Nos. 23-1201 & 24-17

IN THE

Supreme Court of the United States

CC/DEVAS (MAURITIUS) LIMITED, *et al.*,
Petitioners,

v.

ANTRIX CORP. LTD., *et al.*,
Respondents.

DEVAS MULTIMEDIA PRIVATE LIMITED, *et al.*,
Petitioners,

v.

ANTRIX CORP. LTD., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states sued under the Foreign Sovereign Immunities Acts.

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STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37, the United States Council for International Business ("USCIB") respectfully submits this brief as *amicus curiae* in support of petitioners CC/Devas (Mauritius) Limited; Devas Multimedia Private Limited; Devas Employees Mauritius Private Limited; and Telcom Devas Mauritius Limited.

Founded in 1945, USCIB powers the success of U.S. business across the globe by promoting open markets, competitiveness and innovation, sustainable development, and corporate responsibility. Its members include U.S.-based global companies and professional services firms from every sector of the economy, with operations in every region of the world, generating $5 trillion in annual revenues and employing over 11 million workers worldwide. As the U.S. affiliate to several leading international business organizations, including the International Chamber of Commerce ("ICC"), the International Organisation of Employers ("IOE"), and Business at OECD, USCIB advances U.S. business interests with policymakers and regulatory authorities across the globe.

In connection with its role as the U.S. national affiliate to the ICC—the world business organization created in 1919 to promote trade and investment, open markets, and the free flow of capital—USCIB represents U.S. business interests in the ICC's international arbitration arena. The International Court of Arbitration,

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission.

established by the ICC in 1923, is one of the world's leading institutions for administering international arbitration. U.S. parties are among the most frequent users of ICC arbitration by nationality, and the United States is among the top five countries selected as the arbitral seat for ICC cases.[2]

For many USCIB members, arbitration plays an essential role in facilitating international business because it offers a reliable and neutral mechanism for parties to efficiently resolve their cross-border disputes with confidence such that these decisions will be respected and enforced worldwide. Safeguarding the international arbitration system is of utmost concern to USCIB because arbitration forms a cornerstone of risk management for its members' international transactions and investments.

The Ninth Circuit's decision severely undermines U.S. businesses' settled expectations when doing business abroad with foreign states or in heavily regulated industries. U.S. businesses choose to contract with foreign states on specified contractual terms based in part on the understanding that the international arbitration system will offer protection in the event of a breach. This protection comes in the form of multilateral enforcement treaties coupled with domestic statutes like the Foreign Sovereign Immunities Act ("FSIA") that contain arbitral exceptions to immunity.

The United States has ratified numerous multilateral treaties that require the reciprocal recognition and enforcement of foreign arbitral awards. The United States amended the FSIA in 1988 expressly to

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[2] *See ICC Dispute Resolution: 2023 Statistics*, ICC DISP. RESOL. SERVS., at 11, https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf.

permit the enforcement of arbitral awards rendered against foreign states where those states have consented to arbitrate disputes with private parties arising under applicable agreements or treaties. Where those foreign states do not comply with arbitral awards confirmed as U.S. court judgments pursuant to the arbitral exception to immunity, the U.S. legal framework allows for post-judgment discovery into the property of the foreign state and then execution of the unpaid arbitral award against property of the foreign state in the United States that is used for commercial activity.

U.S. investors and businesses frequently rely on the availability of these remedies when deciding whether, and how, to contract with foreign states. Following the Ninth Circuit's unprecedented approach of requiring minimum contacts between the foreign state and the United States would subvert this established legal framework of accountability for foreign states that do not satisfy adverse arbitral awards, even though those foreign states consented to international arbitration to resolve disputes. This outcome would expose U.S. companies to excessive, unexpected, and asymmetric risks in their existing relationships, and would impair U.S. companies' ability to do business abroad safely in the future.

SUMMARY OF ARGUMENT

The exercise of personal jurisdiction over a foreign state defendant under the FSIA does not require satisfaction of the minimum-contacts test. 28 U.S.C. Section 1330(a) provides that "[t]he district courts shall have original jurisdiction . . . against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under Sections 1605–1607 of this title or any applicable international agreement." Section

1330(b) additionally provides that "[p]ersonal jurisdiction over a foreign state shall exist" for claims for relief where an immunity exception under Sections 1605 to 1607 applies and "where service has been made under section 1608."

The Ninth Circuit's additional minimum-contacts test is not required under the law—nor does it reflect U.S. businesses' understanding of the law when negotiating and concluding agreements with foreign states. On the contrary, U.S. businesses expect that they will be able to hold foreign state counterparties to their agreements using arbitration, and to enforce arbitration awards against state assets worldwide, if necessary, using a network of international enforcement conventions. As discussed below, domestic statutes like the FSIA are an indispensable element of this settled expectation because they facilitate the discovery of state assets and enforcement of awards without requiring proof of minimum contacts with a jurisdiction that might harbor executable property.

As discussed in Section I, U.S. businesses generally prefer international arbitration over foreign litigation to resolve cross-border disputes for several reasons. Whereas arbitration is seen as familiar, reliable, neutral, and efficient, foreign court proceedings can be unfamiliar, unreliable, biased, and slow.[3] Moreover, in contrast to court judgments, international arbitration awards are easily enforceable in most jurisdictions

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[3] *See, e.g.*, Sameer Yasir, *"A Lifelong Nightmare": Seeking Justice in India's Overwhelmed Courts*, N.Y. TIMES (Jan. 13, 2024), https://www.nytimes.com/2024/01/13/world/asia/india-judicial-backlog.html; *Canada's Backlogged Civil and Family Courts in "Crisis," According to Lawyers Group*, CBC NEWS (July 10, 2023), https://www.cbc.ca/news/canada/london/justice-delays-canada-courts-ontario-1.6900147.

globally pursuant to multilateral enforcement conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[4] the Inter-American Convention on International Commercial Arbitration (the "Inter-American Convention"),[5] and the International Centre for Settlement of Investment Disputes ("ICSID") Convention,[6] all of which the United States has ratified and implemented into domestic legislation. U.S. businesses rely on these mechanisms with confidence that should disputes arise, the resulting arbitral awards can be enforced worldwide—including in the United States[7]—allowing them to manage and mitigate risks of doing business abroad.

