JURISDICTION BY CONSENT: HARMONIZING U.S. ENFORCEMENT OF ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION AFTER *DEVAS*

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This article argues that consent to arbitrate under the New York Convention (NYC) implies consent to personal jurisdiction in any contracting state where enforcement is sought, thereby rendering a minimum contacts analysis unnecessary. Although U.S. courts have long required such an analysis, this approach is increasingly out of step with international practice and the pro-enforcement framework of the NYC. The U.S. Supreme Court's recent decision in Devas v. Antrix marked a shift by holding that courts need not apply a minimum contacts analysis to enforce arbitral awards against foreign sovereigns under the Foreign Sovereign Immunities Act (FSIA). However, the Court based its decision on statutory interpretation rather than on constitutional due process, leaving unresolved whether its holding depends on the view that due process is unnecessary for foreign sovereigns or on the idea that consent to arbitration satisfies due process in itself. This ambiguity underscores the need for a more coherent and principled foundation. This article maintains that the only interpretation that reconciles the Devas holding with both constitutional principles and the structure of the New York Convention is that a party's consent to arbitration carries with it consent to enforcement jurisdiction in all signatory states. By grounding enforcement jurisdiction in consent rather than in minimum contacts, U.S. courts can resolve doctrinal incoherence, avoid undermining the Convention's purpose, and preserve the United States' credibility as a leading venue for international arbitration.

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I. INTRODUCTION

The enforcement of arbitral awards under the New York Convention (NYC) in the United States has generated significant debate, including whether award-debtors must have sufficient minimum contacts with the forum to permit a court to enforce awards against foreign parties.[1] Circuit courts have reached conflicting conclusions on whether due process principles require a minimum contacts analysis in this context.[2] With 172 states as parties to the NYC, it is the primary mechanism for the recognition and enforcement of foreign arbitral awards worldwide.[3] The uniformity of the NYC, as a binding instrument of international law, is a key factor in its success because it limits states from using domestic law to avoid enforcement.[4] Other jurisdictions around the world do not impose such a jurisdictional requirement

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1. Paulina Cohen, *Enforcing International Arbitral Awards in U.S. Courts and Personal Jurisdiction: Procedure, Problems, and Strategies*, 52 J. INT'L L. & POL. ONLINE F. 1, 2 (2019) (citing *Base Metal Trading, Ltd. v. OJSC "Novokuznetsk Aluminum Factory"*, 283 F.3d 208, 211 (4th Cir. 2002)), https://nyujilp.org/wp-content/uploads/2020/01/Cohen-Annotation-Final.pdf; Ank A. Santen, *Difficulties Enforcing New York Convention Awards in the U.S. Against Non-U.S. Defendants: Is the Culprit Jurisprudence on Jurisdiction, the Three-Year Time Bar in the Federal Arbitration Act, or Both?*, Kluwer Arbitration Blog, (Dec. 23, 2009) ("The emerging rule in the U.S. that, to recognize and enforce an arbitral award under the New York Convention, a U.S. court must have personal jurisdiction over the award debtor or his or her property in the forum, has attracted criticism.").

2. *Contrast Impetrate International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (explaining that the United States, Switzerland, and Nigeria were all parties to the New York Convention and that Nigeria's "agreement to adjudicate all disputes arising under the contract by arbitration under International Chamber of Commerce Rules constitutes a waiver . . . ."), *and Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) ("[A]n agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity, as was recognized by Congress . . . ."), *with First Inv. Corp. v. Fujian Matei 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"), *and Glencore Grain Rotterdam B.V. v. Srinath Rai Harnarayan 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.").

3. U.N. Comm'n on Int'l Trade Law, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, https://www.newyorkconvention.org/countries (last visited Aug. 18, 2025).

4. FRANCO FERRARI, FRIEDRICH ROSENFELD & JOHN FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE INTRODUCTION 201 (Edward Elgar 2021).

in enforcement actions.[5] Thus, this conflict in U.S. jurisprudence undermines the potential success of the NYC.

The recent case of *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.* illustrates one facet of the issue. In 2015, Devas, an Indian corporation, obtained an arbitral award from a tribunal of the International Court of Arbitration of the International Chamber of Commerce (ICC tribunal) seated in New Delhi, India, against Antrix, a state-owned entity of India.[6] Devas then sought to confirm this award in the U.S. District Court for the Western District of Washington.[7] Antrix challenged the court's jurisdiction, claiming that Antrix did not have sufficient minimum contacts with the United States.[8] However, the district court held that a minimum contacts analysis was unnecessary under the Foreign Sovereign Immunities Act (FSIA), which the district and circuit courts found applied to Antrix as a state-owned entity.[9] The FSIA provides exceptions to sovereign immunity in the enforcement of arbitral awards.[10] The district court confirmed the arbitral award, allowing the petitioners to conduct discovery to find assets belonging to Antrix in the United States that they could use to satisfy the confirmation judgment (including accrued interest).[11] The court found that Antrix had a claim in a bankruptcy proceeding in the Eastern District of Virginia.[12]

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5. *Compare Sunlodges Ltd. v. The United Republic of Tanzania*, CV-20-00648370-00CL, ¶¶ 10, 33–34 ((Can. Ont. Sup. Ct. J.) (Nov. 10, 2020)) (finding Tanzania subject to arbitral award enforcement proceeding because it is a signatory to the New York Convention and the seat of arbitration, Sweden, is also bound by the New York Convention), *with Infrastructure Services Luxembourg S.À.R.L v. Kingdom of Spain*, No. CA-2023-001556, ¶ 103 (Court of Appeals (Eng. & Wales) (Oct. 22, 2024)) (finding that English courts have jurisdiction to register ICSID awards because signatories of the ICSID Convention submitted to the court's jurisdiction through Article 54 of the ICSID Convention), *Border Timbers Limited v. Republic of Zimbabwe*, No. CA-2024-000258, ¶¶ 70, 86 (Court of Appeals (Eng. & Wales) (Oct. 22, 2024)) (same), *and Kingdom of Spain v. Infrastructure Services Luxembourg S.À.R.L and ANOR*, HCA S43/2022 (Dec. 4, 2023, AU) (holding that Spain's ratification of the ICSID Convention constituted a waiver of jurisdictional immunity from the recognition and enforcement of ICSID arbitral awards).

6. Brief for Petitioners at 10-11, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, Nos. 23-1201 & 24-17 (U.S. filed Nov. 2024).

7. Petition for Writ of Certiorari at 6, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, Nos. 23-1201 & 24-17 (U.S. May 6, 2024).

8. Brief in Opposition for Respondents at 9, *Antrix Corp. Ltd. v. CC/Devas (Mauritius) Ltd.*, Nos. 23-1201 & 24-17 (U.S. filed Aug. 6, 2024).

9. Reply Brief for Petitioners at 3, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, Nos. 23-1201 & 24-17 (U.S. filed Mar. 2025).

10. 28 U.S.C. § 1605(a)(6).

11. *Reply Brief for Petitioners*, supra note 9, at 3.

12. *Id.* at 9–10.

Based on this discovery, the court permitted the petitioners to register the judgment in Virginia.[13]

On appeal, the Ninth Circuit reversed, ruling that courts must apply a minimum contacts analysis even when the FSIA exempts the award-debtor from sovereign immunity.[14] However, before the Supreme Court, Antrix abandoned the Ninth Circuit's argument.[15] Instead, it shifted to a theory, claiming that the issues in the dispute do not fall within the FSIA because the exception requires an additional nexus to the United States: that agreements involve subject matter "capable of arbitration under the laws of the United States."[16] According to Antrix, this phrase creates an implicit requirement that the parties to the dispute be from different countries.[17] In its decision, issued June 5, 2025, the Supreme Court, in a unanimous decision, held that jurisdiction under the FSIA does not require an analysis of minimum contacts.[18] The Supreme Court remanded the case to the Ninth Circuit to reconsider the case without imposing a minimum contacts analysis.[19]

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13. *Id.*

14. Brief in Opposition for Respondents at 12–13, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, Nos. 23-1201 & 24-17 (U.S. filed Aug. 6, 2024) (explaining that the Ninth Circuit reversed on the grounds that the FSIA requires a minimum contacts showing even when an exception to immunity applies, and that the court found Antrix lacked such contacts because the agreement had no connection to the United States).

15. Transcript of Oral Argument at 36–37, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, Nos. 23–1201 & 24–17 (U.S. argued Mar. 3, 2025), https://www.supremecourt.gov/oral_arguments/audio/2024/23-1201.

16. *Id.*

17. Transcript of Oral Argument at 34, 48–49

"Justice Sotomayor: I don't see anything in the language of the Convention that suggests that the citizenships of the parties entering into the agreement have anything to do with the subject matter.

. . .

Mr. Phillips: [R]egad the second sentence in Section 202. Any dispute between two U.S. citizens is not subject to the Federal Arbitration Act. Why should any dispute between two citizens of another country . . . extend beyond that country?

Justice Jackson: [T]hats in the constitutional realm . . . but you're making a statutory argument?

Mr. Phillips: I'm saying Congress wouldn't have wanted to take this any further than what it said in that statute. And the statute says it's got to be in foreign commerce. And foreign commerce means a relationship between a state, a territory, and a foreign state, not a relationship that arises exclusively between . . . Indian citizens in India under and Indian contract . . . with a dispute resolution system in India to be decided by an Indian court . . . ."

18. *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, No. 23–1201, slip op. at 13 (U.S. 2025).

19. *Id.*

This case raises a fundamental question: Must foreign parties (sovereign or non-sovereign) have sufficient minimum contacts with the forum for U.S. courts to enforce arbitral awards under the New York Convention? This paper argues that this should not be a requirement. Once a party consents to arbitration under the NYC, that consent provides the jurisdictional and due process foundation required for enforcement in U.S. courts, because enforcement is the necessary corollary to binding arbitration.[20] It is precisely for this reason that the FSIA arbitration exception exists—to codify the United States's obligations to enforce arbitral awards under the NYC into U.S. law involving foreign sovereigns in order to avoid inconsistencies in its application.[21] Introducing additional requirements like minimum contacts or implied nexus rules undermines the Convention's central goal of facilitating recognition and enforcement of foreign arbitral awards and conflicts with the FSIA's purpose of removing obstacles in the enforcement of arbitral awards against foreign sovereigns.[22] Though the Supreme Court narrowed its decision in the *Devas* case to concern only the text of the FSIA itself, rather than how the NYC applies to non-sovereign entities, the Court's reasoning provides a springboard for them to later expand the idea that it is not necessary to analyze minimum contacts in general when enforcing an arbitral award under the New York Convention.[23] This action would clarify U.S. doctrine and restore alignment with international expectations.[24]

This argument proceeds in three parts. Part II provides an overview of the legal frameworks that collectively govern the treatment of arbitral awards in the United States: (A) the New York Convention, (B) the Federal Arbitration Act (FAA), and (C) the FSIA. Part III recounts the *Devas* litigation and the parties' respective arguments. Part IV sets forth the core argument of this paper: that consent to arbitration satisfies jurisdictional requirements when confirming arbitral awards in general, even outside of FSIA cases. Part V concludes.

