No. 16-135

In The Supreme Court of the United States

GOVERNMENT OF BELIZE,

Petitioner,

v.

NEWCO LIMITED,

Respondent.

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

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

Newco does not dispute the square circuit split between the D.C. Circuit's adherence to *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) in this case, and the Second Circuit's decision in *Figueiredo Ferraz E. Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011), concerning *forum non conveniens'* applicability in international arbitration enforcement actions. Nor does Newco dispute this Court's lack of guidance on the public policy defense's applicability, or that the D.C. Circuit's categorical rejection of international comity as a cognizable public policy is contrary to the Restatement (3d) of U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2, 2012) §4-18 Rptr. Note b, and *Figueiredo*'s reasoning.

Further, Newco does not oppose consolidation of this case with *BSDL* and *BCB*.[1] And this case cures any "vehicle" issues raised by the United States in *BSDL* (which also fail, *see BSDL* Supp. Br. 5), where *forum non conveniens* was one of the primary arguments briefed to the D.C. Circuit, *see* No. 15-7077, Doc. No. 1589521, at 43-50; *id.*, Doc No. 1596848, at 4-10, and addressed by that court, Pet. App. 4, *after* the order in *BSDL* for the Solicitor General's views. Moreover, the Government of Belize ("GOB") *agrees* Newco is entitled to payment on the award, but only in accord with

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[1] *Government of Belize v. Belize Social Development Limited*, No. 15-830 ("*BSDL*"); *Government of Belize v. BCB Holdings Limited, et al.*, No. 16-136 ("*BCB*").

Belizean law – the *precise* circumstances in *Figueiredo*, making this a perfect vehicle for resolving the split.

Newco's argument that "[t]his case does not even implicate the questions it purports to raise" is baseless. There is a recognized conflict between *TMR Energy* and *Figueiredo*, and *TMR Energy* was the sole basis for the D.C. Circuit's denial of *forum non conveniens* here. Newco's primary/secondary jurisdiction argument is simply irrelevant because all the relief sought by Newco and GOB can be awarded by courts of primary *or* secondary jurisdiction. Indeed, a primary/secondary jurisdiction distinction existed in *TMR Energy* and *Figueiredo*, but was irrelevant to their conflicting decisions.

Newco's argument that there is no disagreement regarding the public policy defense's application also fails. Newco does not dispute (but only ignores) that the public policy of international comity GOB has invoked here in agreeing to pay the award, but seeking to do so in accord with and without violating Belizean law, has been credited by the Restatement and the Second Circuit in *Figueiredo* (albeit under *forum non conveniens*), yet were summarily and categorically dismissed by the D.C. Circuit. Nor does Newco dispute the lack of guidance from this Court on the public policy defense's applicability, or that the circuit court decisions have effectively rendered the defense a nullity that can never overcome the policy favoring arbitration.

Certiorari is required.

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ARGUMENT

I. REVIEW IS COMPELLED ON *FORUM NON CONVENIENS*.

A. Newco's Primary/Secondary Jurisdiction Distinction Is Irrelevant to the Circuit Split.

1. Newco's Waived Argument Has No Bearing on the First Step of the *Forum Non Conveniens* Analysis at Issue Here.

The square circuit split between the D.C. and Second Circuits is undisputed. And Newco's main argument that "[t]his case does not implicate any circuit conflict on the *forum non conveniens* question presented" is spectacularly wrong. Newco Opp. 8. While Newco made other arguments regarding the primary/secondary jurisdiction distinction below, it never argued its relevance to the "adequacy" of the forum, and is therefore waived. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). Instead, Newco invoked *TMR Energy* and argued what the D.C. Circuit in turn held: that it was bound by "*TMR Energy* . . . [where] 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." Pet. App. 4; D.C. Circuit, No. 15-7077, Doc. No. 1594444, at 42-46. That conflicts with the Second Circuit, which rejected *TMR Energy*, and held *forum non conveniens* is not categorically barred in enforcement actions. *Figueiredo*, 665 F.3d at 390-91.

Nor is the primary/secondary jurisdiction distinction germane to the threshold *forum non conveniens* question here. While only a court of primary jurisdiction may annul, set aside, or suspend the award, *see* Newco Opp. 9, neither Newco nor GOB have requested such relief. Newco sought confirmation and enforcement – relief it can seek in *any* court of primary *or* secondary jurisdiction.[2] Likewise, GOB's *forum non conveniens*[3] and Article V(2)(b)[4] arguments apply to primary *and* secondary jurisdictions.