U.S. businesses especially value international arbitration over foreign litigation when transacting with foreign states or when operating overseas in heavily regulated industries (such as energy, mining, and infrastructure). Arbitration's neutrality is far preferable to litigation in the foreign state's domestic courts, which may favor the foreign party or excessively defer to adverse governmental actions.

As discussed in Section I, in addition to U.S. businesses' and foreign states' contracts selecting international arbitration to resolve their disputes, the

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[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

[5] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 249.

[6] Convention on the Settlement of Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[7] New York Convention, *supra* note 4.

United States also has protected U.S. investors overseas by ratifying over 40 bilateral investment treaties ("BITs") and 20 free trade agreements ("FTAs") containing investment chapters bestowing international law protections on U.S. investors and their investments in counterparty foreign states.[8] All of the U.S. BITs and all but three of the FTAs provide for international arbitration to resolve disputes brought by U.S. investors against foreign states arising under those treaties, and enforcement of any resulting arbitration awards against foreign state assets in the United States is also facilitated by the FSIA. Treaties ratified by the United States provide that U.S. courts shall recognize and enforce international arbitral awards as judgments rendered by a U.S. court, save for a limited set of grounds explicitly enumerated in those instruments. As discussed in Section II, the legislative history of the 1988 amendment to the FSIA that added the exception contained in Section 1605(a)(6) demonstrates Congress' intent to facilitate award enforcement by codifying an arbitration exception to foreign states' immunity. Adding a minimum contacts requirement would make the United States an outlier jurisdiction in which businesses may not be able to enforce arbitral awards against foreign states.

In the present case, a group of U.S. investors invested through Mauritian intermediary companies in Indian companies they created (Devas Multimedia) to negotiate with Antrix, an Indian company wholly owned by the Indian Government, to build, launch,

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[8] *United States of America*, UN TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america (last accessed Dec. 9, 2024); *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements (last accessed Dec. 9, 2024).

and manage telecommunication satellites in India.[9] The negotiations were conducted in India, the contract was executed in India, and the primary place of the contract's performance was in India.[10] This scenario is a typical cross-border deal—negotiated, consummated, and performed in the territory of the foreign state—especially when the foreign state is a counterparty. This scenario is also typical insofar as the private party negotiated with the foreign state (Antrix) for international arbitration to resolve any disputes. The parties agreed to arbitration under the ICC or UNCITRAL Rules. Pet. App. 18a. They also agreed to seat any arbitration in Delhi, India, making any resulting award enforceable under the New York Convention, to which India and the United States are both parties. *Id.*

Antrix has failed to pay monetary damages awarded by the tribunal in the arbitral award, amounting to $562.5 million, including interest. Pet. App. 20a. Petitioners seek to confirm the award in U.S. courts. The correct inquiry therefore is whether the award creditors possess an arbitral award against a foreign state that falls within the Section 1605(a)(6) arbitration exception to immunity (assuming proper service of process, which the parties do not contest).

As discussed in Section III, when foreign states do not comply with arbitral awards confirmed as U.S. court judgments, the legal framework allows for post-

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[9] *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, 91 F.4th 1340, 1345 (9th Cir. 2024) (Bumatay, J., dissenting).

[10] *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, No. 20-36024, 2023 WL 4884882, at *3 (9th Cir. Aug. 1, 2023), *cert. granted*, No. 24-17, 2024 WL 4394120 (U.S. Oct. 4, 2024), *and cert. granted sub nom. CC/Devas Ltd. v. Antrix Corp.*, No. 23-1201, 2024 WL 4394121 (U.S. Oct. 4, 2024).

judgment discovery into the property of the foreign state and execution of the unpaid judgments against property of the foreign state in the United States that is used for commercial activities to satisfy the unpaid award (now judgment) pursuant to Section 1610(a)(6) of the FSIA.

U.S. businesses rely on this legal framework to mitigate the risks of doing business with a foreign state. U.S. companies negotiate contracts that provide for international arbitration or invest in jurisdictions where their investments are protected by BITs or FTAs providing for international arbitration to resolve disputes against foreign states. The foreign state waives immunity where it consents to arbitrate its dispute with the private party. U.S. courts must recognize and enforce arbitral awards rendered pursuant to such arbitration agreements falling within the scope of Section 1605(a)(6) if the foreign state has been served properly pursuant to Section 1608. Thereafter, if the foreign state still refuses to fulfill its obligations, then U.S. laws provide for discovery and execution proceedings to satisfy the unpaid award.

Endorsing the Ninth Circuit's unprecedented approach of requiring minimum contacts between the foreign state and the United States would subvert this comprehensive legal framework that holds foreign states accountable when they do not voluntarily satisfy adverse arbitral awards, notwithstanding that they consented in advance to international arbitration as a condition for doing business with the private party. This outcome would expose U.S. companies to excessive, unexpected, and asymmetric risks in their business relationships, and would impair U.S. companies' ability to do business abroad safely in the future.

