APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEVAS MULTIMEDIA PRIVATE LIMITED, Petitioner-Appellee, CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED, Appellees-Intervenors, v. ANTRIX CORP. LTD., Respondent-Appellant,	No. 20-36024 D.C. No. 2:18-cv-01360-TSZ MEMORANDUM*
DEVAS MULTIMEDIA PRIVATE LTD., Petitioner-Appellant, v. CC/DEVAS (MAURITIUS) LTD; TELCOM DEVAS MAURITIUS LIMITED;	No. 22-35085 D.C. No. 2:18-cv-01360-TSZ

Aug. 1, 2023

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent.

DEVAS MULTIMEDIA PRIVATE LIMITED,

Petitioner,

and

CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent-Appellant,

No. 22-35103

D.C. No. 2:18-cv-01360-TSZ

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted June 7, 2023
San Francisco, California

Before: MILLER and KOH, Circuit Judges, and MOLLOY,** District Judge.

These three companion appeals concern an agreement between two Indian corporations: Devas Multimedia Private Ltd. ("Devas") and Antrix Corp. Ltd. ("Antrix"). In the Confirmation Appeal (20-36024), Antrix challenges the district court's orders denying its motion to dismiss and confirming an International Chamber of Commerce ("ICC") arbitration award in favor of Devas. In the Registration Appeals (22-35085 and 22-35103), Antrix and Devas challenge the district court's order granting the motion of CC/Devas (Mauritius) Ltd., Telcom Devas Mauritius Ltd., Devas Employees Mauritius Private Ltd., and Devas Multimedia America, Inc. (collectively "Intervenors") to register the judgment in the Eastern District of Virginia. We hold that the district court erred in exercising personal jurisdiction over Antrix, and we reverse.

1. The district court erroneously concluded that a minimum contacts analysis was unnecessary to exercise personal jurisdiction over Antrix. Personal jurisdiction over a foreign state in a civil action is governed by the long-arm provision of the Foreign Sovereign Immunities Act ("FSIA"). *See Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 589 (9th Cir. 2020). Under the FSIA, a foreign state "shall be immune

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

from the jurisdiction of the courts of the United States" unless an enumerated exception applies. 28 U.S.C. § 1604. The FSIA also provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). The parties agree that for purposes of the FSIA, Antrix is a "foreign state," service has been made, and an enumerated exception applies.

In *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica* ("*Gonzalez*"), we rejected the plaintiff's argument that the FSIA's long-arm provision changed the minimum contacts analysis for foreign states. 614 F.2d 1247 (9th Cir. 1980). We held that "[t]he legislative history of the Act confirms that the reach of [§] 1330(b) does not extend beyond the limits set by the International Shoe line of cases. Personal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard." *Id.* at 1255 (footnote omitted). Since *Gonzalez*, we have continued to apply the rule that personal jurisdiction under the FSIA requires a traditional minimum contacts analysis. *See, e.g.*, *Theo. H. Davies & Co. v. Republic of Marshall Islands*, 174 F.3d 969, 974 (9th Cir. 1998) ("[The FSIA's] long-arm statute, however, is constrained by the minimum contacts required by *International Shoe* . . . and its progeny." (citation omitted)); *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989) ("[I]f defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process clause preclude the assertion of personal jurisdiction over them." (emphasis omitted)); *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1446 (9th Cir. 1991) ("Personal jurisdiction under the

FSIA is determined by resorting to the traditional minimum contacts tests.").

Devas and Intervenors argue that these precedents have been called into question by the Supreme Court's decision in *Republic of Argentina v. Weltover, Inc.*, in which the Court stated, "Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause, . . . we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test." 504 U.S. 607, 619 (1992) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)). However, our prior precedents are binding unless "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Our prior precedents are not "clearly irreconcilable" with *Weltover* for two reasons. First, *Weltover* left open the question of whether foreign states are persons—and thus entitled to a minimum contacts analysis under the Due Process Clause—and only suggested how the Supreme Court might rule on the issue. Second, the application of the minimum contacts analysis to actions under the FSIA in *Gonzalez* is statutory rather than constitutional. Rather than relying on a foreign state's personhood, *Gonzalez* relies on a reading of the FSIA's legislative history to conclude that the FSIA was intended to be consistent with the minimum contacts analysis. 614 F.2d at 1255 n.5. It follows that if a foreign state is not a person and thus not entitled to a minimum contacts analysis through the Constitution, it is still entitled to a minimum contacts analysis through our reading of the FSIA.

Thus, the district court erred in ignoring our precedents requiring it to conduct a minimum contacts analysis.

2. The district court also erred in concluding that Antrix has the requisite minimum contacts with the United States. A defendant is subject to specific personal jurisdiction if "(1) the defendant performed an act or consummated a transaction by which it purposely directed its activity toward the forum state; (2) the claims arose out of defendant's forum-related activities; and (3) the exercise of personal jurisdiction is reasonable." *San Diego Cnty. Credit Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1034–35 (9th Cir. 2023). "The plaintiff has the burden of proving the first two prongs. If he does so, the burden shifts to the defendant to set forth a compelling case that the exercise of jurisdiction would not be reasonable." *Picot v. Weston*, 780 F.3d 1206, 1211–12 (9th Cir. 2015) (citation and quotation marks omitted). "Where service is made under FSIA section 1608, the relevant area in delineating contacts is the entire United States, not merely the forum state." *Richmark*, 937 F.2d at 1447 (cleaned up) (quoting *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987)).

Devas has failed to meet its burden under the first prong to show that Antrix purposefully availed itself of the privilege of conducting activities in the United States. Devas primarily relies on the Antrix and Indian Space Research Organization ("ISRO") Chairman's 2003 visit to Washington D.C. to meet with Forge Advisors and a series of 2009 meetings between ISRO officials and the Devas team. Assuming that ISRO's contacts with the United States may be attributed to Antrix, these meetings are still insufficient because they are not purposeful, but rather "random,

isolated, or fortuitous." *LNS Enters. LLC v. Cont'l Motors, Inc.*, 22 F.4th 852, 859 (9th Cir. 2022) (quoting *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021)). Indeed, ISRO officials came to the United States in 2009 for "unrelated meetings." The Agreement between Antrix and Devas was negotiated outside of the United States, executed in India in 2005, and did not require Antrix to conduct any activities or create ongoing obligations in the United States. *See, e.g.*, *Picot*, 780 F.3d at 1213 (finding insufficient contacts with California because, although the defendant physically entered California, the trips held "no special place in his performance under the agreement as a whole," especially where the agreement was executed in Michigan and contemplated obligations largely in Michigan); *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008) (holding that a contract for sale negotiated in California did not establish minimum contacts in the state because it did not create ongoing obligations in the state); *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007) (finding no minimum contacts when a foreign company made a presentation on a cruise ship in Miami, Florida). Moreover, to the extent that the district court relied on Devas's connections to the United States to justify the exercise of personal jurisdiction over Antrix, this reliance is erroneous because it is the defendant's conduct that must drive the personal jurisdiction analysis, not the plaintiff's. *See Picot*, 780 F.3d at 1212–13 (citing *Walden v. Fiore*, 571 U.S. 277, 289 (2014)).

Thus, the district court erred in holding that Antrix had the requisite minimum contacts for personal jurisdiction.

* * *

Because we hold that the district court erred in exercising personal jurisdiction over Antrix, its judgment is reversed, and we need not address any of the other issues raised in the Confirmation Appeal. Because there is no judgment to register, the district court's order permitting Intervenors to register the judgment in the Eastern District of Virginia is also reversed, and we need not address any of the issues raised by the Registration Appeals.

REVERSED.[1]

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[1] Antrix's motion for a limited remand, **20-36024 Dkt. 72**, is DENIED. CCDM Holdings, LLC; Telcom Devas, LLC; and Devas Employees Fund US, LLC's motions to intervene, **20-36024 Dkt. 94, 22-35085 Dkt. 44, 22-35103 Dkt. 48**, are DENIED.

MILLER, Circuit Judge, with whom KOH, Circuit Judge, joins, concurring:

I join the court's disposition because it correctly applies our precedent that "[p]ersonal jurisdiction under the [Foreign Sovereign Immunities Act] requires satisfaction of the traditional minimum contacts standard." *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980). I write separately to make two observations about the origins of the minimum-contacts requirement and the ways in which it can be satisfied.

First, although our cases have clearly recognized a minimum-contacts requirement for subjecting foreign states to personal jurisdiction, they have been less clear about the source of that requirement. Some of our cases have suggested that the Due Process Clause requires a minimum-contacts analysis. *See*, *e.g.*, *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989). I agree with the District of Columbia Circuit, however, that "[n]either the text of the Constitution, Supreme Court decisions construing the Due Process Clause, nor long standing tradition provide a basis for extending the reach of this constitutional provision for the benefit of foreign states." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002); *accord Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009). "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966). It would be even less reasonable to interpret "person" to encompass foreign states. Whereas the 50

States are part of the constitutional compact—they "derive important benefits and must abide by significant limitations as a consequence of their participation"—foreign states are "entirely alien to our constitutional system." *Price*, 294 F.3d at 96. Principles of comity, diplomacy, and international law, including "a panoply of mechanisms in the international arena," protect the interests that foreign states have in resisting the jurisdiction of United States courts. *Id.* at 97–98. The Due Process Clause does not.

As the court explains today, the better reading of our cases is that "the application of the minimum contacts analysis to actions under the FSIA . . . is statutory rather than constitutional." But the statutory theory of a minimum-contacts requirement is little better than the constitutional one. Nothing in the text of the FSIA's long-arm provision describes a minimum-contacts requirement. 28 U.S.C. § 1330(b). To the contrary, that provision says categorically that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." *Id.* In so doing, it "clearly expresses the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state—and hence its agent—coextensive with the exceptions to foreign sovereign immunity in the FSIA," and it imposes no additional limitations. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005).

In sum, our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other

courts of appeals. In an appropriate case, we should reconsider it en banc.

