No. ________

In The
Supreme Court of the United States

GOVERNMENT OF BELIZE,

Petitioner,

v.

NEWCO 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)).

In *Government of Belize v. Belize Social Development Limited*, Sup. Ct. No. 15-830 ("*BSDL*"), this Court has invited the Solicitor General to express the views of the United States on a petition for a writ of certiorari filed by the Government of Belize ("GOB") regarding the District of Columbia Circuit's holdings (1) that a foreign forum is *per se* inadequate for *forum non conveniens* purposes in a confirmation action because specific assets in the U.S. cannot be attached by a foreign court, in square conflict 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); and (2) its refusal to apply the public policy defense on the basis that countervailing public policies could not override the "emphatic federal policy in favor of arbitral dispute resolution."

Here, the D.C. Circuit affirmed its holdings in *BSDL* on the same issues, and in circumstances virtually identical to those the Second Circuit in *Figueiredo* held compelled *forum non conveniens* dismissal based on international comity concerns. In both, the foreign state agreed to pay the arbitral award, consistent with

QUESTIONS PRESENTED – Continued

its own statutory requirements for doing so. Here, as the Belize Supreme Court has held, Newco's U.S. confirmation action "was intended to enable NEWCO to avoid complying with [Belize's currency and tax laws], it was intended to breach the laws of Belize." This Petition poses the same questions as in *BSDL*, which are:

1. Under the doctrine of *forum non conveniens*, as applied to a confirmation action to enforce a foreign arbitration award, is a foreign forum *per se* inadequate because assets in the United States cannot be attached by a foreign court, as the D.C. Circuit has held; or is it adequate if it has jurisdiction and there are some assets of the defendant in the alternative forum, 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 international comity and the policy against tax evasion?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is the Government of Belize. Respondent Newco Limited filed a complaint against GOB in U.S. District Court for the District of Columbia for confirmation and enforcement of a UNCITRAL arbitration award in Newco's favor. Newco filed this action after GOB had offered to pay the award, subject to its tax and currency statutes, which required an offset for taxes owed and payment in Belizean currency. GOB then filed an injunctive action in the Belize Supreme Court, which granted the injunction, and found that GOB's insistence on making payments in accord with these statutes was proper, and that Newco's confirmation action in the U.S. "was intended to enable Newco to avoid complying with . . . [and to] breach the laws of Belize." Newco persisted in its U.S. action. The District Court confirmed the Award over Belize's *forum non conveniens* and Article V(2)(b) arguments. The D.C. Circuit affirmed.

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

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ABA, Resolution 107c (2013) http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_107C.docx 36

BCB Holdings Ltd. v. Belize, [2013] CCJ 5 (AJ)........31

Charles H. Brower II, *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, Kluwer Arbitration Blog, 2012 WLNR 2324717 (February 2, 2012)..36

International Bar Association, *Report on the Public Policy Exception in the New York Convention*, General Report and United States Country Report, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx 36

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PETITION FOR A WRIT OF CERTIORARI

The Government of Belize 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 Honorable Richard J. Leon, is unreported at 2015 WL 9810457 and reproduced at App. 5. The D.C. Circuit's opinion is unreported, but available at 2016 WL 3040824 and 2016 U.S. App. LEXIS 8917 and reproduced at App. 1.

JURISDICTION

The D.C. Circuit filed its opinion on May 13, 2016, App. 1. This Petition is timely. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970) ("Convention"), implemented by the Federal Arbitration Act, 9 U.S.C. §201 *et seq*.

("FAA"). The relevant provisions are set forth in the Appendix.

INTRODUCTION

This past term, in *BSDL*, this Court invited the views of the United States from the Solicitor General on a petition for a writ of certiorari filed by the Government of Belize regarding the application of *forum non conveniens* and the Article V(2)(b) public policy defense in Convention arbitration confirmation actions. This Petition presents the same issues, also from the D.C. Circuit and the same District Court judge. Thus, for all the reasons stated in the *BSDL* Petition, certiorari should also be granted here.

As in *BSDL* (and *BCB Holdings Ltd. v. Government of Belize*, No. 15-7063, 2016 WL 3042521 (D.C. Cir. May 13, 2016) ("*BCB*")[1]), the circuit split on the *law* regarding *forum non conveniens* is sharply presented here – whether there is an adequate alternative forum justifying *forum non conveniens* so long as *some assets* of the defendant are available in the alternative forum (Second Circuit, in *Figueiredo*), or whether there can *never* be an alternative forum because no foreign jurisdiction can attach assets located in the U.S. (D.C. Circuit, in *TMR Energy Ltd. v. State Property Fund of*

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[1] The same panel, on the same day, reached an identical holding on *forum non conveniens* in *BCB*, and likewise found Article V(2)(b) inapplicable. *BCB*, 2016 WL 3042521. GOB has also filed a certiorari petition in *BCB*.

Ukraine, 411 F.3d 296 (D.C. Cir. 2005)). But now, the D.C. Circuit has gone even farther, holding that the doctrine does not apply to Convention actions *at all*: "the doctrine of *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations." App. 4 (citing *TMR Energy*, 411 F.3d at 303-04); *BCB*, 2016 WL 3042521 at *2. This cements the circuit split. The Convention makes confirmation actions subject to local procedural law, and this Court has held that *forum non conveniens* is a procedural doctrine. Thus, the doctrine applies to Convention actions, as the Second Circuit held in *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002), and affirmed in *Figueiredo*. The D.C. Circuit's categorical exclusion of *forum non conveniens* in Convention confirmation actions requires resolution from this Court, as commentators have recognized.

Moreover, the grounds for granting certiorari here are particularly compelling because the D.C. Circuit has categorically rejected the doctrine's applicability in circumstances that are *factually* identical to those the Second Circuit held compelled *forum non conveniens* dismissal – where the defendant foreign state has agreed to pay the award, but seeks *forum non conveniens* dismissal so that it can do so in accord with its own statutory requirements governing such payments. *See Figueiredo*, 665 F.3d at 389-94. The circuit split could not be more direct.

Further, this case also brings into sharp contrast the D.C. Circuit's conflict with Supreme Court precedent. Here, it is undisputed that GOB has offered to pay the award and that the Belize courts would have jurisdiction over a confirmation action. The D.C. Circuit's holding that the inability to attach the *precise asset* nonetheless entirely precludes *forum non conveniens* dismissal, conflicts with this Court's holdings that *forum non conveniens* is appropriate, even where attachment is sought, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007); *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960); and is inconsistent with *Piper Aircraft*'s holding that an unfavorable change in law cannot categorically thwart a doctrine which is predicated on flexibility, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

Guidance by this Court is also needed regarding the Convention's Article V(2)(b) public policy defense. Its role in the Convention is vital, as it is one of the few explicit bases for refusing enforcement, permitting courts to do so when "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." Article V(2)(b). As explained in GOB's *BSDL* Petition, the D.C. Circuit's summary invocation of the public policy in favor of arbitration as trumping *any* countervailing public policy highlights that Article V(2)(b), in effect, has been rendered superfluous, and underscores confusion in the circuit courts in the absence of guidance from this Court. This case brings this issue into sharp focus. Here, the D.C. Circuit has held that, based on the "design [of] the New York

Convention," "[a]ny public policy interest in 'international comity,' therefore, does not here override 'the emphatic federal policy in favor of arbitral dispute resolution.'" App. 3-4. This is inconsistent with *Figueiredo*, where the Second Circuit rejected the argument that "international comity" must yield to "the strong United States policy favoring the enforcement of foreign arbitral awards." *Figueiredo*, 665 F.3d at 391-92. It is also contrary to the Restatement, which recognizes that "international comity" can be a basis for refusing to enforce an award as "repugnant to *U.S.* public policy." Restatement (3d) of U.S. Law of Int'l Comm. Arb. §4-18 Rptr. Note b (Tentative Draft No. 2, 2012) (emphasis added). These comity concerns are pronounced here, where the Belize Supreme Court has found that Newco's U.S. confirmation action "necessarily involves injustice to the Government of Belize, and in a way that is prejudicial to the public interest in Belize that, tax be paid by all, and foreign exchange be managed and controlled under the Exchange Control Regulations Act." JA[2] 0426 ¶58. It goes without saying that it is also a policy of the U.S. that taxpayers must pay their taxes. The U.S. would not countenance a suit brought against it by one of its citizens in a foreign country solely "to avoid complying with" and "breach the laws of" the U.S., including its tax laws. *See* JA 0425 ¶56. Yet that is precisely what the D.C. Circuit has sanctioned here by summarily refusing to consider international comity and the tax law issues.

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[2] *Newco*, Joint Appendix, filed Dec. 18, 2015.

Guidance from this Court is required on these important issues, and this case's close similarities to the conflicting Second Circuit decision make it a perfect vehicle for doing so. GOB respectfully requests that this Court consolidate GOB's Petitions in *BSDL*, this case, and *BCB* because they present the same two questions.

STATEMENT OF THE CASE

A. GOB Agrees to Pay the Arbitral Award, Subject to its Statutory Taxation and Currency Requirements.

Newco, a Belizean company, JA 0010 ¶3; JA 0390 ¶3, prevailed in an arbitration against GOB on a breach of contract claim surrounding GOB's 2003 termination of the parties' 2002 Concession Agreement for Newco to operate, develop and improve the Philip S.W. Goldson International Airport in Belize. *See* JA 0077; *see also* JA 0016, 0074 ¶4, 0390-92 ¶¶4-7. The arbitration was governed by Belize law and conducted in Miami, Florida, in accordance with UNCITRAL Rules. *See* JA 0094 §XXIX[3]; *see also* JA 0016.

[3] The Concession Agreement provided that controversies "shall be subject to arbitration proceedings in accordance with UNCITRAL Rules. The arbitration proceedings shall be conducted in English and the laws of the [sic] Belize shall apply. The arbitration proceedings shall be conducted in Miami, Florida, USA." JA 0094 §XXIX. For enforcement, it provided that "the parties irrevocably accept, for the purposes of this binding clause and the implementation of any arbitration award, the jurisdiction of

Soon after the arbitration panel issued its final award on June 23, 2008, Newco sent GOB emails regarding enforcement and payment of the award, *see* JA 0276; *see also* JA 297-98 ¶¶11-15, 0392-93 ¶8, which was for US$4,259,832.81, plus arbitration costs and interest of 8% per annum, compounded quarterly, from the date of the award, plus $168,000.00 in costs, JA 0068 ¶¶190-91, 194-96, 0074 ¶10, 0247 ¶9, 0099. GOB responded in a September 30, 2008 letter in which it expressed its willingness to pay the award,[4] subject to the requirements under Belizean law that the award be paid in Belizean dollars[5] and subject to the deduction of any outstanding income or business tax liability

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any tribunal where the parties or their properties may be located." *Id.* GOB argued that this provision was *not* an agreement to enforcement in the U.S., where GOB is not located in the U.S., and Newco did not identify any GOB properties or attachable assets. Mot. to Dismiss, Doc. 14 at 20-21 (Feb. 27, 2009). The District Court ignored this issue. *See* App. 5-10.

[4] GOB first raised some "Preliminary Issues" regarding Newco's registered office, receiving an official sealed copy of the award, and confirming Newco's representative's authority. JA 0276-78 ¶¶2-5. GOB then stated, "[s]ubject to a satisfactory resolution of preliminary issues raised above, we can notionally discuss the method of payment." JA 0278 ¶6; *see also* JA 0427 ¶60.

[5] The Central Bank of Belize Act, Chapter 262, Section 21, requires that "to be valid in Belize, all monetary contracts, obligations or transactions in Belize, whether imposed or authorised by a law or otherwise, shall be deemed to be expressed and recorded and shall be settled or discharged in Belize dollars unless specifically provided otherwise." *See* JA 0278-280 ¶6, 0427-28 ¶1. Belizean currency is pegged at an official rate of 2-to-1 against the U.S. dollar. Central Bank of Belize Act, Ch. 262, §20(1).

of Newco.[6] JA 0278-79 ¶¶6-7, 0392-93 ¶8. The letter then asked for "duly authorised payment instructions from the Company [which] must contain the name of a local bank or financial institution to which Belize dollar remittances may be made." JA 0279 ¶6.