ARGUMENT

I. When Dealing with Foreign States, U.S. Businesses Rely Heavily on United States Treaty Commitments to Enforce Arbitration Awards and Protect Investments

A. The international business community favors international arbitration to resolve disputes with foreign states

Companies engaged in cross-border business typically choose international arbitration to resolve their disputes. In a 2021 survey conducted by Queen Mary University of London, 90% of respondents selected international arbitration as their preferred method of resolving cross-border disputes.[11] The most frequently cited reasons for this preference included relative ease of global enforceability of international arbitration awards pursuant to multilateral treaties, flexible procedures vis-à-vis local litigation, avoidance of home-court advantages of counterparties in local litigation, and the ability to select arbitrators with requisite experience and confidentiality.[12]

In particular, businesses choose international arbitration for cross-border disputes where performance must take place in a heavily-regulated industry in a foreign state, such as upstream oil-and-gas exploration,

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[11] *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, WHITE & CASE (2021), at 5, https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

[12] *2018 International Arbitration Survey: The Evolution of International Arbitration*, WHITE & CASE (2018), at 2, https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).pdf.

mining, or infrastructure projects.[13] In an energy-focused survey conducted by Queen Mary University of London in 2022, 72% of respondents ranked arbitration as being very suitable for deciding energy disputes.[14] In a 2013 survey conducted by PwC and Queen Mary University, 52% of respondents ranked international arbitration as their most preferred method of resolving cross-border disputes, with 56% and 68% of respondents expressing the same preference for cross-border disputes in the energy and construction sectors, respectively.[15]

Businesses prefer international arbitration to resolve disputes with foreign states for several additional reasons. First, an international business may not want to litigate these disputes in the courts of the foreign state, which may be perceived as biased in favor of the home government. Second, the government often wears two hats when dealing with a private business—commercial and sovereign. Local courts may be more deferential to the government, especially when applying local laws promulgated by that government. Accordingly, international arbitration is frequently used in investment

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[13] *See, e.g.*, Phil C. W. Chan, *Re-Regulation of Infrastructure Investment: Issues for the International Lawyer*, 18 EUR. BUS. L. REV. 509 (2007).

[14] *Future of International Energy Arbitration Survey Report*, QUEEN MARY UNIV. LONDON & PINSENT MASONS (Jan. 20, 2023), at 6, https://www.qmul.ac.uk/arbitration/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf.

[15] *Corporate Choices in International Arbitration*, PWC (2013), https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf.

and commercial contracts executed with foreign states, especially in public-private partnerships ("PPPs").[16]

International arbitrations involving states and state-owned companies form a significant percentage of the dockets of international arbitral institutions. The ICC Court of Arbitration revealed that 16% of new arbitrations filed in 2023 involved a state or state entity,[17] compared to 25% in 2022.[18] The London Court of International Arbitration reported that its percentage of arbitrations involving states or state-owned entities was 11% in 2023.[19] The most frequent ICC claims arising out of commercial contracts involving states or state entities relate to construction, maintenance, and the operation of facilities or systems.[20]

B. The United States has ratified key multilateral treaties supporting foreign arbitral award enforcement

The United States has ratified several multilateral treaties governing the recognition and enforcement of arbitral awards. First, the New York Convention has

[16] Charles N. Brower, *State Parties in Contract-Based Arbitration*, 1 J. INST. FOR TRANSNAT'L ARB. 103, 111 (2019).

[17] ICC DISP. RESOL. SERVS., *supra* note 2, at 6.

[18] *ICC Dispute Resolution: 2022 Statistics*, ICC DISP. RESOL. SERVS., https://jusmundi.com/en/document/publication/en-2022-icc-dispute-resolution-statistics.

[19] *Annual Casework Report 2023*, LONDON CT. OF INT'L ARB., https://www.lcia.org/media/download.aspx?MediaId=988 (last accessed Dec. 9, 2024).

[20] *ICC Commission Report: States, State Entities and ICC Arbitration*, INT'L CHAMBER OF COM. (2012), at 2, https://iccwbo.org/wp-content/uploads/sites/3/2015/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration-2012.pdf.

been ratified by 172 Contracting States,[21] including the United States, which did so on September 30, 1970. *See* 9 U.S.C. §§ 201 *et seq*. The New York Convention applies to the recognition and enforcement of non-domestic awards,[22] which U.S. courts interpret to cover arbitral awards rendered outside the territory of the U.S. and arbitral awards rendered within the territory of the U.S. containing a "foreign" element.[23] Article III of the New York Convention, *supra* note 4, states that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."

Second, the Inter-American Convention has been ratified by 19 Contracting States that are Member States of the Organization of American States, including the United States, which did so on November 10, 1986.[24] Article IV of the Inter-American Convention provides a similar enforcement provision.

Third, the ICSID Convention has been ratified by 158 Contracting States, including the United States, which ratified the ICSID Convention on October 14, 1966, when it entered into force.[25] *See* 22 U.S.C.

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[21] *Contracting States*, NEW YORK CONVENTION, https://www.newyorkconvention.org/contracting-states (last visited Dec. 8, 2024).

[22] New York Convention, *supra* note 4, at art. 1(1).

[23] *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999).

[24] *Inter-American Convention on International Commercial Arbitration*, DEP'T OF INT'L LAW, https://www.oas.org/juridico/english/sigs/b-35.html (last accessed Dec. 8, 2024).

[25] *List of Contracting States and Other Signatories of the Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/sites/default/files/ICSID%203/2024%

§ 1650(a). The ICSID Convention requires that Contracting States recognize ICSID Convention awards "as binding" and "enforce the pecuniary obligation imposed by that award within its territories as if it were a final judgment of a court in that State." Art. 54(1).

International businesses value whether a foreign state has ratified conventions aimed at enforcing arbitral awards prior to conducting business in those jurisdictions. Empirical studies demonstrate that access to international arbitration through arbitration agreements as well as enforcement of arbitral awards through enforcement treaties encourage foreign direct investment ("FDI"), especially in developing economies with weaker domestic public institutions.[26] Inter-governmental institutions tasked with promoting cross-border investment emphasize the importance of ratifying enforcement conventions to attract inward FDI.[27] The U.S. ratifications of the New York

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20-%20Aug%2025%20-%20ICSID%203%20-%20ENG.pdf (last updated Aug. 25, 2024).

