No. _____

In The
Supreme Court of the United States

GOVERNMENT OF BELIZE,

Petitioner,

v.

BCB HOLDINGS LIMITED AND
BELIZE BANK LIMITED,

Respondents.

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

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, in square conflict with the Second Circuit; and (2) refusing to apply the public policy defense to an award notwithstanding that the highest court in Belize, the Caribbean Court of Justice ("CCJ"), refused to enforce a parallel award on public policy grounds as being "repugnant to the established legal order of Belize," "unconstitutional, void and completely contrary to public policy," and against "the foundations upon which the rule of law and democracy are constructed throughout the Caribbean."

While the *BSDL* Petition contends that the D.C. Circuit confirmed an award notwithstanding that the CCJ had refused to enforce a *parallel* award against GOB on public policy grounds, at issue here is the *very same* award that the CCJ held to be unconstitutional

QUESTIONS PRESENTED – Continued

and against public policy. The instant D.C. Circuit opinion again denied GOB's *forum non conveniens* and public policy defense arguments on the same grounds. This Petition thus presents the same questions as in *BSDL*:

1. Under the doctrine of *forum non conveniens*, as applied to a confirmation action to enforce a foreign arbitral 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 does *forum non conveniens* remain a viable doctrine in foreign arbitration confirmation actions if the foreign forum has jurisdiction and there are some assets of the defendant available 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 constitutional separation of powers principles, combating government corruption and/or international comity?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is the Government of Belize. Respondents BCB Holdings Limited and Belize Bank Limited ("BCB and BBL") filed a petition against GOB in U.S. District Court for the District of Columbia to confirm an arbitral award issued by the London Court of International Arbitration ("LCIA"). The arbitration concerned a Settlement Deed that the former Prime Minister of Belize secretly executed (without Parliament's approval) with Carlisle Holdings Ltd. (now BCB), that provided BCB and BBL with favorable tax treatment. BCB and BBL began arbitration after the current Prime Minister made the Settlement Deed public and refused to recognize it. After the award was rendered, BCB and BBL sought enforcement in Belize. The highest court in Belize, the Caribbean Court of Justice, held the award to be contrary to the Belizean Constitution and public policy and unenforceable under Article V(2)(b) of the New York Convention. BCB and BBL then filed this action seeking confirmation of the award. Disregarding the holding of the CCJ, the District Court confirmed the award over Belize's arguments that this proceeding should have been dismissed on *forum non conveniens* grounds and, in the alternative, that confirmation should have been denied under Article V(2)(b). The D.C. Circuit affirmed. GOB is a sovereign state, and not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

GOB submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the U.S. District Court for the District of Columbia, by the Hon. Colleen Kollar-Kotelly, is reported at 110 F. Supp. 3d 233 and reproduced at App. 7. The D.C. Circuit's opinion is unreported, available at 2016 WL 3042521 and 2016 U.S. App. LEXIS 8914, 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 of 1958, 21 U.S.T. 2517 ("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

Earlier last term, in *BSDL*, this Court invited the Solicitor General to express the views of the United States ("CVSG") on a petition for a writ of certiorari filed by the Government of Belize from a D.C. Circuit opinion that confirmed an arbitral award under the Convention, over GOB's arguments seeking *forum non conveniens* dismissal and, alternatively, denial of confirmation under the Convention's Article V(2)(b) public policy defense.

This Petition presents the same issues as to the same party, GOB. However, while the *BSDL* Petition highlighted that the D.C. Circuit had confirmed the award in that case notwithstanding that the highest court in Belize, the CCJ, had refused to enforce a *parallel* LCIA award on public policy grounds under Article V(2)(b), *at issue here is the very award that the CCJ found unconstitutional and against public policy.* Certiorari is likewise compelled here.

First, as in *BDSL*, there is a square circuit split between the D.C. and Second Circuits as to *forum non conveniens*' applicability in foreign arbitration confirmation actions. The Convention makes confirmation actions subject to local procedural law, and *forum non conveniens* is a procedural doctrine, as held by this Court. Thus, in two decisions (*Figueiredo Ferraz E.*

Engenharia de Projecto Ltda. v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011) and *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002)), the Second Circuit held that the doctrine is applicable to Convention actions. In *Figueiredo*, the Second Circuit rejected a prior decision of the D.C. Circuit, *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), which held that the doctrine was not applicable to Convention actions where the plaintiff sought to attach assets in the United States. The Second Circuit rejected *TMR Energy* because the Convention makes confirmation actions subject to local procedural law, and *TMR Energy* would eviscerate the doctrine since such actions seek attachment of U.S. assets. In *BSDL*, the D.C. Circuit refused to dismiss that confirmation action against GOB on *forum non conveniens* grounds citing *TMR Energy*, and refused to consider the Second Circuit's reasoning in *Figueiredo*, creating a square circuit split. 794 F.3d 99 (D.C. Cir. 2015). Now, in this confirmation action, the D.C. Circuit had another opportunity to revisit *TMR Energy* in light of *Figueiredo*, but refused to do so. And now the D.C. Circuit has gone one step further, 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*). This holding cements the circuit split and requires resolution by this Court. Commentators have recognized that this split must be resolved by this Court. The fact that the District of Columbia is the default venue for actions

against foreign states, and the Second Circuit and D.C. Circuits together account for most actions against foreign states, makes resolution of this circuit split critical. The D.C. Circuit has adhered to *TMR Energy* (in *BSDL*, in this action, and in a third action against GOB – *Newco Ltd. v. Government of Belize*, No. 15-7077, 2016 WL 3040824 (D.C. Cir. May 13, 2016) – which also involves the two questions presented here and in *BSDL*, and which is the subject of a third petition for certiorari to this Court) regardless of the fact that *TMR Energy* conflicts with decisions of this Court, including *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). Although *Sinochem* considered its facts to be a "textbook example" for application of *forum non conveniens, TMR Energy* would bar application of the doctrine to those facts. The circuit split on the *forum non conveniens* question is important and ripe for adjudication by this Court.

Second, this Court should provide guidance on application of the public policy defense under Article V(2)(b) of the Convention, which provides that confirmation of foreign arbitral awards may be declined where it would violate a public policy of the country where confirmation is sought. This question is also presented in *BSDL*, where GOB argued that the award should not have been confirmed because the CCJ refused to enforce a *parallel* award against GOB on public policy grounds under Article V(2)(b). Both awards are based on agreements signed by the former Prime Minister of Belize that provided tax exemptions to

companies controlled by a reported campaign contributor. According to the CCJ, the Prime Minister signed the agreements without Parliament's approval and in violation of separation of powers principles under the Belizean Constitution. The CCJ held that the awards were thus "repugnant to the established legal order of Belize," "unconstitutional, void and completely contrary to public policy," and against "the foundations upon which the rule of law and democracy are constructed throughout the Caribbean." This action involves *the same award that the CCJ found unconstitutional and against public policy.* Although the CCJ held that "order[ing] the enforcement of this Award" was something that "[n]o court can properly do," that is what the D.C. Circuit has done. The D.C. Circuit's summary refusal to engage in a meaningful public policy analysis is in conflict with the Convention's text and this Court's decisions (*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)) finding that the Convention's pro-arbitration policy is checked by Article V(2)(b). The Restatement also has recognized countervailing public policies as grounds to refuse confirmation. Moreover, the D.C. Circuit's decision underscores broader confusion among the circuits on how Article V(2)(b) is applied, with some assessing whether a dominant public policy trumps the policy in favor of arbitration, while others balance competing public policies. Here, as in *BSDL*, the countervailing public policies (based on separation of powers principles and international comity, as well as the international policy against corruption in government

recognized by this Court in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008)) outweigh the policy in favor of arbitration, which is a creature of private contract. Commentators have noted the need for guidance on this important question, and this case (like *BSDL*) involves the same important countervailing policies making them perfect vehicles to address this question. Finally, the fact that the CCJ is a young Caribbean regional court that replaced the House of Lords' Privy Council as court of last resort, underscores the importance of the subject decision to the Caribbean Region. In a letter to the Solicitor General in *BSDL*, the Caribbean Community has stressed as much. Although the disputes are entirely Belizean with no nexus to the United States, the D.C. District and Circuit courts rejected the CCJ decision as irrelevant in this case and *BSDL*, and were similarly dismissive of the Belize Supreme Court's decision in *Newco*.

Certiorari should be granted. GOB respectfully requests that this Court consolidate GOB's Petitions in *BSDL*, this case, and *Newco* because these three petitions present the same two questions.

STATEMENT OF THE CASE

A. Settlement Deed Granted Belizean Private Entities a Special Tax Regime Without Legislative Approval.

This confirmation action, like *BSDL*, concerns agreements kept secret from the Belizean public, and

executed by former Belizean Prime Minister Said Musa, that provided preferential tax treatment to companies controlled by the wealthiest man in Belize, Lord Michael Ashcroft, a reported campaign contributor to Musa's political party. JA[1] 735, 748, 777, 780. At issue is a March 22, 2005 Settlement Deed the former Prime Minister signed with Carlisle Holdings, Ltd. (now BCB Holdings), an Ashcroft entity. It gave favorable tax treatment to BCB and BBL at variance with Belize tax laws, and without Parliament's approval. JA 16 ¶21, 40-49, 44-45 ¶4.1, 55-57 ¶4.1, 719-20 ¶3; App. 11 n.3, 59-61 ¶¶1-5, 76-78 ¶¶33-36, 80 ¶39. In 2008, after current Prime Minister Dean Barrow assumed office, he made these agreements public and properly disavowed them. JA 720-21 ¶6.

B. BCB and BBL's Arbitration in the LCIA.

BCB and BBL considered GOB's adherence to its tax laws a repudiation of the Settlement Deed and, like Ashcroft-controlled *BSDL*, began arbitration in London. *See* App. 62 ¶7; JA 17 ¶23, 582 ¶36. Although all parties to the Settlement Deed were Belizean, JA 12 ¶¶6-9, disputes were to be resolved in Lord Ashcroft's native country of England, by LCIA Arbitration, where he is a powerful political figure. *See* JA 47 ¶¶11.1-11.4, 59 ¶¶11.1-11.4. GOB did not participate in the arbitration because the underlying agreements violated Belizean constitutional principles of separation of powers, as the CCJ later ruled. App. 62 ¶8; JA 554 ¶12.

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[1] *BCB*, Joint Appendix, filed Dec. 9, 2015.

On August 18, 2009, the LCIA rendered an *ex parte* award against GOB for BZ$40,843,272.34, five months after it did the same in *BSDL*. *See* App. 9-10 & n.1, JA 17-18 ¶27; *see BSDL* Petition 7.

C. BCB and BBL Seek Enforcement in the Belize Courts.

1. Confirmation Proceedings in the Belize Lower Courts.

BCB and BBL sought enforcement of the award in Belize, which the Belize Supreme Court (trial court) enforced. *See* JA 555 ¶¶16-17; *see also* App. 65-67 ¶¶12-13. GOB appealed to the Belize Court of Appeal. App. 65-67 ¶13. It found that Belize's *Arbitration (Amendment) Ordinance* No. 21 of 1980, which provides the legislative basis for arbitration enforcement, was invalid, and on that ground refused enforcement. App. 65 ¶12, 67 ¶14; JA 26 ¶58, 556 ¶19.

2. The Caribbean Court of Justice Refuses to Enforce the Award on Public Policy Grounds Under Article V(2)(b).

BCB and BBL appealed to the CCJ. JA 26 ¶59, 556 ¶20; App. 67-68 ¶16. On July 26, 2013, the CCJ reversed the Court of Appeal's finding that the *Ordinance* was invalid, but refused enforcement because "the public policy point is dispositive" – an award predicated on an agreement that violates constitutional supremacy and separation of powers is unenforceable

under Article V(2)(b) of the Convention. App. 67-68 ¶¶16-17, 91-96 ¶¶54-61.

(a) The Formation and Importance of the CCJ.

The CCJ is a multi-national court that was established by the Caribbean Community of Sovereign States ("CARICOM"), has original jurisdiction over CARICOM treaties, and serves as the highest appellate court for Belize and other states. Both CARICOM and the CCJ are products of Caribbean nations' pursuit of increased independence from the vestiges of European colonialism. CARICOM was established in 1973,[2] and consists of fifteen Member States (including Belize)[3] and five Associate Members, all developing countries in the Caribbean and home to approximately sixteen million citizens.[4]

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[2] CARICOM was established by the 1973 Treaty of Chaguaramas, http://cms2.caricom.org/documents/4905-original_treaty-text.pdf (last visited July 21, 2016). CARICOM is currently governed by the 2002 Revised Treaty, http://cms2.caricom.org/documents/4906-revised_treaty-text.pdf (last visited July 21, 2016).

