No. 16-136

In The
Supreme Court of the United States

GOVERNMENT OF BELIZE,

Petitioner,

v.

BCB HOLDINGS LIMITED AND
BELIZE BANK LIMITED,

Respondents.

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

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

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

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REPLY TO BRIEF IN OPPOSITION

The Petition here and in *Government of Belize v. Belize Social Development Limited*, Case No. 15-830 ("*BSDL*") involve arbitral awards based on secret agreements signed by a former Belizean Prime Minister giving preferential tax treatment to companies owned by the wealthiest man in Belize. The highest court in Belize, the Caribbean Court of Justice ("CCJ"), found those awards unenforceable as violating constitutional separation of powers and antithetical to the rule of law and democracy throughout the Caribbean.

The D.C. Circuit ignored the CCJ decision, and subjected the Government of Belize ("GOB") to inconsistent judgments. The questions presented here and in *BSDL* arise from circuit splits and a lack of well-defined standards, and both ask this Court to decide whether *forum non conveniens* and the public policy exception in the New York Convention enable courts to dismiss a confirmation action, to avoid untenable results like those reached below.

BCB Holdings Limited and The Belize Bank Limited (collectively, "BCB"), in their Brief in Opposition ("BCB Opp."), state that this Petition "does not present anything that would make this case worthy of this Court's attention," BCB Opp. 1, mimicking the D.C. Circuit by failing to properly consider the important countervailing public policies noted by the CCJ and GOB. This Petition and *BSDL* should be consolidated and certiorari granted.

On the first question presented, BCB is unable to dispute that there is a square circuit split regarding *forum non conveniens*' application between the D.C. Circuit's decisions below and in *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), and the Second Circuit's decisions in *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 D.C. Circuit's rule also conflicts with *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) and *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960). BCB's forfeited new argument, based on *Norex Petrol. Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005), even if considered, underscores the need for certiorari.

On the second question, BCB is unable to dispute that there are different approaches on how the New York Convention's public policy defense should be *applied* when there are significant countervailing public policies. Guidance from this Court is needed to resolve whether courts should find dominant countervailing policies or balance the competing policies. Here, the CCJ found *this very arbitral award* unenforceable as against public policy on constitutional separation of powers principles shared by Belize, the U.S., and young democracies throughout the Caribbean. *See also* Petition App. 119-22 (Caribbean Community (CARICOM) Letter); Guyana Amicus Brief 11-14. The D.C. Circuit's failure to give effect to this and other countervailing

public policies recognized in the U.S. runs afoul of the New York Convention.

I. THIS CASE SHOULD BE CONSOLIDATED WITH *BSDL* AND CERTIORARI GRANTED.

This Petition should be consolidated with *BSDL* – in which this Court has called for the views of the United States – because both petitions involve the same questions presented, decisions from the same circuit, the same or related parties, the same counsel of record, and the same underlying CCJ decision. *See* Petition i-ii, 2-16; *BSDL* Petition i-ii, 2-16. Both petitions also implicate issues critical to democracy in the Caribbean, as noted by the CCJ, CARICOM and Guyana. The D.C. Circuit's disregard of such considerations, which has left GOB facing inconsistent judgments, should not be left unexamined.

II. REVIEW OF *FORUM NON CONVENIENS* IS REQUIRED.

A. BCB Cannot Overcome The Square Circuit Split.

BCB's assertion, that GOB's Petition "is completely foreclosed by this Court's precedent and fails to raise any issue that could merit review," BCB Opp. 2, is easily disproven. On *forum non conveniens*, it is undisputed that there is a direct circuit split between the D.C. Circuit in *TMR Energy* and the Second Circuit in *Figueiredo* on what constitutes an adequate alternative forum under that doctrine. Petition 17-20. BCB

admits this "division." BCB Opp. 13. While GOB contends that *Figueiredo* was correctly decided and is in line with this Court's precedents and the United States' view expressed in *Figueiredo*, Petition 17-23, BCB argues that "The D.C. Circuit's Decision In *TMR Energy* Was Correctly Decided," BCB Opp. 13-15. BCB's and GOB's different views underscore the circuit split.

