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

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

BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF INDIA IN SUPPORT OF RESPONDENT

ADITYA SINGH
WHITE & CASE
88 Market St, No. 41-01
CapitaSpring
Singapore 048948

ANDREA J. MENAKER
Counsel of Record
NICOLLE KOWNACKI
MICHAEL MAHAFFEY
WEIQIAN LUO
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807
(202) 626-3600
amenaker@whitecase.com

Counsel for *Amicus Curiae*

January 24, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTIONAL PROVISIONS

U.S. STATUTES

INTERNATIONAL MATERIALS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE* REPUBLIC OF INDIA[1]

In a threadbare analysis of not more than a paragraph, the district court below pierced the corporate veil between Respondent Antrix and the Republic of India.[2] It did so not with respect to any question of liability or damages, but solely to strip Antrix of due-process protection, based on the premise that while foreign corporations have due-process rights, foreign sovereigns do not. The theory goes that by piercing the veil, courts can jettison the Constitution and subject foreign entities to *in personam* judgments and intrusive discovery without regard to the personal jurisdiction requirements that protect all other defendants in U.S. civil litigation. But that theory is deeply incorrect and deeply offensive to India and other foreign sovereigns.

The district court wrongly implicated India in this matter when it baselessly held in a conclusory statement that India exercised "plenary control" over Antrix. The veil-piercing analysis endorsed by this Court in *First National City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626-28 (1983), is properly limited to questions of liability and damages — not to expunging constitutional rights. Even if *Bancec* does apply, moreover, the district court did not correctly apply it. *Bancec* establishes a strong presumption that U.S. courts will respect the corporate separateness of

---

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

[2] *See* Pet. App. 13a-14a.

foreign-state instrumentalities. That presumption is overcome only by a showing that the corporate form is being abused, which the district court did not hold here.

The obvious intention of the Devas Petitioners ("Devas") in pursuing veil-piercing was to exploit misguided case law denying due-process protections to foreign states (though, notably, not to their instrumentalities) in civil damages suits. The district court and other lower courts erred in begetting this veil-piercing strategy by assuming that India and other foreign sovereigns lack due-process rights when they are haled into U.S. courts as civil defendants. But, although India is a "foreign state" within the meaning of the U.S. Foreign Sovereign Immunities Act ("FSIA"), it also is a "person" entitled to due-process protections under the Fifth Amendment to the U.S. Constitution. This Court thus should rule that a minimum-contacts analysis applies to India, as well as to Antrix.

India's interests in the questions before this Court also extend beyond this case. Enforcement actions by Devas and its shareholders related to the same underlying dispute are pending against India in the D.C. District Court (No. 1:21-cv-00106-RCL) and the D.C. Circuit (24-7081). The Devas dispute concerns sensitive national-security matters related to India's space program. These cases have no nexus to the United States, and consistent with the FSIA (as explained by Antrix) and the U.S. Constitution (as explained below), India should not be haled into U.S. courts to defend against them.

Compounding the injury to India, no "award" exists here for Devas to enforce. 28 U.S.C. § 1605(a)(6). That is, the *Antrix* award has been set aside by the Delhi High Court at the seat of arbitration in New Delhi, India, in a decision affirmed by the Supreme Court of India. The Delhi High Court's set-aside decision was based on, among other things, a prior Supreme Court of India decision that upheld the liquidation of Devas on the grounds that the company was formed in India for a "fraudulent and unlawful purpose" and its affairs were conducted in violation of Indian law.

India has great interest in ensuring that the set-aside decisions, and the Supreme Court of India decision on which they are based, are afforded comity and due respect from the courts of the United States. A decision by this Court that foreign states are subject to a minimum-contacts analysis will mean that comity is extended to this case and India need not further defend the fairness and sanctity of its courts' decisions. A decision otherwise runs considerable risk of being moot, as the award has been set aside. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) ("[C]ourts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy.") (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

INTRODUCTION AND SUMMARY OF ARGUMENT

Foreign states should be afforded due process in U.S. courts. This case exemplifies the incongruence of jurisprudence that holds otherwise. India and its state-owned entity have been haled into U.S. court in a case that has no link to the United States, much less one that meets the long-held "minimum-contacts" test required to satisfy due process.

The underlying dispute involves two Indian companies and a contract requiring performance in India, arbitration in India, and enforcement of any award in India under Indian law. The parties received an award that has been set aside at the seat of arbitration by an Indian court. At no point did this dispute touch the United States, and yet, because of the inconsistent notion that foreign states are not afforded due process in U.S. courts, India risks the consequences of award enforcement in the United States.

As a matter of statutory interpretation, India agrees with Respondent Antrix (Antrix Br., Argument § I) that the FSIA arbitration exception requires a showing of a substantial connection between the United States and the dispute. Among other reasons, the statute should not be presumed to have extraterritorial application in a case of purely foreign plaintiffs and defendants, an entirely foreign dispute, and a foreign arbitration.

