No. 15-830

# In The
# Supreme Court of the United States

GOVERNMENT OF BELIZE,

*Petitioner,*

v.

BELIZE SOCIAL DEVELOPMENT LIMITED,

*Respondent.*

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

## 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

Belize Social Development Limited ("BSDL") does not dispute that a square, well-defined, and unchanging circuit split exists between the D.C. Circuit's standard in *TMR Energy* and this case on the one hand, and the Second Circuit's decision in *Figueiredo* on the other. Instead, BSDL's primary argument is that certiorari is inappropriate because the Government of Belize's ("GOB's") discovery responses concede that "regardless of any circuit split, the result in this case would be the same" in either circuit. BSDL Opp. 7. That argument is spectacularly wrong and misleading. It ignores the very Belizean authorities the discovery responses cite, which make clear that the reason "no execution or attachment" may be ordered is because Belizean law codifies a simple, equivalent administrative procedure by which the Government is required to make full payment plus interest to any party that has prevailed against it, including "in connection with any arbitration." Under this law, if the Award were confirmed in Belize, BSDL would be entitled to full recovery plus interest. Thus, under Second Circuit precedent, Belize would be an adequate alternative forum, while this is entirely inconsequential in the D.C. Circuit and *forum non conveniens* is foreclosed. Certiorari is required to resolve this split.

BSDL's other arguments are likewise unavailing. BSDL's contention that *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), was correctly decided is irrelevant for present

purposes; it conflicts with the Second Circuit, commanding the Court's attention. Moreover, certiorari is independently compelled because the D.C. Circuit's rule conflicts with this Court's *Sinochem* decision.

BSDL's opposition to the second question presented similarly fails. BSDL does not dispute the lack of guidance from this Court as to when, in *application*, the policy in favor of arbitration must yield to countervailing public policies. Instead, BSDL argues simply that the black letter *standard* itself is uncontroverted and erroneously contends no countervailing public policy exists here. This latter argument is baseless, and ignores the District Court's own recognition that "the United States has a strong policy against foreign corruption" that "conflict[ed]" with the "policy in favor of arbitral dispute resolution." App. 46-47, 14. Moreover, the very Restatement authority BSDL relies upon makes clear that international comity and the violation of "an important interest shared by the United States" are bases to refuse enforcement on *U.S.* public policy grounds. This case thus presents the perfect opportunity to test the limits of the policy in favor of arbitration. And the countervailing policies at issue here are of vital importance, where the highest court in the English-speaking Caribbean has held that enforcement of a parallel agreement, between the same former Prime Minister and another Lord Ashcroft-controlled entity, that similarly provided preferential tax treatment without Parliamentary approval, would "attack the foundations upon which the rule of law and

democracy are constructed throughout the Caribbean." Far from being "irrelevant," the Caribbean Court of Justice's ("CCJ") decision, this case, and the broader questions it presents, compel this Court's review.

## I. REVIEW IS COMPELLED UNDER THE RULE 10 CRITERIA ON *FORUM NON CONVENIENS*.

### A. Belizean Law Expressly Provides for Full Monetary Relief Against the Belizean Government, Making Belize an Adequate Alternative Forum.

It is undisputed that this case presents a clean circuit split on *forum non conveniens*. "[T]he D.C. Circuit holds that an alternative forum does not exist in foreign arbitral award enforcement proceedings against foreign nations because only a U.S. court may attach the commercial property of a foreign nation located in the United States, whereas the Second Circuit holds that an alternative forum exists as long as 'there are *some assets* of the defendant in the alternative forum.'" BSDL Opp. 7-8.

BSDL instead argues that "resolution of any circuit conflict would not affect this case," because GOB's discovery responses stated:

> Under Belizean law, property or assets of Belize located within Belize are not subject to execution or attachment. *See* Crown Proceedings Act – Chapter 167 of the Laws of Belize

> (Revised Edition 2000), §25(4); Belize Supreme Court (Civil Procedure) Rules 2005 at ¶¶46.6, 50.2(3).

