



1           IN THE SUPREME COURT OF THE UNITED STATES

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3   CC/DEVAS (MAURITIUS) LIMITED,            )

4   ET AL.,    )

5                                    Petitioners,            )

6                                    v.                                    ) No. 23-1201

7   ANTRIX CORP. LTD., ET AL.,            )

8                                    Respondents.            )

9   - - - - -

10   DEVAS MULTIMEDIA PRIVATE LIMITED,    )

11                                    Petitioner,            )

12                                    v.                                    ) No. 24-17

13   ANTRIX CORP. LTD., ET AL.,            )

14                                    Respondents.            )

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17                                    Washington, D.C.

18                                    Monday, March 3, 2025

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20           The above-entitled matter came on for

21   oral argument before the Supreme Court of the

22   United States at 10:04 a.m.

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1 APPEARANCES:  
2 AARON STREETT, ESQUIRE, Houston, Texas; on behalf of  
3 the Petitioner in Case 24-17.  
4 MATTHEW D. MCGILL, ESQUIRE, Washington, D.C.; on  
5 behalf of the Petitioners in Case 23-1201.  
6 SARAH M. HARRIS, Acting Solicitor General, Department  
7 of Justice, Washington, D.C.; for the United  
8 States, as amicus curiae, supporting the  
9 Petitioners.  
10 CARTER G. PHILLIPS, ESQUIRE, Washington, D.C.; on  
11 behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-1201, CC/Devas Mauritius Limited versus Antrix, and the consolidated case.

Mr. Streett.

ORAL ARGUMENT OF AARON STREETT  
ON BEHALF OF THE PETITIONER IN CASE 24-17

MR. STREETT: Mr. Chief Justice, and may it please the Court:

An arbitral award against a foreign state is worth little if no courts can enforce it. Congress added the FSIA's arbitration exception to allow U.S. courts to enforce New York Convention awards against foreign sovereigns. The Ninth Circuit's holding that the FSIA requires minimum contacts is atextual and would gut Congress's purpose. Antrix has abandoned it, and this Court should reject it.

Antrix's new argument that the arbitration exception requires a nexus with U.S. commerce is waived and meritless. Congress knew how to require a U.S. commercial nexus, and it did not do so in the arbitration exception to

1 allow enforcement of all convention awards.

2           Antrix's constitutional defense also  
3 fails. Every circuit post-Weltover has  
4 correctly held that foreign states are not  
5 persons protected by due process. Nor does the  
6 Fifth Amendment reverse-incorporate a minimum  
7 contacts requirement from the Fourteenth. In  
8 any case, Antrix consented to personal  
9 jurisdiction when it agreed to arbitrate under  
10 the convention.

11           I welcome the Court's questions.

12           JUSTICE THOMAS: Would you elaborate  
13 on your -- would you elaborate on your point  
14 that Antrix -- Antrix's point -- argument that  
15 the arbitration exception requires minimum  
16 contact without more?

17           MR. STREETT: Yes, Your Honor. And I  
18 would like to first point out that Antrix  
19 conceded below that the arbitration exception  
20 applies. The district court recognized that,  
21 and the circuit court recognized that at pages 4  
22 and 22 to 23.

23           Now they are arguing that the  
24 arbitration exception, as I understand it, by  
25 its own terms requires a nexus with U.S.

1 commerce. I don't anymore argue -- understand  
2 them to be arguing that the arbitration  
3 exception requires minimum contacts under the  
4 International Shoe standard.

5 But, to the argument that Antrix does  
6 make, which is that the "subject matter capable  
7 of settlement by arbitration" language in the  
8 arbitration exception somehow reads in a U.S.  
9 commercial nexus, I would have a couple things  
10 to say about that.

11 First of all, Congress knew how to  
12 require a nexus with U.S. commerce. It did that  
13 in the commercial activity exception. It did  
14 that in (a)(2) through (a)(5) of the original  
15 FSIA exceptions. But Congress did not do that  
16 here. Because it was looking to enforce the New  
17 York Convention, which does not require minimum  
18 contacts, Congress viewed that as an example of  
19 a waiver and a consent to personal jurisdiction,  
20 similar to what the original FSIA already  
21 allowed under (a)(1).

22 Now Antrix's textual argument  
23 regarding the "subject matter capable" language  
24 is not only waived, but it's completely  
25 meritless. No court, no scholar has ever

1 adopted that, and that's for good reason. That  
2 "subject matter capable" language comes directly  
3 from the New York Convention, and this Court  
4 construed that very language in Mitsubishi  
5 Motors, and this Court explained that for a  
6 matter to fall outside of the "subject matter  
7 capable of arbitration" clause, Congress would  
8 need to expressly legislate that a particular  
9 category of cases was not arbitrable and instead  
10 had to be heard by U.S. courts.

11 Congress knows how do that. We cite  
12 examples in our reply brief. Perhaps the most  
13 recent is 9 U.S.C. Section 402, in which  
14 Congress held that sexual assault cases at the  
15 election of the plaintiff are not arbitrable and  
16 must be heard by a U.S. court.

17 But Congress did not do that with  
18 respect to international commercial disputes.  
19 And Antrix has cited no statute in which  
20 Congress carved out international commercial  
21 affairs from arbitration.

22 Quite the contrary, the New York  
23 Convention, in Articles II and III, expressly  
24 require U.S. courts to recognize international  
25 arbitration awards so long as they are



1 commercial and rendered in the territory of a  
2 signatory state.

3 JUSTICE JACKSON: So is it your  
4 argument that we do have to address the  
5 arbitration exception argument that is now being  
6 made? I mean, I understand you to be saying  
7 that the argument that Antrix is making today is  
8 not the argument that they made below and,  
9 therefore, perhaps the Court shouldn't reach it.

10 Is that your view? And what do we do  
11 with the fact that it relates to subject matter  
12 jurisdiction? Does that have any role?

13 MR. STREETT: So this Court should  
14 reach it at least to the extent to say that it  
15 has been affirmatively waived below when Antrix  
16 conceded that the arbitration exception applied.  
17 We think that's all that the Court needs to do.

18 Now, of course, we think this issue is  
19 easy enough that if the Court thinks it's  
20 closely enough related to the question  
21 presented, that it can readily reject Antrix's  
22 argument.

23 JUSTICE JACKSON: Can it be waived?  
24 Doesn't it go to subject matter jurisdiction?

25 MR. STREETT: I think, ordinarily,

1 we -- that's a concept we would think about, but  
2 not under the Foreign Sovereign Immunities Act  
3 because the Foreign Sovereign Immunities Act  
4 bases subject matter jurisdiction on one of the  
5 immunity exceptions being satisfied.

6 We came into court below and  
7 identified the arbitration exception as having  
8 obviously been satisfied. Antrix agreed to  
9 that. And when Antrix agreed to that, that  
10 became a waiver under 1605(a)(1), which  
11 recognizes that if foreign states wish to, they  
12 may come into U.S. court and simply waive  
13 immunity or waive objections to personal  
14 jurisdiction.