As a matter of constitutional interpretation, affording foreign sovereigns due process is supported by the Constitution's text, context, structure, and history. India agrees with Antrix (Antrix Br.,

Argument § II.B) and *amicus* Professor Ingrid Brunk (Wuerth) that, from the founding era of the United States, foreign states were indeed considered "persons" under the Fifth Amendment. An analysis of jurisprudence since the 18th century shows that "[f]oreign states were not only referred to as 'persons' but were also identified with the term 'process,' as were other artificial entities. On textual and historical grounds, application of Fifth Amendment due process protections to foreign states is straightforward." Ingrid Brunk (Wuerth), *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 679 (2019); *see generally id.* at 676-679 (listing cases).

India writes additionally to emphasize that the jurisprudence that has followed from a contrived reading of *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992), has resulted in erroneous holdings that offend comity, sovereignty, and the United States' diplomatic interests. This jurisprudence includes cases, such as the one here, where plaintiffs circumvent the minimum-contacts test by conflating foreign-state-owned companies with foreign states. This also includes cases in which non-state entities, like the Palestinian Liberation Organization ("PLO"), acting in a capacity far closer to that of a sovereign than Antrix did here, have more rights before U.S. courts than foreign states have. *See, e.g.*, *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 329 (2d Cir. 2016) ("While sovereign states are not entitled to due process protection . . . neither the PLO nor the PA is recognized by the United States as a sovereign state, and the executive's determination of such a matter is conclusive . . . . Because neither

defendant is a state, the defendants have due process rights.") (internal citations omitted).

Finally, as a matter of international law, affording foreign states due process is not inconsistent with the United States' treaty obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("New York Convention" or "Convention"). Devas and *amici* point to no foreign-state treaty partner that asserts otherwise. U.S. courts consistently apply the safeguards of minimum contacts when exercising personal jurisdiction over non-sovereign defendants and state-owned entities in arbitration-enforcement actions. Other sovereigns likewise apply their own jurisdictional requirements, including some similar to a minimum-contacts analysis, in New York Convention enforcement proceedings. The New York Convention has not stripped U.S. courts of their constitutional duty to exercise proper personal jurisdiction over defendants. Devas cannot hide behind an erroneous interpretation of the New York Convention to suggest otherwise.

India urges this Court to affirm.

ARGUMENT

I. Foreign States Should Be Afforded Due Process

For two centuries, U.S. courts and the U.S. government consistently recognized that foreign states were "persons" for Fifth Amendment purposes, and thus entitled to due-process protections. That changed in 1992, after this Court "[a]ssum[ed], without

deciding," that foreign states were entitled to due-process protections, including in particular the minimum-contacts requirement for personal jurisdiction. *Weltover*, 504 U.S. at 619. Since that cursory *dicta*, lower courts have been unwinding two-hundred years of precedent by depriving foreign states — not foreign corporations, foreign-state instrumentalities, or quasi-states, but only foreign states — of due-process rights. These decisions defy the text and context of the Constitution, which show that the U.S. Founders would have understood "persons" to include foreign sovereigns. These decisions also undermine the Founders' reasonable intent to avoid unnecessary conflict with foreign states via the courts, especially in cases lacking any nexus to the United States.

A. The U.S. Constitution's Text and History Establish That the Founders Intended to Afford Due-Process Protections to Foreign States

1. The historical application of due-process protections for foreign states in U.S. courts dates to the founding era and is grounded in the text and context of both Article III of the U.S. Constitution and the Fifth Amendment, as set forth in an emerging body of scholarship. *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 66 nn.23-24 (2d Cir. 2021) ("Recent scholarship questions our earlier holding in *Frontera* [*Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009)] that foreign sovereigns do not qualify as persons under the Due Process Clause." (citing Brunk, 88 Fordham L. Rev. 633)).

Article III itself establishes a baseline of litigation-related constitutional rights in federal courts, including notice and personal jurisdiction, for *all* litigants. These protections are critical, because they apply to foreign states regardless of whether the foreign states are considered "persons" for Fifth Amendment purposes. Article III, for example, grants the federal courts "judicial power" only over "cases" and "controversies." This "judicial power" expressly extends to controversies "between a State, or the citizens thereof, and ***foreign States***, Citizens, or Subjects." U.S. Const. art. III, § 2, cl. I (emphasis added). The drafters would have understood these terms to allow a federal court to exercise this "judicial power" only when the parties are properly before them, *i.e.*, subject to the court's "process." As Chief Justice John Marshall put it, to have a "case," there "must be parties to come into court, who can be reached by its process." John Marshall, *Speech of the Hon. John Marshall Delivered in the House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston*, in 4 *The Papers of John Marshall* 82, 95-96 (Charles T. Cullen ed., 1984). To be "reached by [the court's] process" would have required being subject to summons and personal jurisdiction. *See* Brunk, 88 Fordham L. Rev. at 665-67 (collecting sources).

Founding-era cases likewise emphasized the "process" to which foreign sovereigns are entitled, including with respect to personal jurisdiction. *See, e.g.*, *United States v. Peters*, 3 U.S. 121, 130 (1795) (holding foreign-sovereign property exempt from "process of law" and thus U.S.-court litigation); *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116,

142-46 (1812) (holding that foreign sovereign was not subject to court's personal jurisdiction, even if the Constitution afforded the court subject-matter jurisdiction and even if the sovereign's property were within the jurisdiction).

