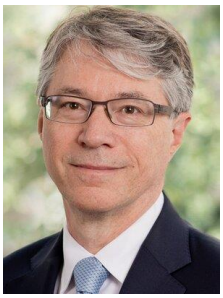
'Minimum Contacts' Issues At Stake In High Court FSIA Case

By **David Ogden, David Bowker and Alyson Zureick** (October 11, 2024)



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On Oct. 4, the U.S. Supreme Court granted certiorari in CC/Devas Ltd. v. Antrix Corp. Ltd. to decide whether either the Foreign Sovereign Immunities Act or the U.S. Constitution requires plaintiffs to establish personal jurisdiction over a foreign state defendant by showing that it has "minimum contacts" with the U.S.

In Devas, the U.S. Court of Appeals for the Ninth Circuit split with other circuits and held that the FSIA itself requires a showing that a defendant foreign state has minimum contacts with the U.S. for purposes of personal jurisdiction.[1]

That ruling made it more difficult for plaintiffs to maintain suits against foreign states in the Ninth Circuit than in other circuits, such as the U.S. Courts of Appeals for the D.C., Second, Seventh and Eleventh Circuits, which have ruled that the FSIA does not require a showing of minimum contacts and that foreign states are not "persons" entitled to due process under the Fifth Amendment.[2]

In its review of Devas, the Supreme Court must decide whether the Ninth Circuit correctly concluded, based on scant legislative history, that a minimum contacts requirement should be implied in the FSIA, despite its absence from the act's personal jurisdiction provision at Title 28 of the U.S. Code, Section 1330(b).

If the court were to reject that reasoning, it could still choose to impose a minimum contacts requirement, but doing so would require finding that the due process clause protects foreign states. This would dramatically change the landscape created by Congress, however, as it would erect a new and significant barrier to U.S. suits against foreign states in many circumstances previously permitted under the FSIA.

Background

The case concerns a long-running dispute between Devas Multimedia Private Ltd., an Indian corporation created by U.S. investors, and Antrix Corp. Ltd., the Indian government's wholly owned space and satellite company, over the Indian government's repudiation of a contract with Devas regarding the construction and launch of two satellites.

Devas submitted the dispute to arbitration under the rules of the International Chamber of Commerce pursuant to the arbitration clause in the Devas-Antrix contract. The arbitral tribunal found that Antrix "wrongful[ly] repudiat[ed]" the contract and awarded Devas $562.5 million plus interest.[3]

The case eventually made its way to the U.S. District Court for the Western District of Washington, where Devas filed a petition to confirm the arbitration award. The district court confirmed the award and entered a $1.3 billion judgment against Antrix.[4]

The district court held minimum contacts were not required to exercise

jurisdiction over Antrix.

In addressing Devas' petition to confirm the arbitration award against Antrix, the district court confronted a key threshold issue: whether personal jurisdiction existed as to Antrix. Antrix had moved to dismiss the petition on the grounds that it lacked minimum contacts with the U.S. and so the court lacked personal jurisdiction over it.

The district court rejected this argument. According to the district court, because Antrix conceded that it was an "agency or instrumentality" of a foreign state (India), and was "wholly owned and controlled by" that foreign state such that a principal-agent relationship existed between them, Antrix — like the foreign state itself — was not a "person" entitled to due process rights under the Fifth Amendment, and thus no minimum contacts analysis was required.[5]

Instead, it was sufficient that the statutory requirements for personal jurisdiction set out in the FSIA's long-arm provision had been met, specifically that: (1) one of the FSIA's exceptions to sovereign immunity applied — here, the arbitration exception under Title 28 of the U.S. Code, Section 1605(a)(6), which abrogates immunity in an action against a sovereign to confirm an arbitral award; and (2) service was properly made.[6]

In the alternative, the district court held that Antrix had sufficient contacts with the U.S. to satisfy due process based on Antrix's negotiations with a U.S. consulting company, which had led to its agreement with Devas.[7]

The Ninth Circuit reversed, held that minimum contacts are required to exercise jurisdiction over Antrix and denied rehearing en banc.

Antrix appealed. The Ninth Circuit panel issued its decision in August 2023, reversing the district court. The Ninth Circuit recognized that the parties agreed that Antrix was a foreign state for purposes of the FSIA.[8] It also recognized that the FSIA's two explicit requirements for personal jurisdiction were met.[9]

The Ninth Circuit went further, however, and concluded that the FSIA itself requires a minimum contacts analysis to establish personal jurisdiction against Antrix as a foreign state. This ruling was based on a decades-old Ninth Circuit precedent — 1980's Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica[10] — which, according to the Ninth Circuit, had relied on a "reading of the FSIA's legislative history" to conclude that the FSIA's long-arm jurisdiction provision in Section 1330(b) was "intended to be consistent with the minimum contacts analysis" of International Shoe Co. v. Washington, decided by the Supreme Court in 1945, and its progeny.[11]

The Ninth Circuit further concluded that Devas had not shown that Antrix had sufficient contacts with the U.S. for personal jurisdiction to be proper.[12]