15 Turn -- turning to the constitutional  
16 argument for a moment, we agree that the Court  
17 should reach that issue, in part because this  
18 Court already has a similar case before it in  
19 which all three of the potential sub-issues in  
20 Antrix's constitutional defense were passed upon  
21 in the Second Circuit.

22 And I'm referring, of course, there to  
23 the Fuld versus PLO case. That case potentially  
24 contains both the person issue -- both the  
25 question of whether the minimum contacts test is

1 required by the Fifth Amendment in an equal way  
2 to the Fourteenth, and it also includes a  
3 statute that deems consent to personal  
4 jurisdiction.

5 We think the Court could apply  
6 whatever it says in Fuld to the -- the dispute  
7 here and may be able to straightforwardly reject  
8 aspects or all of Antrix's constitutional  
9 defense.

10 JUSTICE SOTOMAYOR: I'm sorry, you're  
11 asking us to reach it or not reach it?

12 MR. STREETT: We're -- we're asking  
13 you to reach it, and we think that it may be --

14 JUSTICE SOTOMAYOR: If we have a case  
15 where all issues are being raised, why should we  
16 reach part of them here when that wasn't reached  
17 below?

18 MR. STREETT: My -- my suggestion was  
19 that because the Court is going to have that  
20 same case before it in one month, it may make  
21 sense to observe how the Court resolves that  
22 case and then apply whatever teaching --

23 JUSTICE SOTOMAYOR: Hold yours until  
24 then?

25 MR. STREETT: I think that would make

1 a lot of sense because, for example, if the  
2 Court -- if the --

3 JUSTICE SOTOMAYOR: Why can't we just  
4 answer the question presented, which was whether  
5 the FSIA requires minimum contacts statutorily,  
6 and let you on remand or let the court below on  
7 remand address the issues that weren't addressed  
8 below, the arbitration issue and the minimum  
9 contacts issue?

10 MR. STREETT: So the Court can  
11 certainly do that, and we would be satisfied  
12 with that disposition, and we think it would do  
13 a world of good in clearing up that important  
14 issue of federal law.

15 Our point is -- is simply that, you  
16 know, even apart from Fuld, we agree with the  
17 United States that there is a quite  
18 straightforward way to resolve Antrix's  
19 constitutional defense here that importantly  
20 arises in a lot of FSIA cases and really causes  
21 confusion in the background of a lot of FSIA  
22 cases.

23 And I'm referring particularly to two  
24 of the sub-issues of Antrix's constitutional  
25 defense. The first is that even if you assume

1 Antrix is a person and even if you assume the  
2 Fifth Amendment generally requires minimum  
3 contacts, consent to personal jurisdiction is  
4 always a way to satisfy the Fourteenth  
5 Amendment.

6 And, as Professor Feldman spells out  
7 at great length in his amicus brief, Congress  
8 operated on the assumption that agreeing to  
9 arbitrate in a New York Convention state  
10 consents to personal jurisdiction in the United  
11 States. And that is true as a constitutional  
12 matter as well.

13 I think this is an a fortiori case  
14 from Mallory, for example, because these are the  
15 very instances in which a foreign state would  
16 know that it was consenting to personal  
17 jurisdiction in the United States.

18 JUSTICE SOTOMAYOR: Thank you,  
19 counsel. You've answered my question.

20 MR. STREETT: I -- I think the second  
21 constitutional issue on which we agree with the  
22 United States that the Court could reach, and I  
23 say may not reach in Fuld, is whether foreign  
24 states are persons under the Due Process Clause,  
25 and --

1 JUSTICE JACKSON: But just to be  
2 clear, the lower court in this case did not rule  
3 on that, so we would be doing this in the first  
4 instance?

5 MR. STREETT: The district court ruled  
6 on it, but the court of appeals did not reach  
7 it. And the court of appeals recognized that  
8 there is a lot of confusing pre-Weltover  
9 precedent out there that suggests that foreign  
10 states are persons, but it -- the -- the panel  
11 below grounded the minimum contacts requirement  
12 in the statute and not in the Constitution.

13 And we are submitting to this Court  
14 that it would be helpful to clear up a lot of  
15 that confusion that is causing courts to -- to  
16 adhere or potentially adhere to pre-Weltover  
17 precedent by agreeing with our position and the  
18 position of the United States that foreign  
19 states are not persons.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Thomas, anything further?

23 Justice Sotomayor?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 Justice Barrett?

2 Thank you, counsel.

3 Mr. McGill.

4 ORAL ARGUMENT OF MATTHEW D. MCGILL

5 ON BEHALF OF THE PETITIONERS IN CASE 23-1201

6 MR. MCGILL: Mr. Chief Justice, and

7 may it please the Court:

8 The Ninth Circuit's construction of  
9 Section 1330(b) is unfaithful to its text.  
10 Congress provided in the FSIA that personal  
11 jurisdiction shall exist over every claim where  
12 there is an immunity exception and service.  
13 There simply is no room in that very clear  
14 statutory text for a minimum contacts  
15 requirement.

16 And the Fifth Amendment does not  
17 condemn Congress's choice, a choice that  
18 Congress made in the realm of foreign affairs,  
19 where the political branch's powers are at their  
20 apogee.

21 India is not a natural or artificial  
22 person protected by the Fifth Amendment. And,  
23 in any event, the FSIA provides at least as much  
24 process as this Court hypothesized would be  
25 sufficient to hale a foreign natural person into

1 court almost 200 years ago in Toland versus  
2 Sprague.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Am I right that you  
5 want us to resolve the constitutional question?

6 MR. MCGILL: Yes, Your Honor.

7 JUSTICE THOMAS: Do we need to resolve  
8 it?

9 MR. MCGILL: You do not need to  
10 resolve it to reverse the judgment of the Ninth  
11 Circuit. The district court held that there --  
12 that due process did not apply to the -- to  
13 Antrix here because it was the alter ego of  
14 India.

15 No statutory argument had been raised  
16 in the district court. It was conceded in the  
17 district court that there was juris -- personal  
18 jurisdiction under the statute. But we have  
19 urged that -- that this Court reach the  
20 constitutional question lest the -- any remand  
21 here be a round trip.

22 The Ninth Circuit has held in its  
23 decision, Gregorian versus Izvestia, that if  
24 there is no immunity under the FSIA, the court  
25 still must then consider whether "the



1 constitutional constraints of the Due Process  
2 Clause preclude the assertion of personal  
3 jurisdiction."

4           And that require -- "requires  
5 satisfaction of the traditional minimum contacts  
6 test." So -- and, as we see from this case, the  
7 Ninth Circuit has been at least somewhat  
8 reluctant to address its older precedents  
9 post-Weltover. It has relied on Miller versus  
10 Gammie, saying that there must be a clear  
11 decision by this Court overruling -- overruling  
12 the prior decisions of the Ninth Circuit.