B. Newco Brings this Confirmation Action to Frustrate GOB's Ability to Conform its Payments to its Laws and District Court Stays Action.

Newco did not provide bank wiring instructions, but instead filed this confirmation action on November 21, 2008 in U.S. District Court for the District of Columbia. JA 0009. A corresponding letter Newco sent to the Belize Prime Minister made clear that this action was filed in response to the September letter, and to avoid the "monthly tax assessments from the Commissioner of Income Tax."[7] JA 0282-83.

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[6] Pursuant to Belize's Income and Business Tax Act, Chapter 55, Section 58, governing "Garnishment of debts," the Belize Commissioner of Income Tax, on October 8, 2008, issued a formal Demand to the Financial Secretary of the Minister of Finance stating Newco owed Income Taxes of BZ$5,477,805 from January 2003-August 2008, and requiring the Ministry of Finance to pay the Commissioner that full amount before remitting the remainder of the award to Newco. JA 0287, 0428 ¶2.

[7] Belize law is clear that "[a] notice of a review or an objection or an appeal against the assessment made by the Commissioner shall not result in the suspension of such assessment, and the entire tax due as determined by the Commissioner shall be payable before any such review, objection or appeal is entertained." Income and Business Tax Act, Ch. 55, §53(2); App. 37 ¶19.

Newco's actions prompted GOB to file a declaratory and injunctive action in the Belize Supreme Court (Belize's trial court). JA 0033-39 ¶¶1-4. The Belize Supreme Court granted the interim injunction on February 9, 2009, enjoining Newco from proceeding with its action in the U.S., or commencing any similar action outside Belize for the pendency of the Belize action. JA 0339-40, 0356 ¶25.

GOB then filed a motion in District Court to dismiss, or in the alternative, to stay the proceeding pending the final adjudication of the Belize action. JA 0110-12. The District Court stayed the action until final adjudication of the Belize action. *Newco*, No. 1:08-cv-02010-RJL, Minute Order (D.D.C. June 30, 2009); *see also id.* (D.D.C. Oct. 20, 2009) (denying motion for reconsideration and/or to lift stay).

C. The Belize Supreme Court Issues a Final Judgment in GOB's Favor on the Currency and Tax Law Issues, and Finds Newco's Motives for Filing U.S. Action Were Spurious.

On August 28, 2013, the Belize Supreme Court issued its Final Judgment, finding for GOB.[8] JA 0388.

[8] The Belize Supreme Court noted that final judgment was required due to Newco's failure to proceed with an appeal of its interim injunction, and the then-pending stay of Newco's tax appeal. JA 0388-89 ¶¶1-2. Because under Belize law, "[a] notice of a review or of an appeal does not suspend an assessment, the entire tax assessed must be paid before the review, objection, or appeal is pursued," the Belize Supreme Court was required to "treat the assessments to tax so far made and reviewed by the Commissioner as payable by NEWCO rightaway, regardless of the fact

The Belize court identified that "[t]he main issues in this Claim are:

> [1] whether the award by the arbitrators is payable in Belize dollar and in Belize;
>
> [2] whether NEWCO should be restrained by an order of this Court from proceeding with its Claim or related Claims in the U.S.A. District Court for the District of Columbia, and from commencing any related Claims in any other court outside Belize; and
>
> [3] whether the Financial Secretary is entitled to deduct business tax from the arbitral award made in favour or [sic] Newco."

JA 0401 ¶16. The Belize Supreme Court found in the affirmative and in GOB's favor on all of these issues, entering an order that:

> 1. [I]n accordance with . . . the Laws of Belize . . . the final arbitral award . . . is payable in Belize dollar in Belize, or with the permission of the Controller under the Exchange Control Regulations Act in the currency of the United States of America.
>
> 2. [I]n accordance with . . . the Laws of Belize, the Financial Secretary, Ministry of Finance, is bound to deduct the sum of Bz$5,477,805.00 assessed as tax from the arbitral award and pay over the same to the Commissioner of Income Tax. . . .

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that an appeal is currently before the Appeal Board." App. 37 ¶19 (citing Act, Ch. 55, §53(2)).

4. An order is made restraining NEWCO Limited from taking any or any further steps in the continuation or prosecution of the Complaint filed by NEWCO Limited against the Government of Belize in the United States District Court for the District of Columbia on or about the 21st November, 2008 (Case: 1:08-cv-02010). . . .

JA 0427-29 ¶61.

Driving the Belize Supreme Court's decision was the prejudice to the Belizean public interest wrought by Newco's U.S. confirmation action, which, while "well founded" on its face given the award, *see* JA 0424 ¶55, was brought with spurious motive:

> [T]he evidence is convincing that, Newco has brought the claim in the U.S.A. under colour of asking for justice in a way that necessarily involves *injustice* to the Government of Belize, and in a way that is prejudicial to the public interest in Belize that, tax be paid by all, and foreign exchange be managed and controlled under the Exchange Control Regulations Act. The ends of justice is in favour of granting anti-foreign suit injunction order in the terms stated in the last paragraph of this judgment. I do grant the anti-foreign injunction order.

JA 0426 ¶58 (emphasis added). The Belize Supreme Court was explicit as to Newco's ulterior motives:

> [T]he Claim in the U.S.A. was intended to enable NEWCO to avoid complying with the Central Bank of Belize Act and the Exchange

> Control Regulations Act, and to avoid complying with the Income Tax Act, it was intended to breach the laws of Belize.

JA 0425 ¶56. And it was likewise explicit as to why Newco's pursuit of confirmation in the U.S., rather than Belize, harmed GOB and the public interest:

> If payment is made in Belize dollar in Belize, NEWCO, like every investor and every resident, would be authorised to transfer foreign currency in a manner that would be consistent with the aims of the Central Bank Act and the Exchange Control Regulations Act. Also if the arbitral award is paid in Belize dollar in Belize, the Government would be able to collect income tax owed by NEWCO. Further, in the event that it would be necessary for NEWCO to bring an enforcement claim in court in Belize, the Government would be able to set up a counterclaim in the sum of the tax owing. It is not possible for the Government of Belize or the Government of any other country to raise a claim or set up a counterclaim for tax owing in the courts of the U.S.A., or in the courts of any other country.

JA 0425 ¶57.

D. The District Court Confirms the Award.

Following the Belize Supreme Court's Final Judgment, Newco moved to confirm the award before the District Court. GOB opposed, invoking, *inter alia*, *forum non conveniens* and the Article V(2)(b) public

policy defense. Memo. in Opp. to Mot. to Confirm, Dkt. No. 44. The District Court confirmed the award on August 7, 2015, JA 0462, just two weeks after the D.C. Circuit summarily affirmed the District Court's order in *BSDL*.

The District Court disregarded the Belize Supreme Court's orders and findings *in GOB's favor* regarding the Belizean currency and tax laws' applicability to the award, Newco's ulterior motives, the Belizean public interest, and its enjoinment of Newco's actions. Instead, the District Court's only reference to the Belize Supreme Court's Final Judgment was to highlight out of context that court's passing reference that "the Claim for an enforcement order was 'well founded,'" and its rejection of GOB's argument that it was not a party to the New York Convention. It then proceeded to summarily dismiss GOB's *forum non conveniens* and Article V(2)(b) arguments in a passing footnote, stating simply that "none of these arguments have merit." JA 0466 n.4. GOB appealed.

E. The D.C. Circuit Affirms the Categorical Inapplicability of *Forum Non Conveniens* and Article V(2)(b)'s Inability to Overcome the Policy in Favor of Arbitration.

GOB appealed the District Court's *forum non conveniens* and Article V(2)(b) holdings to the D.C. Circuit, and notified the court that this appeal presented the same issues in which a petition for a writ of certiorari was being sought in *BSDL*. Br. of Appellant 21 n.11.

The D.C. Circuit denied GOB's request that the case be held in abeyance pending disposition of the *BSDL* Petition, and on May 13, 2016, summarily affirmed, reiterating its prior positions in *TMR Energy* and *BSDL*.

On *forum non conveniens*, the D.C. Circuit refused to consider the overwhelming public interests favoring dismissal, and reaffirmed *TMR Energy*:

> Belize contends that the District Court should have dismissed the enforcement action on *forum non conveniens* grounds. That argument is squarely foreclosed by our precedent. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), we held that the doctrine of *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations. *See id.* at 303-04.

App. 4.

As for the public policy defense, the D.C. Circuit recognized that "[u]nder the New York Convention, courts may decline to enforce an arbitral award if 'enforcement of the award would be contrary to the public policy of that country.'" *Id.* at 3 (quoting Article V(2)(b)). It then stated that "courts should rely on the public policy exception only 'in clear-cut cases' where 'enforcement would violate the forum state's most basic notions of morality and justice.'" *Id.* (citation omitted). Balancing the policy in favor of international comity invoked by GOB against the public policy in favor of arbitration, the D.C. Circuit held that the latter always prevailed:

> By design, the New York Convention allows investors to choose to resolve disputes with states through neutral tribunals in neutral countries. Any public policy interest in "international comity," therefore, does not here override "the emphatic federal policy in favor of arbitral dispute resolution." *Belize Social Development Ltd. v. Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (citation omitted).

Id. at 3-4.

GOB moved the D.C. Circuit to stay the mandate pending its petition for a writ of certiorari, which the D.C. Circuit denied without explanation. This petition follows.

REASONS FOR GRANTING THE PETITION

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

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

1. The Circuit Split Between the D.C. and Second Circuits Is Express, Square, and Deadlocked, Demanding this Court's Review.

It is well-established that "[a]t the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *See Piper Aircraft*, 454 U.S. at 254 n.22. For all the reasons described in GOB's *BSDL* Petition, there is a square circuit split between the D.C. and Second Circuits regarding this threshold requirement in Convention actions that requires this Court's resolution. *Compare TMR Energy*, 411 F.3d at 303-04, *with Figueiredo*, 665 F.3d at 390-91. In *TMR Energy*, the D.C. Circuit held there is no adequate alternative forum 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," even if the foreign state "currently has no attachable property in the United States." *TMR Energy*, 411 F.3d at 303. The Second Circuit explicitly "disagree[d]" "[t]o 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." *Figueiredo*, 665 F.3d at 391.

This case compels review because the D.C. Circuit has affirmed that *forum non conveniens* in a foreign arbitration enforcement action "is squarely foreclosed by our precedent," in a case that is identical to the circumstances the Second Circuit found *compelled dismissal* on *forum non conveniens* grounds. *See* App. 4. *Figueiredo*, like this case, involved an arbitration confirmation action in the U.S. against a foreign state, where no confirmation had been sought in the foreign state itself, and the foreign state had either agreed to, or was, making payments on the award in conformity with its statutory requirements.[9] *See* 665 F.3d at 387-88. But whereas the D.C. Circuit here found *forum non conveniens* foreclosed by *TMR Energy*'s holding that "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," 411 F.3d at 303, *Figueiredo* recognized "that circumstance cannot render a foreign forum inadequate," 665 F.3d at 390. Instead, the Second Circuit held that, "in the context of a suit to obtain a judgment and ultimately execution on a defendant's assets, the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether

[9] In addition to GOB's offer to pay, Belizean law requires GOB to pay arbitral awards confirmed by the Belize courts. *See BSDL* Petition Reply 3-6.

the precise asset located here can be executed upon there." *Id.* at 390-91.

The D.C. Circuit's rigid adherence to *TMR Energy* categorically forecloses *forum non conveniens* in a case the Second Circuit found *compelled forum non conveniens* dismissal. The balance of interests here, like in *Figueiredo*, tip overwhelmingly in favor of dismissal under that doctrine:

> With 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 [GOB] to apply its [tax and currency] statute[s] to the disbursement of governmental funds to satisfy the Award tips the FNC balance decisively against the exercise of jurisdiction in the United States.

See id. at 392. Review is required to resolve this circuit split.

2. The D.C. Circuit's Categorical Rejection of *Forum Non Conveniens* Has Not Been Followed by Any Other Circuit and Is in Conflict with the Dominant View.

Supreme Court review is further required because the D.C. Circuit has not just affirmed *TMR Energy*, but expanded its force. The Second Circuit in *Figueiredo*

departed from *TMR Energy* because it recognized the unpalatable but necessary implication of the D.C. Circuit's rule – that "every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC." *Figueiredo*, 665 F.3d at 390. Here, the D.C. Circuit has confirmed that such a categorical bar is precisely what it intended – "h[o]ld[ing] that the doctrine of forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations." App. 4.