[26] Andrew Myburgh & Jordi Paniagua, *Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 U. CHI. J.L. & ECON. 597 (2016), https://www.journals.uchicago.edu/doi/abs/10.1086/689188; Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517 (2006); *see also* Felix Okpe, *Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States*, 13 RICH. J. GLOB. L. & BUS. 217, 248 (2014) ("There is no question that investment treaty arbitration mechanism is an incentive that can attract FDI to host States.").

[27] Xavier Forneris & Nina Mocheva, *A Critical Tool for Enforcement of International Arbitration Decisions*, WORLD BANK GRP. (2018), https://documents1.worldbank.org/curated/en/726311577800894244/pdf/How-Countries-can-Fully-Implement-the-New-

Convention, the Inter-American Convention, and the ICSID Convention demonstrate the United States' international commitment to the rule of law and accountability whereby foreign arbitral awards may be recognized and enforced in U.S. courts.

C. The United States protects outbound foreign investment through arbitration agreements in investment treaties

The United States historically has facilitated international trade and investment through bilateral commercial treaties, generally known as treaties of friendship, commerce, and navigation (the "FCN treaties").[28] The growth in FDI in the 1970s led to the United States launching its own program to negotiate BITs with developing countries in 1981. The major impetus behind this treaty-making activity was to provide U.S. investors abroad with protections enshrined into international law in circumstances where local laws were subject to change or could be misapplied in favor of local actors.[29] The United States has endorsed the use of international arbitration to resolve investor-state disputes for at least three policy reasons: to resolve investment conflicts without creating state-to-state conflicts; to protect U.S. citizens overseas; and to signal to U.S. investors that the rule of law shall be

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York-Convention-A-Critical-Tool-for-Enforcement-of-International-Arbitration-Decisions.pdf.

[28] *See* Kathleen Kunzer, *Developing a Model Bilateral Investment Treaty*, 15 LAW POL'Y INT'L BUS. 273, 276 (1983); Herman Walker, *Modern Treaties of Friendship Commerce and Navigation*, 42 MINN. L. REV. 805, 823–24 (1958).

[29] *See, e.g.*, Z. Elkins et al., *Competing for Capital: the Diffusion of Bilateral Investment Treaties*, *1960-2000*, U. ILL. L. REV. 265, 268–69 (2008).

respected.[30] Further, the United States has concluded that these investment treaties especially benefit U.S. individuals and small businesses, who often have fewer resources than large, multinational corporations and therefore may be mistreated more easily by foreign states.[31]

While the scope of each BIT varies depending on its terms, generally, BITs provide U.S. investors certain substantive international law protections.[32] Every one of the U.S. BITs currently in force provides for international arbitration to resolve disputes arising under the agreements.[33]

Furthermore, comprehensive FTAs between the United States and 20 countries are currently in force.[34] The U.S. FTAs usually contain investment chapters that offer the substantive protections found in the BITs and contain provisions or chapters regarding the settlement of investment disputes arising between an investor and the foreign state.[35]

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[30] *ISDS: Important Questions and Answers*, OFF. U.S. TRADE REPRESENTATIVE (Mar. 2015), available at https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers.

[31] *Id.*

[32] *See* 2004 *U.S. Model Bilateral Investment Treaty,* at arts. 4–7, OFF. U.S. TRADE REPRESENTATIVE, available at https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf; *see also* 2012 *U.S. Model Bilateral Investment Treaty*, at arts. 4–7 OFF. U.S. TRADE REPRESENTATIVE, available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[33] SHAYERAH I. AKHTAR & MARTIN A. WEISS, CONG. RSCH. SERV., RL43052, U.S. INTERNATIONAL INVESTMENT AGREEMENTS: ISSUES FOR CONGRESS 7 (2013).

[34] OFF. U.S. TRADE REPRESENTATIVE, *supra* note 8.

[35] FTAs between the United States and the following counterparties do not contain investment chapters: United States–Bahrain Free Trade Agreement Implementation Act, Pub. L. No.

The United States is not alone in pursuing BITs and FTAs containing investment chapters to promote and protect foreign investment. The United Nations Conference on Trade and Development ("UNCTAD") estimates that, as of 2022, over 4,400 investment agreements have been signed, of which approximately 2,500 are in force.[36] BITs signal to foreign investors that foreign states are committed to protecting their foreign investments or otherwise face enforceable arbitration proceedings.[37]

In addition to international commercial arbitrations that U.S. companies may initiate against state counter-parties, U.S. investors also resort to international investment arbitration under BITs, FTAs, or investment contracts to resolve their investment disputes with foreign states. ICSID's public data indicates that U.S. investors have initiated 178 arbitrations under the

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109–169, 119 Stat. 3581 (2006); Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, Israel-U.S., Apr. 22, 1985, 1985 U.S.T. 232; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Jordan-U.S., Oct. 24, 2000, 2000 U.S.T. 160.

[36] *Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition*, UNCTAD INT'L INV. AGREEMENTS ISSUES NOTE (Aug. 2023), https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf. *See also* Akhtar & Weiss, *supra* note 33, at 4–5.

[37] Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite*, 6 REV. INT'L ORGS. 1 (2011).

ICSID Convention or the ICSID Additional Facility against foreign states.[38]

II. The Ninth Circuit's Approach Conflicts with Section 1605(a)(6)'s Text and History and Jeopardizes the United States' International Commitments

A. Section 1605(a)6)'s text and history do not require minimum contacts for enforcement of arbitral awards

Courts applying Section 1605(a)(6) are tasked with enforcing a foreign state's arbitration agreement or enforcing a resulting arbitral award. Confirmation of an arbitral award pursuant to the arbitration exception in Section 1605(a)(6) requires establishing three jurisdictional facts: an agreement to arbitrate by the foreign state, an arbitration award, and a treaty governing the award in force in the United States.[39] The D.C. Circuit consistently applies the "jurisdictional facts" analysis, including in the recent decision of *Elizabeth Regina Maria Gabriele von Pezold, et al. v. Republic of Zimbabwe*.[40]

Section 1605(a)(6) provides an exception to sovereign immunity for specific kinds of arbitral awards listed in Section 1605(a)(6)(A)–(D). The first two categories are the most commonly used where: "the arbitration takes place or is intended to take place in the United States" or "the agreement or award is or may be governed by

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[38] *Search Cases*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/cases/case-database (last accessed Dec. 9, 2024).