Second, in most cases involving the enforcement of an arbitral award under the New York Convention, the minimum-contacts requirement will have little practical significance because it can easily be satisfied by the presence of assets in the forum. In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, we held that, "in suits to confirm a foreign arbitral award under the [New York] Convention," a court may exercise "jurisdiction over the defendant against whom enforcement is sought *or his property*." 284 F.3d 1114, 1122 (9th Cir. 2002) (emphasis added); *see* Restatement (Third) of Foreign Rels. L. § 487 cmt. c. (Am. L. Inst. 1987) ("[A]n action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property."). We explained that "[c]onsiderable authority" supports the exercise of jurisdiction to enforce an arbitral award against a respondent's forum property "even if that property has no relationship to the underlying controversy between the parties." *Glencore Grain*, 284 F.3d at 1127. And in most cases in which a party is seeking to enforce an arbitral award against a foreign state in the United States, that state will have assets here. (Why else would anyone seek to enforce an award here?)

In response to questioning at oral argument, Intervenors sought to invoke that basis for personal jurisdiction, arguing that Antrix had assets in the United States against which Devas sought to enforce its award. But it is the plaintiff's burden to establish personal jurisdiction, *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1441 (9th Cir. 1987), and no party raised this theory in the district court or in the briefing on appeal. Indeed, it appears that Devas did not

identify any assets that Antrix had in the United States until after the confirmation of the award. *See Glencore Grain*, 284 F.3d at 1128. Because the argument has been forfeited, the court appropriately declines to consider it today. *See Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1271 (9th Cir. 2022). And I agree with the court that Devas's other efforts to establish minimum contacts are unsuccessful.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEVAS MULTIMEDIA PRIVATE LTD., Petitioner, v. ANTRIX CORP. LTD., Respondent.	C18-1360 TSZ MINUTE ORDER Apr. 16, 2019

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Respondent Antrix Corp. LTD.'s ("Antrix") Motion to Dismiss and Opposition to Petition to Confirm Foreign Arbitral Award, docket no. 13, is DENIED as follows:

(a) Antrix is subject to this Court's personal jurisdiction pursuant to the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1330(b). The parties do not dispute that personal jurisdiction exists as a matter of statute, but Antrix maintains that it is entitled to additional, constitutional due process protections requiring a minimum contacts analysis. It is not. Antrix is not a "person" for due process purposes because it is effectively controlled by the Government of India. Both the U.S. Supreme Court and the Ninth Circuit Court of Appeals have assumed without deciding that foreign

states are "persons" entitled to due process. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). Where the state exercises sufficient control over a foreign corporation, the due process clause does not apply and statutory personal jurisdiction under the FSIA is all that is required. *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding Ltd.*, 703 F.3d 742, 752 (5th Cir. 2012); *GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 813-14 (D.C. Cir. 2012); *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Rep.*, 582 F.3d 393, 400 (2d Cir. 2009); *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) (concluding that state control over a private fund meant the fund was not a person entitled to due process protection and that personal jurisdiction was established by subject matter jurisdiction and service under 28 U.S.C. § 1330(b)). The Court finds these cases persuasive. Antrix is wholly-owned by the Government of India. *See* Antrix's Corporate Disclosure Statement, docket no. 10. The Government of India exercises "plenary control" over Antrix in a principal-agent relationship. *TMR*, 411 F.3d at 301-02. Antrix is "under the administrative control of [India's] Department of Space" ("DOS") and is the "commercial arm" of a related government agency, the Indian Space Research Organization ("ISRO"). Second Declaration of Elizabeth A. Hellmann, docket no. 24, Ex. 45. The Government of India itself characterizes Antrix as a "corporate front of DOS/ISRO" and "as a virtual corporation housed within DOS/ISRO for the purposes of staffing, premises and all organizational support." *Id.*, Ex. 48 at 1. Antrix has no satellites, satellite launch

vehicles, transponders, or electromagnetic spectrum of its own, but rather markets assets owned and controlled by ISRO and DOS. *Id.* at 1-2. Most of Antrix's commercial activities are financed by the government of India. *Id.* at 6. Much of Antrix's leadership is appointed by the government of India. *Id.*, Ex. 47. The Court has jurisdiction under FSIA.

(b) The Court declines to dismiss this action based on the doctrine of forum non-conveniens. Petitioner has no adequate alternative forum in which to execute on property Antrix may own in the United States. *See TMR*, 411 F.3d at 303 ("[O]nly a court of the United States . . . may attach the commercial property of a foreign nation located in the United States."). Active investigations and proceedings against Petitioner and its officers and agents in India—including both civil and criminal proceedings—raise additional concerns about the neutrality of proceedings in India. Given the availability of a temporary stay under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), the Court concludes that dismissal would unfairly prejudice Petitioner and is unwarranted.

(c) The Court exercises its discretion to stay this action pursuant to Article VI of the New York Convention pending the resolution of Antrix's challenge to the underlying award in India's courts. *See Matter of Arbitration of Certain Controversies Between Getma International and Republic of Guinea*, 142 F. Supp. 3d 110 (D.D.C. 2015) (citing factors enumerated in *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310 (2d Cir. 1998)).

The matter is STAYED for one (1) year from the date of this Order. On or before April 15, 2020, the parties shall file a joint status report regarding the litigation in India and whether the Court should lift or extend the stay.

(d) The Court defers a decision on as to whether any security must be posted as a condition of the stay now imposed by the Court. The parties shall address the amount of security, if any, the Court should require during the stay under the New York Convention. Petitioner shall file a brief of not more than ten (10) pages on or before April 26, 2019. Respondent shall file a responsive brief of not more than ten (10) pages on or before May 10, 2019. No replies shall be filed.

(2) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Dated this 16th day of April, 2019.

William M. McCool
Clerk

s/Karen Dews
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEVAS MULTIMEDIA PRIVATE LTD. Petitioner, v. ANTRIX CORP. LTD., Respondent.	C18-1360 TSZ ORDER Oct. 27, 2020

THIS MATTER comes before the Court on Petitioner Devas Multimedia Private Ltd.'s Petition to Confirm Foreign Arbitral Award ("Petition"), docket no. 1. Having reviewed all papers filed in support of, and in opposition to, the Petition, *see* docket nos. 1, 13, 22, 26, 41, & 43, and having held oral argument on October 14, 2020, the Court now concludes that the Award should be confirmed for the reasons stated in this Order.

Background

In January 2005, Petitioner, a corporation formed under the laws of the Republic of India, and Respondent Antrix Corp. Ltd., a corporation wholly owned by the Government of India, entered an agreement for the lease of "Space Segment Capacity on ISRO/Antrix S-Band Spacecraft" ("Agreement"), in which Respondent agreed to build, launch, and operate two satellites and to make available 70 MHz of S-band spectrum to Petitioner. Petition at ¶¶ 1–2, 7. Article 20 of the

Agreement contained a binding arbitration clause, providing in relevant part:

> a. In the event of there being any dispute or difference between the Parties hereto as to any clause or provision of this Agreement . . . or otherwise in any way relating to this Agreement such dispute or difference shall be referred to the senior management of both Parties to resolve within three (3) weeks failing which it will be referred to an Arbit[r]al Tribunal comprising of three arbitrators, one to be appointed by each party (i.e. DEVAS and ANTRIX) and the arbitrators so appointed will appoint the third arbitrator.
>
> b. The seat of Arbitration shall be at NEW DELHI in India.
>
> c. The Arbitration proceedings shall be held in accordance with the rules and procedures of the ICC (International Chamber of Commerce) or UNCITRAL.
>
> . . . .
>
> f. Any decision or award made by the board of Arbitration shall be final, binding and conclusive on the Parties and entitled to be enforced to the fullest extent permitted by Laws and entered in any court of competent jurisdiction.

Agreement, Ex. 3 to Hellmann Decl. (docket no. 2-1 at 124–25).

In February 2011, Respondent repudiated the Agreement, which allegedly "destroy[ed]" Petitioner's business. Petition at ¶ 12. To enforce its rights under the Agreement, in June 2011, Petitioner commenced arbitration proceedings in accordance with the Rules

of Arbitration of the International Chamber of Commerce ("ICC"). *Id.* at ¶ 17. Respondent initially refused to participate in the ICC arbitration and refused to nominate an arbitrator in connection with that arbitration. Supreme Court of India Judgment, Ex. 3 to Meehan Decl. (docket no. 15-1 at 24). Instead, Respondent invoked the rules and procedures of UNCITRAL and nominated an arbitrator outside of the ongoing ICC arbitration. *Id.* at 25. Respondent also filed a petition with the Supreme Court of India pursuant to Section 11 of the India Arbitration and Conciliation Act of 1996 ("India Arbitration Act"), requesting that India's highest court order the parties to proceed under the rules and procedures of UNCITRAL. In May 2013, the Supreme Court of India held:

> In view of the language of Article 20 of the Arbitration Agreement which provided that the arbitration would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, [Petitioner] was entitled to invoke the Rules of Arbitration of the ICC for the conduct of the arbitration proceedings.
>
> . . . .
>
> Once the provisions of the ICC Rules of Arbitration had been invoked by [Petitioner], the proceedings initiated thereunder could not be interfered with [by Respondent] in a proceeding under Section 11 of the [India Arbitration Act].
>
> . . . .
>
> Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal

> in terms of the Arbitration Agreement and the said Rules.

Supreme Court of India Judgment, Ex. 3 to Meehan Decl. (docket no. 15-1 at 54–55).

In September 2015, a three-member ICC panel[1] based in New Delhi issued a final arbitral award ("Award"), concluding that Respondent "wrongful[ly] repudiat[ed]" the Agreement and awarding Petitioner $562.5 million plus interest. Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 98). That same month, Petitioner sought to enforce the Award in a court located in New Delhi; the following month, Respondent filed a petition to set aside the Award in a different court, located in Bangalore. Roy Decl. at ¶¶ 2–3 (docket no. 42). The parties then proceeded to litigate which court—the one in New Delhi or Bangalore—has jurisdiction over the proceedings concerning the parties' Award. *Id.* at ¶¶ 4–7. To date, the jurisdictional issue remains unresolved. *Id.* at ¶ 7; Joint Status Report (docket no. 39 at 2).

