Nos. 23-1201 and 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,
Petitioner,

v.

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

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

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BRIEF FOR THE REPUBLIC OF ZIMBABWE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae is the Republic of Zimbabwe, a sovereign state and active member of the international community. Zimbabwe is a Contracting State to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and a member of the United Nations Committee on International Trade Law (known as "UNCITRAL"), which was tasked with the drafting of the New York Convention and has working groups dedicated to issues relevant to international dispute resolution. Zimbabwe is a member of those working groups. Zimbabwe faces litigation in the United States, and Zimbabwe's courts receive applications to enforce foreign arbitral awards in its courts. As a sovereign state, Zimbabwe is a subject of international law, giving it a persuasive voice when interpreting the meaning of international law and treaties. Zimbabwe is interested in the correct, consistent application of the New York Convention. This is especially true because this case speaks to the scope of certain terms in the New York Convention, including a Contracting State's "local procedures" in Article III and the reciprocity obligation in Article XIV. Zimbabwe is also interested in the appropriate interpretation of any alleged breach of an international obligation. Like the United States, Zimbabwe has created international obligations through its accession to the New York Convention, and the content of any claimed breach is important.

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[1] Pursuant to Rule 37.6, no person other than *amicus curiae* or their counsel authored the brief in whole or in part. No one other than *amicus curiae* or their counsel contributed monetarily to the preparation and submission of this brief.

SUMMARY OF ARGUMENT[2]

Petitioners and their *amici* improbably assert that the Ninth Circuit breached an international obligation of the United States by applying the "rules of procedure" allowed by Article III of the New York Convention. This position is incorrect. Article III expressly permits courts to apply the "rules of procedure" of the enforcement court, so long as they are not "substantially more onerous" than those applied to domestic arbitral awards. Contracting States are thus permitted to recognize and enforce foreign arbitral awards in a manner consistent with their domestic limitations. There is no argument that personal jurisdiction is not a rule of procedure, and throughout the United States, the recognition and enforcement of domestic arbitral awards requires a showing of personal jurisdiction. This settles the issue in favor of Respondents, and the result should not be surprising. The drafters of the New York Convention recognized that Article III would lead to divergent results, as shown by the examples provided below.

Because the Ninth Circuit dutifully complied with Article III, there can be no breach of an international obligation. But any supposed breach would face far more hurdles. At least one of Petitioners is an American subsidiary, meaning it cannot invoke the international obligation that the United States undertook as to other Contracting States. And the position exposes deep inconsistencies. By arguing that only Article V of the New York Convention should apply, *amici* fail to address the sea change this would create. Their reading would call into question settled

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[2] *Amicus curiae* hereby adopt the question presented as formulated by Respondents.

law regarding the Foreign Sovereign Immunities Act, the inherent powers of the judiciary, and the text of Chapter 2 of the Federal Arbitration Act, among other issues. There are other problems. *Amici* pursue a strained analogy with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), an incorrect appeal to *quasi in rem* jurisdiction, and overblown concerns regarding the supposed difficulty to identify minimum contacts. At bottom, *amici* do not identify truly similar results in other courts, and they fall far short of their claims of a breach of an international obligation.

The other focus of some *amici* and Petitioners is an argument regarding an implied waiver of sovereign immunity in the New York Convention. But becoming a Contracting State to the New York Convention does not provide the requisite consent to arbitration, waiver of rules of procedure, or a second waiver of the immunity afforded to the instrumentality of a foreign state. The United States has stated as much, as has one of *amici* in other contexts. Should the Court look more closely at this argument, there are other issues regarding its applicability based on Article XIV of the New York Convention. The United States does not consider the New York Convention to be an implied waiver in the courts of other foreign states. Article XIV calls for reciprocity in the application of the New York Convention, which would be undone by finding an implied waiver as to Antrix.

For these reasons and those stated below, Zimbabwe urges this Court to affirm the judgment of the Ninth Circuit.

ARGUMENT

I. The New York Convention, which governs recognition and enforcement of the arbitral award at issue in this case, permits Contracting States to recognize and enforce foreign arbitral awards in a manner consistent with their own domestic limitations.

While the New York Convention creates an international system to enforce foreign arbitral awards, it retains a number of connections to domestic law. These arise throughout the treaty, including the following express mentions:

- the definition of a "domestic award" and the commerciality reservation in Article I;
- the "rules of procedure" that apply to recognition and enforcement in Article III;
- the translation requirement in Article IV;
- the defenses to recognition and enforcement in Article V(1)(a), V(1)(d), V(1)(e), and V(2)(a)-(b);
- the ability to set more permissive standards of review in Article VII; and
- the application of the treaty to any territories in Article X.