The Founders also would have understood "person," for purposes of the Fifth Amendment Due Process Clause, to include not just natural persons, but a range of legal persons, including foreign states. For example, James Madison wrote, "[n]ow all Sovereigns are equal; the Sovereignty of the State is equal to that of the Union; for the Sovereignty of each is but a moral person. That of the State and that of the Union are each a moral person; and in that respect precisely equal." James Madison, *Essay on Sovereignty*, in 9 *The Writings of James Madison* 572 (Gaillard Hunt ed., 1900). As Professor Brunk observes, writings known to the framers also referred to sovereigns as "persons." Brunk, 88 Fordham L. Rev. at 678 (citing Emer De Vattel, *The Law of Nations*, at lv, 2, 164 (Philadelphia, T. & J.W. Johnson 1854) (describing states as "moral persons" and "free persons."); James Kent, *Dissertations* 52 (New York, George Forman 1795) (describing states as "moral persons")).

Cases from the founding era dealing with foreign sovereigns confirm this understanding. *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793) ("By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person."); *id.* at 456 (referring to "the person, natural or artificial"); *id.* at 472 ("Sovereignty

is the right to govern; a nation or State-sovereign is the person or persons in whom that resides."); *Schooner Exch.*, 11 U.S. (7 Cranch) at 133 (discussing jurisdiction over foreign sovereigns as "persons").

On historical and textual grounds, application of Fifth Amendment due-process protections to foreign states is thus straightforward.

2. Before the Supreme Court's decision in *Weltover*, lower courts, commentators, and the federal government all generally assumed that foreign states had due-process rights. The Second Circuit, for example, applied the minimum-contacts test to a foreign sovereign in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981) (overruled by *Frontera*, 582 F.3d at 393), holding that the Central Bank of Nigeria was entitled to a due-process analysis because foreign states are persons under the Fifth Amendment Due Process Clause, citing multiple earlier cases.

Other circuits followed suit. *See, e.g.*, *Theo. H. Davies & Co., Ltd. v. Republic of the Marshall Islands*, 174 F.3d 969, 973 (9th Cir. 1998) (adopting *Texas Trading* framework for assuming jurisdiction over foreign sovereign under the FSIA's commercial-activity exception, including requirement that "the exercise of personal jurisdiction under § 1330(b) compl[ies] with the due process clause, thus making personal jurisdiction proper"); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 819, 819 n.12 (3d Cir. 1981) (same); *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." (citing *Texas Trading*, 647 F.2d at

308)); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1352 (11th Cir. 1982) ("[S]ince 'the Act cannot create personal jurisdiction where the Constitution forbids it,' . . . we must assess the exercise of authority against the standards of due process." (quoting *Texas Trading*, 647 F.2d at 308)); *id.* at 1350-51 (explaining that § 1330(a) of the FSIA did not turn U.S. courts into "international courts of claims," a "preventive aim" that is "accomplished by further restrictions imposed by the requirements for personal jurisdiction, which are set forth in § 1330(b), and — more directly — by constitutional constraints on subject matter jurisdiction and personal jurisdiction"); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C. Cir. 1982) (explaining that the FSIA "cannot grant personal jurisdiction where the Constitution forbids it, and the Supreme Court has held repeatedly that certain 'minimum contacts' must exist between the person and the jurisdiction to be consistent with the Due Process Clause of the Fifth Amendment").

Interpreting "person" under the Fifth Amendment to include foreign states also tracked with this Court's interpretation of the term in statutory contexts. For example, in *Pfizer Inc. v. Government of India*, this Court held that foreign states are "persons" entitled to sue for treble damages under the antitrust laws, which provide that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . . ." 434 U.S. 308, 311-12, 321 (1978). And this Court expressly rejected the argument that "the word 'person' was clearly understood by Congress when it passed the

Sherman Act [in 1890] to exclude sovereign governments." *Id.* at 315.

Notably, the U.S. Congress and this Court have given no indication that they have abandoned that understanding of "person" in modern legal contexts. For example, in *Philippines v. Pimentel*, this Court assumed, without discussion, that the Republic of the Philippines was a "person" for purposes of Rule 19 of the Federal Rules of Procedure, setting forth rules on "persons required to be joined." 553 U.S. 851, 856, 863-65 (2008). And in a statute blocking certain assets of the Republic of Iran, 22 U.S.C. § 8772 (initially enacted in 2012), Congress broadly defined "person" without excluding foreign states from its broad definition. To the contrary, the statute repeatedly refers to "a person *other* than Iran" or Iran and an "*other* person." 22 U.S.C. § 8772(a)(2) (emphases added). "Person" in that context, then, is read naturally to include other foreign states, particularly because if other foreign states jointly held an interest in property with Iran, Congress presumably would not intend to block the non-terrorist foreign state's interest in that property.