II. THE LEGAL FRAMEWORK

A. The New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (widely known as the New York

20. *See* discussion *infra*-Part IV(C)–(D).
21. *See* discussion *infra*-Part II(D).
22. *See* discussion *infra*-Part II(A).
23. *See* discussion *infra*-Part III(B).
24. *See* discussion *infra*-Part II(A).

Convention), adopted in 1958, establishes a harmonized framework for the enforcement of arbitral awards across contracting states.[25] The Convention has since become the most widely recognized treaty for enforcing arbitral awards, and it presumes enforceability, allowing refusal only under seven narrowly construed defenses, none of which concern the enforcing state's jurisdiction over the parties.[26]

Article V of the NY Convention sets out an exclusive list of defenses that a court may consider when determining whether to refuse recognition or enforcement of a foreign arbitral award.[27] These defenses fall into two categories: discretionary defenses under Article V(1) and mandatory defenses under Article V(2).[28]

Under Article V(1), the resisting party may ask a court to refuse enforcement if it proves one of five specific defenses.[29] These include: (1) that the parties to the arbitration agreement were under some incapacity or that the agreement was invalid under the governing law (Article V(1)(a)); (2) that the party was not given proper notice of the arbitration proceedings or was otherwise unable to present its case (Article V(1)(b)); (3) that the award deals with matters beyond the scope of the arbitration agreement (Article V(1)(c)); (4) that the arbitral procedure was not in accordance with the agreement of the parties or the law of the seat (Article V(1)(d)); or (5) that the award has not yet become binding or has been set aside or that a competent authority in the country of origin set it aside or suspended it (Article V(1)(e)).[30]

Article V(2) contains two defenses that courts may raise on their own initiative.[31] These include circumstances where the subject matter of the dispute is not capable of settlement by arbitration under the law of the enforcing state (Article V(2)(a)), or where recognition or enforcement would be contrary to the public policy of that state (Article V(2)(b)).[32]

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25. Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 116 (2018).

26. FERRARI, ROSENFELD & FELLAS, *supra* note 4, at 222 ("This latter provision contains an exhaustive list of grounds for refusal of recognition and enforcement. Considering the Convention's bias towards recognition and enforcement, these grounds for refusing recognition and enforcement must be construed narrowly.").

27. *Id.*

28. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)–(2), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

29. *Id.*, art. V (1).

30. *Id.*, art. V(1)(a)–(e).

31. *Id.*, art. V (2).

32. *Id.*, art. V(2)(a)–(b).

Notably, the Convention only allows courts to refuse enforcement on these grounds.[33] The text does not require a showing of minimum contacts, asset location, or any other jurisdictional nexus between the award debtor and the forum state. Furthermore, scholars interpret the language of the Convention as counseling enforcing courts against implementing additional hurdles as a condition of recognition.[34] Specifically, in the case of *Mitsubishi Motors*, the Supreme Court emphasized that there is a "federal policy in favor of arbitral dispute resolution . . . [and] that federal policy applies with special force in the field of international commerce."[35] Therefore, U.S. courts have stated that "[c]onsistently 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 Convention, and generally have construed those exceptions narrowly."[36] Other signatories to the New York Convention share this interpretation.[37] For instance, in 2010, the Supreme Court of Pakistan held that "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."[38]

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33. FERRARI, ROSENFELD & FELLAS, *supra* note 4, at 222.

34. GEORGE A. BERMANN, *Procedures for the Enforcement of New York Convention Awards*, AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 56–57 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law Int'l 2021) ("Frederic Bachand explains that, in light of the 'well-known pro-enforcement bias of the Convention,' Article III can only be understood to address procedural requirements speaking to the manner in which an award is to be enforced.").

35. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

36. *China Minmetals Materials Import and Export Co., Ltd. v Chi Mei Corporation*, 26 June 2003, 334 F.3d 274, 283 (3d Cir. 2003); *see also 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)); *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").

37. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 84–93 (2016) [hereinafter UNCITRAL Secretariat Guide] (noting pro-enforcement bias among contracting states).

38. *A.M. Constr. Co (Pvt.) Ltd. v. Taisei Corp.*, 2024 SCMR 640, ¶ 40; *see also Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affs., Gov't of Pakistan* [2010] UKSC 46, ¶ 101.

Article III of the New York Convention obligates each contracting state to recognize and enforce foreign arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon."[39] On its face, this provision appears to permit domestic procedural rules to govern enforcement proceedings. However, Article III establishes a procedural gateway for parties seeking to enforce arbitral awards, but it does not impose jurisdictional barriers to enforcement.[40] Article III goes on to prohibit contracting states from imposing "substantially more onerous conditions or higher fees or charges" on the enforcement of foreign awards than those applied to domestic awards.[41] In other words, while the Convention allows states to apply their own procedural law, including service requirements, filing mechanisms, and discovery rules, this does not seem to extend to the use of procedural rules to frustrate enforcement.[42] This limitation reflects the Convention's broader pro-enforcement policy and ensures that courts do not use procedural discretion to circumvent the Convention's substantive protections.[43]

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39. New York Convention, *supra* note 28, art. III; UNCITRAL Secretariat Guide, *supra* note 37, at 84–93.

40. *See* BERMANN, *supra* note 34, at 56–57.

"The rationale for adopting a more restrictive understanding of procedure is twofold. First, for all practical purposes, a ruling by a court that it lacks jurisdiction defeats enforcement in that court and therefore operates as a defense to enforcement. In this respect, an arbitral award is equally denied enforcement whether denial is based on a court's lack of jurisdiction or on one or more of the defenses to enforcement expressly provided for by Article V of the Convention. However, by all accounts, the grounds set forth in Article V are the sole grounds on the basis of which a Convention award may be denied enforcement. Arguably, allowing enforcement to be denied on jurisdictional grounds is adding a defense to enforcement that the Convention does not provide."

41. New York Convention, *supra* note 28, art. III; *OAO Rosneft (Russian Federation) v Yukos Capital S.A.R.L.* (Luxembourg), Dutch Supreme Court, 25 June 2010 in A.J. van den Berg (ed), *Yearbook Commercial Arbitration 2010* (Vol. XXXV) 423–6, 6.

42. *See* BERMANN, *supra* note 34, at 56–57; *see also* FERRARI, ROSENFELD & FELLAS, *supra* note 4, at 211 ("Rules of procedure, in principle, should not determine whether awards can be enforced altogether. Rather, they should set forth modalities for determining how and under what conditions an award can be enforced."); *Figueiredo Ferraz E Engenharia de Projeto Ltda. v Republic of Peru*, 14 December 2011, 665 F.3d 384 (2011), para. 10.; Lynch, J. Dissent ("[T]he 'procedure' provisions of the treaties permit variation with regard to the manner in which the signatory states enforce international awards; they do not provide a means by which a state may decline to enforce such awards at all.").

43. *See* BERMANN, *supra* note 34, at 56–58 ("[N]ational law may conceivably prescribe or apply a procedural rule the effect of which is inimical to the Convention's purposes. If so, that rule, either as a whole or as applied, arguably may not be given effect.").

B. The Federal Arbitration Act

U.S. courts interpret enforcement obligations under Chapter 2 of the Federal Arbitration Act (FAA) in alignment with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[44] This statutory framework implements the Convention and governs the recognition and enforcement of foreign arbitral awards in federal court. Chapter 2 applies to any arbitral agreement or award arising out of a commercial relationship that is not entirely domestic in nature.[45] Specifically, the statute extends to cases involving foreign parties, property located abroad, performance abroad, or any other reasonable relation to a foreign state. This chapter of the FAA covers arbitration agreements between U.S. citizens only if the agreements involve one of these international elements.[46]

Chapter 2 also incorporates provisions of Chapter 1 of the FAA to the extent they are not inconsistent with the NY Convention.[47] This allows domestic arbitration principles to supplement international enforcement in appropriate circumstances. However, in the event of any conflict, the NY Convention and Chapter 2 take precedence.[48] For instance, Section 207 of the FAA requires that courts confirm arbitral awards unless one of the defenses listed in Article V of the Convention applies.[49] Courts have interpreted the term "confirm" in Section 207 as functionally equivalent to "recognition and enforcement" under the Convention, thereby fulfilling the United States' treaty obligations and maintaining consistency with international norms.[50]

C. U.S. Jurisprudence on the Recognition & Enforcement of Arbitral

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44. *See* 9 U.S.C. § 201; Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 126–27 (2018).

45. 9 U.S.C. § 202.

46. *Id.*; *Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609 (7th Cir. 2024).

47. 9 U.S.C. § 208.

48. *Id.*; Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 127–28 (2018).

49. 9 U.S.C. § 207.

50. *See* Louis Del Duca & Nancy A. Welsh, *Enforcement of Foreign Arbitration Agreements and Awards:*

Application of the New York Convention in the United States, 62 AM. J. COMP. L. SUPP. 69, 71 (2014) (using the terms interchangeably); *see also CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 846 F.3d 35, 52 (2d Cir. 2017) (same); *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir. 2017) (same); *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 76–77 (1st Cir. 2000) (same).

