evidence that Dunkeld has claimed an interest in the award – explicitly states that "[o]n

20 March 2009 Telemedia assigned the benefit of the LCIA Award . . . insofar as it orders the payment of certain damages and costs by [GOB] to Telemedia, to [BSDL]." Decl. of Gian C. Ghandi ("Ghandi Decl."), Ex. 8 ¶ 7.13 (Notice of Arbitration) [Dkt. #15-10]. And as already discussed, Telemedia in fact *did* assign to BSDL its right to the monetary portion of the arbitral award, as well as the right to enforce that award. *See supra* Part I.D; *see also* Ruzika Decl., Ex. C ¶ 1.3 ("[T]he Assignee shall have the sole right to enforce any and all rights which accrue in respect of the [damages and costs awarded by the LCIA] against [GOB]."). Dunkeld obviously agrees that there is a valid assignment.[15]

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[15] Paragraph 7.33 of the Dunkeld-GOB Notice of Arbitration does not support GOB's argument that Dunkheld has asserted damages from the non-payment of the arbitration award. *See* Resp't's Mem. at 43-44. Rather, it appears to reflect a disagreement about whether GOB is entitled to deduct "sums allegedly due as arrears of taxes, duties and charges" when compensating Dunkeld for its shares in Telemedia and whether "the specified taxation rates and set-off provisions of the Accommodation Agreement" apply. Gandhi Decl., Ex. 8 ¶ 7.33. It says nothing about Dunkeld's or Telemedia's right to enforce the LCIA award itself.

GOB also grossly mischaracterizes the record when it says that "In [a December 2009] letter, as a basis of its threatened claims against the GOB, Dunkeld asserts that the GOB 'has not complied with [the subject] LCIA award." Resp't's Suppl. Br. at 23. The quoted statement about GOB's non-compliance with the award is not in the letter from Dunkeld's counsel, *see* Ghandi Decl., Ex. 8 at 3-4, but rather is found ten pages into Notice of Arbitration, which was attached to the letter, *see id.* ¶ 7.14. Moreover, it is found in the "factual background to the dispute"

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As a matter of both English and U.S. law, not to mention common sense, an absent party that has assigned its legal rights is not "required" in litigation brought by the assignee to enforce those rights. *See* Smith Op. ¶ 11 ("BSDL can claim the [award] in its own name . . . ."); *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 51 (D.D.C. 2003) ("In light of [an assignee-]plaintiff's claim that it is the sole possessor of the rights being asserted against defendant, it is difficult to see how the Court will be unable to accord relief in the absence of [an assignor] or how defendant will incur multiple or inconsistent obligations by reasons of the claimed interest.").[16] Conversely, an attempt by Telemedia or its former shareholder to enforce rights that it has assigned away would be patently frivolous under English law (which, again, governs the assignment agreement) unless BSDL were joined as a party in *that* case. *See* Smith Op., Ex. K ¶ 58 ("When there has been an assignment that takes effect in equity, the general rule is that *it is the equitable assignee who has the right to sue*, because it is the equitable assignee who is beneficially entitled to the thing in action. *The assignor will not be allowed to maintain an action regarding the thing in action unless the assignee is joined as a party to the*

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section of the Notice, *see id.* ¶ 7, and is not at all presented as "a basis of [Dunkeld's] threatened claims."

[16] *Cf. Capitol Med. Ctr. v. Amerigroup Md., Inc.*, 677 F. Supp. 2d 188, 193 n.7 (D.D.C. 2010) ("Unlike the plaintiff in [*Primax*], [plaintiff] has not assumed the rights of the absent party.").

claim." (emphases added)). GOB offers no evidence that BSDL has ever signaled a willingness to assist Telemedia or Dunkeld in bringing duplicitous lawsuits to enforce the arbitration award. Telemedia and Dunkeld therefore have no "legally protected interest" worthy of recognition under Rule 19(a)(1)(B). *See Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F. Supp. 2d 162, 170 (D.D.C. 2012) ("legally protected interest" excludes claims that are "patently frivolous" (quoting *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999); citing *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992))).

II. GROUNDS FOR DENYING THE PETITION[17]

A. Failure to Produce Copies of Arbitral Award and Accommodation Agreement (Article IV(1))

GOB claims that BSDL's petition should be denied because it does not comply with Article IV of the New York Convention, which requires the petitioner, "at the time of the application, [to] supply:

[17] I note that under the New York Convention, "[r]ecognition and enforcement of the award *may* [not must] be refused . . . only if" the opposing party proves that certain conditions are met. Art. V(1) (emphasis added). As I will explain at length, I find that none of those conditions are met; however, even if I am mistaken, I would still exercise any discretion that I have to recognize and enforce the award in BSDL's favor, as I believe that is consistent with our federal treaty obligations and policies favoring arbitral dispute resolution, deference to arbitrators, and comity with fellow treaty signatories.

(a) The duly authenticated original award or a duly certified copy thereof; [and] (b) The original agreement [to arbitrate] or a duly certified copy thereof." Resp't's Suppl. Br. at 27 (quoting Article IV(1)). BSDL concedes that it did not provide original or duly certified copies of original documents, but says that "signed copies . . . that were certified to be 'true and correct' copies 'under penalty of perjury' " are enough. Pet'r's Suppl. Mem. at 17-18 (citing Dkt. ##1-3, 1-4).

I agree with another judge who characterized an argument like GOB's as "grasping at straws, attempting to persuade the Court to refuse to confirm the award on the basis of a mere technicality." *Arbitration Between Overseas Cosmos, Inc. v. NR Vessel Corp.*, No. 97 CIV. 5898(DC), 1997 WL 757041, at *5 (S.D.N.Y. Dec. 8, 1997).[18] The purpose of Article IV's "original . . . or duly certified copy" requirement is to require the petitioner to prove that the relevant documents exist. *See id.* Like the respondent in *Overseas Cosmos*, GOB challenges only the enforceability – not the *existence* or *genuineness* – of the

[18] In many, if not most, arbitration-confirmation cases, the respondent does not even raise an Article IV argument, and my colleagues routinely confirm arbitral awards relying on documents sworn and certified by petitioner's counsel. *See, e.g.*, *Chevron Corp.*, 2013 WL 2449172 at *6; *id.*, CA No. 12-1247 (JEB), Decl. of Edward G. Kehoe & Exs. 1-5 [Dkt. ##4 to 4-5]; *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 31 (D.D.C. 2011); *id.*, CA No. 09-791 (RBW), Decl. of Christopher R. Hart & Exs. A, B [Dkt. ##1-2, 1-4].

arbitration agreement or award;[19] therefore, sworn and certified copies of these documents are "sufficient to satisfy the requirements of Article IV." *Id.*; *see also Cont'l Grain Co. v. Foremost Farms Inc.*, No. 97 Civ. 0848 (DC), 1998 WL 132805, at *2 (S.D.N.Y. Mar. 23, 1998). Under these circumstances, reading Article IV to require anything more would create a rule that is "unnecessarily restrictive and at odds with a common sense reading of the provision." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983).[20]

B. Invalidity of Accommodation Agreement (Article V(1)(a))

Next, GOB argues that the arbitration award is unenforceable because "the alleged arbitration agreement [between GOB and BTL] is invalid under the laws of Belize." *See* Resp't's Suppl. Br. at 28 (citing N.Y. Conv. Art. V(1)(a)). In truth, however, GOB does not challenge the legality of the *arbitration agreement* as a stand-alone provision; rather, GOB fires attacks on at least a dozen *other* provisions of

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[19] Petitioner's counsel presented originals at the February 25, 2013 oral argument, *see* Tr. at 20, and respondent did not dispute their existence or authenticity.

[20] This case is unlike *Czarina, L.L.C. v. W.F. Poe Syndicate*, where the court held that an "unsigned, unexecuted sample wording" of an arbitration clause was not sufficient. 358 F.3d 1286, 1289 (11th Cir. 2004). BSDL's copies of the arbitration agreement and award are signed, executed, and in final form. *See* Accommodation Agreement at 25; Final Award at 109.

the Accommodation Agreements. *See id.* at 28-38; Resp't's Prelim. Resp. at 26-36.

Unfortunately for GOB, it is well-settled law that "an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (holding that arbitrator should decide whether contract containing arbitration clause was void *ab initio* because terms other than the arbitration clause violated state law and rendered the contract "criminal on its face"). Absent a direct challenge to the arbitration clause itself, the clause remains "enforceable apart from the remainder of the contract," and GOB's challenge to the validity of the contracts "should . . . be considered by an arbitrator, not a court." *Id.* 446; *see also id.* at 449 ("*[A] challenge to the validity of the contract as a whole*, and not specifically to the arbitration clause, *must go to the arbitrator.*" (emphases added)); *Nanosolutions, LLC v. Prajza*, 793 F. Supp. 2d 46, 54-55 (D.D.C. 2011) ("[T]he FAA prohibits a district court from considering . . . challenges [to] the contract as a whole.").[21] Moreover, the New York Convention instructs contracting states to "recognize an agreement in writing under which the parties undertake to submit to arbitration," with "agreement in writing" defined to include "an arbitral clause *in a contract.*" N.Y. Conv. Art. II(1), (2) (emphasis added). Thus, the

[21] The LCIA considered the validity of the Accommodation Agreement, *see* Final Award ¶¶ 146-176, and found it "valid and enforceable against the present [GOB]," *id.* ¶ 176.

"agreement in writing" that must be valid under the convention is the arbitration clause, *not* the entire contract containing the clause.

Section 15.2 of the Accommodation Agreement reflects the parties' clear intent to arbitrate "[a]ny dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination." GOB offers no basis under Belizean law, or any other law, for this Court to find *that particular clause* invalid.[22]

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[22] GOB relies heavily on the Third Circuit's opinion in *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*, but in that case, the respondent claimed that the entire agreement containing the arbitration clause had been forged and thus the parties had never agreed to arbitrate, 334 F.3d 274, 277 (3d Cir. 2003). The court framed the question before it as "whether a foreign arbitration award might be enforceable regardless of the validity *of the arbitration clause* on which the foreign body rested its jurisdiction." *Id.* at 279 (emphasis added). Answering in the negative, the court held "that a district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement *to arbitrate*." *Id.* at 286 (emphasis added); *see also id.* at 284 ("[T]he district court here had an obligation to determine independently the existence of an agreement *to arbitrate*. . . ." (emphasis added)).

Given the particular facts before the court, I read *China Minmetals* as consistent with *Buckeye*, which distinguished between "[t]he issue of the contract's validity," which is *not* for the court to resolve, and "the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded," which the courts might be allowed to consider. *Buckeye*, 546 U.S. at 444 n.1. In this case, GOB alleges that "[t]he illegality of provisions in the Accommodation Agreement is wide and major,"

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C. The Inappropriateness of Arbitration (Articles V(1)(c) and V(2)(a))

The New York Convention allows for enforcement of an arbitral award to be refused if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration," Art. V(1)(c), or if "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of th[e] country" being asked to recognize and enforce the award, Art. V(2)(a). GOB contends that these articles apply because the LCIA Award and its enforcement violate the internationally-recognized common law revenue rule, *see* Resp't's Mem. at 19-24; Resp't's Prelim. Resp. at 12-16, 36-38; Resp't's Suppl. Br. at 38-40, as well as the United States' political question and act of state doctrines and principles of comity,[23] *see* Resp't's Prelim. Resp. at 38-39; Resp't's Suppl. Br. at 40. According to GOB, U.S. courts cannot resolve disputes like the one between GOB and Telemedia, so

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Young Decl. at ¶ 7 [Dkt. #39-1], but unlike the respondent in *China Minmetals*, GOB does not challenge the very existence of an agreement to arbitrate between two parties who had the authority and capacity to contract on behalf of their principals, *see Buckeye*, 546 U.S. at 444 n.1.

[23] I have already discussed comity in an earlier section. *See supra* Part I.C.

an arbitrator in the United States could not settle such a case either. *See* Resp't's Suppl. Br. at 40.[24]

The LCIA considered the revenue rule and decided that it did not apply because this is a contract case, not an action to enforce a foreign nation's tax laws. *See* Final Award ¶ 180.[25] I agree with its reasoning. "[T]he revenue rule is often stated as prohibiting the *collection of foreign tax claims*." *Pasquantino v. United States*, 544 U.S. 349, 361 (2005) (emphasis added) (holding that revenue rule did not preclude wire fraud prosecution of defendants who had engaged in smuggling to evade Canadian taxes). It is clear from the Supreme Court's analysis in *Pasquantino* that the rule long ago derived from "the

[24] It bears noting that GOB is incorrect when it says that "an arbitrator operating under U.S. law cannot have any authority that is broader than a U.S. court would have." Resp't's Suppl. Br. at 40. At least one court has explicitly found that "[a] 'parochial refusal' to enforce an arbitration agreement would frustrate th[e] purpose [of the New York Convention], therefore, a court *should compel arbitration even if the arbitrator could make a ruling that an American court could not.*" *Belship Navigation, Inc. v. Sealift, Inc.*, 95 CIV. 2748 (RPP), 1995 WL 447656, at *6 (S.D.N.Y. 1995) (emphasis added) (quoting and citing *Mitsubishi Motors Corp.*, 473 U.S. at 629-31). In any event, for the reasons that follow, the subject matter of this case could be heard in U.S. courts.