No other circuit has followed this categorical bar. Other circuits begin their *forum non conveniens* inquiry by generally asking whether "an alternative forum has jurisdiction to hear the case," in accord with this Court's precedent.[10] *See Sinochem*, 549 U.S. at 429 (alteration omitted).

Moreover, the even broader argument that *forum non conveniens* is categorically foreclosed in *any* "action to enforce an arbitration award" was specifically

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[10] *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 Államvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015); *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986); *Tuazon v. R.J. Reynolds Tobacco 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).

rejected by the Second Circuit – the only Circuit to expressly decide the question – and explicitly passed over in *TMR Energy*. *See TMR Energy*, 411 F.3d at 304 n.*; *Monegasque*, 311 F.3d 488;[11] *Figueiredo*, 665 F.3d at 390. The D.C. Circuit, however, has now invoked *TMR Energy* as the basis for imposing the very type of categorical bar that case expressly avoided. App. 4. This is contrary to the weight of authorities. Even the Restatement, in advocating for such a position, recognizes "that courts have traditionally been willing to entertain motions to dismiss enforcement proceedings based on forum non conveniens," and that its position is contrary to "the dominant view among U.S. courts [] that motions for stay or dismissal of actions to enforce U.S. Convention awards are permissible." Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 3, 2013) §4-29(a) cmt. b. Such a categorical prohibition is also contrary to the prior position of the United States. *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). This conflict confirms the need for Supreme Court review.

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[11] In *Monegasque*, the Second Circuit held that *forum non conveniens does* apply in Convention actions, reasoning the Convention allows enforcement "in accordance with the rules of procedure of the territory where the award is relied upon" (citing Article III), and that *forum non conveniens* is a "procedural" doctrine (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)). *Monegasque*, 311 F.3d at 494-97.

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

Certiorari is also required because the D.C. Circuit's holding conflicts with this Court's precedents.

1. The D.C. Circuit's Focus Upon the Availability of Particular Assets Conflicts with Decisions from this Court that Have Found the Attachment of Particular Assets Irrelevant.

The D.C. Circuit's focus in *TMR Energy* upon the attachment of assets as dispositive conflicts with this Court's more recent decision in *Sinochem*, as discussed in the *BSDL* Petition. The D.C. Circuit's holding that *forum non conveniens* is foreclosed when "there is no other forum in which [the plaintiff] could reach [the defendant's] property, if any, in the United States," *TMR Energy*, 411 F.3d at 304, cannot stand, when this Court has since unanimously described as "a textbook case for immediate *forum non conveniens* dismissal," an action against Sinochem which sought that "any assets of Sinochem be attached." Amended Complaint, *Malaysia Int'l Shipping Corp. Berhad v. Sinochem Int'l Co. Ltd.*, Civ. Action No. 03-3771, 2003 WL 23904713 (E.D. Pa. 2003).

Moreover, the D.C. Circuit's holding conflicts with this Court's decision in *Continental Grain*, where it *rejected* the argument that an alternative forum's inability to attach particular assets foreclosed *forum non conveniens. Cont'l Grain*, 364 U.S. 19. There, a barge

sunk in Tennessee, and the barge owner and cargo owner disputed which was responsible. *Id.* at 20. The barge owner sued in Tennessee. *Id.* The cargo owner then sued the barge owner *and barge itself* in New Orleans, where the barge was located. *Id.* The barge owner moved to transfer that action to Tennessee under §1404(a), the statutory analog to *forum non conveniens* for domestic actions. *Id.* at 20-21. It was recognized that the case, "if tried in New Orleans, will bring about exactly the kind of mischievous consequences against 'the interest of justice' that §1404(a) was designed to prevent." *Id.* at 21. But the cargo owner "argu[ed] that since the barge was in New Orleans when this 'civil action' was brought and the admiralty *in rem* claim therefore could not have been brought in Memphis at that time, the entire civil action must remain in the inconvenient New Orleans forum." *Id.* at 22. This Court rejected this rule, and "follow[ed] the common-sense approach," recognizing that "[f]ailure to do so would practically scuttle the *forum non conveniens* statute." *Id.* at 24. "[A]lthough any judgment for the cargo owner will be technically enforceable against the barge as an entity as well as its owner, the practical economic fact of the matter is that the money paid in satisfaction of it will have to come out of the barge owner's pocket." *Id.* at 26.

The same "common-sense" reasoning compels the same result here. Like *Continental Grain*, that only a judgment in the U.S. is enforceable against any property of GOB that may exist in the U.S. is not dispositive, when "the practical economic fact of the matter"

is that any satisfaction of the award "will have to come out of [GOB's] pocket." Money is fungible. *See Robers v. United States*, 134 S. Ct. 1854, 1857 (2014). Money is all Newco has sought in this U.S. action. *See* JA 0015, 0466-67. And GOB has offered to pay the award, requesting bank wiring instructions so that it may do so. *Forum non conveniens* is not foreclosed under this Court's precedent.

2. The D.C. Circuit's Holding that there can Never be an Adequate Alternative Forum in a Foreign Arbitration Enforcement Action Is Contrary to *Piper Aircraft.*

Certiorari is compelled because this case highlights the D.C. Circuit's conflict with this Court's decision in *Piper Aircraft*. *Piper Aircraft*, like *TMR Energy*, and now compounded by *Newco*, concerned a Court of Appeals' determination that *forum non conveniens* was categorically unavailable in certain circumstances – there, "that dismissal is automatically barred if it would lead to a change in the applicable law unfavorable to the plaintiff." *Piper Aircraft*, 454 U.S. at 246. This Court rejected that rule: "[t]he Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiff than that of the present forum. The possibility of a change in substantive law should not be given

conclusive or substantial weight in a *forum non conveniens* inquiry." *Id.* at 247.

This Court held that the Court of Appeals' automatic bar "is inconsistent with this Court's earlier *forum non conveniens* decisions," in that "[t]hose decisions have repeatedly emphasized the need to retain *flexibility*." *Id.* at 249 (emphasis added). This Court observed that if an inflexible, categorical bar were adopted, "the *forum non conveniens* doctrine would become virtually useless," and "would lose much of the very flexibility that makes it so valuable." *Id.* at 249-50. *TMR Energy*'s *per se* prohibition on *forum non conveniens*' applicability in Convention actions because "there is no other forum in which [the petitioner] could reach the [defendant's] property, if any, in the United States," is similarly inconsistent with this Court's repeated affirmance of the doctrine's "flexibility." And the D.C. Circuit's characterization here of the doctrine as wholly inapplicable "to actions in the United States to enforce arbitral awards against foreign nations," App. 4, is inconsistent with this Court's emphasis that *forum non conveniens* "is and has long been a doctrine of general application," *American Dredging Co. v. Miller*, 510 U.S. 443, 450 (1993); *Quackenbush v. AllState Ins. Co.*, 517 U.S. 706, 722 (1996).

Piper Aircraft highlighted the problem with a categorical, inflexible approach. It observed "that dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law. This is precisely the situation

in which the Court of Appeals' rule would bar dismissal." 454 U.S. at 249 n.15. The same untenable result occurs here. The Belize Supreme Court found that "NEWCO has brought the claim in the U.S.A. . . . in a way that necessarily involves injustice to the Government of Belize," and "was intended to breach the laws of Belize" JA 0425-26 ¶¶56, 58. "This is precisely the situation in which the Court of Appeals' rule would bar dismissal," contrary to *Piper Aircraft*. *See* 454 U.S. at 249 n.15.

Likewise, this Court identified other "practical problems" with such a categorical rule: "[u]nder the Court of Appeals' holding, dismissal would be barred if the law in the alternative forum were less favorable to the plaintiff – even though none of the parties are American, and even though there is absolutely no nexus between the subject matter of the litigation and the United States." *Id.* at 251-52 & n.17. This same "practical problem" exists here. The D.C. Circuit, by holding that the doctrine "does not apply to actions in the United States to enforce arbitral awards against foreign nations," has ruled that dismissal is barred in cases identical to those where this Court stated the doctrine should be available – where neither party is American and there is no nexus to the U.S.

Moreover, the need for this Court to review the D.C. Circuit's inconsistency with *Piper Aircraft* is pronounced because *TMR Energy* invoked that case as one basis for its rule. *See TMR Energy*, 411 F.3d at 303 (citing, *inter alia*, *Piper Aircraft*, 454 U.S. at 254 n.22). The footnote from *Piper Aircraft* cited by *TMR Energy*

states that "[o]rdinarily, this requirement [that "at the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum"] will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 254 n.22. But *TMR Energy* latched upon this Court's narrow caveat that "[i]n rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied." *Id.* Review is required because the D.C. Circuit has converted what was supposed to be a "rare circumstance" "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory *that it is no remedy at all*," into a categorical prohibition on *forum non conveniens* in Convention actions. *Id.* at 254 & n.22 (emphasis added). This is not a case where the remedy provided in Belize amounts to "*no remedy at all*," where GOB has already *offered to pay* subject to its currency and tax laws, Belize permits confirmation actions, and has a statutory process for recovering arbitral awards against GOB, *see BSDL* Petition Reply 3-6. The exception here has swallowed the rule, requiring review by this Court.

3. The D.C. Circuit's Holding Foreclosing Foreign States from Invoking *Forum Non Conveniens* Is Contrary to This Court's Recognition that the Doctrine Was Unchanged by the FSIA.

Lastly, the D.C. Circuit's prohibition on *forum non conveniens*' applicability "to actions in the United States to enforce arbitral awards *against foreign nations*," App. 4, is inconsistent with this Court's recognition in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983) that the Foreign Sovereign Immunities Act [("FSIA")] "does not appear to affect the traditional doctrine of *forum non conveniens*."

Certiorari is required to resolve the D.C. Circuit's conflict with this Court's *forum non conveniens* jurisprudence.

II. REVIEW IS NECESSARY TO CLARIFY THE APPLICATION OF THE CONVENTION'S ARTICLE V(2)(b) PUBLIC POLICY DEFENSE.

Over three decades ago, this Court highlighted Article (V)(2)(b)'s significance as a basis for refusing recognition or enforcement of an award if doing so "would be contrary to the public policy of that country." Article V(2)(b); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). But the absence of further guidance from this Court in the decades since has led to confusion in the circuit courts regarding the proper application of Article V(2)(b) and its winnowing

to a virtual nullity, as addressed in the *BSDL* Petition, and reflected here.

A. Certiorari Is Required to Resolve Confusion as to When the Public Policy in Favor of Arbitration Yields to Countervailing Interests.

This case implicates the need for Supreme Court guidance on the weight to be given the public policy in favor of arbitration, and when that interest must yield to countervailing public policies. First, here the D.C. Circuit held that the pro-arbitration policy will *always* trump countervailing public policy concerns related to "international comity." App. 3-4 (based on the "design" of the Convention, "[a]ny public policy interest in 'international comity,' therefore, does not here override the 'emphatic federal policy in favor of arbitral dispute resolution' "). But given that it is the U.S.'s "implementation of the Convention" that animates this federal policy in favor of arbitration in the international context, *see Mitsubishi*, 473 U.S. at 631, Article V(2)(b)'s inclusion in the Convention requires that the pro-arbitration policy at some point yield. This is highlighted in *Mitsubishi*, the case that recognized this "emphatic federal policy in favor of arbitral dispute resolution" in the Convention, yet credited Article V(2)(b)'s vitality as a counterbalance to that policy, and emphasized "international comity" considerations. *Id.* at 638 (invoking Article V(2)(b) in explaining that "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure

that the legitimate interest in the enforcement of the antitrust laws has been addressed"). Second, the D.C. Circuit ignored GOB's argument that by confirming this award, the District Court enabled Newco to avoid its Belizean tax obligations, in contravention of U.S. public policy, which is discussed below.

Moreover, the confusion among the circuits in any attempt to balance these competing public policies is illustrated again by the divergent findings in *Figueiredo* and this case. There, the Second Circuit balanced the same interests present here (albeit in the *forum non conveniens* context), and found that the pro-arbitration policy must yield. 665 F.3d at 391-92 ("Although enforcement of such awards is normally a favored policy of the United States and is specifically contemplated by the Panama Convention, that general policy must give way to the significant public favor of Peru's cap statute.").