Awards

Following that framework, U.S. courts treat the New York Convention's command to "recognize and enforce" as operating against the ordinary limits of adjudicatory power.[51] This means that a confirming court must identify a jurisdictional hook on top of the Convention/FAA's grant of subject-matter jurisdiction.[52] The court in *Glencore* states this point clearly: the Convention and Chapter 2 "authorize the exercise of subject matter jurisdiction but not personal jurisdiction," so enforcement must rest on "a defendant's person or property."[53] Consistent with that premise, the Second Circuit in *Frontera* held that a district court "correctly required jurisdiction over either [the debtor] or [its] property" before it could confirm the award.[54] Thus, U.S. courts that confirm an award under the New York Convention still conduct a traditional jurisdictional analysis under familiar statutory and constitutional principles to determine whether they have the power to hear a case.[55]

Those ordinary rules proceed in two moves.[56] First, there must be a statutory hook for service or jurisdiction—typically Rule 4(k)(1)(A) via the forum state's long-arm statute, Rule 4(k)(2) for federal claims when no single state has jurisdiction, or FSIA § 1330(b) when the respondent is a foreign state or instrumentality.[57] Second, due process limits apply in the usual way: defendants may consent (by contract, conduct, or appearance);[58] otherwise, the court assesses either general jurisdiction (where a defendant is "at home" and is always amenable to suit) or specific jurisdiction (where a defendant has sufficient minimum contacts with a forum related to the suit to justify jurisdiction).[59]

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51. *See* Louis Del Duca & Nancy A. Welsh, *Enforcement of Foreign Arbitration Agreements and Awards:*

Application of the New York Convention in the United States, 62 AM. J. COMP. L. SUPP. 69, 90 (2014) ("In general, though, courts in the United States have not tended to rely on the language of the Convention to permit examination of personal jurisdiction. Rather, they have turned to the individual forum state's long-arm statute and the Due Process Clause described *supra*.").

52. *Id.*

53. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1128 (9th Cir. 2002).

54. *Frontera Res. Azer. Corp. v. SOCAR*, 582 F.3d 393, 396–401 (2d Cir. 2009).

55. *See, e.g.*, *id.*; *see also Glencore*, 284 F.3d at 1127.

56. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

57. *See id.*; *see also* FED. R. CIV. P. 4(k); 28 U.S.C. § 1330(b).

58. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 138–39 (2023).

59. *See Int'l Shoe*, 326 U.S. at 316; *see also Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 357–58 (2021).

Most importantly, specific jurisdiction does the heavy lifting in Convention cases, and courts "look through" the petition to the forum-linked conduct that gave rise to the underlying dispute.[60] The Fifth Circuit recently aligned with its sister circuits on this point and rejected jurisdiction over a defendant where its lone contact with the United States—the loading of plaintiff's tanks by workers in New Orleans—was attributable to others and thus not the debtor's purposeful forum conduct.[61] Likewise, the Ninth Circuit dismissed where the debtor had neither qualifying forum conduct nor identified in-forum property to support quasi-in-rem jurisdiction.[62] Therefore, the Convention provides the cause of action and a pro-enforcement posture, but courts confirm only when a familiar jurisdictional hook exists, and, in practice, they usually analyze specific jurisdiction by "looking through" to the dispute-related contacts that *International Shoe* and its progeny require.[63]

D. The Foreign Sovereign Immunities Act (FSIA)

Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976 to provide the exclusive framework governing whether U.S. courts may hear suits against foreign states and their instrumentalities.[64] Under the FSIA, foreign states are presumptively immune unless a statutory exception applies.[65] In the context of international arbitration, parties initially brought enforcement actions under the FSIA's waiver exception.[66] Courts commonly found that when a foreign state agreed to arbitrate disputes, particularly under the New York Convention, that

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60. *See Conti 11. Container Schiffarts-GMBH & Co. KG M.S. v. MSC Mediterranean Shipping Co. S.A.*, 91 F.4th 789, 792 (5th Cir. 2024) (holding that courts assessing personal jurisdiction under the New York Convention should consider "contacts related to the underlying dispute—not only contacts related to the arbitration itself").

61. *Id.* (rejecting personal jurisdiction where the loading of tanks was due to "the unilateral activities of other parties whose actions are not attributable to MSC").

62. *Glencore Grain*, 284 F.3d at 1123–28.

63. *Id.*

64. See 28 U.S.C. §§ 1602–1611; see also *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) ("[T]he 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.").

65. *See* 28 U.S.C. § 1604 (establishing presumption of immunity unless exception applies).

66. *See Ipitrade Int'l, S. A. v. Fed. Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (bringing an action under the FSIA's waiver provision); *see also* 28 U.S.C. § 1605(a)(1) (Supp.1979) (codifying the initial waiver provision); H. R. Rep. No. 94–1487, p. 18 (1976), reprinted at 6617 (expressing that the waiver provision was meant to include arbitral awards).

agreement constituted an implicit waiver of immunity.[67] However, circuits did not uniformly accept this waiver theory.[68] Some courts questioned whether consent to arbitration necessarily implied consent to U.S. jurisdiction for enforcement, particularly in the absence of assets or connections to the United States.[69]

In response to this uncertainty, Congress enacted a specific arbitration exception in 1988, codified at 28 U.S.C. § 1605(a)(6).[70] The exception provides:

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case…
>
> (6) 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 subject to arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement, if:
>
> (A) the arbitration takes place or is intended to take place in the United States,
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> (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, or

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67. *See Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993); *see also* Mark B. Feldman, *Waiver of Foreign Sovereign Immunity by Agreement To Arbitrate: Legislation Proposed by the American Bar Association*, 40 DISP. RESOL. J. 24, 29 (finding that there is "significant authority for the proposition that an agreement to arbitrate . . . in a state party to the New York Convention [is] a waiver of immunity in an action to enforce . . . an arbitral award.").

68. *See Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 125–27 (D.C. Cir. 1999) (holding that an agreement to arbitrate in a New York Convention state is not a consent to personal jurisdiction for enforcement in other states).

69. *Id.*

70. 132 Cong. Rec. S14795 (daily ed. Oct. 8, 1986) (statement of Sen. Lugar) ("Consistent with our longstanding policy favoring arbitration in international commerce, the other provisions of this amendment would perfect the [FSIA] to provide explicitly for the enforcement of arbitral agreements or awards. Currently, agreements and awards are enforced under the provisions of the FSIA that concern explicit or implied waivers of immunity. Although courts are finding that arbitral award agreements constitute waivers in the appropriate cases, the amendment would give more explicit guidance to judges in dealing with these cases.").

> (C) the underlying claim could have been brought in a United States court but for the foreign state's immunity."[71]

Certain members of Congress intended this language to eliminate ambiguity and streamline the enforcement of arbitral awards against sovereigns, reflecting the U.S. government's commitment to honoring its obligations under the New York Convention.[72] The relevant statutory language permits parties to enforce an arbitration agreement or confirm an arbitral award (1) "subject to arbitration under the laws of the United States" and (2) "governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." Courts and commentators have understood the first phrase to mean that the agreement must concern matters that are arbitrable under U.S. law.[73] This clause prevents parties from asking U.S. courts to enforce arbitration agreements involving claims that are non-arbitrable per domestic public policy.[74] It does not require that the dispute arose in the United States nor have any jurisdictional ties to it.[75] The second clause requires only that the award fall under a treaty like the New York Convention.[76] Therefore, the provision imposes a treaty-based requirement, not a territorial one.[77]

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71. 28 U.S.C. § 1605(a)(6).

72. 134 Cong. Rec. 32328 (1988) (statement of Rep. Moorhead) (Congress amended the FSIA to ensure that foreign states could not use sovereign immunity "to frustrate the effect [of] an agreement to arbitrate or to interfere with the enforcement of an arbitral award entered against a foreign state."); 132 Cong. Rec. 28000 (1986) (statement of Sen. Lugar) (Congress sought to "give more explicit guidance to judges in dealing with these issues" and "perfect the [FSIA] to provide explicitly for the enforcement of arbitral agreements or awards.").

73. *See Mitsubishi Motors*, 473 U.S. at 660 ("The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the United States, for example, disputes affecting the title to real property are not arbitrable." (quoting *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, S. Exec. Doc. E, 90th Cong., 1st Sess. 19 (1968))); *see also* 9 USCS § 402 (prohibiting the arbitration of disputes concerning sexual harassment or sexual assault).

74. *See* FERRARI, ROSENFELD & FELLAS, *supra* note 4, at 209, 224 n.8.

75. *See, e.g.*, *G.E. Transp. S.p.A. v. Republic of Alb.*, 693 F. Supp. 2d 132, 136 (D.D.C. 2010) ("District courts may exercise personal jurisdiction over foreign states so long as subject matter jurisdiction exists over the claims at issue and service has been properly effected pursuant to 28 U.S.C. § 1608.").

76. *Process & Indus. Devs. Ltd. v. Fed. Republic of Nig.*, 27 F.4th 771, 776 (D.C. Cir. 2022) ("We have recognized that 'the New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception.'" (quoting *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123–24 (D.C. Cir. 1999)) (internal quotation marks omitted)).

77. *Id.*

Despite the language of the 1988 amendment courts remained divided on how to reconcile the FSIA with constitutional due process.[78] In particular, they disagreed on whether to require a minimum contacts analysis under the arbitration exception.[79] For instance, the Ninth Circuit in *Devas* held that due process imposes an independent obligation to assess whether the foreign sovereign has sufficient contacts with the U.S.[80] The Ninth Circuit primarily relied on its prior decision in *Gonzalez v. Gutierrez*, where it interpreted the FSIA's legislative history to reflect Congress's intent that courts apply a minimum contacts analysis.[81] Based on that interpretation, the Ninth Circuit concluded that the FSIA entitles foreign states to a minimum contacts analysis, even if the Constitution does not independently require.[82] Other courts declined to impose such a requirement, reasoning that the sovereign's consent to arbitration under the New York Convention was sufficient.[83] Some courts have confirmed arbitral awards in such situations because it enables post-judgment discovery to uncover attachable assets at a later

78. *See, e.g.*, *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 125–27 (D.C. Cir. 1999) (holding that a foreign state's agreement to arbitrate in a New York Convention state does not imply consent to personal jurisdiction in U.S. courts for enforcement and rejecting arguments that the FSIA's arbitration exception eliminates the need for minimum contacts); *see also UAB Skyroad Leasing v. OJSC Tajik Air*, No. 20-cv-00763 (APM), 2021 U.S. Dist. LEXIS 13872, at *9–10 (D.D.C. Jan. 26, 2021) (denying petition to confirm arbitral award for lack of personal jurisdiction, holding that minimum contacts were required despite the FSIA's arbitration exception).