[25] GOB characterizes the LCIA's discussion of the revenue rule as "one short paragraph" that relies on "unidentified" authorities. Resp't's Mem. at 22. To the contrary, paragraph 180 of the award is one of the longest in the Final Award, and footnote 95 provides ample support for the proposition that arbitrators can resolve tax issues in contract disputes.

rule against foreign penal enforcement" and the "analogy between foreign revenue laws and penal laws." *Id.* In bringing the LCIA arbitration and this enforcement action, Telemedia and BSDL are not attempting to enforce Belizean tax law or collect any tax revenue. They are seeking to enforce a *contract*, and although that contract contains tax-related provisions, the arbitration award and enforcement of that award do not entail the enforcement of any foreign revenue law. Thus, the matters arbitrated were contemplated by and within the terms and scope of the submission to arbitration, and they relate to subject matter capable of settlement by arbitration in the United States. The revenue rule provides no basis for declining enforcement.[26]

As for the act of state doctrine, the FAA states that "[e]nforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards *shall not be refused on the basis of the Act of State doctrine.*" 9 U.S.C. § 15 (emphasis added).[27] Given that

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[26] GOB does not cite a single case in which a U.S. court declines to enforce a foreign arbitral award based on the revenue rule.

[27] "Although [9 U.S.C. § 15] is located in Chapter One of the FAA rather than in the Convention-implementing Chapters Two and Three, Chapter One of the FAA applies to actions brought under the New York . . . Convention[ ] unless it is 'in conflict' with Chapter[ ] Two . . . [of] the Convention[ ] as ratified." *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 366 (S.D.N.Y. 2005) (quoting 9 U.S.C. § 208), *abrogation on other grounds recognized by Goel v. Ramachandran*, 823

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§ 15 "eliminat[ed] the Act of State doctrine as a bar to arbitration," *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995), it would be nonsensical for me to find that this case was "not capable of settlement by arbitration" in the United States because of that very doctrine.

The political question doctrine, meanwhile, "is primarily a function of the separation of powers" and *should not* be understood to mean that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). The subject matter of the controversy in this case – the existence and enforceability of a contract between a state and a private party – raises no separation of powers concerns, or any other political questions for that matter, that would make it non-arbitrable under U.S. law. In fact, courts in our Circuit regularly resolve contract disputes brought by private parties against foreign countries. *See McKesson, Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012); *Gulf Res. Am., Inc. v. Republic of Congo*, 370 F.3d 65 (D.C. Cir. 2004); *El-Hadad v. United Arab Emirates*, 216 F.3d 29 (D.C. Cir. 2000); *Wye Oak Tech., Inc. v. Republic of Iraq*, ___ F. Supp. 2d ___, 2013 WL 1734436 (D.D.C. Apr. 23, 2013). Given the frequency with which these cases

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F. Supp. 2d 206, 215-16 (S.D.N.Y. 2011). Section 15 does not appear to conflict with the New York Convention or Chapter Two of the FAA, *see id.*, and GOB offers no argument that such a conflict exists.

arise – and the fact that GOB fails to cite even one such case decided on political question grounds – it simply cannot be that the political question doctrine bars U.S. courts from deciding any case in which a foreign government says that it breached a contract or committed a tort for some political reason. That defense could apply in *every* case of this sort, and yet, GOB cannot direct me to a single example of a court accepting it.

Furthermore, GOB cannot challenge enforcement by first, raising arguments that "depart from the law and enter the realm of political theory," and then, invoking the political question doctrine. *Republic of Philippines v. Westinhouse Elec. Corp.*, 774 F. Supp. 1438, 1465 (D.N.J. 1991).[28] This case implicates no "political decisions that are by their nature committed to the political branches to the exclusion of the judiciary," *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (internal quotation marks omitted), nor any "separation-of-powers concerns that would justify invocation of the political question doctrine,"

[28] *See id.* at 1464-65 (denying motion to dismiss on political-question grounds where defendant argued that former president's "*de facto* power negated the very existence of [all relevant] laws," because such an argument "has no place in a court of law"). GOB admits that its arguments are not legal in nature, *see* Resp't's Mem. at 32 ("[Resolving this petition] is not merely a task of applying a foreign law."), but rather are "part of a significant political controversy within Belize," *id.* at 30. A political controversy in Belize, however, does not necessarily create a "political question" in the United States.

de Csepel v. Republic of Hungary, 714 F.3d 591, 604 (D.C. Cir. 2013) (internal quotation marks omitted) (holding that political question doctrine did not bar suit by heirs of Jewish Hungarian art collector against Hungary for breach of bailment agreements entered during World War II).[29]

E. Suspension of the Award by a Competent Authority (Article V(1)(e))

In its initial motion to stay or dismiss and its preliminary response to BSDL's petition, GOB argued that I should decline to enforce the LCIA Award under Article V(1)(e) of the New York Convention because "enforcement of the Award has been suspended by a competent authority (Belize Supreme Court)." Resp't's Mem. at 15; Resp't's Prelim. Resp. at 20-26. Our Circuit Court addressed Article V(1)(e), saying:

> Because the arbitration occurred in London and under the arbitral laws of England, *the courts of England are the competent authority* with primary jurisdiction over the Final Award; absent proceedings for setting aside or suspending the Final Award *in those*

[29] In its first filing, GOB raised the act of state and political question doctrines as grounds for dismissing the case outright, rather than denying the petition under Article V(2)(a). *See* Resp't's Mem. at 28-33. I reach the same outcome either way. This enforcement action raises no greater act-of-state or political-question concerns than the underlying arbitration does.

> *courts*, the [GOB] can offer no basis on which to conclude that the stay of BSDL's petition for enforcement was properly issued under the FAA and New York Convention.

Belize Soc. Dev. Ltd., 668 F.3d at 731 (emphases added). GOB has not sought or obtained any relief in the English courts, so Article V(1)(e) does not apply.

F. Public Policy (Article V(2)(b))

Finally, GOB urges the Court to refuse recognition and enforcement of the LCIA Award on the basis that doing otherwise would be "contrary to the public policy" of the United States. Resp't's Prelim. Resp. at 39-42; Resp't's Suppl. Br. at 41-43 (quoting N.Y. Conv. Art. V(2)(b)). As our Circuit Court has noted, courts around the country "have been very careful not to stretch the compass of 'public policy,'" applying the defense "'only where enforcement would violate the forum state's most basic notions of morality and justice.'" *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004)).

GOB cites the Foreign Corrupt Practices Act as the "best evidence[ ]" that the United States has "a strong public policy against corruption abroad." Resp't's Suppl. Br. 41. I agree with the general notion that the United States has a strong policy against foreign corruption. But it also has a countervailing policy that I mentioned earlier – an "'emphatic

federal policy in favor of arbitral dispute resolution'" that "'applies with special force in the field of international commerce.'" *Belize Soc. Dev. Ltd.*, 668 F.3d at 733 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 631). This is not the first time a court has been confronted with conflicting policies, one weighing in favor of enforcing an arbitral award and one weighing against it, and consistently, U.S. courts have enforced arbitral awards in the face of public policy interests *at least* as weighty as the policy against corruption abroad. *See Agility Pub. Warehousing Co. K.S.C., Prof'l Contract Admins., Inc. v. Supreme Foodservice GmbH*, 495 F. App'x 149, 151 (2d Cir. 2012) ("[T]he [public policy] defense is frequently invoked but rarely successful, particularly in view of the strong United States policy favoring arbitration.").[30] Accordingly, GOB has failed to show that, on balance, enforcing this award would so offend the United States' "most basic notions of morality and justice" that Article V(2)(b) applies.[31]

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[30] *See also*, *e.g.*, *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys.*, 665 F.3d 1091, 1096-100 (9th Cir. 2011) (regulating trade with Iran); *Steel Corp. of Philippines v. Int'l Steel Servs., Inc.*, 354 F. App'x 689, 694-95 (3d Cir. 2009) (preventing forum shopping); *Belship Navigation, Inc.*, 1995 WL 447656, at *6 (embargoing Cuba); *Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819-20 (D. Del. 1990) (cutting off funding to Libya); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 165 (S.D.N.Y. 1987) (remedying arbitrator's "manifest disregard" for law).

[31] For reasons set forth in this Part and in Part II.B. ("Invalidity of Accommodation Agreement"), I find that additional

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III. AWARD

It is "the norm" for courts enforcing arbitral awards to convert foreign currency amounts into dollars, *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, ___ F. Supp. 2d ___, 2013 WL 1201380, at *2 (D.D.C. Mar. 26, 2013), and I will follow that norm. In addition, I will exercise my discretion to award prejudgment interest because I find that doing so is "'consistent with the underlying arbitration award,'" which "grants pre-award interest but is 'silent' on whether a party should recover post-award interest – *i.e.*, prejudgment interest." *Id.* at *8 (quoting *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran*, 665 F.3d at 1103). The prejudgment interest will be calculated using the average daily prime rate between the date of the Final Award and the date of this opinion. *Id.* at 9.[32] Because the parties have not done so already, I will direct them to submit proposed judgment amounts with all conversions and

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briefing on a recent decision by the Caribbean Court of Justice is unnecessary, as that court's ruling would have no impact on my analysis. I therefore will DENY GOB's Motion for Leave to Submit Additional Briefing [Dkt. #47].

[32] The "prime rate" is the "'the rate that banks charge for short-term unsecured loans to credit-worthy customers,'" *id.* at *8 (quoting *Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d 43, 54 (D.C. Cir. 1997)). Although the Final Award sets its own pre-award interest rate, BSDL "offers absolutely no authority, nor any reasoning, to explain why the interest rate used by an arbitral panel for pre-award interest should be mimicked by a United States district court when granting post-award, prejudgment interest." *See id.* at *9.

interest calculations performed consistent with this opinion.

CONCLUSION

For all the foregoing reasons, petitioner's Petition to Confirm Arbitration Award and to Enter Judgment [Dkt. #1] is GRANTED and respondent's Motion to Stay Action or, in the Alternative, Dismiss Petition [Dkt. #15] is DENIED. An appropriate order shall accompany this Memorandum Opinion.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 14, 2011 Decided January 13, 2012

No. 10-7167

BELIZE SOCIAL DEVELOPMENT LIMITED,
APPELLANT

v.

GOVERNMENT OF BELIZE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-02170)

Louis B. Kimmelman argued the cause and filed the briefs for appellant. *Joseph S. Hall* entered an appearance.

Juan C. Basombrio, pro hac vice, argued the cause for appellee. With him on the brief was *Jay C. Johnson*.

Before: ROGERS, GARLAND and KAVANAUGH, Circuit Judges.

Opinion for the Court by *Circuit Judge* ROGERS.

Dissenting opinion by *Circuit Judge* KAVANAUGH.

ROGERS, Circuit Judge: This case involves a petition to confirm and enforce a foreign arbitration award against the Government of Belize pursuant to section 207 of the Federal Arbitration Act, 9 U.S.C. § 207. The plaintiff appeals an order staying the proceeding pending the outcome of related litigation in Belize. We conclude that the stay order as issued exceeded the proper exercise of authority of the district court and remand the case for further proceedings.

I.

The Federal Arbitration Act, 9 U.S.C. § 201-208 (2006) ("FAA"), codifies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which addresses "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." Art. I, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("New York Convention"). Under the New York Convention, "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." *Id.* art. III. Section 207 of the FAA provides that the district court, when exercising its original jurisdiction pursuant to section 203 of the FAA, "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 said Convention." 9 U.S.C. § 207. Article VI of the Convention limits the grounds for deferral of a

decision on enforcement to those specified in Article V(1)(e): enforcement proceedings may be adjourned only if "an application for the setting aside or suspension of the award has been made to a competent authority," N.Y. Convention art. VI, "of the country in which, or under the law of which, that award was made," *id.* art. V(1)(e).

Consistent with the "emphatic federal policy in favor of arbitral dispute resolution" recognized by the Supreme Court as "appl[ying] with special force in the field of international commerce," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards: the Convention is "clear" that a court "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (quoting *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)); *see also Alghanim & Sons*, 126 F.3d at 20. It is equally clear that a court may adjourn enforcement proceedings only on the grounds explicitly set forth in Article V(1)(e) of the Convention. *See* N.Y. Convention art. VI.

The facts underlying the issuance of the challenged stay order are as follows. On September 19, 2005, the Prime Minister of Belize executed an "Accommodation Agreement" with Belize Telemedia

Limited ("Telemedia")[1] on behalf of the Government of Belize. The Agreement called for Telemedia to acquire certain properties "in order to better accommodate the Government's telecommunications needs," and "in consideration" for which the Government of Belize agreed to give Telemedia a number of assurances and benefits. Gov't Telecomm. Accomodn. Agrmt. § 1, Sept. 19, 2005.[2] Telemedia would be entitled to: a tax set-off for purposes of a guaranteed 15% minimum rate of return, favorable business tax treatment, and exemption from import taxes. The Agreement stated that it was governed by Belize law, *id.* § 15.1, and that if Telemedia were to bring proceedings against the Government of Belize or its assets in relation to the Agreement, the Government "irrevocably and unconditionally" waived its immunity, *id.* § 15.5. Additionally, the Agreement provided:

> Any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, which cannot be resolved amicably between the parties shall be referred to and

[1] The original party to the Agreement was Belize Telecommunications Limited. On May 29, 2007, pursuant to the Belize Telecommunications Undertaking (Belize Telecommunications Limited Operators) Vesting Act of 2007, the businesses of Belize Telecommunications Limited were transferred to Belize Telemedia Limited.