13           So, to turn quickly to the new  
14 argument that has been advanced by Antrix in  
15 this Court concerning 1605(a)(6), the  
16 arbitration exception, that fails for three  
17 independent reasons.

18           First -- in addition to the fact that  
19 it's waived, but, if we look to the text of  
20 Section 1605(a)(6), the argument is essentially  
21 that the -- the words "subject matter capable of  
22 arbitration under the laws of the United States"  
23 requires that the plaintiff be a United States  
24 person.

25           That simply does not follow from any

1 part of the text of the U.S. Code. The -- this  
2 provision, the "subject matter capable," as my  
3 friend represented, is taken straight from the  
4 New York Convention. This Court said in  
5 Mitsubishi Motors that for something to be  
6 deemed subject matter not capable of being  
7 arbitrated under the laws of the United States  
8 requires an express direction from Congress.

9           There is an express direction of  
10 Congress of that type in Section 402 of the  
11 Federal Arbitration Act, 9 U.S.C. 402, but  
12 Section 2 and Section 203 do not provide  
13 anything like that. All those provisions  
14 provide is what the FAA and the New York  
15 Convention apply to. There is no prohibition on  
16 arbitration under the laws of the United States  
17 of things that are not covered by the FAA.

18           The -- so I think that's -- that's the  
19 first reason, but then the -- after you -- even  
20 if it were true that -- that the arbitration  
21 exception was limited to U.S. persons, that  
22 would not get you to a minimum contacts  
23 standard.

24           The minimum contacts standard looks to  
25 the contacts of the defendant. The fact that

1 it's a U.S. person bringing the arbitration  
2 claim is practically neither here nor there to  
3 a -- to the -- to a minimum contacts analysis.

4 So there is no basis for holding that  
5 the arbitration exception itself -- no textual  
6 basis for holding that the arbitration exception  
7 itself incorporates a minimum contacts standard.  
8 And, as my friend, Mr. Streett, said, it would  
9 gut the very purpose of the New York Convention,  
10 which is to make arbitration awards enforceable  
11 on an international basis.

12 Turning to the constitutional question  
13 that we urge the Court to reach, I don't think  
14 that there's any very serious argument that  
15 India, as a foreign sovereign, is a person  
16 within the meaning of the Due Process Clause.

17 The -- this Court held in Katzenbach  
18 that a state is not a person under the Due  
19 Process Clause. And there's no reason to think  
20 that a foreign state would be a person if a  
21 state of the union is not. It's, of course, not  
22 a natural person, nor is it a legal person  
23 created under the laws of India. India, the  
24 nation, is something altogether different.

25 JUSTICE JACKSON: Can I ask you, if we

1 vacate and remand on the statutory question, is  
2 there anything precluding the parties from  
3 making the arguments related to the  
4 constitutional issue on remand?

5 MR. MCGILL: Absolutely not, Justice  
6 Jackson, because, as the case came to the Ninth  
7 Circuit, the holding of the district court was  
8 that the Due Process Clause did not apply  
9 because Antrix is the alter ego of India and  
10 India is not a person. And the district court  
11 said in the alternative that there were --  
12 minimum contacts had been satisfied.

13 The Ninth Circuit, although the  
14 statutory argument had not been raised in the --  
15 in the court of appeals, the Ninth Circuit said  
16 that there was a minimum contacts requirement  
17 within the statute. It did not address the  
18 constitutional question in the four corners of  
19 its opinion. But our concern is that Gregorian  
20 versus Izvestia tells us where the remand might  
21 very well end up.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas?

25 JUSTICE SOTOMAYOR: I have a question

1 from curiosity. This is not an enforcement  
2 action. It's a motion to confirm the  
3 arbitration award. How does that get you  
4 anything if there are no resources here to  
5 enforce it against?

6 MR. MCGILL: So, Justice Sotomayor,  
7 we -- we filed a motion to confirm the arbitral  
8 award. That motion ultimately was granted and a  
9 money judgment was entered, and then it was  
10 appealed. There was no stay pending appeal.  
11 And we did, indeed, execute on an asset of  
12 Antrix. Antrix had filed a bankruptcy claim in  
13 the Eastern District of Virginia, and we seized  
14 it.

15 JUSTICE SOTOMAYOR: So that's the  
16 purpose of these confirmation awards, is to  
17 seize property of a debt -- of a debtor on a  
18 judgment?

19 MR. MCGILL: It's to enforce the  
20 arbitral --

21 JUSTICE SOTOMAYOR: Now, if -- if you  
22 don't get it confirmed now, could you -- you --  
23 you have no basis to attach the property that's  
24 here otherwise? Is that it?

25 MR. MCGILL: So, Your Honor --

1 JUSTICE SOTOMAYOR: Because the res  
2 would be here?

3 MR. MCGILL: Your Honor, if -- if this  
4 Court vacates the decision of the Ninth Circuit,  
5 that would have the effect of restoring the  
6 judgment of the district court. So we would,  
7 indeed, have an enforceable judgment at that  
8 time. And, as the district court held, Antrix  
9 is the alter ego of India, so we could seize not  
10 only Antrix's assets but any of those of India  
11 that the -- as the Foreign Sovereign Immunities  
12 Act would allow.

13 JUSTICE SOTOMAYOR: Ah. Okay. Thank  
14 you.

15 MR. MCGILL: If there are any -- I  
16 believe my red light had been on.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Sotomayor? No? Sorry. Anything further?

19 Justice Gorsuch?

20 Justice Jackson?

21 Thank you, counsel.

22 MR. MCGILL: Thank you.

23 CHIEF JUSTICE ROBERTS: Ms. Harris.

24

25

1 ORAL ARGUMENT OF SARAH M. HARRIS  
2 FOR THE UNITED STATES, AS AMICUS CURIAE,  
3 SUPPORTING THE PETITIONERS

4 MS. HARRIS: Mr. Chief Justice, and  
5 may it please the Court:

6 This case should begin and end with  
7 the FSIA's text. Section 1330(b) prescribes  
8 when personal jurisdiction over a foreign state  
9 shall exist and omits any minimum contacts  
10 requirement. That is all this Court need hold  
11 to reverse. The Ninth Circuit's contrary  
12 statutory holding disregards that text, and no  
13 one, even Respondent, appears to defend it.

14 Respondent instead belatedly injects  
15 novel issues, such as the scope of the  
16 arbitration exception that it waived below and  
17 that the U.S. has had no chance to brief. The  
18 lower courts should address those tangents in  
19 the first instance.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: I know you think that  
22 the Respondent waived the arbitration exception  
23 point, that even that requires some nexus.

24 Do you have any preliminary argument  
25 as to whether they're right on the -- on the

1 merits of that argument?