79. *Contrast Creighton*, 181 F.3d at 125–27 (requiring minimum contacts under the FSIA's arbitration exception), *and Devas Multimedia Private Ltd. v. Antrix Corp.*, Nos. 20-36024, 22-35085, & 22-35103, 2023 U.S. App. LEXIS 19755, at *9 (9th Cir. Aug. 1, 2023) (same), *with Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 55 (2d Cir. 2021) (holding that "a court may exercise personal jurisdiction over a foreign sovereign without regard to minimum contacts"); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012) (same).

80. *Devas*, 2023 U.S. App. LEXIS 19755, at *9.

81. *Id.* at *6 (citing *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980)).

82. *Id.* at *6-7.

83. *See Maria Victoria Naviera, S.A. v. Cementos del Valle, S.A.*, 759 F.2d 1027, 1032 (2d Cir. 1985) ("Implicit in an agreement to arbitrate is consent to enforcement of that agreement."); *see also Blue Ridge Investments, LLC v. Republic of Argentina,* 735 F.3d 72, 75–76 (2d Cir. 2013) (enforcing an ICSID award against Argentina based on the finding that Argentina had waived sovereign immunity under the FSIA's arbitration exception).

point.[84] This latter approach is consistent with other contracting states to the New York Convention.[85]

The Supreme Court definitively settled the FSIA-related circuit split in *Devas*.[86] The Court held that courts do not need minimum contacts to establish jurisdiction when confirming arbitral awards, at least in the context of the FSIA's exception to sovereign immunity.[87] This decision, though seemingly insignificant because it technically complied with what arbitration experts suggested,[88] may actually mark a shift in U.S. treatment of arbitral awards under the New York Convention by bringing domestic enforcement procedures more in line with those of other signatory states. It is possible that Justice Alito tailored the opinion to describe the confirmation of arbitral awards when the award-debtor falls under the FSIA[89] but his reasoning for this holding can and should apply to non-sovereign award enforcement as well.

III. THE *DEVAS* CASE

The dispute in *Devas Multimedia Pvt. Ltd. v. Antrix Corp. Ltd.* originated from a 2005 agreement in which Antrix—a corporation wholly owned by the Government of India and the commercial arm of its Department of Space—agreed to lease satellite spectrum capacity to Devas, a private Indian company backed by American telecommunications investors.[90] The agreement contemplated the launch and operation of two satellites to support a new broadband network across India.[91] However, several years later, the Indian government reversed

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84. *See, e.g.*, *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 637 F.3d 373, 375–76 (D.C. Cir. 2011) (upholding confirmation of an arbitral award even where the respondent had no known assets at the time).

85. See Eiser Infrastructure Ltd. v. Kingdom of Spain, FCA 157 (2020) (Austl.); *see also Infrastructure Services Luxembourg S.À.R.L. v. Kingdom of Spain; Border Timbers Ltd. v. Republic of Zimbabwe*, [2024] EWCA Civ 1257, Case Nos. CA-2023-001556 & CA-2024-000258 (Eng.).

86. *CC/Devas*, slip op. at 13.

87. *Id.*

88. Ronald Mann, *Court Rejects Heightened Requirement for Arbitration Awards Under FSIA*, SCOTUSBLOG (June 13, 2025), https://www.scotusblog.com/2025/06/court-rejects-heightened-requirement-for-arbitration-awards-under-fsia/ ("I doubt this case will make a splash of any significance . . . . Because the court reached the result arbitration experts would have suggested, enforcing the award as the convention requires, the decision should not be noteworthy.").

89. *Id.*

90. *See* Brief for Petitioner at 10–11, *Devas Multimedia Pvt. Ltd. v. Antrix Corp. Ltd.*, No. 24-17 (U.S. Jan. 2025) [hereinafter *Devas Pet. Br.*].

91. *Id.*

course.[92] The government directed Antrix to terminate the contract, citing national security interests and a reevaluation of its strategic spectrum resources.[93] Antrix complied.[94] In response, Devas initiated arbitration seated in New Delhi under the Rules of Arbitration of the International Chamber of Commerce (the ICC Rules).[95] In 2015, the tribunal awarded Devas $562.5 million in damages, plus interest, finding that Antrix's termination was unlawful and in breach of contract.[96]

In response to Antrix's refusal to pay the award, Devas initiated a confirmation action in the U.S. District Court for the Western District of Washington, invoking the arbitration exception to the Foreign Sovereign Immunities Act.[97] At the time, Antrix had no known assets in the forum state or elsewhere in the United States.[98] Still, Devas proceeded with confirmation to obtain a U.S. judgment and initiate post-judgment discovery to locate Antrix's assets.[99] Antrix contested personal jurisdiction, asserting that it lacked sufficient contacts with the United States to satisfy constitutional due process requirements.[100] The district court rejected that argument and confirmed the award, holding that the FSIA did not grant Antrix immunity and that the court may recognize or enforce an arbitral award over a foreign sovereign even if the award debtor lacks minimum contacts with the forum state.[101] Later, Devas identified an Antrix claim in a separate bankruptcy proceeding in the Eastern District of Virginia.[102] Based on this discovery, the court permitted Devas to register the judgment in Virginia, which enabled the company to pursue enforcement efforts.[103]

Antrix appealed to the Ninth Circuit, which reversed.[104] The court held that U.S. courts must evaluate minimum contacts in FSIA confirmation proceedings, and courts do not have jurisdiction to confirm if the award debtor lacks minimum contacts with the forum state.[105]

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92. Brief in Opposition at 9–10, *Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd.*, Nos. 23-1201 & 24-17 (U.S. Jan. 2025) [hereinafter *Antrix Opp. Br.*].

93. *Id.*

94. *Id.*

95. *Devas Pet. Br.*, *supra* note 90, at 12–13.

96. *Id.*

97. *Id.* at 14.

98. *Id.* at 15; *see also* Reply Brief for Petitioners at 2–3, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, No. 23-1201 (U.S. Feb. 2025) [hereinafter *Devas Reply Br.*].

99. *Devas Pet. Br.*, *supra* note 90, at 15; *Devas Reply Br.*, *supra* note 98, at 2–3.

100. *Devas Pet. Br.*, *supra* note 90, at 15–16.

101. *Id.*

102. *Id.* at 16.

103. *Id.*

104. *Devas*, 2023 U.S. App. LEXIS 19755, at *9.

105. *Id.*, at *5.

Because Antrix lacked sufficient ties to the United States, the court concluded that it did not have jurisdiction to confirm the award, and it vacated the district court's judgment.[106] The panel relied on its own precedent requiring minimum contacts in such cases.[107] In a concurrence, Judge Miller, joined by Judge Koh, criticized this precedent, arguing that neither the Constitution nor the FSIA supported importing a minimum contacts requirement into proceedings to confirm arbitral awards under § 1605(a)(6).[108]

The Supreme Court granted certiorari to resolve whether the FSIA independently requires a minimum contacts analysis in arbitration enforcement proceedings. [109] This question strikes at the heart of the U.S. framework for recognizing and enforcing international arbitral awards. The U.S. Supreme Court heard oral argument in *Devas v. Antrix* on March 3, 2025, to decide whether federal courts must conduct a minimum contacts analysis before asserting personal jurisdiction over foreign states under the FSIA's arbitration exception.[110]

A. Parties' Arguments

i. Respondent's Arguments

Antrix's legal position evolved over the course of the *Devas* litigation, reflecting a notable shift in both statutory and constitutional theory.[111] In the district court and on appeal, Antrix did not contest the applicability of the FSIA's arbitration exception under 28 U.S.C. § 1605(a)(6).[112] Instead, its primary challenge focused on personal jurisdiction. Antrix argued that it lacked sufficient contacts with the forum to satisfy constitutional due process.[113] The district court rejected this claim, concluding that Antrix, as a foreign sovereign, was not a

106. *Id.*, at *9.

107. *Id.*, at *6 (citing *Gonzalez*, 614 F.2d at 1255).

108. *Id.*, at *11-12 (Miller, J., concurring) ("Neither the text of the Constitution, Supreme Court decisions construing the Due Process Clause, nor long standing tradition provide a basis for extending the reach of this constitutional provision for the benefit of foreign states . . . . But the statutory theory of a minimum-contacts requirement is little better than the constitutional one. Nothing in the text of the FSIA's long-arm provision describes a minimum-contacts requirement." (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99, 352 U.S. App. D.C. 284 (D.C. Cir. 2002)) (internal quotation marks omitted)).

109. Petition for a Writ of Certiorari at i., *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, No. 23-1201 (U.S. Dec. 4, 2024).

110. *See generally* Transcript of Oral Argument.

111. *Devas Pet. Br.*, supra note 90, at 17.

112. Transcript of Oral Argument at 34–37.

113. *Id.*

"person" entitled to due process protections under the Fifth Amendment—and that even if due process applied, Antrix had sufficient contacts with the United States.[114] The Ninth Circuit reversed, primarily on its statutory interpretation of the FSIA.[115]

By the time Antrix submitted briefs to the Supreme Court, it had notably shifted its strategy.[116] Rather than arguing that a lack of minimum contacts deprived a U.S. court of *personal* jurisdiction, counsel for Antrix claimed that a U.S. court did not have *subject matter* jurisdiction under the FSIA.[117] In its merits brief, Antrix argued that the arbitration exception requiring a dispute to concern a "subject matter capable of settlement by arbitration under the laws of the United States" imposed a substantive nexus requirement.[118] According to Antrix, courts should read this provision to limit jurisdiction under the FSIA to disputes with a meaningful connection to U.S. commerce or legal interests, aligning with the approach taken in other FSIA exceptions.[119]

This pivot allowed Antrix to claim that the FSIA's arbitration exception in § 1605(a)(6) was not satisfied, and as a matter of subject matter jurisdiction, they could not waive it by failing to assert the claim below.[120] Antrix's counsel contended that because § 1330(a) provides jurisdiction only where a foreign state is not immune, the court must first determine whether any exception to immunity applies—including whether the award was truly "subject to arbitration under the laws of the United States."[121] Antrix argued that this case involved a purely foreign dispute—one that Congress never intended to bring within U.S. courts' reach.[122] Specifically, it emphasized that Indian law governed the arbitration agreement and that the arbitration took place in India, not the United States.[123] By the time of oral argument, however, the Justices noticed this shift.

Justice Jackson questioned counsel on the apparent change in theory.[124] She asked whether Antrix was now making a statutory argument

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114. *Devas Pet. Br.*, supra note 90, at 17-18.