[2] Belize and Telemedia subsequently adopted three amendments to the Agreement on November 21, 2005, December 15, 2006, and January 7, 2008. The "Agreement" referenced in this opinion includes these amendments.

> finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this Section. There shall be 3 arbitrators.

Id. § 15.2.

On February 8, 2008, a new Prime Minister, who also served as the Minister of Finance of Belize, publically and formally announced that he believed the Agreement was invalid and would not abide by it. Telemedia, claiming breaches of the Agreement, invoked the arbitration clause and submitted a request for arbitration to the LCIA on May 9, 2008. Although notified, the Government of Belize did not participate in the proceedings. The arbitral tribunal issued a final award on March 18, 2009, ("Final Award") ruling that the Agreement was valid and binding on the Government of Belize under Belize law, and that it had jurisdiction over Telemedia's claims, which it concluded were meritorious and entitled Telemedia to declaratory relief and damages of over 38 million in Belize dollars. On March 20, 2009, the Prime Minister repeated his view that the Agreement was illegal and invalid, noted that the local courts had rejected its provisions on tax exemption, and stated that the Government of Belize would "not be bound by any ruling of a foreign arbitral tribunal where that ruling conflicts with a position taken by Belize's superior courts." Resp't Mot. Stay or, in Alternative, Dismiss Pet., Exh. 29 (Decl. Juan Basombrio, Esq. Mar. 26, 2010, attaching newspaper article quoting Prime

Minister). The same day, Telemedia assigned the monetary portion of the Final Award to Belize Social Development Limited ("BSDL"), a company incorporated in the British Virgin Islands.

On April 6, 2009, the Attorney General of Belize sued Telemedia and BSDL in the Belize Supreme Court, alleging that "enforcement of the 'Final Award' . . . would be contrary and repugnant to the Constitution and the Laws of Belize," and sought to block its enforcement. *Id.* Exh. 1 (Decl. of Michael Young, S.C., Mar. 26, 2010, attaching the Fixed Claim Form 1-2). The court issued an *ex parte* interim injunction prohibiting Telemedia and BSDL from pursuing enforcement of the Final Award in any jurisdiction outside of Belize. *See id.* Exh. 5 (Order, Apr. 7, 2009, at 2). When Telemedia sought to have the court discharge the injunction and issue a declaration that the Final Award was valid and binding on the Government of Belize, the court, on July 20, 2009, extended the injunction "until the conclusion of the Claim herein or until further Order." *Id.* Exh. 12 (Order, July 20, 2009, at 2); *see id.* Exh. 13 (Sup. Ct. Decision, July 20, 2009).

On November 16, 2009, BSDL filed a petition in the district court here to confirm and enforce the Final Award pursuant to section 207 of the FAA, 9 U.S.C. § 207. The Government of Belize moved to stay or, in the alternative, to dismiss the petition. It also amended the Supreme Court Judicature Act "to strengthen the provisions relating to contempt of court" by subjecting persons who fail to comply with

an injunction to fines up to $250,000, or imprisonment for five to ten years, or both, with an additional fine of $100,000 for each day the offense continues. Supreme Court of Judicature (Amendment) Act, 2010, c. 91, § 106A (Belize). Citing this enactment, BSDL moved to suspend the district court's scheduling order and for a status conference. The district court denied BSDL's motion to suspend and its subsequent motions to clarify. By minute order of October 12, 2010, the district court granted Belize's motion to stay the petition to confirm "pending resolution of the parties' case before the Belize Supreme Court."

BSDL appeals the stay order or, in the alternative, if the order is not final, requests that its appeal be treated as a petition for a writ of mandamus.

II.

This court has treated an attempted appeal as an application for a writ of mandamus, and granted effective relief, where a "stay order as issued exceeded the proper exercise of authority of the District Court." *Dellinger v. Mitchell*, 442 F.2d 782, 782 (D.C. Cir. 1971); *see id.* at 788-89; *cf. Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 548-49 & n.6 (D.C. Cir. 1992) (citing *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 749 (2d Cir. 1991); *Beard v. Carrollton R.R.*, 893 F.2d 117, 120 (6th Cir. 1989)). Given the "carefully crafted framework for the enforcement of international arbitration awards" *TermoRio*, 487 F.3d at 935, presented in the FAA and the New York Convention, it is

evident that the stay order as issued exceeded the proper exercise of authority of the district court.

"The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *see Cheney v. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004). Because the writ, *see* 28 U.S.C. § 1651(a), is a "'drastic and extraordinary' remedy," *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)), "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify [its] invocation," *id.* (citations and internal quotation marks omitted). Accordingly, the writ will issue only upon the satisfaction of three conditions: there must be "no other adequate means to attain the relief [the petitioner] desires"; "the petitioner must satisfy the burden of showing that [its] right to issuance of the writ is clear and indisputable"; and "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (citations and internal quotation marks omitted). BSDL's appeal satisfies each of these conditions.

1. "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record." *Roche*, 319 U.S. at 28. The relief

BSDL desires – "forthwith consideration of" its petition for enforcement – "could obviously not be preserved for presentation on appeal from the ultimate disposition of this litigation in the District Court." *Dellinger*, 442 F.2d at 790. Nor is there a statutory method of appeal applicable to the stay.

"[A] stay is not ordinarily a final decision for purposes of [28 U.S.C.] § 1291," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983), but may be where the effect of the stay is to put the plaintiff "effectively out of court," *id.* at 9; *see Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). BSDL invokes the "effectively out of court" doctrine in support of its appeal. The doctrine's applicability, however, "is limited to cases where . . . the object of the stay is to require all or an essential part of the federal suit to be litigated" outside of federal court. *Moses H. Cone*, 460 U.S. at 10 n.11. Because the pending action in Belize has no preclusive effect on the district court's disposition of the petition to enforce pursuant to the FAA and the New York Convention, *see* N.Y. Convention art. V(1)(e); *Karaha Bodas v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 367-68 (5th Cir. 2003), the unidentified "object" of the stay could hardly be "to require all or an essential part," *Moses H. Cone*, 460 U.S. at 10 n.11, of the enforcement petition to be litigated in Belize. *See Kreditverein der Bank v. Nejezchleba*, 477 F.3d 942, 946-47 (8th Cir. 2007); *Boushel v. Toro Company*, 985 F.2d 406, 408-09 (8th Cir. 1993). The stay at issue may be sufficiently indefinite as to require a finding

of pressing need, *see infra* subpart 2, but it is not so indefinite as to constitute the equivalent of a dismissal under the "effectively out of court" doctrine. *See Dellinger*, 442 F.2d at 785. Therefore, the statutory method of appeal under § 1291, even as applied to stay orders under the "effectively out of court" doctrine, does not afford BSDL adequate means to attain the relief it requests.

BSDL also invokes the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This court has acknowledged the similarities between the requirements for mandamus and collateral order review. *See In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (citing *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998)); *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1996); *see also* 16 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3932.1, at 510 & n.32.5 (2d ed. 1996 & Supp. 2011). In cases where "the claim of appealability [is] not insubstantial," the court is mindful of "the advantage of limiting the use of appellate recourse in response to stay orders, yet keeping the door open for the occasional case reflecting abuse of discretionary authority." *Dellinger*, 442 F.2d at 790. Because BSDL has shown a clear and indisputable right to the issuance of the writ and the writ is appropriate here, we proceed with the analysis under the mandamus framework. *See In re Sealed Case No. 98-3077*, 151 F.3d at 1063 n.4; *cf. United States v. Gonzales*, 150 F.3d 1246,

1250 n.1 (10th Cir. 1998), *cert. denied* 525 U.S. 1129 (1999).

2. BSDL has shown a "clear and indisputable" right to the issuance of the writ, for the issuance of the stay was not based on a ground set forth in the New York Convention. Under the FAA, Articles V(1)(e) and VI of the New York Convention provide the only grounds on which the district court "may, if it considers it proper, adjourn the decision" on enforcement: "If an application for the setting aside or suspension of the award has been made to a competent authority," N.Y. Convention art. VI, "of the country in which, or *under the law of which*, that award was made," *id.* art. V(1)(e) (emphasis added). *See* 9 U.S.C. § 207.

In support of the stay, the Government of Belize relies on section 15.1 of the Agreement, which states the law of Belize governs the Agreement, in contending that Belize is the country "under the law of which" the Final Award was made.[3] The phrase "under the law of which" in Article V(1)(e), however, refers to the procedural law governing the arbitration, not the

[3] The fact that Belize is not a party to the New York Convention is irrelevant. If the place of the award is "in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration." *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 121 (D.C. Cir. 1999). The Award was rendered in London, and BSDL seeks enforcement in the United States; both England and the United States are parties to the New York Convention.

substantive law governing the Agreement. *See Karaha Bodas v. Perusahaan Pertambangan Minyak*, 364 F.3d 274, 289 (5th Cir. 2004); *Alghanim & Sons*, 126 F.3d at 21 & n.3; *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847-48 (6th Cir. 1996); *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 21 n.5 (D.D.C. 2011); *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima*, 745 F. Supp. 172, 177-78 (S.D.N.Y. 1990); RESTATEMENT (THIRD) OF INT'L COMM. ARB. § 5-12 (2010). The Government of Belize cites no authority to the contrary. The Agreement provides that the LCIA Rules govern arbitration arising from any dispute over its terms. Because the arbitration occurred in London and under the arbitral laws of England, the courts of England are the competent authority with primary jurisdiction over the Final Award; absent proceedings for setting aside or suspending the Final Award in those courts, the Government of Belize can offer no basis on which to conclude that the stay of BSDL's petition for enforcement was properly issued under the FAA and New York Convention.[4]

Furthermore, to the extent the stay purported to be issued pursuant to the district court's inherent authority in the interest of judicial economy, "[t]he

[4] The possibility of "multiple judicial proceedings on the same legal issues" affords the district court no other justification for the stay, for these "are characteristic of the confirmation and enforcement of international arbitral awards under the Convention." *Karaha Bodas*, 335 F.3d at 368.

applicable jurisprudence appears in *Landis v. North American Co.*, 299 U.S. 248 (1936)." *Dellinger*, 442 F.2d at 786; *see McSurely v. McClellan*, 426 F.2d 664 (D.C. Cir. 1970); *cf. Obaydullah v. Obama*, 609 F.3d 444, 449 (D.C. Cir. 2010). In *Landis*, the Supreme Court instructed that a court abuses its discretion in ordering a stay "of indefinite duration in the absence of a pressing need." 299 U.S. at 255. A stay is "immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description," and "an order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done." *Id.* at 257. Underlying the Court's analysis was a recognition that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255.

The scope of the stay and the reasons for its issuance determine whether a stay is immoderate. For instance, in *Trujillo v. Conover & Co. Communications*, 221 F.3d 1262, 1264 (11th Cir. 2000), the Eleventh Circuit held that a stay until "the Bahamanian Courts conclude their review" of related litigation was immoderate because it was indefinite in scope and the order provided "no reason sufficient to justify the indefinite stay." *Id.* at 1264-65. The Government of Belize would distinguish *Trujillo*, along with *Landis*

and presumably *Dellinger*, by interpreting those stays to encompass all possible appeals, while here the stay encompasses only the case pending before the Belize Supreme Court. Yet the record fails to show either what a "resolution" of that case would entail or when such a resolution is likely to be reached, and so the stay has "the legal effect of preventing [BSDL] from proceeding with [its] claims in federal court for an indefinite period of time, potentially for years." *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1169 (11th Cir. 2007). The Government of Belize is not in a position to offer the rationales in *Dellinger*, 442 F.2d at 785, where the U.S. government expressed concern that proceeding with a civil case would circumvent court orders in a criminal case and suggested resolution of the latter would result in stipulations between the parties in the former. Such concerns would be irrelevant under the FAA and the New York Convention, and there appears to be no possibility of a stipulation here. And unlike in *Trujillo*, 221 F.3d at 1264; *see also King*, 505 F.3d at 1172, the stay order includes no provision for status updates or further review.