[3] CARICOM, "Member States and Associate Members," http://caricom.org/about-caricom/who-we-are/our-governance/members-and-associate-members/ (last visited July 21, 2016).

[4] CARICOM, "Who we are," http://caricom.org/about-caricom/who-we-are (last visited July 21, 2016).

The CCJ was created by CARICOM in 2001 and first convened in 2005.[5] The CCJ's mission is to provide "Appellate Jurisdiction which will replace the British Privy Council for most Member States and complete the circle of sovereignty when they accede to that aspect of the Court."[6] The CCJ has allowed Caribbean states like Belize to join other independent countries that remain part of the Commonwealth – such as Canada, India, Hong Kong, and Australia – in abolishing appeals to the Privy Council in London, founded in 1833 to serve as the final appellate court for British colonies.[7] The "development of *Caribbean*

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[5] Caribbean Court of Justice, "The CCJ: From Concept to Reality," http://www.caribbeancourtofjustice.org/about-the-ccj/ccj-concept-to-reality (last visited July 21, 2016).

[6] CARICOM, Strategic Plan for the Caribbean Community 2015-2019: Repositioning CARICOM, Vol. 2 – The Strategic Plan at p.175 (3 July 2014), http://caricom.org/about-caricom/what-we-do (last visited July 21, 2016).

[7] The Rt. Hon. Sir Dennis Byron, President, Caribbean Court of Justice, *Restoring Public Confidence in the Independence of the Judiciary* at 1, 3, Trinidad and Tobago Transparency Institute (Nov. 16, 2015), http://www.caribbeancourtofjustice.org/wp-content/uploads/2015/11/Restoring-Public-Confidence-in-the-Independence-of-the-Judiciary.pdf (last visited June 28, 2016); Ezekiel Rediker, Note, *Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice*, 35 Mich. J. Int'l L. 213, 221 (Fall 2013). Barbados and Guyana also have made the CCJ their final court of appeal, http://www.caribbeancourtofjustice.org/about-the-ccj/faqs (last visited July 21, 2016); David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 Nova L. Rev. 171, 182 (2005).

jurisprudence"[8] was the "central *raison d'être* for the founding of the Caribbean Court of Justice."[9] And it remains of critical importance.[10]

(b) The CCJ Declares That the Settlement Deed is Unconstitutional and Unenforceable Under Article V(2)(b).

The five justices of the CCJ unanimously held that the award was unenforceable under "Article V.2(b) of the Convention." *See* App. 71 ¶23, 113-14 ¶86. The CCJ, recognizing that "the Convention has a definite pro-enforcement bias," invoked the same standard quoted by the D.C. Circuit here: "only where enforcement would violate the forum state's most basic notions of morality and justice would a court be justified in declining to enforce a foreign Award on public policy grounds." App. 72-73 ¶26 (citing *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969 (2d Cir. 1974)); *see also* App. 91

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[8] Agreement Establishing the Caribbean Court of Justice, Preamble, at 1 (Feb. 14, 2001), http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf (last visited July 21, 2016).

[9] The Hon. Justice Winston Anderson, JCCJ, "The Caribbean Court of Justice and the Development of Caribbean Jurisprudence: Theoretical and Practical Dimensions" 4 (Mar. 7, 2013), http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/03/CCJCJDistLECTURE.pdf (last visited July 21, 2016).

[10] "Having one's own final court as the apex of independence [sic] judicial authority will aid the rule of law, economic development and social stability. . . ." "Restoring Public Confidence in the Independence of the Judiciary" at 8.

¶54. *Compare* App. 72-73 ¶26, *with* App. 3. With respect to the Settlement Deed, the CCJ declared "that the Minister had no power to guarantee fulfilment of the promises he gave"; "had no intention to seek the requisite parliamentary approval"; and that "even if Parliament had ratified the promises made, not even Parliament could have bound itself to legislation that was 'irrevocable.'" App. 93-94 ¶58.

The CCJ explained that these were constitutional violations that squarely implicated the public policy exception:

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

> enforcing this Award. This is a case where the Court actually has a duty to invoke the public policy exception.

App. 94-95 ¶59. Moreover, in holding the award unenforceable, the CCJ reiterated that this was premised on "*international* public policy" and that "[*n*]*o court* can properly" enforce such an award:

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

App. 95-96 ¶61.

None of the CCJ Justices who issued this decision were from Belize.[11]

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[11] Justice Saunders, who authored the opinion, is from St. Vincent and the Grenadines, http://www.caribbeancourtofjustice.org/did-you-know/do-you-know-who-the-ccj-judges-are-and-what-countries-they-are-from#more-1242; http://www.caribbeancourtofjustice.org/about-the-ccj/judges/wit. No justice is now, nor was at the time, from Belize. *Id.*

D. Confirmation Proceedings in Federal Court.

One year after the CCJ's decision, BCB and BBL filed this action seeking confirmation of the award in U.S. District Court for the District of Columbia. JA 11 ¶1. GOB moved to dismiss on *forum non conveniens* grounds, and opposed confirmation under Article V(2)(b).

On *forum non conveniens*, the District Court held that "*TMR Energy* controls the specific *forum non conveniens* question before the Court," and concluded that under that standard, "[t]he GOB cannot show that an alternative forum exists, so the Court need not engage in the balancing step of the *forum non conveniens* test."[12] App. 30.

On Article V(2)(b), the District Court quoted the same standard from *Parsons* that the CCJ invoked, but expressly ignored the CCJ's decision. App. 37-39. It held the defense inapplicable, following the holding in *BSDL*: "Although this Court recognizes that 'the United States has a strong policy against corruption abroad,' this policy does not reach the threshold required to outweigh the policy in favor of enforcement." App. 38 (citing and quoting *BSDL*, 5 F.Supp.3d 25, 43 (D.D.C. 2013)).

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[12] BCB and BBL's only other argument against *forum non conveniens* dismissal was that it is not allowed under Section 207 of the FAA and the Convention. Brief of BCB, Nos. 15-7063, 15-7069 (D.C. Cir. 2016) at 56-57. The D.C. Circuit passed on this question in *TMR Energy*, 411 F.3d at 304 n.*, and the District Court did not address it, *see* App. 29-30.

GOB appealed both issues. The D.C. Circuit, after refusing to hold this matter in abeyance pending this Court's disposition of the *BSDL* Petition, issued a *per curiam* unpublished Judgment affirming on May 13, 2016.[13]

The D.C. Circuit relied exclusively on *TMR Energy* in affirming on *forum non conveniens*:

> 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.

On Article V(2)(b), the D.C. Circuit invoked the standard that enforcement must "violate the forum state's most basic notions of morality and justice," and then summarily concluded that standard was not met here, giving no heed to its own acknowledgment that the CCJ refused to enforce the award on constitutional separation of powers grounds:

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[13] The same panel, on the same day, issued a nearly identical *per curiam* judgment addressing the same *forum non conveniens* and Article V(2)(b) defense in *Newco*, 2016 WL 3040824. GOB is also filing a petition for a writ of certiorari in that case.

> In this case, Belize has not shown that enforcement would violate the most basic U.S. notions of morality and justice. The arbitral tribunal did not find any corruption. And Belize's highest court refused to enforce the award not because the underlying agreement was tainted by corruption, but rather because the agreement violated Belize's separation of powers.
>
> Belize also argues that the District Court should have refused to enforce the arbitral award based on two other public policies: the separation of powers and international comity. But enforcement in this case would not violate any "basic notions of morality and justice" rooted in either of those two doctrines.

App. 3-4.

This timely Petition followed.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE A CIRCUIT SPLIT CREATED BY THE D.C. CIRCUIT'S DEPARTURE FROM 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 Express and Deepened Conflict Between the D.C. and Second Circuits Requires this Court's Review.

For the reasons explained in GOB's *BSDL* Petition, the D.C. Circuit's holding in *TMR Energy* that there can be no adequate alternative forum in a Convention action as required for *forum non conveniens* dismissal, because "there is no other forum in which [the petitioner] could reach the [foreign state's] property, if any, in the United States," *TMR Energy*, 411 F.3d at 304, is settled precedent that is in express conflict with the Second Circuit's holdings in *Figueiredo*, which held that, "[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, we respectfully disagree," *Figueiredo*, 665 F.3d at 391-93. The Second Circuit instead recognized that, "[w]here adequacy of an alternative forum is assessed in the context of a suit to obtain a judgment and ultimately execution on a defendant's assets, the adequacy of the alternative forum depends on whether there are

some assets of the defendant in the alternative forum, not whether the precise asset located here can be executed upon there." *Id.* at 391. The Second Circuit noted the danger in the D.C. Circuit's holding: "It is no doubt true that only a United States court may attach a defendant's particular assets located here, but that circumstance cannot render a foreign forum inadequate. If it could, every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC." *Id.* at 390.

The D.C. Circuit has now made explicitly clear that this is its intended result – that as a categorical matter, "the doctrine of *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations." App. 4; *Newco*, 2016 WL 3040824, at *2. Thus, here, the D.C. Circuit has gone even further than in *BSDL* and held that the doctrine does not apply to Convention actions *at all*. That holding is directly contrary to *Figueiredo* and also to an earlier Second Circuit opinion, *Monegasque*, in which the court held that the *forum non conveniens* doctrine *does* apply in Convention actions. In *Monegasque*, the Second Circuit reasoned that the Convention allows enforcement of foreign awards "in accordance with the rules of procedure of the territory where the award is relied upon" (citing Article III), and that this Court has held 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. The D.C. Circuit's holding challenged here thus

cements the circuit split. For its part, the Second Circuit also has recently affirmed its adherence to *Figueiredo*. *See Wenzel v. Marriott Int'l, Inc.*, 629 Fed.Appx. 122, 124 (2d Cir. 2015).

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.

TMR Energy's rule has not been followed by any other circuit. Instead, other circuits, following this Court's directive, ask whether "an alternative forum has jurisdiction to hear the case."[14] *See Sinochem*, 549 U.S. at 429 (alteration omitted). Moreover, since the D.C. Circuit has now extended *TMR Energy* to categorically preclude *forum non conveniens* in Convention actions, it creates further division. The D.C. Circuit in *TMR Energy* declined to pass on this question, 411 F.3d at 304 n.*, and while the Restatement has "take[n] the position that the doctrine is not available in actions to

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[14] *See, e.g.*, *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 424 (1st Cir. 1991); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991); *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249 (4th Cir. 2011); *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 794 (5th Cir. 2007); *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 519 (6th Cir. 2010); *Fischer v. Magyar 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).

enforce Convention awards," the Restatement 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) Rptr. Note b. Such a categorical prohibition is also contrary to the position of the United States Government. *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).

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

Certiorari is also compelled because the D.C. Circuit's rule in *TMR Energy*, as affirmed in *BCB*, is in tension with numerous precedents of this Court. First, for all the reasons set forth in GOB's *BSDL* Petition, *TMR Energy* conflicts with this Court's unanimous and recent pronouncement in *Sinochem* of what constitutes a "textbook case for immediate *forum non conveniens* dismissal." 549 U.S. at 435; *BSDL* Petition 21-22. *Sinochem* reaffirmed what this Court has long held: the threshold requirement for *forum non conveniens* is "when an alternative forum has *jurisdiction* to hear the case." 549 U.S. at 429 (emphasis added) (alteration omitted). Neither BSDL, nor BCB and BBL,

have argued that the Belizean courts would have lacked jurisdiction. Further, if *TMR Energy* were applied to the facts in *Sinochem*, it would foreclose *forum non conveniens*' dismissal because the *Sinochem* petitioner 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).