B. The U.S. Constitution's Structure Supports Affording Due Process to Foreign States

In *Weltover*, this Court "[a]ssum[ed], without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," and found that Argentina "possessed 'minimum contacts' that would satisfy the constitutional test." 504 U.S. at 619. But, even though *Weltover* assumed that a foreign state is a person, many lower courts have since found that *Weltover*'s

citation to *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), called into question two centuries of precedent recognizing due-process rights for foreign states. These lower court decisions reversing course post-*Weltover* seemingly ground their analyses in structural arguments regarding the U.S. Constitution. *See, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002) (suggesting that foreign states are "entirely alien" to the constitutional order); *Frontera*, 582 F.3d at 399 (quoting *Price* and stating a "foreign State lies outside the structure of the Union"). These structural arguments, however, do not withstand scrutiny.

First, as noted above, foreign states are explicitly provided for in Article III, Section 2, Clause I. This inclusion, as Professor Brunk observes, shows "that federal judicial power was created in part to allow foreign states to be brought into the federal judicial system in order to quell potential disputes with them, to the ultimate gain of the United States." Brunk Amicus Br. 9.

Article III also expressly assigns cases between foreign states and U.S. states to the Supreme Court's original jurisdiction. The second clause of Section 2, Article III provides, in relevant part, that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2. The phrase "those in which a State shall be Party" refers to the language quoted above from Section 2, Clause 1, which extends the judicial power of the United States to, among others, controversies involving foreign states. The

notion, then, that foreign states are more "alien" to the judicial system than foreign corporations or individuals is inconsistent with the Constitution's text.

In addition, as others have observed, foreign states are not wholly without constitutional protections for an additional, related reason: they are generally protected by separation of powers, including under Article I. *See, e.g.*, Brunk Amicus Br. 13 (citing *Bank Markazi v. Peterson*, 578 U.S. 212 (2016)).

Finally, this Court's decision in *Katzenbach*, 383 U.S. at 301, which precipitated *Weltover*'s cursory *dicta*, does not support the conclusion that foreign states were not intended to be afforded due process under the Constitution. *Katzenbach*, which held that the Due Process Clause did not afford South Carolina the substantive right to challenge the constitutionality of the landmark Voting Rights Act of 1965, says nothing about whether foreign sovereigns are entitled to due-process protections under the Constitution.

C. Denying Due Process to Foreign States Offends Comity, Sovereignty, and Diplomatic Interests

Post-*Weltover* decisions by lower courts denying due process to foreign states have yielded incongruous results that undermine the Founders' intent and offend international comity and diplomatic interests. As it now stands in most circuits, foreign corporations, including agencies and instrumentalities of foreign states, have due-process rights, but foreign states themselves do not. *See, e.g.*, *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 808, 817 (D.C. Cir. 2012) (holding that a foreign sovereign instrumentality, the

National Port Authority of Liberia, was entitled to due process); *Price*, 294 F.3d at 95-100 (holding that "foreign states are not 'persons' protected by the Fifth Amendment").

As held by these lower courts, foreign states thus have fewer rights in U.S. courts than their instrumentalities and can be summoned to U.S. courts for disputes with foreign parties, based on acts in foreign countries, with no U.S. connection. Even more vexingly, quasi-state actors, like the PLO and Palestinian Authority, are afforded constitutional due-process rights under this structure, but foreign states themselves are not. *See Waldman*, 835 F.3d at 344 (overturning judgment in Anti-Terrorism Act action for lack of personal jurisdiction over PLO and PA under minimum-contacts test). There is no principled or constitutional basis for this distinction. Further, it conflicts with the principle, dating back to the Tate Letter and embodied in the FSIA, that foreign states acting as commercial actors should be treated like any other commercial actor. *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (explaining that in the "Tate Letter," "the State Department announced its adoption of the 'restrictive' theory of sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's commercial acts."). In the FSIA, the United States recognizes that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. A necessary corollary is that foreign-state-owned corporations and foreign states themselves must have the same due-

process rights as other foreign defendants to object to excessive exercises of personal jurisdiction.

The distinction drawn by many courts between the rights accorded to foreign-state instrumentalities and the lack of rights accorded to foreign states themselves also forces courts to draw incomprehensible lines between the two, thus front-loading veil piercing inquiries usually reserved as a last resort for asset-attachment phases. Those lines have no basis in the Constitution and encourage gamesmanship as parties try to circumvent the minimum-contacts test. Besides, *Bancec*, which courts look to in order to distinguish between foreign states and their instrumentalities, *see, e.g.*, *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 301 (D.C. Cir. 2005), sets forth a federal common-law rule based on international law, comity principles, and U.S. domestic corporate law — not based on constitutional principles. Thus, on its own terms, *Bancec* has no role to play in deciding what process is due to a foreign state or entity.

The present case highlights the consequences of this approach. The district court, without even citing *Bancec*, pierced the corporate veil and summarily found that Antrix is not protected by a personal-jurisdiction minimum-contacts inquiry.[3] (The Ninth Circuit did not address the veil-piercing in its decision.) As a result, Antrix — a state-owned corporation, not a foreign state — is penalized for the identity of its shareholder and deprived of its due-

[3] *See* Pet. App. 13a-14a.

process rights.[4] And India, a foreign state that is not a party to the litigation, faces the risk of award enforcement, despite the dispute having nothing to do with the United States.

