Nos. 23-1201 & 24-17

IN THE

Supreme Court of the United States

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

Petitioners,

v.

ANTRIX CORP., LTD.; DEVAS MULTIMEDIA PRIVATE LIMITED,

Respondents.

DEVAS MULTIMEDIA PRIVATE LIMITED,

Petitioner,

v.

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

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ANDREA K. BJORKLUND & FRANCO FERRARI IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are prominent professors of international arbitration and international law.[2] *Amici* are interested in ensuring a consistent and correct jurisprudence related to international arbitration in the United States, and in particular in an accurate interpretation of the Foreign Sovereign Immunities Act ("FSIA") as applied to actions to recognize and enforce arbitral awards against foreign states. Because the Ninth Circuit's decision erroneously adds a "minimum contacts" requirement to the FSIA's statutory conferral of personal jurisdiction, that court's decision risks placing the United States in violation of its obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6. 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention") and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (the "ICSID Convention," collectively, the "International Arbitration Treaties"). This approach undermines the enforceability of international arbitration awards rendered against foreign states in the federal and state courts of the United States, including awards rendered

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

2. *Amici* are affiliated with certain institutions, including McGill University Faculty of Law and New York University School of Law, but this brief does not purport to represent the institutional views of any such institutions which may or may not diverge from the views of *amici* as presented herein.

on behalf of American award creditors. By so doing, the Ninth Circuit's ruling undermines the United States' strong public policy favoring arbitration and the prompt resolution of international disputes through arbitration. *See*, *e.g.*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *Mitsubishi Motors* and affirming the "emphatic federal policy in favor of arbitral dispute resolution"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985) (explaining the "emphatic federal policy in favor of arbitral dispute resolution" in light of the New York Convention "applies with special force in the field of international commerce"). *Amici* thus respectfully submit that the Court should reverse the Ninth Circuit's decision, at least insofar as that decision would require parties seeking to obtain recognition of an award subject to the International Arbitration Treaties in the United States to demonstrate minimum contacts between the respondent foreign state and the United States as a jurisdictional precondition for recognition.

Amicus curiae Andrea K. Bjorklund is the L. Yves Fortier Chair in International Arbitration and International Commercial Law, and a Full Professor at McGill University Faculty of Law. Professor Bjorklund earned her *juris doctor* from Yale Law School, and, prior to entering the academy, *inter alia*, worked as an attorney-advisor at the United States Department of State, Office of the Legal Advisor. She is an elected member of the American Law Institute and acted as an advisor to the Project on Restating the U.S. Law of International Commercial and Investment Arbitration. She is a prolific author on topics in investment law and arbitration, an active arbitrator and expert, and a member of the Bars of Maryland, the District of Columbia, and this Court.

Amicus curiae Franco Ferrari is the Clarence D. Ashley Professor of Law and Executive Director of the Center for Transnational Litigation, Arbitration, and Commercial Law at New York University School of Law. Professor Ferrari taught as full professor at Tilburg University (Netherlands) as well as Bologna University and Verona University (Italy). He has published more than 380 articles and chapters, and more than 50 books, on topics in international commercial law, conflicts of laws, comparative law, and international commercial arbitration, is a member of the editorial board of various peer-reviewed European law journals, and is Co-Editor of the *Encyclopedia of Private International Law* (2017). He has previously worked as Legal Officer at the United Nations Office of Legal Affairs, International Trade Law Division, and is an active international arbitrator in international commercial and investment disputes.

Professors Bjorklund and Ferrari have previously addressed important topics of international and arbitration law as *amicus curiae* before courts in the United States. As leading members of the international arbitration community, they are interested in ensuring the proper and consistent interpretation of laws like the FSIA that have important implications for international arbitration and the United States' treaty obligations in connection with international arbitration. They submit this brief to aid the Court in correctly interpreting the FSIA in the context of international arbitral award enforcement proceedings and to ensure that American sovereign immunity jurisprudence is properly harmonized with those treaty obligations and the important public policies that this Court has recognized in its prior decisions concerning arbitration.