B. BCB's Forfeited *Norex* Argument Supports Certiorari.

BCB leads with a new argument – that the circuit split is not implicated because the CCJ's decision forecloses Belize as an alternative forum. BCB Opp. 11-13. BCB's new "argument was never presented to any lower court and is therefore forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). Nor could BCB raise it on remand. *MBI Group, Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010).

Even if considered, BCB's new argument does not overcome the need for certiorari. The *exclusive basis* for the D.C. Circuit's holding was *TMR Energy*, Petition App. 4 (holding GOB's "argument is squarely foreclosed by our precedent . . . *TMR Energy*"), which conflicts with the Second Circuit's holding in *Figueiredo*, Petition 17-19. Certiorari is required to resolve the circuit split.

Rather, BCB's new argument further supports certiorari. *Norex*, which BCB cites, held "that a case cannot be dismissed on grounds of *forum non conveniens* unless there is *presently* available to the plaintiff an alternative forum that will permit it to litigate the subject matter of its dispute." 416 F.3d at 159 (emphasis added); BCB Opp. 12. *Norex* adds the limitation "presently," which is generally not found in other *forum non conveniens* decisions, including from this Court, which focus on whether the foreign forum has "jurisdiction to hear the case." *Sinochem*, 549 U.S. at 429; Petition 19 n.14.

Norex has not been followed by another circuit. The other cases BCB cites do not involve foreign rulings on the merits. BCB Opp. 12-13. As Judge Posner noted, *Norex* is subject to exception: "There is an exception, however, for cases in which a plaintiff seeks to defeat dismissal by waiting until the statute of limitations in the alternative forum has expired and then filing suit in his preferred forum (with the longer limitations period) and arguing that the alternative forum is inadequate." *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 736 (7th Cir. 2010). Thus, *forum non conveniens* is still warranted because BCB waited until after the CCJ's decision and after the New York Convention's statute of limitations lapsed before filing this action. Petition App. 25. Alternatively, this would be an issue for the lower courts in the first instance, after reversal.

BCB cites this Court's holding that dismissal "would not be appropriate where the alternative forum

does not permit litigation of the subject matter of the dispute." BCB Opp. 12 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)). This Court was referring to the situation where a country's laws do not permit litigation of the issue. *Id.* Belize permits confirmation actions. BCB filed in Belize first and lost. The issue for this Court is whether, under these circumstances, *forum non conveniens* or the public policy defense bar the losing party from forum shopping to relitigate the matter. BCB's new argument is subsumed within the questions presented.

Further, *Norex* held that "an adverse earlier judgment" in a foreign court may require dismissal, "but the reason for dismissal in such circumstances is our recognition of the foreign judgment in the interest of international comity." 416 F.3d at 159. The second question presented asks whether international comity is grounds to apply the public policy defense. *Norex* thus shows a further split between the Second and D.C. Circuits; the circumstances warrant dismissal under *Norex*, yet the D.C. Circuit held otherwise. Petition 27-28.

C. BCB's Argument That *Forum Non Conveniens* Does Not Apply To Enforcement Actions Cements The Circuit Split.

BCB argues that "*forum non conveniens* does not even apply in award enforcement proceedings" because it "is not an Article V defense." BCB Opp. 15-16. BCB's argument again confirms the circuit split. The D.C.

Circuit adopted BCB's argument, and categorically held that "*forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations." Petition App. 4 (expanding *TMR Energy*); *see* Petition 17-19. On the other hand, the Second Circuit *expressly rejected* this argument, reasoning that Article III of the New York Convention makes confirmation subject to local "rules of procedure" and *forum non conveniens* is a *procedural* doctrine. *Monegasque*, 311 F.3d at 495-96. While this Court may "rephrase[] the question presented," *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), the first question is broad enough to also resolve this circuit split on whether *forum non conveniens* applies under the Convention.