Similar arbitration-enforcement cases, lacking any nexus to the United States, have exposed foreign states not only to enforcements of awards, but also to post-judgment discovery of their "worldwide assets" and even costly sanctions for failure to acquiesce to this invasive discovery disconnected from the United States. *See, e.g.*, *Comm'ns Imp. Exp. v. Republic of Congo*, No. 1:13-cv-713 (RJL), 2017 WL 6626205 (D.D.C. Mar. 31, 2017) (in award-enforcement action lacking any U.S. nexus, granting sanctions of US $80,000 per week against Republic of Congo for its failure to comply with post-judgment worldwide asset discovery); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011) (affirming district court's order of civil contempt sanctions against Democratic Republic of Congo for its failure to comply with discovery into U.S. and global assets, in a proceeding to enforce award lacking U.S. nexus). Denying due process to foreign states thus allows the U.S. court system to serve as a clearinghouse for the enforcement of arbitral awards entirely unrelated to the United States — but *only* if those disputes are brought against foreign states.

---

[4] India agrees with Antrix that there should be no doubt that Antrix, like any foreign corporation, is entitled to Fifth Amendment due-process protections and that the award should not be enforced unless Devas can show that Antrix itself has the requisite minimum contacts with the United States. *See* Antrix Br., Argument II.A.

Paradoxically, in most circuit courts, foreign states and their instrumentalities enjoy less protection from suit in the United States than private parties, despite their presumption of sovereign immunity. And, while on the one hand, foreign states are subject to suit in circumstances where a U.S. court would not have personal jurisdiction over a private foreign entity or even over the state's own instrumentality, on the other hand, a foreign state that is itself an award creditor *cannot* enforce its favorable award without establishing personal jurisdiction over the award debtor. This incongruence also limits the foreign state's ability to get discovery about the worldwide assets of *its* judgment debtor. There is no principled basis for this differential treatment.

II. Applying a Minimum-Contacts Analysis Does Not Violate the United States' Treaty Obligations

Contrary to the argument asserted by Petitioners and several of their supporting *amici*, applying a minimum-contacts test does not place the United States in violation of its treaty obligations. No state party to the New York Convention, including the United States in its *amicus* brief in support of Petitioners, has contended otherwise. To the contrary, state parties to the New York Convention, including the United States, have for decades dismissed applications under the New York Convention for lacking sufficient forum connections, without any complaint that applying this condition violated their treaty obligations.

A. U.S. Courts Routinely Dismiss Applications Under the New York Convention Where a Connection to the Forum Is Lacking

1. Federal courts throughout the United States routinely apply a minimum-contacts analysis when considering applications to recognize and enforce New York Convention awards against *non-sovereign* parties. *See, e.g.*, *GSS Grp.*, 680 F.3d at 808, 817 (affirming dismissal of petition under New York Convention for lack of personal jurisdiction where party seeking enforcement failed to rebut that foreign private-party debtor had no "minimum contacts" with relevant forum); *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748-49 (5th Cir. 2012) (holding that "dismissal of a petition under the New York Convention for lack of personal jurisdiction is appropriate," and explaining that "the fact that a treaty and its implementing legislation do not specify that a petition may be dismissed for lack of personal jurisdiction is not dispositive"); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1118 (9th Cir. 2002) ("[T]he [New York] Convention does not eliminate the due process requirement that a federal court have jurisdiction over a defendant's person or property in a suit to confirm a previously issued [foreign] arbitration award."); *Base Metal Trading v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208, 212 (4th Cir. 2002) (conducting minimum-contacts analysis because New York Convention "does not confer personal jurisdiction when it would not otherwise exist. In other words, a plaintiff still must demonstrate that personal jurisdiction is proper under the Constitution.").

Petitioners and their *amici* overlook this long history. They also ignore the fact that the New York Convention draws no distinction between awards against state parties and their instrumentalities, on the one hand, and awards against private parties, on the other. Nor is there any indication that the United States has been accused by other state parties to the New York Convention of violating its obligations under the treaty by applying the minimum-contacts test to non-state respondents. It has not.

2. Besides routinely requiring minimum contacts before asserting jurisdiction over parties in award-enforcement cases, U.S. courts have also denied petitions to enforce New York Convention awards when the award debtors lacked sufficient contacts with the United States, and there was an alternative, more suitable forum for enforcement, under the *forum non conveniens* doctrine. *See, e.g.*, *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 496-501 (2d Cir. 2002) (rejecting "argument that Article V of the Convention sets forth the only grounds for refusing to enforce a foreign arbitral award" and dismissing the petition under *forum non conveniens* doctrine); *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru*, 665 F.3d 384, 389-93 (2d Cir. 2011) (concluding that the award-enforcement petition "should be dismissed on the ground of FNC"); *see also Zhejiang Medicines & Health Prods. Imp. & Exp. Co. v. Blue California Co.*, No. CV 08-06327 RGK (FFMx), 2009 WL 10702552, at *4-5 (C.D. Cal. Apr. 23, 2009) (analyzing New York Convention award application under *forum non conveniens* doctrine); *Satyam Comput. Servs., Ltd. v. Venture Glob. Eng'g, LLC*, No.