Two of the panel judges — U.S. Circuit Judges Eric D. Miller and Lucy H. Koh — concurred in the decision on the grounds that it "correctly applies our precedent," but disagreed with the decision on the merits and noted that "[i]n an appropriate case, we should reconsider [the issue] en banc."[13]

Devas accepted the apparent invitation and petitioned for rehearing en banc. The Ninth Circuit denied the petition in February 2024.[14] The denial provoked a vigorous dissent from seven Ninth Circuit judges, led by U.S. Circuit Judge Patrick J. Bumatay. Judge Bumatay took issue with the decision on several grounds:

- First, as Judge Bumatay reasoned, the panel's decision conflicted with the plain language of Section 1330(b), which provides for personal jurisdiction over a foreign state so long as an FSIA exception applies — i.e., there is subject matter jurisdiction — and service is properly completed. Judge Bumatay noted that the Gonzalez court had read a minimum contacts inquiry into this provision "under the most dubious of guises — legislative history. ... Today, it's obvious that we cannot appeal to legislative history to undo a statute's plain meaning."[15]

- Second, in Judge Bumatay's view, the Gonzalez court had misread the FSIA's legislative history, which merely noted that some FSIA exceptions to sovereign immunity "'embodied' a minimum-contacts analysis" for purposes of subject matter jurisdiction but did not address personal jurisdiction under the FSIA long-arm provision.[16]

- Third, Judge Bumatay rejected the idea that foreign state defendants are persons entitled to due process.[17] Judge Bumatay concluded: "Today, the consensus among circuit courts squarely rejects any constitutional basis for a minimum-contacts regime. So, yet again, the Ninth Circuit stands alone."[18]

Devas next petitioned the Supreme Court for certiorari to answer whether either the FSIA or the Fifth Amendment requires a minimum contacts analysis for personal jurisdiction over a foreign state defendant. The Supreme Court granted certiorari on Oct. 4.

What's at stake: Minimum contacts protections will further shield foreign states from U.S. suits.

The Supreme Court now has the opportunity to bring the Ninth Circuit's precedent in line with other circuits that have concluded that a minimum contacts analysis does not apply to foreign state defendants — or reject that approach and raise the jurisdictional bar that plaintiffs must surmount when suing foreign states in U.S. courts.

The court could decide the issue by interpreting the FSIA's long-arm provision and leave it at that (if it decides that the FSIA requires minimum contacts for personal jurisdiction), or it could tackle the thorny question of whether foreign states have due process rights — an issue it elided in Republic of Argentina v. Weltover Inc. in 1992[19] — and whether due process requires a minimum contacts analysis.

The decision could have significant implications for the viability of suits against foreign sovereigns in U.S. courts.

Take, for instance, cases like Devas', where a plaintiff is attempting to confirm and enforce an arbitration award against a foreign state in U.S. courts. The FSIA's arbitration exception to foreign sovereign immunity has no explicit geographic nexus; it simply requires that the award is "governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards."[20]

Award-holders often seek to confirm arbitration awards against foreign states in U.S. courts in part because U.S. law permits them broad postjudgment discovery to locate the defendant's assets against which they might execute to satisfy the judgment.

Requiring plaintiffs to show that the foreign state defendant has sufficient contacts with the U.S. — either continuous and systematic enough that the foreign state defendant is at home in the U.S. for general jurisdiction, or sufficiently related to the award or the underlying

arbitration such that the dispute arises out of or relates to those contacts for specific jurisdiction — could dampen award-holders' ability to prosecute enforcement actions against recalcitrant foreign states that refuse to comply with arbitration awards.

This also raises questions regarding what contacts might be sufficient for general jurisdiction over a foreign state — a question that might have different answers for a foreign state's political subdivisions as opposed to its state-owned corporations. Courts have rarely addressed this issue given that most jurisdictions do not apply a minimum contacts analysis for personal jurisdiction over foreign state defendants.

Other FSIA exceptions similarly do not require a geographic nexus between the foreign state defendant and the territory of the U.S.

For example, the FSIA's "terrorism exception" allows U.S. citizens to sue designated state sponsors of terrorism for acts of torture, extrajudicial killing, aircraft sabotage or hostage-taking.[21] These states, which include Iran and Syria, are not at home in the U.S. for purposes of general jurisdiction, and the acts of terrorism that form the basis for these suits almost never occur in the U.S., as relevant to specific jurisdiction.

But many plaintiffs have brought and succeeded in such suits, particularly in the U.S. Court of Appeals for the D.C. Circuit, where personal jurisdiction over the foreign state is established by showing that an FSIA exception applies and the defendant foreign state was properly served. Cases brought under the terrorism exception do require a U.S. nexus based upon the U.S. nationality of the victim.