Within three years of the Award being issued, in September 2018, Petitioner filed the instant Petition, docket no. 1, to confirm the Award. Respondent then filed a Motion to Dismiss, docket no. 13. The Court concluded that Respondent was subject to this Court's personal jurisdiction pursuant to 28 U.S.C. § 1330(b), declined to otherwise dismiss the case, and entered a one-year stay. Minute Order (docket no. 28 at 2).

On September 17, 2020, the Court lifted the stay after considering the factors identified in *Europcar*

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[1] The ICC panel was comprised of English barrister V.V. (Johnny) Veeder, Q.C., former Supreme Court of India Chief Justice Dr. A.S. Anand, and Professor Michael Pryles of Australia. Joint Status Report (docket no. 39 at 3 & n.2).

Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998), giving substantial weight to the prolonged nature of the case and its indeterminate resolution. Order (docket no. 45 at 10–11). The Court further concluded that the issues raised in the Petition are ripe for consideration. *Id.* at 11.

Discussion

A. Jurisdiction

Confirmation of foreign arbitration awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, and by federal law implementing the Convention, 9 U.S.C. § 201. The Court has jurisdiction over this proceeding under 9 U.S.C. § 203 and under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330. Although foreign states, such as Respondent, are generally "immune from the jurisdiction of the courts of the United States," there is an exception when a party seeks to confirm an arbitral award against the foreign state that is "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. §§ 1604, 1605(a)(6).

Respondent does not dispute that it is "an agency or instrumentality of a foreign state," defined under FSIA as "any entity . . . which is a separate legal person, corporate or otherwise, and which is the organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b); *see* Motion to Dismiss (docket no. 13 at 18). Respondent also acknowledges

the statutory basis for personal jurisdiction under 28 U.S.C. § 1330(b), but it argues that the constitutional constraints of the Due Process Clause preclude the Court's assertion of personal jurisdiction over it. *Id.* at 18–19. The Court previously ruled in its Minute Order entered April 16, 2019, docket no. 28, that because Respondent is wholly owned and controlled by a foreign state, the Due Process Clause does not apply and statutory personal jurisdiction under FSIA is all that is required. Minute Order (docket no. 28 at 1–2); *see First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 752 (5th Cir. 2012); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 400–01 (2d Cir. 2009); *see also GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 815 (D.C. Cir. 2012) ("Whenever a foreign sovereign controls an instrumentality to such a degree that a principal-agent relationship arises between them, the instrumentality receives the same due process protection as the sovereign: none.").

Even if Respondent was entitled to due process protection, due process has been satisfied in this case because Respondent possesses the requisite "minimum contacts" with the United States. *See Gregorian v. Izvestia*, 871 F.2d 1515, 1529–30 (9th Cir. 1989) (holding that "the district court properly 'aggregated' all contacts with the United States rather than only considering those contacts in California"). "Federal due process permits a court to exercise personal jurisdiction over a nonresident defendant if that defendant has at least minimum contacts with the forum such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1106 (9th Cir.

2020) (internal quotation marks and citations omitted). To assert that a court has specific jurisdiction over a nonresident, as Petitioner does here, a party must show (1) that "the non-resident defendant . . . purposefully direct[ed] his activities or consummate[d] some transaction with the forum or resident thereof; or perform[ed] some act by which he purposefully avail[ed] himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws"; and (2) that "the claim . . . arise[s] out of or is related to the defendant's forum-related activities." *Id.* at 1107 (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)). The burden then shifts to the nonresident defendant "to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting *Schwarzenegger*, 374 F.3d at 802).

In this case, Respondent does not seriously dispute the underlying facts establishing its contacts with the United States[2]—principally its long-term negotiations with Forge Advisors, a Virginia-based consulting firm, which resulted in the establishment of Petitioner's corporation and the execution of the Agreement. *See* Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 18–19). Beginning in the summer of 2003, the former Chairman of Antrix and ISRO, Dr. Krishnaswamy Kasturirangan, visited Washington D.C.; while there,

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[2] Respondent asks the Court to distinguish between Antrix and ISRO and argues that "ISRO's contacts with the United States cannot be attributed to Antrix for purposes of establishing personal jurisdiction over Antrix." Reply (docket no. 26 at 10). Although the Court notes that "[a]t all relevant times, . . . the Chairman of ISRO . . . and the Chairman of Antrix were the same person," Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 16), it confines its analysis to Antrix's contacts with the United States. *See Gregorian*, 871 F.2d at 1530.

he signed a memorandum of understanding with Forge Advisors providing that Respondent had a "long-term objective" of building "a strategic partnership that leverages Antrix's satellite & space capabilities to enable new social & commercial applications." *Id.* at 18; March 2011 Report by Government of India, Ex. 29 to Second Hellmann Decl. (docket no. 24 at 47). In May 2004, Forge Advisors made a presentation to the "ANTRIX/ISRO [Chairman] and senior officers of ANTRIX/ISRO[ ]" and proposed the establishment of Devas. March 2011 Report by Government of India, Ex. 29 to Second Hellmann Decl. (docket no. 24 at 47–48). After Petitioner's company was established, at least five U.S. citizens served on its board of directors, three of whom testified against Respondent in the underlying arbitrations. Ahmad Supp. Decl. at ¶ 7 (docket no. 25); Second Hellmann Decl. at ¶ 3 (docket no. 24). During negotiations of the Agreement, Petitioner's CEO, Ramachandran Viswanathan, explained to "ISRO/Antrix" representatives that "Devas would need to raise immediate and considerable outside venture capital . . . most likely from the United States." Viswanathan Witness Statement, Ex. 28 to Second Hellmann Decl. (docket no. 24 at 31). After the Agreement was executed, in September 2009, the new ISRO/Antrix Chairman, Dr. G. Madhavan Nair, met with Petitioner's CEO and three of its U.S.-based directors in Washington D.C. "to discuss the progress of the Devas project." *Id.* at 2, 35.

Considering the parties' entire course of dealing—beginning with Respondent's relationship with Forge Advisors and culminating in the execution of the Agreement between Respondent and Petitioner (an entity controlled in part by U.S.-based directors)—the Court concludes that Respondent purposely availed itself of the privilege of conducting business activities

in the United States. The U.S. Supreme Court has "emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (citation omitted). This Court, in concluding that Respondent purposely established minimum contacts with the United States, evaluates not just the terms of the Agreement itself, but also the parties' "prior negotiations and contemplated future consequences, along with the . . . parties' actual course of dealing." *Id.*; *see also Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215–16 (7th Cir. 1984) (concluding exercise of personal jurisdiction over defendant was proper because "the discussions that took place in [the forum] . . . played a part in subsequent negotiations between [the parties], which led to the contract between [the parties]"). Moreover, Respondent's dealing in the United States relates to the execution of the parties' Agreement, the breach of which gave rise to the Award at issue in this case. *See Burger King*, 471 U.S. at 472–73. Finally, it is not unreasonable for Respondent "to expect that it would be haled into [this Court] to fulfill its obligations and to account for the harm it foreseeably caused" to Petitioner. *Glob. Commodities*, 972 F.3d at 1109; *see also Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172 (3d Cir. 2006) (concluding "the fact that a proceeding was for the enforcement of an arbitral award, rather than an adjudication on the merits, rightly colors [the court's minimum contacts] analysis" and that "the desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether [the respondent] 'reasonably anticipate[d] being haled

into' " the forum). The Court's assertion of personal jurisdiction over Respondent in this action is proper.[3]

B. The New York Convention

Under the New York Convention, a "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. Article V of the Convention lists seven grounds for refusing to confirm an award, two of which are relevant here:

- "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ."; and
- "The recognition or enforcement of the award would be contrary to the public policy of that country."

New York Convention, T.I.A.S. No. 6997, art. V, §§ 1(d), 2(b). These "defenses are interpreted narrowly," and Respondent "has the burden of showing the existence of a New York Convention defense." *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010). The Respondent's "burden is substantial because the public policy in favor of international arbitration is strong." *Id.*; *see Mitsubishi Motors Corps. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (concluding the policy favoring arbitration "applies with special force in the field of international commerce").

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[3] For the reasons stated in its previous Minute Order, docket no. 28, the Court declines to dismiss this action based on the doctrine of forum non-conveniens.

1. Article V(1)(d)—Compliance with Agreement's Arbitral Procedures

Respondent argues that because the Award was not made by arbitrators appointed in accordance with the Agreement, the Court should refuse to confirm the Award under Article V(1)(d) of the New York Convention, T.I.A.S. No. 6997, art. V, § 1(d). That provision allows a court to refuse to recognize or enforce an arbitral award if "[t]he composition of the arbitral procedure was not in accordance with the agreement of the parties . . . ." *Id.* A court "may not 'overlook agreed-upon arbitral procedures' in favor of the *enforcement* of an arbitration award" or "utilize the federal policy favoring arbitration to justify the imposition of general procedural rules at the expense of the parties' agreement." *Polimaster*, 623 F.3d at 841 (emphasis in original). Instead, the court must "adhere[ ] to the parties' agreed-upon procedures . . . , such as where relevant to . . . the appointment of arbitrators." *Id.* (citations omitted).

Nevertheless, when a party has adequate notice of its duty to appoint an arbitrator in accordance with the parties' agreement and *fails* to do so, courts have confirmed the arbitral award, rejecting any defense under Article V(1)(d). *See, e.g.*, *Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 207 (D.D.C. 2018), *aff'd by* 773 F. App'x 627 (D.C. Cir. 2019) (rejecting respondent's Article V(1)(d) defense because the arbitration "rules plainly allow[ed]" the arbitral tribunal to appoint an arbitrator on respondent's behalf after respondent failed to do so by the set deadline); *Belize Bank Ltd. v. Gov't of Belize*, 191 F. Supp. 3d 26, 37 (D.D.C. 2016) (rejecting respondent's Article V(1)(d) defense because it "forfeited its right to appoint a[n] . . . arbitrator by not initially participating in the . . .