Second, *TMR Energy*'s exclusive focus upon the inability of another forum to reach particular property sought in recovery was rejected by this Court in *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960). There, a barge owner and a cargo company disputed which had caused the barge to sink. *Id.* at 20. The barge owner sued the cargo company in Tennessee, where the barge had sunk. *Id.* Then, the cargo company sued the barge owner and the *barge itself* in New Orleans, where the barge was then located and remained. *Id.* at 20-22; *id.* at 28 (Whittaker, J., dissent). The barge owner filed a motion to transfer the New Orleans action to Tennessee under 28 U.S.C. §1404(a), the codification of *forum non conveniens* within U.S. jurisdictions. *Id.* at 20-21. The cargo company opposed on the basis "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 that argument and found transfer appropriate, recognizing that "[a]lthough the action in New Orleans was technically brought against

the barge itself as well as its owner, the obvious fact is that, whatever other advantages may result, this is an alternative way of bringing the owner into court. And although 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. In so holding, this Court "follow[ed] the common-sense approach," recognizing that "[f]ailure to do so would practically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned." *Id.* at 24.

The D.C. Circuit's holding in *TMR Energy* is irreconcilable with *Continental Grain*. The "practical economic fact of the matter is that the money paid in satisfaction of [the award] will have to come out of the [foreign state's] pocket," regardless of whether it is the *precise* assets available in the United States. Money is fungible. *See Robers v. United States*, 134 S. Ct. 1854, 1857 (2014). And this confirmation action simply obtained a monetary judgment. *See* JA 26-28; App. 41. Here, "common-sense" dictates, as *Figueiredo* held, that so long as the foreign forum offers *some* remedy, *forum non conveniens* should be available in Convention actions. *TMR Energy*'s contrary rule "would practically scuttle *forum non conveniens* . . . so far as [Convention enforcement] actions are concerned." *See Cont'l Grain*, 364 U.S. at 24; *Figueiredo*, 665 F.3d at 390-91.

The D.C. Circuit's holding that *forum non conveniens* is unavailable in suits against *foreign states* is also in tension with this Court's recognition that the Foreign Sovereign Immunities Act "does not appear to affect the traditional doctrine of *forum non conveniens*." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983). Despite *Verlinden*, the D.C. Circuit has excluded *forum non conveniens* from the doctrines available to foreign states.

Accordingly, certiorari is required.

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

For the reasons discussed in GOB's *BSDL* Petition, certiorari is also required to provide guidance on application of the Convention's public policy defense, under which courts may refuse confirmation if "recognition or enforcement of the award would be contrary to the public policy of that country." Article V(2)(b). The need for review is illustrated by this case. The CCJ held the award to be unenforceable under Article V(2)(b). The CCJ held that the underlying agreement violated constitutional separation of powers principles, and that confirmation of the award would violate public policy and attack the rule of law and democracy in Belize and other young democracies in the Caribbean. Yet, the D.C. Circuit rejected Article V(2)(b)'s application, dismissing GOB's arguments that the agreement

was tainted by corruption, and noting that the CCJ only found that "the agreement violated Belize's separation of powers." App. 4. GOB submits that a violation of separation of powers principles, which are also at the core of the United States' constitutional order, is sufficient grounds to deny confirmation. Nonetheless, the D.C. Circuit also ignored that this Court has acknowledged that there is a "significant international policy" of "combating public corruption."[15] *Pimentel*, 553 U.S. at 869. The subject agreements, which provided preferential tax treatment to the Prime Minister's contributor, and resulting award, conflict with this significant policy.

The divergence between the CCJ's and D.C. Circuit's decisions under Article V(2)(b), despite invocation by both courts of *Parsons*' standard that "[e]nforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice," is striking. *See* 508 F.2d at 974. Three decades after this Court emphasized the role that Article V(2)(b) was to play in counterbalancing the Convention's pro-arbitration policy, the need remains for guidance from this Court regarding Article V(2)(b)'s

[15] The D.C. Circuit found the policy against corruption inapplicable here because "[t]he arbitral tribunal did not find any corruption." App. 3. Obviously, if the tribunal had found corruption, it would not have entered an award. And it ignores that the State Department has noted "public indications of government corruption under the previous administration." *2009 Investment Climate Statement – Belize* (2009), http://www.state.gov/e/eb/rls/othr/ics/2009/117851.htm.

application where there are countervailing public policies.

A. The D.C. Circuit's Summary Rejection of the Article V(2)(b) Defense is Contrary to this Court's Statements Regarding Its Important Counterbalance to the Policy in Favor of Arbitration.

It has been more than three decades since this Court addressed the Convention, and it is has never done so in the context of a confirmation action. *See Scherk*, 417 U.S. 506; *Mitsubishi*, 473 U.S. 614. While this Court recognized an "emphatic federal policy in favor of arbitral dispute resolution," it noted the courts' counterbalancing role in evaluating awards on public policy grounds under Article V(2)(b) in subsequent proceedings. *Mitsubishi*, 473 U.S. at 631, 638 ("Having permitted the arbitration to go forward, 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," under Article V(2)(b).);[16]

[16] In *Mitsubishi*, this Court explained that the Article V(2)(b) inquiry is "to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." 473 U.S. at 638. The CCJ's Article V(2)(b) analysis was entirely consistent with *Mitsubishi*'s directive. The CCJ focused its Article V(2)(b) inquiry upon "an issue that was not at all considered by the Tribunal and the judge failed to advert to" – "whether the Award was contrary to public policy given the *implementation* of the underlying agreement *without parliamentary approval and without any intention*

Scherk, 417 U.S. at 519 n.14 ("Although we do not decide the question, presumably the type of fraud alleged here could be raised, under Art. V of the Convention . . . in challenging the enforcement of whatever arbitral award is produced through arbitration." (citation omitted)). These decisions indicate that Article V(2)(b) is to be a meaningful and robust provision in confirmation actions. The D.C. Circuit's summary disregard for this exception, when the CCJ found to the contrary, eliminates the vitality the public policy defense should have, as this Court has found, in counterbalancing the pro-arbitration policy, and reflects the need for guidance from this Court.

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

There is a lack of guidance as to what constitutes a cognizable public policy under Article V(2)(b). The International Law Association ("ILA")[17] has recognized the need for greater clarity in this regard, observing that "public policy remains the most significant aspect of the Convention in respect of which such discrepancies might still exist." ILA, Final Report on Public Policy as a Bar to Enforcement of International Arbitral

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on the part of the contracting parties to seek such approval." App. 80 ¶39.

[17] ILA reports have been cited by this Court with favor. *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).

Awards at ¶23 (2002). Although the ILA "recognises the ultimate right of State courts to determine what constitutes public policy in their respective jurisdictions,. . . . the Committee encourages States to consider how courts of other countries have applied the public policy test and, to the greatest extent possible, to apply the test consistently." *Id.* at ¶24. This case highlights the need for guidance. Here, the CCJ, invoking *Parsons*' standard, found this to be a case where "the Court actually has a duty to invoke the public policy exception" given the constitutional separation of powers issues; observed that "[t]he public policy contravened in this case falls well within the definition of 'international public policy' recommended by the ILA that might justify the non-enforcement of a Convention Award"; and held that enforcement of the subject award was something which "[n]o court can properly do." App. 95 ¶61; *see also* ILA Report ¶¶10-14; App. 72-74 ¶¶26, 27. The D.C. Circuit's general invocation of the same standard, but determination that "enforcement in this case would not violate any 'basic notion of morality and justice' rooted in either" separation of powers or international comity, highlights the need for Supreme Court guidance. App. 4.

Moreover, the confusion in the law and need for Supreme Court guidance is pronounced here, where the public policies the D.C. Circuit found "would *not* violate any 'basic notion of morality and justice [in the United States],'" – "international comity" and "separation of powers" – have been *credited* by the Restatement as justifying application of Article V(2)(b). 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). This is the case here. Nothing could be more detrimental to Belize's interests than "enforcement of this Award," which would "attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean." App. 94-95 ¶59. International comity considerations, which this Court has long stressed, *see, e.g.*, *Pimentel*, 553 U.S. at 869; *Mitsubishi*, 473 U.S. at 629; *Daimler AG v. Bauman*, 134 S. Ct. 746, 762-63 (2014), require consideration of and deference to the CCJ's judgment.

This is particularly so because Belize's constitutional separation of powers concerns are interests shared by the United States. The Restatement recognizes that this gives rise to another basis for denying enforcement – that "in exceptional circumstances a foreign State's arbitrability prohibitions may coincide with U.S. public policy by expressing an *important interest shared by the United States*. By vacating or withholding recognition and enforcement of an award in that circumstance, a court may vindicate *U.S.* public policy." Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-17 Rptr. Note c (emphasis added). There is nothing more fundamental

to Belize, other CARICOM States, and the U.S. than constitutional supremacy and separation of powers. This is a shared "principle go[ing] back to the writings of Montesquieu." App. 82 ¶¶41-42. This Court has noted, like the CCJ, the dangers "[w]hen the legislative and executive powers are united in the same person or body" on issues of taxation, and the critical role that the courts play in safeguarding constitutional separation of powers principles. *Compare Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., *concurring*) (based on Montesquieu, "[i]t follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened."), *with* App. 94 ¶59 (observing that these constitutional concerns arose in the context of "tax laws," which is listed "as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award," according to the ILA); *compare also Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("As Hamilton put it, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' "), *with* App. 83 ¶42 ("In young States especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance."). These shared interests are not just philosophical – rather, "Belize's . . . democratic political stability . . . [is an] important U.S. objective[ ]." U.S. Dep't of State, *U.S. Relations with Belize* (Dec. 1, 2015),

http://www.state.gov/r/pa/ei/bgn/1955.htm (last visited July 21, 2016). Likewise, there is a shared consensus that agreements with a sovereign that violate the fundamental rule of law are unenforceable. *See Pan-Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 501, 506 (1927) (contracts signed by Secretaries of Interior and Navy annulled where they were "not authorized by the Act of June 4, 1920," and principles of equity "will not be applied to frustrate the purpose of its laws and to thwart public policy"); App. 95 ¶¶60-61 (refusing enforcement where to do so "would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation").

Certiorari is required to resolve this confusion and disagreement as to which public policies are cognizable under Article V(2)(b).

C. Certiorari is Required to Resolve Disagreement as to How to Apply the Article V(2)(b) Test.

Certiorari is also required given the lack of consensus as to how to apply Article V(2)(b). While *Parsons*' invocation that enforcement must "violate the forum state's most basic notions of morality and justice" has been recognized by most circuits[18] (as well

[18] *Parsons* is followed by most circuits, the ILA, the Restatement, and the CCJ, yet as noted here invocation of that standard has not led to consensus as to approach or results. *See, e.g.*, App. 3

as the ILA and Restatement), there is confusion as to how public policies counseling against enforcement are measured against the countervailing federal policy in favor of arbitration. Some circuits (properly) recognize that the narrowness of the *Parsons* standard accounts for the policy in favor of arbitration, and thus so long as a "well-defined" and "dominant" public policy is implicated, the public policy exception applies. *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. Mut. Marine Office, Inc.*, 344 F.3d 255, 264 (2d Cir. 2003); *see also* ILA Report ¶¶13-14, 16. Other circuits purport to balance countervailing policies, *see*, *e.g.*, *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft MBH & CIE KG*, 783 F.3d 1010, 1017 (5th Cir. 2015), as the D.C. Circuit has done with respect to the public policy against corruption and policy in favor of arbitration, *BSDL*, 5 F.Supp.3d at 43, *aff'd* 668 F.3d 724; *Newco*, 2016 WL 3040824, at *1; *see also* App. 37-39.

In *BCB*, the D.C. Circuit was dismissive of the public policy against corruption on the basis that the

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(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)); *Ministry of Def.*, 665 F.3d at 1096-97; *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); ILA Report ¶12; Restatement §4-18 cmt. b; App. 72-73 ¶26 & n.13.

CCJ found the agreement unenforceable because it violated separation of powers. App. 4. But this should have instead compelled the D.C. Circuit to consider the public policies of separation of power and international comity, which it disregarded. *Id.*

Here, this Court should resolve which test controls, and provide guidance as to its application. Without such guidance, Article V(2)(b) is in danger of becoming superfluous, as reflected here and in *BSDL*, as courts either identify countervailing public policies but reflexively find that the policy in favor of arbitration trumps, *see BSDL* Petition; or construe the exception so narrowly that even public policies of constitutional dimension are summarily dismissed as failing to implicate "basic notions of morality and justice," *see* App. 3.[19] As the D.C. Circuit's decisions in *BCB*, *BSDL*, and *Newco* reflect, guidance from this Court is needed as to what are cognizable countervailing public policies, and the appropriate standard for ascertaining whether they compel a refusal to enforce under Article V(2)(b).