Newco's primary/secondary jurisdiction distinction is not implicated by the circuit split. The holding in *TMR Energy* that *Figueiredo* rejected – there is no adequate alternative forum because no other forum can attach assets that may exist in the U.S. – does not

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[2] Recognition and enforcement may be obtained in any "Contracting State." Pet. App. 13, Art. III.

[3] *Forum non conveniens*' applicability, as a rule of procedure, rests on Convention Article III, requiring that any action for recognition and enforcement in any "Contracting State" shall proceed "in accordance with the rules of procedure" of that Contracting State. Pet. App. 13, Art. III; *see Figueiredo*, 665 F.3d at 390; *In re Arbitration Between Monagasque De Reassurance S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497 (2d Cir. 2002). Because Article III expressly applies to "[e]ach Contracting State," the primary/secondary jurisdiction distinction is irrelevant to *forum non conveniens*' applicability.

[4] Article V(2)(b) may be applied by "the competent authority in the *country where recognition and enforcement is sought*," Pet. App. 15, Art. V(2) (emphasis added), regardless of whether it is of primary or secondary jurisdiction. Conversely, the authority to "set aside or suspend" an award can only be ordered by a court "of the country in which, or under the law of which, *that award was made*." Pet. App. 15, Art. V(1)(e) (emphasis added).

implicate this distinction. Nor does that distinction affect the D.C. Circuit's broader holding here that *forum non conveniens* is categorically inapplicable in arbitration enforcement actions against foreign states, Pet. App. 4, or the Second Circuit's determination that *forum non conveniens* is available as a rule of procedure under the Convention. *See Figueiredo*, 665 F.3d at 390; *Monegasque*, 311 F.3d at 497.

TMR Energy itself fatally undercuts Newco's primary/secondary jurisdiction distinction. In *TMR Energy*, the defendant sought *forum non conveniens* dismissal from the U.S. (secondary jurisdiction), for an enforcement action pending in Sweden (primary jurisdiction). But the D.C. Circuit held that the Swedish court of *primary* jurisdiction was an *inadequate* forum because of its inability to attach any assets that may exist in the U.S. With *TMR Energy* itself holding the court of *primary* jurisdiction is *inadequate* as against a court of secondary jurisdiction, Newco's argument the circuit split is not implicated here because no court of *secondary* jurisdiction can ever be found *adequate* in an enforcement action as against the court of primary jurisdiction, is necessarily wrong.

2. Newco's Arguments Regarding the Second Step are Irrelevant and Wrong.

Newco argues that even if Belize is an adequate alternative forum, the U.S. court's primary jurisdiction role would frustrate *forum non conveniens* under the

second balancing step. Newco Opp. 10-11. That is irrelevant. What may occur on remand if the lower courts are ordered to balance the interests for the first time is no reason for this Court to deny certiorari where there is a square circuit split on an issue of national and international importance.

Newco's argument is also wrong. Newco does not dispute the nearly identical circumstances between this case and *Figueiredo*; in both, the foreign state agreed to pay an award, but sought *forum non conveniens* dismissal so it could do so in accord with its own payment laws. In *Figueiredo*, there was also a primary/secondary jurisdiction distinction, with Peru primary, and the U.S. secondary. But the Second Circuit *never* cited Peru's primary jurisdiction as a reason for *forum non conveniens* dismissal. Instead, *all* the dispositive factors perfectly apply here, which GOB highlighted and Newco never disputes:

> With the underlying claim arising (1) from a contract executed in Peru (2) by a corporation then claiming to be a Peruvian domiciliary (3) against an entity that appears to be an instrumentality of the Peruvian government, (4) with respect to work to be done in Peru, the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award tips the FNC balance decisively against the exercise of jurisdiction in the United States.

Figueiredo, 665 F.3d at 392. These nearly identical circumstances make this case the perfect vehicle for resolving this circuit split.