[a]rbitration" and concluding that the arbitral tribunal was "authorized to appoint one in its stead under" the arbitration rules).

The parties in this case agreed, under Article 20 of the Agreement, that the arbitral panel shall be "compris[ed] of three arbitrators, one to be appointed by each party (i.e. DEVAS and ANTRIX) and the arbitrators so appointed will appoint the third arbitrator." Agreement, Ex. 3 to Hellmann Decl. (docket no. 2-1 at 125). They also plainly agreed that the "Arbitration proceedings shall be held in accordance with the rules and procedures of the ICC . . . or UNCITRAL," and that the parties must "discharge their obligations in utmost good faith." *Id.* In July 2011, after Petitioner had commenced the arbitration in the ICC Court, Respondent did not respond to the ICC's request to nominate an arbitrator and instead challenged its jurisdiction to arbitrate the parties' dispute. Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 8–9). The ICC informed the parties that Respondent's objections would be settled by the ICC Court or the three-member panel appointed by the parties, and it again invited Respondent to appoint an arbitrator by August 8, 2011. Antrix Letter to ICC, Ex. 1 to Meehan Decl. (docket no. 15-1 at 3). Respondent did not do so and renewed its objections to arbitration before the ICC. *Id.* at 3–4. In August 2011, the ICC informed the parties that the "arbitration shall proceed" pursuant to the ICC Rules, and the ICC again requested that Respondent appoint an arbitrator within 21 days. *Id.* at 5–6. In September 2011, the ICC informed the parties that it would appoint an arbitrator on Respondent's behalf "pursuant to Article 8(4) of the ICC Rules . . . but that any nomination received from [Respondent] before the ICC Court made the appointment will be communicated to the ICC Court." Award, Ex. 1 to

Hellmann Decl. (docket no. 2-1 at 9–10). The ICC never received any nomination from Respondent. *Id.* at 10.[4] Accordingly, on October 13, 2011, the ICC appointed former Supreme Court Chief Justice Dr. A.S. Anand on Respondent's behalf in accordance with the ICC Rules. *Id.* at 10; Joint Status Report (docket no. 39 at 3 n.2). The relevant provision of the ICC Rules, former Article 8(4), provides that "[i]f a party fails to nominate an arbitrator, the appointment shall be made by the [ICC] Court." Article 8(4) of the ICC Rules (1998).[5]

Respondent argued in its briefs and at oral argument that the ICC lacked jurisdiction to arbitrate the dispute based on an alleged defect in the Agreement's arbitration clause. However, the Supreme Court of India expressly concluded that under the plain terms of Article 20 of the Agreement, Petitioner "was entitled to invoke the Rules of Arbitration of the ICC for the conduct of the arbitration proceedings." Supreme Court of India Judgment, Ex. 3 to Meehan Decl. (docket no. 15-1 at 54–55). The parties also disputed at oral argument whether the ICC's decision to exercise jurisdiction is entitled to deference. *See BG Grp.,*

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[4] Respondent maintains that it had notified the ICC that it appointed former Justice Sujata V. Manohar "as an arbitrator in accordance with the Parties' Agreement," but that appointment was made with respect to a different arbitration, not the ICC arbitration. *Compare* Motion to Dismiss (docket no. 13 at 14 & 23), *with* Antrix Letter to ICC, Ex. 1 to Meehan Decl. (docket no. 15-1 at 4 & 4 n.7).

[5] The 1998 version of the ICC Rules is available at https://www.trans-lex.org/750200/_/icc-arbitration-rules-1998/#head_13. The current version of ICC Rules contains similar language under Article 12(2), available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_13.

PLC v. Republic of Argentina, 572 U.S. 25, 41, 134 (2014). Regardless of whether the ICC's decision to exercise jurisdiction is entitled to deference, the Supreme Court of India has already resolved the issue.

Construing Article V(1)(d) of the Convention narrowly, as the Court must, Respondent has not met its substantial burden to show that the ICC's appointment of an arbitrator on its behalf is a ground for refusing to confirm the Award. *See Polimaster*, 623 F.3d at 836. While the parties' Agreement provides that "one [arbitrator is] to be appointed by each party," it does not address what follows when a party altogether refuses to appoint an arbitrator. Agreement, Ex. 3 to Hellmann Decl. (docket no. 2-1 at 124–25). The ICC gave Respondent at least three opportunities to appoint its own arbitrator in accordance with the Agreement and the ICC Rules, and Respondent never did so. The Court also notes that although Respondent challenged the ICC's jurisdiction to arbitrate the dispute, it never specifically challenged the ICC's appointment of former Supreme Court Chief Justice Dr. A.S. Anand[6] on its behalf. *See* Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 39–43).

The Court concludes that Respondent's repeated refusal to appoint an arbitrator with respect to the ICC arbitration essentially operated as a forfeiture of its right to do so. *Belize Bank*, 191 F. Supp. 3d at 37. The Court also concludes that the ICC properly made

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[6] Acknowledging Justice Anand's unquestionable credentials to serve as an arbitrator, *see* Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 10), the Court further concludes that Respondent has not shown that its inability to appoint a different arbitrator "worked substantial prejudice" to it. *See Purus Plastics GmbH v. Eco-Terr Distributing, Inc.*, No. C18-0277JLR, 2018 WL 3064817 at *7 (W.D. Wash. June 21, 2018).

the appointment in accordance with the ICC Rules and the Agreement itself, which expressly incorporated the ICC Rules. *See Stati*, 302 F. Supp. 3d at 207. Article V(1)(d) does not provide a basis to refuse confirmation of the Award.

2. Article V(2)(b)—Public Policy Considerations

Respondent also argues that two public policies justify the Court's refusal to confirm the Petition: (1) a policy of "respect for the sovereignty of other nations and respect for foreign arbitral awards" and (2) a policy "against corruption." Motion to Dismiss (docket no. 13 at 24–26). Article V(2)(b) of the New York Convention allows a court to refuse confirmation if "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention, T.I.A.S. No. 6997, art. V, § 2(b). The Ninth Circuit has held that the public policy defense "applies only when confirmation . . . of a foreign arbitration award 'would violate the forum state's most basic notions of morality and justice.' " *Ministry of Def. & Support for the Armed Forces of the Republic of Iran v. Cubic Def. Sys.*, 665 F.3d 1091, 1097 (9th Cir. 2011) (citation omitted). "Although this defense is frequently raised, it 'has rarely been successful.' " *Id.* (citation omitted).

Neither public policy identified by Respondent provides grounds to refuse confirmation of the Award. First, it is true that "[a]ctions against foreign states in our courts raise sensitive issues concerning foreign relations of the United States," *Verlinden B.V. v. Cen. Bank of Nigeria*, 461 U.S. 480, 494 (1983). However, that concern, standing alone, cannot override "the emphatic federal policy in favor of arbitral dispute resolution," which applies "with special force in the field

of international commerce." *Belize Soc. Dev. Ltd. v. Belize*, 668 F.3d 724, 727, 733 (D.C. Cir. 2012) (concluding that the district court exceeded its authority under the Convention in staying confirmation proceedings against the Government of Belize (quoting *Mitsubishi*, 473 U.S. at 631)); *see Newco Ltd. v. Gov't of Belize*, 650 F. App'x 14, 15–16 (D.C. Cir. May 13, 2016) (affirming confirmation of arbitral award against the Government of Belize); *but see Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 314 F. Supp. 3d 95, 110, 114 (D.D.C. 2018) (refusing to confirm the "specific performance portion" of an arbitral award against the Government of India because of "a policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their own sovereign territories"). Indeed, FSIA expressly contemplates "jurisdiction over foreign countries in suits seeking compensatory (but not punitive) damages, and allowing for specific, domestic methods of ensuring that plaintiffs receive those damages." *Hardy*, 314 F. Supp. at 113; *see* 28 U.S.C. § 1605(a)(6). This "demonstrates the United States' public policy commitment to respecting the sovereignty of foreign nations by only holding them liable for certain forms of relief." *Hardy*, 314 F. Supp. at 113. In this case, there is no question that the Award provides for pure monetary relief without reference to specific performance or punitive damages. Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 98). Accordingly, Respondent has not established that this Court's confirmation of the Award would violate the sovereignty of India.

Second, Respondent argues that confirming the Award would violate the United States' policy against corruption. Motion to Dismiss (docket no. 13 at 25–

26). Respondent does not argue, let alone cite any facts showing, that the Agreement was the product of corruption or that Respondent annulled the Agreement on that basis. *See id*. Instead, Respondent takes issue with the Award's purported conclusion that a former Antrix Chairman, Dr. Radhakrishnan, "was required to derogate from his sovereign responsibilities as a government official and place the commercial interests of Antrix's contracting partner, Devas, above the critically important sovereign priorities." *Id.* at 25; Reply (docket no. 26 at 14–15). Even assuming that such a conclusion amounts to "corruption" or violates our country's "most basic notions of morality and justice," Respondent misconstrues the ICC panel's findings and conclusions. The Award found that if Dr. Radhakrishnan had "done everything in his power to ensure that the [A]greement remained on foot, . . . *he would not have taken any of the steps that led to the [government] being asked to approve the annulment of the [A]greement*." Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 59) (emphasis added). Based on the finding that the proposal to annul the Agreement was not "beyond Antrix's reasonable control," the Award concluded that Respondent could not rely on the Agreement's "Force Majeure Events" clause as a reason to justify its actions. *Id.* at 60. Respondent's alternate reading of the Award is simply not a ground to refuse its confirmation.

Finding no other basis under Article V of the Convention to refuse or defer its recognition,[7] the Court hereby confirms the Award.