Article III is the focus of this case, and the drafters of the New York Convention chose not to define the "rules of procedure" to apply. The principal drafter of the New York Convention, Professor Pieter Sanders, remarked that "procedure is left to national arbitration law" and disagreed with trying to amend the New York Convention to harmonize these rules. Pieter Sanders, The Making of the Convention, p. 3 (1999).

The unsurprising result is a patchwork of different rules and decisions. This diversity of results led UNCITRAL to undertake a study in 2016 of the "rules of procedure" applied by Contracting States. This process resulted in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "UNCITRAL Guide"). It found differences in terms of venue, formal requirements, and jurisdiction, among other issues. While not a binding interpretation of the New York Convention, the UNCITRAL Guide incorporated research from around the world, including leading law firms, arbitral institutions, and renowned professors, such as *amicus curiae* Professor Bermann. UNCITRAL Guide, p. xii.

Contrary to the assertions of Devas Mauritius and *amici*, there is wide acceptance of a variety of grounds to question the recognition and enforcement under Article III. *See* UNCITRAL Guide, pp. 82-83. Reaffirming the drafters' intention, the widespread view is that the New York Convention refrained from devising a set of harmonized procedural rules. *Id*. Each Contracting State therefore has the ability to design its own "rules of procedure," which are those of its "national laws." *Id*., p. 83. Because there is no guidance in the Convention, Contracting States are "free to determine the content of the rules of procedure applicable to the recognition and enforcement of arbitral awards." *Id*., p. 85. The Convention thus contemplates, and accepts, that the relevant "rules of procedure" mean the same award "could be granted recognition and enforcement in one Contracting State and denied recognition and enforcement in another based on a rule of procedure that exists in the former but not the latter." *Id*., p. 86; *see, e.g. Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 Fed.Appx. 110, 113

(2d Cir. 2012) (summary order) (applying "rules of procedure" in Article III to dismiss based on forum selection clause and deny collateral estoppel to Israeli court's recognition of the award).

The only limitation one might find in Article III comes in the second sentence, which mandates that a Contracting State cannot impose "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." Indeed, the drafters of the Convention added this sentence as an outer boundary to the "rules of procedure" that a Contracting State can adopt. UNCITRAL Guide, p. 77. The test is thus one of comparing how a Contracting State treats "domestic arbitral awards."

Devas Mauritius and *amici* do not apply the words "domestic arbitral awards," mentioning them only in passing. *Amici* focus instead on the "fees or charges" to then argue that Article III relates only to "how" an award is enforced, not "whether." Bermann Amicus, p. 29; Feldman Amicus, pp. 29-30. The distinction is unavailing. "How" will inevitably result in "whether," since a failure to comply with the "rules of procedure" means that the award will not be recognized or enforced. This also misses an important point. Across the United States, domestic awards are treated precisely how the Ninth Circuit viewed the arbitral award at issue.

The Court need only consult the Revised Uniform Arbitration Act (the "RUAA") to see the treatment given to domestic awards. Adopted in 23 states, the RUAA applies to domestic awards or where the parties opt for the treatment given to domestic awards by the

RUAA. Enactment Map, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736 (last visited Jan. 24, 2025).

The RUAA defines "court" to be one of competent jurisdiction. Section 1(3). There can be no doubt that this is not only a court of general jurisdiction. The Comment to Article 1 clarifies that the term means a court with personal jurisdiction and subject matter jurisdiction. The same use of the word "court" applies to actions to vacate or confirm an award, just like the present. Sections 22, 23. Domestic arbitral awards are thus subject to a showing of personal jurisdiction, and requiring the same of international awards would not violate Article III.

With nothing to say on the treatment of domestic arbitral awards, *Amici* reference decisions from other common law jurisdictions, but the New York Convention is not a common law treaty. The "rules of procedure" throughout the world are relevant, and those are as varied as the languages and cultures from each Contracting State. Commentators have noted the divergences but refrained from seeking unanimity. And the cited cases are largely unhelpful. The decision of the English Court of Appeal in *Infrastructure Services Luxembourg S.À.R.L v. Kingdom of Spain*, No. CA-2023-001556 (Court of Appeals (Eng. & Wales) (Oct. 22, 2024)), and *Border Timbers Limited v. Republic of Zimbabwe*, No. CA-2024-000258, (Court of Appeals (Eng. & Wales) (Oct. 22, 2024)) (consolidated on appeal and referred to as *ISL v. Spain*) deals with the ICSID Convention. USCIB Amicus, p. 24. The Court of Appeal recognized that Article III could lead to different outcomes because a waiver of sovereign immunity is a rule of procedure that could apply when

seeking enforcement pursuant to the New York Convention. *ISL v. Spain*, ¶ 102(1). The Court of Appeal thus indicated that a sovereign can contest jurisdiction through Article III, which is the opposite conclusion urged by *amici*.