SUMMARY OF ARGUMENT

International arbitration is the cornerstone of the Investor-State Dispute Settlement ("ISDS") system because it affords investors access to neutral, expert tribunals and allows them to avoid the courts of the state with whom they have a dispute. The success of investor-state arbitration in turn rests on the enforceability of investor-state awards. Investor-state awards are enforced through the International Arbitration Treaties, which impose affirmative and solemn obligations on contracting states to enforce arbitration awards in accordance with a series of fixed criteria that are uniform among contracting states, and that allow both investors and states to understand the legal regime that governs the arbitrations that they agree to. The United States—through actions taken by each branch of government—has fully committed itself to the international arbitral dispute resolution system and to the International Arbitration Treaties and this Court has itself identified an emphatic policy in favor of international arbitral dispute resolution. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 631.

The Ninth Circuit's ruling would, if affirmed by this Court, upend that commitment and undermine that policy. Unlike every other U.S. appellate court to consider the issue, the Ninth Circuit concluded that the FSIA requires plaintiffs not only to satisfy the FSIA's clearly stated requirements, but also to plead and prove that a foreign state has "minimum contacts" with the United States to establish personal jurisdiction over a foreign sovereign in an action seeking recognition of an international arbitration award. But the FSIA says no such thing—rather, it says that "[p]ersonal jurisdiction over a foreign

state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [*i.e.*, subject matter jurisdiction] where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). There is no ambiguity to that statutory command: "Under the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction." *GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 811 (D.C. Cir. 2012) (internal quotations omitted). And, under the FSIA, subject matter jurisdiction is explicitly authorized in any action against a foreign state "either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate" if "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

In other words, the FSIA provides a complete answer to the question of when jurisdiction—personal and subject matter—exists to enforce an international arbitral award against a foreign sovereign, and it does so with explicit reference to the International Arbitration Treaties that may apply to the arbitral award. By engrafting a minimum contacts requirement onto that clear statutory formula, the Ninth Circuit's ruling threatens to undermine the United States' ability to meet its commitments under the International Arbitration Treaties.

Even if this Court were inclined to find that personal jurisdiction under the FSIA requires a showing of minimum contacts, however—and it should not—*amici* respectfully submit that that minimum contacts test should

never preclude the exercise of personal jurisdiction over foreign states in cases seeking recognition of an arbitral award under the International Arbitration Treaties. In any case where a foreign state agrees—via treaty or contract—to submit a dispute to arbitration covered by either of the International Arbitration Treaties, that agreement should be considered as encompassing a consent to personal jurisdiction in an action to recognize any resulting award in the United States. Enforcement of awards that are subject to the International Arbitration Treaties in any state that is bound by those instruments is both foreseeable and often necessary for the award to be made meaningful.

ARGUMENT

I. THE FSIA MUST BE INTERPRETED CONSISTENT WITH THE INTERNATIONAL ARBITRATION TREATIES TO WHICH THE UNITED STATES HAS ACCEDED

The ISDS system provides a mechanism through which foreign investors can initiate arbitration proceedings against host states for breaches of those states' international commitments under various international investment protection agreements, such as bilateral investment treaties, free trade agreements, or similar instruments.[3] This system is central to the protection of foreign investments, the effective resolution of disputes arising from such investments, and ultimately to the

3. States and their instrumentalities may also agree to arbitration and offer substantive protections for foreign investors through contracts or other instruments of consent.

unimpeded flow of investment capital across national borders. International arbitration, in turn, is central to the ISDS system. It is the preferred method of dispute resolution in that system due to its neutrality, efficiency, and—most critically—the ultimate enforceability of international arbitral awards across borders, including against sovereign parties, regardless of where those international arbitral awards are rendered.