06-cv-50351-DT, 2006 WL 6495377, at *6-8 (E.D. Mich. July 13, 2006), *aff'd*, 233 F. App'x 517 (6th Cir. 2007) (same).

Nothing in the New York Convention prevents state parties from dismissing applications where, as here, the parties, the dispute, and the underlying arbitration proceedings all lack sufficient connections to the forum — whether for lack of jurisdiction or on a discretionary basis under the *forum non conveniens* doctrine.

3. A personal-jurisdiction requirement indeed may be a "rule of procedure" that Article III of the New York Convention permits states to apply to enforcement petitions. *See* New York Convention, Art. III ("Each 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."); *cf. Basile v. Walt Disney Co.*, 717 F. Supp. 2d 381, 385 (S.D.N.Y. 2010) ("It is hornbook law that venue and personal jurisdiction are threshold procedural issues to be decided before the substantive grounds in a motion to dismiss."); Jonathan Remy Nash, *National Personal Jurisdiction*, 68 Emory L.J. 509, 542 (2019) (arguing that, even under the *Erie* Doctrine, "personal jurisdiction is very much a matter of procedural, not substantive, law," and noting that "[l]awyers and legal academics have long understood service of process and jurisdiction to lie within the procedural realm"); S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. Int'l Arb. 479, 483 (2004) ("[J]ust because a private party is subject to personal jurisdiction in one contracting state does not mean

that it is subject to personal jurisdiction in all contracting states. Courts in the various contracting states may take differing views, depending on their interpretation of Article III of the New York Convention and the particularities of their domestic procedural law.").

Regardless of whether personal jurisdiction may be characterized as a "rule[] of procedure," the New York Convention does not bar states from applying their jurisdictional rules to enforcement actions.[5] The United States does exactly that, for example, when it applies the FSIA to every suit involving a foreign state, with no suggestion that it is running afoul of its international treaty obligations. Likewise, applying minimum contacts to foreign states, whether under the FSIA or the U.S. Constitution (or both), does not impose a prohibited requirement.

B. Other State Parties to the New York Convention Apply Jurisdictional Requirements Similar to and, in Some Cases More Restrictive Than, Minimum Contacts in Award-Enforcement Cases

Like the United States, many state parties to the New York Convention deny jurisdiction over petitions to enforce arbitral awards under the Convention where there is a lack of minimum contacts with the

[5] India does not address the argument by certain *amici* that according foreign states due process violates the United States' obligations under the ICSID Convention, given that the New York Convention and ICSID Convention are materially different treaties, India is not a contracting party to the ICSID Convention, and the ICSID Convention has no bearing on this case.

forum. In India — where this arbitration between two Indian parties took place — no court would have jurisdiction over an application to recognize a New York Convention award where the dispute and arbitration occurred outside of India, no Indian nationals were parties to the arbitration, and no assets within India belonging to the debtor could be used to satisfy the debt. *See* The Arbitration and Conciliation Act, 1996 (the "Indian Arbitration Act"), Section 47; *Bharat Aluminium Co. v. Kaiser Aluminium Tech. Services Inc.*, (2012) 9 SCC 552 (India) ¶ 97 (The Supreme Court of India clarifying that the appropriate court to approach for enforcing a New York Convention award in India would be the one "within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought.").

German courts, meanwhile, require a "domestic connection," which may be satisfied if, for example, assets that might be subject to attachment are located in Germany. Only in cases where a "domestic connection" exists do the German courts assert jurisdiction over an enforcement petition under the New York Convention. *See, e.g.*, Kammergericht Berlin (KG), Judgment of 10 Aug. 2006, 20 Sch 07/04 (Ger.) (refusing enforcement of New York Convention award because it was not shown that award-debtor company had any assets in Germany that might be subject to attachment).

In the United Arab Emirates, courts have refused to enforce New York Convention awards against state-owned entities for lack of contacts with the forum and have expressly rejected any suggestion that this places

Dubai in violation of its treaty obligations. *See, e.g.*, Dubai Court of Cassation, Case No. 156/2013, Aug. 18, 2013 (Dubai) (Dubai highest court affirming dismissal of petition to enforce award under New York Convention for lack of jurisdiction where sovereign entity had no domicile in UAE and underlying obligation had been undertaken abroad, and holding that UAE rules for establishing jurisdiction comport with New York Convention Article III, which requires enforcement "in accordance with the rules of the procedure of the territory where the award is relied upon."); Dubai Court of Cassation, Case No. 790/2022, Oct. 19, 2022 (Dubai) (Dubai's highest court affirming that enforcement of UAE rules on "matters of territorial jurisdiction" do not violate the New York Convention).