BSDL Opp. 8, Add. 3add, 8add-9add. BSDL contends this is a concession that "there are no assets available in the alternative forum, rendering any conflict irrelevant to the resolution of this case." BSDL Opp. 8.

BSDL is simply wrong. In an attempt to distract from the square circuit split, BSDL fails to inform this Court that the same statutory section cited in GOB's discovery responses makes clear that execution or attachment is unavailable because an alternative administrative procedure is firmly established, which is simpler in practice, and equivalent in force, requiring the Government to pay Belizean judgments against it in full and with interest. Crown Proceedings Act – Chapter 167, §25(1)-(4); Reply_App. 1-2.

This statutory process applies to "any civil proceedings . . . in connection with any arbitration to which the Crown is a party." Reply_App. 1 §25(1). When a party prevails, they may apply to the court for a certificate stating the amount owed by the Government, which legally obligates the Government to pay the amount listed, plus interest, after that certificate is served on the appropriate Government department, which here would be the Attorney General. Reply_App. 1-2 §§25(1)-(3).[1] The next sub-section,

[1] The U.S. has a similar procedure, where judgments against it may be made from funds appropriated under 31 U.S.C. §1304.

which Belize cited and BSDL seizes upon, simply provides that this procedure is the only procedure for enforcing payment from the Government.[2] Reply_App. 2 §25(4).

BSDL's assertion that it "cannot obtain *any* relief in Belize" is thus false.[3] *See* BSDL Opp. 1. The admitted circuit split is fully at issue. Belize's statutory provisions *requiring* full payment, plus interest, to a prevailing party, plainly satisfy the Second Circuit's standard that "there are some assets of the defendant in the alternate forum."[4]

Significantly, there was no finding by the District Court or D.C. Circuit beyond a blind adherence to *TMR Energy* as to whether the Belizean courts, and

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[2] Belize Supreme Court Rules 46.6 and 50.2(3) reflect the same. Reply_App. 3. Rule 50.2(3) n.91 also notes that "Rule 59.4 provides an alternative procedure in this situation." Rule 59.4 is entitled "Enforcement against Crown," and concerns the certificate for payment. Reply_App. 4.

[3] That Belize is an adequate alternative forum is also confirmed by the parallel action involving BCB Holdings. Before the CCJ refused enforcement on public policy grounds, BCB filed an application to enforce before the Belize trial court, which "ordered that the Companies be at liberty to enforce the Award in the same manner and to the same effect as a local judgment." CCJ ¶¶12-13, App. 94-95.

[4] The Question Presented's reference to "some attachable assets" does not limit this Court's review. BSDL recognizes that the heart of the issue is "whether there is an available alternative forum for an award enforcement proceeding," BSDL Opp. 1, a question that, at a minimum, is "fairly included" within the question as stated, Sup. Ct. R. 14.1(a).

the administrative process under Belize's statute, provided an adequate alternative forum, nor was it ever litigated. In fact, BSDL's argument here was never even raised in its lower court briefing, for obvious reasons – it is completely wrong.

### B. BSDL Does Not Dispute that the D.C. Circuit Conflicts with the Second Circuit's Decision, and the U.S.'s Position, in *Figueiredo*.

BSDL next contends that "the D.C. Circuit's decision in *TMR Energy* was correctly decided." BSDL Opp. 9 (capitalization altered). But that misses the point. The Second Circuit expressly considered and rejected *TMR Energy*'s *forum non conveniens* rule. Only this Court can resolve this circuit split, which until settled, subjects foreign governments and commercial parties in international disputes to uncertainty and forum shopping favoring the D.C. Circuit. *See* Pet. 3, 35-36.