2 MS. HARRIS: Yes. We -- in addition  
3 to thinking that's waived, we have three  
4 objections that we would have briefed given the  
5 opportunity. One is that we agree with  
6 Petitioners' view that under this Court's  
7 decision in Mitsubishi, for something to not be  
8 a subject matter capable of arbitration under  
9 U.S. laws, there needs to be something express  
10 in U.S. law putting it off bounds, like, for  
11 instance, the sexual assault exclusion for  
12 certain circumstances under 9 U.S.C. 402.

13 And there's nothing like that here.  
14 The thing they're pointing to is the Federal  
15 Arbitration Act, but that simply suggests that  
16 federal courts can, in fact, consider matters  
17 that arise under domestic commerce, not that  
18 that's the only thing that's arbitrable under  
19 U.S. law.

20 Second point on this is that Chapter 2  
21 of Title 9 is devoted in -- in painstaking  
22 detail to implementing the New York Convention,  
23 and its provisions are flatly inconsistent with  
24 the idea that only U.S. commerce is allowed or  
25 that you could only have a foreign sovereign



1       subjected to U.S. courts for enforcement of a  
2       New York Convention matter based on those. So,  
3       to start with, 9 U.S.C. 202, which provides that  
4       matters arising under -- under the New York  
5       Convention just need to involve commercial  
6       matters, not matters involving U.S. commerce,  
7       commercial matters.

8                 Section 203 goes on to create original  
9       jurisdiction in federal courts over all those  
10      matters and treats them as arising under the  
11      laws of the United States. That's not the kind  
12      of language that is putting those matters off  
13      limits for U.S. courts as subject matters  
14      capable of arbitration.

15                And then, to remove any doubt, Section  
16      208 provides that if there is any tension  
17      between Chapter 2, which is this whole  
18      reticulated scheme for enforcing the New York  
19      Convention, and Chapter 1, the domestic FAA,  
20      where Respondents are drawing their limitation,  
21      Chapter 2 wins. And so that's the second point.

22                And third is, just with respect to the  
23      arbitration exception itself, Respondents' view  
24      makes very little sense. So their idea is that  
25      the subject matter capable of arbitration in the

1 U.S. has this implicit limitation for U.S.  
2 commerce. But the place where Congress seems to  
3 have required U -- accounted for U.S. interests  
4 and required something short of a nexus but a  
5 connection is actually (a) through (d) of the  
6 arbitration exception.

7           So, for instance, 1605(a)(6)(A) says,  
8 if you're a foreign sovereign, you can send it  
9 to arbitration, et cetera, plus you have agreed  
10 to arbitrate the matter in, say, New York or  
11 anywhere else in the United States. That  
12 suffices. Or, under (b), if it's a treaty that  
13 the U.S. ratified, that suffices. Or, under  
14 (c), if it's a sub -- if it's a matter that  
15 could have otherwise been brought in U.S. courts  
16 but for the arbitration agreement, that  
17 suffices.

18           It's hard to fathom why Congress would  
19 have taken the trouble to create these very  
20 specific grounds for identifying something  
21 connected to the United States, whether it's  
22 arbitrating here, ratifying a treaty that the  
23 U.S. is a party to, or having something that  
24 could have otherwise been brought in U.S. courts  
25 or there's otherwise a waiver, if Congress all

1 along wanted this massive limitation that no  
2 court has ever adopted and that is flatly  
3 contrary to the way that arbitration agreements  
4 and treaties have been enforced in the United  
5 States for a long time. So that's what the  
6 United States would like to have briefed.

7 JUSTICE GORSUCH: Ms. Harris, here's  
8 another unfair one for you. The parties quarrel  
9 over whether the Fifth Amendment requires  
10 minimum contacts in the way that the Fourteenth  
11 does. I know you've counseled us not to address  
12 that question, but, if you were to, what would  
13 you say?

14 MS. HARRIS: If we were to, our brief  
15 in Fuld does address these points, albeit as a  
16 second-level fallback there as well.

17 JUSTICE GORSUCH: Yeah.

18 MS. HARRIS: And the United States'  
19 position in Fuld is that the Fifth Amendment due  
20 process inquiry is different given the nature of  
21 the Fourteenth Amendment. It's a territorial  
22 limit on states. This Court's recognized in  
23 cases like J. McIntyre, BMS, a long line of  
24 cases, that the Fourteenth Amendment also  
25 implicates federalism interests that, of course,

1 do not apply when you're talking about Fifth  
2 Amendment due process and that when you're  
3 thinking about Fifth Amendment due process, one,  
4 you know, you're thinking about Congress and  
5 Congress's powers especially over foreign  
6 affairs, so --

7 JUSTICE GORSUCH: I appreciate all  
8 that, but minimum contacts, is there some hook  
9 in the Fourteenth Amendment to require them  
10 independent of what Congress has provided?

11 MS. HARRIS: So independent of what  
12 Congress was providing, the United States'  
13 position in Fuld is no, the minimum contacts  
14 would not be the right test.

15 JUSTICE GORSUCH: Thank you.

16 MS. HARRIS: And just to reiterate,  
17 you know, this seems like a straightforward  
18 test -- case. Everyone appears to agree on the  
19 question presented. We would, therefore, ask  
20 that the Court reverse.

21 CHIEF JUSTICE ROBERTS: Questions?

22 JUSTICE ALITO: What about the -- the  
23 question whether a foreign state is a person?

24 MS. HARRIS: Whether a foreign state  
25 is a person?

1 JUSTICE ALITO: Yeah.

2 MS. HARRIS: So the United States, if  
3 you were to entertain the concept of the due  
4 process question being in this case, the United  
5 States' position is that foreign states are not  
6 persons for constitutional purposes, consistent  
7 with what this Court suggested in Weltover and  
8 the consent -- the post-Weltover consensus of  
9 courts of appeals.

10 That flows from, first of all, I mean,  
11 I think the way the Constitution deals with  
12 foreign states by calling them foreign states  
13 and foreign nations as distinct from persons and  
14 the fact that foreign nations deal with the  
15 United States on a plane of international  
16 relations where they have all sorts of tools of  
17 diplomacy that are very far afield from the idea  
18 that foreign sovereigns can invoke due process  
19 in U.S. courts to sort of thwart the judgments  
20 of the political branches as to when they should  
21 face suit. That carries immense foreign  
22 relations concerns, which is something the  
23 United States cares obviously a lot about in  
24 terms of flexibility in dealing with our -- with  
25 foreign countries.

1 JUSTICE ALITO: Do you think  
2 Mr. McGill is correct that if we don't reach the  
3 issue, it will just bounce back here very  
4 quickly?