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[19] Under either test, this award is unenforceable. There are no policies more sacrosanct or "basic" than those of a constitutional dimension. A pro-arbitration policy that "is at bottom a policy guaranteeing the enforcement of private contractual arrangements," *Mitsubishi*, 473 U.S. at 625, and the Convention, which as "a treaty is [also] a contract, though between nations," *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014), are subservient to the *constitution* of a nation. *See BSDL* Petition 31-32.

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

First, *forum non conveniens* is a critical tool in ensuring that "an issue best left for determination by the [foreign] courts," is decided by that foreign court. *Sinochem*, 549 U.S. at 435-36. The doctrine's role is pronounced in cases like this, where "none of the parties are American, and . . . there is absolutely no nexus between the subject matter of the litigation and the United States," *Piper Aircraft v. Reyno*, 454 U.S. 235, 252 n.17 (1981). The doctrine, and its §1404(a) analog, are acknowledged as available also in FAA actions. *See Monegasque*, 311 F.3d at 495 ("[I]t cannot be disputed that the doctrine is applied in the United States Courts in the enforcement of domestic arbitral awards."); *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 870 n.6 (10th Cir. 1999) ("common law doctrines such as forum non conveniens, may also apply" to confirmation actions).

Review of the subject circuit split is important, because the D.C. Circuit has imposed a categorical bar to what "has long been a doctrine of general application," *Am. Dredging*, 510 U.S. at 450; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996) ("[*F*]*orum non conveniens* is not limited to actions in equity. . . ."), and where there is a "need to retain flexibility," *Piper Aircraft*, 454 U.S. at 250. The D.C. Circuit's rigid rule putting "conclusive . . . weight" on whether the *particular* assets in the United States could be attached by any other forum, has made that doctrine "virtually

useless" to the very category of cases where comity concerns and the absence of any discernable nexus to the United States are at their peak. *See id*. And while the opinions of treatises and commentators diverge, they recognize the importance of this issue. *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 application of *forum non conveniens*), *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 application of *forum non conveniens*). But for present purposes, as Professor Brower notes, "[g]iven the United States' relative lack of interest in localized disputes between foreign governments and their own nationals on matters of local importance, it seems wise for U.S. courts to preserve *forum non conveniens* dismissals as a possible antidote for the rare situations in which the New York Convention's and the FAA's unusually broad scope threatens to produce surprising results." *See* Brower, 2012 WLNR 2324717 at 4. This is such a case, where the D.C. Circuit has confirmed an award previously held

by the CCJ to constitute an affront to democratic order in the Caribbean Region. Review by this Court is necessary to preserve the application of the *forum non conveniens* doctrine in Convention actions, particularly where the dispute (like this one) has no nexus to the United States. "[T]here is no reason why localized matters should not be determined by the courts of the locale bearing the most significant contacts with them." *Monegasque*, 311 F.3d at 500-01.[20] And the United States has previously taken the position that "*forum non conveniens* may be considered in an action to confirm and enforce an arbitral award." *Figueiredo*, U.S.

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[20] Yet, if *TMR Energy* applied to the facts of the following decisions, the courts could not have affirmed *forum non conveniens* dismissals although the claims arose outside of the U.S., because the defendants' U.S. assets could not be reached by foreign courts. *E.g.*, *Hefferan v. Ethicon Endo-Surgery Inc.*, ___ F.3d ___, 2016 WL 3648368 (6th Cir. 2016) (medical malpractice in Germany); *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799 (10th Cir. 2016) (Russian venture); *Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692 (5th Cir. 2015) (employment in Mexico); *Ranza v. Nike, Inc.*, 793 F.3d 1059 (9th Cir. 2015) (employment in The Netherlands).

Moreover, the D.C. Circuit's rule requiring cases with little to no nexus to the U.S. be litigated here is inconsistent with recent decisions from this Court. *See, e.g.*, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015) (action "based upon" Austrian railway's conduct in Innsbruck made suit fall outside commercial activity exception and was barred by sovereign immunity); *Daimler*, 134 S. Ct. at 763 ("Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016) (RICO "§1964(c) does not overcome the presumption against extraterritoriality.").

Br. at 6. Finally, commentators note, with respect to *TMR Energy* and *Figueiredo*, that "the fact that the Second Circuit majority rejected the D.C. Circuit's rule raises the possibility that the Supreme Court may ultimately seek to resolve the conflict," James Berger and Charlene C. Sun, *Second Circuit Issues Two Key Enforcement Rulings*, Mondaq, 2012 WLNR 2560377 at 7 (Feb. 6, 2012). Resolution of this conflict is needed now.

Second, the proper application of Article V(2)(b) also is important. It has unique stature as one of the few bases explicitly found in the Convention for refusing confirmation. This Court affirmed its vitality in *Scherk* and *Mitsubishi*. This means that the pro-arbitration policy must yield at some point to countervailing public policies. But despite Article V(2)(b)'s importance, there is disparity in its application and a dearth of guidance from this Court, as the legal community has recognized. *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 21, 2016); *see also Ministry for Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, Nos. 99-56380, 99-56444, Brief for the United States as Amicus Curiae Supporting Affirmance at 4 (9th Cir. May 4, 2011) (United States "not here address[ing] what sort of public policy could come within article V(2)(b) of the New York Convention").

Here, this issue is not academic. The CCJ held this award to violate separation of power principles. The D.C. Circuit's disregard for those policies "attack[s]" the "rule of law and democracy" not just in Belize, but "throughout the Caribbean," with potentially devastating effects on "young States especially" and the U.S.'s interests in the region. *See* App. 83, 94 ¶¶42, 59.

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

This case, along with *BSDL* and *Newco*, are prime vehicles for this Court's resolution of the two questions presented. Enforcement of this award in the U.S. would have serious consequences not only for GOB, but would be an attack on the rule of law for young democracies in the Caribbean and an attack on the CCJ's credibility,[21] with potentially damaging consequences to United States interests in the region. *Forum non conveniens* and Article V(2)(b) allow U.S. courts to disentangle themselves from foreign relations issues, and thus the D.C. Circuit's holdings cannot stand.

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[21] In connection with the CVSG order in *BSDL*, on April 12, 2016, the CARICOM Secretary General sent a letter to the U.S. Solicitor General, reproduced at App. 116. The CARICOM Secretary General highlighted the importance of the CCJ to the Caribbean region, the seminal nature of the CCJ decision in *BSDL*, and urged this Court to accept review of the important issues presented by GOB's *BSDL* Petition, which questions also are presented here, since this Petition involves the very award subject of the CCJ ruling.

On *forum non conveniens*, the circuit split is square and unchanging. The D.C. Circuit has refused to revisit *TMR Energy* by panel or *en banc*, despite the Second Circuit's rejection of *TMR Energy*. Rather, the D.C. Circuit now treats *forum non conveniens* as "squarely foreclosed by [its *TMR Energy*] precedent" and undeserving of anything other than summary, *per curiam* treatment. This holding is troublesome given that the District of Columbia federal courts are the default venue for actions against foreign states.[22] *See* 28 U.S.C. §1391(f)(4).

The significance of the public policy issues here also is irrefutable, given that the CCJ has rejected enforcement of this very same award, under the same Article V(2)(b) standard expressed by U.S. courts and propounded by the ILA, and supported by the Restatement. The importance of the countervailing policies at issue in this case presents a perfect vehicle to clarify when the policy in favor of arbitration must yield to countervailing public policies.

[22] Avoiding *Figueiredo*, BCB and BBL, like BSDL, filed in the District of Columbia, then registered the judgment in New York. *BCB Holdings Ltd v. Gov't of Belize*, No. 1:16-mc-00266-P1, Registration of Foreign Judgment, ECF No. 1 (S.D.N.Y. Jul. 21, 2016); *BSDL* Petition 39. The circuit split invites such forum shopping.

CONCLUSION

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

Respectfully submitted,

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Counsel for Petitioner
Government of Belize

July 26, 2016

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7063 **September Term, 2015**
FILED ON: MAY 13, 2016

BCB HOLDINGS LIMITED
AND BELIZE BANK LIMITED,

APPELLEES

v.

GOVERNMENT OF BELIZE,

APPELLANT

Consolidated with 15-7069

Appeals from the United States District Court
for the District of Columbia
(No. 1:14-cv-01123)

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**.

BCB Holdings Limited and Belize Bank Limited are two Belizean banking companies. In 2005, those two companies signed an agreement with the Belizean Prime Minister regarding, among other things, their tax treatment. In 2008, the Government of Belize repudiated that agreement. In response, BCB Holdings and Belize Bank invoked the agreement's arbitration clause. On August 20, 2009, an arbitral tribunal in London ruled against Belize and ordered the country to pay a substantial amount (approximately $20.5 million in U.S. dollars), plus interest and costs. The two companies first tried to enforce the award in Belize itself. But that effort failed because Belize's highest court ruled that the award contravened Belize's separation-of-powers system. So on July 1, 2014, BCB Holdings and Belize Bank sought to enforce the award in the U.S. District Court for the District of Columbia. Belize moved to dismiss the suit on a variety of grounds, including international comity, public policy, forum non conveniens, and the statute of limitations. The District Court found none of Belize's arguments persuasive, and it enforced the arbitral award. *See BCB Holdings Ltd. v. Belize*, 110 F. Supp. 3d 233 (D.D.C. 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 because it was the result of a corrupt bargain between the two companies and the former Belizean Prime Minister. 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. The arbitral tribunal did not find any corruption. And Belize's highest court refused to enforce the award not because the underlying agreement was tainted by corruption,

but rather because the agreement violated Belize's separation of powers. Belize has failed to justify the use of the public policy exception in this case.

Belize also argues that the District Court should have refused to enforce the arbitral award based on two other public policies: the separation of powers and international comity. But enforcement in this case would not violate any "basic notion of morality and justice" rooted in either of those two doctrines.

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.

Finally, Belize claims that BCB Holdings and Belize Bank were time-barred from bringing their enforcement action. Generally, parties must bring suit to enforce an arbitral award within "three years after [it] is made." 9 U.S.C. § 207. Here, BCB Holdings and Belize Bank took almost five years. But the District Court equitably tolled the statute of limitations so that their claims were not time-barred. *BCB Holdings Ltd.*, 110 F. Supp. 3d at 245. The District Court reasoned that BCB Holdings and Belize Bank had pursued their rights to the arbitral award diligently. *Id.* According to

the District Court, the two companies had failed to enforce the award only because of an external obstacle – a 2010 Belize criminal statute that, as relevant here, imposed imprisonment and substantial fines on those who violated a Belize Supreme Court injunction, including injunctions against pursuing enforcement of arbitration awards against Belize. *Cf. Belize Social Development Ltd. v. Belize*, 668 F.3d 724, 729 (D.C. Cir. 2012). That statute was ruled unconstitutional in January 2014. But up until that point, the District Court observed, the statute had a "chilling effect" on enforcement efforts. *BCB Holdings Ltd.*, 110 F. Supp. 3d at 245. This Court has not resolved the appropriate standard of appellate review for equitable tolling decisions. But even under de novo review, we agree with the District Court that equitable tolling was appropriate under all the circumstances here. The companies persuasively explain that they and their lawyers were reasonably chilled from enforcing the award in the United States because they might thereby run afoul of the Belizean statute and risk criminal penalties. So long as the statute was in effect, therefore, it was reasonable for BCB Holdings and Belize Bank to avoid any action – including starting an enforcement suit in the United States. And once the statute was ruled unconstitutional, it was reasonable for BCB Holdings and Belize Bank to then file the enforcement action in the District Court within six months.

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

BCB HOLDINGS LIMITED and THE BELIZE BANK LIMITED, Petitioners/Plaintiffs v. THE GOVERNMENT OF BELIZE, Respondent/Defendant.	Civil Action No. 14-1123 (CKK)

ORDER
(June 24, 2015)

For the reasons expressed in the accompanying Memorandum Opinion, it is, this 24th day of 2015, hereby

ORDERED that petitioners' petition to confirm arbitration award and to enter judgment [ECF No. 1] is **GRANTED**; it is further

ORDERED that judgment shall be entered in favor of petitioners and against respondent for the monetary portion of the Award as set forth in paragraphs 146-148 of the Award [Dkt. 1-2] converted to United States dollars, applying the conversion rate as of the date the Award was issued, August 20, 2009, plus interest at the annual rate of 3.38%, compounded annually, between August 20, 2009, and this date; it is further

ORDERED that the parties shall submit by July 8, 2015, proposed judgment amounts calculated with the conversions and interest consistent with the Memorandum Opinion and this Order; it is further

ORDERED that petitioners' motion for leave to file a sur-reply [Dkt. No. 38] is **GRANTED**; it is further

ORDERED that the respondent's motion to dismiss petition [Dkt. No. 26] is **DENIED**; it is further

ORDERED that petitioners' motion for summary judgment [Dkt. No. 32] is **DENIED** as **MOOT**; it is further

ORDERED that the case is dismissed subject to the submission of judgment amounts.