B. The Second Circuit Properly Held *TMR Energy* Was Incorrect, and this Conflict Requires Certiorari.

Newco also argues the D.C. Circuit's decision is correct. Newco Opp. 11-13. But Newco does not dispute *Figueiredo* found specifically to the contrary. Newco Opp. 13. Tellingly, while the Second Circuit carefully explained the fatal flaws with *TMR Energy*'s reasoning, the D.C. Circuit has never explained why *Figueiredo* is wrong, despite numerous opportunities in these three GOB actions.

Regardless, it is *this Court's* responsibility to resolve such splits. *See* Sup. Ct. Rule 10(a). This responsibility is heightened here, since as Newco concedes, the D.C. Circuit is the default venue for such actions. *See* Newco Opp. 13 n.4. Unless this Court grants certiorari now, *forum non conveniens* will be rendered effectively obsolete as any petitioner can bring a Convention enforcement action against a foreign state in the D.C. Circuit and frustrate the doctrine's applicability.

Newco's "alternative reason" why *forum non conveniens* does not apply, Newco Opp. 13-14, is actually an additional reason certiorari should be granted. Newco asserts "the doctrine of *forum non conveniens*

simply does not apply in award-enforcement proceedings." Newco Opp. 13. But Newco's reasoning – that *forum non conveniens* is not an Article V defense and is thus inapplicable – has been *rejected* by the Second Circuit. Newco Opp. 14; *Figueiredo*, 665 F.3d at 390; *Monagasque*, 311 F.3d at 497. And while the D.C. Circuit has not addressed that specific *reasoning*, the *effect* of its holding here is in conflict, by now categorically holding "that the doctrine of forum non conveniens does not apply to actions in the United States to enforce arbitral awards against foreign nations." Pet. App. 4. Any lack of clarity identified by the United States in *BSDL* as to "whether the D.C. Circuit in *TMR Energy* intended to establish a categorical rule that a foreign forum is always inadequate when the plaintiff seeks to attach assets in the United States," *BSDL*, U.S. 11, was answered in *Newco* and *BCB*, and in a way contrary to the Second Circuit and the United States' own position in *Figueiredo*.

C. *TMR Energy* Conflicts and Is in Tension with this Court's Precedents.

Certiorari is independently compelled because the D.C. Circuit's decision here and in *TMR Energy* is contrary to this Court's *forum non conveniens* jurisprudence. Newco's arguments to the contrary fail.

First, Newco does not dispute that *TMR Energy*'s rule, if applied to *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) and *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960),

where the attachment of assets was also sought, would foreclose *forum non conveniens* in cases this Court held it applies. Nor do Newco's arguments that *TMR Energy* does not "conflict" with those decisions because they were not Convention enforcement actions, address the *tension* in their holdings. Newco's arguments are all borrowed from BCB's opposition brief, and for the same reasons explained in *BCB* Reply 7-9, those distinctions fail.

Newco's effort to distinguish *Sinochem* because the "gravamen" of the action differed ignores that *Sinochem*'s "gravamen" analysis was part of the *second step* never reached under *TMR Energy*'s rule. *See* Newco Opp. 15-16. On the adequacy of the alternative forum, all that mattered in *Sinochem* was that China had jurisdiction. It was irrelevant that the complaint in the U.S. sought "that 'any assets of Sinochem be attached.'" But if *TMR Energy*'s rule were applied in *Sinochem*, *forum non conveniens* would be foreclosed in what this Court unanimously held to be a "textbook" case for its application.

Newco's attempts to distinguish *Continental Grain* likewise fail. That it involved an *in rem* claim arising under *forum non conveniens*' domestic analog does not change that it addressed the *very issue* here – whether an alternative forum's inability to attach specific assets frustrates §1404(a) venue transfer or *forum non conveniens* dismissal. The D.C. Circuit's rigid holding that the alternative forum's inability to attach any assets that may exist in the U.S. renders it inadequate, conflicts and is in tension with *Continental Grain*'s

contrary finding, based on the "common-sense approach" that "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," Pet. 22 (quoting *Continental Grain*, 364 U.S. at 24, 26).