Hence, the stay as issued is sufficiently indefinite to require a finding of a pressing need under *Landis*. The Government's suggestion such a finding is required only where there is a "fair possibility that the stay will work damage to someone else," Appellee's Br. 27 (quoting *Landis*, 299 U.S. at 255), ignores that in *Landis* sufficient damage consisted of undue delay of the kind BSDL suffers here. *See Landis*, 299 U.S. at 256. As this court has interpreted and applied

Landis, a district court's issuance of an indefinite stay order must be supported by "a balanced finding that such need overrides the injury to the party being stayed." *Dellinger*, 442 F.2d at 787. And the court has vacated stay orders where "the [d]istrict [c]ourt has not advanced any reason for a stay of such potentially long duration." *McSurely*, 426 F.2d at 671; *cf. Dellinger*, 442 F.2d at 787. Here, as in *Dellinger* and *McSurely*, no articulation of need, pressing or otherwise, accompanied issuance of the stay order. Nor did the district court engage in the interest balancing required by *Landis*, which calls for the district court, in "the exercise of judgment," to "weigh competing interests and maintain an even balance," 299 U.S. at 254-55, between the court's interests in judicial economy and any possible hardship to the parties, *see id.* at 259. Therefore the order as issued, staying BSDL's petition pending foreign litigation of indefinite duration, exceeded the proper exercise of discretion by the district court under *Landis.*

3. Mandamus is appropriate because the FAA, by codifying the New York Convention, provides a carefully structured scheme for the enforcement of foreign arbitral awards and represents an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 631. The plain terms of the FAA instruct a district court reviewing a foreign arbitral award to "confirm the award unless it *finds* one of the grounds for refusal or deferral of recognition or enforcement

. . . specified in the [New York] Convention." 9 U.S.C. § 207 (emphasis added). No such finding supported issuance of the stay here, and that alone is sufficient to justify mandamus. Moreover, there could not have been such a finding under Article VI of the Convention, for no "application for the setting aside or suspension of the award" had been made to a "competent authority" in England, the "country in which" and "under the laws of which [the] award was made." N.Y. Convention arts. V(1)(e), VI.

Given the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1519 (D.C. Cir. 1989) (quoting *Moses H. Cone*, 460 U.S. at 15) (internal quotation marks omitted), the original jurisdiction vested in the district court by section 203 of the FAA and the limitations on that authority under section 207 of the FAA defined the district court's task: to review and grant BSDL's petition to confirm the Final Award absent a finding that an enumerated exception to enforcement specified in the New York Convention applied. The stay order as issued was not in conformity with federal law and international commitments, and the indefinite stay, lacking justification by any pressing need, exceeded the bounds of any inherent authority the district court may have had to stay proceedings in the interest of judicial economy. Mandamus is appropriate here "to compel the district court to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26.

Our dissenting colleague makes much of the lack of an opposition to the stay. Instead of filing an opposition to the motion for a stay, BSDL filed a motion to suspend the scheduling order and for a status conference, advising the district court that its failure to respond was based not on agreement that a stay was warranted but on fear of criminal sanctions for violation of the anti-enforcement injunction issued by the Supreme Court of Belize. Both BSDL's petition to enforce the Final Award and Belize's motion to stay the enforcement proceedings alerted the district court that it was obligated to proceed in accordance with the FAA and the New York Convention. Contravening the clear dictates of this governing law, both federal and international, and lacking supporting reasoning of any kind, contrary to Supreme Court precedent, the district court's stay order is extraordinary in nature. Although our dissenting colleague repeatedly characterizes the stay order – which has already lasted for more than a year – as "temporary," Dis. Op. 734, it in fact contained no temporal limitations and could very well last indefinitely.

We conclude that there is no need to vacate the stay or mandate any action by the district court; instead, we remand the case because this court may "rightfully assume that the [district] court will conduct further proceedings not inconsistent with our opinion," *Dellinger*, 442 F.2d at 790.

KAVANAUGH, *Circuit Judge*, dissenting:

I respectfully dissent. This case arises out of a messy commercial dispute between a Belize company and the Government of Belize. A London arbitration panel ruled in favor of the Belize company. The company then sued in U.S. District Court to enforce the arbitration award. Because of ongoing judicial proceedings in Belize related to this matter, the Government of Belize asked for a temporary stay, which was *uncontested* by the company. The District Court then entered a temporary stay – understandably, since the stay is only temporary and the company did not oppose it.

The company has now appealed and, in the alternative, sought mandamus to overturn the temporary stay. But we do not have appellate jurisdiction. As the majority opinion appears to acknowledge, there is no final order because the company was not placed "effectively out of court," nor does this case fit within the narrow confines of the collateral order doctrine. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983) ("most stays do not put the plaintiff 'effectively out of court' "; stays are final orders when "the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum"); *id.* at 12 (stay order falls within collateral order doctrine when it "amounts to a refusal to adjudicate the merits").

Although the majority opinion does not assert that we have appellate jurisdiction under the principles

governing appeals of final or collateral orders, it invokes mandamus jurisdiction. But mandamus is an "extraordinary" remedy reserved for correcting egregious missteps by a district court, not for upending temporary stay orders – and particularly not temporary stay orders like the one here, which was issued in response to an *uncontested* temporary stay motion. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes") (internal quotation marks omitted); *id.* ("the writ is one of the most potent weapons in the judicial arsenal") (internal quotation marks omitted); *id.* ("only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy") (citations and internal quotation marks omitted).

Even if we think the District Court erred under the Federal Arbitration Act by entering a temporary stay, its error was hardly "extraordinary." Mandamus for this case is akin to using a chainsaw to carve your holiday turkey. Indeed, if you ask me which is the more extraordinary – the District Court's temporary stay or this Court's invocation of mandamus jurisdiction under these circumstances – I would say the latter.

I would dismiss the appeal for lack of appellate jurisdiction and deny the petition for a writ of mandamus. I respectfully dissent.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7002 **September Term, 2015**

1:09-cv-02170-RJL

Filed On: September 28, 2015

Belize Social Development Limited,

Appellee

v.

Government of Belize,

Appellant

Consolidated with 14-7003, 14-7018

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

[SEAL]

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X

hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement,

was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature,

ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in

regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

I hereby certify that the foregoing text is a true copy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, the original of which is deposited with the Secretary-General of the United Nations, as the said Convention was opened for signature, and that it includes the necessary rectifications of typographical errors, as approved by the Parties.

For the Secretary-General,
The Legal Counsel:

Je certifie que le texte qui précède est une copie conforme de la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères, conclue à New York le 10 juin 1958 et dont l'original se trouve déposé suprès du Secrétaire général de l'Organisation des Nations Unies telle que ladite Convention a été ouverte à la signature, et que les

rectifications matérielles nécessaires, telles qu'approuvées par les Parties, y ont été incorporées.

Pour le Secrétaire général,
Le Conseiller juridique:

/s/ Carl-August Fleischhauer
Carl-August Fleischhauer

United Nations, New York
6 July 1988

Organisation des
Nations Unies
New York, le 6 juillet 1988

CHAPTER 2 – CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Sec.

9 U.S.C. §201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

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9 U.S.C. §202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United

States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

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9 U.S.C. §203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

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9 U.S.C. §204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place

designated in the agreement as the place of arbitration if such place is within the United States.

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9 U.S.C. §205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

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9 U.S.C. §206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United

States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

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9 U.S.C. §207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The 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 said Convention.

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9 U.S.C. §208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

[2013] CCJ 5 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE
COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 7 of 2012
BZ Civil Appeal No 4 of 2011

BETWEEN

BCB HOLDINGS LIMITED
THE BELIZE BANK LIMITED **APPELLANTS**

AND

THE ATTORNEY GENERAL
OF BELIZE **RESPONDENT**

Before The	
Rt Honourable	**Mr Justice Byron, President**
And The Honourables	**Mr Justice Saunders**
	Mme Justice Bernard
	Mr Justice Wit
	Mr Justice Anderson

Appearances

Mr Edward Fitzgerald QC, Mr Eamon Courtenay SC and Mrs Ashanti Arthurs-Martin for the Appellants

Mr Michael Young QC, Ms Magalie Perdomo and Ms Iliana Swift for the Respondent

JUDGMENT
of
The President and Justices Saunders,
Bernard, Wit and Anderson
Delivered by
The Honourable Mr Justice Adrian Saunders
and
The Honourable Mr Justice Winston Anderson
on the 26th day of July 2013

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS

[1] The London Court of International Arbitration ("the Tribunal") determined that the State of Belize should pay damages for dishonouring certain promises it had made to two commercial companies, namely, BCB Holdings Limited and The Belize Bank Limited ("the Companies"). The promises were contained in a Settlement Deed as Amended ("the Deed") executed in March 2005. The Deed provided that the Companies should enjoy, from the 1st day of April, 2005, a tax regime specially crafted for them and at variance with the tax laws of Belize.

[2] This unique regime was never legislated but it was honoured by the State for two years until it was repudiated in 2008 after a change of administration in Belize following a General Election. The Companies then commenced arbitration. The Tribunal found the State of Belize in breach and awarded damages against Belize in addition to arbitration costs and legal, professional and other fees ("the Award"). The Award totalled

approximately $44 million and it carried interest at the rate of 3.38% compounded annually. The damages were calculated on the hypothesis that the Companies would have continued to benefit from the special tax regime at least until 2020; the year when, in keeping with the laws of Belize, BCB Holdings Limited's status as a public investment company was due to expire.

[3] The Companies are applying now to enforce the award. The State resists enforcement. The critical question is whether it is or is not contrary to public policy for the Court to enforce the same. For the reasons that follow it is our judgment that it would be contrary to public policy to recognise the Award and accordingly we decline to enforce it.

A brief background

[4] The Deed arose, at least in part, out of the stated intention of the Minister of Finance and the Companies to settle a pre-existing dispute between them. The prior dispute had to do with a share purchase deed and an option deed the parties had previously negotiated. That initial dispute had itself been submitted to the Tribunal for resolution by arbitration because of certain claims made by the Companies against the State. The Deed recorded the Companies' agreement not to pursue further these existing claims. In return, the Minister agreed to grant the Companies the special tax regime to which reference was earlier made. The Deed expressed that its provisions were to be governed by English law and it

contained an arbitration clause stipulating that either party could refer to the Tribunal for resolution of disputes that were not amicably settled.

[5] The Deed was executed by the Prime Minister (the then Minister of Finance) and also by the Attorney General of Belize. The document was expressed to be "confidential". The parties agreed not to make any announcement concerning its contents or any ancillary matter. That did not, however, prevent any announcement being made or any confidential information being disclosed by a party –

> "a) with the written approval of the other parties, which in the case of any announcement shall not be unreasonably withheld or delayed; or
>
> b) to the extent required by law or any competent body or stock exchange."

[6] For well over a year after its execution, the Commissioner of Income Tax was unaware of the Deed's existence or its implications. On 10th July, 2006 the Commissioner wrote to the Companies seeking their compliance with the published tax laws of the land. The Companies responded by instructing the Commissioner to liaise directly with the Minister of Finance. Three months later the Commissioner wrote back to the Companies accepting the Companies' position and retracting what initially was his. For a period of two years, the Companies enjoyed the tax regime set out in the Deed.

[7] In February, 2008, following a general election, a new administration was sworn into office in Belize. A few months later the Commissioner of Income Tax assessed the Companies for tax on the basis of Belize law in respect of the period the Companies had enjoyed the benefits under the Deed. The Commissioner rejected the tax returns filed by the Companies for the two previous years and required the Companies to comply with the law. The Commissioner informed the Companies that the Deed did not supersede the country's revenue laws. This turn-around by the Government constituted a repudiation of the promises made in the Deed and motivated the Companies once again to resort to arbitration.

The Arbitral Award

[8] The Tribunal was duly constituted but the State did not participate in the arbitration. It did not appear. It did not make any submissions to the Tribunal. It did not enter a defence to, nor did it comment upon, the Companies' submissions. The Tribunal nonetheless rightly felt that it still had an obligation to take into account such matters as it considered might represent Belize's position on the issues in dispute. There was some material that enabled it so to do. Satellite proceedings had been tried in the Belize courts in which the State had participated and been legally represented. The Tribunal concluded that the submissions made in those proceedings and the judgments of the courts provided an indication of what arguments the State of Belize would

have likely pursued before the Tribunal in relation to the matters in dispute.

[9] The Tribunal considered that it had jurisdiction to entertain the dispute. It dismissed any notion that the dispute was not arbitrable whether because tax-related matters were involved or because of the alleged incompatibility of the promises made to the Companies with Belize law. In making these findings the Tribunal emphasised that it was pronouncing not upon the taxation regime of Belize but instead upon the contractual warranties the Government, in the exercise of its sovereign power, had made to the Companies. The Tribunal noted that the Crown at common law had a wide prerogative power to enter into contracts and this power was unfettered by restrictions as to subject matter or persons. The Tribunal asserted that the only constraint on this wide prerogative power is that any such contract: (i) should be entered into in the ordinary or necessary course of Government administration; (ii) must be authorised by the responsible Minister, and that (iii) any payments by the Government to honour any such contract must be covered by, or referable to, an appropriate Parliamentary grant.

[10] The Tribunal decided that the first of these three conditions was demonstrably established as the Deed gave the Government considerable financial benefits, including the Companies' agreement not to re-open the previous disputes between the parties. The Tribunal reasoned that it was not unusual for governments to enter into settlement arrangements which involved concessions

or reductions. As to the second condition, according to the Tribunal, the Prime Minister clearly had actual and ostensible authority both to make the contractual warranties that were made and to assure the Companies that they would indeed enjoy the promised benefits. The Tribunal stated that the third condition did not apply in this case. No specific reason was given for this finding but one can infer that it was because the Deed did not require the Government to make unappropriated payments to anyone.