The other cases cited by *amici* add little. The decision by the United Kingdom Supreme Court, cited at pages 9 and 10 by *amici* Bjorklund and Ferrari, does not deal at all with Article III. The lightly reasoned order by the Ontario Superior Court of Justice instead supports Zimbabwe's argument. There, Tanzania did not provide a ground for challenging recognition of the arbitral award, the court did not deal with jurisdiction at all, and the court stated that Ontario law would govern recognition and enforcement. *Sunlodges Ltd. v. The United Republic of Tanzania*, CV-20-00648370-00CL, ¶¶ 20, 26 ((Can. Ont. Sup. Ct. J.) (Nov. 10, 2020)). Pointing to domestic law only furthers Zimbabwe's position.

Other noted commentators have not gone as far as *amici* urge the Court. Professor Albert Jan van den Berg, cited by Mr. Feldman (pp. 26, 30) and Prof. Bermann (pp. 28-29), has stated that Contracting States can comply with Article III by applying the procedural law of the forum. A. Jan van den Berg, The New York Convention of 1958: An Overview, p. 12 (1981). This can include a law specific to international arbitral awards or the same treatment afforded to domestic awards. *Id*. This would touch matters beyond the scope of personal jurisdiction, such as the discovery of new evidence, estoppel or waiver, set off or counterclaim, and other matters of procedural law. *Id*. One district court has applied setoff. *Jugometal v. Samincorp, Inc.*, 78 F.R.D. 504, 507 (S.D.N.Y. 1978). And the courts of Switzerland have followed a test

similar to minimum contacts for the purposes of immunity. J. Stewart McClendon, Enforcement of Foreign Arbitral Awards in the United States, 4 Northwestern J. Int'l Law & Bus. 1, p. 73 (1982).

While Petitioners and *amici* may desire, as a matter of policy, the elimination of the rules of procedure in Article III, it is plainly not the case textually or in practice.

A. By applying the rules of procedure in the Ninth Circuit, the appellate court did not create, in the least, the threat of breaching an international obligation.

Devas Mauritius asserts that the Ninth Circuit might have breached an international obligation (Pet.Brief, p. 27), an argument that *amici* take further, asserting that there was a breach. Bjorklund Amicus, p. 19; Feldman Amicus, p. 29. Zimbabwe rejects any such conclusion. The United States assumes an international obligation when it makes an agreement with another nation. *See* International Law and Agreements: Their Effect upon US Law, p. 1 (Congressional Research Service, 2018). And any breach comes from the obligation assumed. *See* Responsibility of States for Internationally Wrongful Acts, Art. 12 (2001) (breach of an international obligation is "when an act of that State is not in conformity with what is required of it by that obligation"). The "law of nations" and other sources of international law do not create a different, relevant obligation here. Pet.Brief, p. 15; Bjorklund Amicus, p. 20. The Court need only look at the text of Article III of the New York Convention, which contains the obligation, and for the reasons stated above, compliance with Article III means there is no breach of an international obligation.

There are other hurdles Petitioners would have to overcome to even begin to assert a breach of international obligation. The Court can look to the identity of one of Petitioners. As stated plainly, at least one of Petitioners is an American subsidiary that intervened before the district court, on appeal, and in this Court. Pet.App. 54a. Devas Mauritius Brief, p. ii. This admission and later lack of proof is fatal to any claim for a breach of an international obligation.

The United States undertook no international obligation to its own citizens in relation to the New York Convention. Rather, the obligation is one of the United States in relation to other Contracting States, none of whom have filed an *amicus* submission, much less a claim, asserting a breach of an international obligation.

Then there is the inconsistency of the supposed breach of an international obligation by the Ninth Circuit and the seeming acceptance of a wide array of rules of procedure that are not "fees or charges." Petitioners and *amici* take no issue with the requirement for award claimants to plead and prove personal jurisdiction as to foreign companies or individuals. If the requirement to plead personal jurisdiction as to Contracting States is a breach of an international obligation, merely because such a requirement is not expressly set forth in Article III of the New York Convention, then one would assume that Petitioners and *amici* would take the same position as to foreign companies. There is no engagement with this argument. Other threshold issues should meet a similar fate. There is nothing in Article III of the New

York Convention about the FSIA and its requirements as to service and venue.