Of the mechanisms to enforce international arbitral awards across borders, the International Arbitration Treaties are of pre-eminent importance.[4] The International Arbitration Treaties play a crucial role in the ISDS system by imposing mandatory obligations on signatory states to recognize and enforce international arbitral awards, through a reliable and uniform framework for the enforcement of such awards across national borders.

A. The United States Is Fully Committed to the New York Convention

The New York Convention, to which the United States has been a party since 1970, is the cornerstone of the international regime for the recognition and enforcement of foreign arbitral awards. As this Court has explained,

4. While other regional conventions exist to facilitate the cross-border enforcement of international arbitral awards in certain types of disputes, such as the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), *adopted* Jan. 30, 1975, 1438 U.N.T.S. 245, O.A.S.T.S. No. 42, incorporated into U.S. law at 9 U.S.C. §§ 301 *et seq.*, none of these regional treaties rises to the level of frequency of use or prominence as the International Arbitration Treaties, and so are not discussed further here.

"[t]he goals of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The Ninth Circuit itself has held that the "New York Convention and its implementing legislation emphasize the need for uniformity . . . " *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1168 (9th Cir. 2021), and that this need for uniformity is "of paramount importance." *Id.*

The Convention applies to any arbitral award arising out of a commercial contractual or non-contractual relationship that is considered as foreign or non-domestic under the law of the enforcing state. *See* New York Convention, art. I.

The New York Convention provides that each contracting state shall recognize and enforce foreign arbitral awards as binding and enforce them in accordance with its rules of procedure, unless the party resisting enforcement can prove one of the seven grounds for refusal enumerated in Article V. *See* New York Convention, arts. III, V. These grounds are: (a) incapacity of the parties or invalidity of the arbitration agreement; (b) lack of proper notice or due process in the arbitration proceedings; (c) excess of authority by the arbitral tribunal; (d) irregularity in the composition of the arbitral tribunal or the arbitral procedure; (e) non-finality, suspension, or setting aside of the award in the country of origin; (f) non-arbitrability of the subject matter of the dispute; and (g)

violation of the public policy of the enforcing state. New York Convention, art. V. Critically, the courts of appeals have held consistently that these grounds are *exclusive. See*, *e.g.*, *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (refusal of enforcement permissible "only on the grounds explicitly set forth in Article V" (internal citations omitted)); *China Minmetals Mats. Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 283 (3d Cir. 2003) ("Consistently with the policy favoring enforcement of foreign arbitration awards, courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the [New York] Convention, and generally have construed those exceptions narrowly."); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998) ("[T]he Convention's enumeration of defenses is exclusive."); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996) ("Article V of the Convention lists the exclusive grounds justifying refusal to recognize an arbitral award."); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974) (New York Convention clearly "limited his defenses to [the] seven set forth in Article V").

The New York Convention does not permit any additional or different grounds for refusal of recognition and enforcement of foreign arbitral awards, nor does it afford courts of contracting states any discretion to deny enforcement on any other basis. As demonstrated above, the courts of appeals are in broad alignment on this point, as are courts outside the United States. For example, the Supreme Court of the United Kingdom has found that the New York Convention grounds are "exhaustive." *Dallah Real Estate and Tourism Holding Co. v. Ministry of*

Religious Affs., Gov't of Pakistan [2010] UKSC 46, ¶ 101. Similarly, just this year, the Supreme Court of Pakistan expressly held that "domestic law . . . cannot add further [non-recognition] grounds. As is apparent from Article III of the New York Convention, any Contracting State imposing more onerous conditions on the recognition and enforcement of foreign arbitral awards will be in breach of its obligations under the New York Convention." *A.M. Constr. Co (Pvt.) Ltd. v. Taisei Corp.*, 2024 SCMR 640, ¶ 40.

The United States implements the New York Convention through Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq.*, which provides that district courts shall have jurisdiction over any action or proceeding falling under the New York Convention, and likewise confirms that the grounds for refusing enforcement under the New York Convention are exclusive. 9 U.S.C. § 207 ("The court *shall confirm* the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award *specified in the said Convention*." (all emphasis added)).