BSDL is also wrong that *TMR Energy* was correctly decided. Notably, the D.C. Circuit's holding is at odds with the U.S.'s position. *See* Pet. 35. In *Figueiredo Ferraz E. Engenharia De Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011), the U.S. agreed *forum non conveniens* was "an available ground for dismissal" in Convention actions,[5]

[5] The Restatement's rejection of *Figueiredo* does not concern the question presented here. Rather, the Restatement posits

(Continued on following page)

"assum[ed] the availability of another adequate forum," and then proceeded to what, "[i]n the United States' view, [was] the determinative consideration in th[at] case, . . . the balancing of the public and private interest factors." *Figueiredo*, Brief for the United States of America as *Amicus Curiae* in Support of Vacatur and Remand at 21-23 (2d Cir. Feb. 25, 2011). Under the D.C. Circuit's rule, however, courts cannot even reach what the U.S. deemed "the determinative consideration," because "[t]he balancing of private and public interests occurs *only if* an adequate alternative forum exists." App. 26, 14. Unsurprisingly, BSDL's opposition ignores the U.S.'s prior position.

### C. *TMR Energy* Conflicts with this Court's Precedent.

The D.C. Circuit's categorical exclusion of cases from *forum non conveniens* consideration also conflicts with this Court's precedent. BSDL does not

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that *forum non conveniens* is unavailable in Convention actions because it is not a "specific Convention defense to enforcement." Restatement (3d) U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 3, 2013), §4-29(a) cmt. b; BSDL Opp. 11 n.8. That is contrary to the Second Circuit and the U.S., which maintain that *forum non conveniens*, as a procedural doctrine, is available in Convention actions. *Figueiredo*, Brief for U.S. at 21 (citing *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002)). The D.C. Circuit expressly declined to reach this question in *TMR Energy*, *see* 411 F.3d at 304 n.*, and did not address it here. This Petition, therefore, does not raise this separate question.

dispute that if the D.C. Circuit's rule were applied to the facts in *Sinochem*, what this Court unanimously held to be a "textbook case for immediate *forum non conveniens* dismissal," *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007), would instead be barred from dismissal because only a U.S. court "could reach [Sinochem's] property, if any, in the United States," *TMR Energy*, 411 F.3d at 304. Moreover, BSDL is forced to concede "that the plaintiff in *Sinochem* requested that any assets of Sinochem be attached." BSDL Opp. 12 (quotations omitted). Thus, the complaint in *Sinochem* specifically sought the type of relief dispositive to *TMR Energy*'s rule. It also makes *Sinochem* fundamentally different from the two D.C. Circuit cases BSDL cites as examples of the D.C. Circuit dismissing on *forum non conveniens* grounds post-*TMR Energy*, which exclusively sought monetary damages. *See* BSDL Opp. 12 n.9 (and cases cited therein).

Instead, BSDL argues that *TMR Energy*'s rule would not extend to *Sinochem* because, "[a]s the *Sinochem* Court instructed, the key was the 'gravamen' of the complaint," which there was a negligent misrepresentation case arising from events in China, as opposed to a confirmation action. BSDL Opp. 12-13. But BSDL's seizure upon this "gravamen" analysis highlights the fatal flaw in BSDL's argument. This Court's conclusion that "the *gravamen* of Malaysia International's complaint . . . is an issue best left for determination by the Chinese courts," went specifically to the *balancing of interests* in the *forum non*

*conveniens* inquiry, and was addressed by the Court only *after* it concluded that the Chinese courts were an adequate alternative forum. *Sinochem*, 549 U.S. at 435-36 (emphasis added); *id.* at 435 ("Jurisdiction of the Guangzhou Admiralty Court has been raised, determined, and affirmed on appeal."). This is critical, because under the D.C. Circuit's rule, courts are *foreclosed* from even reaching the "gravamen" issue identified in *Sinochem*, given that "[t]he balancing of private and public interests occurs *only if* an adequate alternative forum exists."[6] App. 26, 14. Thus, BSDL offers no meaningful argument that the D.C. Circuit's rule is not in conflict with this Court's unanimous pronouncement of what constitutes a "textbook" case for *forum non conveniens* dismissal.