Further, there is confusion among the circuits as to whether any formal balancing of interests is even the appropriate analysis. Some circuits, as well as the ILA, appropriately recognize that the generally-accepted standard requiring "violat[ing] the forum state's most basic notions of morality and justice," already narrows the scope to "well-defined" and "dominant" countervailing public policies that are sufficient to trigger Article V(2)(b)'s applicability. *See Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096-97 (9th Cir. 2011); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir.

2003); *see also* ILA, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards at ¶¶13-14, 16 (2002). Others, like the D.C. Circuit, purport to balance countervailing policies against the policy in favor of arbitration. *See* App. 3-4; *see also Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft MBH & CIE KG*, 783 F.3d 1010, 1017 (5th Cir. 2015); *see also BSDL*, 5 F.Supp.3d 25, 43 (D.D.C. 2013); *aff'd*, 668 F.3d 724. This Court should clarify the proper approach.

B. Certiorari Is Required to Resolve Disagreement as to What Public Policies Are Cognizable Under Article V(2)(b).

Critical under either formulation of the public policy defense is clarification from this Court as to what public policies are cognizable under Article V(2)(b). Although such public policies require that "enforcement would violate the forum state's most basic notions of morality and justice,"[12] *see* App. 3, there is no consensus as to how to identify public policies that fall within

[12] This standard was articulated in *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De L'Industrie Du Papier (Rakta)*, 508 F.2d 969 (2d Cir. 1974). Although this standard has been recognized by most circuits, the ILA, and the Restatement, its invocation has not led to any consensus in approach or results. *See, e.g.*, *BCB*, 2016 WL 3042521, at *1 (quoting *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007)); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) (quoting *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 n.2 (6th Cir. 1996)); *accord Ministry of Def.*, 665 F.3d at 1096-97; *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d

that criteria. This need for clarity has been recognized by the ILA.[13] ILA Report at ¶23 ("public policy remains the most significant aspect of the Convention in respect of which such discrepancies might still exist").

This is highlighted by the D.C. Circuit's holding, which disavowed any "public policy interest in 'international comity'" for Article V(2)(b) purposes. App. 4. That conflicts with the Restatement, which has *credited* "international comity" as a basis for the public policy defense. The Restatement recognizes that "a U.S. court might plausibly regard recognition or enforcement of an award to be so detrimental to a foreign State's paramount interests that it *offends international comity* and is, to that extent, repugnant to U.S. public policy." Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-18 Rptr. Note b (emphasis added). The Belize Supreme Court's finding that the U.S. action "involves injustice to the Government of Belize, and in a way that is prejudicial to the public interest in Belize," JA 0426 ¶58, means that enforcement of the award would necessarily be "detrimental to [Belize's] paramount interests." The "public interest in Belize, that tax be paid by all," App. 426 ¶58, moreover, is echoed in the United States.

Cir. 2006); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); ILA Report ¶12; Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-18 cmt. b; [2013] CCJ 5 (AJ) ¶26 & n.13.

[13] ILA reports have been favorably cited by this Court. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring); *United States v. Louisiana*, 394 U.S. 11, 24 n.29 (1969).

Here, there is a "broad public interest in maintaining a sound tax system." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Courts recognize a strong public policy interest in the collection of federal taxes. *See Atlas Tool Co., Inc. v. Comm'r of Internal Revenue*, 614 F.2d 860, 871 (3d Cir. 1980) (there is a "favored public policy of the collection of the federal revenue. . . ."); *see also Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 523 (1984). As this Court has held, "taxes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. U.S.*, 295 U.S. 247, 260 (1935). And "tax laws" are credited by the ILA as a public policy for Article V(2)(b). ILA Report at ¶30.

Those interests and policies are fundamentally frustrated by flagrant efforts to circumvent and "breach the laws," as occurred here. *See* App. 425 ¶56. GOB's tax claims *cannot* be tried in the U.S. because of the U.S.'s "revenue rule," which "generally barred courts from enforcing the tax laws of foreign sovereigns." *See Pasquantino v. United States*, 544 U.S. 349, 352 (2005). But by confirming the award, the D.C. Circuit effectively countenanced Newco's breach of Belize's laws, while requiring GOB to breach its own legal obligations. GOB cannot disregard its obligation to collect taxes due in paying Newco. As this Court has held, "[t]he Government . . . cannot indulge the luxury of declining to hold the taxpayer liable for his taxes. . . ." *United States by and through I.R.S. v. McDermott*, 507 U.S. 447, 455 (1993).

The appropriate way for the U.S. courts to disentangle themselves from these tax issues, while

recognizing the strong U.S., Belizean, and international public policy and comity interests at issue, was to refuse enforcement under Article V(2)(b) so that this matter could be litigated in Belize.[14] That the D.C. Circuit instead adhered to the public policy in favor of arbitration and disregarded the countervailing policies highlights the need for guidance from this Court.

III. THE IMPORTANCE OF THE *FORUM NON CONVENIENS* AND ARTICLE V(2)(b) ISSUES SUPPORTS CERTIORARI.

The importance of the two issues presented here is pronounced due to the "international comity" concerns underlying them both. This Court has emphasized the important need for circuit courts to take note of international comity considerations before adopting a rigid pro-jurisdiction test, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 762-63 (2014) ("The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed."), and has highlighted international comity's centrality to the Convention, *Mitsubishi*, 473 U.S. at 628-29. Yet "international comity" considerations were

[14] Article V(2)(b)'s applicability is compelled under either a balancing approach, or narrow reading of the cognizable public policies. For the reasons provided by the Restatement, *see supra* II.B., even under a narrow reading of Article V(2)(b), "international comity" is a "clear-cut" countervailing public policy that compels refusal of enforcement, particularly where the party seeking confirmation is *admittedly* doing so to avoid its foreign tax obligations. The same result is compelled under a balancing test, for the reasons explained above and in *Figueiredo*.

rejected by the D.C. Circuit in its *forum non conveniens* and Article V(2)(b) analysis in summary fashion. App. 3-4. This is significant, given the possibility that such orders "might provoke 'reciprocal adverse treatment of the United States in foreign courts.' " *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 (2014) (quoting Brief for United States as *Amicus Curiae* 18).[15]

As in *BSDL*, the importance of the issues raised in these petitions is heightened since the D.C. Circuit is the default venue for actions against foreign states under the FSIA. *See* 28 U.S.C. §1391(f)(4); *BSDL* Petition 3. This now takes on added significance, given that the D.C. Circuit has expanded *TMR Energy* so that "forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations." App. 3-4; *BCB*, 2016 WL 3042521 at *2. Review is required where the sole default venue for suits against foreign states is also the only circuit to have categorically foreclosed *forum non conveniens*' applicability to foreign states in Convention actions. Unless this Court grants review, the D.C. Circuit's ruling will effectively become the law of the land despite the circuit split, since plaintiffs could choose to sue foreign

[15] This Court recognized these reciprocity concerns in *NML Capital*, but held it could not alter what the FSIA's plain text compelled, and found "[t]hese apprehensions are better directed to" the legislature. *NML Capital*, 134 S. Ct. at 2258. Here, in contrast, *forum non conveniens* is a non-codified common law doctrine, and Article V(2)(b) already permits courts to refuse enforcement where it "would be contrary to the public policy of that country."

states in D.C. and entirely frustrate the doctrine's applicability.

Review of both issues is critical because the D.C. Circuit's holdings limit these doctrines in the very circumstances in which they are most vital. *Forum non conveniens* is foreclosed where it should be most robust – where "none of the parties are American, and even though there is absolutely no nexus between the subject matter of the litigation and the United States." *See Piper Aircraft*, 454 U.S. at 251 n.17. And by categorically doing so, "[t]he Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions . . . [which] have repeatedly emphasized the need to retain flexibility," *id.* at 249, and its general applicability in FAA actions, *see, e.g.*, *Monegasque*, 311 F.3d at 495; *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 870 n.6 (10th Cir. 1999). As for Article V(2)(b), the D.C. Circuit's rigid invocation of the policy in favor of arbitration has rendered one of the few bases for refusing enforcement superfluous. Moreover, review is important because, while "[t]he New York Convention's goal was to provide uniform procedures for enforcing arbitral awards,. . . . public policy remains the most significant aspect of the Convention in respect of which such discrepancies might still exist." ILA Report at ¶23.

The division in the courts and need for Supreme Court guidance has been noted by commentators as to both of these issues, as highlighted in the *BSDL* and

BCB Petitions.[16] *See BSDL* Petition 36-37; *BCB* Petition 33-34. Moreover, the need for review is underscored by the prior positions of the United States, that, contrary to the D.C. Circuit, "*forum non conveniens* may be considered in an action to confirm and enforce an arbitral award," *Figueiredo*, U.S. Br. at 6, and that the United States has not "address[ed] what sort of public policy could come within article V(2)(b)," *Ministry for Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, Nos. 99-56380, 99-56444, Brief for the United States as Amicus Curiae Supporting Affirmance at 4 (9th Cir. May 4, 2011). This highlights the importance of these issues and need for this Court's review.

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[16] On *forum non conveniens*, *compare* Thomas H. Oehmke and Joan M. Brovins, *Commercial Arbitration* (3d ed.) §41:101 (2015); Jay E. Grenig, *Enforcing and Challenging Int'l Comm. Arbitral Awards* §2:7 (2015); Charles H. Brower II, *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, Kluwer Arbitration Blog, 2012 WLNR 2324717 (February 2, 2012) (all supporting *forum non conveniens*' application), *with* Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-29(a); Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 3, 2013) §4-29(a); Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 4, 2015) §2-25(b); *and* ABA, Resolution 107c (2013) http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_107C.docx (all criticizing *forum non conveniens*' application).

On Article V(2)(b), *see* International Bar Association, *Report on the Public Policy Exception in the New York Convention*, General Report and United States Country Report, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx (last visited July 23, 2016).

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

This case, along with GOB's analogous petitions in *BSDL* and *BCB*, is the right vehicle for this Court to resolve these issues. "The doctrine of *forum non conveniens* is an instrument of *justice*," *Rogers v. Guar. Tr. Co. of N.Y.*, 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting) (emphasis added), and this Court is presented with the opportunity to resolve *forum non conveniens*' applicability to Convention actions against a foreign state in a case that the Belize Supreme Court has held "necessarily involves *injustice* to the Government of Belize," *see* JA 0426 ¶58 (emphasis added). This is thus the perfect case for this Court to test the limits of the D.C. Circuit's rule categorically barring *forum non conveniens*' applicability in arbitration confirmation actions against foreign states.

This is also a perfect vehicle for this Court's review because it not only presents a square circuit split between the D.C. and Second Circuits, but also presents essentially the *same factual grounds for dismissal* found in *Figueiredo*, 665 F.3d at 389-93. This applies to the question of the alternative forum's adequacy (where the foreign state in both has agreed to payment subject to its laws for doing so), and the balancing of public policies (both weighing international comity considerations against the policy in favor of arbitration).

The time to resolve these issues is now. The Second Circuit's and D.C. Circuit's positions are well-established and unchanging. And with the D.C. Circuit

as the default venue for actions against foreign states, without review in these three GOB-related actions, the D.C. Circuit's rule will effectively become the *de facto* law of the land in arbitration confirmation actions against foreign states. Certiorari should be granted.

CONCLUSION

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

Respectfully submitted,

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July 26, 2016

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7077 **September Term, 2015**
FILED ON: MAY 13, 2016

NEWCO LIMITED,

APPELLEE

v.

GOVERNMENT OF BELIZE,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-02010)

Before: ROGERS, GRIFFITH, and KAVANAUGH, *Circuit Judges.*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the District Court is hereby **AFFIRMED**.

In 2002, Newco Limited signed an agreement with the Government of Belize to operate and develop the country's international airport. Less than a year later, Belize repudiated the agreement. Newco invoked the agreement's arbitration provisions, and an arbitral tribunal in Miami issued an award in Newco's favor for approximately $4.3 million. Belize agreed to pay the award immediately, subject to two conditions. First, Belize insisted on paying the award in Belize dollars rather than in U.S. dollars as required by the agreement. Second, Belize refused to pay Newco without first subtracting any unpaid taxes owed by the company. And according to Belize, Newco owed the Belize treasury approximately $2.7 million.