SO ORDERED.

This is a final, appealable Order.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BCB HOLDINGS LIMITED and THE BELIZE BANK LIMITED, Petitioners/Plaintiffs v. THE GOVERNMENT OF BELIZE, Respondent/Defendant.	Civil Action No. 14-1123 (CKK)

MEMORANDUM OPINION
(June 24, 2015)

This matter comes before the Court on review of an arbitration award pursuant to 9 U.S.C. § 207 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"). Petitioners BCB Holdings Limited and the Belize Bank Limited ("BBL") (collectively "petitioners") initiated an arbitration on October 16, 2008, before the London Court of International Arbitration ("LCIA") in London, England. The Government of Belize ("GOB") opted to abstain from the arbitration, and the proceedings were conducted *ex parte.* On August 18, 2009, the arbitral tribunal issued an award in favor of petitioners and concluded that the GOB owed petitioners BZ$40,843,272.34 in damages plus interest and costs ("Award").[1] On July 1, 2014, BCB and BBL

[1] In their petition, petitioners note that the Award was issued on August 20, 2009. *See* Pet. ¶ 27. However, in a later filing,

filed a Petition to Confirm Foreign Arbitration Award and to Enter Judgment or, Alternatively, Complaint to Recognize and Enforce Foreign Money Judgment. *See* Petition to Enforce (July 01, 2014), Docket No. [1] ("Pet."). On January 30, 2015, the GOB filed a motion to dismiss the petition and complaint[2] (*see* Motion to Dismiss (Jan. 30, 2015), Docket No. [26] "Mot.") and a response to the petition (*see* Response to Petition (Jan. 30, 2015), Docket No. [28] "Resp. to Pet."). For the reasons explained below, the Court shall GRANT the petition and DENY respondent's motion to dismiss.

I. BACKGROUND

BCB Holdings, previously known as Carlisle Holdings Limited, entered into a Settlement Deed with the GOB on March 22, 2005. *See* Pet. ¶ 4. The Settlement Deed was subsequently amended on June 21, 2006. *See id.* The Settlement Deed contains an arbitration clause which memorialized the parties' intention to arbitrate all disputes pursuant to the arbitration rules of the LCIA. *See id.* ¶ 20. In 2008, a dispute arose between the parties related to Clauses 4.1 and 4.2 of the Settlement Deed, in which the GOB agreed to provide

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petitioners state that the Award was issued on August 18, 2009. *See* Opp. to Resp. to Pet. at 42. The first page of the Award lists both dates, but the Court interprets this document to indicate that the issuance date is August 18, 2009, and the later date is the certification date by the LCIA Registrar.

[2] On April 29, 2015, petitioners filed a Motion for leave to file a sur-reply (Docket No. [38]) to respondent's motion to dismiss which the Court GRANTS.

favorable tax treatment[3] to BBL and BCB Holdings.[4] *See id.* ¶ 21. Specifically, in August 2008, the Belize Commissioner of Income Tax rejected tax returns that were filed by BBL in accordance with the Settlement Deed. *See id.* ¶ 22. Petitioners considered this rejection a repudiation of the Settlement Deed and sought to engage the GOB in arbitration before the LCIA on October 16, 2008. *See id.* ¶ 23. The GOB did not participate in the arbitral proceedings. *See id.* ¶ 24.

The arbitral tribunal, consisting of three arbitrators, unanimously rendered a foreign arbitral award in favor of petitioners on August 18, 2009. *See id.* ¶ 27. The arbitral tribunal concluded that the GOB had promised to provide certain tax treatment to petitioners and that "[i]n refusing to accept [petitioners'] tax returns based on this treatment, Respondent [GOB] breached its contractual warranty and clearly evinced its intention not to honour the agreement." Award ¶ 97[5]; Pet. ¶ 27. The arbitral tribunal also awarded petitioners BZ$40,843,272.34 in damages plus interest

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[3] Specifically, in Clauses 4.1 and 4.2 of the Settlement Deed, the GOB warranted that BBL could offset overpayment of business taxes against future business tax payments and that petitioners would be indemnified against all costs, expenses, losses and damages incurred by them arising out of any breach of warranties provided by the Settlement Deed. *See* Pet. ¶ 21.

[4] BCB Holdings and BBL are both Belize registered companies. BCB Holdings is the parent company of BBL. *See* Pet. ¶¶ 7-8.

[5] The Award and the Settlement Deed are available in exhibit 2 to the petition. *See* Pet. Ex. 2, First Kimmelman Decl.

and costs to be paid by the GOB for breach of contract. *See* Pet. ¶ 27.

On August 21, 2009, petitioners sought to enforce the arbitral award in Belize. *See id.* ¶ 55. Opposing the enforcement of the Award, the GOB argued that the Award was contrary to the law and public policy of Belize. *See id.* The Supreme Court of Belize enforced the Award in late 2010, and the GOB appealed this decision in early 2011 to the Belize Court of Appeals. *See id.* ¶¶ 56-57. The appellate court reversed the decision below and held that the Award would not be enforced. *See id.* ¶ 58. On July 26, 2013, the Caribbean Court of Justice ("CCJ"), Belize's final court of appeal, affirmed on public policy grounds, holding that the implementation of the tax treatment provisions of the Settlement Deed were not legislatively approved, which was "repugnant to the established legal order of Belize." *Id.* ¶ 59 (quoting *BCB Holdings Ltd., et al., v. Attorney General of Belize*, CCJ Appeal No. CV 7 of 2012, ¶ 53).

Petitioners also sought enforcement of the Award in England. The High Court of Justice, Queen's Bench Division, Commercial Court, in the United Kingdom, granted petitioners leave to enforce the Award as a judgment and issued a foreign money judgment on February 26, 2013 ("U.K. Judgment"). *See* Pet. ¶ 84-87. The U.K. Judgment recognized and confirmed the arbitral award and provided pre- and post-judgment interest at an annual rate of 3.38%, compounded annually, and past and future costs of the arbitration. *See id.* ¶ 87.

On March 31, 2010, the GOB enacted a criminal statute that penalized parties that violated Belize Supreme Court injunctions and those that aided such violations. *See id.* ¶ 41. Penalties included mandatory fines between $50,000 and $250,000 and/or imprisonment for a minimum of five years. *See id.* ¶¶ 42-43. This statute applied to offenses committed both in Belize and in other jurisdictions. *See id.* ¶ 43. In the meantime, the GOB initiated litigation to enjoin several enforcement proceedings in any forum other than Belize courts. *See id.* ¶ 29. According to Petitioners, "the ease with which the GOB obtained injunctive relief in the Belize courts, coupled with the new mandatory penalties for violating such injunctions, had a chilling effect upon companies in Belize asserting legal claims against the GOB outside of Belize." *Id.*

BCB Holdings, BBL, and other companies challenged this criminal statute in legal proceedings in Belize. *See id.* ¶ 47. Although the Belize Supreme Court upheld the law, the Belize Court of Appeals and the CCJ concluded in 2012 and 2014 respectively, that the sections of the law that created a criminal offense with mandatory penalties for violating Belize Supreme Court injunctions were unconstitutional and unenforceable. *See id.* ¶¶ 49-50. In its final decision on the validity of the 2010 criminal statute, the CCJ outlined limited circumstances in which the Belize Supreme Court could issue injunctions related to arbitration proceedings. *See id.* ¶ 52.

Between early 2009 and January 2014, while the mandatory penalties on parties who violated Belize

court injunctions were still in effect, the GOB obtained numerous injunctions against parties with claims against the GOB. *See id.* ¶ 54. One such injunction was obtained against the British Caribbean Bank ("BCB Bank"), a subsidiary of BCB Holdings. BCB Bank had filed a treaty arbitration against the GOB in 2010, but the GOB filed a claim in Belize Supreme Court seeking a declaration that the Belize Supreme Court was the proper forum for addressing a dispute between the parties. *See id.* ¶¶ 39-40. In so doing, the GOB obtained an anti-arbitration injunction against BCB Bank that restrained BCB Bank from pursuing the arbitration outside of Belize. *See id.* ¶ 40. This injunction was only discharged by the CCJ in 2013. *See id.* ¶¶ 51-52. The GOB did not request or obtain a similar injunction against BCB Holdings or BBL.

Petitioners filed this action on July 1, 2014, to confirm the arbitral Award pursuant to Section 207 of the Federal Arbitration Act ("FAA"), convert the Award plus costs and interests to United States dollars, and enter judgment in favor of petitioners. In the alternative, petitioners filed a complaint to recognize and enforce a foreign money judgment (U.K. Judgment) pursuant to the District of Columbia Foreign-Money Judgments Recognition Act of 2011, D.C. Code § 15-361 *et seq*.

The GOB timely filed a motion to dismiss the petition and motion to dismiss or strike the complaint. In addition, the GOB also submitted a response to the petition. In these two filings, the GOB lodges a series of

arguments why this Court should not confirm the arbitral award or enforce the U.K. judgment. Namely, the Settlement Deed containing the arbitration clause is invalid; enforcement would violate the revenue rule; the Award is against U.S. public policy; the New York Convention does not apply to the dispute between the parties; the Court lacks subject-matter jurisdiction because Belize is entitled to foreign sovereign immunity; the Court lacks personal jurisdiction; the petition is time barred; the doctrines of *res judicata*, collateral estoppel, or international comity preclude enforcement of the Award; and there is a more convenient alternative forum. *See* Resp. to Pet. at 1; Mot. at 1. In addition, the GOB urges the Court to dismiss the complaint to recognize the U.K. Judgment because it was improperly joined with this confirmation action, the Court lacks subject matter and personal jurisdiction, *res judicata* and international comity must be applied, the foreign judgment is against public policy, and it conflicts with the final CCJ judgment. *See* Mot. at 2. Petitioners oppose all of these arguments. *See* Pet'r Opp. to Mot. (Mar. 2, 2015), Docket No. [29]; Opp. to Resp. to Pet. (Mar. 2, 2015), Docket No. [30].

II. LEGAL BACKGROUND

United States federal courts have a robust history of enforcing arbitral awards. Indeed, the Supreme Court has recognized an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Dean Witter Reynolds Inc. v. Byrd*,

470 U.S. 213, 217 (1985) (noting that there is a "strong federal policy in favor of enforcing arbitration agreements.") In 1970, the United States acceded to the New York Convention. The New York Convention was implemented in the United States by amendment of the FAA. *See* Act of July 31, 1970, Pub.L. 91-368, 84 Stat. 692, codified at 9 U.S.C. §§ 201-208.

This Court has jurisdiction to enforce an arbitral award against a foreign state pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, *et seq* ("FSIA"). *See* 28 U.S.C. § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity."). It is undisputed that the GOB is a foreign state under 28 U.S.C. § 1603(a). Under the FSIA,

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States in any case – . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United

> States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a), (a)(6), & (a)(6)(B). "The New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception." *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 121 (D.C. Cir. 1999).

United States courts have little discretion to refuse to confirm an award under the FAA. The FAA provides that in exercising its original jurisdiction over enforcing international arbitral awards, the district 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 . . . Convention." 9 U.S.C. § 207. *See Yusuf Ahmed Alghanim & Sons, W.I.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997) ("There is now considerable case law holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award."). The grounds for refusal enumerated in the Convention are as follows:

> 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 . . . 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

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration . . . ; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; 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.

New York Convention, art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (effective for the United States on Dec. 29, 1970).

In its response to the petition to enforce the award and enter judgment, the GOB argues that the Court should refuse to enforce the award pursuant to Article V(1)(a), 2(a), and (2)(b) of the New York Convention. *See* Resp. to Pet. at 1. In its motion to dismiss, the GOB submitted numerous defenses to enforcing the Award, none of which fall within Article V of the New York Convention because, according to the GOB, the New York Convention does not apply because 1) the dispute between the parties was not commercial, and 2) Belize has not ratified the Convention. *See* Mot. at 16. Although, as discussed above, the Court may only refuse to enforce an award pursuant to Article V of the New York Convention, the Court will first take up the GOB's jurisdictional and other non-Article V arguments. It will then address the merits of the GOB's Article V arguments.