5 MS. HARRIS: Respectfully, I would  
6 point you to the parts of the Ninth Circuit  
7 panel decision at Pet. App. 5a and then the  
8 concurrence of two members of that panel at 10a,  
9 which suggest that they -- solely that they were  
10 reaching a statutory holding but that they did  
11 not believe that the Ninth Circuit had --  
12 seemingly did not believe the Ninth Circuit had  
13 held that foreign sovereigns were persons for  
14 due process purposes. And the panel expressed  
15 extreme skepticism about that proposition for  
16 the reasons I've kind of outlined.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Anything  
19 further?

20 Thank you, counsel.

21 Mr. Phillips.

22 ORAL ARGUMENT OF CARTER G. PHILLIPS

23 ON BEHALF OF THE RESPONDENTS

24 MR. PHILLIPS: Thank you, Mr. Chief  
25 Justice.

1           I think it's appropriate to try to  
2     take a step back and understand the context in  
3     which this case arises.

4           We are here talking about an  
5     arbitration agreement between two corporations  
6     incorporated in India, enter into a contract  
7     that was executed in India, to be performed in  
8     India. When there was a disagreement between  
9     the parties, the contract specifically provides  
10    that that agreement should be resolved by  
11    arbitration in India according to Indian law and  
12    that -- and that after that, according to the  
13    government of India, by a court of competent  
14    jurisdiction, it would be reviewed by an Indian  
15    court.

16           There is nothing in that agreement  
17    that remotely implicates any interest of the  
18    United States of America, and there's certainly  
19    nothing in that entire enterprise that remotely  
20    affects either interstate or foreign commerce.

21           And that is a fundamental limitation  
22    of the Federal Arbitration Act that begins with  
23    the proposition that this statute is limited to  
24    actions that operate in interstate or foreign  
25    commerce. And, therefore, this is outside of

1 the Federal Arbitration Act.

2           If you look at Section 202, which the  
3 Solicitor General herself makes reference to,  
4 she -- she quotes the first sentence talk --  
5 talking about "commercial" and what that means.  
6 And "commercial" in that context is -- I think  
7 it clearly goes back to Section 2 and Section 1,  
8 which takes you right back to the Commerce  
9 Clause, foreign commerce clause restriction.

10           But read the second sentence of 201:  
11 An agreement or -- or award arising out of such  
12 a relationship which is entirely between  
13 citizens of the United States shall be deemed  
14 not to fall under the convention.

15           All right? So, when you have two U.S.  
16 citizens, they enter into an arbitration  
17 agreement, that's not part of the convention.  
18 It seems to me quite improbable, candidly, that  
19 the United States Congress that wrote that  
20 language had in mind that an agreement entered  
21 into by two Indian citizens could, in fact, be  
22 arb -- could -- could, in fact, be reviewed by a  
23 U.S. court.

24           To be sure, once you have  
25 confirmation -- and I think this goes to your



1 question, Justice Sotomayor -- once you have  
2 confirmation, then you can execute literally  
3 anywhere in the world where you can find  
4 property. There's no question about that.

5 The issue in this case is  
6 confirmation, what courts have the ability to  
7 convert the arbitral award into a judicial  
8 decree. And I submit to you that the only court  
9 that has that power to do that here would be the  
10 court in India, which, in fact, has held that  
11 this award should be set aside.

12 JUSTICE SOTOMAYOR: I'm sorry, can I  
13 just go back to that? What difference does it  
14 matter under your theory that this contract is  
15 between two Indian citizens as opposed to --  
16 let's say it was an American corporation who  
17 contracted to do exactly the same thing in  
18 India. Would that be considered a commercial  
19 transaction subject to the FAA?

20 MR. PHILLIPS: So are you -- you're  
21 talking about a U.S. --

22 JUSTICE SOTOMAYOR: A U.S. If the  
23 plaintiff was a --

24 MR. PHILLIPS: -- citizen enters into  
25 an agreement?

1 JUSTICE SOTOMAYOR: Yeah.

2 MR. PHILLIPS: That would make all the  
3 difference in the world because that's --  
4 that's --

5 JUSTICE SOTOMAYOR: So it's not the  
6 subject matter --

7 MR. PHILLIPS: -- that's an agreement  
8 operating in foreign commerce.

9 JUSTICE SOTOMAYOR: It's -- that's not  
10 the subject matter of the contract? You think  
11 it has to do with who -- who's making the  
12 contract as opposed to the subject matter?

13 MR. PHILLIPS: I think it -- I think  
14 it has to do -- yes, I think Mitsubishi says it  
15 has to do with both. Subject matter capable of  
16 settlement by arbitration under the laws of the  
17 United States is -- to be sure, includes things  
18 like could you exclude antitrust, can you  
19 exclude domestic relations. Those are subject  
20 matters.

21 JUSTICE SOTOMAYOR: Yeah. Well, but  
22 that seems to --

23 MR. PHILLIPS: But there's also a  
24 subject matter --

25 JUSTICE SOTOMAYOR: -- but -- but that

1 seems to be all it excludes, meaning I don't see  
2 anything in the language of the convention that  
3 suggests that the citizenships of the parties  
4 entering into the agreement --

5 MR. PHILLIPS: Section -- Section --

6 JUSTICE SOTOMAYOR: -- have anything  
7 to do with the subject matter.

8 MR. PHILLIPS: Section 202 takes you  
9 straight back to Section 2, and Section 2 takes  
10 you right back to Section 1.

11 JUSTICE SOTOMAYOR: Mr. Phillips, the  
12 one thing this is leading me to believe is that  
13 this wasn't adequately argued below. Whether  
14 you have --

15 MR. PHILLIPS: But this is subject  
16 matter jurisdiction, Justice Sotomayor.

17 JUSTICE JACKSON: Is it, Mr. Phillips?  
18 That -- that was my question. I'm trying to  
19 figure out whether your argument is, you know,  
20 seeded in subject matter jurisdiction or  
21 personal jurisdiction.

22 Where -- I understand the thrust of  
23 what you're saying, but where -- where is it  
24 coming from in terms of the doctrines that we  
25 use to evaluate the limits on judicial

1 authority?

2 MR. PHILLIPS: Right. 1330(a) says  
3 that there is only subject matter jurisdiction  
4 when there has -- when there is clearly an  
5 exemption to the Foreign Sovereign Immunities  
6 Act that operates.

7 JUSTICE JACKSON: And counsel on the  
8 other side says that below at least you conceded  
9 that the arbitration agreement -- or the  
10 arbitration exception applies here and there was  
11 subject matter jurisdiction.

12 MR. PHILLIPS: Right. But this Court  
13 still has to say -- of course, still -- still  
14 have to satisfy -- I mean, it -- it would be  
15 inherent in protecting the interests and rights  
16 of a government like India or its -- or its  
17 state-owned enterprises.

18 JUSTICE JACKSON: Well, I guess I just  
19 want to understand your position. Are you  
20 saying that the arbitration exception is  
21 satisfied here or not?

22 MR. PHILLIPS: No, it -- I'm saying  
23 it's not satisfied here, which is why I  
24 didn't -- and -- and it's not waivable.