[39] *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021).

[40] No. 23-7109, 2024 WL 4763943 (D.C. Cir. 2024).

a treaty or other international agreement in force for the United States."[41]

In the first category, the foreign state consented to arbitration seated in the United States. In the second category, the international agreement must be in force for the United States. But the international agreement also must be in force either for the foreign state party or the foreign state in which the arbitration is seated. When acceding to the New York Convention, the United States made a reservation providing, "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another State."[42] U.S. implementation of the Inter-American Convention also contains a reciprocity requirement,[43] while one of the ICSID Convention's jurisdictional requirements is that the "legal dispute" must be between a Contracting State and a national of another Contracting State.[44] The immunity exception under Section 1605(a)(6)(B) only applies to New York Convention or Inter-American Convention awards

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[41] *See, e.g.*, *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022). 28 U.S.C. § 1605(a)(6)(A)–(B).

[42] *Chapter XXII: Commercial Arbitration and Mediation*, UN Treaty Collection, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxii-1&chapter=22&clang=_en#EndDec (last updated Aug. 12, 2024); *see also* New York Convention, *supra* note 4, art. 1(3) ("When signing, ratifying or acceding to this Convention . . . any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.").

[43] 9 U.S.C. § 304.

[44] ICSID Convention, *supra* note 6, at art. 25.

where the foreign state consented to a seat of arbitration in a jurisdiction that has ratified either treaty or the foreign state itself ratified the ICSID Convention. Therefore, in addition to agreeing to arbitration, the foreign state also must have agreed to an appropriate seat of arbitration or itself have ratified an enforcement convention for any resulting arbitral award to qualify for judicial confirmation under Section 1605(a)(6).

U.S. courts have recognized that a foreign state's choice of arbitral seat or its own ratification of a recognition-and-enforcement treaty results in an immunity exception under Section 1605(a)(6), and that this consent-based agreement to arbitrate does not necessitate minimum contacts between the foreign state and the United States for enforcement. In *Maritime Ventures International, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 722 F. Supp. 1032, 1038 (S.D.N.Y. 1989), the court concluded that it had jurisdiction to hold St. Kitts accountable to its consent to arbitrate via an arbitration agreement in the defendant's charter pursuant to Section 1605(a)(6): "[W]hile it would be inequitable for private entities to claim the same protection as foreign governments and avoid jurisdiction in American courts, there is nothing unfair about honoring a waiver executed by an authorized agent of the government."

In *Employers Insurance of Wausau v. Banco Seguros del Estado*, the court concluded that it had personal and subject matter jurisdiction under the FSIA, on the basis that "subject matter jurisdiction exists because the arbitration clause within the retrocessional treaties state[s] that any arbitration 'shall take place in Wausau, Wisconsin.' . . . [A] foreign state has no immunity from a proceeding to confirm an arbitral

award where the arbitration 'is intended to take place in the United States.'"[45] In the alternative, the court found that "subject matter jurisdiction exist[ed] because confirmation of the award [was] sought under the Inter-American Convention. A foreign state has no immunity from a proceeding to confirm an award that 'may be governed by a treaty. . . calling for the recognition and enforcement of arbitral awards.'"[46]

The arbitral exception was designed to facilitate enforcement of arbitral awards pursuant to treaties ratified by the United States.[47] Before the enactment of the FSIA, U.S. courts had interpreted agreements to arbitrate disputes in contracts executed by foreign states as implied waivers of their sovereign immunity.[48] Subsequently, U.S. courts interpreted the FSIA as allowing for judicial confirmation of arbitral awards

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[45] 34 F. Supp. 2d 1115, 1119 (E.D. Wis. 1999), *aff'd*, 199 F.3d 937 (7th Cir. 1999).

[46] *Id. See also Banco de Seguros del Estado v. Mut. Marine Offs., Inc.*, 230 F. Supp. 2d 362, 367 (S.D.N.Y. 2002) (finding jurisdiction over Uruguayan state-owned entity where "it [had] agreed to submit to arbitration and the arbitration took place in the United States."); *Vantage Deepwater Co. v. Petrobras Am. Inc*, No. 4:18-CV-02246, 2019 WL 2161037, at *11 (S.D. Tex. May 17, 2019) (finding jurisdiction over a foreign state and no immunity under the FSIA regarding confirmation of an award governed by the Inter-American Convention), *aff'd*, 966 F.3d 361 (5th Cir. 2020).

[47] Karen Halverson, *Is a Foreign State a "Person"? Does It Matter?*, 34 N.Y.U. J. INT'L L. & POL'Y. 115, 124 n. 44 (2001) (first citing 134 CONG. REC. H10678 (Oct. 20, 1988) (statement of Rep. Moorhead); and then citing 132 CONG. REC. 28000 (Oct. 2, 1986) (statement of Sen. Lugar); *see also id* at 177–78 n. 263 (citing 132 CONG. REC. S14795 (1986) (statement of Sen. Lugar).