Newco brought suit to enforce the award in the U.S. District Court for the District of Columbia. Shortly thereafter, Belize brought its own suit in the Belize Supreme Court. Belize obtained an anti-suit injunction against Newco from the Belize court, and Newco's suit in the District Court was stayed as Newco litigated in Belize. The Belize Supreme Court ultimately agreed with Belize that the country could subtract unpaid taxes and pay the remainder of the award in Belize dollars. Newco refused to agree to those conditions and renewed its effort to enforce the arbitral award in the District Court. Belize moved to dismiss the suit on a variety of grounds, including international comity, public policy, and forum non conveniens. The District Court rejected Belize's arguments and enforced the award. *See Newco Ltd. v. Belize*, No. 08-2010, 2015 WL 9810457 (D.D.C. Aug. 7, 2015).

We affirm. Under the Federal Arbitration Act, U.S. courts must enforce foreign arbitral awards unless they find "one of the grounds for refusal or deferral of recognition or enforcement of the award specified in" the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1958), also known as the New York Convention. 9 U.S.C. § 207. In this case, Belize asks us to deny enforcement on the basis of international comity. Belize argues that the Convention instructs courts to enforce arbitral awards "in accordance with the rules of procedure of the territory" where the enforcement action is brought. New York Convention art. III. But Belize has failed to provide support for its assertion that the doctrine of international comity is a "rule of procedure" of the United States.

Belize also claims that the District Court should have refused to enforce the arbitral award based on an alleged public policy interest in international comity. Under the New York Convention, courts may decline to enforce an arbitral award if "enforcement of the award would be contrary to the public policy of that country." New York Convention art. V(2)(b). But courts should rely on the public policy exception only "in clear-cut cases" 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) (citations omitted). In this case, Belize has not shown that enforcement would violate the most basic U.S. notions of morality and justice. By design, the New York Convention allows investors to

choose to resolve disputes with states through neutral tribunals in neutral countries. Any public policy interest in "international comity," therefore, does not here override "the emphatic federal policy in favor of arbitral dispute resolution." *Belize Social Development Ltd. v. Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (internal quotation mark and citation omitted).

Belize contends that the District Court should have dismissed the enforcement action on forum non conveniens grounds. That argument is squarely foreclosed by our precedent. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), we held that the doctrine of forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations. *See id.* at 303-04.

We have carefully considered all of Belize's arguments. We affirm the judgment of the District Court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NEWCO LIMITED,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 08-2010 (RJL)**
THE GOVERNMENT OF BELIZE,	)	
Defendant.	)	

MEMORANDUM ORDER
August 7, 2015 [Dkt. # 14, 43]

Plaintiff Newco Limited ("Newco" or "plaintiff") brought this action pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201, *et seq.*, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 21 U.S.T. 2517, to confirm an arbitral award made in favor of Newco against defendant Government of Belize ("GOB" or "defendant"), arising out of an agreement whereby Newco agreed to operate and make capital improvements to an international airport in Belize. *See generally* Complaint [Dkt. # 1] ("Complaint" or "Compl."). Currently before the Court is Newco's motion to confirm foreign arbitration award and to enter judgment. *See* Pl.'s Mot. to Confirm Foreign Arbitration Award and to Enter Judgment [Dkt. # 43] ("Motion" or "Mot."). Upon due consideration of the pleadings, the relevant law, and the entire record

herein, plaintiffs motion is GRANTED, and judgment shall be entered in favor of Newco.

The arbitration at issue arose from a 30-year concession agreement entitling Newco to operate and undertake substantial capital improvements to the only international airport in Belize. *See* Compl. at Ex. 1 ("Concession Agreement"). The Concession Agreement included a dispute resolution clause providing for arbitration of any controversy under the Concession Agreement under the UNCITRAL Arbitration Rules in Miami, Florida. *Id.* at Art. XXIX. Eleven months after the parties signed the Concession Agreement, the GOB terminated it without cause. Newco demanded arbitration in accordance with the Concession Agreement, and an arbitral tribunal issued a unanimous final award in favor of Newco and against the GOB. *See* Compl. at Ex. A (the "Award"). The tribunal concluded that the GOB had breached its obligations under the Concession Agreement, and awarded Newco $4,259,832.81, plus its cost of arbitration, plus interest of 8% per annum, compounded quarterly, for the period from the date of the Award to the date of payment. *Id.* ¶¶ 190-91, 194-96.[1] To date, the GOB has not complied with the Award.

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[1] The GOB then had a three-month opportunity to seek to vacate, modify, or correct the Award by filing a motion in the district where the award was rendered, which was Miami. 9 U.S.C. §§ 9-10. The GOB did not seek to vacate, modify, or correct the Award within this three-month period.

Almost immediately after Newco commenced this action to confirm the Award, the GOB responded by initiating a lawsuit against Newco in Belize requesting a worldwide anti-suit injunction against Newco and declarations that the Award was deficient in various ways. *See* Mot. at 5-6. The Belizean Supreme Court (the first instance court in Belize) entered the worldwide anti-suit injunction, and the GOB then moved to stay or dismiss this action. *See* Motion to Dismiss the Complaint or Stay the Action [Dkt. # 14]. On June 30, 2009, I granted the GOB's motion in part, granting the stay in this action pending resolution of the proceedings in the Belizean Supreme Court. *See* Minute Order, entered June 30, 2009.

On August 28, 2013, the Belizean Supreme Court issued its final opinion. *See* Dkt. # 43-3] ("Belize Opinion"). The court found that Newco's claim for an enforcement order was "well founded," and rejected certain of the GOB's arguments, including the argument that Belize was not a party to the New York Convention. *Id.* ¶¶ 24-25.

An arbitration award falls under the New York Convention if (i) the award arises from a commercial legal relationship between the parties; (ii) there was a written agreement to arbitrate disputes arising from that relationship; (iii) the agreement provided for arbitration proceedings to take place in a signatory country to the New York Convention; and (iv) at least one of the parties is not an American citizen. *See* 9 U.S.C. § 202; *Invista N. Am. S.A.R.L. v. Rhodia Polyamide Intermediates S.A.S.*, 503 F. Supp. 2d 195, 201 (D.D.C.

2007). The Award in this case meets all of these criteria: It is based on a commercial legal relationship to provide services, the Concession Agreement contained a written provision that disputes would be resolved by arbitration, the dispute resolution provision called for arbitration to take place in the United States, which is a signatory to the New York Convention, and neither of the parties is an American citizen. Thus, the Court has subject matter jurisdiction to confirm the Award under 9 U.S.C. § 203.[2]

The Court has personal jurisdiction over the GOB under 28 U.S.C. § 1330(b), which provides that personal jurisdiction over a foreign state shall exist for every claim as to which the district court has jurisdiction under 28 U.S.C. § 1330(a) where service has been made pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608. Under FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994); *see also Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002) (personal jurisdiction over a foreign sovereign is established through 28 U.S.C. § 1330(b)). Newco properly served the notice of suit, summons, complaint, and related documents, and the Clerk of this Court received the return of service on

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[2] "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 . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203.

February 6, 2009. *See* Affidavit: Proof of Service as to Foreign Defendant [Dkt. # 8]. Thus, the requirements of personal jurisdiction are met.

As our Circuit recently held in a similar case against the GOB, a court may refuse to enforce an award "only on the grounds set forth in Article V of the [New York] Convention." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (quoting *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007)). The GOB raised only one defense under Article V of the New York Convention: that the Award had "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," due to the pending litigation in the Supreme Court of Belize. *See* New York Convention, at Art. V(1)(e); Mem. in Supp. of Mot. to Dismiss, at p.15 [Dkt. # 14]; *see also* Minute Order, entered June 30, 2009 (granting stay until final adjudication of action in the Supreme Court of Belize). However, this argument is now moot because, even assuming the Belizean Supreme Court ever had the proper authority to set aside the Award,[3] the Belizean

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[3] That the Belizean Supreme Court ever had authority to set aside or suspend the Award under the New York Convention is suspect because the law under which the "award was made" was United States procedural law, even though the arbitral panel applied Belize substantive law. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d at 727 ("The phrase 'under the law of which' in Article V(1)(e), however, refers to the procedural law governing the arbitration, not the substantive law governing the Agreement."). Accordingly, under the New York Convention, only a

Supreme Court has not, in fact, set aside the arbitral award, but has found the award "well founded." *See* Belizean Supreme Court Decision [Dkt. # 43-3].[4]

Accordingly, it is hereby

ORDERED that plaintiffs motion to confirm foreign arbitration award and to enter judgment [Dkt. # 43] is **GRANTED**; it is further

ORDERED that defendant's motion to dismiss the complaint or stay the action [Dkt. # 14] is **DISMISSED** as moot; it is further

ORDERED that judgment shall be entered in favor of Newco Limited and against the Government of Belize pursuant to the arbitral award issued on June 23, 2008, in the amount of $4,420,586.63, plus interest at 8% annually, subject to quarterly compounding, until paid.

SO ORDERED.

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

United States court could have properly set aside or suspended the Award. *See* 9 U.S.C. §§ 9-10.

[4] The GOB makes numerous other attenuated arguments that the arbitral award should be set aside, *i.e.*, because of procedural deficiencies, comity, *forum non conveniens*, the Panama Convention, and United States public policy. *See* Def. GOB'S Mem. in Opp. to Pl. Newco's Pet. to Confirm Arb. Award [Dkt. # 44]. However, none of these arguments have merit.

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 acceding 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.
201. Enforcement of Convention.
202. Agreement or award falling under the Convention.
203. Jurisdiction; amount in controversy.
204. Venue.
205. Removal of cases from State courts.
206. Order to compel arbitration; appointment of arbitrators.
207. Award of arbitrators; confirmation; jurisdiction; proceeding.
208. Chapter 1; residual application.

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.

IN THE SUPREME COURT
OF BELIZE, A.D. 2008

CLAIM NO. 880 OF 2008

BETWEEN:

ATTORNEY GENERAL CLAIMANT

AND

NEWCO LIMITED DEFENDANT

Ms. Lois Young, SC, for the Claimant
Mr. Glenn Godfrey, SC, and Mr. Aldo Reyes for the Defendant

AWICH Ag. J.

28.08.2013 JUDGMENT

1. This judgment was pending when I retired from the Supreme Court, the trial court. It was my belief that, the interlocutory judgment (decision) dated 9 February, 2009 in which I made an interim anti-foreign suit injunction order against NEWCO Ltd., and the striking-out order I made in a related claim, No. 811 of 2009, by NEWCO of misfeasance against the Commissioner of Income Tax, ended this Claim. NEWCO at the time informed the court that it would appeal both decisions. It has not proceeded with appeals, instead NEWCO proceeded to challenge assessments to tax made by the Commissioner under the Income and Business Tax Act, Cap. 55, as suggested in my interlocutory

judgment of 9 February, 2009 and in the proceedings leading to the order made striking out Claim No. 811 of 2009.

2. The tax assessments were at the centre of this Claim and in the misfeasance Claim. The Government had tendered payment of an arbitral award, the subject of this Claim subject to tax liability. I understand that, the challenge to the tax assessments has reached the stage of appeal to the Income Tax Appeal Board under the Act, but has been stayed. That has made judgment in this substantive claim necessary even though the liability of NEWCO to tax is not yet conclusive. It had been my view that once the final position of the tax liability of NEWCO was known, one or both parties would reconsider their position in this Claim. Moreover, it would have been better for the court to have the final tax position of NEWCO instead of the position under appeal.

The Facts

3. In this Claim the Attorney General is the claimant on behalf of the Government of Belize, and NEWCO is the defendant. It is a company incorporated in Belize on 16 October, 2002 under the Companies Act, Cap. 250 of the Laws of Belize, by a consortium of German and American companies led by Lufthansa Consulting GmbH. The business of NEWCO in Belize is primarily to carry out airports development, air transportation and associated businesses. Its registered office is at No. 1876 Hutson Street, Belize City Belize.