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) The Petition to Confirm Foreign Arbitral Award, docket no. 1, is GRANTED;

(2) The Court will enter Judgment in the amount of (i) the full amount of the Award, $562.5 million, together with (ii) pre-Award simple interest at the rate of three-month USD LIBOR + 4%, from February 25, 2011, to the date of the Award, September 14, 2015 ($672,791.593.75); (iii) post-Award simple interest at the rate of 18% per annum of the amounts in subsections (i) and (ii) of this Section, from the date of the Award, September 14, 2015, to the date that Judgment is entered ($331,787.64 per day); and (iv) post-Judgment interest pursuant to 28 U.S.C. § 1961 at the rate of twelve hundredths of one percent (0.12%) per annum. *See* Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 98);[8]

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[7] In a footnote, Respondent briefly argues that Article V(1)(c) provides an additional defense, asserting that the ICC arbitrators "exceeded their powers" by failing to apply a well-established principle of Indian law where a plaintiff is unable to prove the quantum of damages. Motion to Dismiss (docket no. 13 at 26 n.8). Rather, the Award, which is thorough and well-reasoned, extensively discussed its calculation of Petitioner's damages and expressly relied on the law of India. Award, Ex. 1 to Hellmann Decl. (docket no. 2-1 at 81–96 & 81 n.359).

[8] In its supplemental brief, docket no. 43 at 16, Petitioner calculated the daily amount of interest associated with the 18% per annum interest rate using a 360-day calendar (i.e., $336,395.80

(3) Any objections to the amount of the Judgment shall be filed on or before Tuesday, November 3, 2020;

(4) Each party shall bear their own legal fees and costs incurred as a result of this proceeding; and

(5) The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 27th day of October, 2020.

/s/ Thomas S. Zilly
Thomas S. Zilly
United States District Judge

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per day); the Court, however, has calculated the daily amount of interest associated with the 18% per annum interest rate using a 365-day calendar (i.e., $331,787.64 per day).

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEVAS MULTIMEDIA PRIVATE LTD., Petitioner, and DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED; and CC/DEVAS (MAURITIUS) LTD., Intervenor-Petitioners, v. ANTRIX CORP. LTD., Respondent.	C18-1360 TSZ ORDER Jan. 3, 2022

THIS MATTER comes before the Court on a motion, docket no. 142, for court approval to register judgment nationwide under 28 U.S.C. § 1963 and 28 U.S.C. § 1610(c), filed by Intervenors Devas Multimedia America, Inc. ("DMAI"), Devas Employees Mauritius Private Limited ("DEMPL"), Telcom Devas Mauritius Limited ("Telcom Devas"), and CC/Devas (Mauritius) Ltd. ("CC/Devas") (collectively, "Intervenors"). Having reviewed all papers filed in support of, and in opposition to, the motion, the Court determines that

oral argument is unnecessary and enters the following Order.

Background

In November 2020, the Court entered an order confirming the foreign arbitral award at issue ("Award") and entered a $1.29 billion judgment ("Judgment") in favor of Petitioner Devas Multimedia Private Ltd. and against Respondent. Respondent appealed the Court's order, *see* Notice of Appeal (docket no. 53), but to date, Respondent has not paid the Judgment or posted a supersedeas bond. *See* Champion Decl. at ¶ 1 (docket no. 143).

On August 16, 2021, the Court granted in part and denied in part the Intervenors' motion to compel post-judgment discovery. *See* Order (docket no. 133). The Court concluded that Intervenors DEMPL, Telcom Devas, and CC/Devas have future, contingent interests in the Judgment sufficient to show that the Intervenors are successors in interest for the purposes of Federal Rule of Civil Procedure 69(a)(2). The Court also concluded that Intervenor DMAI is a judgment creditor within the meaning of Rule 69(a)(2).

The Intervenors now move, docket no. 142, for an order to register the Judgment nationwide under 28 U.S.C. § 1963 and 28 U.S.C. § 1610(c). Petitioner and Respondent oppose the Intervenors' requested relief.

Discussion

1. 28 U.S.C. § 1963

A district court judgment becomes final and enforceable thirty (30) days after entry of judgment. *See* Fed. R. Civ. P. 62(a). "Pending appeal, however, the judgment is only enforceable in the district in which it was rendered, unless the judgment is 'registered' in

another district by court order." *Columbia Pictures Television, Inc. v. Krypton Columbia Pictures Television, Inc.*, 259 F.3d 1186, 1197 (9th Cir. 2001) (quoting 28 U.S.C. § 1963). The party requesting registration of a judgment in another judicial district must show "good cause" when an appeal of the judgment is pending. 28 U.S.C. § 1963.

"A likely absence of assets in [the judgment forum], coupled with a likelihood that there are recoverable assets in another jurisdiction, is generally sufficient to show good cause for registration elsewhere." *Rockin Artwork, LLC v. Bravado Int'l Grp. Merch. Servs., Inc.*, No. C15-1492, 2017 WL 11437734, at *1 (W.D. Wash. Apr. 4, 2017) (citing *Columbia Pictures*, 259 F.3d at 1197–98). A moving party's burden to show good cause is "minimal." *See Kreidler v. Pixler*, No. C06-0697, 2011 WL 13193276, at *1 (W.D. Wash. May 13, 2011). "[T]he courts that have found good cause have generally based their decisions on an absence of assets in the judgment forum, coupled with the presence of substantial assets in the registration forum." *Columbia Pictures*, 259 F.3d at 1197–98 (quoting *Dyll v. Adams*, No. 91-CV-2734, 1998 WL 60541, at *1 (N.D. Tex. Feb. 6, 1998)). A district court may also consider whether "registering the judgment elsewhere may help prevent the debtor from transferring or concealing property while the matter is on appeal, and whether the debtor posted a supersedeas bond." *Rockin Artwork*, 2017 WL 11437734, at *1 (citing *Chi. Downs Ass'n, Inc. v. Chase*, 944 F.2d 366, 371–72 (7th Cir. 1991)).

Petitioner and Respondent challenge the Intervenors' standing to register the Judgment in other judicial districts. The Court concludes that the Interve-

nors have standing to seek registration of the Judgment. However, the Intervenors have not shown good cause for nationwide registration of the Judgment. Here, Respondent has not posted a supersedeas bond and does not have sufficient assets in the Western District of Washington to satisfy the Court's judgment. Champion Decl. at ¶¶ 1, 2 (docket no. 143). In support of their request for nationwide registration, the Intervenors submitted a declaration that states:

> Antrix does appear to have assets in other districts across the United States. Antrix's discovery produced to date has revealed that it possess[es] assets in several banks with American branches in several other districts across the United States. Antrix is also owed debts by companies located in several other districts across the United States.

Id. at ¶ 3. Respondent claims that it does not have any bank accounts or substantial assets in the United States. Antrix's Resp. (docket no. 144 at 7–8).

The Intervenors cite to *Non-Dietary Exposure Task Force v. Tagros Chems. India, Ltd.*, 309 F.R.D. 66, 69 (D.D.C. 2015) in support of their argument that a declaration from counsel is sufficient to establish good cause for nationwide registration of the Judgment. In that case, counsel's declaration provided that the defendant had "substantial assets in Texas, New Jersey, and North Carolina." *Id.* Here, with the exception of the Eastern District of Virginia, the Intervenors have not provided the Court with sufficient information concerning where Respondent's assets are located and

whether the assets are substantial.[1] Accordingly, the Intervenors have not shown to the Court's satisfaction that Respondent likely has substantial assets in other districts in the United States to warrant nationwide registration of the Judgment.

Although the Intervenors have not shown good cause for nationwide registration, the Court concludes that there is good cause to register the Judgment in the Eastern District of Virginia. Respondent concedes that Intelsat Service and Equipment LLC, a U.S. company currently pending bankruptcy proceedings in the U.S. Bankruptcy Court for the Eastern District of Virginia, owes Respondent $146,457.47. Answer to Interrog. No. 2, Ex. C to Meehan Decl. (docket no. 116-3 at 8–9); Antrix's Resp. (docket no. 144 at 7–8). Therefore, the Intervenors may register the Judgment, docket no. 52, in the Eastern District of Virginia.

2. 28 U.S.C. § 1610(c)

Under the Foreign Sovereign Immunities Act, "[n]o attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment . . . ." 28 U.S.C. § 1610(c). For example, in *NED Chartering & Trading, Inc. v. Republic of Pak.*, 130 F. Supp. 2d 64, 67 (D.D.C. 2001), six weeks was found to be a reasonable period of time. In this case, over one year has elapsed since the Court entered the Judgment on November 4, 2020. *See* Judgment (docket no.

[1] The Intervenors allege that Respondent's post-judgment discovery responses are "woefully deficient." Mot. (docket no. 142 at 8); *see also* Champion Decl. at ¶ 4 (docket no. 143). The Intervenors have not sought relief from the Court concerning Respondent's allegedly deficient responses.

52). Accordingly, the Court determines that, under 28 U.S.C. § 1610(c), a reasonable period of time has elapsed since the entry of the Judgment.

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) The Intervenors' motion, docket no. 142, for court approval to register the Judgment nationwide under 28 U.S.C. § 1963 and 28 U.S.C. § 1610(c) is GRANTED in part and DENIED in part, as follows. The Intervenors may register the Judgment, docket no. 52, in the Eastern District of Virginia. The Intervenors' request to register the Judgment in other districts is DENIED, though it is possible that the Intervenors could make the required showing.[2]

(2) The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 3rd day of January, 2022.

/s/ Thomas S. Zilly
Thomas S. Zilly
United States District Judge

[2] Nothing in this Order precludes the Intervenors from presenting the Court with *ex parte* evidence that Respondent likely has substantial assets in other districts in the United States. If the Court is satisfied that additional evidence provides good cause to register the Judgment in other judicial districts, the Court will authorize further registration of the Judgment.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEVAS MULTIMEDIA PRIVATE LIMITED, *Petitioner-Appellee*, CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED, *Appellees-Intervenors*, v. ANTRIX CORP. LTD., *Respondent-Appellant*.	No. 20-36024 D.C. No. 2:18-cv-01360-TSZ ORDER Feb. 6, 2024

DEVAS MULTIMEDIA PRIVATE LIMITED, *Petitioner-Appellant*, CC/DEVAS (MAURITIUS) LIMITED; TELCOM DEVAS MAURITIUS LIMITED; DEVAS MULTIMEDIA AMERICA,	No. 22-35085 D.C. No. 2:18-cv-01360-TSZ

INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent.