[48] H.R. REP. NO. 94-1487, at 18 (1976) ("With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country.").

through the waiver exception under Section 1605(a)(1). Congress later explicitly codified the arbitration exception by adopting Section 1605(a)(6) in 1988.[49] This amendment "add[ed] a new exception for actions to enforce or confirm arbitration awards either issued in the United States or covered under an international agreement for the recognition and enforcement of arbitral awards."[50]

Section 1605(a)(6) was enacted to protect U.S. companies when doing business abroad. Senator Mathias, discussing an earlier version of the bill that later became Section 1605(a)(6), stated, "[t]his amendment will reassure Americans engaged in international business that the arbitration mechanism works. By preventing a foreign government from invoking the sovereign immunity defense to escape enforcement of an arbitral award, it will help secure the safety of U.S. companies' interests abroad." 132 Cong. Rec. S33742 (1986). Similarly, Senator Lugar stated:

> Consistent with our longstanding policy favoring arbitration in international commerce, the other provisions of this amendment would perfect the [FSIA] to provide explicitly for the enforcement of arbitral agreements or awards. Currently, agreements and awards are enforced under the provisions of the FSIA that concern explicit or implied waivers of immunity. Although courts are finding that arbitral

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[49] Halverson, *supra* note 47, at 123 ("The apparent purpose of [§ 1605(a)(6)] was to facilitate the enforcement of international arbitration agreements by clarifying that a foreign state's agreement to submit a dispute to international commercial arbitration amounts to a waiver of sovereign immunity in any suit to enforce arbitral awards relating to such agreements.").

[50] *Id.*

> award agreements constitute waivers in the appropriate cases, the amendment would give more explicit guidance to judges in dealing with these cases.

132 Cong. Rec. S14795 (1986).

In a hearing before the Subcommittee on Administrative Law and Governmental Relations, Mark B. Feldman specifically refuted any requirement of "minimum contacts" with the following considerations: first, that constitutional objections to the personal jurisdiction of the court are waivable; and second, a federal district court may enforce an arbitral award against property within its jurisdiction, even if it would not have jurisdiction to adjudicate the dispute on the merits.[51] The arbitral exception intentionally allowed enforcement against a foreign state not present in the United States, even when the underlying transaction has no connection with the United States.[52] This accords with the fact that Congress enacted the arbitral exception twelve years after the original FSIA exceptions and that Congress chose language indicating that a lesser degree of U.S. connection was sufficient to

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[51] *Foreign Sovereign Immunities Act: Hearing before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 97–98 (1987) (statement of Mark B. Feldman) [hereinafter "Statement of Mark B. Feldman"]. Mr. Feldman then served as Chairman of the Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act of the Section of International Law and Practice of the American Bar Association and participated in the drafting of the FSIA as a Deputy Legal Adviser and Acting Legal Adviser of the Department of State. *Id*. at 89.

[52] *Id.* at 98.

grant federal courts jurisdiction over actions to confirm or enforce foreign arbitral awards.[53]

U.S. courts routinely confirm New York Convention awards against foreign states without conducting a minimum-contacts inquiry. For example, in *Cargill International S.A. v. M/T Pavel Dybenko*, the court found that the New York Convention "is exactly the sort of treaty Congress intended to include in the arbitration exception."[54] Similarly, in *Chevron Corp. v. Republic of Ecuador*, the court held that since the arbitration was seated in The Hague and the Netherlands is a party to the New York Convention, the arbitral award was governed by that convention: "Awards are enforceable in the courts of any signatory so long as the place of the award is in the territory of a party to the Convention."[55] As discussed in Section I above, U.S. businesses negotiate with foreign states to choose the seat of arbitration, the applicable arbitral rules, and assess whether any arbitral awards rendered pursuant to the agreement to arbitrate will be protected by the enforcement treaties. They rely on a straightforward and uncontroversial application of Section 1605(a)(6) to recognize and enforce arbitral awards against foreign states.

[53] As noted by Petitioners, the arbitration exception's addition "more than a decade after the Committee Report[] mak[es] application of a minimum-contacts test here even more dubious." Pet. App. 61a.

[54] 991 F.2d 1012, 1018 (2d Cir. 1993).

[55] 795 F.3d 200, 204 (D.C. Cir. 2015) (alteration, citation and internal quotation marks omitted); *see also Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petrol. Corp.*, 40 F.4th 56, 61 (2d Cir. 2022) (finding U.S. courts are generally bound to enforce New York Convention awards).

B. Other jurisdictions fulfill their treaty obligations to enforce arbitral awards against foreign states without adding an additional requirement of minimum contacts

The United States currently is in line with other states in recognizing and enforcing foreign arbitral awards by focusing on the foreign state's agreement to arbitration, choice of seat of arbitration, and ratification of multilateral enforcement conventions rather than minimum contacts between the foreign state and the enforcement jurisdiction. For example, enforcement actions have been brought by European award creditors in multiple jurisdictions against Spain seeking to enforce arbitral awards rendered under the Energy Charter Treaty or BITs over Spain's reversal of its policy of subsidizing its renewable energy sector launched in 1999. In *NextEra Energy Global Holdings B.V. v. Spain*, the D.C. Circuit held that district courts have jurisdiction to enforce ICSID awards under the arbitration exception contained in Section 1605(a)(6), while remanding a specific question to the district court on the scope of Spain's consent to arbitrate disputes under the treaties with EU nationals.[56]

Recently, on October 22, 2024, the English Court of Appeal confirmed in *Infrastructure Services Luxembourg S.À.R.L v. Kingdom of Spain*, No. CA-2023-001556, ¶ 103 (Court of Appeals (Eng. & Wales) (Oct. 22, 2024)), and *Border Timbers Limited v. Republic of Zimbabwe*, No. CA-2024-000258, ¶¶ 70, 86 (Court of Appeals (Eng. & Wales) (Oct. 22, 2024)), that the English courts enjoyed jurisdiction to register the ICSID awards on the basis that Spain and Zimbabwe submitted to the

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[56] 112 F.4th 1088, 1094 (D.C. Cir. 2024).

court's jurisdiction through Article 54 of the ICSID Convention, which constituted a "prior written agreement" for purposes of Section 2 of the State Immunity Act 1978. Earlier, on April 12, 2023, in *Kingdom of Spain v. Infrastructure Services Luxembourg S.À.R.L and ANOR*, HCA S43/2022 (Dec. 4, 2023, AU), the High Court of Australia held that Spain's ratification of the ICSID Convention constituted a waiver of jurisdictional immunity from the recognition and enforcement of ICSID arbitral awards under Australia's Foreign States Immunities Act 1985.