25 JUSTICE JACKSON: And it's not

1 waivable?

2 MR. PHILLIPS: Correct.

3 JUSTICE JACKSON: So the fact that you  
4 said below that it was satisfied, we don't --  
5 we're not bound by that in any way? Or you're  
6 not?

7 MR. PHILLIPS: You're not bound by  
8 that in any way.

9 JUSTICE JACKSON: You're not.

10 MR. PHILLIPS: And I think it's fair  
11 to -- you know, in context, you should  
12 recognize, right, the -- the -- the law in the  
13 Ninth Circuit was absolutely clear that minimum  
14 contacts was required, there was no -- you know,  
15 there were no minimum contacts in this case, and  
16 that this case would be easily resolved in the  
17 Ninth Circuit on the basis of -- of that  
18 interpretation of the -- of the FSIA --

19 JUSTICE GORSUCH: Mr. Phillips --

20 JUSTICE KAGAN: Have you given up on  
21 that?

22 MR. PHILLIPS: -- and 13 -- I'm sorry,  
23 Your Honor?

24 JUSTICE KAGAN: Have you given up on  
25 that?

1 MR. PHILLIPS: I have given up on  
2 that, Your Honor.

3 JUSTICE KAGAN: So why isn't the right  
4 thing to do just to say everybody agrees that  
5 the Ninth Circuit was wrong, we toss it back to  
6 the Ninth Circuit for everything else?

7 MR. PHILLIPS: Because, in order to  
8 get to 1330(a), you have to go through -- there  
9 has to be an exception under the Foreign  
10 Sovereign Immunities Act. And if you don't --  
11 so -- so you have to have subject matter  
12 jurisdiction.

13 JUSTICE GORSUCH: Yeah. But why --  
14 why wouldn't the Ninth Circuit be the  
15 appropriate forum for that argument in the first  
16 instance?

17 MR. PHILLIPS: Well, I mean, you can  
18 always send it back for -- to take that issue up  
19 in the first instance, but it is subject matter  
20 jurisdiction, Your Honor. And --

21 JUSTICE GORSUCH: Yeah, but it is a  
22 new argument that you concede you didn't raise  
23 below and, in fact, disclaimed below. So --

24 MR. PHILLIPS: But it's -- but it's --  
25 it's --

1 JUSTICE GORSUCH: -- why wouldn't we  
2 normally send it back?

3 MR. PHILLIPS: Well, as I understand  
4 it, the Court, even on its own motion, could sua  
5 sponte decide that issue.

6 JUSTICE GORSUCH: I -- I understand  
7 that. That's not my question, though.

8 My question is this is an argument  
9 that you disclaimed in the district court, you  
10 disclaimed in the court of appeals, and you're  
11 making for the first time here. Do you see any  
12 impediment to us simply remanding the matter --  
13 vacating and remanding the matter back to the  
14 Ninth Circuit to consider your argument in the  
15 first instance?

16 MR. PHILLIPS: It -- it would be a  
17 little strange, I guess, for the Court to --

18 JUSTICE GORSUCH: You might think it a  
19 little strange, but do you see any impediment to  
20 it?

21 MR. PHILLIPS: I would think the Court  
22 would want to ensure itself it has subject  
23 matter jurisdiction.

24 I -- I suppose the single impediment  
25 to it, candidly, would be taking into account

1 the -- the brief filed by the Government of  
2 India, which has said all along that this case  
3 is -- this is an Indian matter that's been  
4 resolved by India --

5 JUSTICE GORSUCH: Yeah, I -- I've  
6 heard that.

7 MR. PHILLIPS: -- et cetera, and that  
8 this remains an irritant.

9 JUSTICE GORSUCH: But I'm -- I'm --  
10 I'm looking for a legal impediment, the course  
11 that Justice Kagan outlined, and I'm not hearing  
12 one.

13 MR. PHILLIPS: Well, I don't know, I  
14 mean, unless the Court's willing to ignore the  
15 subject matter jurisdiction to resolve a  
16 personal jurisdiction --

17 JUSTICE GORSUCH: All right. Let --  
18 let --

19 JUSTICE KAGAN: But we wouldn't be  
20 ignoring the subject matter jurisdiction,  
21 Mr. Phillips. We'd just be saying, you know, as  
22 to the view of subject matter jurisdiction that  
23 was taken by the Ninth Circuit, that's  
24 incorrect, nobody defends it, so try again and  
25 see whether there's subject matter jurisdiction



1 in this case.

2 Not only does there seem to me no  
3 impediment, I mean, I don't see really what's  
4 strange about that. I would think it would be  
5 strange to do the opposite given that neither  
6 the Ninth Circuit nor, as far as I'm aware, any  
7 circuit has evaluated the theory that you're  
8 raising now.

9 MR. PHILLIPS: To be sure, I mean,  
10 that -- that -- that's undeniably true. I --  
11 but I -- you know, the -- the bottom line is is  
12 that subject matter jurisdiction is not waivable  
13 and --

14 JUSTICE KAGAN: I mean, we wouldn't be  
15 saying it's waivable. We would just be saying,  
16 you know, nobody's raised these subject matter  
17 jurisdiction arguments.

18 MR. PHILLIPS: Well --

19 JUSTICE KAGAN: The ones that were  
20 raised, the ones that were passed on are wrong.  
21 There are some other arguments that people are  
22 tossing around. We're not the people to  
23 evaluate that in the first instance when neither  
24 the Ninth Circuit nor any other circuit has done  
25 so.

1                   MR. PHILLIPS: Look, the -- the -- to  
2 be sure, the -- I think the Court can decide for  
3 itself how to order up dealing with  
4 jurisdictional issues. I -- I would just go  
5 back to two points. One is it goes to subject  
6 matter jurisdiction, not waivable. Second of  
7 all, the longer this litigation continues, it  
8 serves as an irritant to the Indian government.

9                   JUSTICE GORSUCH: Yeah. Well, I -- I  
10 get that. But part of it is that it's a new  
11 argument that's being pressed here for the first  
12 time, and so, in terms of prolonging the  
13 litigation, that seems to me perhaps nobody's  
14 hands are entirely clean here.

15                   On the question whether it is subject  
16 matter jurisdiction, this is a sovereign  
17 immunity defense and that's waivable. So what  
18 do we do about that?

19                   MR. PHILLIPS: Well, you don't -- you  
20 don't get to 1330(a) unless -- unless -- well,  
21 it's waivable because it -- but it hadn't been  
22 waived.

23                   JUSTICE GORSUCH: Well, that's -- that  
24 is the question. I mean, if you stipulate below  
25 that there is statutory basis for -- for the

1 Court's jurisdiction, it seems to me that that  
2 might have been a waiver. Why -- why wouldn't  
3 that be right?

4 MR. PHILLIPS: Well, because -- well,  
5 as I understand it, subject matter jurisdiction  
6 in the ordinary course is not waivable.