DEVAS MULTIMEDIA PRIVATE LIMITED,

Petitioner,

and

CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent-Appellant.

No. 22-35103

D.C. No. 2:18-cv-01360-TSZ

Filed February 6, 2024

Before: Eric D. Miller and Lucy H. Koh, Circuit Judges, and Donald W. Molloy,* District Judge.

Order;
Statement by Judge O'Scannlain;
Dissent by Judge Bumatay

SUMMARY**

Personal Jurisdiction / Foreign Sovereign Immunities Act

The panel filed an order denying petitions for rehearing en banc and directing that no further petitions will be entertained, in a case in which the panel held that the district court erred in exercising personal jurisdiction over Antrix Corp. Ltd., an Indian corporation, under the Foreign Sovereign Immunities Act, because plaintiff failed to establish that Antrix had the requisite minimum contacts for personal jurisdiction.

In a statement respecting the denial of rehearing en banc, Judge O'Scannlain wrote that he agreed with the views expressed by Judge Bumatay in his dissent from the denial of rehearing en banc.

Dissenting from the denial of rehearing en banc, Judge Bumatay, joined by Judges Callahan, Ikuta, Bennett, R. Nelson, and VanDyke, wrote that the For-

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

eign Sovereign Immunities Act, governing when foreign states may be sued in federal court, does not require plaintiffs to also prove "minimum contacts" to assert personal jurisdiction over a foreign state, and this court's error in holding otherwise should be corrected through rehearing en banc.

ORDER

The panel has unanimously voted to deny the petitions for rehearing en banc. Judge Miller and Judge Koh have voted to deny the petitions for rehearing en banc, and Judge Molloy so recommends.

The full court has been advised of the petitions for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

The petitions for rehearing en banc, (20-36024 Dkts. No. 111, 112; 22-35085 Dkt. No. 56; 22-35103 Dkt. No. 63), are DENIED. No further petitions for rehearing or rehearing en banc will be entertained. Judge O'Scannlain's statement respecting the denial of en banc rehearing and Judge Bumatay's dissent from the denial of en banc rehearing are filed concurrently herewith.

O'SCANNLAIN,[1] Circuit Judge, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Bumatay in his dissent from the denial of rehearing en banc.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, BENNETT, R. NELSON, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). We thus have a "virtually unflagging" obligation to "hear and decide cases within [our] jurisdiction." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (simplified). When reading jurisdictional statutes, our task is to simply "apply traditional principles of statutory interpretation" and ask whether Congress authorized suit. *See id*. at 128. It should go without saying that we do not "ask whether in our judgment Congress *should* have authorized . . . suit." *Id.*

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") to govern when foreign states may be sued in federal court. 28 U.S.C. § 1602 *et seq*. As a default, the FSIA establishes that foreign states are immune from the jurisdiction of federal courts. *Id.* § 1604. But Congress set aside sovereign

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[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

immunity for claims that fall within certain specified exceptions. *See id.* §§ 1605, 1605A, 1605B. Those exceptions range from pursuing state sponsors of terrorism to recovering damages for violations of commercial agreements. And Congress did not mince its words in providing jurisdiction for these claims. The FSIA states that "[p]ersonal jurisdiction over a foreign state *shall exist*" when enumerated claims are brought with proper service. *Id.* § 1330(b) (emphasis added). Such mandatory language leaves no room for courts to alter the immunity inquiry. Put simply, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141–42 (2014).

This case presents a straightforward question. Despite the FSIA's text, does the Act require plaintiffs to *also* prove "minimum contacts" to assert personal jurisdiction over a foreign state? Unlike every other federal court, the Ninth Circuit answers "yes." And saying "yes" is a big deal—it means that we lock the courthouse doors to plaintiffs whom Congress expressly granted access. So victims of terrorism, those harmed by violations of international law, and persons who suffered from torture may be barred from seeking justice in our courts. *See* 28 U.S.C. §§ 1605, 1605A, 1605B. Congress swung the doors open and we slammed them shut. Our failure to correct this error violates the separation of powers and anoints ourselves gatekeepers in a way not contemplated by Congress or the Constitution.

The problem started more than 40 years ago. Back then, our court appended minimum contacts to the list of requirements that plaintiffs must establish to assert jurisdiction over a foreign state. *See Thomas P.*

Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica ("*Gonzalez*"), 614 F.2d 1247, 1255 (9th Cir. 1980). There, we said, "[p]ersonal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard." *Id*. We thus replaced the words "shall exist" in § 1330(b) with "may exist" and substituted our own view that Congress must have really wanted foreign states to also have sufficient minimum contacts with the United States. Under our rule, then, personal jurisdiction exists only when our judicially created hurdle is satisfied.

And we made this interpretive move under the most dubious of guises—legislative history. While strongly disfavored today, back in 1980, it was more common to determine meaning not from statutory text, but from legislative accoutrements. And that's what we did. We looked at a single House Committee Report and surmised what we thought Congress really wanted. *See Gonzalez*, 614 F.2d at 1255 ("The legislative history of the Act confirms that the reach of § 1330(b) does not extend beyond the limits set by the *International Shoe* line of cases."). "The question, however, is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 618 (1992).

Today, it's obvious that we cannot appeal to legislative history to undo a statute's plain meaning. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). So we know that *Gonzalez*'s interpretation is wrong. But even if that history mattered, the Report doesn't say what *Gonzalez* thought it said about minimum contacts. The Report merely observed that the Act's exceptions "embodied" a minimum-contacts analysis. *Gonzalez*, 614 F.2d at 1255 n.5 (quoting the Committee Report). It says nothing about adding *another*

layer of minimum-contacts review before denying foreign-state immunity. To my knowledge, no other court interprets the FSIA this way.

And nothing in the Constitution requires a minimum-contacts analysis either. Federal courts have uniformly recognized that foreign states are not entitled to the protection of minimum contacts under the Fifth Amendment. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399–400 (2d Cir. 2009); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012). The Supreme Court has also suggested the same. *See Weltover*, 504 U.S. at 619. So the Due Process Clause fails to justify our wayward precedent.

Despite all this, our court not only perpetuates, but arguably expands, the minimum-contacts requirement here. *See Devas Multimedia Priv. Ltd. v. Antrix Corp.*, 2023 WL 4884882, at *1–2 (9th Cir. 2023). While *Gonzalez* merely dealt with the commercial activities exception, *see* 614 F.2d at 1255, our court seemingly rules that the minimum-contacts inquiry extends to *all* exceptions under the FSIA. *Devas*, 2023 WL 4884882, at *1–2. In this case, we applied it to a new context—the arbitral exception—for the first time. *See* 28 U.S.C. § 1605(a)(6). We did so even while a majority of the panel recognized that "our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other courts of appeals." *Devas*, 2023 WL 4884882, at *4 (Miller, J., joined by Koh, J.,

concurring). So while the majority of the panel disagrees with our precedent, it expanded its troubling reach.

This case presented an opportunity to correct our erroneous precedent and apply the FSIA the way Congress enacted it. But our court refuses to step in and denies en banc review. And it's hard to explain why. Sure, it's true that the specific dispute between Devas Multimedia and Antrix Corporation raises some *other* complexities—like whether Antrix is sufficiently controlled by India to be considered a foreign state. But those other questions are secondary to whether foreign states are entitled to a minimum-contacts analysis in the first place. Those subsidiary questions are thus distractions that should have been left to the three-judge panel to resolve. At a minimum, we should have overruled *Gonzalez* and discarded our blanket bar to bringing claims against foreign states unless plaintiffs can prove minimum contacts.

After all, how many would-be plaintiffs gave up valid claims in the Ninth Circuit because of our out-of-sync rule? How many plaintiffs had to seek redress in other courts to sidestep our precedent? And how many plaintiffs were simply kicked out of our courts by the minimum-contacts requirement? The effect of our ruling is unquestionably significant. Under a proper reading of the FSIA, those plaintiffs should be welcome to bring their claims in our circuit.

Because we fail our "unflagging" duty to hear and decide cases within our jurisdiction, I respectfully dissent from the denial of rehearing en banc.

I.

A.

Let's begin with a brief overview of the FSIA. The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Weltover*, 504 U.S. at 610. The Act "standardize[s] the judicial process with respect to immunity for foreign sovereign entities in civil cases." *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272 (2023).

The FSIA starts from the "baseline" that foreign states and their instrumentalities are entitled to sovereign immunity in our courts. *Id*. (citing 28 U.S.C. § 1604). But Congress then specified certain exceptions when that immunity is withheld. The FSIA provides that:

> (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 either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330.

So whenever an exception applies, Congress grants personal jurisdiction over a foreign state "as to every

claim for relief" after proper service. *Id.* § 1330(b). Thus, the FSIA "bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and [then] confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). In other words, Congress closed the door on suits against foreign states, while leaving the keys for some types of claims.

The FSIA exceptions to immunity cover many subject matters.

- *Commercial Activities*—Cases "in which the action is based upon a commercial activity . . . that . . . causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).
- *Expropriation*—Cases "in which rights in property taken in violation of international law are in issue and that property [has a connection to the United States]." 28 U.S.C. § 1605(a)(3).
- *Arbitration*—Cases "in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate" including when that award "is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).
- *Terrorism*—Cases "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . [by] a state sponsor of terrorism." 28 U.S.C. § 1605A.