115. *Devas*, 2023 U.S. App. LEXIS 19755, at *6.

116. Brief of Respondent Antrix Corp. Ltd. at 17–18, *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, Nos. 23-1201 & 24-17 (U.S. Jan. 2025) [hereinafter *Antrix Merits Br.*]; Transcript of Oral Argument at 34–37.

117. *Antrix Merits Br.*, *supra* note 116, at 17–18.

118. *Id.* at 22.

119. *Id.* at 22–23.

120. *Id.* at 26.

121. *Id.* at 24–25.

122. Transcript of Oral Argument at 30.

123. *Id.*

124. *Id.* at 35–36.

about the FSIA's text when it had previously agreed the arbitration exception applied.[125] Antrix's counsel confirmed the abandonment of the constitutional minimum contacts theory, stating that Antrix was now advancing a purely statutory argument.[126] Antrix's counsel justified the change in argument based on the fact that subject matter jurisdiction is not waivable.[127] However, Justice Gorsuch emphasized that sovereign immunity is "a little different" from traditional subject matter jurisdiction, especially when the sovereign has stipulated below that jurisdiction was proper.[128] He suggested that such concessions, particularly when repeated in multiple courts, may amount to waiver.[129] Ultimately, based on this change in argument, the oral hearing did not include much discussion of constitutional due process.

ii. Petitioners' & Amici Arguments

From the beginning of the *Devas* litigation, Petitioners consistently argued that the FSIA's arbitration exception provides a standalone basis for jurisdiction over foreign sovereigns, and that the statute does not require a separate showing of minimum contacts under the Constitution or otherwise.[130] In the Ninth Circuit, Petitioners maintained that under 28 U.S.C. § 1330(b), service under § 1608 and subject matter jurisdiction under an FSIA exception like § 1605(a)(6) automatically establish personal jurisdiction over a foreign sovereign.[131] They contended that the FSIA supplants any need for a separate constitutional analysis—especially because the due process clause does not apply to foreign states.[132] Nonetheless, the Ninth Circuit imposed a minimum contacts requirement and vacated the judgment.[133]

Before the Supreme Court, Petitioners reiterated their original theory.[134] In both their merits and reply briefs, they argued the Ninth Circuit's decision was contrary to the FSIA's plain text and structure.[135] They emphasized that § 1330(b) sets out a complete personal jurisdiction framework and makes no reference to due process or minimum

125. *Id.*
126. *Id.* at 36–37.
127. *Id.* at 36–43.
128. *Id.* at 42–43.
129. *Id.*
130. *Devas Pet. Br.*, supra note 90, at 16–17.
131. *Id.* at 19.
132. *Id.* at 21–22.
133. *Devas*, 2023 U.S. App. LEXIS 19755, at *9.
134. *Devas Reply Br.*, *supra* note 98, at 2–3.
135. *Id.*

contacts.[136] They also pointed out that subject matter jurisdiction and service under § 1608 are the only conditions Congress imposed, and any additional judicially created requirement would violate separation of powers and undermine the FSIA's uniformity.[137]

Petitioners also claimed that due process principles do not apply to foreign states because foreign sovereigns are not "persons" under the Fifth Amendment and therefore do not enjoy its protections.[138] Even if due process applied, Petitioners contended that consent to arbitration under the New York Convention inherently satisfies any procedural fairness concerns, obviating the need for a separate contacts analysis.[139] Counsel for the petitioners also rejected Antrix's new argument that the FSIA did not apply because Antrix had conceded that the FSIA's arbitration exception applied throughout the lower court proceedings.[140] Justice Sotomayor raised the practical stakes, asking how a confirmation judgment without assets in the U.S. would benefit Devas.[141] Counsel for petitioner responded that the judgment had already allowed Devas to seize Antrix's bankruptcy claim in Virginia, and that the Ninth Circuit's decision would undo this result.[142]

The U.S. government, represented by Acting Solicitor General Sarah Harris, supported Devas.[143] She emphasized that § 1330(b) of the FSIA does not contain a general minimum contacts requirement and that imposing one would contradict both statutory text and treaty obligations under the New York Convention.[144] She also criticized Antrix's late-breaking statutory argument as both waived and meritless, noting that other FSIA exceptions expressly include nexus requirements, but § 1605(a)(6) does not.[145]

B. Supreme Court Decisions: Devas and Fuld

In *Devas*, the Court held that the plain meaning of the FSIA eliminates any requirement of minimum contacts to confirm arbitral awards under the NYC against a foreign sovereign.[146] The Court reinforced this decision by explaining that the Act's exceptions satisfy due process

136. *Id.* at 4.
137. *Id.*
138. *Devas Pet. Br.*, *supra* note 90, at 21.
139. *Devas Reply Br.*, *supra* note 98, at 6–7.
140. Transcript of Oral Argument at 8–10.
141. *Id.* at 19–21.
142. *Id.*
143. *Id.* at 22–23.
144. *Id.* at 22–26.
145. *Id.* at 24–26.
146. *CC/Devas*, slip op. at 2.

because the exceptions themselves "require varying degrees of suit-related domestic contact before a case may proceed," obviating the need for a separate minimum contacts analysis.[147] The Court also found support for its holding through the legislative history of the Act, in which Congress explained that the FSIA's immunity provisions "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction."[148] Ultimately, the Court did not attach much significance to *how* the FSIA satisfied due process (i.e. via consent) or even if it was even *necessary* for it to do so. It seemed to emphasize that it based its holding on statutory interpretation of the FSIA alone.[149] The Court refused to address whether Fifth Amendment due process required a showing of minimum contacts.[150] It instead chose to address this issue only two weeks later in its decision in *Fuld v. Palestine Liberation Organization*[151]

Fuld v. PLO arose from lawsuits brought by the families of U.S. citizens killed or injured in terrorist attacks in Israel between 2014 and 2016 against the Palestinian Authority and the Palestine Liberation Organization.[152] Plaintiffs sought to hold the defendants liable under the Anti-Terrorism Act (ATA), relying on the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) to establish jurisdiction.[153] The question before the Court was whether the PSJVTA violated due

147. *Id.* at 9.

148. *Id. But see id.* at 12 ("Congress believed that the contacts set forth in the immunity provisions satisfy due-process requirements . . . . It is a separate question whether Congress was correct in its assumption." (quoting *Rote* v. *Zel Custom Mfg. LLC*, 816 F. 3d 383, 398 (CA6 2016)) (internal quotation marks omitted)).

149. *Id.* at 13 ("The Ninth Circuit relied exclusively on its interpretation of the FSIA's personal-jurisdiction provision, so that court has not yet addressed Antrix's alternative arguments . . . . Personal jurisdiction exists under §1330(b) of the FSIA when an immunity exception applies and service is proper. Because the Ninth Circuit required more, we reverse the judgment below and remand the suit for further proceedings consistent with this opinion.").

150. *Id.*; The Court's decision not to address the Fifth Amendment may reflect the constitutional avoidance doctrine, which counsel's courts to decide cases on statutory grounds where possible, rather than reaching constitutional questions. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." (quoting *Escambia County* v. *McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984) (*per curiam*)) (internal quotation marks omitted)).

151. *Fuld et al. v. Palestine Liberation Organization*, No. 24-20, slip op. at 6–8 (U.S. June 20, 2025).

152. *Id.* at 2.

153. *Id.* at 2–5.

process.[154] The Supreme Court in *Fuld* clarified that the jurisdictional constraints imposed by the Fifth Amendment's Due Process Clause on the federal government differ from those applied to the states under the Fourteenth Amendment.[155] This distinction reflects the federal government's unique and broader sovereign authority, particularly in domains such as international relations and extraterritorial jurisdiction.[156] As the Court explained, this conception of due process is essential to enable the federal government to effectively conduct foreign affairs, requiring a more flexible standard for jurisdiction that is "commensurate with the federal government's broader sovereign authority," rather than the more rigid minimum contacts standard applicable to state courts.[157] Together, the two decisions play a significant role in defining jurisdiction over foreign parties in U.S. courts and could alter how courts confirm arbitral awards under the New York Convention.

IV. JURISDICTION THROUGH CONSENT IN ARBITRAL AWARD PROCEEDINGS

The core principle underlying *Devas* and other cases dealing with the recognition and enforcement of arbitral awards under the New York Convention is the nature of jurisdiction by consent. The Supreme Court's decision in *Devas* makes it clear that consent to arbitration under the New York Convention satisfies jurisdictional requirements under the FSIA, and this logic should extend to non-sovereign parties as well. Requiring a minimum contacts analysis in such cases undermines the Convention's core promise of uniform and predictable enforcement and paradoxically gives private parties stronger jurisdictional defenses than sovereigns. This result is doctrinally incoherent and contrary to global norms.

This Section advances the argument in three parts. Part A establishes that consent to arbitrate is itself sufficient to satisfy due process and jurisdictional requirements. Part B illustrates how the FSIA's arbitration exception reflects that understanding by removing unnecessary barriers to enforcement against sovereigns. Part C contends that extending this consent-based framework to private parties is essential to harmonize U.S. law with the expectations of other Convention states and preserve the uniformity of international arbitration.

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154. *Id.*

155. *Id.* at 12 ("Because the State and Federal Governments occupy categorically different sovereign spheres, we decline to import the Fourteenth Amendment minimum contacts standard into the Fifth Amendment.").

156. *Id.*

157. *Id.*

A. Consent is a Standalone Basis for Personal Jurisdiction

Consent to personal jurisdiction is a constitutionally sufficient, standalone basis for jurisdiction that entirely bypasses the need for a minimum contacts analysis. [158] The Supreme Court reaffirmed this foundational principle in *Mallory v. Norfolk Southern Railway Co.*, where it upheld Pennsylvania's statutory scheme allowing jurisdiction over foreign corporations for any claim so long as they register to do business in the state.[159] Critically, *Mallory* reinforced the ongoing vitality of *Pennsylvania Fire*, a decision that recognized consent by registration as a valid and independent ground for personal jurisdiction.[160] The Court explained that *International Shoe* did not displace *Pennsylvania Fire* but merely introduced an additional path to jurisdiction via minimum contacts for defendants who have *not consented*.[161] Indeed, the Court in *Mallory* emphasized that once valid consent exists, factors like residence or where the cause of action arose are irrelevant—Mr. Mallory no longer lived in Pennsylvania and the claim did not accrue there, but "none of that makes any more difference."[162] When a party consents, the court does not need to conduct a minimum contacts analysis because consent itself satisfies the Due Process Clause.[163] Thus, under settled doctrine, courts may assert personal jurisdiction based on consent alone.[164]

Because personal jurisdiction is a personal due process right, defendants can easily waive or forfeit the defense.[165] Waiver is a "critical feature of the personal-jurisdiction analysis," and parties may waive jurisdiction through several channels: by expressly or implicitly agreeing, by defaulting procedurally, or by voluntarily invoking benefits conditioned on forum jurisdiction.[166] As the Supreme Court explained in *Insurance Corp. of Ireland*, a variety of seemingly technical procedural acts,

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158. *See, e.g.*, *Mallory*, 600 U.S. at 138.