4. The transaction, the subject matter of this Claim, is the following. On 27 November 2002, the Government of Belize, the Belize Airports Authority and NEWCO entered into a "Concession Agreement" under which NEWCO was granted, for its own account and risk, the risk and obligation to operate, develop and improve the Phillip S.W. Goldson International Airport," for 30 (thirty) years. It would collect and keep airport revenue, operate duty free businesses at the airport, and could lease out land and business spaces, carry out other related businesses at the airport, and maintain the airport and facilities in accordance with international standard, the ICAO standard. Belize Airports Authority is a statutory corporation charged with the duty to administer, control and manage prescribed airports. It had to concern itself with what would be agreed to in the Concession Agreement. It is not a party to this Claim.

5. It was said that, "notwithstanding significant progress," by NEWCO over eleven months, the Government wrongfully terminated the Concession Agreement by a letter dated 27 October, 2003. The agreement contained an arbitration clause. Parties considered that, a dispute arose between the Government and NEWCO. The dispute was referred to arbitration in Miami, Florida, USA, in accordance with Article XXIX of the Concession Agreement, the arbitration clause.

6. The arbitrators summarised the substance of the dispute at paragraph 119 of their determination, in these words: "119. In its prehearing brief, NEWCO characterized these events as follows: 'Ten days after wrongfully terminating the

concession agreement, the respondents announced that they had awarded the concessions to a local group comprised of local companies owned by: Samira R. Musa (niece of the Prime Minister of Belize), Pablo Espat (chairman of the Belize Airports Authority), David Espat (brother of the Minister of National Development, Investment and Culture) and Christopher Roe. The new group's directors included Edward Musa (brother of the Prime Minister of Belize). Claimant understands that the new group was formed as Belize Airport Concession Company Ltd; and has taken over operations at the airport as concessionaire. The new group did not obtain the required financing until 2005, but was permitted to operate the airport for its own account in the interim". Failing to obtaining adequate financing by a certain deadline was the reason that the Government gave for cancelling the Concession Agreement with NEWCO.

7. The Government and NEWCO, acting by counsel, attended the arbitration in the U.S.A. On 23 June, 2008, the arbitrators made an award in favour of NEWCO. The total sum awarded was US$4,259,832.81 plus interest at 8% per annum compounded quarterly, from the date of award until the date of payment. Costs in the sum of US$160,753.82 were also awarded to NEWCO. The Government does not challenge the award, its complaint is about the currency in which payment is to be made, and offsetting tax said to be owed by NEWCO in Belize.

8. By a letter dated 10 July, 2008 to the Government, NEWCO demanded payment of the award. The Government responded by a letter dated 30

September, 2008 that: (1) the Government be provided with an official sealed copy of the award; (2) NEWCO provides the Government with powers of attorney appointing an identified person who would deal with the Government; (3) according to S:21 of the Central Bank Act, Cap. 262 of Laws of Belize, the award should have been expressed in Belize dollar, and was payable in Belize dollar in Belize; (4) NEWCO provides the name of a local bank at which payment would be made; and (5) any income tax owed by NEWCO would be deducted from the award.

9. A certified and sealed copy of the award was required under the Rules, and the Arbitration Act anyway. It was subsequently received by the Government. Mr. Robert T. Wray, a director of NEWCO who also at times acted as its attorney was nominated the person to deal with the Government in the payment of the award. His affidavits and letters showed that he was vexed about the response by the Government, nonetheless NEWCO did not file a claim for enforcement of the award in the Supreme Court of Belize.

10. On 21 November, 2008 NEWCO filed "a complaint" (a Claim) No. 1:08-CV-02010, in the United States District Court for the District of Colombia [sic], in Washington D.C. against the Government of Belize. The Claim was for confirmation and enforcement of the arbitration award (UNCITRAL Arbitration Award) made against the Government on 23 June, 2008. The Government filed its "Notice of Appearance" on 2 February 2009; and obtained extension of time to file its "answer" (defence) to

the complaint, the answer was initially due on 9 February, 2009.

11. In the meantime, on 31 December 2008, the Government filed its Claim, this Claim in this court, the Supreme Court of Belize, the first instance court, for declarations consistent with its response on 30 September, 2009, and obtained an interim injunction order of this Court restraining NEWCO from proceeding with its Claim in the United States District Court for the District of Columbia. On 9 February, 2009 the interim injunction order was extended until the determination of this Claim or until further order of this Court.

12. It seems the United States District Court for the District of Columbia became aware of the interim injunction order made by this Court, and has taken upon itself to act with international comity; something that this Court acknowledges with appreciation. For my part, I must make it clear at this early stage that, I do not pretend or desire to decide this Claim in any way that may be an interference with the jurisdiction of the U.S.A. District Court for the District of Columbia. It is the law of Belize that, when considering a claim or an application for anti-foreign suit injunction order, courts in Belize must act with restrain [sic] and international comity.

This claim, grounds and defences.

13. The Claim of the Attorney General, on behalf of the Government of Belize, in this Court was by a fixed date claim form dated and filed on 31 December, 2008. It is for the following:

"1. A declaration that in accordance with section 21 of the Central Bank of Belize Act, Chapter 262 of the Laws of Belize, the Final Award dated 23 June 2008 ("the Award") issued by the Arbitration Tribunal in the dispute between NEWCO limited, the Government of Belize and the Belize Airports Authority arising out of the Concession Agreement dated 27 November 2002 between the said parties is payable in Belize dollars.

2. A declaration that in accordance with section 58 of the Income and Business Tax Act, Chapter 55 of the Laws of Belize, the Financial Secretary, Ministry of Finance, is bound to deduct the sum of Bz$5,477,805.00 from the Award and pay over the same to the Commissioner of Income Tax, in compliance with a garnishee order dated, 8th October 2008, ("Demand of Third Parties") issued and served by the Commissioner of Income Tax.

3. A declaration that the interest on the Award cannot and will not commence until the Defendant has provided the Claimant with duly authorised payment instructions for payment to be made in Belize dollars to a bank or financial institution in Belize.

4. An order restraining the Defendant from taking any or any further steps in the continuation or prosecution of the Complaint filed by the Defendant against the Government of Belize in the United States District Court for the District of Columbia on or about the 21st November 2008 (Case: 1:08-CV-02010), or to

commence or continue any other legal or arbitration proceedings in any court or jurisdiction outside Belize relating to or arising out of the Award, or in respect of any matter contained in the Concession Agreement dated 27th November 2002 between NEWCO Limited, the Government of Belize and the Belize Airports Authority.

5. Further or other relief.

6. Costs."

14. The Claim was supported by the first and second affidavits of Mr. Gian Gandhi, Director General of International Financial Services Commission of Belize, an affidavit of Mr. Joseph Waight, Financial Secretary in the Ministry of Finance, an affidavit of Ms. Marilyn Ordonez, Acting Commissioner of Income Tax, and an affidavit of Mr. Juan C. Basombrio, an attorney acting for the Government of Belize in the Claim filed in the U.S.A. District Court for the District of Columbia, in Washington D.C.

15. NEWCO opposed the Claim by filing five affidavits of Robert Wray, in his capacities as a director of NEWCO and an attorney acting for NEWCO in the Claim in the U.S.A. District Court, and an affidavit of Carl K. Vercollosse. The defences were the following:

1. The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 21 U.N.T.S; "the New York Convention", and the Rules of the United Nations Commission on International Trade Law, Resolution No. 31/98 of 15

December 1976, applied to Belize and the United States of America, and to the enforcement of the arbitral award made.

2. NEWCO had filed a complaint No. 1:08-CV-02010 in the U.S.A. District Court for the District of Columbia to confirm and enforce the award by the arbitrators, this Court has no jurisdiction any more;

3. NEWCO was entitled to bring proceedings for the enforcement of the award by the arbitrators in the courts of the US.A. or of any country that was a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 10 June 1958, and was entitled to bring the Claim under the arbitration clause at article XXIX of the Concession Agreement between the parties under which the parties agreed to refer dispute to arbitration in Miami, Florida, U.S.A., in accordance with United Nations Commission on International Trade Law Rules (resolution No. 31/98 of the United Nations General Assembly), 15 December 1976 – the UNCITRAL Rules.

4. The business tax assessments and interests totalling BZ$5,477,805.00 was not signed by the Commissioner of Income Tax or a revenue officer, the assessments were "fraudulent", NEWCO had never received any income in Belize in the years 2013 [sic] to 2008.

5. NEWCO objected to the tax assessments and appealed to the Income Tax Appeal Board.

6. NEWCO has since filed a court Claim for misfeasance against the Commissioner of Income Tax in the Supreme Court of Belize (this Court).

Determination

16. The Claim by NEWCO against the Commissioner of Income Tax for misfeasance has been struck out by this Court, and the court has not been shown any notice of appeal against the order striking out the Claim. In any case, the misfeasance Claim was not relevant to any of the declarations claimed by the Attorney General in this Claim. The main issues in this Claim are: whether the award by the arbitrators is payable in Belize dollar and in Belize; whether NEWCO should be restrained by an order of this Court from proceeding with its Claim or related Claims in the U.S.A. District Court for the District of Columbia, and from commencing any related Claims in any other court outside Belize; and whether the Financial Secretary is entitled to deduct business tax from the arbitral award made in favour or [sic] NEWCO.

Allegation of fraudulent assessment to tax.

17. The Acting Commissioner of Tax, Marilyn Ordonez has sworn an affidavit in which she deposed that, she had confirmed in a letter to attorneys for NEWCO that, the notices of assessments of NEWCO to tax for the period January, 2003 to 31 August, 2008 were valid. That disposes of the question of fraudulent assessments. In Belize fraud must be pleaded with particulars. NEWCO did not give any particulars of the fraud pleaded.

18. In any case, whether or not the notices of the assessments were fraudulent or inaccurate is not for this Court to decide at this stage. There is a statutory regime for pursuing a complaint regarding tax assessment. The law is in *sections 30 to 45 of the Income and Business Tax Act.* Under *S.42* a complaint is made to the Commissioner of Income Tax who will be obliged, "to review and revise the assessment". If the person assessed still disagrees, he may by notice to the Income Tax Appeal Board state his grounds of objection. The Board shall then summon the person assessed and the Commissioner to a hearing and decide the appeal. If the person assessed is still dissatisfied, he may appeal under *S.43* on the ground of, "error in a point of law," to a judge of this Court. The decision of the judge is final.

19. While objection proceedings are underway, the person assessed must pay the tax assessed in the first place. A notice of a review or of an appeal does not suspend an assessment, the entire tax assessed must be paid before the review, objection or appeal is pursued – see *S.53(2) of the Act.* That provision means that in this Claim I must treat the assessments to tax so far made and reviewed by the Commissioner as payable by NEWCO rightaway, regardless of the fact that an appeal is currently before the Appeal Board. It follows that the Commissioner of Tax having known that a sum of money is owed by the Government, as an arbitral award to NEWCO, and that NEWCO was unwilling to pay the tax owing, the Commissioner was entitled to demand from the Financial Secretary

the sum owed as tax. The Commissioner has so demanded by a garnishee order; the Financial Secretary is obliged to pay over the tax demanded.

UNCIRAL [sic] *Rules*

20. There is no issue regarding the applicability of the Arbitration Rules of the United Nations Commission on International Trade Law, the "UNCIRAL [sic] Rules", to the arbitration, the subject of this Claim. In any case, the parties agreed in the arbitration clause (the arbitration agreement) that, UNCIRAL [sic] Rules would apply to an arbitration that would arise, and that such an arbitration would be held in Miami, Florida, U.S.A. The agreement at article XXIX states as follows:

    "Any controversy, except for those specifically dealt with under the terms of this Agreement, pertaining to the signing, execution, performance development and termination or liquidation of this Agreement that cannot be directly resolved between the parties shall be subject to arbitration proceedings in accordance with UNCIRAL [sic] Rules. The arbitration shall be conducted in English and the laws of Belize shall apply. The arbitration proceedings shall be conducted in Miami, Florida, U.S.A.

    For this purpose, the party asserting dispute shall request in writing to the other party that the dispute be submitted to arbitration. The arbitration proceedings shall be conducted by three (3) arbiters, one appointed by the BAA, the other by NEWCO and the third by mutual

agreement of the two (2) arbiters appointed by the parties. The latter shall preside over the arbitration tribunal. If the two (2) arbiter fail to reach an agreement in regard to the third arbiter at the lapse of thirty (30) calendar days from the moment the parties appoint their respective arbiters, or if within a like period of time counted from the moment a party requests arbitration proceedings from the other, the requested party fails to appoint an arbiter, the third arbiter(s), shall be appointed in accordance with UNCIRAL [sic] Rules.