7 JUSTICE GORSUCH: In the -- in the  
8 ordinary course. But sovereign immunity's a  
9 little different, isn't it?

10 MR. PHILLIPS: Right. But I would  
11 think that in the absence of a clear waiver,  
12 which, of course, is where you -- which is the  
13 very first exception, right, after you get past  
14 the first exception and you're looking at the  
15 rest of the exceptions, in that context, it  
16 would seem to me that you have to again waive  
17 those provisions explicitly.

18 JUSTICE GORSUCH: Yeah, but when you  
19 say I agree that there's statutory jurisdiction  
20 and you've done it in two courts, why -- why --  
21 I mean, and it's a waivable defense, I -- I  
22 guess I'm a little curious why -- why you aren't  
23 stuck with that.

24 MR. PHILLIPS: Well, the best I can  
25 give you is that the Court has historically

1 treated this as clearly a subject matter  
2 jurisdiction question.

3 JUSTICE GORSUCH: Yeah. But you --  
4 you'd agree sovereign --

5 MR. PHILLIPS: That's what 1330(a)  
6 says.

7 JUSTICE GORSUCH: -- you'd agree  
8 sovereign immunity is a little bit different  
9 when it comes to waivability, wouldn't you?

10 MR. PHILLIPS: Yes, because the  
11 Congress has -- has dealt with it in a little  
12 bit different way but only as to the statement  
13 that it waives at the outset, not in -- in the  
14 sense that it waives going forward.

15 Again, the -- the -- you know, this  
16 Court's -- all -- the U.S. authorities, U.S.  
17 courts only have the authority to deal with  
18 arbitrations that -- that have some kind of an  
19 international component to them.

20 JUSTICE JACKSON: All right,  
21 Mr. Phillips, on the -- on the merits of your  
22 argument, how --

23 MR. PHILLIPS: Thank you.

24 JUSTICE JACKSON: -- how do you  
25 respond to General Harris's points about the

1 subcategories within the arbitration exception  
2 and that those seem to be the place in which  
3 Congress was accounting for the kinds of  
4 contacts that you say exist in that prefatory  
5 language about subject matter?

6 MR. PHILLIPS: Right. I would view  
7 the prefatory language as the -- not prefatory  
8 but, in fact, setting out the first limit on the  
9 arbitration, arbitrability.

10 JUSTICE JACKSON: So what was the need  
11 for the -- the rest of them if it --

12 MR. PHILLIPS: So, first of all, the  
13 question is, is this within foreign commerce or  
14 interstate commerce? Is this a subject matter  
15 capable of resolution by the United States?  
16 Meaning that it's either in our foreign commerce  
17 or within our interstate commerce.

18 Once you get past -- and if the answer  
19 is yes, then you look at the sub-provisions to  
20 say, you know, did the parties agree to have it  
21 arbitrated here? Then that would be a reason to  
22 bring it here.

23 I mean, the first one is just -- is an  
24 overarching requirement that you have to affect  
25 foreign commerce, I mean, which makes sense.

1 That's the limit of Congress's power, right?  
2 Congress doesn't have the power -- the United  
3 States courts don't have the power to dictate to  
4 the world what's fair and just.

5 JUSTICE JACKSON: What about consent?  
6 I don't -- I don't -- I guess I just don't  
7 understand how that necessarily dovetails with  
8 the idea that the United States Congress might  
9 want to allow for litigation of disputes  
10 concerning arbitration agreements where the  
11 international parties have agreed to that.

12 MR. PHILLIPS: But there are no -- I  
13 mean, I don't know what you mean by  
14 "international parties." We are -- they are  
15 non-U.S. parties to be sure, but they are both  
16 citizens of India.

17 JUSTICE JACKSON: No, I understand  
18 that, but -- but your -- your argument suggests  
19 that the Congress could not determine to make  
20 U.S. courts available to litigate disputes  
21 between non-U.S. parties in the context of  
22 international agreements, et cetera, et cetera.  
23 And I don't know necessarily --

24 MR. PHILLIPS: But even this isn't an  
25 inter- -- I mean, I -- I --

1 JUSTICE JACKSON: Yeah.

2 MR. PHILLIPS: You -- yes, I think  
3 there's a serious question about how far  
4 Congress can go in the first place. You know,  
5 why -- why would Congress open the courts and  
6 the use -- and -- and limited judicial resources  
7 to resolve the question of the validity of an  
8 agreement between non-U.S. citizens on a  
9 non-U.S. contract to be resolved by arbitration  
10 in a non-U.S. forum subject to review by a  
11 non-U.S. court which in this case has, in fact,  
12 declared the -- set aside the -- the award,  
13 which, frankly, raises its own mootness issue  
14 that the Court ought to -- ought to at least be  
15 concerned about in this particular litigation.

16 JUSTICE JACKSON: So does it matter  
17 for your argument that the contract in this  
18 case, the parties agreed to have the disputes  
19 litigated by an Indian court? What if they had  
20 agreed to have it litigated in the U.S.? Could  
21 Congress, in your view, given this statute -- or  
22 could Congress allow for U.S. courts to hear  
23 that?

24 MR. PHILLIPS: That's an interest --  
25 that's a tougher question, to be sure, because,

1 again, why would U.S. courts want to waste their  
2 resources resolving a dispute of another  
3 country?

4 JUSTICE JACKSON: I mean, I think, in  
5 the background, what I'm worried about your --  
6 your argument, in the background, we do have  
7 international relations and circumstances in  
8 which Congress might want to allow for  
9 international parties to do certain things as a  
10 part of their -- you know, of the United States'  
11 relationship with other countries.

12 And your kind of blanket subject  
13 matter jurisdiction argument seems to me to  
14 undercut that in a -- in a concerning way.

15 MR. PHILLIPS: Well, I would -- I  
16 would candidly be more concerned about the flip  
17 side of it, which is, I mean, let's think about  
18 this in the concept of reciprocity, Justice  
19 Jackson. If you -- if you had -- General Motors  
20 has a domestic agreement with another company  
21 and, for some reason, the other company refuses  
22 to go to arbitration. Under -- under the  
23 government's -- under the broad theory put  
24 forward by the Petitioners in this case, that  
25 agreement, you -- the -- the -- the -- the



1 unhappy party in theory could go to India or  
2 Russia or any of the other 171 signatories and  
3 get an order to compel arbitration that would be  
4 enforceable in those countries against U.S.  
5 citizens.

6 As I said, read the second sentence in  
7 Section 202. Any dispute between two U.S.  
8 citizens is not subject to the Federal  
9 Arbitration Act. Why should any dispute between  
10 two citizens of another country, when it's  
11 excluded -- unless there are aspects of it that  
12 extend beyond that country? This -- it seems to  
13 me this goes to -- and if you want to know why  
14 you should decide it, it's because this is at  
15 the -- this is beyond the limits of what I think  
16 Congress legitimately can regulate under this --

17 JUSTICE JACKSON: Ordinarily, that's  
18 in -- in -- in constitutional realm, though,  
19 so -- but you're making a statutory argument?