159. *See id.* at 134, 138 ("Pennsylvania law is explicit that 'qualification as a foreign corporation' shall permit state courts to 'exercise general personal jurisdiction' over a registered foreign corporation, just as they can over domestic corporations." (quoting 42 Pa. Cons. Stat. §5301(a)(2)(i))).

160. *Id.* at 138 (reaffirming *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)).

161. *Id.* ("All *International Shoe* did was stake out an additional road to jurisdiction over out-of-state corporations."); *see also Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U.S. 915, 927–928 (2011).

162. *Mallory*, 600 U.S. at 135.

163. *Id.* at 138; *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

164. *Mallory*, 600 U.S. at 138; *Pennsylvania Fire*, 243 U.S. at 95.

165. *See Ins. Corp. of Ir.*, 456 U.S. at 703.

166. *Mallory*, 600 U.S. at 147; *Ins. Corp. of Ir.*, 456 U.S. at 703–04.

such as litigating without objection, failing to comply with court rules, or seeking the benefits of a forum, can "amount to a legal submission to the jurisdiction of a court" and thereby satisfy due process.[167] For instance, under Rule 12(h) of the Federal Rules of Civil Procedure, a defendant who fails to raise a timely objection to personal jurisdiction forfeits the defense.[168] Courts routinely treat such forfeiture as a form of implied consent.[169] Whether the defendant relinquishes their rights explicitly or constructively, the governing rule is the same: when a party's actions reflect legal submission, due process imposes no barrier to jurisdiction.[170] Once a party establishes consent, either implicitly or explicitly, the constitutional inquiry ends.[171]

B. Jurisdiction Under the FSIA's Arbitration Exception is Rooted in Consent

This conception of due process tracks with the provisions of the FSIA. Courts base jurisdictional requirements on the same principles of procedural fairness that guide all cases.[172] Courts cannot assert unbridled authority over any party, whether it be a person or a sovereign.[173] Jurisdiction must always be exercised in a manner consistent with fairness.[174] Applying traditional jurisdictional principles to the

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167. *Id.* at 704–05.

168. FED. R. CIV. P. 12(h)(1)

169. *See Ins. Corp. of Ir.*, 456 U.S. at 703–05 ("Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection."); *see also Mallory*, 600 U.S. at 148 (Alito, J., concurring).

170. *See Ins. Corp. of Ir.*, 456 U.S. at 704–05.

171. *See id.* at 703; *see also Mallory*, 600 U.S. at 138; *BNSF R. Co.* v. *Tyrrell*, 581 U.S. 402, 415 (2017).

172. *See CC/Devas*, slip op. at 12 ("[T]he Report explains that this 'embodiment' of due process comes from the Act's immunity exceptions and service-of-process rules . . . . '[E]ach of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States,' . . . . '*These immunity provisions*, *therefore*, *prescribe the necessary contacts* which must exist before our courts can exercise personal jurisdiction . . . . [S]ection 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill.'" (quoting H. R. Rep. No. 94–1487, p. 13-14 (1976))).

173. *See id.* at 9 ("Although nothing in the text of §1330(b) requires a minimum-contacts analysis, that does not mean Congress dispensed altogether with proof of contact between the foreign state and the United States. In order for subject-matter jurisdiction to exist under the FSIA, an exception to immunity must apply.").

174. *Mallory*, 600 U.S. at 139 ("But the fact remains that *International Shoe* itself eschewed any 'mechanical or quantitative' test and instead endorsed a flexible approach focused on 'the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.'" (quoting 326 U.S., at 319)).

FSIA, courts can view exceptions like commercial activity and property rights in the United States as resting on a defendant's connection to the forum. Though the FSIA does not require courts to apply the formal minimum contacts test, these exceptions indicate the same understanding of due process.[175] Conversely, exceptions like arbitration and waiver rely on defendants' consent to establish jurisdiction.

The foundational premise of international arbitration is that the parties consent to the process.[176] That consent extends not only to arbitration itself, but also to enforcement proceedings in any NYC contracting state.[177] As Professor Mark Feldman, a principal drafter of the FSIA's arbitration exception, has explained, "[a]n arbitration agreement also ordinarily constitutes consent to recognition and enforcement proceedings if the losing party refuses to pay the award" because the Convention envisions enforcement as the natural and necessary corollary of arbitration.[178] Courts have interpreted the FSIA's arbitration exception to reflect that understanding: it creates a stand-alone exception to immunity because sovereigns who arbitrate do so knowing enforcement might occur abroad.[179] Moreover, the history of the FSIA demonstrates that the arbitration exception rests on consent.

Before the FSIA's amendment in 1988, courts often relied on the FSIA's general waiver exception to enforce arbitral awards.[180] But the waiver exception required case-by-case analysis of whether the foreign

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175. *CC/Devas*, slip op. at 9 ("[T]he FSIA's immunity exceptions themselves require varying degrees of suit-related domestic contact before a case may proceed.").

176. *See Granite Rock Co. v. International Bhd. Of Teamsters*, 561 U.S. 287, 299 (2010) ("The language and holdings on which Local and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly a matter of consent." (internal quotations omitted)).

177. *See Maria Victoria Naviera, S.A. v. Cementos del Valle, S.A.*, 759 F.2d 1027, 1032 (2d Cir. 1985) ("Implicit in an agreement to arbitrate is consent to enforcement of that agreement.").

178. Feldman Amicus Br. at 7 (Nos. 23-1201 & 24-17).

179. *See Seetransport*, 989 F. 2d at 578 ("[T]he [New York] Convention which expressly permits recognition and enforcement actions in Contracting States . . . . [By] enter[ing] into a contract . . . that had a provision that any disputes would be submitted to arbitration . . . [the respondent] had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award.").

180. F. Supp. at 826 (bringing an action under the FSIA's waiver provision); *see also* 28 U.S.C. § 1605(a)(1) (Supp.1979); H. R. Rep. No. 94–1487, p. 18 (1976) (expressing that the waiver provision was meant to include arbitral awards); Brief for the United States as Amicus Curiae, *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, No. 80-1207, at 32-37 (D.C. Cir. filed June 16, 1980), reproduced in relevant part at 20 I.L.M. 161 (1981).

state's actions implied waiver.[181] Congress enacted the arbitration exception in § 1605(a)(6) to remove ambiguity and make it clear that sovereign consent to arbitrate constituted consent to U.S. jurisdiction to confirm the resulting award.[182] In this sense, the arbitration exception clarifies and streamlines what would otherwise be an unstable implied waiver analysis.[183] Arbitrating in a state subject to the NYC therefore constitutes a waiver of jurisdictional objections to enforcement and extends beyond the context of sovereign immunity. Thus, consent provides an independent and sufficient basis for personal jurisdiction under the FSIA's arbitration exception. Courts need not reach the more complex question of whether due process requires minimum contacts for sovereigns when consent offers a clearer and more straightforward path.

C. Consent to Arbitration Under the New York Convention Extends to Jurisdiction for Enforcement in All Signatory States

The step from consent to enforcement under the NYC to consent to personal jurisdiction in the courts of signatory states is doctrinally supported and structurally embedded in the nature of the Convention. The NYC creates a binding framework under which contracting states commit to recognizing and enforcing foreign arbitral awards.[184] When

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181. *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 488 F. Supp. 1284, 1300–02 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981), rev'd, 461 U.S. 480 (1983).

182. *Foreign Sovereign Immunities Act Amendments: Hearing Before the Subcomm. on Admin. Law & Gov. Operations of the H. Comm. on the Judiciary*, 99th Cong. 97–98 (1986) (statement of Mark B. Feldman, Former Deputy Legal Adviser, U.S. Dep't of State).

> "The argument has been made in some cases that a federal district court is precluded from enforcing an arbitration award made in a foreign state if the defendant is not present in the jurisdiction and the underlying transaction has no connection with the United States. It is claimed that the exercise of jurisdiction in these circumstances would not satisfy the "minimum contacts" required by the due process clause of Article V of the Constitution. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This contention ignores two important considerations. First, constitutional objections to the personal jurisdiction of the court may be waived. Nothing in the Constitution precludes a foreign state from waiving its immunity and consenting to the jurisdiction of a United States court. Second, a federal district court may enforce a judgment or an arbitral award against property within its jurisdiction, even if it would not have jurisdiction to adjudicate the dispute on the merits."

183. *Id.*

184. Konstantina Kalaitsoglou, *Exploring the Concept of Arbitral Awards Under the New York Convention*, 5 J. STRATEGIC CONT. & NEGOT. 99, 99 (2021)

a party consents to an arbitration governed by the NYC, it also consents to the mechanisms necessary to give effect to such awards, foremost among them, judicial enforcement wherever assets may be located.[185] Because enforcement must occur through domestic courts, and because assets may be dispersed globally, that consent functionally extends to personal jurisdiction in any court where enforcement is pursued.

The NYC is a particularly powerful treaty precisely because of its wide ratification and the uniformity with which its enforcement obligations are applied across jurisdictions. Weakening the enforceability of awards by permitting parties to evade personal jurisdiction would undercut this uniformity and diminish the Convention's practical effectiveness.[186] The credibility and strength of the Convention depend not just on its text, but on the reliable operation of its enforcement mechanisms in all contracting states. Accordingly, consent to enforcement under the NYC necessarily implies consent to jurisdiction under the Convention's enforcement structure.