B. The United States Is Fully Committed to the ICSID Convention

The ICSID Convention (also known as the Washington Convention), to which the United States has been a party since 1966, is a multilateral treaty that establishes a self-contained system for the settlement of investment disputes between states and nationals of other states. It applies to any legal dispute arising directly out of an investment that the parties have consented in writing to submit to arbitration under the ICSID Convention. *See* ICSID Convention, arts. 25, 36.

The ICSID Convention requires contracting states to recognize and enforce ICSID awards as if they were final judgments of their own courts, and prohibits contracting states from subjecting awards to any appeal or any other recourse except those provided for in the Convention. *See* ICSID Convention, arts. 53, 54. The only remedies available under the Convention are interpretation, revision, and annulment of the award, proceedings for each of which are conducted before an ad hoc committee appointed by the Chairman of the ICSID Administrative Council; no recourse is available in or from national courts. *See* ICSID Convention, arts. 50–52. This critical feature of the ICSID Convention is incorporated into U.S. law by 22 U.S.C. § 1650a, which provides:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The 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. The Federal Arbitration Act (9 U.S.C. 1 *et seq.*) shall not apply to enforcement of awards rendered pursuant to the convention.

In other words, the ICSID Convention is, like the New York Convention, *exclusive* in its remedies: it does not permit any review or challenge of ICSID awards by national courts, nor does it allow any discretion to enforcing courts to deny enforcement on any ground. *See* ICSID Convention, art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to

this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."); art. 54(3) ("Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.").

C. The United States Is a Key Jurisdiction for the Enforcement of Foreign Arbitral Awards

As explained above, international arbitration is essential for ISDS primarily because of the effective cross border enforcement mechanisms provided by the International Arbitration Treaties. And among all signatory countries of the International Arbitration Treaties, the United States is of particular importance to the effective enforcement of arbitral awards.

Voluntary compliance—once the norm for international arbitration awards—has declined in recent years. While one 2008 survey showed a voluntary compliance rate of over 76%, *see* Queen Mary University of London & PriceWaterhouseCoopers, International Arbitration: Corporate Attitudes and Practices, at 8 (2008), *available at:* https://www.qmul.ac.uk/arbitration/media/arbitration/docs/IAstudy_2008.pdf, a study conducted in 2020 indicated that "instances of non-compliance are significant" and accelerating, with prevailing parties being forced to initiate enforcement actions in nearly 40% of cases. Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35(3) ICSID Rev. 540, 586–7, 590 (2020). Sovereigns' increasing non-compliance with international arbitral awards has magnified the importance of the International Arbitration

Treaties, and of the United States as a jurisdiction for the enforcement of arbitral awards against recalcitrant sovereign award debtors.

The United States' role as a key jurisdiction reflects its status as the world's largest economy, and a hub of international commerce. As of 2017, the United States represented 22% of global output, a third of stock market capitalization, one-tenth of global trade flows, one-fifth of global foreign direct investment stock, close to one-fifth of remittances, and one-fifth of global energy demand. M. Ayhan Kose et al., *The Global Role of the U.S. Economy: Linkages, Policies and Spillovers*, World Bank Policy Research Working Paper 7962 (Feb. 2017), at 1. The United States is also the indispensable global financial center, because the U.S. dollar is the most widely used currency in global trade and financial transactions. *Id.*

In addition to its economic significance, the United States' judicial system makes it an important forum for the enforcement of international arbitral awards. The American justice system's embrace of broad discovery—including the use of third-party disclosure that is unavailable in other parts of the world—is key; award creditors may utilize post-judgment discovery to assist in locating an award debtor's assets both inside the United States and elsewhere. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 138, 145–46 (2014) (permitting discovery of extraterritorial assets of foreign sovereign as consistent with FSIA).