D. *TMR Energy* Also Conflicts With This Court's Precedents.

TMR Energy's rule barring *forum non conveniens* because only a U.S. court "could reach [the defendant's] property, if any, in the United States," 411 F.3d at 304, if applied to this Court's precedents in *Sinochem* and *Continental Grain*, would foreclose *forum non conveniens'* application in cases in which this Court held the doctrine applied.

BCB's efforts to distinguish *Sinochem*, citing this "Court['s] instruct[ion] [that] the key to *forum non conveniens* is the 'gravamen' of the complaint," are misguided. BCB Opp. 17. *Sinochem*'s gravamen discussion went to the balancing of interests *after* this Court

found an adequate alternative foreign forum. 549 U.S. at 435-36. *TMR Energy* forecloses courts from reaching the gravamen issue since a foreign forum is categorically inadequate. 411 F.3d at 303.

BCB's efforts to distinguish *Continental Grain* are also meritless. BCB Opp. 18-20. That *Continental Grain* involved §1404(a) rather than common law *forum non conveniens* makes no material difference when this Court has recently stated that "Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system." *Atlantic Marine Constr. Co. v. United States Dist. Court*, 134 S. Ct. 568, 580 (2013). The issues here and in *Continental Grain* are the same – whether *forum non conveniens* (or §1404(a)) is precluded when the alternative forum is not one "where [the action] might have been brought," *Continental Grain*, 364 U.S. at 21-22, because "there is no other forum in which [the petitioner] could reach [the defendant's] property," *TMR Energy*, 411 F.3d at 304. There is no material distinction between *forum non conveniens* and §1404(a) as to *this question*.

Finally, the *in rem* nature of *Continental Grain* heightens the conflict with *TMR Energy*'s rule in an *in personam* action. This Court's holding that *forum non conveniens* under §1404(a) was available in an *in rem* action where the "thing" (the barge) could not be named in the other action, because "the practical economic fact of the matter is that the money paid in satisfaction of [the judgment] will have to come out of

the barge owner's pocket," *Continental Grain*, 364 U.S. at 26, conflicts with the D.C. Circuit's rule that, even in an *in personam* action, *forum non conveniens* is foreclosed since the assets sought in the U.S. could not be reached in the other forum, *TMR Energy*, 411 F.3d at 303-04.

Certiorari is necessary to resolve this important conflict.

III. THE PUBLIC POLICY DEFENSE REQUIRES REVIEW.

A. The Dispute As To How The *Parsons* Standard Is *Applied* Requires This Court's Guidance.

BCB's argument – that "The *Standard* Governing The Public Policy Defense To Enforcement Under The New York Convention Is Well Established," BCB Opp. 21-22 (emphasis added) – misses the point. Most circuits, the ILA, the Restatement, and CCJ recognize that "enforcement [must] violate the forum state's most basic notions of morality and justice." *See, e.g.*, *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974); Pet. 30-32 & n.18. However, that is not the question presented. The lack of guidance lies in how this standard is *applied* – whether articulating a "well-defined" and "dominant" public policy or balancing between competing public policies is required under Article V(2)(b). Pet. 30-32. The legal community's call for greater clarity given the "discrepancies" that

exist and dearth of guidance from this Court, Petition 26-27, 36, should be answered.

B. Disagreement As to What Is A Cognizable Well-Defined And Dominant Public Policy Of The United States Requires Review.

BCB incorrectly argues that GOB has "failed to demonstrate how enforcement of the Award would violate any 'explicit' or 'well-defined and dominant' United States public policy." BCB Opp. 22. The public policies that GOB has invoked – *U.S*. separation of powers and international comity – are the same policies the Restatement, applying *Parsons*, has *credited* as a basis for refusing enforcement. *Compare* BCB Opp. 24, *with* Petition 27-30.