The Devas case also has implications for suits under other FSIA exceptions with U.S. nexus requirements. The FSIA's expropriation exception allows for subject matter jurisdiction in suits against a foreign state where, among other things, there is a U.S. nexus because the expropriated property — or property exchanged for it — is in the U.S. or is "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."[22]

The exception does not require that the suit arise out of the foreign state's activities in the U.S., as relevant to specific jurisdiction, or even that a significant volume of commercial activity take place in the U.S. Adding a minimum contacts analysis for personal jurisdiction would make it vastly more difficult — indeed, likely impossible in many cases — for plaintiffs to bring claims for unlawful expropriations conducted by foreign states. That is in part because it is rare for foreign state defendants to expropriate property located in the U.S. or to have other expropriation-related contacts in U.S. territory.

Even if the Supreme Court were to decide that foreign states have due process rights under the Fifth Amendment, this would not necessarily require a minimum contacts analysis. As Judge Bumatay observed in his dissent from the denial of rehearing en banc, there may be an "emerging consensus ... that the political branches may dictate what process is afforded to foreign sovereigns."[23] In other words, the Supreme Court might decide that defendant foreign states are owed due process but that Congress decided what process was required in enacting the FSIA long-arm provision — and that does not include a minimum contacts analysis.

To be sure, there are ways for the court to narrow its ruling in this case. Antrix is a state-owned corporation and some federal courts have held that, while foreign governments are not owed due process, state-owned corporations are to the extent they are separate juridical entities from the foreign state itself.[24] Here, the district court concluded that Antrix was so controlled by India that it should be treated as the foreign state and was not

entitled to due process.

The Ninth Circuit did not closely scrutinize the issue because it did not reach the due process question and instead interpreted the FSIA, which includes certain state-owned entities in the definition of the "foreign state."[25]

If the Supreme Court adopted the Ninth Circuit's approach, it would require a minimum contacts analysis for personal jurisdiction over the foreign state broadly defined — whether the government itself or a state-owned corporation. But if it rejected that approach and turned to the due process issue, it could simply tackle the issue of whether a minimum contacts analysis is required for state-owned corporations, and, as in Weltover, avoid the broader question of what process, if any, is due to foreign governments themselves.

Finally, the court's approach to this case could be affected by the views of the U.S. government and other amicus curiae on these issues of importance to U.S. foreign relations and international commerce. The U.S., as a litigant and potential defendant in courts overseas, relies on the protections of sovereign immunity to shield itself from lawsuits and liability in foreign courts, and thus has its own interests in the potential reciprocal application of U.S. courts' sovereign immunity rulings in foreign fora.

The U.S. also has an interest in ensuring that U.S. victims of wrongdoing by foreign states have an adequate judicial forum for the resolution of claims where there is no sovereign immunity and a clear U.S. nexus (that may or may not constitute "minimum contacts").

The U.S.'s interest in providing access to justice in U.S. courts may be heightened today, as authoritarian and other foreign states increasingly target U.S. citizens, companies and entities for unlawful treatment while denying them any local forum capable of fairly adjudicating claims against the state. Conversely, other potential amici — including certain foreign states and the companies they control — may express their concerns about the prospect of facing justice in U.S. courts, especially in the absence of minimum contacts with the U.S.

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[1] Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd., No. 20-36024, 2023 WL 4884882 (9th Cir. Aug. 1, 2023).

[2] See TMR Energy Ltd. v. State Property Fund of Ukraine, 411 F.3d 296, 303 (D.C. Cir. 2005); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 99 (D.C. Cir. 2002); Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 49 (2d Cir. 2021); Abelesz v.

Magyar Nemzeti Bank, 692 F.3d 661, 694 (7th Cir. 2012); S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1303 (11th Cir. 2000).

[3] Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd., No. C18-1360 TSZ, 2020 WL 6286813, at *2 (W.D. Wash. Oct. 27, 2020).

[4] Devas, 2020 WL 6286813, at *7.

[5] Devas, 2020 WL 6286813, at *3.

[6] 28 U.S.C. § 1330(b); see also Devas, 2020 WL 6286813, at *3.

[7] Devas, 2020 WL 6286813, at *3-4.

[8] Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd., No. 20-36024, 2023 WL 4884882, at *1 (9th Cir. Aug. 1, 2023).

[9] Id.

[10] Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica, 614 F.2d 1247 (9th Cir. 1980).

[11] Devas, 2023 WL 4884882, at *1-2.

[12] Id. at *2.

[13] Id. at *3, *4 (Miller, J., concurring).

[14] Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd., 91 F.4th 1340 (9th Cir. 2024).

[15] Devas, 91 F.4th at 1342-1343 (Bumatay, J., dissenting).

[16] Id. at 1343.

[17] Id. at 1350-1351.

[18] Id. at 1352.

[19] Republic of Argentina v. Weltover, 504 U.S. 607, 619-620 (1992).

[20] 28 U.S.C. § 1605(a)(6).

[21] 28 U.S.C. § 1605A.

[22] 28 U.S.C. § 1605(a)(3).

[23] Devas, 91 F.4th at 1351.

[24] See, e.g., TMR Energy, 411 F.3d at 301.

[25] 28 U.S.C. § 1602(a).