20 MR. PHILLIPS: I'm saying Congress  
21 wouldn't have wanted to take this any further  
22 than what it said in that statute. And the  
23 statute says it's got to be in foreign commerce.  
24 And foreign commerce means a relationship  
25 between a state, a territory, and a foreign

1 state, not a relationship that arises  
2 exclusively between U.S. citizens -- I mean,  
3 sorry, Indian citizens in India under an Indian  
4 contract with -- with a dispute resolution  
5 system in India to be decided by an Indian court  
6 and then to have the Indian court's decision  
7 that set it aside ignored by the U.S. courts.

8           If you want to know where the problems  
9 of foreign relations arise, read the Government  
10 of India's brief. It tells you that this kind  
11 of disrespect to an Indian court and this kind  
12 of disrespect in terms of intruding into the  
13 relationship between the State of India -- the  
14 Government of India and its state-owned  
15 enterprise to find out what assets are being  
16 done and who's doing what with whom, those are  
17 the reasons why the Court should not be  
18 enforcing this kind of award under these kinds  
19 of circumstances.

20           JUSTICE KAGAN: But the Solicitor  
21 General tells us that the United States'  
22 interests would be perfectly well served if we  
23 just remanded this case.

24           MR. PHILLIPS: Well, the Solicitor  
25 General also didn't have the benefit of -- of

1 thinking about the Foreign Sovereign Immunities  
2 Act argument. You know, I apologize for that.  
3 And -- and, look, if the Court -- if the Court  
4 thought -- I think the Court, rather than  
5 remanding, if -- if -- if you take my argument  
6 seriously, which I think you have to, then you  
7 ought to ask the case -- you know, reset the  
8 case for argument, rebrief that issue, and then  
9 we'll argue that preferably next month because  
10 it's fresh in my mind. I'd rather not have to  
11 renew all of this stuff.

12 (Laughter.)

13 MR. PHILLIPS: But we'll put -- but  
14 that -- that's for you all to decide.

15 But that would make more sense to me  
16 than simply trying to -- the problem is you  
17 can't just flip off a piece -- a piece -- this  
18 is not lint on a sweater that you can knock off  
19 and move away.

20 This is -- this is attached to the  
21 fabric of the sweater through 1330(a) and (b).  
22 1330(a) sends you to the Foreign Sovereign  
23 Immunities Act. You have to do business with  
24 the Foreign Sovereign Immunities Act. You can't  
25 just simply say, well, nothing in 1330(a) and

1 (b) calls for minimum contacts because I  
2 don't -- I don't -- I don't dispute that issue.  
3 There's no -- I recognize that fact.

4 Now I do think there is a second  
5 argument. And I think it's not fair to say that  
6 Antrix, which is a foreign corporation, and --  
7 and -- and foreign corporations have -- have  
8 long been recognized as having due process  
9 rights, that they are persons. And I don't  
10 think there's anything -- I don't think  
11 Banchik's -- this Court's decision in Banchik  
12 does anything to -- to detract from that, and,  
13 therefore, they have -- they should have a Fifth  
14 Amendment right to some form of -- of due  
15 process, which, in this context, I would hope  
16 would include minimum contacts. And we already  
17 know from the Ninth Circuit's decision that  
18 there are no contacts in -- arising in this  
19 case.

20 So there is still a very significant  
21 Fifth Amendment issue here for the Court to  
22 resolve that only affects Antrix. You know,  
23 there's no reason for the Court to decide at  
24 this point whether India or any other foreign  
25 sovereign is entitled to -- entitled to due

1 process rights. That one I think clearly should  
2 be saved for another day.

3 CHIEF JUSTICE ROBERTS: Anything  
4 further?

5 JUSTICE THOMAS: No.

6 CHIEF JUSTICE ROBERTS: Anything  
7 further?

8 Thank you, counsel.

9 MR. PHILLIPS: Thank you, Your Honor.  
10 Please -- please affirm.

11 CHIEF JUSTICE ROBERTS: Mr. McGill.

12 REBUTTAL ARGUMENT OF MATTHEW D. MCGILL  
13 ON BEHALF OF THE PETITIONER IN CASE 23-1201

14 MR. MCGILL: Thank you, Mr. Chief  
15 Justice.

16 On the construction of Section  
17 1330(b), we have another instance of radical  
18 agreement. It does not require minimum  
19 contacts. We also have radical agreement that  
20 Antrix previously conceded that the arbitration  
21 exception applies. That establishes that an  
22 immunity exception applies either under  
23 1605(a)(6), which is the arbitration exception,  
24 or 1605(a)(1), which is the waiver exception.  
25 Either way, an immunity exception applies, and

1 that is all that is required to establish  
2 subject matter jurisdiction under Section  
3 1330(a).

4           Going to the merits of the brand-new  
5 argument, the relevant text here is "subject  
6 matter capable of arbitration under the laws of  
7 the United States." That is torn from the New  
8 York Convention. It appears in both Article II  
9 and Article V. It was construed by this Court  
10 in *Mitsubishi Motors*, and it requires an express  
11 direction from Congress to exclude a subject  
12 matter from arbitration under the laws of the  
13 United States.

14           Section 2 of the FAA, Section 202 of  
15 Chapter 2 of Title 9, neither of them excludes  
16 anything whatsoever from arbitration under the  
17 laws of the United States. It is simply not  
18 true that just because an item is not something  
19 that can be arbitrated under the FAA, it cannot  
20 be arbitrated at all under the United States.

21           What we're left with is a policy  
22 argument that Congress would not have wanted to  
23 allow foreign persons to bring claims to enforce  
24 arbitral awards. The Supreme Court, this Court,  
25 addressed that in *Verlinden* when it said that

1 this Foreign Sovereign Immunities Act allows  
2 foreign persons to bring claims.

3 Therefore, because we're talking about  
4 the Foreign Sovereign Immunities Act, you're  
5 always talking, in -- at least in the language  
6 of Verlinden, you're always allowing a foreign  
7 plaintiff versus a foreign state defendant.  
8 This is a -- this has been settled since  
9 Verlinden.

10 The last point is that if Antrix's  
11 argument here were accepted and only U.S.  
12 persons can bring claims to enforce arbitral  
13 awards, international arbitral awards in the  
14 United States, then we could fairly only expect  
15 that similar reciprocal limitations would be  
16 placed on the ability of United States  
17 businesses to bring -- to enforce their arbitral  
18 awards outside of the United States, which is  
19 vital to the enforcement of arbitral awards  
20 internationally.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 The case is submitted.

24 (Whereupon, at 10:55 a.m., the case  
25 was submitted.)

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