The same is true of a variety of other rules of procedure. Applying the argument of Petitioners and *amici*, there are breaches of international obligations littering the jurisprudence of the Federal courts. Professors Bjorklund and Ferrari intimate that requiring a plenary action is a breach of an international obligation. Bjorklund Amicus, p. 23. One can only assume that this reasoning would extend to the venue provision in the FSIA, service requirements in the FSIA, the minimum contacts required of foreign companies (Resp.Brief, p. 29), statutes of limitations (9 U.S.C. § 207) and laches, the ability to require counsel to establish its authority to represent a party (*Doraleh Container Terminal SA v. Republic of Djibouti*, No. 23-7023 (D.C. Cir. 2024)), and any number of other precedents. A ruling that Article III applies only to "fees or charges" would invite wide-ranging scrutiny of decisions from across the Circuit Courts of Appeal and this Court. And none of it would be warranted. The supposed breach, one not recognized by countless other jurisdictions, would subjugate the Federal Rules of Civil Procedure, the FSIA, and the courts' inherent authority to control their own dockets to a strained reading of the New York Convention. Zimbabwe trusts that this Court has no interest in such an outcome.

Petitioners and *amici* also face other challenges, specifically their reduced relevance in determining the existence of a breach of an international obligation. *Amici* are law professors and a trade organization. Zimbabwe certainly values their professional contributions, but in determining the existence of a breach of an international obligation, sovereign states, such as Zimbabwe have a far more persuasive voice.

Zimbabwe is a subject of international law and a Contracting State. Zimbabwe, like the United States, is entitled to appear before the International Court of Justice, which is the principal judicial organ of the United Nations and charged with interpreting international law. In light of the Solicitor General not sharing its views on the question, the most persuasive voices would be other Contracting States, making Zimbabwe's position particularly relevant.

B. Other erroneous premises undermine the arguments offered by Petitioners and *amici*.

Devas Mauritius incorrectly equates the New York Convention to the ICSID Convention, even though the enabling statutes of the two treaties are different. Pet.Brief, p. 27. Beginning in page 27, Bjorklund and Ferrari repeat this error. But the analogy leads to affirmance, not reversal. When the United States incorporated the ICSID Convention into Federal law, Congress enacted 22 U.S.C. 1650a. This statute provides that "[t]he pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." No such language exists in relation to the New York Convention, which must be enforced in accordance with Chapter 2 of the Federal Arbitration Act. 9 U.S.C. § 201. By providing for enforcement "as if the award were a final judgment of a court of general jurisdiction of one of the several States," Congress provided a firm connection to the Full Faith and Credit Clause and the accompanying methods for enforcement. Instead of the "rules of procedure" in Article III of the New York Convention and the comparison to domestic arbitral awards, ICSID awards receive treatment like

a state court judgment, a more direct process that is unconcerned with different types of arbitral awards or the meaning of the word "procedure." And following the Full Faith and Credit Clause would bring the potential to review personal jurisdiction in the court charged with execution of the award. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 124 (2d Cir. 2017).

Amici rely on a number of other errors. There is obvious conflict between *in personam* jurisdiction, invoked here, and *in rem* or *quasi in rem* jurisdiction cited by Professor Bermann. Resp.Brief, pp. 31-32. In addition, it is incorrect to equate post-judgment proceedings to enforce foreign judgments to post-award proceedings to enforce foreign arbitral awards. Bermann Amicus, pp. 20-21. These two things are not sufficiently similar. Enforcing a foreign judgment often relies on a statutory scheme, such as CPLR Section 5303(b), exempting the creditor from filing a complaint. This option is not available for proceeding against a sovereign. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 116 (2d Cir. 2017). The foreign judgment also comes following the more complete review available in courts. Arbitration awards lack exacting review and still contain the possibility to question jurisdiction. And this does not include the fundamental distinctions in the two instruments, as recognized in numerous Circuit Courts of Appeal. *Comm'ns Imp. Exp. S.A. v. Congo*, 757 F.3d 321, 330 (D.C. Cir. 2014); *Seetransport Wiking Trd. v. Navimpex Cent Navala*, 29 F.3d 79, 82 (2d Cir. 1994).