[11] The Tribunal did not justify their decision only on the wide prerogative power of the Government. The Tribunal also held that section 95 of the *Income and Business Tax Act*[1] expressly authorised the Government, through the Minister of Finance, to make and guarantee the promises contained in the Deed. As section 95 is a short section we take the liberty of setting it out in full:

> "(i) The Minister may remit the whole or any part of the income tax payable by any person if he is satisfied that it would be just and equitable to do so.
>
> (ii) Notices of such remission shall be published in the Gazette".

[1] *Income and Business Tax Act*, Cap 55 [Belize]

In support of its findings that the Agreement was not illegal and the dispute was arbitrable the Tribunal cited several authorities.[2]

The decisions of the Courts below

[12] The Tribunal's award cannot be enforced in Belize without an application first being made to the court to enforce it. The legislative basis for enforcement is the *Arbitration (Amendment) Ordinance* No 21 of 1980[3] ("the Act"). The application to enforce was made to a trial judge in Belize. On this occasion the State appeared and made several submissions strenuously resisting the application.

[13] In essence, the State submitted to the judge that (a) the relevant provisions of the Act were in fact not part of the law of Belize; (b) the subject matter of the arbitration was non-arbitrable and (c) it would be contrary to public policy to enforce

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[2] These included but were not limited to *The Attorney General of New South Wales v Bardolph* [1934] 52 CLR. 455; *The Attorney General of Saint Lucia v Martinus Francois, Civil* Appeal No 37 of 2003; *In re D.H. Curtis (Builders) Ltd* [1978] 2 WLR 28; *Marubeni Hong Kong and South China Ltd v. Government of Mongolia* [2004] 2 Lloyd's Rep. 198; *Attorney-General v. Silver* [1953] AC 461, Arbitral awards made in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, Engineering Company (Italy) v. Engineering Company (Greece) and Producer (Greece), TCSB Inc. v Iran and Paushok and Others v. the Government of Mongolia* and an Article by Emmanuel Gaillard on *Tax Disputes Between States and Foreign Investors* "Tax Disputes Between States and Foreign Investors" [1997] NYLJ 217

[3] Arbitration Act, Cap 125 [Belize]

the Award. The judge rejected each of these arguments. The judge noted that section 28 of the Act enshrines the principle that an arbitral award, made pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention")[4] is, for all purposes, binding on those who are parties to the Convention. The judge held that this Award is a Convention Award. The judge therefore weighed this principle against the provisions of section 30 of the Act which enjoins the court not to refuse enforcement of a Convention award except upon very limited grounds which are specifically prescribed. Citing the case *of P T Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*[5], the judge explained that the courts in Belize ought to lean toward enforcement of Convention awards unless to allow enforcement would "shock the conscience" or "is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public". The judge concluded that the Deed was a lawful and legally binding commercial agreement and that to refuse enforcement would transgress established applicable legal principles and practices. He therefore ordered that the Companies be at liberty to enforce the Award in the same manner and to the same effect as a local judgment. The

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[4] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted 10 June 1958, entered into force on 7 June 1959) 330 UNTS 3 (New York Convention)

[5] [2007] 1 SLR (Reissue) 597

State appealed the judge's decision to the Court of Appeal.

[14] It is a matter of great regret that the Court of Appeal determined the appeal on a consideration only of the State's submission (discussed more fully in the judgment delivered by Justice Anderson), that the Act was invalid and that for this reason enforcement of the Award should be refused. Two of the three judges upheld that submission. The third, Mendes JA, dissented. In his opinion the Act was valid and therefore the other submissions regarding enforceability were not at all moot.

[15] No other issues were discussed in the judgment of the Court of Appeal. Mendes JA expressed his willingness to pronounce on the other issues in the case which, given his opinion that the Act was valid, would have arisen. Since his views on those other issues would have been otiose, given that the opinions of his colleagues had already determined the appeal, he considered ultimately that it was superfluous to express them in his judgment.

The issues

[16] Three central issues arise from the appeal of the Companies to this Court:

1. Is the Act valid? Was its passage an improper encroachment by the Belize colonial legislature upon the preserve of the Crown? Should the claim for enforcement be dismissed on this ground?

2. If the first point is decided in favour of the Companies and the Act is valid and applicable, should this Court remit the case to the Court of Appeal so that it can first pronounce on the questions whether the Award should not be enforced because it is non-Arbitrable and/or because it is contrary to public policy?

3. If the Act is not invalid and the case is not remitted, should the application to enforce the Award be refused either because it would be contrary to public policy to do so (the public policy point) or because it is in respect of a matter which was not capable of settlement by arbitration (the non-Arbitrability point)?

[17] For the reasons set out by Justice Anderson, we are of the view that the Act is not invalid and the case should not be remitted. As our opinion on the public policy point is dispositive of the appeal we consider it unnecessary to consider the non-Arbitrability point.

The Public Policy Point

The submissions of the parties

[18] On this point, the State submits that it was never bound by the agreement that gave rise to the Deed because implementation of the same without parliamentary approval violates the country's fundamental law. While the Minister, in making agreements, could ordinarily be taken to have implicitly promised that he would secure

any necessary legislative approval, the Award on its face discloses that no such approval was ever sought or obtained and there never was any intention to seek or obtain such approval. In these circumstances, counsel submits, the Court should not enforce the Award as it is repugnant to the Belize legal order.

[19] The Companies, on the other hand, argue that the State benefited from the Agreement because the Deed amicably settled prior and pending claims of the Companies against the Government. The Tribunal has definitively ruled that the Agreement was not illegal and the Court should not now re-open the merits of what has already been determined. The State could and should have raised, before the Tribunal or before the English supervisory courts, any arguments it now wishes to raise on the legality of the Deed. The Award is final and, in keeping with the pro-enforcement bias courts should have towards Convention Awards, this Court should enforce it. The Companies support their submissions with reference to several authorities[6].

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[6] These included: *Soinco SACI and Another v Novokuznetsk Aluminium Plant and Others* [1998] 2 Lloyd's Rep. 337; *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [2000] 1 QB 288; and *Kersa Holding Company Luxembourg v Infancourtage, Famajuk Investment and Isny Kersa Holding Company Luxembourg v Infancourtage, Famajuk Investment and Isny* 24 November 1993, reported in Yearbook Commercial Arbitration, A .J. van den Berg ed., Vol. XXI, 1996, p.624

The broad approach to the public policy exception

[20] Competing policies are invariably at play when a court is called upon to decide whether to enforce an arbitral Award. The court must balance divergent policies and interests and apply to them principles of proportionality.

[21] Almost two hundred years ago, Burrough J. in *Richardson v. Mellish*[7] famously noted that "public policy" is a very unruly horse. Once you get astride it, he warned, you never know where it will carry you. This admonition is especially prescient because the concept of public policy is fluid, open-textured, encompassing potentially a wide variety of acts. It is conditioned by time and place. Religion and morality, as well as the fundamental economic, social, political, legal or foreign affairs of the State in which enforcement is sought, may legitimately ground public policy concerns. Whether those concerns are of a substantive or procedural nature, if they are fundamental to the polity of the enforcing State, they may successfully be invoked.

[22] Since the Award here in question is a foreign Award governed by English law, the question that naturally arises is, whose public policy is being interrogated? Is there some international public policy which must be used as a yardstick against which to measure those matters which it is said are contrary to public policy?

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[7] (1824) 2 Bing 229, 252

[23] Public 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. It is in Belize that the Companies seek to enforce the Award and it is the courts of Belize that must make the assessment as to what, if anything, is offensive to public policy. It is also in Belize that the underlying obligations and promises were to be performed. 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*" – that is, in this case, the State of Belize. But this does not mean that, although there is no universal standard of "public policy"[8], it would be appropriate for courts to adopt a parochial approach. As Cardozo J. reminds us in *Loucks v Standard Oil Co. of New York*[9], the courts are not free to refuse to enforce a foreign judgment at the pleasure of the judges or to suit the individual notion of expediency or fairness.

[24] Where enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour

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[8] See: International Law Association's Final Report on Public Policy 2002 at [21]

[9] 224 N.Y. 99

of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalised and mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards.

[25] The Court must be alive to the fact that public policy is often invoked by a losing party in order to re-open the merits of a case already determined by the arbitrators[10]. Courts must accordingly be vigilant not to be seen as frustrating enforcement of the Award or affording the losing party a second bite of the cherry. To encourage such conduct would cut straight across the benefits to be derived from the arbitral process and undermine the efficacy of the parties' agreement to pursue arbitration[11].

[26] An expansive construction of the public policy defence would vitiate the Convention's attempt to remove pre-existing obstacles to enforcement and to accommodate considerations of reciprocity[12]. For all these and other reasons the Convention has a definite pro-enforcement bias and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias.

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[10] See: *A v. R (Arbitration: Enforcement)* [2009] 3 HKLRD 389 at page 395 [24]

[11] *A v. R* [2009] 3 HKLRD 389 at page 395 [25]

[12] *Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America* 508 F.2d 969(2d Cir. 1974)

There is universal consensus that courts will decline to enforce foreign arbitral Awards only in exceptional circumstances. In particular, this restrictive approach is adopted in relation to Convention Awards therefore, only where enforcement would violate the forum state's most basic notions of morality and justice[13] would a court be justified in declining to enforce a foreign Award based on public policy grounds. Enforcement would be refused, for example, if the Award is "at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle".[14] In such a case the infringement must constitute "a manifest breach of a rule of law regarded as essential in the legal order".[15] In this vein, the Indian Supreme Court has stated that it will decline to enforce an Award only if enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.[16]

[27] The International Law Association (the "ILA") has recommended the use of the phrase "international public policy" as an appropriate description of the restrictive scope of public policy that

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[13] *Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America* 508 F.2d 969(2d Cir. 1974)

[14] *Krombach v. Bamberski* [2001] 3 WLR 488 at [37]

[15] *Krombach v. Bamberski* [2001] 3 WLR 488 at [37]

[16] See: *Renusagar Power Company Ltd v. General Electric Company* (1994) AIR 860 at [66]

should be applied to Convention Awards.[17] The phrase is used in contra-distinction to "domestic public policy". Its content includes such matters as (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; and (ii) rules designed to serve the essential political, social or economic interests of the State.

[28] We agree that to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must represent an unacceptable violation of those principles. The threshold that must be attained by the State to establish the public policy exception is therefore a very high one.

Public Policy and the underlying Agreement

[29] The rival submissions of the parties raise two important preliminary questions. Is it permissible for the Court now to examine the underlying Agreement reflected in the Deed? Should the Court re-examine the legality of the Deed even after the Tribunal has specifically addressed that issue and found the Deed to be valid?

[30] In our view, the circumstances of this case lend themselves to a positive answer to both questions. There is no controversy as to the conduct of

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[17] See: ILA Final Report on Public Policy 2002, http://www.newyorkconvention.org/publications/full-text-publications/general/ila-report-on-public-policy-2002

the parties in the making of the Agreement. No one has any quarrel with the manner in which the Award sets out the basic terms of the Minister's Agreement with the Companies. The warranties and promises made to the Companies, the consideration given in exchange, these are all agreed. There is no dispute that in 2008, when a new Minister of Finance assumed office, further implementation of the Agreement was halted. The reasons put forward to justify premature termination of the Agreement are also undisputed. In short, this is a case where all the relevant facts are uncontested matters of public record accepted by both sides. It is necessary only to decide whether, on the basis of these uncontroverted matters, enforcement of the Award will violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".[18]

[31] It may be possible here to make that decision by confining oneself to the dispositive aspect of the Award, but given the circumstance that the factual background is agreed and since the court is performing, essentially, a balancing exercise between the competing public policies of finality and illegality, the nature and seriousness of the alleged illegality and the extent to which it can be seen that the same was addressed by the arbitral tribunal are factors we must take into

[18] See Cardozo J in *Loucks v Standard Oil Co. of New York* 224 N.Y. 99 at 111

account.[19] If there is illegality we must also consider the extent to which it impacts on the society at large and is offensive to primary principles of justice.

[32] We respectfully disagree with the opinion of the trial judge that, because the Tribunal had considered and rejected the idea that the Deed was illegal, we are necessarily precluded from considering afresh that issue. We agree with Colman J who held in *Westacre* that any such estoppel must yield to the public policy against giving effect to transactions obviously offensive to the court[20]. In the context of the credible allegations of illegality put forward by the Government, in order to assess whether this transaction is truly offensive the court *must* examine the Agreement and the promises the Minister made to the Companies against the backdrop of fundamental principles and rules.

The promises made by the Minister

[33] The promises made by the Minister were designed to affect, indeed to alter, the Companies' tax obligations under existing law. The Deed looked to past as well as future obligations. As to those of the past, whatever may have been the factual position in relation to the Companies'

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[19] *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [1999] 3 All ER 864 at 885 H

[20] See *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [1998] 2 Lloyd's Rep. 111, 118

liabilities as at the date of its execution, the Deed determined that, for "all periods up to and including 31st March 2005", the Companies had "satisfied in full all and any such liabilities, assessments or claims". The Deed further assured the Companies that all their filings, in relation to any form of taxation required to be made on their behalf, were complete and up to date.