## II. THE PUBLIC POLICY DEFENSE'S APPLICATION REQUIRES THIS COURT'S GUIDANCE.

### A. Guidance Is Needed Regarding the Proper Application of the Standard When Confronted with Conflicting Policies.

Strikingly, BSDL nowhere contests that this Court's guidance is needed on the second question presented: under the public policy defense, when does the policy in favor of arbitration yield to countervailing public

[6] When the "gravamen" of this action is considered, it points decidedly in favor of *forum non conveniens* dismissal for the same reasons as *Figueiredo*. *See* Pet. 20-21.

policies? BSDL instead obfuscates the issue by noting the general accord as to the *standard* – the defense is to be "construed narrowly," enforcement may be denied where it "would violate the forum state's most basic notions of morality and justice," and requires an "explicit" or "well-defined and dominant" public policy rooted in "laws and legal precedents." *Compare* Pet. 29-30, *with* BSDL Opp. 14 (and authorities cited therein). But the critical question requiring review is how that rule is *applied* when such public policies exist and conflict with the policy in favor of arbitration.[7]

BSDL nowhere disputes that there must necessarily be a limit to the policy in favor of arbitration, nor that guidance from this Court is lacking. One approach (the proper one) recognizes that the policy in favor of arbitration is already encapsulated in the public policy defense's "narrow" reading, and applies the defense so long as an "express" or "well-defined and dominant" countervailing public policy exists. Alternatively, courts can balance the countervailing interests. But what is entirely improper, yet occurred here, is to explicitly identify "strong" and "conflicting policies," yet reflexively hold that the policy in favor of arbitration necessarily prevails. App. 46-47, 14.

[7] BSDL's assertion that *Asignacion v. Rickmers Genoa Schiffahrtsgesselschaft MBH & CIE KG*, 783 F.3d 1010 (5th Cir. 2015), is indistinguishable because it recited the same standard, BSDL Opp. 15, misses the key point as to how it *applied* that standard, there applying a balancing test.

This renders the public policy defense superfluous. Guidance is needed by this Court and needed now, as highlighted by the International Bar Association (and unrebutted by BSDL). *See* Pet. 37-38 (cited therein).

### B. This Case Presents Explicit, Well-Defined and Dominant Public Policies that Conflict with the Policy in Favor of Arbitration.

BSDL also argues certiorari is inappropriate "because Belize has failed to demonstrate how enforcement of the Award would violate any 'explicit' or 'well-defined and dominant' United States public policy." BSDL Opp. 16. This is patently false. The District Court specifically "agree[d]" with GOB "that the United States has a strong policy against foreign corruption," a policy that is explicit, well-defined, and dominant, given its grounding in the Foreign Corrupt Practices Act and this Court's precedent. *See* App. 46, 14; *Republic of Philippines v. Pimentel*, 553 U.S. 851, 869 (2008). And BSDL nowhere contests the State Department's statement that "[t]here were public indications of government corruption under the previous administration" of Prime Minister Musa. *See* Pet. 28.

Likewise, BSDL's efforts to dismiss as "irrelevant" the CCJ's refusal to enforce a near-identical

award,[8] ignores the very Restatement authority upon which BSDL relies, which firmly *credits* decisions like the CCJ's as providing a basis for refusing enforcement on *U.S.* public policy grounds. *See* BSDL Opp. 17 (citing Restatement (3d) U.S. Law of Int'l Comm. Arb. §4-18 cmt. e (Tentative Draft No. 2, 2012)). "[A] U.S. court might plausibly regard recognition or enforcement of an award to be so deeply 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 §4-18 Rptr. Note b. There can be nothing more detrimental to Belize's interests than enforcement of an Award which would disregard Belize's "core constitutional values" and "attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean." Pet. 25 (quoting App. 123 ¶59). International comity dictates that the CCJ's admonition