Given the strong public policy favoring the prompt resolution of disputes subject to international arbitration, American courts can—and do—play an important role

in assisting award creditors in identifying assets and enforcing awards, allowing these often lengthy and expensive disputes to be brought to their conclusion even when the award debtor resists enforcement of the award. Based on a review of current federal ECF filings there are at least 27 actions pending in U.S. courts to enforce awards under the International Arbitration Treaties against foreign sovereigns or their instrumentalities at the time of this filing. Of course, the United States' openness to international arbitral award enforcement is not purely altruistic: It protects American investors who hold arbitration awards against foreign states, and further encourages the reciprocal enforcement of the International Arbitration Treaties by other signatory states, thereby maintaining the international arbitration regime to which the United States is committed as a matter of public policy. *See*, *e.g.*, *Mitsubishi Motors*, 473 U.S. at 631; *see also* H.R. Rep. No. 94-1487 at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (explaining that execution exceptions of FSIA were enacted with view to potential "reciprocal application of the act" to U.S. property, by other countries).[5]

5. This Court has recognized the United States' interest in encouraging reciprocal treatment by other countries in the context of cross-border disputes in similar contexts. *See ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 632 (2022) ("[T]he animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance.").

D. The FSIA Explicitly Excepts Arbitration-Related Disputes from Its Grant of Presumptive Sovereign Immunity

As this Court has explained, the FSIA was designed to create a uniform and exclusive regime to govern claims of sovereign immunity in the United States. *Argentine Republic v. Amerada Hess Shipping Corp., et al*, 488 U.S. 428, 434, 437 (1989) (holding that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts" and noting the "comprehensiveness of the statutory scheme" it created). The FSIA is the sole basis for obtaining *both* personal jurisdiction *and* subject matter jurisdiction over a foreign state. It provides a presumption of immunity from subject matter jurisdiction, "except as provided in sections 1605-1607 of this chapter." 28 U.S.C. § 1604.[6]

As relevant here, the FSIA contains an exception to jurisdictional immunity for actions brought to confirm an arbitral award made pursuant to an arbitration agreement to which the foreign state is a party:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of

6. The FSIA distinguishes between jurisdictional immunity and execution immunity, and provides different exceptions and rules for each. *See* 28 U.S.C. §§ 1605–1607 (exceptions to jurisdictional immunity); §§ 1609–1611 (immunity from attachment and execution and exceptions thereto). The case now before the Court implicates only the former, as the Ninth Circuit refused to recognize and enforce the arbitral award at issue, and thus the issue of actual execution of a judgment enforcing the award was not reached.

> the States in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States; (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards; (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607.

28 U.S.C. § 1605(a)(6). The FSIA also provides for personal jurisdiction wherever subject matter jurisdiction exists and service of process is effectuated:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330(b). In other words, under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." *GSS Group Ltd.*, 680 F.3d at 811 (internal citations omitted).

II. THE NINTH CIRCUIT'S MINIMUM CONTACTS ANALYSIS IS INCOMPATIBLE WITH THE UNITED STATES' TREATY OBLIGATIONS UNDER THE INTERNATIONAL ARBITRATION TREATIES

In light of the legal framework described in Section I, the Ninth Circuit's application of the minimum contacts test to foreign sovereigns in the context of arbitral award enforcement is both improper and problematic. It is inconsistent with the text and purpose of the FSIA, and, just as critically, runs counter to the United States' international commitments in the International Arbitration Treaties, thereby placing the United States in violation of those treaties.

A. The Ninth Circuit's Decision Is Incompatible with the New York Convention Because It Impermissibly Creates an Additional Condition for Recognition of Arbitral Awards Against Foreign States

The Ninth Circuit's ruling impermissibly creates an additional condition for recognition of arbitral awards against foreign sovereigns under the New York Convention, and one that would rarely be satisfied.