[34] As to the future, the Deed recites at Clause 4.1(c) that

> "to the extent that [the Companies] are liable to pay any Business Tax and/or Income Tax in respect of any period beginning on or after 1st April 2005, the calculation of the raising of any assessments or claims in respect of such Business Tax and/or Income Tax shall be calculated solely and exclusively on the basis that . . . "

The Deed at this point goes on at some length to construct in careful detail a special tax regime reserved for the Companies; a regime that all parties readily acknowledge is at variance with the extant revenue laws of Belize and one which conferred significant benef its on the Companies. To cite just one example of this variation, section 21(3) of the Income and Business Tax Act states:

> "The excess of any business tax paid by any person other than an employed person during the basis year over the income tax due on the chargeable income of such person shall be carried forward as an expense to the next basis year."

On the other hand Clause 4.1(c)(iii) of the Deed states

> "Business tax is a withholding tax and an advance payment of final Income Tax and any amount paid in Business Tax which is in excess of the amount due in Income Tax will constitute an overpayment of Income Tax and shall be offset on a quarterly basis against Business Tax and payable in subsequent financial years."

[35] The Award discloses that the Deed was buttressed by other assurances made to the Companies. The Deed was accompanied by a letter dated 21st June 2006 addressed to the Chairman of the Companies in which the Minister of Finance "*irrevocably confirmed*" that all business and income tax obligations of the Companies would be governed by the terms of the Deed. The Minister also confirmed that the Deed had "*irrevocably fixed*" the rate of income tax payable by the Companies for as long as BCB Holdings remained a Public Investment Company *notwithstanding anything contained in the Income and Business Tax Act to the contrary*" (the italics are all those of the Tribunal in its published Award).

[36] In sum, in exchange for settling the prior arbitral proceedings, the Deed purported to create and guarantee to the Companies a unique tax regime that was unalterable by Parliament. So, for the sake of argument, if BCB remained a Public Investment Company for the next 15 years, the State of Belize would be in breach of contract if its National Assembly, at any time during that

period, without the Companies' concurrence, enacted any revenue measure applicable to the Companies that diverged from the Deed. The promises made by the Minister were thus intended to supplant and supersede all current and any future statutes enacted by the National Assembly.

[37] The Tribunal addressed the issue of the legality of the Deed by asking itself whether the Minister had actual and/or ostensible authority to make these promises to the Companies. The Tribunal held that the Minister did have such authority. The Tribunal rested this conclusion on two premises, firstly, the extensive prerogative powers of the Executive to make agreements and secondly, section 95 of the Income and Business Tax Act[21]. The Tribunal noted that it is commonplace in international investment contracts for a host country to promise a foreign investor or contractor tax incentives *as* an inducement to make the investment or carry out an activity which is the subject of such agreements. The judge at first instance affirmed these conclusions of the Tribunal.

[38] We agree that the Minister does indeed possess wide prerogative powers to enter into agreements. The Executive may do so even when those agreements require legislative approval before they can become binding on the State. This was also the opinion of the Eastern Caribbean Court of Appeal in the Saint Lucian case of *The*

[21] See [11] above where the section is set out

Attorney-General v. Francois[22], an authority cited by the Tribunal. The judge's focus, however, ought logically to have extended beyond the issue of whether it was lawful *to make* the promises. The making of a Government contract may be a matter quite distinct from its enforceability against the State as the *Francois* case also demonstrates.

[39] It was necessary for the judge to consider whether the Award was contrary to public policy given the *implementation* of the underlying agreement *without parliamentary approval and without any intention on the part of the contracting parties to seek such approval*. This was an issue that was not at all considered by the Tribunal and the judge failed to advert to it. *Francois* concerned a guarantee entered into by the Saint Lucia Minister of Finance. No parliamentary approval had been given for the grant of the guarantee. The State was subsequently obliged to make good on the instrument. A citizen challenged its legality. The court held that nothing prevented the Minister from *giving* the guarantee, but the State only became *bound* by the same *after* Parliament had approved the funds necessary to discharge it. As Parliament had done so before the guarantee was honoured there was no basis for the citizen's complaint.

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[22] Civil Appeal No 23 of 2003, Judgment of the Court of Appeal delivered 29th March 2004

Executive prerogative and the Separation of Powers

[40] If it turns out that the Minister had no power to make or implement the promises he made, his lack of authority would be a potent factor in any assessment of the legality of the Agreement and the question whether enforcement of the Award is contrary to public policy. The Companies accept that the Minister's authority to make the Agreement could only have been premised either on prerogative power or on section 95 of the Income and Business Tax Act[23]. As to the former, the Companies submit that the Deed was "a detailed commercial agreement" between two parties dealing with matters of "a significant financial value"; that both sides must have sought legal advice with its drafting; and that it was entered into in order to settle prior arbitral proceedings in which claims amounting to "considerable sums of money" were being made against the State. None of these points is disputed although it must be emphasised that this Court has no material before it to indicate the reasonableness or strength of the claims the Companies allegedly had against the Government. The Court also has no evidence before it of an approximate figure that might reasonably represent the "considerable sums" mentioned by the Companies for which the State may have been liable if the prior dispute had been settled or arbitrated upon terms favourable to the Companies. These are, however, not matters of great

[23] See [11] above where the section is set out in full

significance. The crucial question is whether any of the points made above to justify the exercise of prerogative power, or all of them taken together, serves to render enforceable an agreement made by the Executive branch of government, without parliamentary approval, to except a taxpayer from obligations contained in current and future revenue statutes.

[41] To negotiate an agreement with a company that can properly be described as a "detailed commercial" or "business" agreement or "settlement deed" does nothing to enhance the capacity of the Executive unilaterally to provide exceptions from the country's revenue laws on the strength of Executive prerogative. The Government either has or lacks such capacity. It is trite that whatever legal advice the Minister procured does not bind a court and, interestingly, the State today actually *has* radically different advice from that which apparently informed the making of the Deed. The idea that the Minister who signed the Deed (or his Government) was attempting, in good faith, to settle a prior dispute is also quite beside the point. Neither a noble motive, as may have been the case, nor an executed Deed excuses or repairs an obvious excess of jurisdiction or serious breach of the fundamental principle of Separation of Powers.

[42] The latter principle goes back to the writings of Montesquieu. So far as it relates to a strict division between the Executive and the Legislature, with the growing complexity of the machinery of government, the principle may have lost some of its lustre. In particular, in relatively small

Parliaments like Belize's, and where the Executive is largely drawn from the legislature, the separation between these two bodies often appears blurred. But it is erroneous to assume that there is not an important division between the functions performed by each branch. The struggle to maintain this important distinction is as old as the epic battles waged between Chief Justice Coke and King James I who sought to use Royal proclamations to make law without Parliament's approval.[24] The structure and content of the Belize Constitution reflects and reinforces the distinction. The Constitution carefully distributes among the branches the unique functions that each is authorised to exercise.[25] The rights and freedoms of the citizenry and democracy itself would be imperilled if courts permitted the Executive to assume unto itself essential law-making functions in the absence of constitutional or legislative authority so to do. It would be utterly disastrous if the Executive could do so, selectively, via confidential documents. In young States especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance.

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[24] See *Case of Proclamations* (1611) 12 Co. Rep. 74 which established the principle that the Executive has no general inherent power to alter the law of the land

[25] See in relation to the Constitution of Jamaica the judgment of Harrison JA in *Independent Jamaica Council for Human Rights and others v. The Attorney General*, Civil Appeals Nos 36-39 of 2004, at pages 11-13, judgment of the Court of Appeal delivered 12th July, 2004

Caribbean courts, as part of their general function of judicial review, have a constitutional obligation to strike down administrative or executive action that exceeds jurisdiction or undermines the authority of the legislature.[26]

[43] Section 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country's revenue laws. Counsel for the Companies submitted that the Deed merely resolved "uncertainties and ambiguities" in the law, but the Executive Branch, whether for the purpose of "settling" claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the parliament and the courts. Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the State, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.

[44] There is and must continue to be a healthy relationship among the arms of government. The State certainly cannot function effectively with

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[26] See for example: *J Astaphan & Co. (1970) Ltd v Comptroller of Customs of Dominica* (1996) 54 WIR 153 K

its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each Branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one Branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the Executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the Minister to implement the promises recorded in the Deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.

[45] There is a more fundamental reason why the Minister's authority to make and implement the promises given in the Deed cannot be justified on the basis of prerogative power. This is because, as *was* noted by Lord Bridge in *Williams Construction v Blackman*[27], it is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under

[27] (1994) 45 WIR 94 at 99

which the same function might previously have been exercised is superseded. While the statute remains in force, the function can only be exercised in accordance with its provisions. Since it is being put forward also that the Minister's authority sprang from his powers under section 95 of the Income and Business Tax Act[28], prerogative power is ousted and it is to the statute that one must turn to discover whether (a) section 95 authorised the Minister to do what he did and (b), assuming such authorisation, the Minister acted within the scope of the authority given.

Section 95 of the Income and Business Tax Act

[46] The constitutionality of section 95 was challenged by counsel for the State. It is unnecessary now to rule on that challenge. Suffice it to say that, assuming its constitutional validity, the section must be interpreted in light of the Constitution. The Belize Constitution, like other Anglophone CARICOM Constitutions, places a specific and extremely high value on legislation dealing with taxation. Any Bill dealing with the imposition, repeal, remission, alteration or regulation of taxation is in the Constitution referred to as a "Money Bill"[29]. Money Bills are not enacted in the ordinary way. Sections 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the

[28] See [11] above where the section is set out in full

[29] See s 80(1) of the Belize Constitution

Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly exercised, the accompanying safeguards must be scrupulously observed.

[47] Section 95 cannot properly be interpreted as being capable of granting the Minister the power to do what the Deed here purported to do. In particular, we fail to see how, in one fell swoop, the Minister could possibly "remit" tax payable in respect of business activity to be conducted over an indefinite time in the future. The Tribunal expressed a different view on this issue. The Tribunal also likened remission of tax to the cancellation or extinguishment of all or part of a financial obligation whether past or future. In our opinion there is a substantial difference between the remitting tax payable and extinguishing an obligation to pay tax. If the Minister was authorised by section 95 to do the former he certainly had no power whatsoever to promise the latter.

[48] Since the Minister is not the only official upon whom is conferred a power of remission, it is instructive to reason by analogy. Section 52(1)(d) of the Constitution confers on the Governor-General the power to "remit the whole or any part of any punishment imposed on any person for any offence . . . " If the Tribunal's views

on remission are correct, then the Governor-General would be acting within the scope of the power if he/she remitted all the future sentences likely to be imposed upon a known recidivist. This would be an absurd interpretation of the Governor-General's power.

[49] In the exercise of the statutory power to remit, section 95 imposes upon the Minister the obligation to comply with two rather weak safeguards. Failure so to conform would impugn and automatically render void the exercise of the power. Here, the Minister flouted *both* measures. Firstly, the Minister's power under the section is constrained to the extent that the Minister needs to satisfy himself, on objective criteria, that it is just and equitable to remit tax payable. Foreknowledge of the actual tax payable (which may be remitted in whole or part) constitutes a crucial, if not indispensable, factor informing the Minister's exercise of discretion. Just as it would be perverse for the Governor-General (whose discretion is not ostensibly limited by what is "just and equitable") to remit punishment when no crime has as yet been committed, far less a sentence imposed, so too the Minister cannot properly satisfy himself of the justice or equity in remitting tax payable by a company where the business activity upon which the tax may or may not accrue has not yet commenced and there is no knowing whether the company would even be in business for the period the tax is supposedly "remitted". Apart from its absurdity, to construe the power to remit tax as capable of being exercised in respect of tax that may or may not become payable throughout the lifetime

or existence of the taxpayer, evades section 95's first safeguard and easily opens the door to the arbitrary and unlawful exercise of the power delegated.

[50] Section 95 also required Notices of any remission to be published in the Gazette. Given the cloak of confidentiality that surrounded the making and implementation of the Deed, it is reasonable to conclude that there was never an intention on the part of the Minister to publish the required Notice. At any rate, the Minister had two years to fulfil this statutory obligation and no attempt was made to comply with it during that time. The trial judge accepted the Tribunal's view that the requirement of publication is merely "an administrative formality" and that publication may lawfully be done at any time. In light of the importance the Constitution attaches to the remission of tax, we disagree. Parliament in its wisdom has decreed publication in the gazette so that the Minister's decisions on remission are open to public scrutiny. This might be a mild, after-the-fact legislative safeguard. But to strip it of all its content, to render it devoid of any force only emphasises the grave danger to public policy that flows from interpreting the first limb of section 95 in the manner in which the Companies suggest.

[51] Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of

taxation.[30] Even if one assumes that the Minister was entitled, by section 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of "remitting tax payable" includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament's revenue laws. In essence, the framers of the Deed conceptualised and designed a whole new *tax policy* for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly.

[52] It is not the Court's function in this case to assess the wisdom of this special tax policy. The Government does of course have the power to settle, and to settle in confidence if it so desires, and on terms it considers prudent, claims made against it. But transforming the policy conceived here, effectively into the status of a Money Bill, necessitated the intervention of the National Assembly so that legislation consistent with the imperatives of the Constitution could be enacted to give force to it.