III. DISCUSSION

A. Jurisdiction

1. Applicability of the New York Convention

Petitioners rightly argue that the New York Convention governs the enforcement of the Award. *See* Pet'r Opp. to Mot. at 7-10. The New York Convention covers "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." N.Y. Convention, art. I(1). Pursuant to the framework set forth by the New York Convention, "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." *Id.* at art. III.

Under the FAA, arbitration agreements arising out of a legal relationship that are considered commercial fall under the New York Convention. *See* 9 U.S.C. § 202. This affirms the notion that the purpose of the New York Convention is "to 'encourage the recognition and enforcement of commercial arbitration agreements in international contracts.'" *TermioRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)). The commercial relationship requirement, however, is construed broadly. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1298 (11th Cir. 2005) ("Congress meant for 'commercial' legal relationships

to consist of contracts evidencing a commercial transaction . . . *as well as* similar agreements.") The Settlement Deed resolved a previous dispute between the parties that arose from the GOB's purchase of shares of stock in Belize Telecommunications Limited from Carlisle Holdings Limited, the predecessor of BCB Holdings. *See* Opp. to Resp. to Pet. at 9. The Settlement Deed and included arbitration agreement "resolved the dispute between the parties relating to this purchase and sale of stock." *Id.* The underlying transaction was commercial, and the agreement to resolve the dispute arising out of this transaction facilitated the commercial legal relationship between the parties. Therefore, the Settlement Deed was indeed commercial for purposes of the FAA and the New York Convention.

In *Belize Soc. Dev. Ltd. v. Gov't of Belize*, the D.C. Circuit confronted nearly identical facts as those at hand. Specifically, the former Prime Minister of Belize executed an agreement with Belize Telemedia Limited on behalf of the GOB that included an agreement to submit any unresolvable disputes to arbitration under the LCIA rules. *See* 668 F.3d 724, 728 (D.C. Cir. 2012). In 2008, Belize's newly appointed Prime Minister declared that the contractual agreement and the included agreement to arbitrate were invalid, and the GOB declined to participate in the subsequent arbitration proceedings. *See id.* The arbitral tribunal issued a final award stating that it had jurisdiction over Telemedia's claim, that the agreement was valid, and that Telemedia was entitled to relief. *See id.* Subsequently, Telemedia filed a petition to enforce the award in the

District Court for the District of Columbia, and on appeal of an Order to Stay, the D.C. Circuit analyzed the claims within the framework of the New York Convention. *See id.* at 727. "The fact that Belize is not a party to the New York Convention is irrelevant. If the place of the award is 'in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration.'" *Id.* at 731 n.3 (quoting *Creighton*, 181 F.3d at 121). Similarly, the arbitral tribunal in the case at bar issued the Award in England and petitioners seek enforcement of it in the United States. Both the United States and England are parties to the New York Convention, and thus, the New York Convention applies.

2. Subject-matter jurisdiction

The GOB also argues that this Court does not have subject matter jurisdiction. The GOB argues that the FSIA exception to sovereign immunity for arbitration governed by an international treaty does not apply, and the former Prime Minister lacked authority to enter into the initial agreement with BCB Holdings, and consequently, Belize did not agree to arbitrate. *See* Mot. at 21. The Court is satisfied that it has subject matter jurisdiction in this matter.

"The FSIA confers upon district courts subject matter jurisdiction as to 'any claim for relief in personam with respect to which the foreign state is not entitled to immunity.'" *TMR Energy Ltd. v. State Prop.*

Fund of Ukraine, 411 F.3d 296, 324 (D.C. Cir. 2005) (quoting 28 U.S.C. § 1330(a)); *see also*, *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 (D.C. Cir. 1987) ("If an exception to the main rule of sovereign immunity applies, then the FSIA confers subject matter jurisdiction on the district courts."). The FSIA provides an exception to foreign sovereign immunity for actions to confirm arbitration awards that are governed by an international treaty in force in the United States calling for the recognition and enforcement of arbitral awards. *See* 28 U.S.C. § 1605(a)(6)(B) (quoted above). Despite the GOB's arguments to the contrary, all of these requirements have been met.

The GOB argues that the arbitration exception to foreign sovereign immunity does not apply because the agreement to arbitrate is void *ab initio* because the former Prime Minister of Belize lacked actual authority to execute the Settlement Deed, including the arbitration clause. *See* Mot. at 22-23. However, the proposition that this Court must conduct a *de novo* review of the arbitrability of the dispute to find subject-matter jurisdiction "runs counter to the clear teaching of this Circuit on the purpose and role of the FSIA. The FSIA is a jurisdictional statute that 'speak[s] to the power of the court rather than to the rights and obligations of the parties.'" *Chevron Corp. v. Republic of Ecuador*, 949 F.Supp.2d 57, 63 (D.D.C. 2013) (quoting *Creighton*, 181 F.3d at 124). Inquiring into the merits of whether this dispute was rightly submitted to arbitration is beyond the scope of the FSIA's jurisdictional framework. *See id.* at 63-64 (reviewing case law and concluding

that in assessing subject-matter jurisdiction, federal courts have examined only "whether the award was made pursuant to an appropriate arbitration agreement with a foreign state and whether the award 'is or may be' governed by a relevant recognition treaty.") Regardless, the Court considers the merits of the GOB's argument pursuant to Article V of the Convention in Section III(E)(1) of this opinion. However, as to the FSIA exception, the Court is satisfied that the FSIA's arbitration exception applies, and the Court has subject-matter jurisdiction to enforce the Award.

3. Personal Jurisdiction

The GOB also argues that this Court does not have personal jurisdiction over Belize because "[t]he minimum contacts requirements of Due Process cannot be satisfied as to GOB." Mot. at 32. The GOB asserts that "compelling reasons exist to safeguard sovereigns against the unfettered exercise of personal jurisdiction." *Id.* However, "foreign sovereigns and their extensively-controlled instrumentalities are not 'persons' under the Fifth Amendment's Due Process Clause – and thus have no right to assert a personal jurisdiction defense." *GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 809 (D.C. Cir. 2012) (citing *TMR Energy*, 411 F.3d at 300-01; *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96-97 (D.C. Cir. 2002)). The D.C. Circuit has held that the FSIA requirements suffice, and therefore, "subject matter jurisdiction plus service of process equals personal jurisdiction." *Practical Concepts*, 811 F.2d at 1548 n.11 (quoting *Texas*

Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981)) (internal quotation marks omitted); *see also* FSIA 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."). The GOB has not contested proper service.

B. Statute of Limitations

The FAA provides that "[w]ithin 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." 9 U.S.C. § 207. The arbitral panel issued the award on August 18, 2009, and petitioners filed their petition for enforcement of the award on July 1, 2014. The GOB argues that the petition is time-barred by the FAA, and petitioners' right of action was not equitably tolled by the 2010 criminal statute. *See* Mot. at 8. The Court disagrees.

A "petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (internal quotation marks omitted). Petitioners have shown that they have been pursuing their rights to the arbitral award

diligently since 2009. On August 21, 2009, petitioners sought enforcement of the award in Belize. They also brought their claim to the United Kingdom and received a foreign money judgment in 2013. In April 2010, petitioners joined in litigation challenging the constitutionality of the 2010 criminal statute. *See* Pet. ¶ 47; *see also* Pet'r Opp. to Mot. at 14. Also, BCB Bank, a BCB Holdings subsidiary, appealed an injunction issued by the Belize Supreme Court that prevented it from resolving its arbitration claim outside of Belize. *See* Pet'r Opp. to Mot. at 14. The 2010 criminal statute was dismantled by the CCJ in January 2014, and petitioners initiated this action six months later in July 2014. Petitioners have diligently sought the enforcement and confirmation of the Award since it was issued in 2009 through both enforcement actions and litigation of the statute that created a risk of exposure to criminal penalties if petitioners had filed this action within the three-year limitations period.

Petitioners have also shown that they faced extraordinary circumstances that prevented them from timely filing an enforcement action. The mandatory criminal penalties in effect between 2010 and 2014 subjected petitioners and their attorneys to the risk of imprisonment and a substantial fine if they attempted to enforce the award in this or any other jurisdiction. Although these facts were described in detail in the petition, the GOB did not contest them in its motion. Instead, the GOB argues that petitioners slept on their rights because the criminal statute did not affect petitioners considering that the Belize Supreme Court had

not issued an injunction specifically barring their recovery. *See* Mot. at 9. However, petitioners have demonstrated that the 2010 criminal statute had a "chilling effect" on seeking enforcement of the Award. *See* Pet. ¶ 29. And once this impediment to enforcement was lifted in 2014, petitioners immediately took advantage of the changed circumstances and filed this action.

Petitioners have satisfied the criteria for equitable tolling, and the period during which they were barred from pursuing their rights while the 2010 criminal statute was in effect is excluded from the limitations period. Thus, petitioners are not time-barred from seeking enforcement of the arbitral award.

C. Effect of CCJ Decision

The GOB argues that the final judgment rendered by the CCJ prevents petitioners from attempting to enforce the Award in this jurisdiction. Specifically, the doctrines of *res judicata*, collateral estoppel, and international comity bar the Petition because a competent court, the CCJ, issued a final judgment refusing to enforce the Award. *See* Mot. at 10-15. These arguments are unavailing.

The New York Convention provides that "1. Recognition and enforcement of the award may be refused . . . if . . . (e) [t]he award . . . 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." N.Y. Convention, art. V(1)(e). The country under which an award was made is considered the primary

jurisdiction whilst other member-countries to the New York Convention are designated as secondary jurisdictions. Secondary jurisdictions may refuse to enforce an award, but these decisions do not preclude other jurisdictions from enforcing it. By contrast, only a primary jurisdiction may set aside an award. *See Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 (5th Cir. 2003) ("Under the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have *primary* jurisdiction over the arbitration award. All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.") Thus, the GOB must show that Belize is a country under the law of which the award was made in order to succeed on its argument that the CCJ decision to refuse enforcement of the award precludes this Court from granting the petition.

The GOB cannot make such a showing. The Settlement Deed provides that any disputes that cannot be resolved by the parties shall be referred to and resolved by "arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this clause." Award ¶ 20 (quoting Settlement Deed); *see also* Settlement Deed at 11.2. "The phrase 'under the law of which' in Article V(1)(e) . . . refers to the procedural law governing the arbitration." *Belize Soc. Dev. Ltd.*, 668 F.3d at 731 (citing *Karaha Bodas v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,

364 F.3d 274, 289 (5th Cir. 2004)). Because the arbitration was conducted in England under English arbitral laws, England is the country with primary jurisdiction. *See, e.g.*, *Steel Corp. of the Philippines v. Int'l Steel Servs., Inc.*, 354 Fed. Appx. 689, 692 (3d Cir. 2009) (concluding that Singapore is the country with primary jurisdiction because the arbitrator applied Singapore procedural law in reaching the award). As England is the country with primary jurisdiction, only an English court may set aside the arbitral award issued by the LCIA. Consequently, although the CCJ decided not to enforce the award, its decision to do so does not hold preclusive effect on this Court.

D. Forum Non Conveniens

The GOB also argues that dismissal is warranted on *forum non conveniens* grounds. *See* Mot. at 36. Under this doctrine, the Court "must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Agudas Chisidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981)). The GOB cannot satisfy the first step of the *forum non conveniens* test: "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States." *TMR Energy*, 411 F.3d at 303. The GOB argues that the D.C. Circuit's holding in *TMR Energy* is no longer good law because of the Supreme Court's holding in *Sinochem Int'l Co.*

Ltd. v. Malaysia Int'l Shipping Corp. that "[a] federal court has discretion to dismiss a case on the ground of *forum non conveniens* 'when an alternative forum has jurisdiction to hear [the] case.'" 549 U.S. 422, 429 (2007). However, these two cases are not in conflict. In *Sinochem*, the Supreme Court held that courts may dismiss a case on *forum non conveniens* considerations before definitively determining jurisdiction when such an inquiry is burdensome. 549 U.S. at 436. By contrast, in *TMR Energy*, the Court did not address the timing of assessing the appropriateness of the forum, but rather, the D.C. Circuit plainly stated that there is no alterative [sic] forum that has jurisdiction to attach the commercial property of a foreign nation located in the United States. 411 F.3d 296 at 303. Thus, *TMR Energy* controls the specific *forum non conveniens* question before the Court. The GOB cannot show that an alternative forum exists, so the Court need not engage in the balancing step of the *forum non conveniens* test. *TMR Energy*, 411 F.3d at 303 ("The district court need not weigh any factors favoring dismissal . . . if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose.").