This understanding is reinforced by the U.S. Supreme Court's holding in *Devas v. Antrix* that the arbitration exception constitutes a sufficient jurisdictional basis to overcome both the absence of minimum contacts and sovereign immunity under the FSIA. Given that the arbitration exception is rooted in consent, by corollary, consent to

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https://doi.org/10.1177/20555636211022839 ("The arbitral award is undisputedly the most powerful legal document today, considering that no court may review it on its merits and is enforceable almost anywhere in the world through the streamlined system of the New York Convention on Recognition and Enforcement of Foreign Awards.").

185. Cf. Int'l Comm. Disputes Comm. of the Ass'n of the Bar of the City of N.Y., Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards (2005), https://www.worldcat.org/oclc/774531559 ("In the Committee's view, the presence of the debtor's property within the state, regardless of whether that property is connected with the underlying claim, is sufficient to establish quasi-in-rem jurisdiction."). *But see Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 126–27 (D.C. Cir. 1999) (holding that agreement to arbitrate in France did not waive objection to personal jurisdiction in the U.S. by analogizing the NYC to the Full Faith and Credit Clause and rejecting the notion that consent to jurisdiction in one forum implies consent in others). Note the decision in *Creighton* is the only one to address this theory and was made prior to the Supreme Court's 2017 decision in *Mallory v. Norfolk Southern Railway Co.*

186. *See supra* note 34 at 66–67 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law Int'l 2021) ("However, the notion of dismissing an action on convenience grounds is widely rejected around the world. ln such jurisdictions, its practice is viewed, as a general matter, as anomalous. But it is seen as especially troubling because it operates as an obstacle to the entertainment of enforcement actions, which is widely viewed as an obligation under the. Convention, and because it jeopardizes the Convention's goals of uniformity in the enforcement of foreign arbitral awards.").

enforcement under the NYC should likewise suffice to establish personal jurisdiction even in the absence of minimum contacts. Enforcing courts would undermine the Convention's purpose if parties could consent to its enforcement regime in principle while avoiding the practical judicial processes through which enforcement is realized.

D. Consent-Based Jurisdiction Under the New York Convention Should Apply to All Parties—Not Just Foreign Sovereigns

i. It is doctrinally incoherent to require more of foreign sovereigns than of private parties.

Building on the Supreme Court's holding in *Devas* that the FSIA's arbitration exception eliminates the need for minimum contacts, courts should recognize that no such requirement exists for any party seeking to confirm an arbitral award under the NYC. The decisive fact is consent. When either sovereign or private parties agree to arbitrations pursuant to the Convention, they also consent to enforcement in any contracting state.[187] It would make little sense to require more of sovereigns than of private parties under the very same treaty. The FSIA simply extends the enforcement obligations under the NYC into U.S. law.[188] Therefore, courts should treat sovereigns and non-sovereigns alike when confirming arbitral awards.

To hold that private parties alone would receive a minimum contacts test would invert the FSIA's protective design.[189] Foreign states

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187. *See supra* Part IV(B).

188. *See* 28 U.S.C. § 1605(a)(6) (providing for an exception to immunity "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"); *see also Process & Indus. Devs. Ltd. v. Fed. Republic of Nig.*, 27 F.4th 771, 776 (D.C. Cir. 2022) ("We have recognized that 'the New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception.'" (quoting *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123–24 (D.C. Cir. 1999)) (internal quotation marks omitted)).

189. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U. S. 170, 179 (2017) ("To grant [foreign] sovereign entities an immunity from suit in our courts both recognizes the absolute independence of every sovereign authority and helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our own." (internal quotation marks and alteration omitted)); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (finding an exception to sovereign immunity "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it"); *Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004) (upholding sovereign immunity when the municipal government "performed actions that were only superficially similar to actions typically undertaken by private parties").

traditionally receive *greater* procedural and jurisdictional protections than private parties, not fewer.[190] Creating a jurisdictional shortcut that favors individuals or corporations over sovereigns runs against the foundational principle that immunity flows from "the perfect equality and absolute independence of sovereigns."[191] Specifically, the FSIA operates against a baseline presumption of immunity, rebuttable only through carefully enumerated exceptions.[192] However, if U.S. courts continue to apply a minimum contacts test to private parties under the NYC after Devas, the FSIA would effectively place sovereigns at a special disadvantage. That result is backwards. Indeed, amici such as Zimbabwe point out that if a minimum contacts test conflicts with the NYC, then the United States' jurisprudence has already drifted from its international obligations under the Convention—not just in sovereign immunity cases, but more broadly.[193] Courts can avoid this incoherence and restore alignment with international obligations by relying on the principle of consent: once a state knowingly agrees to arbitrate under the Convention, due process is satisfied, whether under the Fifth or Fourteenth Amendment.

Although the Court's decision in *Fuld* may suggest that the FSIA makes foreign sovereigns *more* susceptible to jurisdiction than private parties in the recognition and enforcement of arbitral awards under the NYC, the Supreme Court explicitly chose not to rely on this reasoning in *Devas*.[194] The key difference lies in the basis for jurisdiction. In *Fuld*, Congress had provided a special jurisdictional provision in the Anti-Terrorism Act (ATA) that allowed victims of terrorism to sue the Palestinian Authority and the PLO in U.S. courts based on specified

190. *See CC/Devas*, slip op. at 4 ("For much of American history, foreign states and their instrumentalities enjoyed near total immunity from suit in our courts." (citing *Hungary* v. *Simon*, 604 U. S. ___, ___ (2025) (slip op., at 2))).

191. *See WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 17 F.4th 930, 938 (9th Cir. 2021) (quoting The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812)).

192. *See Republic of Hungary v. Simon*, 145 S. Ct. 480, 486–88 (2025) ("The FSIA provides foreign states with presumptive immunity from suit . . . unless a specified exception applies.").

193. Brief for Republic of Zimbabwe as Amicus Curiae Supporting Respondent at 11, *CC/Devas (Mauritius) Ltd. v. A v. Antrix Corp. Ltd.*, No. 22-429 (U.S. May 2023) ("Applying the argument of Petitioners and amici, there are breaches of international obligations littering the jurisprudence of the Federal courts.").

194. *See CC/Devas*, slip op. at 12-13 ("Antrix contends that the Fifth Amendment's Due Process Clause itself requires a showing of minimum contacts before a federal court can exercise personal jurisdiction over a company owned by a foreign sovereign . . . . We decline to answer those questions today.").

statutory contacts with the United States.[195] Because jurisdiction in *Fuld* rested on those legislatively defined contacts rather than party agreement, the Court analyzed whether the lower court had to assess *those* contacts under the minimum contacts standard.[196] The Court ultimately concluded that the lower court did not need to conduct a minimum contacts analysis to assess whether due process was satisfied under the Fifth Amendment because the nature of the ATA indicated that the Court inherently had jurisdiction over the sovereign defendants.[197]

By contrast, in *Devas*, the case concerned enforcement of an arbitral award under the FSIA's arbitration exception. There, jurisdiction was not the product of a congressional attempt to manufacture contacts but instead flowed directly from the parties' consent to arbitrate under the NYC. Consent, as the Court underscored in *Mallory v. Norfolk Southern Railway Co.*, does not impose the same constitutional demands as minimum contacts.[198] In *Mallory*, the Court reaffirmed that when a party consents to jurisdiction due process is satisfied without further inquiry into the party's connections to the forum.[199] Thus, unlike the higher and more fact-intensive bar of establishing minimum contacts, consent provides a straightforward and constitutionally sufficient basis for jurisdiction.[200] In *Devas*, this principle allowed the Court to resolve the case through simple statutory interpretation of the FSIA's arbitration exception, avoiding complex constitutional questions altogether. This approach accords with the core principles of jurisdiction: notice, connection, and, above all, consent.[201] Extending those principles beyond the FSIA context, courts should recognize that parties may

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195. *Fuld*, slip op. at 19 ("We need not separately consider whether the statute comports with our cases addressing the circumstances under which a defendant may be deemed, consistent with due process, to have consented to jurisdiction. Respondents' consent-based arguments rest on the premise that Congress could not in the PSJVTA 'transform constitutionally-insufficient conduct overseas into grounds for "deemed consent" to personal jurisdiction in the United States.' The Court of Appeals thought similarly. Since we hold that the statute ties the assertion of jurisdiction to predicate conduct that in and of itself bears a meaningful relationship to the United States, we need not further consider the matter through the lens of consent." (citation omitted)).

196. *Id.*

197. *Id.* at 12 ("Because the State and Federal Governments occupy categorically different sovereign spheres, we decline to import the Fourteenth Amendment minimum contacts standard into the Fifth Amendment.").

198. *See supra* Part IV(A).

199. *Id.*

200. *Id.*

201. *Id.*

enforce arbitral awards under the NYC without a minimum contacts requirement, whether the resisting party is a sovereign or a private actor.

ii. The current system undermines the success of the New York Convention and the U.S.'s status as a leading venue for arbitration.

There is increasing concern that U.S. courts are departing from their Convention obligations by imposing additional procedural hurdles not contemplated in the treaty.[202] U.S. courts impose jurisdictional tests that conflict with the Convention's core structure and undermine the global predictability the treaty seeks to secure.[203] As previously explained, U.S. courts find that the FAA grants U.S. courts subject matter jurisdiction to hear a case but they must still conduct a separate analysis to confirm whether they have personal jurisdiction over an award-debtor to issue a binding decision.[204] Specifically, U.S. courts rely on Article III of the NYC which permits courts to look at their own local "rules of procedure" at the enforcement stage.[205] However, globally, courts have understood Article III to permit variations in process but not to authorize new jurisdictional thresholds.[206] This practice of relying on Article III to bar enforcement actions appears to be in

202. *See* William W. Park, *Convention Violations and Investment Claims*, 29 ARB. INT'L 175, 186 (2013) ("[M]uch judicial failure to respect the Convention will likely remain without practical sanction. Such seems to be the case with respect to the American decisions that rely on parochial notions of jurisdiction and discretion as grounds for non-recognition of foreign awards.").

203. *See id.*; *see also* Ank A. Santens, *Difficulties Enforcing New York Convention Awards in the U.S. Against Non-U.S. Defendants: Is the Culprit Jurisprudence on Jurisdiction, the Three-Year Time Bar in the Federal Arbitration Act, or Both?*, KLUWER ARBITRATION BLOG (Dec. 23, 2009) (explaining conflicting opinions on whether procedural rules can act as a bar to enforcement under the NY Convention) (first citing *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (finding that the doctrine of forum non conveniens was applicable as a "rule of procedure" under Article III of the New York Convention); then citing Aristides Diaz-Pedrosa, Shaffer's Footnote, 109 W. VA. L. REV. 17, 24 (assuming that the due process jurisdictional requirement falls within the local "rules of procedure" in Article III); and then citing William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 262 (Dec. 2006) (maintaining that such approach is not supported by the drafting history of the New York Convention)).