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[30] See s 80(1) of the Constitution

[53] Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy. No court can afford to encourage the spread of such cancer.[31] In our judgment, implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize. In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement.

Should the Award be enforced?

[54] As stated before, competing policies contend with each other when one must decide whether the public policy exception may successfully be invoked to render a foreign Award not enforceable. Even if a judge determines that there are features of an award that may seem inconsistent with public policy, it does not at all follow that the court *must* decline to enforce the Award. Reference has already been made to the pro-enforcement bias that informs the court's approach and to the restrictive manner in which the public policy exception should be applied in the case of foreign awards.

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[31] See in this regard *Antigua Power Company Ltd v The Attorney General of Antigua and Barbuda & Ors (Antigua and Barbuda) (Rev 1)* [2013] UKPC 23 at [51]-[60]

[55] There is also the fact here that the State treated with indifference the arbitral process to which it had agreed. This was far from exemplary conduct and it is a factor to which one should have regard. For this purpose no useful distinction can be made between the Administration in Belize which occupied the seat of government prior to 2008 and the one which held the reins immediately after the General Elections of that year. The latter was contractually bound by the warranties of the former, provided that the implementation of those warranties was not by law, impliedly or expressly, subject to parliamentary or judicial approval. The agreement to arbitrate was a free standing agreement separable from the remainder of the Deed and it is unfortunate that the Government approached its obligations *under that agreement* in the way it did.

[56] We do not consider, however, that in each and every case, a failure to participate in the arbitral process should preclude a party from successfully arguing the public policy exception at the enforcement stage. The case law on this issue is far from coherent and it would not be right to lay down hard and fast rules. It seems to us that here also, a tension exists between various public interests. In resolving that tension the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns must be weighed and placed alongside the court's desire to promote finality and certainty with respect to arbitral awards.

[57] There is actually nothing in the Act that suggests that a pre-condition for invoking the public policy exception is prior participation in the arbitral process. The Convention envisages that a court may *on its own motion* decline to enforce an Award on public policy grounds. This is hardly surprising. While it is public policy that arbitral awards, and in particular foreign awards, should be enforced, it is also public policy that awards which collide with foundational principles of justice ought *not* to be enforced. These two facets of public policy may sometimes appear to be, but are really not, mutually inconsistent. When a municipal court considers whether to decline to enforce an Award on public policy grounds, the court is not concerned with favouring or prejudicing *a party* to the arbitral proceedings. The Court is concerned with protecting the integrity of its executive function. In the process, the Court seeks simultaneously to guarantee public confidence in arbitral processes generally and to respect the institutional fabric of the country where the Award is to be enforced.

[58] This is a case where, as we have noted, it is clear that the Minister had no power to guarantee fulfilment of the promises he gave. It is equally clear that the signatories to the Deed, including the Companies' representatives, had no intention to seek the requisite parliamentary approval. There was nothing in the Deed to suggest any such intention. Implementation of the promises made, far from being suspended pending possible legislative approval, took effect immediately upon execution of the Deed. But even

if Parliament had ratified the promises made, not even Parliament could have bound itself to legislation that was "irrevocable".

[59] The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value[32]. So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted[33]. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception.[34] The Committee on International Commercial Arbitration has endorsed "tax laws" as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award.[35] In our judgment, especially as the underlying agreement was to be performed in Belize, the balance here undoubtedly lies in favour of not enforcing this Award. This is a case where

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[32] See *Methodist Church v Symonette* [2000] 5 LRC 196 at 208; (2000) 59 WIR 1 at 13

[33] See *Moses Hinds v. The A.G. of Jamaica* [1976] 1 All ER 353 at 359

[34] See Report, Committee on International Commercial Arbitration, International Law Association – London Conference (2000) pages 4-5

[35] See ILA Final Report on Public Policy 2002 at [30]

the Court actually has a duty to invoke the public policy exception.

[60] We have considered whether, notwithstanding all of the above, we should still enforce the Award because if we did not, the State of Belize may be unjustly enriched. There are powerful factors that weigh against this view. As mentioned above at [47], we have no evidence of the strength of the Companies' claims relating to the prior dispute between the parties. There is therefore only a tenuous basis for presuming any unjust enrichment. Even assuming there could conceivably be *some* unjust enrichment, there is no way of assessing its likely quantum. It is also significant that the Companies are *not* foreign entities. They are Belizean companies cognizant of and constrained by the public policy of special tax rates, exemptions and concessions being granted by Parliament. The Companies themselves are currently the beneficiaries of tax concessions which were obtained, not from the Minister but through the National Assembly.

[61] The public policy contravened in this case falls well within the definition of "international public policy" recommended by the ILA that might justify the non-enforcement of a Convention Award. If this Court ordered the enforcement of this Award we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this. Responsible bodies, including the Attorney General, have a right and duty to draw attention to and

appropriately challenge attempts to undermine the Constitution.

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON

[62] An interesting question of general public importance raised by this case is the following: Did the enactment by the Parliament of Belize of the 1980 Arbitration Ordinance to give effect to the New York Convention before that treaty had been accepted by the Executive constitute a breach of the separation of powers doctrine thereby making the legislation unconstitutional?

Constitutionality of the 1980 Arbitration Ordinance

[63] In order to properly examine the constitutionality of the 1980 Arbitration Ordinance it is necessary to engage in a brief review of the historical background to the constitutional and legislative order in Belize. British Honduras was acquired by Great Britain by settlement becoming part of Her Majesty's dominions by 1817, at the latest. The British Honduras Constitution of 1870 vested power to make laws "for the peace, order and good governance of the . . . Colony" in the Governor "with the advice and consent of the . . . Legislative Council . . . " On 1st January 1964, the Colony achieved self-government through the British Honduras Letters Patent ("Letters Patent") and the enactment of the British Honduras Constitution Ordinance ("Constitution

Ordinance"). These instruments, together with the common law relating to the Crown prerogative and executive power, delineated and delimited the boundaries of the three arms of governmental power in British Honduras: executive power was vested in the Monarch headed by Queen Elizabeth II; legislative authority vested in the colonial legislature; and judicial authority vested in the colonial judiciary.

[64] British Honduras became Belize on 1st June 1973. For ease of reference the Court will henceforth refer to "Belize" regardless of the date of the relevant event. Belize became independent on 21st September 1981. By letter dated 29th September 1982, the Prime Minister informed the Secretary General of the United Nations that Belize would continue to apply provisionally and on the basis of reciprocity, the treaties extended to it by the United Kingdom.

[65] On 10th October 1980, during the era of self-government, the Belize Legislature enacted the Arbitration (Amendment) Ordinance[36] ("the 1980 Ordinance") which came into effect on the same day. By the 1980 Ordinance the Legislature added Part III, sections 25-30 and a Fourth Schedule titled "*New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*" to the Arbitration Ordinance of 1932. The 1980 Ordinance was expressed to be: "*An Ordinance to amend the Arbitration Ordinance Chapter 13 of the Laws to give effect to the New*

[36] No. 21 of 1980

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards." It provided for the staying of court proceedings in the absence of proof that the arbitration agreement was null and void and the enforcement in Belize of an arbitration award made in the territory of a country (other than Belize) which is a party to the New York Convention ("Convention Award"). The New York Convention had been ratified by the United Kingdom on 24th September 1975 and made applicable to Belize by Notice of Territorial Application (in the form of a Declaration by the United Kingdom) which was received by the Secretary General of the United Nations on 26th November 1980, some six weeks *after* the enactment of the 1980 Ordinance.

[66] The Appellants contend that the LCIA Final Award of 29th August 2009 was made in the United Kingdom, a party to the New York Convention and is therefore a Convention Award that ought to be enforced in Belize in accordance with the provisions of the 1980 Arbitration Ordinance inserted into the Arbitration Act. This is opposed by the Respondent who argues that the Ordinance was *ultra vires* the powers of the Legislature and therefore unconstitutional at the time of its enactment. In response the Appellants say that even *if* the 1980 Arbitration Ordinance was defective at its passage, which they strenuously deny, it could nevertheless be characterized as "having effect" immediately before Independence Day and was therefore "saved" as existing law by Section 134(1) of the Constitution. Finally, the Appellants argue that Belize is estopped from contending that the New York

Convention is not applicable given the 29th September 1982 letter of the Prime Minister to the Secretary General of the United Nations.

(a) ***Is ultra vires legislation saved as existing law?***

[67] If the Appellants are correct that any defect in the passage of the 1980 Arbitration was cured by its being "saved" under the Independence Constitution then the issue would be resolved in their favour and this resolution would foreclose on the need to discuss whether the Ordinance was *ultra vires* the powers of the colonial legislature. For this reason it is convenient to consider this point first.

[68] Section 134 of the Independence Constitution of 1981 made provision for the saving of "existing laws" and where necessary, for the Governor General and the courts to bring those laws into conformity with the 1981 Constitution. "Existing laws" meant any Act, Ordinance, rule, regulation, order or other instrument "having effect as part of the law of Belize immediately before Independence Day." The Appellants argue that even if the 1980 Ordinance was *ultra vires*, it was still capable of being saved on the basis that section 136(6) does not require that an Ordinance be "valid" to qualify as an existing law but only that it be an Ordinance "having effect" immediately before Independence Day. Having been saved by section 134 the only basis on which the Ordinance could be declared unconstitutional was for want of compatibility with the

1981 Constitution, since the section gave the same effect to saved laws "as if they had been made in pursuance of this Constitution."

[68] There is no merit in this argument. In order for a law to be saved as "existing" law that law must first exist. The purported enactment of a law by a colonial legislature that has no power to enact that law does not result in the creation of law. Such a "law" does not exist and never did; it is void *ab initio*: see *Murphy v R.*[37] There is therefore nothing to be saved. If the 1980 Ordinance was outside the legislative competence of the colonial Legislature then the Court agrees entirely with Pollard JA that the Ordinance could "not constitute 'existing law' within the meaning of Section 134 (1) of the Belize Constitution and amenable to being saved at the time of independence of Belize".[38] The real question, therefore, is whether the enactment of the 1980 Ordinance was in fact outside of the legislative powers of the Legislature.

(b) *Was the 1980 Ordinance ultra vires the powers of the legislature?*

[69] The Respondent argues that by enacting the 1980 Ordinance the colonial legislature acted outside its legislative competence and encroached on the authority of the Executive thereby breaching the Separation of Powers doctrine and thus

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[37] 1982 Ir. 241

[38] At paragraph 46 of the Judgment in the court below

rendering the legislation unconstitutional. The competence of the colonial legislature derived from the Letters Patent and from the Constitutional Ordinance, section 16 of which provided: "Subject to the provisions of this Ordinance, the Legislature may make laws for the peace order and good government of the Territory." Under the Royal Prerogative executive power was vested in the Crown and exercised by the Governor of Belize. For centuries it has been accepted that executive powers in the Royal Prerogative included the power to make international treaties, although the legislative implementation of the treaty was a matter for the legislature: *Roberts v Minister of Foreign Affairs*;[39] and *Attorney General v Joseph and Boyce.*[40] Section 16 of the Letters Patent and Section 2(4) of the Constitutional Ordinance confirmed that the Governor acting in his discretion was responsible for "external affairs".

[70] The difficulty in this case arises from the fact that the 1980 Ordinance was expressly enacted "to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" at a time when the Executive had not yet accepted the Convention. Pollard JA, who delivered the majority judgment in the court below, held as follows:

> "Section 16 of the Constitutional Ordinance 1963 empowered the colonial legislature of

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[39] [2007] UKPC 56

[40] [2006] CCJ 3 (AJ)

> Belize to make laws for the peace, order and good government of Belize. However, when the colonial legislature purported to pass an ordinance "to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" the colonial legislature was clearly encroaching on the royal prerogative in respect of the matter relating to foreign affairs. The 'enactment' of the Convention by the colonial legislature necessarily involved interference in foreign affairs which was exclusively the domain of the Crown.
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> . . .
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> On the evidence before this Court, the colonial legislative assembly of Belize presumed to apply in its domestic law, and I would venture to say without proper executive authority, express or implied, an international treaty, the New York Convention, which had not yet been extended by the Crown in the exercise of its exclusive prerogative powers to Belize . . . "

[71] The Appellants argue that the 1980 Ordinance dealt with the internal affairs of Belize, that is, the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize. It does not purport to regulate or govern external affairs or the external relationships between the State and other States. This line of reasoning found favour with Mendes JA who put the matter this way:

> "The establishment of obligations on the international plane is the domain of the executive. The enactment of laws for the peace and good government of the people of [Belize] was the responsibility of the [Belize] Legislature. It seems clear to me that these plenary powers include the power to provide for the enforcement of arbitration awards, no matter where made and no matter who the parties to the award might be. It was also within the competence of the legislature to place such limitations on the enforcement of such awards as it deem fit. In this particular instance, it chose to identify the awards which are enforceable by reference in part to whether the country in which the award was made was a party to the New York Convention. That too was clearly within its plenary powers. It does not seem to me to make one jot of difference that the terms in which the legislative will of the [Belize] Legislature was expressed was inspired or was intended to replicate or indeed was intended to give effect to an existing treaty by which [Belize] was not yet bound. Such a legislative act does not intrude into the domain of external affairs. It concerns entirely the development of the domestic law of [Belize]."