Switzerland's requirements are even stricter. Even if there are assets that may be subject to attachment within Switzerland and the arbitration was seated in Switzerland, that still could not confer jurisdiction for enforcement of an award. Rather, the underlying dispute itself must have a sufficient relationship to the forum. And like other state parties, Switzerland has firmly rejected any notion that its jurisdictional requirements conflict with its New York Convention obligations. *See, e.g.*, *Ltd., Guernsey v. Republic of Uzbekistan,* Judgment of 7 Sept. 2018, BGE 104 I 367 E.2c (Swiss Fed. Sup. Ct.) (holding that the New York Convention does not prevent Swiss law from setting out restrictions — particularly the requirement of link to Switzerland for enforcement claims against sovereigns debtors — on Swiss courts' jurisdiction over state actors); *Socialist Libyan Arab Popular Jamahiriya v. Libyan Am. Oil Co. (LIAMCO),*

Judgment of 19 June 1980, BGE 106 Ia 142. E.5 (Swiss Fed. Sup. Ct.) (annulling enforcement order against Libya because there were insufficiently close connections between subject of dispute and Switzerland, even though Libyan assets were present in Switzerland and the seat of arbitration had been Switzerland).

Requiring minimum contacts with the forum thus does not introduce novel methods of addressing petitions under the New York Convention, let alone violate treaty obligations.

III. Comity Requires the United States to Recognize the Set-Aside of the *Devas* Award

India has a paramount interest in ensuring that the decisions of its judiciary are accorded due respect and comity in the United States, particularly in disputes that are between Indian entities and ultimately turn on India's sovereign choices about how India's spectrum band should be used to advance India's national-security needs.

1. The arbitral award that Devas seeks to enforce has been set aside by the Delhi High Court, the competent court at the seat of the arbitration. *See Devas Employs Mauritius Priv. Ltd. v. Antrix Corp. Ltd. & Ors.*, (2023) 2 Arb LR 107 (Delhi High Court) (India). The Indian Supreme Court affirmed the set-aside decision and dismissed the appeal. *See Devas Employees Fund US LLC v. Antrix Corp. Ltd.*, SLP(C) No. 22622 of 2023 (India Supreme Court).

No "award," therefore, exists, and the award that has now been set aside cannot be the basis for

overcoming the sovereign immunity of either Antrix (as an agency or instrumentality) or India. *See* 28 U.S.C. § 1605(a)(6).

As to enforcement and recognition, Article 20(f) of the agreement between Devas and Antrix (the "Agreement") — whose termination gave rise to the arbitral award at issue — provides that any award is "entitled to be enforced to the fullest extent permitted by Laws and entered in any court of competent jurisdiction." "Laws," in turn, is defined at Clause 23 of Annexure I to the Agreement as "all laws, statutes, rules, regulations, ordinances, by-laws and other pronouncements having the effect of law of India." An arbitral award issued pursuant to the Agreement is thus only entitled to enforcement to the extent permitted by Indian law. Because the award has been set aside pursuant to Section 34 of the Indian Arbitration Act, by the Delhi High Court at the seat of arbitration, it has lost its legal effect and is *not* "permitted by" Indian law to be enforced. Regardless of whether the United States' courts are courts of "competent jurisdiction" under the agreement (which they are not, as shown in Pt. IV below), the Agreement, by its terms, prohibits enforcement of this award *anywhere*.

Further, to confirm an arbitral award that "does not exist to be enforced" would "seriously undermine a principal precept of the New York Convention." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935-36 (D.C. Cir. 2007). U.S. courts may recognize an annulled arbitral award only when the set-aside decision is "repugnant to fundamental notions of what is decent and just in the United States." *Id.* at 939

(quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)). This U.S. public policy standard is extremely high, so as to apply "[o]nly in clear-cut cases." *Id.* at 938 (quoting *Tahan*, 662 F.2d at 866 n.17).

2. The principle of comity, *i.e.*, "the recognition which one nation allows within its territory to the legislative, executive, and judicial acts of another nation," *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), requires this Court to accord the decisions of both the Delhi High Court and the Indian Supreme Court due respect. *See also Medellin v. Dretke*, 544 U.S. 660, 670 (2005) ("It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a 'let's see if we agree' approach is out of order.") (Ginsburg, J., concurring).

The Supreme Court of India and the Delhi High Court warrant such comity and respect. For the last four decades, U.S. courts have consistently recognized the Indian judiciary as "developed, independent and progressive." *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 199 (2d Cir. 1987); *see also Bano v. Union Carbide Corp.*, 273 F.3d 120, 127-32 (2d Cir. 2001) (interpreting and following decisions made by the Supreme Court of India); *In re Marriage of V.S. & V.K.*, 97 Cal. App. 5th 219, 235 (Ct. App. 2023) (holding that "as a matter of statutory interpretation" of Indian law, the court is "unable to disregard the Supreme Court of India's pronouncement").

U.S. courts have thus consistently found India to be "an adequate forum" for resolving disputes. *Rehman v. Chadive*, No. 2:24-cv-00341-WJM-JBC, 2025 WL

101520, at *2 n.4 (D.N.J. Jan. 15, 2025) (observing that "our federal courts have found India to be an adequate alternate forum"); *USHA (India), Ltd. v. Honeywell Int'l, Inc.*, 421 F.3d 129, 135 (2d Cir. 2005) (holding that New Delhi High Court was an adequate forum to resolve claims arising under laws of India); *Randhawa v. Skylux Inc.*, No. Civ. 2:09-02304 WBS DAD, 2013 WL 3354453, at *2 (E.D. Cal. July 3, 2013) (same) (collecting cases). And U.S. courts have recognized that it is not their "role . . . to conduct appellate review of the acts of the Indian Judiciary." *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) ("defer[ring] to the adequacy and ability of the courts of India"), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987). As the Second Circuit has stated of the Indian judiciary, "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity." *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d. Cir. 1991) (quoting *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976)). Here, where two Indian corporations affirmatively contracted to submit any disputes about the enforceability of an arbitral award to Indian courts, it would be a significant affront if the courts of the United States refused to recognize the validity of the resulting set-aside determination.