Under the Ninth Circuit's rule, an action for recognition of an arbitration award against a foreign state could not be maintained against a foreign state unless the foreign state had minimum contacts with the United States.[7] Pet.

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7. Plainly, of course, general jurisdiction over a foreign state or its instrumentality would virtually never exist in the United

App. 3a–5a; *see also* Pet. App. 49a–50a (lamenting "how many plaintiffs were simply kicked out of our courts by the minimum contacts requirement" even though "[u]nder a proper reading of the FSIA, those plaintiffs should be welcome to bring their claims in our circuit") (Bumatay, J., dissenting)).

Thus, the party seeking recognition, *i.e.*, the award creditor, would need to establish specific personal jurisdiction by showing that, "(1) the defendant performed an act or consummated a transaction by which it purposely directed its activity towards the forum state; (2) the claims arose out of defendant's forum-related activities; and (3) the exercise of personal jurisdiction is reasonable." Pet. App. 5a–6a (quoting *San Diego Cnty. Credit Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1034–35 (9th Cir. 2023)).

While this test would be satisfied in cases where the arbitration was seated in a U.S. jurisdiction, such cases do not require invocation of the New York Convention, which was conceived and designed specifically to facilitate recognition and enforcement of *foreign* arbitral awards. In cases, like this one, where the arbitration was conducted abroad, it is overwhelmingly *unlikely* that the foreign sovereign would have sufficient contacts with the U.S. to permit the exercise of personal jurisdiction. Pet. App. 6a–7a (finding a lack of minimum contacts). It is

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States because foreign states would not be "at home" here, and foreign states generally do not create instrumentalities based abroad. *See Daimler AG v. Bauman*, 571 U.S.117, 139 (2014) (entity not "at home" and amenable to general jurisdiction absent having its place of incorporation or principle place of business in the jurisdiction).

no overstatement to say that, under the Ninth Circuit's rule, the vast majority of foreign arbitration awards rendered against foreign states would be incapable of being recognized or enforced in the United States.

This would constitute nothing less than a total abdication by the United States of its obligations under the New York Convention. As noted above, the New York Convention imposes a mandatory obligation on signatory states to recognize arbitration awards rendered in another signatory state except where one of the exclusive treaty-based defenses to enforcement is established by the party opposing recognition. Franco Ferrari, Friedrich Rosenfeld, & Charles Kotuby, Recognition and Enforcement of Foreign Arbitral Awards 73 (2023) ("The list of grounds for refusal of recognition and enforcement in Article V is exhaustive. States may not invoke grounds other than those set forth in this provision."); *see also, e.g.*, *China Minmetals*, 334 F.3d at 283 ("Consistently with the policy favoring enforcement of foreign arbitration awards, courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the [New York] Convention, and generally have construed those exceptions narrowly."); *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, ¶ 101 ("Those grounds are exhaustive"). It does not permit additional defenses to enforcement. Yet the Ninth Circuit's ruling introduces a new defense: that an award creditor has failed to show minimum contacts between the foreign state respondent and the United States. This is inconsistent with both the United States' obligations under the New York Convention and with the structure and purpose of the New York Convention as a whole, the

entire purpose of which is to facilitate the enforcement of "foreign" awards subject to the limited circumstances expressly provided for by the New York Convention itself.

It is well settled as a matter of American law that domestic provisions of law may not be invoked to frustrate the purposes of a treaty to which the United States is a member. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also Samantar v. Yousuf*, 560 U.S. 305, 320 n.14 (2010) (reasoning that "the [*Charming Betsy*] canon that a statute should be interpreted in compliance with international law" would be relevant if the FSIA "addressed the question" then before the Court). But that is precisely what the Ninth Circuit's ruling does; it impermissibly construes the FSIA to violate the New York Convention, a treaty in force in the United States. *See* Pet. App. 5a (ruling that "the application of the minimum contacts analysis to actions under the FSIA in *Gonzalez* is statutory rather than constitutional").