Second, Newco does not dispute that *TMR Energy* implicates issues left open in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). As Newco concedes, the premise for *TMR Energy*'s holding is a footnote from *Piper Aircraft* that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." Newco Opp. 17 (quoting *Piper Aircraft*, 454 U.S. at 254 n.22). But what this Court described as something arising in "rare circumstances," *Piper Aircraft*, 454 U.S. at 254 n.22, the D.C. Circuit has converted into a categorical rule foreclosing *forum non conveniens* in actions to enforce arbitral awards against foreign nations. *See* Pet. App. 4. And it has done so in circumstances entirely *distinct* from the sole example offered by this Court – where it was unclear whether the foreign tribunal "will hear the case," and there was "no generally codified . . . legal remedy" for the "claims asserted." *Piper Aircraft*, 454 U.S. at 254 n.22. Here, the D.C. Circuit has foreclosed *forum non conveniens* even though Belize courts hear enforcement actions, Belizean statutes *require* the Government to pay awards enforced by the Belize courts, and Belize has *agreed* to pay the award, in accord with its tax and currency statutes. It has also done so in a case implicating

the Foreign Sovereign Immunities Act ("FSIA"), despite *Verlinden*'s observation that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*." 461 U.S. at 490 n.15.

This tension, if not outright conflict, with *Sinochem* and *Continental Grain*, on issues left open by *Piper Aircraft* and *Verlinden*, independently calls for certiorari.

II. REVIEW IS REQUIRED ON THE ARTICLE V(2)(b) PUBLIC POLICY DEFENSE.

Certiorari is also compelled on the Article V(2)(b) public policy defense. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court confirmed that defense's vitality, but left its application open. Newco does not meaningfully dispute the lack of guidance and uniformity as to the *standard* applied for determining which public policies are "'explicit' or 'well-defined and dominant,'" and how the public policy defense is then to be *applied* given the countervailing policy favoring arbitration. Nor does it dispute that the International Law Association has recognized that Article V(2)(b) is the Convention's aspect with the "most significant" discrepancies, and the need for "[g]reater consistency" in its application. ILA, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards ¶23 (2002); *see* Pet. 31, 35.

Rather, what Newco claims as the "dispositive flaw" in Belize's argument – that Belize has "failed to articulate any 'explicit' or 'well-defined and dominant' United States public policy" – is the very thing compelling this Court's review. *See* Newco Opp. 19. Newco does not dispute (but simply ignores) that the public policy in "international comity" identified by Belize and rejected by the D.C. Circuit, has been *credited* by the Restatement as grounds for refusing enforcement under Article V(2)(b). *See* Pet. 31-32 (discussing Restatement §4-18 Rptr. Note b). Nor does Newco dispute that *Figueiredo*, on nearly identical facts (albeit on *forum non conveniens*), found that "international comity" interests in permitting the foreign state to pay the award in accord with its own statutes, *prevailed* over "the strong United States policy favoring the enforcement of foreign arbitral awards." *Figueiredo*, 665 F.3d at 391-92.

Newco fails in its attempts to discredit "international comity," and the specific circumstances here where the Belize courts have found Newco brought its confirmation action in the U.S. to "avoid complying with" and "to breach the laws of Belize." The case Newco cites for its argument that international comity is a discretionary doctrine, *Hilton v. Guyot*, 159 U.S. 113 (1895), only highlights that international comity has been a bedrock principle of this Court for over a century. *See* Newco Opp. 23. Newco's primary/secondary jurisdiction argument also fails. While the award's validity is only subject to challenge in courts of primary jurisdiction, *GOB does not dispute the award is valid*. As in

Figueiredo, GOB only seeks to pay the award in accord with its statutes. Newco's argument that "this award-enforcement proceeding has nothing to do with tax collection" fails when it has been specifically found that Newco's reason for filing its U.S. action was "to breach the laws of Belize," including Belize's Income Tax Act. Pet. App. 54 ¶56.[5]

Guidance from this Court is needed on this issue.

[5] The district court decision Newco cites for confirming an award over a tax-related argument, *see* Newco Opp. 26 (discussing *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, 963 F.Supp.2d 289, 298 (S.D.N.Y. 2013), *aff'd sub nom. Yukos Capital S.A.R.L. v. Samaraneftegaz*, 592 F. App'x 8 (2d Cir. 2014), does not trump *Figueiredo*. Here, like in *Figueiredo*, and unlike *Yukos Capital*, enforcement is sought against the foreign state itself, which is not challenging the award, but only seeking to pay consistent with its own laws.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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December 21, 2016