As part of Congress's "carefully calibrated scheme," it also established procedures governing suits under the FSIA. *Turkiye Halk Bankasi*, 598 U.S. at 273. Congress included many specifics, like a venue provision, 28 U.S.C. § 1391(f), service of process requirements, *id.* § 1608, and a bar on punitive damages, *id.* § 1606. And foreign states are "liable in the same manner and to the same extent as a private individual under like circumstances." *Id.*

Finally, the FSIA does not just cover direct suits against a foreign government. Instead, "[t]he FSIA defines a 'foreign state' to [also] encompass instrumentalities of a foreign state." *Turkiye Halk Bankasi*, 598 U.S. at 272 (citing 28 U.S.C. §§ 1603(a)–(b)). This definition "includ[es] entities that are directly and majority-owned by a foreign state." *Id*. Thus, personal jurisdiction may exist over a foreign sovereign and its state-owned companies.

B.

Now, a quick rundown of this case. Antrix is a company wholly owned by the Republic of India. India incorporated Antrix to market goods and services created by the country's Department of Space and the Indian Space Research Organization. Devas was a private company created by a group of American investors and executives to develop telecommunications services in India. The two companies agreed to work together to build, launch, and manage telecommunication satellites. To carry out this agreement, they signed a contract which included an arbitration provision. Eventually, Antrix sought to terminate the agreement; Devas responded by initiating arbitration. A foreign arbitration tribunal found for Devas and awarded it $562.5 million in damages. Devas and Antrix then filed dueling petitions in the Indian courts—

Devas's to confirm the award and Antrix's to set it aside.

While the Indian proceedings were pending, Devas sought to confirm the award elsewhere. It petitioned to confirm the arbitration award in the Western District of Washington, where Antrix has business relationships with several firms. Devas relied on the arbitral exception to the FSIA. *See* 28 U.S.C. § 1605(a)(6). Although it was uncontested that Antrix is a "foreign state" under the FSIA, service was proper, and Devas's claim falls under the arbitral exception, Antrix still argued personal jurisdiction was improper.

The district court rejected Antrix's jurisdictional challenge. It first held that personal jurisdiction was satisfied under the FSIA, because the "parties d[id] not dispute that personal jurisdiction exists as a matter of statute." The district court then concluded that foreign states are not entitled to minimum contacts under the Due Process Clause and, even if they were, Antrix had sufficient contacts. And the district court held that the Republic of India "exercises sufficient control" over Antrix such that it should be treated the same as the country for purposes of the due process analysis. As a result, the district court ruled that personal jurisdiction was proper, confirmed the award, and entered judgment for $1.293 billion (after the inclusion of pre-award and post-award interest). Antrix then appealed from the district court's judgment.

After that notice of appeal, there were two developments. First, the Indian government placed Devas into liquidation on the grounds that it had fraudulently conducted its affairs. As a result, several shareholders of the company and its American subsidiary intervened. The district court then permitted the intervenors post-judgment discovery and granted them

leave to register the judgment. Both Antrix and Devas (under the control of a liquidator) appealed the order granting them leave to register the judgment.

Second, during the appeal, an Indian court set aside the arbitration award. Antrix now claims that the award is no longer enforceable, which Devas and the intervenors dispute. Because these events occurred after the notice of appeal here, Antrix sought a limited remand to determine whether the district court should reverse its judgment on the merits.

On appeal, our court brushed past all these developments and complications and simply held that the district court lacked personal jurisdiction over Antrix. The panel ruled that the district court was bound to apply the minimum-contacts analysis from *Gonzalez* because (1) the Supreme Court has not contradicted our prior holding and (2) our court's minimum-contacts inquiry is based on a statutory interpretation of the FSIA. The panel then easily rejected the argument that minimum contacts were satisfied here. Because it concluded that the district court lacked personal jurisdiction, the panel didn't address any other question on appeal.

Judge Miller wrote a concurrence, joined by Judge Koh. He explained that "our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other courts of appeals." *Devas*, 2023 WL 4884882, at *4 (Miller, J., concurring). He recommended that, "[i]n an appropriate case," we should reconsider our erroneous precedent en banc. *Id.*

So the *sole question* for the en banc court was whether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states under the FSIA. Of course, answering that question may lead to other questions.[1] But that's no reason to punt on this case. As we often do, we could have left those subsidiary questions to the three-judge panel or district court after correcting our precedent. We were wrong to shy away from this significant question.

I now turn to that question.

II.

While the Supreme Court has called the FSIA Congress's "comprehensive framework" for resolving claims of sovereign immunity, *Weltover*, 504 U.S. at 610, the Ninth Circuit thinks it is not quite comprehensive enough. Forty years ago, our court held that Congress's command that personal jurisdiction "shall exist" when an enumerated exception is met, 28 U.S.C. § 1330(b), was really just the starting point. We then rewrote the statute to add a minimum-contacts requirement. Only after satisfying our minimum-contacts inquiry does our court permit personal jurisdiction over a foreign state.

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[1] For example, Antrix argues that its corporate status may independently mean it deserves due process protection. While that question adds another wrinkle to this case, it would not prevent the en banc court from answering whether a foreign state is entitled to a minimum-contacts inquiry under the FSIA or the Due Process Clause. We could have then remanded to the district court to see whether Antrix should be treated the same as India. *See Frontera*, 582 F.3d at 400–01 (remanding to the district court to determine whether a state-owned corporation was entitled to due process

This is not the law enacted by Congress and signed by the President. We have no authority to make up our own rules, especially when dealing with international affairs. *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 208 (2018) ("[C]ourts traditionally deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns." (simplified)). And nothing in the Due Process Clause mandates our statutory interpretation. Rather than extending our dubious precedent, we should have used this case to discard it.

A. The FSIA's Text Doesn't Require Minimum Contacts

Despite the clear command that personal jurisdiction over a foreign state "shall exist" when an enumerated exception applies, 28 U.S.C. § 1330(b), we adjoined a new requirement to the FSIA in *Gonzalez*. In that case, we said that "[p]ersonal jurisdiction under the Act requires satisfaction of the traditional minimum contacts standard." *Gonzalez*, 614 F.2d at 1255. We thus added a layer of review found nowhere in the text.

What supported this minimum-contacts regime? The tersest of reasoning.

Gonzalez first looked to the phrase "direct effect" in one exception—the commercial activities exception—and seemingly read an across-the-board minimum-contacts requirement from those two words. The commercial activities exception provides for jurisdiction "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). *Gonzalez* explained that the term " 'direct effect' . . .

ha[s] been interpreted as embodying the minimum contacts standard" of *International Shoe* and its progeny. 614 F.2d at 1255. As support, *Gonzalez* cited two opinions suggesting that § 1605(a)(2) incorporates the minimum-contacts requirement. *Id*. (citing *Carey v. Nat'l Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) and *East Eur. Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 388–90 (S.D.N.Y. 1979)). *But see Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016) (holding that "the 'direct effect' requirement does not incorporate the 'minimum contacts' test").

Next, *Gonzalez* looked outside the text—to legislative history. It stated that "[t]he legislative history of the Act confirms that the reach of § 1330(b) does not extend beyond the limits set by the *International Shoe* line of cases." *Gonzalez*, 614 F.2d at 1255.

That's the entirety of *Gonzalez*'s textual analysis. Based on these flimsy data points, *Gonzalez* broadly proclaimed: "Personal jurisdiction under the Act requires satisfaction of the traditional minimum contacts standard." *Id*.

The errors here are obvious—

First, *Gonzalez* didn't ground its analysis in the text of § 1330(b). And it is hard to imagine a clearer statute. It states that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under [an FSIA exception and] where service has been made[.]" 28 U.S.C. § 1330(b). That presents a simple if-then statement. When subject-matter jurisdiction and service are proper under the FSIA, the district court "shall" have personal jurisdiction. The word "shall" connotes a "mandatory" requirement. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). When

"the statutory language is mandatory," Congress "does not [provide for] discretion." *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007).

Every circuit that has analyzed the FSIA has refused to find a statutory minimum-contacts requirement under § 1330(b). *See TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005); *Frontera*, 582 F.3d at 396; *Abelesz*, 692 F.3d at 694; *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1303 (11th Cir. 2000). The FSIA thus "clearly expresses the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state." *TMR Energy*, 411 F.3d at 303.

Second, *Gonzalez* simply mixes up subject-matter jurisdiction and personal jurisdiction. The commercial activities exception, along with the other FSIA exceptions, provides subject-matter jurisdiction to federal courts. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992) ("A federal court lacks subject-matter jurisdiction over a claim against a foreign state unless the claim falls within an exception to immunity under the FSIA."). But *subject-matter jurisdiction* is a separate question from *personal jurisdiction*, which is governed by § 1330(b). So holding that § 1605(a)(2) creates a universal minimum-contacts requirement for § 1330(b) conflates the two concepts and makes no textual sense.

Third, *Gonzalez* was wrong to alter the clear text of § 1330(b) based on legislative history. While there was once a time when courts would look to legislative history to discern a statute's meaning, that time has long since passed. *See Citizens to Pres. Overton Park,*

Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) (only looking to the "statutes themselves" after concluding that the legislative history was "ambiguous"). Today, the rule is simple: "legislative history is not the law." *Epic Sys. Corp.*, 584 U.S. at 523. "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 337 (1994). So "to interpret the statute, we look first to the statute's language itself and the specific context in which that language is used." *Resisting Env't Destruction on Indigenous Lands, REDOIL v. EPA*, 716 F.3d 1155, 1161 (9th Cir. 2013) (simplified).

Even for those who find legislative history persuasive, it does not support *Gonzalez*'s minimum-contacts test for the FSIA. *Gonzalez*'s analysis of that legislative history consisted merely of a block quote of a House Committee Report:

> (b) Personal Jurisdiction. Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (, 66 S.Ct. 154, 90 L.Ed. 95) (1945), and McGee v. International Life Insurance Co., 355 U.S. 220, 223 (, 78 S.Ct. 199, 201, 2 L.Ed.2d 223) (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the dis-

> trict courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected. (Footnotes omitted.)

Gonzalez, 614 F.2d at 1255 n.5 (quoting H.R. Rep. No. 94-1487, at 13–14 (1976)).