The result is particularly problematic given that the very purpose of the New York Convention is to facilitate the enforcement of arbitration awards in jurisdictions *other* than where the arbitration was seated. *See*, *e.g.*, *Scherk*, 417 U.S. at 520 n.15 (noting the treaty's drafters were "concern[ed] that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement . . . on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements."); *Rhône Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*,

712 F.2d 50, 54 (3d Cir. 1983) (explaining that neither the "parochial interests of the forum state, nor those of states having more significant relationships with the dispute should be permitted to supersede" the pro-enforcement policy of the New York Convention).

B. The Ninth Circuit's Decision Is Incompatible with the ICSID Convention Because It Imposes a Condition for Enforcement on ICSID Awards that Does Not Exist for State Court Judgments

Affirmance of the Ninth Circuit's ruling would also frustrate the ISDS system by imposing a condition for enforcement on ICSID awards that does not exist for state court judgments. The ICSID Convention requires that ICSID awards be enforceable in the same manner as, and treated as on par with, final judgments of state courts. ICSID Convention, art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."); *see also* 28 U.S.C. § 1650a.; *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 87 F.4th 510, 518–19 (D.C. Cir. 2023) ("Both the Convention and its implementing legislation strictly limit a federal court's authority to review an ICSID award. The [ICSID] Convention treats Contracting States' courts as courts of enforcement, not review. . . . Congress adopted implementing legislation consistent with the Convention's intent. Section 1650a . . . does not direct federal courts to review the merits of state court judgments." (citations omitted)); *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 124 (2d Cir. 2017) ("Section 1650a of Title 22

requires federal courts to enforce ICSID awards as if they were final judgments of state courts—that is, pursuant to civil actions brought under the Federal Rules of Civil Procedure. The FSIA provides the sole basis for United States courts' subject matter jurisdiction over foreign sovereigns, and Section 1650a embodies no exception. As a result . . . the FSIA's procedural mandates control.").

Courts need not and do not inquire into whether they have personal jurisdiction prior to domesticating a sister-state court judgment under the Full-Faith and Credit Clause. *See* 28 U.S.C. § 1738 ("The records and judicial proceedings of any court of any such State . . . so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."). Simply put, the Full Faith and Credit Clause does not require a party holding a judgment from New York to prove that the judgment creditor has minimum contacts with New Jersey as a precondition to domesticating that judgment in New Jersey. U.S. Const., art. IV, § 1; *Underwriters Nat'l Ass. Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704–05 (1982) (explaining the Court "has consistently recognized" that the Full Faith and Credit Clause requires enforcement of sister state judgments so long as the *rendering* State's court had jurisdiction); *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("Regarding judgments . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

Ordinarily, the domestication transaction posited in the foregoing paragraph would simply require the judgment creditor to file the rendering state court's judgment in the clerk's office of the recognition state's court, which would enter its own judgment. There would be no civil action, and no judicial intervention. *See*, *e.g.*, N.Y. Civ. Prac. L. & R. § 5402. The District of Columbia Circuit and the Second Circuit have held, however, that this method of domestication cannot be used for ICSID awards, the award debtors under which are, by definition, foreign states, actions against whom are exclusively governed by the FSIA. *See Valores Mundiales*, 87 F.4th at 519; *Mobil*, 863 F.3d at 124. A civil action must therefore be filed in order to obtain recognition of the award. Putting aside whether this requirement itself is consistent with the ICSID Convention—a question this Court has not addressed—*amici* submit that the Ninth Circuit's imposition of a minimum contacts requirement on Section 1330(b)'s grant of personal jurisdiction is *not* consistent with it, as it would, as discussed above, create a situation in which ICSID awards rendered outside the United States would almost never be capable of being recognized in the United States. Such a result would run far afoul of both Article 54 of the ICSID Convention and Section 1650a by imposing requirements on the recognition of ICSID awards that do not exist for sister-state judgments.