204. *See supra* Part II(B).

205. New York Convention, *supra* note 28, art. III; *see also supra* Part II(A).

206. *See* UNCITRAL Secretariat Guide, *supra* note 37, at 84–93 (describing Article III's "pro-enforcement bias" and explaining that courts apply domestic procedure only insofar as it does not tighten the Convention's terms); *see also supra* Part II(A).

contravention of the practice of other countries that are parties to the NYC, as well as leading scholarship on the topic.[207]

Courts in most other NYC states[208] do not impose personal jurisdiction requirements akin to U.S.-style minimum contacts analyses when confirming foreign awards.[209] Rather, most other jurisdictions find that "the mere presence of assets belonging to the award debtor" is sufficient to sustain an action for enforcement.[210] Some require even less.[211] Additionally, the UNCITRAL Secretariat's Guide emphasizes a "pro-enforcement bias" and explains that most courts grant exequatur without demanding local assets, noting only a single (outlier) German decision that briefly refused enforcement for lack of assets.[212] The

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207. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 65 (George A. Bermann ed, 2017) ("Jurisdiction of course is not the prototypical procedural issue . . . . [P]rocedural issues ordinarily relate to the question how an enforcement action is to be conducted, and not (as in the case of judicial jurisdiction) to the question whether such an action is to be conducted.").

208. *Id.* at 66 n.265 ("Among these countries are Austria, Argentina, Brazil, China, the Czech Republic, France, Germany, Hungary, Italy, Japan, Mexico, Norway, Paraguay, Peru, Portugal, Switzerland, Turkey, and Venezuela.").

209. *Id.* at 66 ("The United States is an especially dramatic case in regard to personal jurisdiction. In keeping with general U.S. law principles, the award debtor must, in order to be subject to the personal jurisdiction of the court where enforcement is sought, not only meet the statutory requirements for the exercise of personal jurisdiction in the U.S. state in which the court sits, but also, as a matter of due process under the U.S. Constitution, have sufficient 'minimum contacts' with that state.").

210. *Id.*

211. *Id.* at 67, 67 n.272 ("[I]n a minority of jurisdictions reporting on this issue, the law apparently imposes no particular personal jurisdiction requirements – not even a requirement of the presence of assets . . . . Among these countries are Australia, Canada, Croatia, Israel, Slovenia, and Uruguay. This also appears to be the case in the Netherlands."). *But see id.* at 66 (discussing how Korea and Switzerland require more than merely the presence of assets to sustain an action).

212. UNCITRAL Secretariat Guide, *supra* note 37, at 80

> "While parties seeking recognition and enforcement of foreign arbitral awards have often seized the courts of Contracting States where the award-debtor had assets, or where they believed the collection of a monetary award was more likely, neither article III nor any other provision of the Convention requires the presence of assets in the jurisdiction where recognition and enforcement is sought. With the exception of a German decision that refused enforcement of a foreign arbitral award in a case where the award-debtor had no assets in Germany, the courts of the Contracting States have not conditioned recognition and enforcement under the Convention to the presence of assets. Leading commentators confirm that the presence of assets in the jurisdiction in which recognition and enforcement is sought is not a condition of the recognition and enforcement of an award under the Convention." (citing Germany, Kammergericht [KG] [Higher Regional Court of

divergent practice in the United States undermines the success of the NYC.[213]

Leading commentary is to the same effect. For instance, Albert Jan van den Berg, widely regarded as a preeminent commentator on the NYC,[214] in describing the wording of Article III observes that in "a number of other countries, no such additional requirements are imposed."[215] Van den Berg explains the logic behind this interpretation because petitioners may have an interest to enforce an action before finding identifiable assets "if it is expected that assets belonging to the respondent will move to the country concerned in the near future."[216] Additionally, Gary Born, author of the leading treatise in international commercial arbitration,[217] argues that the Convention does not "limit the forums where enforcement or recognition of an award may be sought."[218] Thus, when courts impose a jurisdictional nexus requirement, they effectively add a defense the Convention does not

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Berlin], Aug. 10, 2006, 20 Sch 07/04 (refusing enforcement for lack of assets), rev'd, Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 17, 2008, III ZB 97/06 (Ger.)).

213. BERMANN, *supra* note 34, at xiii ("[T]he Convention is only as good as the use that can be, and is, made of it. And, again like most treaties, its efficacy depends on the will and the ability of national courts to act in compliance with it.").

214. *See* Faculty Biography, Georgetown Law, https://www.law.georgetown.edu/faculty/albert-jan-van-den-berg/ (last visited Aug. 22, 2025); *see also* Erica Stein, *A Tribute to Professor Albert Jan van den Berg*, in *Recent Developments*, New York Convention (Nov. 27, 2024); Hanotiau & van den Berg, *Albert Jan van den Berg*, https://www.hvdb.com/albert-jan-van-den-berg/ (last visited Aug. 22, 2025) (listing leadership roles including Honorary President of ICCA and past President of the LCIA).

215. Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18 ICC INT'L CT. ARB. BULL. 1, 23 (2007).

216. *Id.*; *see also* Loukas A. Mistelis & Domenico D. Pietro, *New York Convention, Article III [Obligation to Recognise and Enforce Arbitral Awards]*, in CONCISE INTERNATIONAL ARBITRATION 10 (Loukas A. Mistelis ed., 2010); Emilia Onyema, *Formalities of the Enforcement Procedure* (Articles III and IV), ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 597, 603 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

217. *See* Gary B. Born, Author Biography, Global Arb. Rev., https://globalarbitrationreview.com/authors/gary-b-born (last visited Aug. 22, 2025).

218. Gary B. Born, *International Commercial Arbitration* § 22.03[A], at 4877 (Kluwer Law Int'l 3d ed. 2021); *see also id.* § 22.03[B], at 4878 ("Despite this, a few national courts have imposed jurisdictional, forum non conveniens, or similar limits on actions to recognize foreign awards. As discussed below, the consistency of at least some of these limits with the New York Convention . . . as well as their wisdom, is doubtful.")

recognize.[219] U.S. courts could avoid the thorny debate over whether Article III's reference to "rules of procedure" permits such obstacles by grounding enforcement jurisdiction in the parties' consent, rather than importing minimum contacts tests. These divergences highlight not only a doctrinal inconsistency with the NYC but also a practical risk: they threaten to erode the United States' credibility as a reliable venue for arbitration on the global stage.

The United States has long positioned itself as a leading venue for international arbitration, aiming to compete with other global arbitration hubs like London, Paris, and Singapore.[220] By acceding to the New York Convention in 1970 and implementing it through Chapter 2 of the Federal Arbitration Act (FAA), Congress has embedded in U.S. law a robust framework for the recognition and enforcement of foreign arbitral awards, evidencing a clear policy in favor of their enforcement.[221] Federal courts have likewise embraced a liberal policy favoring arbitration, particularly in the international context, recognizing its value for cross-border commerce and foreign relations.[222] Major cities such as New York and Houston serve as key arbitration seats, attracting parties from Latin America, Europe, and Asia, and hosting prominent arbitral institutions.[223]

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219. *See* FERRARI, ROSENFELD & FELLAS, *supra* note 4, at 211 ("[A] rule of procedure must be geared at giving force to the obligation to recognize and enforce arbitral awards, as opposed to creating obstacles that would effectively add a new ground for refusal of recognition and enforcement. Rules of procedure, in principle, should not determine whether awards can be enforced altogether. Rather, they should set forth modalities for determining how and under what conditions an award can be enforced.").

220. Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 72–73, 79 (2003) (discussing the United States' strong influence on international arbitration as a whole).

221. Gerald Aksen & Wendy S. Dorman, *Application of the New York Convention by United States Courts: A Twenty-Year Review (1970–1990)*, 2 AM. REV. INT'L ARB. 1 (1991) (assessing how the U.S. has implemented these laws and applied them to "consistently [compel] arbitration and [confirm] arbitral awards under the Convention").

222. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 631 ("And at least since this Nation's accession in 1970 to the Convention, . . . and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.").

223. IBA Arb. 40 Subcommittee, *The Current State and Future of International Arbitration: Regional Perspectives* 11 (Sept. 2015); Andrew J. Tuck, Kristen Bromberek & Jamie George, *International Arbitration: The Role of Federal Courts and Strong Support from the Eleventh Circuit*, THE FEDERAL LAWYER, Aug. 2017, at 61–66, https://www.alston.com/-/media/files/insights/publications/2017/08/international-arbitration–the-role-of-the-federal.pdf.

Maintaining this status depends not just on infrastructure, but on legal predictability, neutrality, and a demonstrated respect for international commitments. If courts hold that consent to arbitrate is sufficient to establish jurisdiction under the FSIA's arbitration exception, without layering on additional U.S.-specific requirements like minimum contacts, it will reinforce the United States' standing as a reliable and arbitration-friendly forum. Such a decision would support U.S. treaty obligations, encourage reciprocal treatment abroad, and assure parties that U.S. courts can effectively enforce awards rendered outside the United States. But if the Court continues to impose additional hurdles to enforcement, it risks introducing legal uncertainty, undermining the NYC, and prompting other jurisdictions to respond in kind. That result would jeopardize the reciprocity the Convention seeks to ensure and diminish confidence in the U.S. as a neutral seat for arbitration, undermining its ambition to remain a competitive hub in the global arbitration landscape.

V. CONCLUSION

In sum, the Supreme Court's decision in *Devas* underscores that jurisdiction by consent, not minimum contacts, should govern the enforcement of arbitral awards under the NYC. The logic is straightforward: by agreeing to arbitrate, parties also agree to recognition and enforcement in any contracting state. This principle reflects both constitutional sufficiency and international consensus, and it avoids the doctrinal incoherence of requiring sovereigns to meet a higher jurisdictional bar than private actors. Embracing consent as the foundation of enforcement harmonizes U.S. practice with the Convention's pro-enforcement framework, removes unnecessary barriers to recognition, and restores confidence in the United States as a reliable and arbitration-friendly forum.