Decisions from the arbitration tribunal shall be final and binding, and the parties irrevocably accept, for the purposes of this binding clause and the implementation or any arbitration award, the jurisdiction of any tribunal where the parties or their properties may be located."

The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards; "The New York Convention"

21. The position of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 6 July 1988 – "The New York Convention," was contentious. The learned Solicitor General, Mrs. Cheryl Krusen SC, submitted that, while some of the provisions of the Convention are similar to some provisions in the Arbitration Act, Cap. 125, Laws of Belize, the New York Convention as a whole was never adopted by Belize, and Belize

never became a party to the Convention. Her reason was that Belize never carried out any "treaty action", the act by which under article 16 of Vienna Convention on the Law of Treaties, 23 May 1969, a Nation State becomes a party to a treaty. Treaty actions are: exchange of treaty documents between the contracting Nation States; deposit by a Nation State of a signed copy of the treaty; and if agreed as a means of becoming a party, notification by Nation States. Further, Mrs. Krusen submitted that, the UN Legal Affairs, Treaty Section Office, had by email confirmed to the Government of Belize that, Belize was not a party to the New York Convention, and the Office provided a list of States that were members; Belize was not on the list. Mr. Gandhi's affidavit deposed to this.

22. Learned counsel Mr. Aldo Reyes, for NEWCO, for his part, submitted that the New York Convention applied to Belize in two ways. First, the United Kingdom, the sovereign Nation State that exercised colonial power over Belize was a party to the Convention, and that by Notice dated 26 November, 1980 given by the United Kingdom to the United Nations, the New York Convention was extended to and applied to Belize; and further, by authority of S.134(1) of the Constitution of Belize Cap. 4 Laws of Belize, 'existing law' in force on Independence Day (21 September 1981) continued to have effect as if made under the Constitution. Existing law is defined by subsection (6) as, "any Act of the Parliament of the United Kingdom, Order of her Majesty in Council, ordinance, rule, regulation, order or other instrument having effect as part of the law of Belize immediately before Independence Day including any such law made before

that day and coming into operation on or after that day".

23. Secondly, Mr. Reyes submitted that, the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, have been enacted in Part IV of the Arbitration Act, and so the New York Convention applies to Belize and to this Claim. Mr. Reyes further argued that, since enforcement proceedings had commenced in the U.S.A. District Court for the District of Columbia, this Court, the Supreme Court of Belize, no longer has jurisdiction in the matter.

24. In my view, Belize is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Whereas I accept that, "treaty action" is the means by which Nation States accept a treaty and commit themselves as parties to the treaty, and the Nation State of Belize never executed treaty action in respect to the New York Convention made on 6 June 1958, I note that Belize was at the time a colonial territory of the United Kingdom until 21 September, 1981. The United Kingdom was a party to the treaty, and by Notice dated, 26 November, 1980 to the United Nations caused the New York Convention to apply to its colonial territory of Belize. The Convention provided for notification by a colonial power as a means of extending the application of the Convention to a colonial territory. Accordingly, the New York Convention became part of international laws applicable to the territory of Belize, and an 'existing law' in force on Independence Day; and continued in force after Independence Day. It was authorised by *S.134(1) and (6) of the Constitution*

to continue as part of the laws of the independent Nation State of Belize. Further, the independent Nation State of Belize enacted the Arbitration Act of Belize and included as part of the Act, all the relevant provisions of the New York Convention as part of the Act. The Convention is a schedule to the Act, and part of the laws of Belize.

25. It follows that by the authority of the New York Convention NEWCO could bring a Claim for the enforcement of the arbitral award made on 23rd June, 2008 in the U.S.A. District Court for the District of Columbia. NEWCO was not required by the Convention or any other law to first bring her claim to a court in Belize. However, that does not mean that an order of this Court to restrain NEWCO from proceeding with the Claim in the U.S.A. District Court cannot be made where the ends of justice requires.

26. Non-applicability of the New York Convention to Belize was raised by counsel for the Attorney General to oppose the bringing of enforcement proceedings against the Government of Belize by NEWCO in the United States District Court. It was submitted that, the New York Convention under which NEWCO had made the Claim in the U.S.A. did not apply to Belize so, the U.S.A District Court had no jurisdiction over the Government of Belize. Mr. Reyes' reply was that, Belize and the United States of America were parties to the New York Convention and the Convention applied to the two countries; further, that the Convention authorised that, enforcement proceedings of an arbitral award could be brought in any country that was a party to the Convention, and so NEWCO

could bring the enforcement Claim in the U.S.A. District Court for the District of Columbia. I have already rejected the argument of Mrs. Krusen that the New York Convention did not apply to Belize.

27. It was also argued for the Attorney General, in the alternative I suppose, that the making of the Claim in the US.A. District Court was oppressive, vexatious and unconscionable. That argument and the question of payment of the arbitral award in Belize currency are part of the wider question as to whether in the circumstances of this case this Court may issue an order restraining NEWCO permanently from proceeding with its enforcement claim, and from bringing new related claims in the US.A. District Court, or in any other court, and in any other country. It is convenient to consider the questions of expressing the award in Belize dollar, and of payment in Belize dollar first.

The arbitral award, and whether payable in Belize currency in Belize.

28. Regarding the question whether the arbitral award should have been expressed in Belize currency, the Belize dollar, and whether the award is payable in Belize, it was submitted for the Attorney General that, the parties had agreed that UNCIRAL [sic] Rules would apply to procedural matters in the arbitration, but that the laws of Belize would apply to questions regarding the contents of the agreement, so SS.21 and 22 of the Central Bank of Belize Act, applied to the currency

in which any award should be made by the arbitrators, and further to the currency in which the award is payable and the place of payment.

29. *Sections 21 and 22* that counsel for the Attorney General relied on provide as follows:

    21. To be valid in Belize, all monetary contracts, obligations or transactions in Belize, whether imposed or authorised by law or otherwise, shall be deemed to be expressed and recorded, and shall be settled or discharged in Belize dollar unless specifically provided otherwise.

    22. (1) The Bank shall have the sole right to issue notes and coins in Belize, and subject as aforesaid, only such notes and coins issued by the Bank shall be legal tender in Belize.

        (3) Legal tender notes shall be accepted throughout Belize without limitation as to amount in settlement of any public or private debt or monetary obligation.

30. The argument for the Attorney General proceeded that, S.21 means that unless *the law* provides in regard to a particular transaction that the obligation therein may be expressed in a foreign currency, the contract must state the monetary debt or obligation in Belize dollar, or the contract shall be deemed to have expressed the monetary obligation in Belize dollar. "S.22(3) means that, any indebtedness in whatever currency must be discharged by tendering an equivalent amount in Belize dollar, and that will be sufficient discharge of the indebtedness," Ms. Perdomo emphasised.

31. For NEWCO, it was argued that, S.21 means that a debt or other monetary obligation in a contract shall be deemed expressed in Belize dollar, if the contract does not state that the debt or obligation is in a foreign currency; in this Claim the Concession Agreement expressed monetary obligations in the United States dollar, a foreign currency, so S.21 did not apply, and the arbitrators were obliged to express the award in the United States dollar, and the award is payable in the United States dollar anywhere.

32. In my respectful view, *SS.21 and 22(3) of the Central Bank of Belize Act*, read with *S.3 of the Exchange Control Regulations Act, Cap. 52* and *the Regulations* made thereunder, mean that where in a contract the currency of a monetary obligation has not been stated, it shall be taken to be in Belize dollar; and where a monetary obligation has been stated in a foreign currency, it shall by law, be dischargeable in Belize dollar equivalent in Belize, or with the permission of the Controller under the Exchange Control Regulations Act, may be dischargeable in the foreign currency and outside Belize.

33. I have to include the Exchange Control Regulations Act because notwithstanding that *S.22 of the Central Bank of Belize Act* provides for the discharge of a debt or an obligation in the Belize dollar, the legal tender for Belize, *the Exchange Control Regulations Act* authorises controlled and restricted payments in gold, foreign currencies and securities, and transfer of them outside Belize, and other exchange transactions. The regulations applicable in this case are *regulations 1 and 2 of*

the Regulations. This is not peculiar to Belize. Almost all countries whose currencies are not regarded as 'hard currencies', namely, the U.S.A. dollar, the British pound sterling, the Euro and others, do have to earn and accumulate sufficient hard currencies to be able to import most goods including essential ones such as medicine, oil, electricity and machinery. Money laundering could also be a reason for exchange control.

34. It is also my respectful view that *sections 21 and 22 of the Central Bank of Belize Act* do not mean that it is illegal in Belize to enter a contract in which obligations are expressed in the United States dollar or any other foreign currency. Such a contract can be performed in a lawful manner by making payment in Belize dollar equivalent, or with the permission of the Controller under the Exchange Control Regulations Act, in the foreign currency. The practice is that permission is required only when one seeks to obtain more than a fixed sum in foreign currency in a month.

35. It is my view that, liberty to contract is a well established belief and practice in Belize, a statutory provision intended to restrict that liberty must state the restriction and any sanction unequivocally, for courts to restrict the liberty; and where required, to apply the sanction.

36. In *Leslie Frank Sharp v Belize Cemecol Ltd., Civil Appeal No. 30 of 2000*, the appellant was employed as a general manager by the respondent company in Belize. His salary was BZ$8,000.00 per month, payable in two parts. BZ$5,000.00 was payable in Belize dollar in Belize, the remaining BZ$3,000.00,

equivalent to US$1,500.00, was payable outside Belize. He was also entitled to US$10,000.00 bonus and US$10,000.00 commission, per year payable outside Belize. The services of the appellant were terminated. He claimed, US$30,000.00 unpaid bonus, US$10,000.00 unpaid commission and BZ$9,000.00 severance pay. The trial judge dismissed the claim as an illegal claim for the reason that, the payment outside Belize was intended to evade income tax, and contravened the Exchange Control Regulations Act.

37. By majority, this Court allowed the appeal. It held that the contract of employment was not illegal because there was a legal way to perform it; the employer could deduct and pay over the income tax to the tax authority; and the payments outside Belize in US$ could be made with the permission of the Controller under the Exchange Control Regulations Act.

38. Regarding making the arbitral award in U.S.A. dollar, it is not the law that, arbitrators cannot make arbitral award in a foreign currency, or that a court cannot express a judgment in a foreign currency. Case law permits arbitrators and courts to do so. This Court has on occasions expressed judgments in foreign currencies.

39. I agree with the view taken in the United Kingdom of Great Britain, the UK, that, arbitrators in the UK may make arbitral award in foreign currency; and courts in the UK may give judgment in foreign currency – see *Lesotho Highland Development Authority v Impregilo [2005] UKHL 43; Miliangos v George Frank (Textiles) Ltd. [1976] A.*

C. 443 and; Jugoslavenska Oceanska Plovidba v Castle Investment Co. Inc. [1973] 3 W.L.R. 847. In the last case, Denning M.R. stated the following:

"In my opinion English arbitrators have authority, jurisdiction and power to make an award for payment of an amount in foreign currency. They can do this – and I would add, shall do this – whenever the money of account and the money of payment is in one single foreign currency. They should make their award in that currency because it is the proper currency of the contract. By that I mean that is the currency with which the payments under the contract have the closest and most real connection. Likewise whenever the proper currency of a contract is a foreign currency, English arbitrators can and should make their award in that currency, unless the parties have expressly or impliedly agreed otherwise. The proper currency can usually be ascertained without difficulty. But if the transaction is closely connected with two currencies . . . the arbitrators can and should make their award in whichever of the two currencies seems to them to produce the most appropriate and just result."

40. The Court of Appeal (UK) also advised that an arbitral award in a foreign currency will be enforced in pound sterling, and the pound sterling sum is determined by converting the foreign currency into pounds at the rate of exchange prevailing on the date of the award – see *the Miliangos case.*

Whether or not to restrain NEWCO from proceeding with the Claim in the U.S.A. District Court.