Other arguments are little more than red herrings. *Amici* express their concern that the Ninth Circuit essentially added something new to stop recognition of an award. Feldman Amicus, p. 30 (describing personal

jurisdiction as a "condition"); Bermann Amicus, p. 30 (minimum contacts a "barrier"). None of the *amici* argue that personal jurisdiction is not a "rule of procedure." Rather, personal jurisdiction is largely a policy concern that might make collection efforts more difficult. USCIB Amicus, p. 31; Bermann Amicus, p. 30. Article V is not at issue, and a motion to dismiss for lack of personal jurisdiction does not call into question any of the requirements of Article V. Requiring minimum contacts as to Contracting States is also not a particular challenge. Minimum contacts have been necessary as to foreign corporations for decades—the New York Convention framework has still thrived. But this is beside the point. The Contracting States permitted Article III to coexist alongside Article V, and it would be an error to read Article V so broadly that Article III has no effect.

Professor Bermann suggests that the absence of personal jurisdiction in the New York Convention is indicative of something specific to this case. Bermann Amicus, p. 13. The argument misses the mark. Drafting a multilateral treaty never permits one sovereign state, the United States in this case, to impose such a requirement on every other. And if the Contracting States pursued this path, the New York Convention would have to include extensive references to specific features of rules of procedure for every Contracting State. Such a result would be unworkable. And any silence cuts against the argument.

Pursuing this line of reasoning pose further problems for Petitioners and *amici*. As Respondents elaborate (Rep.Brief, pp. 19-21), the arbitration exception in 28 U.S.C. § 1605(a)(6) is quite similar to the language in Articles II and V of the New York Convention. Should the Court look for meaning in the presence of certain

language, the result would be an application of the arbitration exception as drafted.

II. Becoming a Contracting State to the New York Convention does not amount to a foreign sovereign's waiver of its sovereign immunity and of the sovereign immunity of all its instrumentalities in any suit in any other signatory country seeking to enforce an arbitration or confirm an award.

Petitioners and their *amici* cannot support their theory of waiver of personal jurisdiction by looking to a foreign state's ratification of the New York Convention. The implied waiver would require an award creditor to satisfy two conditions within the New York Convention: consent to arbitration and waiver of any rules of procedure that may apply. Neither is plausible. The New York Convention, standing alone, is not consent to any arbitration at all. A Contracting State can ratify the New York Convention and never enter into an agreement to arbitrate. Or it could restrict the terms for any enforcement, excluding the United States or the law of the United States. And when it comes to the moment of recognition, the rules of procedure can include sovereign immunity that might apply, such as the routine grant of sovereign immunity when the New York Convention entered into force.

Respondents make this point, citing to the position of the United States. Rep.Brief, p. 44-45. There is no need to elaborate, except to highlight the absence of any position by one *amici*. As recently as 2021, Professor Bermann recognized the "the prevailing view . . . that States do not, by ratifying the New York Convention, waive their sovereign immunity to suit, in national court to the extent they enjoy such immunity." George A. Bermann, *Procedures for the Enforcement of*

New York Convention Awards, Autonomous Versus Domestic Concepts under the New York Convention, at § 4.02[G], Kluwer Law International (2021). The other *amici*, as well as Devas Mauritius, do not meaningfully engage with the position of the United States, referring instead to the opinion (Bjorklund Amicus, p. 25) or not addressing the argument at all.

Devas Mauritius cites to the decisions of other courts regarding a waiver of sovereign immunity in the ICSID Convention. Pet.Brief, p. 28. Needless to say, immunity is considered a "rule of procedure," and as mentioned above would not apply the same way when analyzing the ICSID Convention. The relevant legal framework in the United Kingdom and Australia is also different. There is no implied waiver exception, and those courts directly applied the ICSID Convention. The United States has 22 U.S.C. § 1650a. Devas Mauritius also does not explain the reticence by the D.C. Circuit to adopt this position in analyzing awards rendered pursuant to the ICSID Convention. *NextEra Energy Glob. Holdings B. V. v. Kingdom of Spain*, 112 F.4th 1088, 1100 (D.C. Cir. 2024).

There are other issues that Devas Mauritius and *amici* do not take up, all of which pose serious hurdles. There is no theory offered under which Antrix could have waived its immunity when it is only an instrumentality, not the foreign state. And there is no engagement with how a court in the United States could invoke an implied waiver against Antrix even though the United States would seek to take advantage of the same waiver in other countries. *Process and Indus. Dev. Ltd. v. Fed. Republic of Nigeria*, Case No. 21-7003, *Amicus* Brief of the United States, p. 22 (D.C. Cir. Jan. 20, 2022). Article XIV of the New York Convention provides that "[a] Contracting State

shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention." Devas Mauritius is far from showing that its position is consistent with Article XIV, nor could it given the stated position of the United States.

CONCLUSION

For the foregoing reasons, Zimbabwe urges this Court to affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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