E. New York Convention

As discussed above, courts "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *TermioRio*, 487 F.3d at 935 (quoting *Yusuf Ahmed Alghanim*, 126 F.3d at 23) (internal quotation marks omitted). Because "the New

York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature." *Int'l Trading and Indus. Inv. Co. v. DynCorp Aerospace Technology*, 763 F.Supp.2d 12, 20 (D.C. Cir. 2011). "[T]he burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation," and "the showing required to avoid summary confirmation is high." *Id.* (quoting *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987)) (internal quotation marks omitted).

The GOB has brought three defenses under Article V to the New York Convention against the enforcement of the Award. For the reasons stated below, the GOB cannot meet its burden under Article V.

1. Article V(1)(a) – Validity of the Agreement

The GOB argues enforcement of the Award should be refused pursuant to Article V(1)(a). Specifically, the GOB argues that the Settlement Deed was not valid under Belizean law because the former Prime Minister did not have actual authority to agree to it. *See* Resp. to Pet. at 13-15. As a result, the GOB was not a party to the contract and was not able to agree to arbitrate any disputes thereto. *See id.* at 15. The GOB has not

challenged the validity of the arbitration agreement itself beyond the assertion that the arbitration provision is part of the allegedly invalid contract.

The GOB relies on *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003) for the proposition that this Court must review the validity of the contract as a whole. *See* Resp. to Pet. at 13-14. In *China Minmetals*, the party resisting enforcement of the arbitral award claimed the contract containing the arbitration clause had been forged, so the parties had never agreed to arbitrate. *See* 334 F.3d at 277. Without issuing a written opinion, the district court enforced the arbitral award. The Third Circuit framed the question before it as "whether a foreign arbitration award might be enforceable regardless of the validity of the arbitration clause on which the foreign body rested its jurisdiction." *Id.* at 279. Applying the rule articulated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) to the international arbitration context, the court stated that the common principles in arbitration decisions "suggest that the district court here had an obligation to determine independently the existence of an agreement to arbitrate even though an arbitration panel in a foreign state already had rendered an award." *Id.* at 284; *see First Options*, 514 U.S. at 944 ("If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.").

Applying the facts before the Court, this reasoning is consistent with that in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), in which the Supreme Court "distinguished between '[t]he issue of the contract's validity,' which is *not* for the court to resolve, and 'the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded,' which the courts might be allowed to consider." *Belize Soc. Dev, Ltd. v. Gov. of Belize*, 5 F.Supp.3d 25, 39 n.22 (D.D.C. 2013) (analyzing *China Minmetals* and quoting *Buckeye*, 546 U.S. at 444). Unlike the respondent in *China Minmetals*, the GOB does not argue that the arbitration clause of the Settlement Deed was independently invalid and also failed to raise its argument that the contract was void *ab initio* before the arbitral panel. *See* Mot. at 5 (admitting the GOB chose "not to participate in the arbitration").

The GOB's insistence that it did not agree to arbitrate because the contract is invalid is also inconsistent with the language of the New York Convention. Article V(1)(a) provides that an arbitral award may be refused only if the party that is challenging enforcement furnishes to the competent authority proof that "[t]he 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 to it . . . " N.Y. Convention, art. V(1)(a). The agreement referred to in Article II of the Convention is "an agreement in writing under which the parties undertake to submit to arbitration all or any differences. . . . The term

'agreement in writing' shall include an arbitral clause in a contract." *Id.* at art. II. Therefore, a challenge brought under Article V(1)(a) must be brought against the agreement to arbitrate, not against the contract as a whole. *See* Restatement (Third) of Intl Comm. Arb. § 4-12 cmt. e. (Draft No. 3, 2011) (Under Article V(1)(a), "courts do not review the arbitral tribunal's rulings on challenges to the validity of the contract as a whole, such as a claim that a contract including an arbitration clause was fraudulently induced or is illegal."); *see also Nanosolutions, LLC v. Prajza*, 793 F.Supp.2d 46, 54-55 (D.D.C. 2011) ("[T]he FAA prohibits a district court from considering . . . challenges [to] the contract as a whole.").

The LCIA arbitral panel examined the question of the legality of the contract in assessing its jurisdiction and concluded that "the widely accepted doctrine of the separability of the arbitration clause contained in a contract would preserve the validity of the arbitration clause in the Settlement Deed as Amended and the jurisdiction of this Tribunal in this case." Award at ¶ 62.[6] Contrary to the GOB's assertion that the arbitration clause cannot be severed from the contract in this manner (*see* Mot. at 28), it is settled law that "an arbitration provision is severable from the remainder of the

[6] The CCJ judgment also found that the arbitration agreement was enforceable. *See BCB Holdings Ltd, et al., v. Attorney General of Belize*, CCJ Appeal No. CV 7 of 2012, ¶ 55 ("The agreement to arbitrate was a free standing agreement separable from the remainder of the Deed.").

contract." *Buckeye*, 546 U.S. at 445 (holding that an arbitrator should consider claims that a contract containing an arbitration provision is void for illegality).[7] Again, the GOB has not provided any proof to the Court that the provision in which the parties agreed to arbitrate is invalid under Belizean law, so the GOB's challenge under Article V(1)(a) fails.

2. Article V(2)(a) – Appropriateness of Arbitration

The GOB also claims that this Court should deny confirmation of the revenue rule which precludes U.S. courts from adjudicating foreign tax liabilities. *See* Resp. to Pet. at 16. Article V(2)(a) of the New York Convention allows courts to refuse to enforce an award when "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country." N.Y. Convention, art. V(2)(a). "The revenue rule is a long-standing common law rule that prevents

[7] The GOB argues that the severability rule is inapplicable because it pertains to the FAA and not to the FSIA. *See* Mot. at 26-28. As explained above, the Court is not required to conduct a *de novo* review of the arbitrability of the dispute to satisfy the jurisdictional requirements of the FSIA. *See infra* at Section III(A)(2). Indeed, the Court's analysis of the arbitrability of the dispute is confined to the GOB's Article V defense. Thus, principles available under the FAA, which incorporates the New York Convention, are available to the Court. *See, e.g.*, *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 155 (3d Cir. 2001) ("We recognize that *First Options* is a domestic arbitration case, but the international nature of the present litigation does not affect the application of *First Options*' principles.").

the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign." *Rep. of Honduras v. Philip Morris Co., Inc.*, 341 F.3d 1253, 1256 (11th Cir. 2003). In cases in which the revenue rule has been applied, "[t]he main object of the action . . . was the collection of money that would pay foreign tax claims." *Pasquantino v. U.S.*, 544 U.S. 349, 364 (2005). In *Pasquantino*, the Supreme Court articulated the link between the revenue rule and the rule against foreign penal enforcement, analyzing the "analogy between foreign revenue laws and penal laws." *See id.* at 361.

No such link is present in the instant case. Petitioners did not bring their claim to the arbitral tribunal in an attempt to enforce Belize's tax laws. Indeed, the LCIA determined that the revenue rule did not apply because this is a contract case, not an action to enforce Belizean tax laws. *See* Award ¶ 180. The crux of the dispute was contract enforcement rather than the enforcement of a foreign revenue law. *See* Opp. to Resp. to Pet. at 27 (explaining the dispute arose out of an alleged breach of warranties contained in the Settlement Deed). Thus, the subject matter arbitrated was contemplated by the parties and capable of settlement by arbitration.

3. Article V(2)(b) – Public Policy

Lastly, the GOB argues that confirmation of the Award should be denied because the Award violates

the public policy of the United States against government corruption. *See* Resp. to Pet. at 17. "The public-policy exception under the New York Convention is construed extremely narrowly and applied 'only where enforcement would violate the forum state's most basic notions of morality and justice.'" *Chevron Corp.*, 949 F.Supp.2d at 69 (D.D.C. 2013) (quoting *Parsons v. Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)); *see also Termio Rio S.A. E.S.P.*, 487 F.3d at 938 (quoting *Karaha Bodas*, 364 F.3d at 305-06). "Although this defense is frequently raised, it 'has rarely been successful.'" *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Systems, Inc.*, 665 F.3d 1091, 1097 (9th Cir. 2011) (quoting Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. Fed 481 (1998) (collecting cases)). Establishing a countervailing public policy that weighs against enforcement of an arbitral award is a "substantial" burden and requires the moving party to "demonstrate a countervailing public policy sufficient to overcome [the] strong policy favoring confirmation." *Id.* at 1098. "Such a public policy . . . must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *United Broth. Of Carpenters and Joiners of America, AFL-CIO v. Operative Plasterers' & Cement Masons' Int'l Ass'n of U.S. & Can., AFL-CIO*, 721 F.3d 678, 697 (D.C. Cir. 2013) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Linoleum & Plastic Workers*, 461 U.S.

757, 766 (1983)) (internal quotation marks omitted); *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp.2d 936, 955 (S.D.Tex. 2001). *See also Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998).

The GOB relies on a broad policy statement, arguing that "[j]ustice and U.S. public policy against corruption will not be served by allowing this corrupt agreement and tainted Award to burden the people of Belize." Resp. to Pet. at 18. In so doing, the GOB does not identify an explicit or well-defined U.S. public policy that, if violated, would offend the most basic notions of morality and justice. Although this Court recognizes that "the United States has a strong public policy against corruption abroad," this policy does not reach the threshold required to outweigh the policy in favor of enforcement. *Belize Soc. Dev. Ltd.*, 5 F.Supp.3d at 43 ("U.S. courts have enforced arbitral awards in the face of public policy interests *at least* as weighty as the policy against corruption abroad."). Indeed, the GOB cannot point to any cases in which a court declined to enforce an arbitral award because it violated the United States' public policy against government corruption. Additionally, the general public policy the GOB relies upon implicates the politics of a foreign nation. Article V(2)(b) "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'" *Parsons*, 508 F.2d at 974. Refusal to enforce the Award on the public-policy grounds suggested by the GOB would undoubtedly implicate politics

abroad. The Court declines to do so. The GOB has not met the substantial burden of proving its public-policy defense.

F. The Award

Conversion of foreign currency into dollars at judgment "is the norm, rather than the exception." *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 932 F.Supp.2d 153, 158 (D.D.C. 2013), *aff'd*, 2015 WL 233385 (D.C. Cir. Jan. 16, 2015). The monetary relief in the Award shall be converted into U.S. dollars as of August 18, 2009, the date of the Award, and the judgment will be entered in U.S. dollars. The Court also has discretion to award prejudgment interest and will exercise that discretion because doing so is "consistent with the underlying arbitration award." *Cont'l Transfert*, 932 F.Supp.2d at 164 (internal quotation marks omitted). *See also Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran*, 665 F.3d at 1103 ("[F]ederal law allows a district court to award post-award, prejudgment interest in actions under the New York Convention."); *Waterside Ocean Nav. Co., Inc. v. Int'l Nav. Ltd.*, 737 F.2d 150, 153-54 (2d Cir. 1984); *Indus. Risk Insurers*, 141 F.3d at 1445. The arbitral tribunal awarded petitioners pre- and post-judgment interest at an annual rate of 3.38% compounded annually. Award ¶ 149. The Court accepts this determination and awards petitioners interest consistent with the Award calculated from the date the Award, August 18, 2009, to this date. The parties are ordered to submit to the Court proposed judgment amounts calculated

with the conversions and interest consistent with this opinion.

IV. CONCLUSION

For the foregoing reasons, the Court shall GRANT the Petition to Confirm Foreign Arbitration Award; convert the monetary relief in the Award into U.S. dollars; and award prejudgment interest. The complaint in the alternative is dismissed as moot. Likewise, the motion to dismiss is DENIED as moot. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BCB HOLDINGS LIMITED and THE BELIZE BANK LIMITED, Petitioners/Plaintiffs v. THE GOVERNMENT OF BELIZE, Respondent/Defendant.	Civil Action No. 14-1123 (CKK)

JUDGMENT
(July 1, 2015)

In accordance with the Court's Memorandum Opinion [Dkt. 42] and Order [Dkt. 41] filed on June 24, 2015, judgment is entered in favor of petitioners BCB Holdings Limited and the Belize Bank Limited against the respondent the Government of Belize.