Although unclear, perhaps *Gonzalez* relied on the Report's statement that the "requirements of minimum jurisdictional contacts and adequate notice are embodied in" § 1330(b). *Id*. But that doesn't support appending an additional minimum-contacts inquiry to § 1330(b). The Report was just noting that the FSIA's *enumerated exceptions* by themselves satisfy the requirement of "some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction." *Id*. So the Report determined that satisfying one of these exceptions meets "the necessary contacts which must exist before our courts can exercise personal jurisdiction." *Id*. It says nothing about a minimum-contacts analysis over and above satisfying a statutory

exception. And if all that were not enough, the arbitral exception was added more than a decade after the Committee Report, making application of a minimum-contacts test here even more dubious. *See* Pub. L. No. 100-669, § 2, 102 Stat. 3969, 3969 (1988).

All told, this was the time to correct our circuit's misstep. All parties agree that an FSIA exception applied and service was proper. *Devas*, 2023 WL 4884882, at *1. With those two requirements satisfied, Congress's command should have been mandatory. Rather than adhering to the plain text of the statute, we instead expanded our precedent to cover all FSIA exceptions.

B. The Due Process Clause Doesn't Require Minimum Contacts

Perhaps realizing *Gonzalez*'s shaky textual foundation, some of our later precedents began couching our minimum-contacts inquiry as a constitutional requirement. *See Gregorian v. Izvestia*, 871 F.2d 1515, 1528–29 (9th Cir. 1989) (sourcing the requirement in the "constitutional constraints of the Due Process clause"); *Altmann v. Republic of Austria*, 317 F.3d 954, 969–70 (9th Cir. 2002) (after concluding that the FSIA is satisfied, conducting a minimum-contacts analysis "[a]ssuming that a foreign state is a 'person' for purposes of the Due Process Clause"). But the Due Process Clause does not rescue our improper addition of a minimum-contacts requirement. As a matter of original meaning and modern precedent, the Fifth Amendment's Due Process Clause does not extend the benefit of minimum contacts to foreign states.

Start with modern jurisprudence. The Supreme Court has never said that the Due Process Clause ap-

plies to foreign states. In fact, it has suggested the opposite. Nearly 60 years ago, the Court held that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966). Later, while leaving whether "a foreign state is a 'person' for purposes of the Due Process Clause" open, the Supreme Court strongly hinted that foreign states should be treated the same as domestic States—meaning no due process protection. *Weltover*, 504 U.S. at 619 (citing *Katzenbach*'s holding that "States of the Union are not 'persons' for purposes of the Due Process Clause").

Since *Weltover*, the consensus of circuit courts has followed the Supreme Court's lead and definitively held that foreign states are not entitled to the protections of the Due Process Clause.

The D.C. Circuit gave the most thorough explanation. It said that conferring due process protections to foreign states was "not only textually and structurally unsound, but it would distort the very notion of 'liberty' that underlies the Due Process Clause." *Price*, 294 F.3d at 99. According to that court, common usage of the term "person" didn't "include the sovereign." *Id.* at 96 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)). Indeed, the court said, "foreign states stand on a fundamentally different footing than do private litigants who are compelled to defend themselves in American courts." *Id*. at 98. Unlike most "person[s]," "foreign nations are the juridical equals of the government that seeks to assert jurisdiction over them." *Id*.

And structurally, the D.C. Circuit described foreign states as "entirely alien to our constitutional system." *Id*. at 96. Even though domestic States "derive important benefits and must abide by significant limitations as a consequence of their participation," they receive no protection under the Due Process Clause. *Id*. Given this, the D.C. Circuit reasoned that foreign states must also be excluded. *Id*. at 97. It would be "strange," the court observed, if domestic States, which were "integral and active participants in the Constitution's infrastructure," were unprotected by the Due Process Clause while foreign states were. *Id.* at 96.

"[H]istory and tradition" also counseled in favor of excluding foreign states from the Due Process Clause, according to the D.C. Circuit. *Id*. at 97. As a historical matter, the "principles of comity and international law . . . protect[ed] foreign governments." *Id.* Thus, "[t]he most a foreign state can demand is that other states observe *international* law, not that they enforce provisions of domestic law." *Id.* (quoting Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483, 520 (1987)). So "foreign states have available to them a panoply of mechanisms in the international arena through which to seek vindication or redress." *Id*. at 99 (citing Damrosch, *supra*, at 525).

Based on all this, the D.C. Circuit held that "[n]either the text of the Constitution, Supreme Court decisions construing the Due Process Clause, nor long standing tradition provide a basis for extending the reach of this constitutional provision for the benefit of foreign states." *Id*.

The Second Circuit and Seventh Circuit agree. *See Frontera*, 582 F.3d at 400 ("[F]oreign states are not 'persons' entitled to rights under the Due Process

Clause."); *Abelesz*, 692 F.3d at 694 ("Other circuits have confronted the issue and have held that foreign states are not 'persons' entitled to rights under the Due Process Clause. . . . We agree."). After *Weltover*, no other circuit court has ruled otherwise.[2]

And the original meaning of the Due Process Clause supports the view that foreign states are not entitled to the protection of minimum contacts.

To be fair, recent scholarship has suggested foreign states were understood to be "persons" at the time of the Founding. For example, one author argues that Founding-era sources show "foreign states were viewed as 'persons' entitled to 'process.'" Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 637 (2019). As an example, Emmerich de Vattel, an influential 18th-century international law scholar, wrote, "[t]he law of nations is the law of sovereigns: free and independent states are moral persons, whose rights and obligations we are to establish in this treatise." Emmerich de Vattel, The Law of Nations or the Principles of Natural Law, bk. I, ch. I § 12 (1758) (Charles G. Fenwick trans., 1916).

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[2] Before *Weltover*, the Third Circuit and Fifth Circuit ruled that foreign states are entitled to due process. *See Velidor v. L/P/G Benghazi*, 653 F.2d 812, 819 n.12 (3d Cir. 1981) ("We must also inquire . . . whether the assertion of personal jurisdiction comports with the due process clause."); *Callejo v. Bancomer, S.A.,* 764 F.2d 1101, 1107 n.5 (5th Cir. 1985) ("As with all suits, however, the exercise of personal jurisdiction must comply with the due process clause."). Both circuit courts cited Second Circuit precedent which has since been overruled. *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *overruled by Frontera*, 582 F.3d at 399.

Another disagrees. According to this scholar, it is "unlikely that the framers of the Fifth Amendment would have viewed foreign states as persons given that foreign sovereigns were treated as completely immune from suit at the time of the founding." Donald Earl Childress III, *Questioning the Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. Online 60, 70 (2019).

But even assuming some process is due—an emerging consensus shows that the original understanding of the Fifth Amendment's Due Process Clause does not require minimum contacts for foreign states. Instead, these sources all agree that the political branches may dictate what process is afforded to foreign sovereigns. As Professor Wuerth concludes, "[t]hat foreign states are protected by due process does not tell us what the content of those protections are[.] . . . [W]hen it comes to personal jurisdiction, due process limitations may be largely coextensive with the process that Congress chooses to provide." Wuerth, *supra*, at 679–86; *see* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1743 (2020) ("The Fifth Amendment bars the execution of a federal judgment only if the federal court lacked jurisdiction. And Congress gets to answer th[e jurisdiction] question."); Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 530–31 (2022) ("Because the Due Process of Law Clause requires process, . . . service on a defendant" may be "sufficient to validate personal jurisdiction whether or not the *International Shoe Co. v. Washington* minimum contacts test was satisfied." (simplified)).

Indeed, the view that Congress could legislate the bounds of jurisdiction over foreign sovereigns finds support in a well-known case from Justice Joseph Story. Riding circuit in 1828, Justice Story considered whether a French plaintiff could successfully obtain a default judgment against a Massachusetts defendant who was living in Paris. *Picquet v. Swan*, 19 F. Cas. 609, 609–10 (C.C.D. Mass. 1828) (No. 11,134). The plaintiff argued that attaching the Massachusetts property was a sufficient method of serving process on the Paris-residing Massachusetts resident. *Id.* Justice Story rejected the argument, concluding Congress had not clearly chosen to authorize that kind of extraterritorial jurisdiction and thus "there ha[d] been no sufficient service of the process." *Id.* at 613, 619. Even so, he explained that it was well within the power of Congress to have, "a subject of England, or France, or Russia . . . summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Id.* at 613. Congress need only do so clearly. *Id.* at 615 ("If congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law."). In sum, Justice Story opined that foreign-based defendants were owed no more than service authorized by Congress before being haled into our federal courts.

So modern jurisprudence, tugged by the gravitational pull of original meaning, points to excluding foreign states from the protection of minimum contacts. Like every other circuit court post-*Weltover*, we should have followed suit. This was yet another reason to take this case en banc.

III.

Forty years ago, our court disregarded the plain language of the FSIA to add minimum contacts to the

requirements for personal jurisdiction over a foreign state. And we did so using questionable interpretive moves. Today, the consensus among circuit courts squarely rejects any constitutional basis for a minimum-contacts regime. So, yet again, the Ninth Circuit stands alone. And when it comes to the law, experimentation isn't usually a virtue.

Our atextual reading creates a needless roadblock for plaintiffs seeking to assert their rights against foreign states and their agents. And we are simply incompetent to interfere in these matters of foreign affairs. Imagine requiring a state sponsor of terrorism to have minimum contacts with our country before allowing our citizens to vindicate the death or injury of a loved one at the hands of a terrorist. *See* 28 U.S.C. § 1605A. But that is the regime that the Ninth Circuit erects.

With no constitutional provision requiring otherwise, we should have deferred to the political branches here. FSIA plaintiffs deserve a full opportunity to litigate their cases as Congress determined. By freelancing in this area, we do the legislative process, separation of powers, and rule of law a disservice.

Faced with an opportunity to correct course, we again close the courthouse doors. And we refuse to act despite overwhelming evidence that our position is wrong. Our failure to fix our precedent is a serious mistake.

I respectfully dissent from the denial of rehearing en banc.