41. It cannot be over-emphasised that, in this Claim the jurisdiction of this Court is limited to making a court order of injunction if the ends of justice requires, only in regard to NEWCO, a resident in this jurisdiction, and does not extend to what the U.S.A. District Court may do.

42. The courts in Belize have jurisdiction to make what has become known as anti-suit injunction order or anti-foreign suit injunction order. The jurisdiction was adopted from the common law of England. In the common law the jurisdiction is traceable back to 1821 in the case of *Bushby v Munday (1821) 5 Madd 297.56 ER908.* In the case, Mr. Cloves, an assignee of a personal security, given for a gaming debt brought a claim in Scotland where Bushby had assets. Bushby subsequently brought a claim in England for cancellation of the security. Both claims concerned the question whether the security could be enforced. The Vice-Chancellor in England granted an injunction order against Cloves restraining him from proceeding with his claim in Scotland. The Vice-Chancellor stated at page 307 as follows:

    "*Where parties, Defendants, are resident in England, and brought by subpoena here, this court has full authority to act upon them personally with respect to the subject matter of the suit, as the ends of justice require; and with that view, to order them to take, or omit to take, any steps or proceedings in any other Court of Justice, whether in this country, or in a foreign country.*"

43. So, it was laid down that the power to issue anti-foreign suit injunction order was founded on there being personal jurisdiction of the home court over the plaintiff suing in the foreign court, and on the ground that the 'ends of justice' requires that the injunction order be made. That was the common law of England.

44. The jurisdiction to grant anti-foreign suit injunction order continued to be examined and developed. Examples are in, *South Carolina Insurance Co. v Assurance Maatschappij De Zeven NV [1987] A. C. 24*, and the important case, *Societe Aerospatiale v Lee Kui Jak [1987] A. C. 871.* In the latter case *(Aerospatiale v Lee Jak)* the development reached and established the principle that the jurisdiction is based on the grounds that: (1) the jurisdiction is to be exercised only when the 'ends of justice' require it; (2) the anti-foreign suit injunction order will be directed not against the foreign court, but against the parties; (3) the anti-foreign suit injunction order may be granted only against a person amenable to the jurisdiction of the Court granting the order, and against whom the anti-foreign suit injunction order will be an effective remedy; and (4) since anti-foreign suit injunction order indirectly affects the foreign court, the jurisdiction must be exercised with caution, bearing in mind international comity. That is the common law, and that is the law of Belize.

45. Having alerted myself to the above four requirements, I proceed to consider the particulars of this Claim as they relate to the Claim in the U.S.A. District Court, in order to decided whether or not I

may exercise discretion to issue an anti-foreign suit injunction order.

46. NEWCO, the complainant in the U.S.A. District Court, is a company registered in Belize, this Court has jurisdiction over NEWCO. By affidavit of Mr. Wray, NEWCO says, the Government of Belize, "has asset in the U.S.A.", but it does not identify the asset and does not give particulars of the said asset. In the Claim in the U.S.A. District Court there is no averment that the Government of Belize has asset in the U.S.A. On the other hand, the Government has assets in Belize, and NEWCO has at least one known asset in Belize, the tribunal award debt is an asset and is a large sum of money. An order of this Court would be effective for or against either party. However, this Court would be cautious in making any order directed at the parties, so as to avoid interference with the jurisdiction of the U.S.A. District Court.

47. International comity requires that this Court does not make an order which interferes with the jurisdiction of the U.S.A. District Court, a foreign court. This important requirement must be balanced against the domestic rule that this Court may make an anti-foreign suit injunction order, if the ends of justice requires in the case. I recognise that it is a delicate balancing act.

48. It was submitted for the Attorney General that, bringing the Claim in the U.S.A. District Court was vexatious and oppressive. The reasons given were that: (1) "NEWCO had not taken any step to enforce the arbitral award in Belize; (2) the enforcement Claim in the U.S.A. was intended to

force the Government to pay the award in the U.S.A.; (3) the enforcement Claim in the currency of the U.S.A. was intended to enable NEWCO to avoid paying income tax that it owed in Belize; and (4) the Claim was intended to embarrass the Government of Belize internationally.

49. For NEWCO it was submitted that, the New York Convention provided for making a claim for enforcement of arbitral award in any country that was a party to the Convention and so, NEWCO's enforcement Claim in the U.S.A. was not oppressive and vexatious, and NEWCO should not be restrained by an injunction order.

50. A vexatious claim includes a claim which is frivolous and absurd and cannot possibly succeed; and also includes a circumstance where the same claim is made in different courts when no real benefit will be gained by the claimant, and any advantage is merely fanciful – see *McHenry v Lewis 22 Ch. D397* and *Peruvian Guano v Bockwoldt (1883) 23 Ch. D225*. But apart from those two circumstances, several other circumstances may disclose that a claim has been brought to pervert the administration of justice, and the claim may be regarded as vexatious and oppressive, and therefore unconscionable. It is not advisable to limit one's consideration of the facts of a case to a given definition of vexation and oppression.

51. I consider the statement made by Bowen LJ in *the Peruvian Guano case* a very useful way of identifying an unconscionable claim. Bowen LJ stated the following on page 233:

"When a plaintiff comes into an English Court he asks for justice. The Court is bound therefore not to refuse to hear his case . . . Of course that rule does not mean that a plaintiff, under the pretence of asking for justice, is to do that which is oppressive and vexatious, and the Courts have always . . . interfered to prevent a plaintiff under colour of asking for justice from harassing others. Therefore, when that which he is asking for is frivolous or sometimes when he is asking for it in a way which necessarily involves injustice, the Courts have interfered."

52. The underlying principle for the exercise of the discretion to grant an anti-suit injunction order is justice, the ends of justice, whether on the grounds of vexation or oppression or other unconscionable ground.

53. The enforcement claim in the U.S.A is not frivolous or so absurd that it could not possible [sic] succeed. It is based on a reasonable ground, an arbitral award. It is not vexatious in that sense. But NEWCO brought the claim in the U.S.A. other than in Belize, supposedly because there was a benefit in doing so, namely, that the Government of Belize had asset in the U.S.A. The particulars of the asset were not given. Generally, a claim in a foreign country is not vexatious, oppressive and unconscionable if the claimant will gain a benefit in bringing the claim there – see *the McHenry v Lewis case.*

54. On the other hand, there is no doubt that, the Government has assets in Belize, and that Belize is the natural forum for enforcing the arbitral award,

notwithstanding the provision of the New York Convention. The mere allegation, without giving particulars, that the Government has asset in the U.S.A. does not help NEWCO resist the claim for an anti-suit injunction order, given the contentions of the Government. I do not find that NEWCO will gain any benefit in continuing with the claim in the U.S.A.

55. The point that, the claim in the U.S.A. is brought for the purpose of embarrassing the Government of Belize could be a point to demonstrate vexation, if there was utterly no possibility of success in the Claim for an enforcement order in the U.S.A. I have already stated that the Claim for an enforcement order was well founded on the arbitral award. I reject embarrassment as a ground for oppressive and vexatious claim in the circumstances.

56. The grounds that, the claim in the U.S.A. was made to force the Government to make payment in the currency of the U.S.A.; and to enable NEWCO to avoid paying income tax that it owed, are very strong grounds indeed in the circumstances, for claiming anti-foreign suit injunction order against NEWCO. Another way of putting the grounds is that, the Claim in the U.S.A. was intended to enable NEWCO to avoid complying with the Central Bank of Belize Act and the Exchange Control Regulations Act, and to avoid complying with the Income Tax Act, it was intended to breach the laws of Belize.

57. If payment is made in Belize dollar in Belize, NEWCO, like every investor and every resident, would be authorised to transfer foreign currency

in a manner that would be consistent with the aims of the Central Bank of Belize Act and the Exchange Control Regulations Act. Also if the arbitral award is paid in Belize dollar in Belize, the Government would be able to collect income tax owed by NEWCO. Further, in the event that it would be necessary for NEWCO to bring an enforcement claim in court in Belize, the Government would be able to set up a counterclaim in the sum of the tax owing. It is not possible for the Government of Belize or the Government of any other country to raise a claim or set up a counterclaim for tax owing in the courts of the U.S.A., or in the courts of any other country.

58. In my respectful view, the evidence is convincing that, NEWCO has brought the claim in the U.S.A. under colour of asking for justice in a way that necessarily involves injustice to the Government of Belize, and in a way that is prejudicial to the public interest in Belize that, tax be paid by all, and foreign exchange be managed and controlled under the Exchange Control Regulations Act. The ends of justice is in favour of granting anti-foreign suit injunction order in the terms stated in the last paragraph of this judgment. I do grant the anti-foreign injunction order.

Payment of interests.

59. Interest is awarded to the successful party for the reason that, he has unfairly been kept out of the use of money he is entitled to – see *Jefford v Gee [1970] 1 All ER 1202CA.* In this claim, the arbitrators awarded interest to NEWCO at the rate of 8%

per annum from the date of the award until payment. This Court does not modify it, but the Court takes into consideration that it was common evidence that, on 30 September, 2008 the Government offered to pay the arbitral award less tax owing in Belize currency. It was also common evidence that, the Government requested the particulars of a bank account in Belize into which to make the payment, NEWCO has not provided the bank account, it simply protested the tax assessments and filed a claim in U.S.A District Court for the District of Columbia.

60. The evidence proved that, NEWCO has not been unfairly kept out of the use of money it was entitled to from the date the Government asked for particulars of NEWCO's bank account. Interest at 8% per annum is chargeable from 23 June, 2008, the date on which the award was made, to 30 September, 2008, the date on which the Government requested particulars of a bank account in which to make payment. Thereafter interest will be chargeable from the date when NEWCO will provide particulars of a bank account in Belize, until full payment.

Orders made.

61. The orders that I make out of this judgment are the following:

    1. A court declaration is made that, in accordance with sections 21 and 22 of the Central Bank of Belize Act, Chapter 262 of the Laws of Belize, and sections 1 and 2 of the Exchange

Control Regulations Act Chapter 52, and regulations 1 and 2 of the Regulations, the final arbitral award dated 23 June, 2008 issued by the Arbitration Tribunal sitting in Miami, Florida, U.S.A. in the dispute between NEWCO Limited, the Government of Belize and the Belize Airports Authority, arising from the Concession Agreement dated 27 November, 2002 between the said parties, is payable in Belize dollar in Belize, or with the permission of the Controller under the Exchange Control Regulations Act in the currency of the United States of America.

2. A court declaration is made that, in accordance with section 58 of the Income and Business Tax Act, Chapter 55 of the Laws of Belize, the Financial Secretary, Ministry of Finance, is bound to deduct the sum of Bz$5,477,805.00 assessed as tax from the arbitral award and pay over the same to the Commissioner of Income Tax, in compliance with a garnishee order dated, 8th October 2008, (Demand of Third Parties) issued and served by the Commissioner of Income Tax or upon any notice demanding payment of the said sum.

3. A court declaration is made that, interests [sic] on the entire arbitral award is chargeable from 23 June, 2008 when the arbitral award was made, to 30 September, 2008 when the Government of Belize tendered payment in Belize currency less income tax assessed, and requested from NEWCO particulars of a bank account in Belize into which payment would be made; AND THEREAFTER interests [sic]

will be chargeable on the Belize dollar equivalent of US$4,259,832.81 less BZ$5,477,805.00, the sum of the arbitral award less tax assessed, from a date when NEWCO will provide particulars of a bank account into which payment will be made in Belize, or outside Belize with the permission of the Controller under the Exchange Control Regulations Act, until full payment of the arbitral award reduced by the total sum assessed as tax.

4. An order is made restraining NEWCO Limited from taking any or any further steps in the continuation or prosecution of the Complaint filed by NEWCO Limited against the Government of Belize in the United States District Court for the District of Columbia on or about the 21st November, 2008 (Case: 1:08-cv-02010), or to commence or continue any other legal or arbitration proceedings in any court or tribunal outside Belize relating to or arising out of the arbitral award, or in respect to any matter contained in the Concession Agreement dated 27th November, 2002 between NEWCO Limited, the Government of Belize and the Belize Airports Authority.

5. Costs of this claim are awarded to the Government of Belize.

Dated this Wednesday 28 August, 2013
Belize City

/s/ Samuel Lungole Awich
Samuel Lungole Awich
Acting as a judge of the
Supreme Court for
Delivering this judgment