It is ORDERED and ADJUDGED that judgment is entered in favor of petitioners BCB Holdings Limited and the Belize Bank Limited against respondent the Government of Belize in the amount of $22,583,027.89 plus $4,846,968.67 in prejudgment interest in U.S. dollars, totaling $27,429,996.56 in U.S. dollars.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

[SEAL]

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

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

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

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

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

Article II

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

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

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

Article III

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

Article IV

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

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

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

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

Article V

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

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

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

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

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

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

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

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

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

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

Article VI

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

Article VII

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

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

Article VIII

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

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

Article IX

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

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

Article X

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

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

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

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

Article XI

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

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

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

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

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

Article XII

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

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

Article XIII

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

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

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

Article XIV

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

Article XV

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

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

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

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

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

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

Article XVI

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

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

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

For the Secretary-General,
The Legal Counsel:

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

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

Pour le Secrétaire général,
Le Conseiller juridique:

/s/ Carl-August Fleischhauer
Carl-August Fleischhauer

United Nations, New York
6 July 1988

Organisation des
Nations Unies
New York, le 6 juillet 1988

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

Sec.

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

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

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

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

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

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

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

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9 U.S.C. §204. Venue

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

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

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

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

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

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

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

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

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

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

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

[2013] CCJ 5 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE
COURT OF APPEAL OF BELIZE

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

BETWEEN

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

AND

THE ATTORNEY GENERAL
OF BELIZE **RESPONDENT**

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

Appearances

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

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

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

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS

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

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

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

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

A brief background

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

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

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

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

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

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

The Arbitral Award

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

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

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

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

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

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

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

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

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

The decisions of the Courts below

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

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

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

[3] Arbitration Act, Cap 125 [Belize]

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

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

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

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

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

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

The issues

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

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

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

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

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

The Public Policy Point

The submissions of the parties

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

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

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

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

The broad approach to the public policy exception

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

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

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

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[7] (1824) 2 Bing 229, 252

[23] Public policy in this case must in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize. It is in Belize that the Companies seek to enforce the Award and it is the courts of Belize that must make the assessment as to what, if anything, is offensive to public policy. It is also in Belize that the underlying obligations and promises were to be performed. Article V. 2(b) of the Convention provides that enforcement of an award may be refused, if enforcement would be contrary to "the public policy of *that country*" – that is, in this case, the State of Belize. But this does not mean that, although there is no universal standard of "public policy"[8], it would be appropriate for courts to adopt a parochial approach. As Cardozo J. reminds us in *Loucks v Standard Oil Co. of New York*[9], the courts are not free to refuse to enforce a foreign judgment at the pleasure of the judges or to suit the individual notion of expediency or fairness.

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

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

[9] 224 N.Y. 99

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Policy and the underlying Agreement

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

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

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

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

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

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

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

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

The promises made by the Minister

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executive prerogative and the Separation of Powers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] (1994) 45 WIR 94 at 99

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

Section 95 of the Income and Business Tax Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Should the Award be enforced?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

appropriately challenge attempts to undermine the Constitution.

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON

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

Constitutionality of the 1980 Arbitration Ordinance

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

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

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

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

[36] No. 21 of 1980

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

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

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

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

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

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

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

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

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

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

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[37] 1982 Ir. 241

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

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

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

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

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[39] [2007] UKPC 56

[40] [2006] CCJ 3 (AJ)

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

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

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

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

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

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

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

[42] [2009] 1 AC 453 at 486

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

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

[43] [1937] AC 326 (PC)

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

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

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

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

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

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

(Continued on following page)

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

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

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

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

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

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

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

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

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

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

Why the case was not remitted to the Court of Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Costs

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

Disposition

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

The Right Hon Mr Justice Dennis Byron, President

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

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12 April 2016

Hon. Donald B. Verrilli, Jr.
Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530-0001

Dear Mr. Verrilli

Re: *Government of Belize v. Belize Social Development Limited*, Sup. Ct. No. 15-830.

I write to you in my capacity as the Secretary-General of the Caribbean Community (CARICOM), a Community of fourteen Sovereign States and the island of Montserrat.[1] It has been brought to my attention that the Government of Belize has a pending petition for a writ of certiorari before the United States Supreme

[1] CARICOM's Member States include Antigua and Barbuda; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; Saint Lucia; St. Kitts and Nevis; St. Vincent and the Grenadines; Suriname; and Trinidad and Tobago.

Court, and that the Court, in its recent order of 28 March 2016, has invited the Solicitor General to express the views of the United States. This is an important matter to CARICOM because the case implicates international comity considerations with respect to the Caribbean Court of Justice (CCJ), and the fundamental rule of law with respect to one of its Member States, Belize.

CARICOM, for its part, was established by the Treaty of Chaguaramas in 1973,[2] and its roles and functions continue to be defined by that Treaty, as revised.[3] CARICOM's objectives include economic development, improved standards of living and work, enhanced coordination among its Member States, and enhanced economic relations with third States.[4]

The establishment of the CCJ in the early 2000's remains one of CARICOM's key achievements.[5] The CCJ

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[2] CARICOM, *History of the Caribbean Community (CARICOM)*, http://www.caricom.org/jsp/community/historyjsp?menu=community; CARICOM, *The Original Treaty*, http://www.caricom.org/jsp/community/original_treatyjsp?menu=community; Treaty Establishing the Caribbean Community, July 4, 1973, *available at* http://www.caricom.org/jsp/community/original_treaty-text.pdf.

[3] CARICOM's roles and functions are now set forth in the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, *available at* http://www.caricom.org/jsp/community/revised_treaty-text.pdf.

[4] CARICOM, *Objectives of the Community,* http://www.caricom.org/jsp/community/objectives.jsp?menu=community.

[5] CARICOM, STRATEGIC PLAN FOR THE CARIBBEAN COMMUNITY 2015-2019: REPOSITIONING CARICOM, Vol. 2, p.155 (3 July 2014) [hereinafter "CARICOM STRATEGIC PLAN"], *available at*

was created because its founding Members were "convinced that the Caribbean Court of Justice . . . will have a determinative role in the further development of Caribbean jurisprudence through the judicial process; convinced also of the desirability of entrenching the [CCJ] in their national Constitutions; aware that the establishment of the [CCJ] is a further step in the deepening of the regional integration process; [and] recognising the sovereignty of Members of the Caribbean Community."[6] The CCJ thus has exclusive and compulsory original jurisdiction over the treaties establishing CARICOM, offers definitive guidance on the application of Community law, and has final appellate jurisdiction for a number of CARICOM's Member States.[7] The CCJ has served to provide certainty and predictability to the operations of the CARICOM Single Market and Economy; brings a Regional ethos to judicial decisions; and plays a historically important role in replacing the British Privy Council as court of last resort.[8]

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http://caricom.org/jsp/secretariat/THE%20STRATEGIC%20PLAN%20VOL2-final.pdf.

[6] Agreement Establishing the Caribbean Court of Justice, Preamble, 2001 & 2003, *available at* http://caricom.org/jsp/secretariat/legal_instruments/agreement.ccj.pdf.

[7] *See id.* at Part II and Part III; CARICOM STRATEGIC PLAN at p.55. The CARICOM Member States which have enabled the CCJ as the final appellate court are: Barbados, Belize, Dominica and Guyana. Other Member States are taking the necessary steps to enable the appellate jurisdiction.

[8] CARICOM STRATEGIC PLAN, Vol. 2, at p.155.

This latter feature is particularly important here. Belize is among those Member States that have acceded to the CCJ's appellate jurisdiction, replacing the British Privy Council in London that was created by the British Parliament in the early 1800s. The CCJ thus fully completes the circle of judicial sovereignty for nations like Belize.[9] And the CCJ decision implicated in this case, *BCB Holdings Limited v. The Attorney General of Belize*, [2013] CCJ 5 (AJ), is a landmark decision by the CCJ in this respect. The CCJ, exercising appellate jurisdiction, firmly upheld that "[t]he supremacy of the [Belizean] Constitution is a core constitutional value," as is "Separation of Powers," and that "[t]o disregard these values is to attack the foundations upon which the rule of law and democracy are constructed *throughout the Caribbean*." *Id. at* ¶59 (emphasis added). In that case, the CCJ renounced the enforcement of an arbitral award rendered by the London Court of International Arbitration (LCIA) that was based upon a "confidential" agreement executed by former Prime Minister of Belize Said Musa providing unconstitutional tax benefits to a private company, which were not authorized by the Belizean Parliament. The CCJ held that no court could properly enforce such an arbitral award. *Id.* at ¶61. The CCJ held that such agreements are "repugnant to the established legal order of Belize," and "unconstitutional, void and completely contrary to public policy." *Id.* at ¶53. "The rights and freedoms of the citizenry and democracy itself would be imperilled if courts permitted the Executive

[9] *Id*.

to assume onto itself essential lawmaking functions in the absence of constitutional or legislative authority to do so. It would be utterly disastrous if the Executive could do so, selectively, via confidential documents. In young states, keen observance by the courts of the separation of powers principles remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance." *Id.* at ¶42. "If this Court ordered enforcement of [the LCIA award] we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in that violation." *Id.* at ¶61.

Nonetheless, the District Court and District of Columbia Circuit Court, by treating the CCJ's decision as "irrelevant," completely disregarded the CCJ's admonishment that [n]o court can properly do this [that is, enforce the arbitral award]," *id.* at ¶61, and confirmed a similar LCIA arbitral award rendered *ex parte* against the Government of Belize based upon a similar agreement executed by the same former Belizean Prime Minister and also purporting to provide unauthorized tax benefits to another private company. The holdings of the District Court and District of Columbia Circuit Court are of great concern to CARICOM, because they undermine the importance of this seminal CCJ decision, which is designed to further the rule of law and the core democratic principle of Separation of Powers in the Caribbean Region. These rulings would also have serious implications for the other CARICOM Member States for which the CCJ is the final Court of

Appeal now and in the future. CARICOM has recognized, as part of its ongoing Strategic Plan, that "special attention should be given to the role of the CCJ in strengthening and optimizing the governance arrangements" of its Member States.[10] Further efforts to utilize the CCJ in strengthening the governance of its Member States and to expand the CCJ's final appellate jurisdiction will be hindered if important decisions by the CCJ that go directly to the rule of law and support essential tenets of democracy are summarily disregarded by courts of other jurisdictions in the international community.

Rather, international comity, as well as the United States' shared concerns for separation of powers and democratic order, and against political corruption, compels greater respect and consideration for the decisions of the highest court among the 15 Member States in the Caribbean Community than the CCJ has been afforded thus far in this case. This case presents a fork in the road in terms of the future relations among the courts of our respective jurisdictions. It is submitted

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[10] As explained in CARICOM STRATEGIC PLAN, "Stakeholders have emphasized that special attention should be given to the role of the CCJ in strengthening and optimizing the governance arrangements. In that regard, Governments need to signal greater commitment to the CCJ and improve utilization of the Court, for example to: i) resolve disputes in a speedy manner on the basis of regional and international law; ii) draw on the competence of the Court in interpreting and applying the [Revised Treaty of Chaguaramas] and related decisions of the Organs of the Community; and/or iii) develop the regional legal framework to achieve greater clarity and certainty regarding the rights and duties of all actors of the Community." CARICOM STRATEGIC PLAN, at p.59 n.24.

that deference should be accorded to the CCJ's reasoned decision given its critical importance to the Caribbean Region, so as not to risk impugning the legitimacy of the CCJ.

Accordingly, CARICOM submits that the United States Supreme Court should consider the Government of Belize's petition for certiorari in this case in light of these important issues. And for these reasons, CARICOM respectfully requests that the United States Government support CARICOM, its Member States including Belize, and the CCJ, by expressing its view that the Supreme Court should hear this case.

Yours sincerely

/s/ Irwin Larocque
IRWIN LAROCQUE
SECRETARY-GENERAL

c.c.: Hon. Dean O. Barrow
Prime Minister of Belize and Chairman
of the Conference of Heads of Government
of CARICOM

Juan Basombrio, Esq.