III. A FOREIGN STATE'S AGREEMENT TO ENGAGE IN AN ARBITRATION THAT IS SUBJECT TO THE INTERNATIONAL ARBITRATION TREATIES ENCOMPASSES CONSENT TO PERSONAL JURISDICTION IN AN ACTION TO ENFORCE AN AWARD RESULTING FROM THAT AGREEMENT

Even if this Court were to agree that the FSIA's statutory grant of personal jurisdiction is tempered by a minimum contacts requirement—and it should not—the Court should rule that a foreign state's agreement to arbitrate a matter covered by one of the International Arbitration Treaties constitutes consent to personal jurisdiction in any action to enforce that award in the United States under the International Arbitration Treaties. Indeed, several lower courts have held as much in the sovereign immunity context, holding that a foreign state's accession to the ICSID Convention or the New York Convention is tantamount to a waiver of sovereign immunity for purposes of actions to enforce arbitration awards covered by either of those treaties. *See*, *e.g.*, *Tatneft v. Ukraine*, 771 Fed. App'x 9, 10 (D.C. Cir. 2019) *cert. denied* 140 S. Ct. 901 (2020) ("[A] sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states."); *Blue Ridge Investments, LLC v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (agreement to submit a dispute to ICSID Convention arbitration constitutes a waiver of jurisdictional immunity); *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 578–79 (2d Cir. 1993) (agreement to submit a dispute to New York Convention arbitration constitutes a waiver of jurisdictional immunity for purposes of

proceedings related to the arbitration of that dispute); *see also Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (opining that *Seetransport* was correctly decided); *but see NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1100 (D.C. Cir. 2024) (noting that the D.C. Circuit has never formally adopted *Seetransport* and deciding to "leave clarification of the waiver question for another day because . . . the district courts have jurisdiction under the FSIA's arbitration exception"). The U.S. practice in this respect is similar to the practice of courts in other signatory jurisdictions. *See Eiser Infrastructure Ltd. v. Kingdom of Spain* [2020] FCA 157, ¶¶ 180–190. (24 Feb. 2020) (Austl.), (concluding that signing of ICSID Convention amounted to waiver of sovereign immunity as to jurisdiction, though not execution, under Australian statute equivalent to FSIA); *Infrastructure Servs. Luxembourg SARL v. Kingdom of Spain and Border Timbers Ltd. v. Republic of Zimbabwe* [2024] EWCA Civ. 1257, ¶¶ 77–79 (same, under English State Immunities Act).[8]

The rationale in these cases applies with equal force to personal jurisdiction: Foreign states that have agreed to engage in arbitrations that are covered by the International Arbitration Treaties should reasonably expect to be haled into the courts of signatory states—including the United States—in the event they refuse to satisfy an

8. *See* Andrea K. Bjorklund *et al.*, *State Immunity as a Defense to Resist the Enforcement of ICSID Awards*, 36 ICSID Rev. 1, 13 (2021) ("Grounding the waiver of immunity in adherence to the ICSID Convention itself is consistent with the object and purpose of the treaty and with the Convention's overall self-contained design, which was to avoid the ability of domestic courts to review ICSID Convention awards.").

award against them. This approach aligns with the pro-enforcement policies of the International Arbitration Treaties and ensures that the objectives of these treaties are not undermined by additional jurisdictional hurdles—especially those that lack any basis in the statutory text of the FSIA and the comprehensive scheme it creates.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit. The ruling ignores the plain text of the FSIA and impermissibly construes the statute to contravene the United States' well-established obligations under the International Arbitration Treaties. The result undercuts the international arbitration system to which the United States has committed itself. Even if the Court were inclined to uphold the Ninth Circuit's minimum contacts test (and it should not), it should reverse the Ninth Circuit's order on the ground that, by agreeing to an arbitration that is subject to the New York Convention, Respondents have consented to personal jurisdiction in any action related to that agreement.

Respectfully submitted,

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