Common law courts have adopted similar positions when enforcing arbitral awards governed by the New York Convention. *See, e.g.*, *Sunlodges Ltd. v. The United Republic of Tanzania*, CV-20-00648370-00CL, ¶¶ 10, 33–34 ((Can. Ont. Sup. Ct. J.) (Nov. 10, 2020)) (finding Tanzania subject to arbitral award enforcement proceeding because it is a signatory to the New York Convention and the seat of arbitration, Sweden, is also bound by the New York Convention).

Imposing a minimum-contacts requirement could put the United States in violation of its treaty obligations to enforce arbitral awards.[57] Notably, other common law jurisdictions around the world do not impose such a requirement. Adding this requirement would make the United States an outlier jurisdiction in which businesses may not be able to enforce arbitral awards against foreign states.

[57] Brief for Petitioners at 27–28, CC/Devas (Mauritius) Ltd., et al. v. Antrix Corp. Ltd., et al., (2024) (Nos. 23-1201, 24-17).

III. The Ninth Circuit's Minimum-Contacts Requirement Would Frustrate Creditors Seeking to Hold Foreign States Accountable for Unpaid Debts

A. Creditors frequently rely on U.S. courts to discover foreign state assets

Where a foreign sovereign does not comply with an arbitral award that has been confirmed as a U.S. judgment, the judgment creditor may seek discovery into the foreign state's assets to satisfy the judgment. This is the natural next step in holding foreign states accountable where they fail to comply with adverse arbitral awards.[58] In *Republic of Argentina v. NML Capital, Ltd.*, this Court held that the FSIA has "no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets."[59] This Court concluded that NML Capital could seek post-judgment discovery pursuant to Fed. R. Civ. P. 26(b)(1) of Argentina's worldwide assets generally, "so that NML can identify where Argentina may be holding property that *is* subject to execution."[60]

NML and its progeny do not require creditors to prove a foreign states' minimum contacts with the United States to satisfy personal jurisdiction in order

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[58] Statement of Mark B. Feldman, *supra* note 51, at 94–95 ("This uncertainty is a serious problem for American trade and investment . . . [i]n practice, most sovereign parties respect their obligation to carry out arbitration awards rendered against them, but that tradition rests on expectations that awards are enforceable in court if they are not implemented voluntarily.").

[59] 573 U.S. 134, 142 (2014).

[60] *Id.* at 145.

to grant post-judgment discovery.[61] Petitioners in this case utilized *NML* and its progeny the way it was intended: to seek information about a foreign debtor's executable assets to satisfy an arbitral award.

Contrary to the concurring opinion from the Ninth Circuit, which adopted a facile view of parties' prospects for establishing minimum contacts via in rem jurisdiction by identifying a foreign state's assets in the United States, see *Devas Multimedia Private Limited v. Antrix Corp. Ltd.*, 2023 WL 4884882 (Miller, J., concurring), in practice, judgment creditors often do not know the whereabouts of attachable assets without obtaining post-judgment discovery.[62] Creditors should not be placed in the Catch-22 of having to prove the

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[61] *See Aurelius Cap. Master, Ltd. v. Republic of Argentina*, 589 F. App'x 16, 17 (2d Cir. 2014) ("Federal Rule of Civil Procedure 69(a)(2) allows judgment creditors like appellees to 'obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.'") (citation omitted).

[62] *See, e.g.*, *LLC SPC Stileks v. Republic of Moldova*, No. 14-CV-1921 (CRC), 2023 WL 2610501, at *6 (D.D.C. Mar. 23, 2023) ("The purpose of discovery under Rule 69(a)(2) is to allow the judgment creditor to identify assets from which the judgment may be satisfied and consequently, the judgment creditor should be permitted to conduct a broad inquiry to uncover any hidden or concealed assets of the judgment debtor.") (citation and internal quotation marks omitted); *Continental Transfert Technique, Ltd. v. Federal Government of Nigeria*, 308 F.R.D. 27, 37 (D.D.C. 2015) (petitioner needed the discovery it sought "precisely because it does not yet know what property Nigeria has and where it is, let alone whether it is executable") (alteration, citation and internal quotation marks omitted); *Tatneft v. Ukraine*, No. 17-582 (CKK), 2021 WL 5353024, at *4 (D.D.C. Oct. 18, 2021) (petitioner was "authorized to engage in worldwide discovery to obtain information about Ukraine's assets outside of Ukraine" as petitioner asserted Ukraine had employed six years of delay tactics).

existence of unknown state assets to satisfy a minimum contacts test in order to conduct the very discovery needed to identify those unknown assets in the first place. In this way, a minimum contacts test could thwart award creditors' existing ability to discover state assets in the United States and erode U.S. capability to uphold the integrity of the treaty-based international arbitration award enforcement system.

B. The Ninth Circuit's Minimum-Contacts Test May Prevent Judgment Enforcement Against Foreign States Under Sections 1609 to 1611 of the FSIA

Even if a judgment creditor satisfies the requirements under Section 1330 and Sections 1605 to 1607 to overcome "jurisdictional immunity," it must also overcome "execution immunity" should it seek to execute against the property of foreign states to satisfy unpaid arbitral awards. Section 1609 protects foreign sovereigns by ensuring that, in the event of an adverse judgment, the sovereign's property in the United States "shall be immune from attachment[,] arrest[,] and execution." Execution immunity, however, is immediately offset by Section 1610, wherein Congress authorized execution against, or attachment in aid of execution to, "[t]he property in the United States of a foreign state" where that property is "used for a commercial activity in the United States . . . upon a judgment entered by a court of the United States or of a State," and where an enumerated immunity exception in Section 1610(a)(1)–(7) applies.[63] *See TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 781 (D.C. Cir. 2020).