[8] BSDL argues the CCJ's decision is an improper reason "to review the tribunal's conclusions regarding the parties' agreement and its legality." BSDL Opp. 18. But this is not an affront to the Convention, nor to England where the arbitration was heard. As the English case *Soleimany v. Soleimany* makes clear, even "when arbitrators have entered upon the topic of illegality, and have held that there was none[,] . . . an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent." [1999] 3 Eng. Rep. 847, 859. Here, this would be a determination for the U.S. court, but the unequivocal holding by the highest court of Belize and the English-speaking Caribbean that a similar agreement was unconstitutional, is far from "irrelevant" as against the *ex parte* finding of an arbitration association.

that "No court can properly do this," Pet. 12 (quoting CCJ, App. 124-25 ¶61), likewise extends to the courts of the U.S.

The Restatement also credits the U.S.'s *own* constitutional separation of powers principles (which BSDL flippantly dismisses) as directly bearing on the public policy exception. *Compare* Pet. 27, *with* BSDL Opp. 16-18. "[I]n 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) Int'l Comm. Arb. §4-17 Rptr. Note c(ii) (Tentative Draft No. 2, 2012). Here, where Belize and the U.S. share the same constitutional separation of powers principles, and "Belize's . . . democratic political stability . . . [is an] important U.S. objective[ ],"[9] refusing enforcement would "vindicate U.S. public policy."

It is thus an affront to the CCJ, and Belize itself, that the decision of the English-speaking Caribbean's highest court has been disregarded as "irrelevant" – a holding which threatens to weaken the CCJ's rule of law in its twelve member Caribbean states. Guidance from this Court is needed.



[9] U.S. Dep't of State, *U.S. Relations with Belize* (Dec. 1, 2015), http://www.state.gov/r/pa/ei/bgn/1955.htm.

## CONCLUSION

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

Respectfully submitted,

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PART IV

*Judgments and Execution*

* * *

**Satisfaction of orders against the Crown.**

25.-(1) Where in any civil proceedings by or against the Crown or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person, at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs, if any, ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the head of the authorised Government department or the officer concerned, or the Attorney General, as the case may be.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his attorney-at-law the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued, may order any such directions to be inserted therein.

(4) Except as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs.

* * *

**No writ of execution against the Crown.**

46.6 No writ of execution may be issued where the judgment debtor is the Crown.

* * *

**Circumstances in which court may make order for attachment of debt.**

50.2 (1) The attachment of debt procedure may not be used where the order is to pay money into court.

(2) An attachment of debt order can be made only against a garnishee who is within the jurisdiction.

(3) An attachment of debt order may not be made to attach debts due from the Crown.[91]

(4) A debt may be attached if it is –

(a) due or accruing to the judgment debtor from the garnishee on the date that the provisional order under Rule 50.3 is served on the garnishee; or

(b) becomes due or accrues due to the judgment debtor at any time between the service of the provisional order under Rule 50.3 and the date of the hearing.

* * *

[91] Rule 59.4 provides an alternative procedure in this situation.

**Enforcement against Crown.**

59.4 (1) Parts 44 to 53 do not apply to any order against, or money due or accruing due, or alleged to be due or accruing due from, the Crown.

(2) Any application under the Act for a direction that a separate certificate be issued with respect to costs (if any) ordered to be paid to the applicant may be made without notice.

(3) Every application for an order under the Act restraining any person from receiving money payable to that person by the Crown and directing payment to the applicant or some other person must be served on the Crown at least 14 days before the date of hearing and, unless the court otherwise orders, on the person to be restrained.

(4) Every application under paragraph (3) must be supported by evidence on affidavit –

(a) of the facts giving rise to it; and

(b) identifying the particular debt from the Crown in respect of which it is made.

* * *