To the extent that the Court declines to affirm the Ninth Circuit's decision requiring minimum contacts to establish personal jurisdiction over Antrix, the Court should affirm on the alternative ground that no "award" exists to be enforced, an objection that was

deemed moot by the Ninth Circuit. Pet. App. 8a. Alternatively, this Court should affirm on the grounds of *forum non conveniens*, an objection that the Ninth Circuit did not reach. *Forum non conveniens* applies with full force here. This dispute has no bearing on the United States, and India is an available, and the most suitable, forum to resolve this case involving the enforcement of an Indian arbitral award concerning a contractual dispute governed by Indian law between two Indian parties.

IV. Neither India nor Antrix Waived Its Right to Object to Personal Jurisdiction

1. By merely signing the New York Convention, India did not consent to award-enforcement proceedings in the United States for arbitral awards with no relationship to the United States, and where no assets that may be subject to attachment to satisfy the award have been identified in the United States. As the United States confirms, it and other state parties to the Convention did not consent to jurisdiction in the courts of every state party to the Convention merely by signing the Convention. Br. for the United States as Amicus Curiae at 20, *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024) (No. 23-7031) ("Becoming a party to either the New York Convention or the ICSID Convention, without more, does not provide the necessary 'strong evidence' that a foreign state intended to waive its sovereign immunity in United States courts.") (internal citations omitted). Because the Convention "do[es] not commit a foreign state to engage in arbitration, [those state parties] could not implicitly waive sovereign immunity for any

enforcement action." *Id.* A decision holding that foreign sovereigns lack due-process protections and implicitly waived jurisdictional (and thus immunity) defenses merely by joining an international convention that speaks to neither issue would substantially intrude upon the sovereignty of foreign states — precisely the type of judicial interference into diplomatic affairs and foreign sovereignty that the Founders sought to prevent.

2. As Antrix rightly argues, it also did not waive its right to object to personal jurisdiction before U.S. courts when it signed the Agreement with Devas. Contrary to the Solicitor General's position, U.S. *Amicus* Br. 23-26, Antrix did not consent to personal jurisdiction in U.S. courts via Article 20(f) of the Agreement, which provides that any arbitral award "shall be . . . entitled to be enforced to the fullest extent permitted by Laws and entered in any court of competent jurisdiction."

Indian law, which governs the Agreement, provides that contracts must be interpreted in accordance with their terms and the surrounding circumstances. Agreement Art. 19 (providing Indian law as the governing law); *Bangalore Elec. Supply Co. Ltd. v. E.S. Solar Power (P) Ltd.*, (2021) 6 SCC 718 (India) ¶ 17 (Supreme Court of India holding that if a clause is ambiguous and two meanings are possible, then the "intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract").

The text of Article 20(f) is best understood as an agreement to subsequent proceedings in any *Indian* court of competent jurisdiction. The Solicitor General fixates on the word "any" in Article 20(f), while ignoring the reference to "Laws" (defined in the Agreement as the laws of India) in that same clause.

The surrounding circumstances of the Agreement — a contract between two Indian parties, executed and performed exclusively in India, governed by Indian law, and with its arbitral seat in India — resolves any ambiguity and unmistakably demonstrates that the phrase "any court of competent jurisdiction" in Article 20(f) refers to any *Indian* court of competent jurisdiction. This interpretation aligns with the parties' evident intent to create a wholly domestic legal framework for their contractual relationship.

This interpretation further aligns with the Indian domestic nature of the Award and its nullity under Indian law given the set-aside decision. The Indian Arbitration Act's two-part framework distinguishes between domestic and foreign awards, with Part I governing arbitrations seated in India. Domestic awards, like the one here, are subject to greater scrutiny under Section 34, while foreign awards face narrower review. By choosing New Delhi as the seat of arbitration, the parties intended for any award to be subject to Indian judicial oversight. Reading Article 20(f) as a consent to award enforcement in any of the more than 170 state parties to the New York Convention fails to respect the carefully delineated structure of the Indian Arbitration Act and the intent of the parties to the Agreement to be governed by it.

CONCLUSION

For the foregoing reasons, India respectfully urges the Court to affirm.

Respectfully submitted,

ANDREA J. MENAKER
Counsel of Record
NICOLLE KOWNACKI
MICHAEL MAHAFFEY
WEIQIAN LUO
WHITE & CASE LLP
701 Thirteenth Street NW
Washington, DC 20005
(202) 626-3600
amenaker@whitecase.com

ADITYA SINGH
WHITE & CASE
88 Market Street
No. 41-01
CapitaSpring
Singapore 048948

Counsel for *Amicus Curiae*

JANUARY 24, 2025