[63] 28 U.S.C. § 1603(d) provides that "[a] 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act."

Section 1610(a)(6) provides an arbitration exception to immunity regarding attachment and execution when "the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement."[64] *See, e.g., Lloyd's Underwriters v. AO Gazsnabtranzit*, No. CIVA1:00-MI-0242-CAP, 2000 WL 1719493, at *2 (N.D. Ga. Nov. 2, 2000) (finding that "the judgment creditor ha[d] shown that the license fees [were] not immune from attachment or execution pursuant to Section 1610(a)(6)" where the Republic of Moldova used the property at issue in the United States for commercial activity and a previous U.S. court had confirmed the arbitral award).[65]

Section 1610(a)(6), along with the other enumerated exceptions to immunity from attachment or execution contained in Section 1610, were intended to "conform more closely" with the provisions on jurisdictional immunity, H.R. Rep. No. 94-1487, at 27 (1976). The "parallel" between the jurisdictional and execution

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[64] 28 U.S.C. § 1610(a)(6).

[65] *See also Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 478 (7th Cir. 2016) ("[A] judgment creditor may proceed against a foreign state's property 'used for a commercial activity in the United States' if . . . 'the judgment is based on an order confirming an arbitral award,' § 1610(a)(6).") *aff'd*, 583 U.S. 202 (2018); *Suraleb, Inc. v. Prod. Ass'n "Minsk Tractor Works," Republic of Belarus*, No. 1:2006cv03496, 2008 WL 294839, at *2 (N.D. Ill. Jan. 31, 2008) ("Because this judgment was based on an order confirming an arbitral award and concerns property used for commercial activity in the United States, the judgment falls within the § 1610(a) exception."); *Libancell S.A.L. v. Republic of Lebanon*, No. 06 Civ. 2765 (HB), 2006 WL 1321328, at *6 (S.D.N.Y. May 16, 2006) (Section 1610(a)(6) provides for post-judgment attachment once an award entered against a foreign state is reduced to a domestic judgment).

immunity provisions of the FSIA evinces a Congressional desire to harmonize Sections 1605(a) and 1610(a).[66] While Congress did not include a minimum-contacts requirement in Section 1605(a) regarding confirmation of an arbitral award pursuant to Section 1605(a)(6), it included a nexus prerequisite in Section 1610(a), requiring that the property of the foreign state "be in the United States" and also "used for a commercial activity in the United States," when that property was being attached or executed upon to satisfy an unpaid arbitral award pursuant to Section 1610(a)(6).[67] Sections 1605(a)(6) and 1610(a)(6) should be read together as they address enforcement of an unpaid arbitral award and execution of property to

[66] *See* H.R. REP. NO. 94-1487, at 28; *see also* Statement of Mark B. Feldman, *supra* note 51, at 92 (emphasizing that enacted text was "needed to clarify the jurisdiction of the federal courts to enforce arbitration agreements with and arbitral awards made against foreign states and government agencies" and that the "legislative history of the FSIA indicates that Congress expected arbitration awards to be executed against the commercial assets of foreign states."); William S. Dodge, *Foreign Sovereign Immunity in the Enforcement of Investor-State Awards*, *in* REFLECTIONS ON INTERNATIONAL ARBITRATION – ESSAYS IN HONOUR OF PROFESSOR GEORGE BERMANN 2 (Julie Bédard & Patrick W. Pearsall eds., 2022) ("Section 1610(a)(6) contains an arbitration exception to immunity from execution that is parallel to Section 1605(a)(6)'s exception to immunity from suit[]").

[67] *See Preble-Rish Haiti, S.A. v. Republic of Haiti*, No. 1:2021cv06704, 2022 WL 2967633, at *4 (S.D.N.Y. July 27, 2022) (bank accounts of an entity wholly owned by the Republic of Haiti "qualif[ied] as property in the United States of a foreign state," even though Section 1610 ultimately did not apply); *Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 423 F. Supp. 3d 45, 53 (S.D.N.Y. 2019) (a U.S. bank account of an entity controlled by the Venezuelan government used to make payments to commercial vendors in the United States constituted property for commercial activity in the United States).

satisfy an unpaid arbitral award. Imposing an additional minimum-contacts test at the enforcement stage short-circuits the FSIA process, which contains a nexus requirement at the execution stage, potentially blocking recovery of executable assets by award creditors.

CONCLUSION

Section 1605(a)(6) protects businesses transacting with foreign states by providing an arbitration exception to immunity where the foreign state agreed to arbitrate disputes with those businesses. For a host of reasons, U.S. companies rely on international arbitration to manage their risks when contracting with foreign states or investing in businesses operating in foreign states. The United States and hundreds of other countries have ratified conventions such as the New York Convention and the ICSID Convention to facilitate the global enforcement of arbitral awards. Additionally, the United States and its counterparts worldwide have ratified BITs and FTAs that often give investors the right to initiate international arbitration against foreign states for breaches of their treaty obligations.

This comprehensive legal framework of holding foreign states accountable to their agreements to arbitrate would be upended if the Court imposes an additional requirement of minimum contacts between the United States and a foreign state when confirming an arbitral award that falls within Section 1605(a)(6). And if a creditor cannot confirm the award as a U.S. judgment, it would be unable to use post-judgment discovery in the United States to identify the property of the foreign state that could be used to satisfy the unpaid award. The creditor also would lose its recourse to Section 1610(a)(6) to attach and execute against those assets to satisfy the unpaid award using

properties of the foreign state that are in the United States and that are used for a commercial activity in the United States. Accordingly, this Court should reverse the Ninth Circuit's unprecedented reading of the FSIA's personal jurisdiction requirements and uphold a critical piece of the international arbitration award enforcement system that U.S. businesses have relied on for decades to mitigate the risks of doing business with foreign states.

Respectfully submitted,

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