[72] This Court finds the views expressed by Mendes JA utterly convincing and prefers them to those articulated by Pollard JA. The 1980 Ordinance in no way interfered with the exercise of the executive authority in foreign affairs. In legislating the 1980 Ordinance, the legislature was not engaged in the negotiation, signature or

ratification of the New York Convention; matters which belonged to the prerogative powers of the Crown. Nothing in the 1980 Ordinance purported to make Belize a party to the New York Convention. The annexure of the Convention to the Ordinance appeared to have been for purposes of identifying the categories of foreign awards that would be recognized and enforced in Belize, not to undertake international law obligations on behalf of the State. By giving force to the obligations in a treaty at the domestic level the legislature does not usurp the executive's functions. Belize could not, by virtue of the 1980 Ordinance, assert an international law right to compel other parties to the Convention to enforce awards made in favour of Belizean nationals; equally, an amendment to or repeal of the 1980 Arbitration Ordinance could not engage the international responsibility of Belize. There is a normative separation between international rights and obligations under the New York Convention and domestic legislative enactment of that Convention.

[73] Further, the 1980 Ordinance was within the broad powers of the Belize legislature, "to make laws for the peace, order and good government of the Territory". These words are apt to connote the widest plenary law-making powers appropriate to a sovereign (*Ibralebbe v The Queen*[41] and *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*[42]. It

[41] [1964] AC 900 at 923 (PC)

[42] [2009] 1 AC 453 at 486

is, indeed, unanimously agreed that this law-making power includes the power to legislate for the incorporation of international treaties. What the Respondent argues, and Pollard JA accepted, was that there was state practice in so-called "dualist" jurisdictions that established a requirement for the prior executive act of acceptance of the treaty by the Executive.

[74] There is no such requirement. At best, state practice could amount to a customary rule of international law recognized as part of the common law but such a common law rule could scarcely override the clear vesting by the Constitution of the widest plenary law-making powers in the Legislature. Furthermore, the emergence of customary law requires uniformity of state practice and state practice is by no means uniform on whether treaty acceptance must precede legislative incorporation. There are undoubtedly many instances in which the executive act of treaty acceptance has preceded legislative enactment of the treaty, although the authorities cited for the proposition that the timing of the 1980 Ordinance made it *ultra vires*, i.e., being enacted six weeks before executive acceptance of the New York Convention, do not establish that principle. *Attorney-General for Canada v Attorney General for Ontario*[43] held that the legislative enactment by the Dominion Parliament of the Versailles Treaty was *ultra vires* not because of a sequencing issue

[43] [1937] AC 326 (PC)

but, rather, because the domestic implementation of the relevant treaty obligations was within the exclusive competence of the legislatures of the provinces. The Dominion Parliament had therefore sought to usurp the jurisdiction of the Provincial Legislatures.

[75] It is also the case that there are many occasions where legislative incorporation of a treaty has *preceded* executive acceptance of that treaty."[44] The Arbitration Act 1975 of England was enacted to give effect to the New York Convention before the United Kingdom had acceded to the Convention, although in *Channel Group v Balfour Beatty Ltd*[45] it was said that "strictly speaking" the legislation should have followed Executive acceptance of the Convention. The UK Act to implement the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air was passed before the Convention was ratified by the Executive.[46] In some instances the New York Convention has been given effect in domestic law even though the State is not a party to the Convention, as in the British Virgin Islands,[47] an important

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[44] McNair, The Law of Treaties, (Oxford University Press, 8th Edition, 1961) at p. 86, footnote 3; *Salomon v Commissioner of Customs and Excise* [1967] 2 QB 116, at p. 143-D; *The Hollandia* [1982] 1 QB 872 (CA) and [1983] 1 AC 565 at p. 571 per Lord Diplock

[45] [1993] AC 334 at 354 (HL)

[46] Judgment in the court below, Pollard JA at paragraph 52

[47] The UK colony of the British Virgin Islands enacted its Arbitration Ordinance dated 6 September 1976 to give effect to

(Continued on following page)

Caribbean jurisdiction for the settlement of transnational commercial disputes. Pre-acceptance enactment has also been recommended by colonial legal advisors as well as modern academic writers.[48] The rationale appears to be that if domestic legislation is required to enable the State to give effect to its treaty obligation then the legislation should be in place before the treaty comes into force so as to avoid a breach of the international obligation at the point when the treaty enters into force. In an ideal world both the treaty and the incorporating legislation would enter into operation at the same time. But the sequencing of these events has never, prior to the decision below, been held to displace the constitutional competence in the legislature to enact incorporating legislation. We do not think that any such fettering of the legislative competence was intended by the Constitution.

[76] We do not think that the majority in the court below gave sufficient weight to the Governor's assent to the 1980 Ordinance. The colonial Constitution vested executive authority in the

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the New York Convention in domestic law although the Convention has never been extended to the BVI by the British Government.

[48] See Diplomatic Telegram dated 31 December 1980 by the UK F&CO Advisers; UKFCO, Treaty Section, Information Management Department, "Treaties and MOUs, Guidance on Practice and Procedures," (2nd edition, May 2004), at p. 7; Joanna Harrington, "Scrutiny and approval: the Role for Westminster-style Parliaments in Treaty-making" in *International and Comparative Law Quarterly* (2006) Vol. 55 at p. 125).

Crown and provided for its exercise by the Governor; the Governor acting in his discretion had responsibility for "external affairs". The Governor could interrupt the legislative passage (section 27(1)) or refuse his assent or reserve the Bill for the signification of Her Majesty's pleasure (section 28(3)) if he felt the Bill infringed upon the prerogative powers or his special responsibilities. While not conclusive, it is reasonable to assume that by assenting to the Bill providing for the giving of effect to the New York Convention, the Governor must have considered that the legislation did not usurp the treaty making prerogative of Her Majesty or his special responsibilities. More crucially, the Bill was only fully enacted upon Assent of the Crown in the exercise of the Royal Prerogative. It is therefore difficult to see how a law which can only become so on the exercise of the Royal Prerogative could be inconsistent with the Royal Prerogative. It is not without significance that the Crown exercised its executive power to extend the Convention to Belize a mere six weeks after the enactment.

[77] For these reasons the Court concludes that the enactment of the 1980 Ordinance was *intra vires* the powers of the legislature and did not encroach into the domain of the Royal Prerogative in treaty-making. We therefore find the 1980 Ordinance to be constitutional and saved as "existing law" under the 1981 Independence Constitution.

(c) ***Is Belize estopped from arguing that the New York Convention is not applicable?***

[78] The Appellants argue that the declaration made by the Prime Minister of Belize in the *Note Verbale* of 29th September 1982 was legally binding and estopped Belize from denying the applicability of the New York Convention. In the *Note Verbale*, the Prime Minister informed the Secretary General of the United Nations that the Government of Belize, ". . . . had decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize." The Prime Minister requested that his letter be circulated to all Member States of the United Nations. The Appellants contend that this declaration fulfilled the conditions for estoppel to arise in International Law, namely, (a) the meaning of the statement is clear and unambiguous; (b) the statement or representation is voluntary, unconditional, and authorised; and (c) there is reliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation).[49]

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[49] These conditions are discussed by Professor Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", British Yearbook of International Law (1957) Vol. 33 at pp. 188-194.

[79] This issue of the binding nature of the declaration made by the Government of Belize raises very complex issues and not only those relating to estoppel in International Law. Diverse theories underpinning the law of treaties, state responsibility, state succession, and of unilateral declarations also come into play. Since this Court has already held that the 1980 Ordinance giving effect to the New York Convention was constitutional and saved as existing law at the time of independence, we consider it unnecessary and unwise in the circumstances to decide on the issue of estoppel.

Why the case was not remitted to the Court of Appeal

[80] There was no common ground between the parties as to the consequential disposal of the appeal in the event that this Court found the Arbitration Act to be constitutional, as we have. The Appellants submit that we should decide the issue of enforcement of the award without further ado while the Respondent seeks a remittal to the Court of Appeal. The remittal would enable the court below to decide the two other objections raised by the Respondent to enforcement, that is, that the subject matter of the dispute was not capable of settlement by arbitration, and enforcement would be contrary to public policy.

[81] The issues of constitutionality, arbitrability, and public policy were the subject of comprehensive written submissions and were fully argued over

a three-day period in October 2011, before the Court of Appeal. At the request of the Court of Appeal made on 26th January 2012, the parties made further written submissions on the question of the constitutionality of the 1980 Ordinance. The judgment of the Court of Appeal was handed down on 8th August 2012, and dealt exclusively with the question of constitutionality. The judgment did not at all address the issues of arbitrability or public policy. This approach was lamented by Mendes JA who observed that " . . . . if there is an appeal and the decision of the majority is overturned, their Honours of the Caribbean Court of Justice are very likely to require the views of this court particularly on the question whether the enforcement of the award would be contrary to public policy."[50]

[82] We deeply regret that the Court of Appeal declined to make their views on these matters available to us. This Court places considerable weight on the opinions expressed in the Court of Appeal; opinions which are pre-eminent in providing vital juridical material to inform and shape the views of this final Court especially on such innate questions as arbitrability and public policy: *Boyce v Attorney General and Minister of Public Utilities*.[51] The scheme of adjudication in the Constitution contemplates review by this Court of decisions of the Court of Appeal. But this Court does have explicitly in relation to any

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[50] At paragraph [30] of the judgment in the court below

[51] [2012] CCJ 1 (AJ) (R)

appeal, all the jurisdiction and powers possessed in relation to that case by the Court of Appeal.[52] The Court's overriding objective is "to deal with cases fairly and expeditiously so as to ensure a just result".[53] In every case the most important objective is for the Court to ensure a fair and just result. Subject to that requirement, the question which arises is whether the natural reluctance to decide the issues without the benefit of the views of the Court of Appeal should prevail over the judicial impulse to settle litigation with expedition and finality.

[83] This question cannot be answered in the abstract but only by reference to the particular circumstances of the case at hand. In this case the arbitral award was made on 20th August 2009 and finalized on 29th August 2009, almost four years ago. Each subsequent cycle of litigation before the courts of Belize occasions additional substantial costs and expense. Under the terms of the award interest continues to accrue. The arguments on arbitrability and public policy were fully ventilated before the Supreme Court and in the judgment of the trial judge. That the Court of Appeal was aware of its responsibility to address the outstanding issues but chose not to do so argues against remitting the case: *Re James McDonald*.[54] Remitting the matter to the

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[52] Section 11(6), Caribbean Court of Jurisdiction Act 2010

[53] Rule 1.3 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules

[54] (1975) 13 JLR 12 especially at p 27 per Graham-Perkins, JA

Court of Appeal could require a full rehearing before a new panel as Pollard JA is no longer a Judge of the Court of Appeal.

[84] It is also significant that there are no relevant disputes of fact and that the issues to be decided do not derive from peculiar constitutional or legislative provisions in Belize. Whether an agreement that includes matters relating to the imposition and collection of taxes is properly submitted to international arbitration and whether enforcement of an award resulting from such arbitration would be contrary to public policy are quintessentially matters of judicial policy. Access to the views of the judges below remains important but the matters for decision are of broad significant public importance to the Caribbean polity as a whole. In these circumstances this Court must pay some attention to its determinative role in the further development of Caribbean jurisprudence through the judicial process.[55]

[85] For these reasons the Court decides that the balance was tilted in favour of deciding the outstanding issues in dispute rather than remitting them to the Court of Appeal.

Conclusion

[86] For the reasons so eloquently articulated in the judgment of our brother Saunders JCCJ the

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[55] Cf. *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, 832

Court orders that enforcement of the arbitral award should be declined under section 30(3) of the Arbitration Act.

Costs

[87] The award of costs in this case is complicated by a number of factors. The Respondent has prevailed on the central issue that enforcement of the Convention Award would be contrary to the public policy of Belize. However, the Respondent had sought to have this Court defer decision on the public policy issue and instead to remit the matter to the Court of Appeal. The Appellants succeeded on the primary ground of appeal arising from the decision of the Court of Appeal, namely, that the Arbitration Act of 1980 was constitutional and saved as existing law under the Independence Constitution. A further factor that complicates the issue was the non-participation by the Respondent in arbitration proceedings despite numerous invitations and opportunities to do so. It is not beyond the realm of possibility that had the Respondent mounted vigorous and comprehensive arguments before the arbitral tribunal as it did before us the tribunal might have been persuaded to decline to adjudicate upon the matter thereby saving considerable expense. It is also the case that this Court has and must encourage the greatest respect for international commercial under the Arbitration Ordinance and by extension as well the New York Convention. In the circumstances we consider that the most appropriate award would be for each party to bear its own costs.

Disposition

[88] The appeal is dismissed. There is no order as to costs.

The Right Hon Mr Justice Dennis Byron, President

The Hon Mr Justice A Saunders	The Hon Mme Justice D Bernard
The Hon Mr Justice J Wit	The Hon Mr Justice W Anderson