BCB asserts that "[a] purported U.S. public policy of separation of powers cannot be implicated because the Award does not involve any branches of the U.S. Government." BCB Opp. 24. But the public policy defense permits courts to decline enforcement of an award where it "would be contrary to the public policy of that country" where enforcement is sought. Petition App. 46, Art. V(2)(b). U.S. courts thus *necessarily* apply U.S. policy to facts arising *outside* of the U.S. The CCJ has held that enforcement of this award violates Belize's separation of powers principles. Those same principles are at the core of the U.S. Constitution. The D.C. Circuit should have denied confirmation on U.S. public

policy grounds. Because the policies articulated by the CCJ

> *coincide* with U.S. public policy by expressing an important interest *shared* by the United States[,] [b]y vacating or withholding recognition and enforcement of an award in that circumstance, a court may vindicate U.S. public policy.

Petition 28 (quoting Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-17 Rptr. Note c) (emphasis added).

BCB also incorrectly argues that "the doctrine of international comity cannot constitute a public policy within the meaning of Article V(2)(b)." BCB Opp. 25-26. The Restatement states 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." Petition 28 (quoting Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-18 Rptr. Note b). In contrast to the D.C. Circuit, which rejected international comity as grounds for dismissal even though GOB is being subjected to inconsistent judgments, Petition App. 3-4, the Second Circuit recently held that because defendants "could not simultaneously comply" with U.S. and foreign law, "international comity required the district court to abstain from exercising jurisdiction," *In re Vitamin C Antitrust Litigation*, ___ F.3d ___, 2016 WL 5017312 at *1 (2d Cir. Sept. 20, 2016).

While BCB attempts to downplay the significance of the CCJ's decision, the CCJ's refusal to enforce this award on public policy grounds makes this the perfect vehicle for this Court to address this issue. The highest court in the English-speaking Caribbean, with unquestioned impartiality, applied the same *Parsons* standard, to the same award, and found it unenforceable on separation of powers grounds that are the "foundations upon which the rule of law and democracy are constructed throughout the Caribbean" and the bedrock of the U.S. Constitution – grounds the Restatement *credits* to refuse enforcement.

This case also implicates the U.S. public policy against international public corruption. While BCB denigrates the significance of that policy, BCB Opp. 24-25, this Court has noted that "combating public corruption is a significant international policy," *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 869 (2008).

Indeed, that these policies are shared by Belize and the U.S. (and support refusing enforcement) makes this case distinct from cases where policy interests conflict, like the recent Second Circuit decision cited by BCB, *Corporación Mexicana de Mantenimiento Integral S. de R.L. de C.V. v. Pemex-Exploración y Producción*, ___ F.3d ___, 2016 WL 4087215 at *8-10 (2d Cir. Aug. 2, 2016) (finding conflict between international comity and the U.S.'s repugnancy of retroactive legislation). Notably, *Pemex* demonstrates a split between the Second and D.C. Circuits on this question.

Pemex grounded the policy against retroactive application of laws on the U.S. Constitution and "a legal doctrine centuries older than our Republic." *Id.* at *10 (citation omitted). *Pemex* thus conflicts with the D.C. Circuit below, which rejected GOB's articulated public policy based on separation of powers principles, Petition App. 4, even though such principles are grounded in the U.S. Constitution, and "go[ ] back to the writings of Montesquieu" as the CCJ noted, Petition App. 82, ¶42.

BCB's argument that "[a]n arbitral award's validity is only subject to challenge in the courts of primary jurisdiction," BCB Opp. 27-29, confuses different articles in the New York Convention. Article V(1)(e) permits a court to refuse enforcement where "[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." Petition App. 46. BCB is correct that such a country has "primary jurisdiction." However, GOB did not seek non-recognition on the basis of Article V(1)(e). GOB sought non-recognition on different grounds – that enforcement would be contrary to U.S public policy under Article V(2)(b).

Finally, BCB's suggestion that GOB is seeking reconsideration of the tribunal's holding "through the back door of the public policy exception," BCB Opp. 25, is also wrong. It is undisputed that the LCIA arbitral tribunal *never* addressed U.S. public policy, because it had no basis to do so. Under Article V(2)(b), U.S. public policy becomes relevant only in a post-award confirmation action if enforcement is sought in the United States.

Certiorari is therefore also necessary to provide guidance on application of Article V(2)(b) where there are countervailing public policies.

CONCLUSION

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

Respectfully submitted,

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